

FILED
COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
2022 JUN 17 PM 3:07
JEANNE M. STEPHEN
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL TRIAL DIVISION

STATE OF OHIO, EX REL., : CASE NO. 2022 CV 02 0104
RICHARD P. HOMRIGHAUSEN, :
 : **JUDGE**
PLAINTIFF-RELATOR : **MICHAEL J. ERNEST**
 :
vs. :
 : JUDGMENT ENTRY
 :
CITY OF DOVER, OHIO, et al., :
 :
DEFENDANTS-RESPONDENTS :

This matter came before the Court for oral hearings on April 11, 2022 and June 2, 2022. Plaintiff-Relator, Richard P. Homrighausen, was present and represented in his individual capacity by Attorneys Jonathon J. Downes, Drew C. Piersall and Jantzen D. Mace, Zashin & Rich Co. L.P.A, Columbus, Ohio. Defendants, City of Dover and Douglas J. O'Meara, in his official capacity as Law Director, City of Dover, Ohio, as well as David Douglas, Eva Newsome and Gerald Mroczkowski were represented by Attorney Dolores P. Garcia, Ulmer & Berne, LLP, Cleveland, Ohio and Douglas J. O'Meara, Law Director, City of Dover, Ohio. It should also be noted that Attorneys Garcia and O'Meara have also filed pleadings on behalf of the City of Dover's Interim Mayor, Shane Gunnoe.

The matters before the Court for consideration are Richard P. Homrighausen's Motion for Temporary Restraining Order filed on March 11, 2022; Defendants-Respondents' Motion to Dismiss Plaintiff-Relator's First Amended Complaint filed on March 22, 2022; and Plaintiff's Motion to Strike filed on May 19, 2022. The Court has also reviewed all responsive filings, which are specifically listed below in the Court's summary of the relevant matters pending in this case.

On February 25, 2022 Richard P. Homrighausen filed Taxpayer's Verified Complaint for Writ of Mandamus and Other Relief in Law and Equity against The City of Dover, Ohio and Douglas J. O'Meara, in his official capacity as Law Director, City of Dover, Ohio. Through his Complaint, Homrighausen seeks a Writ of Mandamus issuing an order mandating that the Defendants comply with R.C. 733.51 and Chapter 137 of the Codified Ordinances of Dover by providing him with statutorily recognized legal counsel as required by law.

On March 11, 2022, Homrighausen filed Plaintiff-Relator's First Amended Complaint along with a Motion for Temporary Restraining Order. In Richard P. Homrighausen's First Amended Complaint, he again seeks a Writ of Mandamus Order compelling the City of Dover to provide him with legal counsel at the City of Dover's expense along with a request for Injunctive Relief. Homrighausen's request for Injunctive Relief seeks an Order preventing the City of Dover and Law Director O'Meara from enforcing the terms of a Settlement Agreement entered into by the Dover City Council and three employees of the City of Dover. Homrighausen's Motion for Temporary Restraining Order further requests a temporary restraining order against Defendants City of Dover and Law Director O'Meara restraining Defendants from directly or indirectly (a)

enforcing the terms of the settlement agreement approved by Dover's City Council through Ordinance No. 7-22 during its March 10, 2022 meeting; and (b) preventing the Mayor from obtaining legal counsel at the City's cost pursuant to R.C. 733.51 or otherwise interfering with the Mayor's attempts to obtain legal counsel.

On March 22, 2022, the City of Dover and Douglas O'Meara, in his official capacity as Law Director for the City of Dover, (collectively, Defendants) filed a Motion to Dismiss Plaintiff-Relator's First Amended Complaint. Defendants argue in their Motion to Dismiss that Homrighausen's Amended Complaint should be dismissed as he is not enforcing a public right, failed to request Law Director O'Meara to file suit, fails to show that he has a right to the Writ and that Plaintiff's Mandamus Claim is now moot.

