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Court of Common Pleas

MOTION TO DISMISS
February 16, 2021 14:17

By: ALIX M. NOUREDDINE 0092484

Confirmation Nbr. 2181879

EX. REL. GARRY KANTER

vs.

CITY OF CLEVELAND HEIGHTS AND CITY COUNCIL, ET AL

CV 21 942733

Judge: DEBORAH M. TURNER

Pages Filed: 9

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO ex rel. GARRY KANTER,	)	CASE NO. CV-21-942733
	)	JUDGE DEBORAH M. TURNER
Relator,	)	
v.	)	
CITY OF CLEVELAND HEIGHTS CITY COUNCIL, *et al.*	)	**MOTION TO DISMISS RELATOR'S COMPLAINT**
Respondents.	)	

Now come Respondents, City of Cleveland Heights, Jason Stein, Kahlil Seren, Mary Dunbar, Melody Joy Hart, Davida Russell, and Michael Ungar, by and through undersigned counsel, and, pursuant to Rule 12(b)(6) of the Ohio Rules of Civil Procedure, respectfully move this Honorable Court to dismiss Relator's Complaint, with prejudice, for failure to state a claim upon which relief can be granted and because the Complaint is procedurally defective. The reasons for this Motion are set forth in the attached Memorandum in Support which is expressly incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The City of Cleveland Heights is a chartered municipality exercising its powers of local self-government pursuant to Section 3 and Section 7 of Article XVIII of the Ohio Constitution. Compl. at ¶ 2. Garry Kanter ("Relator") filed this action against the City of Cleveland Heights and each of its Councilmembers (collectively, the "City" or "City Council") seeking a writ of mandamus compelling City Council to immediately fill a vacancy on Council. *Id.* at ¶ 11. The vacancy on City Council occurred on March 2, 2020, due to the resignation of a council member. *Id.* at ¶ 5.

The Complaint notes that Section III-4 of the Charter of the City of Cleveland Heights provides in relevant part that "[a]ny 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…." *Id.* at ¶¶ 6, 7. Relator's Complaint further alleges that Relator and various other residents of the City have demanded that the remaining six members of Council abide by Section III-4 of the Charter and fill the vacancy on Council, but that the vacancy has not been filled. *Id.* at ¶¶ 8, 10. The Complaint alleges that because Respondents have not filled the vacancy on Council as of the date of the Complaint, Respondents have failed to comply with the Charter provision at issue. *Id.* at ¶ 10. Relator asks this Court for a writ of mandamus ordering Cleveland Heights City Council to immediately fill the Council vacancy. *Id.* at ¶ 11.

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II. LAW AND ARGUMENT

A. Standard of Review

Rule 12(B)(6) of the Ohio Rules of Civil Procedure provides that a court must dismiss an action when the Complaint fails to state a claim upon which relief can be granted. "In reviewing a motion to dismiss for failure to state a claim, [courts] accept as true all factual allegations in the complaint." *LGR Realty, Inc. v. Frank & London Ins. Agency*, 152 Ohio St. 3d 517, 2018-Ohio-334, ¶ 10 (citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988)). Dismissal of an action is proper under Civ.R. 12(B)(6) when the plaintiff "can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

Here, dismissal of the Complaint is warranted because Relator cannot establish that he is entitled to a writ of mandamus. Indeed, Relator can neither establish a clear legal right to the requested relief nor that City Council has a clear legal duty to perform the requested act—the filling of the vacant Council seat within a certain period of time. As will be explained below, the City's Charter vests City Council with the sole power and authority to fill a vacant council seat and does not impose a mandatory timeframe in which City Council must act to fill such vacancy. As a matter of law, in the absence of Charter language imposing upon City Council a deadline within which to fill the vacancy, a writ of mandamus cannot be used to compel it to act within a timeframe that meets with Relator's approval.

Even if Relator could demonstrate his entitlement to a writ of mandamus, which he cannot, the Complaint remains subject to dismissal because it is procedurally defective. Indeed, Relator

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did not comply with the requirement imposed by R.C. 2731.04 that a complaint for a writ of mandamus be verified by affidavit. To the contrary, Relator failed to attach an affidavit verifying the Complaint in this matter.

B. Relator is not entitled to a writ of mandamus because City Council does not have a mandatory duty to fill the vacant council seat under Section III-4 of the City's Charter within any certain period of time.

"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). As will be explained below in greater detail, under the language of Charter Section III-4, City Council does not have a mandatory duty to fill a vacancy on council within any certain period of time. Thus, mandamus cannot be used to force Council to act at a certain time.

In *State ex rel. Devine v. Hoermle*, 168 Ohio St. 461, 462 (1959), the Supreme Court of Ohio squarely addressed the exact issue in this case. In *Hoermle*, a vacancy occurred on the Columbus City Council due to a councilmember's death. *Id.* at 461. However, the Columbus City Council did not fill the vacant seat. *Id.* Rather, after a period of time passed, the Mayor of Columbus filled the vacant seat, ostensibly relying upon R.C. 731.43, which authorized a Mayor to fill such a vacancy by appointment if the legislative authority failed to do so within 30 days of the

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vacancy. *Id.* at 462-63. A lawsuit was filed challenging the Mayor's authority to fill the vacant seat, which was alleged to be in violation of the Columbus City Charter, by seeking to eject the Council member appointed by the Mayor. *Id.* at 462.

