

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Frank Burge,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 10AP-856
	:	(C.P.C. No. 10CV-6-8516)
Ohio Attorney General, Revenue	:	
Recovery/Collection[s] Enforcement et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	
	:	

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D E C I S I O N

Rendered on August 11, 2011

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*Stephen P. Ames*, for appellant.

*Michael DeWine*, Attorney General, *Robert Byrne*, and *Melanie Cornelius*, for appellees Ohio Attorney General and Ohio Department of Health.

*Michael DeWine*, Attorney General, and *Dennis P. Smith, Jr.*, for appellee Ohio Public Employees Retirement System.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Frank Burge, appeals from the judgment of the Franklin County Court of Common Pleas dismissing his declaratory judgment action filed against

defendants-appellees, the Ohio Attorney General, Revenue Recovery/Collections Enforcement ("OAG"), the Ohio Department of Health ("ODH"), and the Ohio Public Employees Retirement System ("OPERS"). For the reasons that follow, we affirm.

{¶2} Appellant filed a complaint for declaratory judgment on July 7, 2010, seeking a declaration regarding appellees' interest in appellant's OPERS account. According to the complaint, appellant was convicted of theft in office on or about November 3, 1992, in case No. 91CR-2259. In addition to being sentenced to a term of incarceration, appellant was ordered to pay restitution. Attached to the complaint as Exhibit A is an amended order of the trial court issued in case No. 91CR-2259 on September 21, 2009. The amended order requires that OPERS withhold all funds held on behalf of appellant for payment to ODH pursuant to R.C. 2921.41, Ohio's theft-in-office statute. The amended order also requires that payment be made to the Franklin County Clerk of Courts who would in turn send payment to ODH in care of OAG's Collections Enforcement Section. Attached to the complaint as Exhibit B is a copy of the face of a check from OPERS paid to the order of "Frank Reginald Burge, Case No. 91CR-04-2259, Franklin Co. Clerk of Courts, 373 S. High St., Columbus, OH 43215" for \$44,930.16.

{¶3} In the complaint, appellant alleges he did not receive notice of the forfeiture hearing, the hearing was untimely, the state waived its interest in the OPERS account, and that the state is barred from attaching his OPERS account on the basis of unjust enrichment, estoppel, and unclean hands. Additionally, appellant alleges that the state's interest is dormant, constitutes cruel and unusual punishment, is against public policy, infringes upon his Medicare benefits, and that he has incurred tax liability as a result of a check issued to him by OPERS. Appellant states in his complaint that for these reasons,

he seeks a declaration that "the State of Ohio has either waived or has no interest in Plaintiff's retirement account." (Complaint at 3.)

{¶4} On July 8, 2010, OAG and ODH filed a motion to dismiss the complaint arguing that this declaratory judgment action constitutes an attempt to impermissibly raise a collateral attack on the forfeiture order issued by the trial court in appellant's criminal case. On July 12, 2010, OPERS filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted on the basis that no justiciable controversy exists because not only was OPERS not a party to the criminal proceedings, but, also, it has no pecuniary interest in the outcome of this matter. Appellant did not file a response to either motion. Agreeing with the contentions of appellees, the trial court granted both motions to dismiss via a decision and entry filed on August 11, 2010.

{¶5} This appeal followed and appellant brings three assignments of error for our review:

FIRST ASSIGNMENT OF ERROR

The Trial Court erred in finding that no justifiable controversy existed between the parties.

SECOND ASSIGNMENT OF ERROR

The Trial Court erred in not addressing the issue of the State's unlawful taking of Plaintiff's Medicare Benefits.

THIRD ASSIGNMENT OF ERROR

The Trial Court erred in finding Mr. Burge had notice of the Forfeiture hearing.

{¶6} Prior to addressing the merits of appellant's assignments of error, we will first address the motion to dismiss this appeal filed by OAG and ODH. In their motion,

appellees argue we should dismiss this appeal because appellant raises arguments on appeal that were not raised in the trial court and because it is clear that through this action appellant is attempting to substitute a declaratory judgment action for an appeal in a related criminal matter. While these arguments may constitute a basis for overruling appellant's assigned errors and affirming the judgment of the trial court, we do not find that these arguments constitute a basis to dismiss the appeal. Accordingly, appellees' motion to dismiss is denied.

{¶7} We now address appellant's assignments of error challenging the trial court's decision to dismiss his declaratory judgment action.<sup>1</sup> A declaratory judgment action is a civil action and provides a remedy in addition to other legal and equitable remedies available. *Victory Academy of Toledo v. Zelman*, 10th Dist. No. 07AP-1067, 2008-Ohio-3561, ¶8, citing *Aust v. Ohio State Dental Bd.* (2000), 136 Ohio App.3d 677, 681. "The essential elements for declaratory relief are (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Walker v. Ghee*, 10th Dist. No. 01AP-960, 2002-Ohio-297, quoting *Aust* at 681. "A trial court properly dismisses a declaratory judgment action when no real controversy or justiciable issue exists between the parties." *State v. Brooks* (1999), 133 Ohio App.3d 521, 525, citing *Weyandt v. Davis* (1996), 112 Ohio App.3d 717, 721.

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<sup>1</sup> We note appellant does not appear to separately challenge the trial court's decision granting OPERS' motion to dismiss on the basis that appellant's complaint fails to state a claim against OPERS. Therefore, our discussion focuses likewise. However, such distinction is rendered moot given our conclusion that this declaratory judgment action constitutes an impermissible collateral attack on a forfeiture order issued in a criminal case, and, is therefore, subject to dismissal.

{¶8} When a declaratory judgment action is disposed of by dismissal pursuant to Civ.R. 12(B)(6), our review of the trial court's resolution of legal issues is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. Rather, the trial court may only review the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. Moreover, the court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

{¶9} In dismissing appellant's complaint, the trial court concluded appellant's complaint for declaratory judgment constituted an impermissible collateral attack on a forfeiture order issued by the trial court in appellant's criminal case. The "collateral attack" doctrine disfavors the authority of one court to revisit a judgment of another court in another proceeding in other than very limited circumstances. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶1. As described by the Supreme Court of Ohio, a collateral attack is an attempt to defeat the operation of a judgment in a proceeding where some new right derived from or through the judgment is

involved. *Id.* at ¶16. "The objective of a collateral attack is to modify a previous judgment because it is allegedly ineffective or flawed for some fundamental reason." *Id.* at ¶19.

{¶10} It is well-settled that a declaratory judgment action cannot be used to collaterally attack a conviction or sentence in a criminal case. *Wilson v. Collins*, 10th Dist. No. 10AP-511, 2010-Ohio-6538, ¶9 (summary judgment in favor of defendants in a declaratory judgment action proper where action was merely an attempt to collaterally attack prior conviction and sentence); *Gotel v. Ganshiemer*, 11th Dist. No. 2008-A-0070, 2009-Ohio-5423, ¶47 (affirming dismissal of declaratory judgment action that sought to invalidate prior conviction); *Moore v. Mason*, 8th Dist. No. 84821, 2005-Ohio-1188, ¶14 (affirming dismissal of declaratory judgment action where criminal defendant sought to void his sentence). As stated by the court in *O'Donnell v. State*, 4th Dist. No. 05CA3022, 2006-Ohio-2696, " '[a]n action under declaratory judgment acts will not lie to determine whether rights theretofore adjudicated have been properly decided, nor will it lie to determine the propriety of judgments in prior actions between the same parties. An action for a declaratory judgment cannot be used as a subterfuge for, or for the veiled purpose of, relitigating questions as to which a former judgment is conclusive.' " *Id.* at ¶13, quoting *Tootle v. Wood* (1974), 40 Ohio App.2d 576, 578, quoting 26 Corpus Juris Secundum 93-94, Declaratory Judgments, Section 23. "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.' " *Wilson*, quoting *Moore*.