On March 29, 2022, Defendants filed a Memorandum in Opposition to Plaintiff-Relator's Motion for Temporary Restraining Order. Defendants argue that Homrighausen has failed to meet the requirements for a Temporary Restraining Order ("TRO").

On April 5, 2022, Homrighausen filed his Response in Opposition to Defendants/ Respondents' Motion to Dismiss Plaintiff-Relator's First Amended Complaint. Homrighausen sets forth various counter-arguments to those raised by the Defendants that the Homrighausen Amended Complaint should be dismissed.

On April 8, 2022, Homrighausen filed his Reply in Support of his Motion for Temporary Restraining Order. He argues that the four factors necessary for a Temporary Restraining Order can be established and again requests that the Court issue the TRO.

On April 8, 2022, Defendants also filed a Reply in Support of their Motion to Dismiss Plaintiff-Relator's First Amended Complaint. Defendants argue that

Homrighausen's mandamus claim has no basis in law and that Plaintiff does not have standing to bring the mandamus claim. Defendants argue that Homrighausen's mandamus claim is moot because they did offer Plaintiff-Relator representation, and the SPBR proceedings have now concluded. Defendants further argue that the claim for injunctive relief must be dismissed and that the settlement agreement contradicts the misrepresentations set forth in Plaintiff's response. Defendants assert that the Settlement Agreement at issue protects both the City of Dover and the *Plaintiff* from further litigation based on the December 21, 2021 terminations.

Defendants-Respondents filed a Sur-Reply in Support of Opposition to Plaintiff-Relator's Motion for Temporary Restraining Order on April 11, 2022. Defendants again argued that Homrighausen failed to establish any element entitling him to a motion for temporary restraining order.

On April 11, 2022, a hearing was conducted in which Richard P. Homrighausen was present in the Courtroom and represented by Attorneys Jonathan J. Downes and Drew C. Piersall. The Defendants, City of Dover, Ohio, and Douglas O'Meara, Law Director, City of Dover, were present. At this hearing, counsel for Richard P. Homrighausen set forth legal arguments in support of Homrighausen's Amended Complaint and Motion for Temporary Restraining Order. Homrighausen provided the Court with Exhibits A, B, C, D, E, F, G, H, I, J, L, M, N, O, P, and Q. Likewise, Counsel for the Defendants set forth their legal arguments in opposition to Homrighausen's Amended Complaint and Motion for Temporary Restraining Order. Following this hearing, Defendants filed a Notice of Supplemental Evidence in Opposition to Plaintiff-Relator's Motion for Temporary Restraining Order on April 12, 2022. On April 14, 2022, a Joint

Stipulation of Facts was filed by all the parties, and Defendants-Respondents filed a Notice of Supplemental Authority in Opposition to Plaintiff-Relator's Motion for Temporary Restraining Order.

On May 16, 2022, a Notice of Dismissal was filed pursuant to Ohio Rule of Civil Procedure 41 (A)(1)(a) by Interim Mayor Shane N. Gunnoe in which he sought to dismiss with prejudice all claims asserted in this action against all the Defendants. The Notice of Dismissal goes on to provide that Interim Mayor Gunnoe holds the authority to dismiss all claims in this action as Richard P. Homrighausen "has been suspended from office and no longer serves as the mayor or appointing authority for the City of Dover."

On May 18, 2022, a Withdrawal of Notice of Dismissal was filed seeking to withdraw the Notice of Dismissal filed on May 13, 2022; however, the record does not reflect that a Notice of Dismissal was filed on May 13, 2022 in this case.

On May 19, 2022, Richard P. Homrighausen filed Plaintiff's Motion to Strike, or, in the Alternative, Memorandum in Opposition to Appellees' [sic] Notice of Dismissal. Richard P. Homrighausen argues that while he is suspended from the position of Mayor of the City of Dover, he is still the Mayor of the City of Dover pursuant to R.C. 3.16 (E)(1) as it provides that he "shall retain the title of the holder of that office during the period of the suspension[.]" Richard P. Homrighausen also points out that a voluntary dismissal pursuant to Civ. R. 41 (A) can only be filed by the Plaintiff.

