

[Cite as *State ex rel. Pullins v. Eyster*, 2009-Ohio-2846.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL. KATHRYN ELLIOTT	:	JUDGES:
PULLINS	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Relator	:	
	:	
-vs-	:	Case No. 2009-CA-09
	:	
HONORABLE OTHO EYSTER	:	
	:	<u>OPINION</u>
Defendant-Respondent	:	

CHARACTER OF PROCEEDING:

JUDGMENT: Denied

DATE OF JUDGMENT ENTRY: June 12, 2009

APPEARANCES:

For Plaintiff-Relator For Defendant-Respondent

Scott A. Pullins, Esq. 110 East Gambier Street P.O. Box 1185 Mount Vernon, OH 43050-1186	No Appearance
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Gwin, J.,

{¶1} Relator, Kathryn Elliott Pullins, has filed an Original Action in Mandamus and Prohibition. Respondent, Judge Otho Eyster, has not filed a response to the complaint. Relator has also filed a Motion for Default Judgment to which Respondent has not filed a response.

{¶2} On December 20, 2007, Relator filed a Shareholder's Derivative Suit which Respondent dismissed pursuant to Civ.R. 12(B)(6) for failing to comply with the pleading requirements of Civ. R. 23.1. Relator appealed to this Court wherein we affirmed the trial court's dismissal of all counts of the shareholder's derivative suit except for Count 2 which alleged denial of corporate records.

{¶3} Upon remand, Relator filed an Amended Complaint "which consisted of sixteen counts, forty-eight pages, three hundred and nine paragraphs, and fifty-six exhibits in an effort to comply with the ruling of this appellate court and to satisfy the heightened pleading requirements of Ohio Civil Rule 23.1." (Paragraph 8 of the Original Action in Mandamus and Prohibition.) Respondent dismissed all counts of the Amended Complaint except the claim relative to the corporate records which remains pending. In the entries of dismissal, Respondent indicates the issue of sanctions will be considered at the conclusion of the case.

{¶4} Relator raises three arguments. First, Relator argues Respondent has ignored this Court's mandate issued in Knox Case Number 08CA00007 by dismissing all but one claim in the Amended Complaint based upon *res judicata*. In Knox County Case Number 08CA000007, we held, "Upon review, we find the trial court erred in

granting the motion to dismiss as to Count 2, but was correct in granting the motion as to the remaining counts.”

{¶15} Second, Relator argues Respondent is under a clear legal duty to issue a stay of the underlying proceedings while the Relator’s appeals are pending. Relator filed three notices of appeal with this Court which were assigned Knox County Case Numbers 09CA03, 09CA04, and 09CA05. This Court has dismissed all three of these cases based upon lack of jurisdiction because Relator’s appeals were not filed from final, appealable orders.

{¶16} Finally, Relator argues Respondent should be prohibited from considering the issue of sanctions.

{¶17} On two occasions, Relator requested Respondent issue a stay of Respondent’s dismissal order pending appeal. Both requests were denied. A third request was pending at the time the instant complaint was filed. Relator anticipates Respondent will deny the third request if not prohibited from doing so.

{¶18} First, we will address the Motion for Default Judgment. Loc.R. 4(A) provides, “Service in original actions shall be made and the actions shall commence upon the filing of a complaint and proceed as a civil case under the Ohio Rules of Civil Procedure unless those rules are clearly inapplicable.” Although Civ.R. 55 permits default judgments, this Court is not required to do so where the complaint on its face does not state a claim upon which relief may be granted. The Supreme Court has held, “Sua sponte dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint. Rules Civ.Proc., Rule 12(B)(6).” State ex

rel. *Kreps v. Christiansen* 88 Ohio St.3d 313, 725 N.E.2d 663 (Ohio,2000). The Court in *Kreps* held judges named as respondents were not required to file a responsive pleading to avoid default judgment where the complaint lacked merit on its face and was sua sponte dismissed. Because we sua sponte dismiss the instant complaint, Relator's Motion for Default Judgment is denied.

{¶9} A writ of mandamus will issue if the party seeking the writ demonstrates that the respondent is under a clear duty to perform the requested act, that there is clear legal right to the requested relief, and that there is no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d.28, 29, 451 N.E.2d 225, citing *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 399 N.E.2d 66, syllabus 1. *Lawrence Twp. Bd. of Trustees v. Canal Fulton* 2009 WL 418752, 3 (Ohio App. 5 Dist.).

{¶10} In order for a writ of prohibition to issue, petitioner must prove that: (1) the lower court is about to exercise judicial authority; (2) the exercise of authority is not authorized by law; and, (3) the petitioner has no other adequate remedy in the ordinary course of law if a writ of prohibition is denied. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St. 3d 176, 178, 631 N.E.2d 119. A writ of prohibition, regarding the unauthorized exercise of judicial power, will only be granted where the judicial officer's lack of subject-matter jurisdiction is patent and unambiguous. *Ohio Dept. of Adm. Serv., Office of Collective Bargaining v. State Emp. Relations Bd.* (1990), 54 Ohio St.3d 48, 562 N.E.2d 125. *State ex rel. Daniels v. Harris*, 2008 WL 5197131, 1 (Ohio App. 5 Dist.).

{¶11} Neither mandamus nor prohibition will issue where there is an adequate remedy at law. *Id.* For the reasons which follow, we find Relator has or had an adequate remedy at law to challenge Respondent's denial of the stay, Respondent's dismissal of portions of the underlying complaint, and Respondent's ruling on sanctions.

{¶12} I. STAY

{¶13} Relator argues Respondent has a clear legal duty to issue a stay while Relator's appeals are pending. Because there are no longer any pending appeals, Relator's argument fails.

{¶14} Further, App.R. 7(A) provides an adequate remedy at law as it allows an appellant to seek a stay in the appellate court should the trial court refuse to grant the requested stay. See *State ex rel. Mason v. Burnside* 881 N.E.2d 224117 Ohio St.3d 1 (availability of appeal and stay precludes writ). Relator never requested a stay from this Court in any of the three appellate cases which were pending at the time the instant complaint was filed. Because Relator has failed to establish a clear legal duty to issue a stay when no appeal is pending and because Relator has or had an adequate remedy at law to obtain a stay, we deny Relator's request for the issuance of a writ of mandamus.

{¶15} II. DISMISSAL OF COMPLAINT and III. SANCTIONS

{¶16} Relator has an adequate remedy at law to challenge the trial court's dismissal of portions of the complaint and to challenge any ruling on the motion for sanctions by way of direct appeal.

{¶17} Respondent does not patently and unambiguously lack jurisdiction to dismiss any causes of action or to rule on the issue of sanctions. "[U]nless jurisdiction

is patently and unambiguously lacking, a tribunal having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy in the ordinary course of law by appeal. See *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197, ¶ 10.” *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 326, 859 N.E.2d 923, 926 (Ohio,2006).

{¶18} Because Relator has or had an adequate remedy at law, the requested Writs are denied.

{¶19} WRITS DENIED.

{¶20} COSTS TO RELATOR.

{¶21} IT IS SO ORDERED.

By Gwin, J.,
Farmer, P.J., and
Hoffman, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

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IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE EX REL. KATHRYN ELLIOTT PULLINS	:	
	:	
Plaintiff-Relator	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
HONORABLE OTHO EYSTER	:	
	:	
Defendant-Respondent	:	CASE NO. 2009-CA-09

For the reasons stated in our accompanying Memorandum-Opinion, the requested Writs are denied. Costs to Relator.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN