

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE ex rel.	:	PER CURIAM OPINION
KATHLEEN B. KRIHWAN,	:	
	:	
Petitioner,	:	CASE NO. 2009-L-093
	:	
- vs -	:	
	:	
JUDGE COLLEEN FALKOWSKI,	:	
	:	
Respondent.	:	
	:	

Original Action for Writ of Mandamus.

Judgment: Writ denied.

William F. Chinnock, 8238 Sugarloaf Road, Boulder, CO, 80302 (For Petitioner).

Charles E. Coulson, Lake County Prosecutor, and *Michael L. DeLeone*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for final disposition of the summary judgment motion of respondent, Judge Colleen Falkowski of the Lake County Court of Common Pleas, Domestic Relations Division. As the primary basis for her motion, respondent submits that no further proceedings are necessary in the instant matter because the merits of the petition of relator, Kathleen B. Krihwan, are now moot as a result of a subsequent act. For the following reasons, we conclude that respondent is entitled to summary judgment as to all aspects of relator's mandamus petition.

{¶2} A review of the parties' respective evidentiary materials demonstrates that the majority of the underlying facts in this matter are not in dispute. In July 1993, relator initiated a divorce proceeding against her former husband, Robert R. Krihwan. After the proceeding had been pending for nearly three years, the domestic relations court issued the final divorce decree which, inter alia, contained an order distributing the property of the marriage. As part of this order, Mr. Krihwan was required to pay relator the sum of \$900,000 over a period of five years.

{¶3} During the ensuing seven years, multiple disputes arose as to whether Mr. Krihwan was complying with the payment requirements of the final divorce decree. In December 2003, respondent, as the new duly-elected domestic relations judge for Lake County, issued a separate judgment in which Mr. Krihwan was found to be in contempt of the original "property distribution" order, and was sentenced to a term of ninety days for failing to make the required payments. However, respondent further ordered that he could purge his contempt by immediately beginning to make a new monthly payment of \$9,000 until the remaining sum of \$505,369 was fully satisfied.

{¶4} Mr. Krihwan complied with the "purge" order for a period of fifty months. In March 2008, though, he stopped making the payments and filed a motion to terminate the "purge" order on the grounds that he should not be required to pay any interest on the original amount owed under the divorce decree. Two months later, after being granted an extension of time by a court magistrate, relator filed her response to Mr. Krihwan's new submission and also filed a motion to enforce the ninety-day sentence which had already been imposed in the December 2003 judgment.

{¶5} Over the next seventeen months, respondent did not enter a final decision

concerning relator's motion to enforce. In September 2008, an evidentiary hearing was scheduled before respondent on the motion to enforce and other pending matters. But this hearing ultimately did not go forward because relator entered into an agreement to give Mr. Krihwan an extension of twenty days in which to make a lump-sum payment for three of the disputed months. When Mr. Krihwan failed to submit the agreed payment within the twenty-day period, relator's counsel notified respondent of the violation of the agreement. Nevertheless, a new evidentiary hearing was not immediately scheduled because, during the interim period, Mr. Krihwan filed two new motions pertaining to his legal obligation to make further payments.

{¶6} After again obtaining an extension of time, relator filed her response to Mr. Krihwan's second new motion in late November 2008. All pending matters in the case were then scheduled for an evidentiary hearing before a court magistrate on February 18, 2009. Throughout this entire period, both sides in the divorce proceeding continued to file numerous new submissions regarding the general "payment" issue. Although the majority of these submissions was filed on behalf of Mr. Krihwan, relator's trial counsel also submitted multiple motions. For example, in January 2009, relator moved for the immediate issuance of an arrest warrant without conducting any new hearing. As she had asserted in her May 2008 motion, relator maintained that Mr. Krihwan's continuing refusal to make the monthly payments in accordance with the prior "purge" order warranted his immediate incarceration for ninety days.

{¶7} After the February 2009 hearing, the court magistrate issued two written decisions in regard to all pending matters. The second of these two decisions was entered on March 20, 2009, approximately thirty days after the hearing. Since part of

the magistrate's recommendation was in favor of Mr. Krihwan, relator filed objections to the second decision on April 1, 2009. After Mr. Krihwan failed to submit a response to the objections, respondent released a separate entry stating that the merits of the objections would be considered without benefit of an additional oral hearing.

{¶8} When respondent failed to release any type of final ruling by July 17, 2009, relator brought the instant action for a writ of mandamus before this court. As the primary grounds for her sole claim, relator alleged that respondent's failure to rule upon her May 2008 motion within seventeen months constituted an inordinate delay that had caused irreparable harm to her, including the possible loss of her residence through a foreclosure proceeding. In her original petition, relator sought the issuance of an order that would require respondent to take the necessary steps to arrest Mr. Krihwan in light of his lack of compliance with the previous December 2003 "purge" order. In addition, in amending her petition as a matter of right under Civ.R. 15(A), relator altered her prayer for relief to also include the request that respondent be required to compensate her for the irreparable harm allegedly stemming from the delay.

{¶9} In now moving for summary judgment on relator's entire claim, respondent argues that the merits of this matter have been rendered moot because she has already performed the specific act which relator sought to compel. Specifically, she maintains that, subsequent to the filing of the mandamus petition, she issued a series of judgment entries in which she disposed of all pending motions in the divorce case and essentially granted the final relief that relator had requested against Mr. Krihwan.

{¶10} In support of this contention, respondent has attached to her motion and reply brief certified copies of six judgment entries. A review of these documents readily

shows that five of the entries were released on July 24, 2009, only seven days after the filing of the instant proceeding. As part of the five entries, respondent granted relator's objections to the magistrate's decision of March 20, 2009, and entered final judgment in her favor as to those motions in which Mr. Krihwan had challenged his legal obligation to continue to make the monthly payments. Respondent predicated her determination upon the conclusion that Mr. Krihwan had waived his right to challenge the ruling that the total sum he still owed under the original divorce decree was \$505,369 during the earlier trial proceedings that had culminated in the December 2003 "purge" order. In turn, this meant that the payments he had made from January 2004 until March 2008 had not been sufficient to extinguish the entire debt.

{¶11} Although the five judgment entries of July 24, 2009, resolved the majority of the pending issues in the underlying divorce case, it did not dispose of relator's May 2008 motion for the enforcement of the ninety-day contempt sentence. Nevertheless, our review of respondent's evidentiary materials establishes that she rendered a sixth new judgment entry on September 11, 2009. In this particular entry, respondent initially indicated that a separate oral hearing had been held on the motion to enforce, and that the evidence presented during that proceeding had demonstrated that Mr. Krihwan had failed for a period of eighteen months to comply with the requirement of the December 2003 "purge" order. As a result, the sixth entry granted relator's motion and ordered Mr. Krihwan to either immediately serve the suspended contempt sentence or pay the sum of \$162,000 to relator.

{¶12} In responding to the summary judgment motion, relator has not contested the authenticity of the certified copies of the six judgment entries. Furthermore, she has

not sought to dispute the fact that the various holdings in the six entries had the effect of disposing of all pending matters pertaining to Mr. Krihwan's continuing liability under the original divorce decree and whether he had properly purged his prior contempt. Despite this, she still submits that the entry of summary judgment is not justified because neither this court nor respondent have the authority to render any new determinations regarding the underlying dispute at the present time. In relation to this point, relator has asserted two separate arguments for our consideration.

{¶13} First, as to the authority of this court, relator submits that no further action can be taken in the instant mandamus action because, immediately after the release of respondent's final judgment entry on September 11, 2009, Mr. Krihwan filed his bankruptcy petition in the United States Bankruptcy Court for the Northern District of Ohio. Given this event, relator argues that all further proceedings before this court must be stayed under the automatic stay provision of the Federal Bankruptcy Code. Relator notes that, pursuant to §362(a)(1), Title 11 of the federal code, the filing of a petition for bankruptcy operates as a stay of the following:

{¶14} "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."

{¶15} Given that the foregoing provision only refers to legal proceedings against the debtor himself, its language does not support relator's contention that the automatic stay is applicable in this instance. In interpreting §362(a)(1), federal courts have stated

that Congress generally intended for the stay provision to apply only to the debtor, not other persons. See, e.g., *Ripley v. Mulroy* (E.D.N.Y., 1987), 80 B.R. 17. The only type of situation in which the automatic stay can be enforced against a non-bankrupt party is when “such an identity of interest exists between the debtor and third party non-debtor that a judgment against the third party will directly affect the debtor.” *Gucci America, Inc. v. Duty Free Apparel, LTD.* (S.D.N.Y., 2004), 328 F.Supp. 439, 441.