On May 23, 2022, a second Notice of Dismissal was filed pursuant to Ohio Rules of Civil Procedure 41 (A)(1)(a) by Interim Mayor, Shane N. Gunnoe, in which he again sought to dismiss this cause of action with prejudice to refiling on the basis that Richard

P. Homrighausen “has since been suspended from office and no longer serves as the mayor or appointing authority for the City of Dover.”

On June 1, 2022, a Memorandum in Opposition to the Motion to Strike was filed on behalf of the Defendants. The Defendants reiterate their arguments that Richard P. Homrighausen was suspended from the office of the Mayor as of May 4, 2022 and that all powers and authority which he held have been suspended pursuant to R.C. 3.16 (E)(1).

LAW AND APPLICATION

Civ.R. 41(A)(1) Motions to Dismiss

Civ.R. 41(A)(1) allows a plaintiff to voluntarily dismiss an action at any time prior to trial by filing a notice of dismissal. The rule provides:

(A) Voluntary Dismissal; Effect thereof.

(1) By Plaintiff; by Stipulation.

Subject to the provisions of Civ.R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

- (a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;
- (b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Civ.R. 41 affords the practitioner a variety of options, foremost of which is the self-executing notice of dismissal. A court has inherent control over its docket, but a court is powerless to prevent a *properly* filed self-executing dismissal by a *party*. (*emphasis mine*). *Rini v. Rini*, 8th Dist. Cuyahoga No. 80225, 2002-Ohio-6480, ¶ 11; *Conley v. Jenkins* (1991), 77 Ohio App.3d 511, 602 N.E.2d 1187.

The parties to this action agree that Richard P. Homrighausen is currently suspended from his position as Mayor of the City of Dover pursuant to R.C. 3.16, and that Shane N. Gunnoe is serving as the Interim Mayor of the City of Dover. When a community, such as the City of Dover, has a suspended mayor and an interim mayor, R.C. 3.16 (E)(1) provides the following directive during such a time period:

Any public official suspended from office under this section shall not exercise any of the rights, powers, or responsibilities of the holder of that office during the period of the suspension. The suspended public official, however, shall retain the title of the holder of that office during the period of the suspension and continue to receive the compensation that the official is entitled to receive for holding that office during the period of the suspension, until the public official pleads guilty to or is found guilty of any felony with which the public official is charged, or until one of the conditions in division (C)(4)(a), (b), or (c) of this section occurs.

The parties agree that Richard P. Homrighausen is suspended from the office of Mayor of the City of Dover; however, they disagree as to whether he continues to serve as the Plaintiff in this action. Richard P. Homrighausen argues that he is still the Mayor of the City of Dover but suspended. He argues that R.C. 3.16 (E)(1) explicitly provides that a suspended mayor “shall retain the title of the holder of the office during the period of suspension.” Defendants and Interim Mayor Gunnoe argue that as Richard P. Homrighausen’s powers and authority as mayor were stripped from him by R.C. 3.16(E)(1), he then ceases to hold the office of Mayor of the City of Dover which has resulted in Interim Mayor Gunnoe becoming the Plaintiff in this action and authorized to file a Notice of Dismissal.

The Ohio Supreme Court has repeatedly held that if a statute is ambiguous, a court must interpret the statute to determine the General Assembly's intent, but if a statute is not ambiguous, a court need not interpret it. A court must simply apply it. See *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 13; *Sears v. Weimer* (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413, paragraph five of the syllabus (“An unambiguous statute is to be applied, not interpreted.”).

