[Cite as *State ex rel. Davie v. Calabrese*, 2016-Ohio-5420.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104205

STATE OF OHIO, EX REL. MICHAEL DAVIE

RELATOR

vs.

JUDGE DEENA R. CALABRESE

RESPONDENT

JUDGMENT:
WRITS DENIED

Writs of Procedendo and Mandamus
Motion No. 495057
Order No. 497637

RELEASE DATE: August 17, 2016

FOR RELATOR

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TIM McCORMACK, J.:

{¶1} On March 6, 2016, the relator, Michael Davie, commenced this procedendo and mandamus action against the respondent, Judge Deena Calabrese, to compel the judge to issue a final, appealable order in the underlying case, *M.D. v. Cleveland Clinic Found.*, Cuyahoga C.P. No. CV-14-824176. On April 5, 2016, the respondent moved to dismiss on the grounds of adequate remedy at law. Davie filed his brief in opposition on April 15, 2016. For the following reasons, this court grants the judge's dispositive motion and denies the application for an extraordinary writ.

{¶2} On March 24, 2014, in the underlying case, Davie sued the Cleveland Clinic Foundation; South Pointe Hospital; individual medical providers; the law firm of Cavitch, Familo & Durkin; a lawyer and a paralegal from that firm; and Nationwide Insurance. The Cavitch defendants filed a counterclaim against Davie for vexatious conduct under R.C. 2323.52 and for frivolous conduct under R.C. 2323.51. On October 23, 2014, the Cavitch defendants moved for partial summary judgment on Count 1 of their counterclaim that Davie be declared a vexatious litigator.

{¶3} On April 22, 2015, the trial court resolved Davie's complaint by granting summary judgment to all the defendants. However, the Cavitch counterclaim remained pending and the trial court did not certify that there was no just reason for delay.

{¶4} On May 20, 2015, Davie appealed the granting of the defendants' motions for summary judgment. *M.D. v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 103052.

{¶5} On June 1, 2015, the trial court denied the Cavitch defendants' motion for partial summary judgment. The Cavitch defendants then dismissed their counterclaim without prejudice on June 12, 2015.

{¶6} On June 15, 2015, the trial court issued the following order:

> Cavitch defendants filed a notice of voluntary dismissal of their counterclaim on 6/12/15. No pending claims remain. Court costs assessed to the plaintiff(s). Pursuant to Civ.R. 58(B), the clerk of courts is directed to serve this judgment in a manner prescribed by Civ.R. 58(B). The clerk must indicate on the docket the names and addresses of all parties, the method of service, and the costs associated with this service. Notice issued.

{¶7} On September 23, 2015, this court sua sponte dismissed appeal No. 103052, for lack of a final, appealable order. This court noted that when the appeal was filed, there was still a counterclaim pending before the trial court, which had not certified "no just reason for delay." Thus, there was no final, appealable order.

{¶8} On October 20, 2015, Davie filed a motion to issue a corrected judgment showing that there is a final, appealable order. The trial court denied this motion as moot on October 21, 2015.

{¶9} On December 22, 2015, Davie in case No. 103052 moved this court for an order to proceed with a prematurely filed appeal pursuant to App.R. 15(A) or to reinstate the appeal. This court denied the motion on January 6, 2016. On January 11, 2016,

Davie filed a motion for reconsideration of the January 6, 2016 order or for en banc consideration of that order. This court denied those motions on February 16, 2016.

{¶10} Davie then commenced this writ action to compel the trial judge to issue a final, appealable order.

{¶11} The writ of procedendo is an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 553 N.E.2d 1354 (1990). Procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 1998-Ohio-190, 696 N.E.2d 1079. The writ, however, will not issue to control what the judgment should be, nor will it issue for the purpose of controlling or interfering with ordinary court procedure. Thus, procedendo will not lie to control the exercise of judicial discretion. It will not issue when there is an adequate remedy at law. *State ex rel. Utley v. Abruzzo*, 17 Ohio St.3d 202, 478 N.E.2d 789 (1985); and *State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 589 N.E.2d 1324 (1992).

{¶12} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

Mandamus is not a substitute for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerninghan v. Gaughan*, 8th Dist. Cuyahoga No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). If the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108; *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 564 N.E.2d 86 (1990). Mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); and *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (8th Dist.1993).

{¶13} Davie is not entitled to a writ because the underlying case has proceeded to resolution and because he had adequate remedies at law that preclude issuing either writ.

{¶14} The orders granting the defendants' summary judgment motions on Davie's claims were not final, appealable orders. The Cavitch defendants' counterclaim remained pending and was a jurisdictional impediment. Civ.R. 54(B). Thus, on May 20, 2015, Davie appealed at the wrong time.

{¶15} The Civ.R. 41(A) dismissal of the counterclaim on June 12, 2015, was self-executing, resolved the remaining claims, and made the orders previously appealed

from final, appealable orders. *Howard v. Fiyalko*, 8th Dist. Cuyahoga No. 74308, 1998 Ohio App. LEXIS 5056 (Oct. 29, 1998); *Cronin v. Smith*, 92 Ohio App.3d 606, 636 N.E.2d 420 (12th Dist.1994); and *James v. Allstate Ins. Co.*, 8th Dist. Cuyahoga No. 75993, 2000 Ohio App. LEXIS 1065 (Mar. 16, 2000). At that point in time, the case was completely resolved. Procedendo is not an available remedy, because the case is over and the judge cannot take any further actions. Mandamus will not lie because the respondent has no duty to fulfill on the case.

{¶16} The proper remedy was to file a timely notice of appeal from the June 12, 2015 dismissal. *Lee v. Joseph Horne Co., Inc.*, 99 Ohio App.3d 319, 650 N.E.2d 530 (8th Dist.1995), is instructive. In that case, an employee and her spouse brought a personal injury action against the owner of the premises on which the employer, pursuant to a license agreement, sold jewelry. Initially, the trial court granted the employee's motion for default judgment and then granted Horne's motion to vacate. The employee appealed that decision on May 6, 1994. The husband then dismissed his claim for loss of consortium without prejudice, and the employee filed a notice of appeal within 30 days of the voluntary dismissal. This court ruled that the order granting the motion to vacate became a final, appealable order upon the filing of the dismissal without prejudice, and the second notice of appeal was timely. Thus, this court proceeded to rule on the appeal on its merits. Davie's remedy was to follow the procedure in *Lee.* Instead, he pursued other untimely and ineffective remedies, such as trying to obtain a final judgment from

the trial court, and asking this court to reconsider its decision more than three months after the dismissal of the appeal.[1]

{¶17} Finally, to the extent that Davie's objective is to preserve his appellate rights, he had the adequate remedy at law of appealing the propriety of this court's dismissal for lack of a final, appealable order to the Supreme Court of Ohio. *State ex rel. Birdsall v. Stephenson*, 68 Ohio St.3d 353, 626 N.E.2d 946 (1994); *State ex rel. Atkins v. Hoover*, 97 Ohio St.3d 76, 776 N.E.2d 99 (2002).

{¶18} Accordingly, this court grants the respondent's dispositive motion and denies the application for writs of mandamus and procedendo. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶19} Writs denied.

TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR

[1]App.R. 26(A) provides that a motion for reconsideration must be filed within ten days of service of this court's decision.