

[Cite as *Moore v. Russo*, 2017-Ohio-9166.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105448

ROBERT MOORE, III

PLAINTIFF-APPELLANT

vs.

JUDGE JOHN J. RUSSO

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-860606

BEFORE: Boyle, J., E.T. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 21, 2017

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} Plaintiff-appellant, Robert Moore, III, appeals from the trial court's judgment dismissing his case against defendant-appellee, Judge John J. Russo. Moore raises six assignments of error for our review:

1. Assigned Judge Reinbold's judgment entry and order was not a final-order pursuant to Crim.R. 32(B) and (C), because Judge Reinbold had failed to sign his judgment entry after he dismissed the case with prejudice and his order was never time-stamped by the clerk.

2. Judge Reinbold erred in dismissing Moore's complaint seeking injunction relief under Civ.R. 12(B)(6) without ruling on the existing controversy and the merits of the complaint.

3. Defendant Judge Russo committed plain reversible error where he clearly breached Moore's plea agreement when defendant Russo imposed a 9-year sentence than the negotiated plea-agreement the appellant had with the state prosecutor.

4. A plea agreement is a contract that all state agencies including defendant Judge Russo had to honor and defendant erred when he failed to honor the agreement appellant Moore had made with the state prosecutor thereby breaching the contract agreement.

5. Defendant Judge Russo erred by refusing to enforce the plea agreement after the defendant Judge Russo accepted the agreement on the record while in open court and failed to enforce the plea agreement pursuant to the principles of contract law.

6. Defendant Judge Russo erred when he imposed a thirteen-year sentence at the conclusion of the sentencing and prejudicial error was committed when Judge Russo ran the Crim.R. 11 sentence concurrent with the jury trial sentence and defendant Judge Russo committed harmful error for making a plea agreement with the state prosecutor to let the jurors guilty verdict trial become a part of the appellant's Crim.R. 11 trial was harmful error and both convictions and sentence must be vacated.

{¶2} Finding no merit to his appeal, we affirm.

I. Procedural History and Factual Background

{¶3} In March 2016, Moore filed a complaint against Judge John J. Russo to obtain a declaratory judgment and injunctive relief, alleging that Judge Russo did not honor a plea agreement that he entered into in his 2009 criminal case before Judge Russo.

The background is as follows.

{¶4} In 2009, Moore was charged in a multicount indictment under Cuyahoga C.P. No. CR-09-521078-A (“Case One”) with several codefendants relating to various drug-related activities that occurred between February 13 and 15, 2009.

{¶5} During the course of the case, Moore filed multiple suppression motions, which were denied after an evidentiary hearing. Approximately a week or two before trial, defense counsel was made aware that Moore was possibly going to be indicted in a second case stemming from a controlled buy from a confidential informant that also occurred on February 13, 2009. The state informed Moore that if he went to trial on the pending case, the second indictment would be filed against him. The trial court indicated to Moore that given the nature of the two cases and in the event of guilty verdicts in both cases, the court would impose at the very least an aggregate 18-year sentence. Moore exercised his right to go to trial, and Moore was indicted in the second case — Cuyahoga C.P. No. CR-09-525878-A (“Case Two”), charging him with two counts of drug trafficking and one count of drug possession with one-year firearm specifications.

{¶6} In Case One, a jury found Moore guilty of (1) drug possession with a

one-year firearm specification, (2) drug trafficking with a one-year firearm specification, (3) carrying a concealed weapon, (4) drug possession with a one-year firearm specification, (5) drug trafficking with a one-year firearm specification, and (6) possession of criminal tools.

{¶7} Following the verdict in Case One but before sentencing, a plea deal was reached in Case Two that also involved an agreed sentence in Case One. The agreement provided that Moore would plead guilty to drug trafficking in violation of R.C. 2925.03(A)(1), and waive any discovery and suppression issues, as well as appellate rights in Case Two. As part of his plea agreement in Case Two, Moore also agreed to waive his appellate rights on any suppression or trial issues in Case One and agreed to forfeit vehicles and money. The parties further agreed that Moore would receive an aggregate sentence of 13 years in prison for both cases. And the remaining counts were nolle.

{¶8} The court sentenced Moore in both cases in August 2009. In Case One, the court imposed an aggregate sentence of 13 years and stated that this was an “agreed mandatory sentence” and noted that Moore had waived his appellate rights. In Case Two, the court imposed an eight-year sentence on the drug trafficking offense consecutive to one year for the firearm specification, for a total of nine years, and ordered that this sentence run concurrent to the sentence in Case One. The court also imposed mandatory fines and court costs. Again, the court stated that Moore waived any appellate and suppression rights.