{¶11} Appellant contends under his first assignment of error that because his complaint "alleges the State's attachment of his PERS account deprives him of his

Medicare benefits which were not subject to the Forfeiture action," he has satisfied the requirement that a justiciable controversy exists between the parties. (Brief at 7.) We disagree. The sole statement in the complaint regarding Medicare benefits is, "[t]he State of Ohio's interest infringes upon Plaintiff's Medicare benefits." (Complaint at 2.) While this may suggest the state's interest in the OPERS account in some fashion impacts appellant's Medicare benefits, it does not explain *how* or *why* this establishes a justiciable controversy between appellant and appellees regarding the OPERS account.

{¶12} In the first paragraph of appellant's complaint, appellant asserts he seeks a declaration regarding "the interest that any of the Defendants may have in his PERS Retirement Account." (Complaint at 1.) Appellant reiterates the relief he seeks in the concluding paragraph of his complaint wherein he states, "WHEREFORE, Plaintiff seeks an Order from the Court determining that the State of Ohio has either waived or has no interest in Plaintiff's retirement account, and for any other relief that may be available pursuant to law." (Complaint at 3.)

{¶13} Attached to his complaint is a September 21, 2009 amended order of the Franklin County Court of Common Pleas issued in appellant's criminal case No. 91CR-2259, which states, in toto:

The Court, having considered the Motion of the Ohio Department of Health to Execute on the Judgment of Forfeiture and, having conducted a hearing at the request of Frank R. Burge, and having found good cause to issue the requested order,

It is hereby ORDERED, ADJUDGED and DECREED that the Public Employee Retirement System shall withhold all funds held on behalf of Frank R. Burge for payment to the Ohio Department of Health pursuant to Ohio Revised Code section 2921.41. Payment shall be made to the Franklin County

Clerk of Courts, who will send payment to the Ohio Department of Health, c/o Robert J. Byrne, Principal Assistant Attorney General, Collections Enforcement Section, 150 E. Gay Street, 21st Floor, Columbus, Ohio 43215.

{¶14} After review of appellant's complaint, we find appellant is attempting to use a declaratory judgment to collaterally attack a prior valid order of a court in his criminal case, and, as such that appellant does not present a justiciable controversy capable of resolution by declaration under the declaratory judgment act. Rather, appellant's arguments would be properly raised on direct appeal of the judgment he challenges here. *Jackson v. Bartec, Inc.*, 10th Dist. No. 10AP-173, 2010-Ohio-5558, ¶38; *Moore; Carter v. Walters* (Mar. 22, 1990), 3d Dist. No. 11-88-24 ("a declaratory judgment [action] is not part of the criminal appellate process" because neither the declaratory judgment act nor Civ.R. 57 convert a claimed error by a judge in a criminal case into a justiciable controversy subject to resolution by declaration).

{¶15} Accordingly, appellant's first assignment of error is overruled.

{¶16} In his second assignment of error, appellant asserts the trial court erred in not addressing the "issue of the State's unlawful taking of Plaintiff's Medicare Benefits." (Brief at 8.) A review of the complaint reveals that appellant's complaint does not contain such an allegation. Accordingly, appellant's second assignment of error is overruled.

{¶17} In his third assignment of error, appellant states the trial court erred in finding that he had notice of the forfeiture hearing. Under this assigned error, appellant states, "this counsel has not been able to verify that [appellant] actually received personal service of the Forfeiture hearing." (Brief at 9.) Not only does this assignment of error fail to contain an argument that includes "the contentions of the appellant with respect to [the]

assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies," as required by App.R. 16(A)(7), we note again that this declaratory judgment action cannot be used to collaterally attack the forfeiture order because declaratory relief is not a substitute for an appeal or post-conviction remedies. *Collins*. Accordingly, appellant's third assignment of error is overruled.

{¶18} For the foregoing reasons, appellees' motion to dismiss is denied, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Motion to dismiss denied;  
judgment affirmed.*

KLATT and CONNOR, JJ., concur.

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