

[Cite as *State ex rel. Berryhill v. Khouri*, 2017-Ohio-302.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105090

**STATE OF OHIO, EX REL.
MARY BERRYHILL**

RELATOR

vs.

RUSTOM R. KHOURI, ET AL.

RESPONDENTS

JUDGMENT:
WRIT GRANTED IN PART AND DENIED IN PART

Writ of Mandamus
Motion No. 502123
Order No. 503217

RELEASE DATE: January 25, 2017

FOR RELATOR

Robert Berryhill, pro se
Inmate No. 58898-060
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ATTORNEYS FOR RESPONDENTS

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Charles E. Hannan
Assistant County Prosecutor
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EILEEN A. GALLAGHER, J.:

{¶1} Robert Berryhill has filed a complaint for a writ of mandamus. Berryhill requests an order from this court that requires Judge Richard J. McMonagle to render a ruling and also issue findings of fact and conclusions of law, with regard to a Civ.R. 60 “motion to reopen judgment” filed in *Berryhill v. Khouri*, Cuyahoga C.P. No. CV-10-721073 on July 20, 2015. For the foregoing reasons, we grant in part and deny in part Judge McMonagle’s motion for summary judgment and partially grant Berryhill’s request for a writ of mandamus.

{¶2} In order for this court to issue a writ of mandamus, Berryhill must clearly establish that: 1) he possesses a clear legal right to the requested relief, 2) Judge McMonagle possesses a clear legal duty to perform the requested relief, and 3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452; *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas*, 72 Ohio St.3d 461, 650 N.E.2d 899 (1995).

{¶3} When a relator demonstrates that a judge has unnecessarily delayed in ruling on a motion or has otherwise refused to issue a judgment, a complaint for a writ of procedendo is the most appropriate remedy, asking the court to proceed to judgment. *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110; *State ex rel. Dehler v. Sutula*, 74 Ohio St.3d 33, 656 N.E.2d 332 (1995). However,

an action in mandamus may be substituted for procedendo to effect the same result. *State ex rel. Reynolds v. Basinger*, 99 Ohio St.3d 303, 2003-Ohio-3631, 791 N.E.2d 459.

{¶4} Herein, Berryhill is entitled to a ruling with regard to his Civ.R. 60 “motion to reopen judgment,” that has been pending since January 20, 2015. *State ex rel. Grove v. Nadel*, 81 Ohio St.3d 325, 691 N.E.2d 275 (1998), quoting *Kennedy v. Cleveland*, 16 Ohio App.3d 399, 402, 476 N.E.2d 683 (8th Dist.1984); *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 527, 709 N.E.2d 1148 (1999).

{¶5} Berryhill, however, is not entitled to any findings of fact and conclusions of law upon Judge McMonagle issuing a judgment with regard to his Civ.R. 60 “motion to reopen judgment.” Civ.R. 52 provides that findings of fact and conclusions of law are authorized only when questions of fact are tried by the trial court without a jury. Findings of fact and conclusions of law, pursuant to Civ.R. 52, are not applicable to a motion filed under Civ.R. 60. *Stafford & Stafford, L.P.A. v. Steele*, 8th Dist. Cuyahoga No. 99554, 2013-Ohio-4042; *Home S. & L., Youngstown, Ohio v. Avery Place, L.L.C.*, 5th Dist. Delaware No. 11-CA-02-0014, 2011-Ohio-4525; *Watts v. Brown*, 8th Dist. Cuyahoga No. 45638, 1983 Ohio App. LEXIS 15311 (Aug. 4, 1983).

{¶6} Accordingly, Judge McMonagle’s motion for summary judgment is granted in part and denied in part. Within 30 days, Judge McMonagle is ordered to render a ruling with regard to Berryhill’s pending Civ.R. 60 “motion to reopen judgment.” However, no findings of fact and conclusions of law need to be made upon the rendering of a ruling on the Civ.R. 60 “motion to reopen judgment.” Costs to Judge

McMonagle, with costs waived. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶7} Writ granted in part and denied in part.

EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
SEAN C. GALLAGHER, J., CONCUR