{¶9} Since August 2009, Moore has continually filed motions to withdraw the guilty plea, motions to vacate the plea and sentence, and appeals. He succeeded in vacating the fines and court costs. See *State v. Moore*, 8th Dist. Cuyahoga Nos. 100483 and 100484, 2014-Ohio-5682 (for a complete history).

{¶10} In the current case, Moore has resorted to the irregular remedy of seeking a declaratory judgment and injunctive relief against Judge Russo, the trial court judge in his criminal cases, to declare that the judge violated the plea agreement in Case Two by imposing a nine-year sentence instead of the agreed 13-year sentence. In May 2016, Judge Russo moved to dismiss, which the trial court granted. It is from this judgment that Moore now appeals.

II. Standard of Review

{¶11} When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, an appellate court's standard of review is de novo. *Rogers v. Fuerst*, 8th Dist. Cuyahoga No. 100670, 2014-Ohio-2774, ¶ 5, citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44. A motion to dismiss for failure to state a claim is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

{¶12} It is well settled that when a party files a motion to dismiss, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Brown v. Carlton Harley-Davidson, Inc.*, 8th

Dist. Cuyahoga No. 99761, 2013-Ohio-4047, ¶ 12, citing *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 104, 661 N.E.2d 218 (8th Dist.1995). But “unsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss.” *U.S. Bank Natl. Assn. v. Perry*, 8th Dist. Cuyahoga No. 99608, 2013-Ohio-3814, ¶ 7, citing *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989). To prevail on a Civ.R. 12(B)(6) motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court in granting relief. *Id.*, citing *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975).

III. Final Appealable Order

{¶13} In his first assignment of error, Moore argues that the trial court’s judgment dismissing his case with prejudice was not a final order because the judge failed to sign the order and the order was not time-stamped. Moore seems to be referring to the fact that the judge wrote “OSJ” on the order, rather than signing it. “OSJ” refers to “order see journal” or “order see judgment.” Essentially, “OSJ” means that the signed judgment is attached to the order, which was the case here. The order was also time-stamped on January 18, 2017. Moore’s first assignment of error is overruled.

IV. Remaining Arguments on Appeal

{¶14} Moore’s remaining five assignments of error all relate to the trial court’s dismissal of his case after finding that Moore failed to state a claim upon which relief could be granted.

{¶15} In this case, Moore is attempting to collaterally attack his criminal conviction by filing this civil declaratory judgment action. In *Moore v. Mason*, 8th Dist. Cuyahoga No. 84821, 2005-Ohio-1188, this court explained:

A declaratory judgment action, however, cannot be used as a substitute for an appeal or as a collateral attack upon a conviction. Declaratory relief “does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or post conviction remedies.” *Shannon v. Sequechi* (C.A.10, 1966), 365 F.2d 827, 829. A declaratory judgment action is simply not part of the criminal appellate process. *State v. Brooks* (1999), 133 Ohio App.3d 521, 525, 728 N.E.2d 1119.

Id. at ¶ 14.

{¶16} Thus, the trial court’s dismissal of Moore’s suit was proper.

{¶17} Moreover, it is a well-settled rule in Ohio that where judges possess jurisdiction over a controversy, they are not civilly liable for actions taken in their judicial capacity because they have absolute immunity. *Metzenbaum v. Krantz*, 11th Dist. Portage No. 2002-P-0124, 2003-Ohio-6415, ¶ 8, quoting *State ex rel. Fisher v. Burkhardt*, 66 Ohio St.3d 189, 610 N.E.2d 999 (1993); *see also Kelly v. Whiting*, 17 Ohio St.3d 91, 477 N.E.2d 1123 (1985); *Wilson v. Neu*, 12 Ohio St.3d 102, 465 N.E.2d 854 (1984); and *Voll v. Steele*, 141 Ohio St. 293, 47 N.E.2d 991 (1943). Judicial immunity dissolves only under two circumstances: (1) if the judge has acted in a nonjudicial capacity; or (2) if the judge has performed judicial acts in the complete absence of all jurisdiction. *Triplett v. Connor*, 109 Fed. Appx. 94, 96 (6th Cir.2004).

{¶18} There is no question that in this case Judge Russo had jurisdiction over Moore’s criminal cases in 2009 and acted within his judicial capacity when he accepted

Moore's guilty pleas and sentenced him. Judge Russo is therefore immune from civil actions filed by Moore.

{¶19} Accordingly, Moore's complaint fails to state a claim upon which relief can be granted and his assignments of error two through six are overruled.

{¶20} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR