



116280465

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

EX. REL. GARRY KANTER
Plaintiff

Case No: CV-21-942733

Judge: DEBORAH M TURNER

CITY OF CLEVELAND HEIGHTS AND CITY
COUNCIL, ET AL
Defendant

FILED
2021 MAR -5 A 11:01
CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY

89 DIS. W/PREJ - FINAL

MOTION TO DIMSMISS RELATOR'S COMPLAINT, FILED 02/16/2021, IS GRANTED. ORDER SEE JOURNAL.
COURT COST ASSESSED TO THE PLAINTIFF(S).

PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER
PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL
PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

OST

Judge Signature

Date

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE EX REL. GARY KANTER,	)	CASE NO. CV-21-942733
	)	
Relator,	)	JUDGE DEBORAH M. TURNER
	)	
v.	)	
	)	<u>OPINION AND ORDER</u>
CITY OF CLEVELAND HEIGHTS, <i>et al.</i>	)	
	)	
Respondents.	)	
	)	
	)	

Pending before this Court is Respondents Motion to Dismiss Relator's Complaint. Relator has filed a Response and this matter is ripe for adjudication.

Respondents are the City of Cleveland Heights and the individual City Council members. Cleveland Heights is an Ohio municipality which has chosen to exercise its right of self-government. Pursuant to Article 3, Section I of the Cleveland Heights Charter, the legislative power is vested in a Council of seven members. On or about March 2, 2020 a vacancy arose due to a resignation of a council member, leaving six members.

Article 3, Section 4 of the Charter provides:

SECTION III-4. VACANCIES. Any vacancy in the Council, except as otherwise provided in this Charter, shall be filled by appointment by a majority of the remaining members of the Council. Such appointee shall hold office through December 31 following the next regular municipal election taking place more than sixty days after such vacancy occurs; provided, however, that the term of a member shall not be lengthened by his resignation and subsequent appointment. The term of the person chosen at such election to succeed such appointee for any unexpired term shall begin the first day of January next following his election and he shall serve the remainder of such unexpired term.

Respondent Council Members have failed to fill the vacancy. Relator has brought this Mandamus action seeking an order directing the Council of Cleveland Heights to immediately fill the vacancy on the Council.

LEGAL STANDARD

A. Motion for Judgment on the Pleadings Standard

In resolving a Civ.R.12(B)(6) motion, a court is confined to the averments set forth in the complaint and cannot consider outside evidentiary materials unless the motion is converted into one for summary judgment under Civ.R. 56. *Tibbs v. Kendrick* (8th Dist. 1994), 93 Ohio App.3d 35, 40, 637 N.E.2d 397. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural in nature and test the sufficiency of the complaint. *Assn. for the Defense of the Washington Local School Dist. V. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292, 1293. In order to grant a motion to dismiss for failure to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of their claim which would entitle her to relief. *Byrd v. Faber* (1991), 57 Ohio.Wt.3d 56, 565 N.E.2d 584.

B. Writ of Mandamus

"Mandamus is an extraordinary remedy 'to be issued with great caution and discretion and only when'" it is clearly warranted. *See State ex rel. Manley v. Walsh*, 142 Ohio St. 3d 384, 387 (2014) (*quoting State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 166 (1977)). To be entitled to a writ of mandamus a party must establish (1) a clear legal right to the relief requested; (2) a corresponding clear legal duty on the part of the respondent to provide the requested relief or perform the requested act; and (3) the absence of a plain and adequate remedy in the ordinary course of law. *State ex rel. Ney v. Niehaus*, 33 Ohio St. 3d 118, 118-19 (1987).

In *State ex rel. Devine v. Hoermle*, 168 Ohio St. 461, 462 (1959), the Supreme Court of Ohio a similar situation. In *Hoermle*, there was a vacancy in the Columbus City Council. The Council failed to fill the vacancy. Thereafter, the Mayor filled the vacant seat, ostensibly relying upon R.C. 731.43 which provided authority to a mayor to fill a vacancy. The Supreme Court of Ohio determined that the Mayor could not rely upon R.C. 731.43 because Columbus, like Cleveland Heights, had elected to exercise its powers of self-government. This election meant that the issue could only be decided based upon the specific provisions of the City Charter, not the general provisions of the Ohio Revised Code.

In *Hoermle*, the Columbus City Charter did not provide a time frame for filling a Council vacancy and did not authorize the Mayor to make fill the vacancy. The Ohio Supreme Court refused to add a condition that the appointment be made in a reasonable time because that would be adding additional language not found within the Charter. The Court further held that even if it were to imply a duty to act in a reasonable time, "such duty would represent a directory and not a mandatory duty," such that mandamus would not be available. *Id.* (citing *State ex rel. Kay, v. Lausche, Gov.* (1954), 161 Ohio St.168 and *State ex rel. Armstrong, v. Davey, Gov.* (1935), 130 Ohio St. 160).

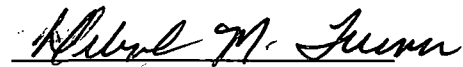
Just as in *Hoermle*, the Cleveland Heights Charter does not provide a time frame for when Council must fill a vacancy. Therefore Relator cannot establish that Respondents failed to perform a clear legal duty. A Writ of Mandamus is not available under the circumstances presented herein.

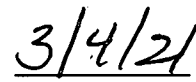
CONCLUSION

Based upon the forgoing, Respondents Motion to Dismiss is GRANTED and the Petition for Mandamus is DISMISSED with prejudice. Final.

There is no just reason for delay.

IT IS SO ORDERED.


JUDGE DEBORAH M. TURNER


DATE