R.C. 3.16 is not ambiguous. R.C. 3.16(E)(1) explicitly provides that during Richard P. Homrighausen’s suspension as Mayor of the City of Dover that he “shall retain the title of the holder of that office during the period of the suspension[.]” The Defendants fail to set forth any authority to the contrary. R.C. 3.16 (C)(4) goes on to provide that Richard P. Homrighausen’s suspension shall continue until one of the following occurs:

- (a) The public official is reinstated to office by an appeal as provided in division (D) of this section;
- (b) All charges are disposed of by dismissal or by a finding or findings of not guilty;
- (c) A successor is elected and qualified to serve the next succeeding term of the public official’s office.

Pursuant to R.C. 3.16(E)(1) and R.C. 2961.01, Richard P. Homrighausen’s suspension would also end if he is convicted of a felony offense in Case No. 2022 CR 03 0072, ***The State of Ohio vs. Richard P. Homrighausen*** in which he is the named defendant, and as he likely would no longer be permitted to hold elected office. At this time, none of the criteria outlined have occurred.

Furthermore, the means by which a new Plaintiff is substituted for an original Plaintiff is set forth in Civ. R. 25. Civ. R. 25(D) specifically addresses the substitution of a “public officer” which provides as follows:

When a public officer is a party to an action in the public official's official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party.

In *State ex rel of Sperry v. Licking Metropolitan Hous. Auth.*, 5th Dist. Licking No. 95 CA 52, 1995 WL 615951, the Fifth District Court of Appeals recognized the definition of a "public officer" as that set forth in *Merriam-Webster's Collegiate Dictionary*, Tenth Edition, 1993, which defines "public officer" as "[a] person who has been legally elected or appointed to office and who exercises governmental functions." Therefore, the Court concludes that Richard P. Homrighausen is the Plaintiff in this action.

Writ of Mandamus

To be entitled to a Writ of Mandamus, a relator must carry the burden of establishing that he or she has a clear legal right to the relief sought, that the respondent has a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel., Van Gundy v. Industrial Commission of Ohio, et al.*, 111 Ohio St. 3d 395, 398, 2006-Ohio-5854, 856 N.E.2d 951. The Relator must prove that he is entitled to a Writ of Mandamus by clear and convincing evidence. *State ex rel. Ward v. Reed*, 141 Ohio St. 3d 50, 2014-Ohio-4512, 21 N.E. 3d 303.

In this action, the Plaintiff-Relator, Homrighausen, has not established that he is entitled to such a Writ by clear and convincing evidence. As the Defendants point out, Dover's Law Director is the lawyer for the City of Dover and he serves the Mayor, Safety Director, Service Director and other city officials, but does not have a legal duty to

represent them. Further, the Ohio Revised Code does not indicate that a city law director must serve a city's mayor ahead of any other city interests.

The Ohio Revised Code does not indicate that a city law director must serve a City's Mayor ahead of any other various interests he is assigned. R.C. 733.51 sets forth the powers and duties of the city law director:

The city director of law shall prepare all contracts, bonds, and other instruments in writing in which the city is concerned, and shall serve the several directors and officers provided in Title VII of the Revised Code as legal counsel and attorney.

Further, R.C. 733.53 provides further insight into the duties of the law director which provides that:

The city director of law, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute. He shall not be required to prosecute any action before the mayor of the city for the violation of an ordinance without first advising such action.

Furthermore, R.C. 731.47 provides that the legislative authority of a municipality "shall have the management and control of the finances and property of the municipal corporation, except as otherwise provided."

A law director has multiple duties; however, his duty to the city takes precedence. A city relies upon its law director to prepare contracts and defend it when needed which is what has taken place in this matter. Law Director O'Meara defended the City of Dover in a complaint or suit in which the City of Dover was a party. Richard P. Homrighausen was not named as a defendant in any form of civil or administrative complaint and the

City of Dover was a named party in actions filed with the State Personnel Board of Review by David Douglas, Eva Newsome and Gerald Mroczkowski (collectively “the Fired Employees”).