{¶16} In the present case, Judge Colleen Falkowski was the sole person relator named as a respondent; thus, Mr. Krihwan, the debtor in the bankruptcy proceeding, is not a party to the matter before this court. Moreover, in light of respondent’s status as a domestic relations judge, any “interest” she could conceivably have in the subject debt would clearly not be consistent with Mr. Krihwan’s interest. Consequently, this court still has the authority to proceed on respondent’s summary judgment motion because the automatic stay provision of the Federal Bankruptcy Code has no application to the question of whether a writ of mandamus might lie to compel further acts by respondent.

{¶17} Under her second argument, relator contends that the merits of the instant action have not become moot because, by the time respondent issued the six judgment entries in question, she did not have jurisdiction over the underlying divorce proceeding. According to relator, the commencement of this action in mandamus had the effect of depriving respondent of the authority to go forward.

{¶18} As a general proposition, the act of perfecting a direct appeal from a final judgment does have the effect of divesting a trial judge of jurisdiction over any matters which will be subject to review before the appellate court. *State ex rel. Rock v. School Employees Retirement Bd.*, 96 Ohio St.3d 206, 2002-Ohio-3957, at ¶8. However, since

any original action before an appellate court does not directly stem or arise from a trial proceeding in the same manner as an appeal, the act of filing such an action does not have the identical effect on the trial judge's authority to proceed. In other words, even though the subject matter of an original action might relate to a trial proceeding, it still constitutes a separate legal action; therefore, the pendency of an original action has no effect on the jurisdiction of the trial judge unless a stay of the trial proceedings has been granted.

{¶19} As to this point, this court would also indicate that the Supreme Court of Ohio has consistently held that a judge's completion of the requested act after the filing of the mandamus claim will render the relator's claim moot. See *State ex rel. Hamilton v. Brunner*, 105 Ohio St.3d 304, 2005-Ohio-1735; *State ex rel. National City Bank v. Maloney*, 103 Ohio St.3d 93, 2004-Ohio-4437. Obviously, such a holding would not be feasible if the mere commencement of a mandamus action was sufficient to deprive the trial judge of jurisdiction to perform the disputed act.

{¶20} In bringing the instant mandamus action, relator never moved this court to stay all further proceedings before respondent in the divorce case. Hence, respondent was still acting within the scope of her general authority when she released the six judgment entries in July and September 2009.

{¶21} Furthermore, as was previously noted, respondent's sixth judgment entry contained an express order requiring Mr. Krihwan to immediately report to the county jail and begin to serve the ninety-day contempt sentence. Given that relator sought the writ to compel the issuance of an arrest warrant so that Mr. Krihwan would be taken to jail, respondent's issuance of the last judgment entry achieved the same result which

relator hoped to obtain in pursuing this matter. To this extent, respondent's evidentiary materials are sufficient to demonstrate that the final merits of the pending mandamus claim have become moot as a result of the subsequent acts of respondent.

{¶22} Finally, this court would again note that, in amending her original petition, relator sought an award of damages based upon the alleged irreparable harm caused by the delay in the resolution of the underlying matter. Pursuant to R.C. 2731.11, an award of damages can be made in the context of a mandamus action if "judgment" for the writ had been rendered in favor of the relator. In applying this statutory provision in an action in which the mandamus claim was rendered moot as a result of a subsequent act, the Supreme Court has specifically held that a claim for monetary damages should not be considered unless the writ is actually granted for the relator. *Maloney*, 2004-Ohio-4437, at ¶13. In light of this precedent, relator's request for damages cannot be litigated in the instant action because the issuance of a writ of mandamus is not justified under the facts.

{¶23} Since relator never contested the authenticity of the six judgment entries submitted by respondent in conjunction with her summary judgment motion, there is no dispute that respondent has already performed the basic act which relator sought to compel. That is, respondent has issued a judgment which required Mr. Krihwan to serve time in the county jail. Under these facts, respondent is entitled to final judgment as a matter of law because the merits of relator's mandamus claim are now moot. In light of this, respondent has satisfied the three requirements for summary judgment under Civ.R. 56(C).

{¶24} Consistent with the foregoing discussion, respondent's motion for

summary judgment is granted. It is the order of this court that final judgment is hereby entered in favor of respondent as to relator's entire amended petition in mandamus.

MARY JANE TRAPP, P.J., DIANE V. GRENDALL, J., CYNTHIA WESTCOTT RICE, J.,
concur.