The Supreme Court of Ohio ultimately determined that the Mayor lacked the authority to fill the vacant council seat under the charter. The Court's decision turned on the language of Section 5 of the charter which stated, in pertinent part, "[v]acancies in council shall be filled by the council for the remainder of the unexpired term …." *Id.* The language of Section 5 of the Columbus Charter was dispositive of the issues before the Supreme Court because that provision provided the sole power of appointment to the council, and further did not provide a timeframe in which council was required to fill the vacant council seat. *Id.* at 462-463.

The Court noted that it could be argued that Section 5 of the Columbus Charter should be construed *as though* it read that "vacancies in council shall be filled within a reasonable time by the council" (the underlined language not being actually contained in the Charter) and that 30 days was more than reasonable, such that in the absence of a provision for filling the vacancy after a reasonable time passed, the above-cited Ohio Revised Code provision should be found to apply. *Id.* at 463-464. But the Court found that where a charter specified who shall make appointments, *statutory* provisions authorizing an appointment by someone else do not apply unless otherwise permitted by the charter. *Id.* at 462 (citing *State ex rel. Bindas v. Andrish* (1956), 165 Ohio St. 441). Further, even if insertion of the additional language "within a reasonable time" and providing a remedy for a failure of Council to act within a reasonable time were considered advisable, such changes could only be implemented by Charter amendment: "This court has no

power or authority to do that." *Id.* at 464. Finally, the Court 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 a year later, the Court reaffirmed its holding in *Hoermle* in the case of *State ex rel. Allison v. Jones*, 170 Ohio St. 323 (1960). That case once again concerned the Columbus City Council's failure to fill a vacancy on council within 30 days from the date of the vacancy, prompting the mayor of Columbus, once again, to fill the vacancy. *Id.* at 323. Given that the city charter had not changed, the Court applied the doctrine of *stare decisis* to find *Hoermle* dispositive of the issue and held, again, that the mayor had no authority to make such appointment despite Council's failure to do so within what the mayor believed to be a reasonable period of time. *Id.* at 324. Justice Peck, in a concurring opinion, reinforced the court's finding in *Hoermle* that the court had "neither power nor authority" to alter the city's charter. *Id.* at 326.

Hoermle and *Jones* are dispositive of the issues in this case and Relator's Complaint should be dismissed with prejudice as a matter of law. Indeed, Section III-4 of the City's Charter provides in relevant part that "[a]ny 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." Compl. at ¶ 6. Like the Charter provision at issue in *Hoermle* and *Jones*, Section III-4 does not impose a mandatory timeframe by which City Council must fill the vacant council seat. And there is no contrary provision in the Charter. As the Supreme Court found in *Hoermle* and affirmed in *Jones*, to impose a timeframe by which City Council must fill the vacancy would require this Court to

read into Section III-4 of the Cleveland Heights Charter words that do not appear there. The Supreme Court has held that courts lack authority and power to impose upon a chartered municipality a duty to fill a vacant legislative seat within a time not expressly prescribed by the municipality's charter.

Thus, Relator is not entitled a writ of mandamus because he can establish neither that he has a clear legal right to the requested relief nor that City Council has a corresponding mandatory legal duty to perform the requested act—the filling of the vacant seat on City Council—within a particular time frame. Therefore, the Complaint fails to state a claim upon which relief can be granted and must be dismissed as a matter of law.

C. The Complaint must be dismissed because Relator failed to verify the Complaint by affidavit as required by R.C. 2731.04.

R.C. 2731.04, governing applications for a writ of mandamus, provides that applications "must be by petition, in the name of the state on the relation of the person applying, and **verified by affidavit**. (Emphasis added.) A petitioner's failure to comply with the requirements of the statute is an independent basis to dismiss a mandamus action. *See Mentch v. Cuyahoga County Public Library Board*, 8th Dist. No. 105963, 2018 WL 1778590, 2018-Ohio-1398, ¶ 80 (citing *Blue v. Ryan*, 8th Dist. Nos. 106166, 106180, 106181, 106182, 2017 WL 4423027, 2017-Ohio-8072, ¶ 7, citing *Shoop v. State*, 144 Ohio St.3d 374, 2015-Ohio-2068, ¶ 10).

Here, Relator did not attach an affidavit to his Complaint as required by R.C. 2731.04. Relator's failure to comply with the statutory requirements is an independent basis to dismiss his mandamus action. As such, the Court should dismiss the procedurally defective Complaint as a matter of law.

Electronically Filed 02/16/2021 14:17 / MOTION / CV 21 942733 / Confirmation Nbr. 2181879 / CLSLP

III. CONCLUSION

Relator cannot establish his entitlement to a writ of mandamus compelling City Council to fill the vacant council seat. Thus, the Complaint should be dismissed with prejudice as a matter of law for failure to state a claim upon which relief can be granted. Even if Relator could establish his entitlement to the writ on the substance, the Complaint remains subject to dismissal because Relator failed to comply with the statutory requirements of R.C. 2731.04 when he failed to attach an affidavit verifying the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Motion to Dismiss Relator's Complaint and Memorandum in Support* has been sent by regular U.S. mail on February 16, 2021 to the following:

Garry Kanter
3624 Cummings Road
Cleveland Heights, Ohio 44118

/s/ Alix M. Noureddine
Alix M. Noureddine (0092484)
An Attorney for Respondents

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