While the Fired Employees may have made allegations that Homrighausen violated Ohio’s Whistle Blower Statute terminating their employment as he alleges, the Fired Employees brought forth their action against the City of Dover not Homrighausen. (See Plaintiff’s Exhibits A, H, I, L, and P). This is made further evident by Plaintiff’s Exhibit H, (Homrighausen’s Motion to Intervene) as it indicates he is seeking to be a part of the action before the State Personnel Board of Review.

Law Director O’Meara defended the City of Dover as was his duty in the actions brought by the Fired Employees. Homrighausen might disagree with the settlement that was reached with the Fired Employees; however, Homrighausen has failed to establish that he has a clear legal right to separate counsel, paid by the City of Dover, and his request for a writ of mandamus is denied.

Motion for Temporary Restraining Order / Injunctive Relief

“In determining whether to grant injunctive relief, courts take into consideration the following four factors: (1) the likelihood or probability of a plaintiff’s success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and, (4) whether the public interest will be served by the granting of the injunction. *Kinder Morgan Cochin L.L.C. v. Simonson*, 5th Dist. No. 15 COA 044, 2016-Ohio-4647, 66 N.E.3d 1176, ¶ 18, citing *Corbett v. Ohio Bldg. Auth.*, 86 Ohio App.3d 44, 49, 619 N.E.2d 1145 (10th Dist. 1993); *See also Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260,

267, 747 N.E.2d 268, 273 (1st Dist.2000), *cause dismissed*, 91 Ohio St.3d 1478, 744 N.E.2d 775 (2001). Each of these elements must be established by clear and convincing evidence. *J.P. v. T.H.*, 9th Dist. Lorain No. 15CA010897, 2017-Ohio-233, ¶ 19, citing *Mead Corp. v. Lane*, 54 Ohio App.3d 59, 63 (4th Dist. 1988). “No one factor in the analysis is dispositive, but the four factors must be balanced as is characteristic of the law of equity.” *McHenry v. McHenry*, 5th Dist. No. 2016CA00158, 2017-Ohio-1534, 88 N.E.3d 1222, ¶ 21, citing *AultCare Corp. v. Roach*, 5th Dist. Stark No. 2008CA00287, 2009-Ohio-6186, 2009 WL 4023210, ¶56.

A permanent injunction is only issued after “a party has demonstrated a right to relief under the applicable substantive law.” *Procter & Gamble Co. v. Stoneham*, at 267. Therefore, the moving party must demonstrate success on the merits of the underlying claim before the court may issue a permanent injunction. *See State v. City of Cincinnati Citizen Complaint Auth.*, 1st Dist. No. C-180509, 2019-Ohio-5349, 139 N.E.3d 947, ¶ 20, citing *Procter & Gamble Co. v. Stoneham*, at 267. Additionally, the party seeking the permanent injunction must show by clear and convincing evidence that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law. *Procter & Gamble Co. v. Stoneham*, at 267-68.

In support of his motion for restraining order, Homrighausen argues that there is a strong likelihood of success on the merits in his mandamus action against Defendants and that the remaining factors also weigh in favor of a temporary restraining order. The Court has concluded; however, that Homrighausen cannot show that he is entitled to the requested writ of mandamus. Based on this conclusion, Homrighausen will not be able to show that he is likely to succeed on the merits of his mandamus action. Upon review of

the remaining three factors, the Court cannot conclude that these factors weigh in Homrighausen's favor, and they do not overcome his inability to show that there is a likelihood that he will succeed on the merits. Therefore, Homrighausen's Motion for Temporary Restraining Order is not well taken.

Furthermore, Homrighausen cannot show that he is entitled to the permanent injunction requested in Count Two of the Plaintiff-Relator's First Amended Complaint because he is unable to demonstrate success on the merits of the underlying claim set forth in Count One. Based on the Court's findings that Plaintiff-Relator cannot prevail on either of his claims, Defendants-Respondents' Motion to Dismiss Plaintiff-Relator's First Amended Complaint is well taken and should be granted.

Decision

This Court finds that Richard P. Homrighausen is a "public officer" as he is the elected Mayor of the City of Dover. Plaintiff-Relator's First Amended Complaint filed on March 11, 2022 seeking a writ of mandamus and injunctive relief related to a settlement agreement that the Defendants entered into together and as it relates to Homrighausen's position as the Mayor of the City of Dover and its Appointing Authority. While the Court agrees with the Defendants that Richard P. Homrighausen's rights, powers, or responsibilities as the Mayor of the City of Dover have been suspended, Richard P. Homrighausen has not ceased to hold the office of Mayor of the City of Dover.

This Court finds that the Defendants and Interim Mayor Gunnoe have failed to establish that Interim Mayor Gunnoe has been substituted as the Plaintiff in this action pursuant to Civ. R. 25. The Court further finds that Interim Mayor Shane Gunnoe is not

the Plaintiff in this case, and he had no standing to file either the May 16, 2022 Notice of Dismissal or the May 23, 2022 Notice of Dismissal.

The Court finds therefore that Richard P. Homrighausen's Motion to Strike, or in the Alternative, Memorandum in Opposition to Appellees' [sic] Notice of Dismissal should be granted and Defendants' May 16, 2022 Notice of Dismissal and May 17, 2022 Notice of Dismissal should be stricken.

The Court finds; however, that Homrighausen is not entitled to the writ of mandamus requested in this action.

The Court finds, therefore, that Homrighausen is unable to show that there is a likelihood that he will prevail on the merits of his mandamus action, and therefore, his Motion for Temporary Restraining Order is not well taken.

The Court further finds that Homrighausen also cannot show that he is entitled to the permanent injunction requested in Count Two of the Plaintiff-Relator's First Amended Complaint because he is unable to demonstrate success on the merits of the underlying claim requesting a writ of mandamus set forth in Count One.

The Court finds, therefore, that Defendants-Respondents' Motion to Dismiss Plaintiff-Relator's First Amended Complaint is well taken and should be granted.

The Court further finds that Plaintiff-Relator is not entitled to the attorney fees requested in his First Amended Complaint.

The Court therefore **ORDERS** that Richard P. Homrighausen's Motion to Strike, or in the Alternative, Memorandum in Opposition to Appellees' [sic] Notice of Dismissal is granted and Defendants' May 16, 2022 Notice of Dismissal and May 17, 2022 Notice of Dismissal are stricken.

The Court further **ORDERS** that Richard P. Homrighausen's Motion for Temporary Restraining Order is denied.

The Court further **ORDERS** that Defendants-Respondents' Motion to Dismiss Plaintiff-Relator's First Amended Complaint is granted.

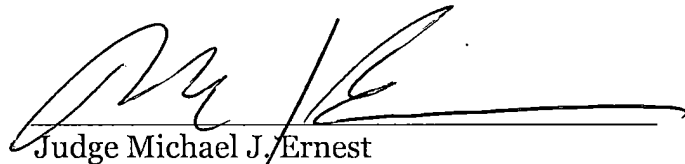
The Court further **ORDERS** that Plaintiff-Relator's First Amended Complaint is dismissed with prejudice to refiling.

The Court further **ORDERS** that all parties shall be responsible for their own attorney fees.

The Court further **ORDERS** that Court costs shall be assessed to Plaintiff-Relator.

The Clerk of Courts shall close this case file and remove it from the pending case docket.

IT IS SO ORDERED.



Judge Michael J. Ernest

6-17-22

Date

Copies to: Court Administrator's Office
Richard P. Homrighausen
Attys. Jonathan J. Downes, Drew C. Piersall, & Jantzen D. Mace
Atty. Dolores P. Garcia
Douglas J. O'Meara, Law Director, City of Dover
Court

MJE/lrh