

[Cite as *State ex rel. Bardwell v. Lyndhurst*, 2010-Ohio-525.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93636

**STATE OF OHIO, EX REL.
BRIAN BARDWELL**

RELATOR

vs.

CITY OF LYNDHURST, ET AL.

RESPONDENTS

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion Nos. 428825, 429373, 430309, 428785,
428786, and 426589
Order No. 430892

RELEASE DATE: February 17, 2010

FOR RELATOR

Brian Bardwell, pro se
6917 Westmoreland Road
Falls Church, Virginia 22046

ATTORNEYS FOR RESPONDENTS

Robert J. Foulds
Paul T. Murphy
Dyson, Schmidlin & Foulds Co., LPA
5843 Mayfield Road
Suite 106
Mayfield Heights, Ohio 44124

James A. Climer
Mazanec, Raskin, Ryder & Keller Co.
100 Franklin's Row
34305 Solon Road
Solon, Ohio 44139

Cara M. Wright
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139

ANN DYKE, J.:

{¶ 1} On July 20, 2009, relator, Brian Bardwell, filed a petition for a writ of mandamus against respondents city of Lyndhurst and Chief Rick Porrello. In his petition, Bardwell asserts that on or about May 28, 2009, he delivered a handwritten request pursuant to the Ohio Public Records Act to the city of Lyndhurst, and they failed to provide him the requested records in a reasonable time period.

{¶ 2} On October 27, 2009, respondents submitted their answer that they amended on November 20, 2009. In their amended answer, respondents also filed a counterclaim against Bardwell, alleging that the current action constitutes frivolous conduct and asked this court to declare Bardwell a vexatious litigator and to award sanctions.

{¶ 3} Thereafter, on December 1, 2009, respondents submitted a motion for summary judgment. Bardwell opposed their motion and filed his own motion for summary judgment. On December 23, 2009, Bardwell filed his answer to the counterclaim, and respondents submitted their response to Bardwell's motion for summary judgment on December 24, 2009.

Facts

Bardwell's Request for Public Records

{¶ 4} On May 28, 2009, Bardwell hand-delivered a written public records request to the city of Lyndhurst allegedly asking to inspect the following records: the police department records retention schedule; all incident and accident reports from April 2009; all supplements and attachments to those reports; all emails sent by the Chief of Police in April 2009; and all emails sent to the Chief of Police in April 2009.

{¶ 5} According to Officer Kathy Tomaro's affidavit, Bardwell delivered the records request to her. Officer Tomaro stated that the records request was written in cursive and asked for all incident and accident reports for 2008.

According to Officer Tomaro and Bardwell, Officer Tomaro asked what he intended to use the records for. Tomaro stated in her affidavit that she asked Bardwell this question in an attempt to help Bardwell receive the records he was looking for, although she did fail to inform Bardwell that he did not have to provide the requested information. Bardwell did not answer the officer's question. Tomaro then asked for Bardwell's name, but Bardwell refused to identify himself.

{¶ 6} In Bardwell's affidavit, he avers that a true and accurate video of the entire transaction was placed on a public website. Respondent did not challenge the authenticity or relevance of the video, so this court will consider the video in determining this action. The video accurately portrays the above occurrence. However, we note that after Bardwell refused to provide his name, Bardwell took the public records request and voluntarily left. He did not leave any request with the city of Lyndhurst.

{¶ 7} Thereafter, on July 17, 2009, Bardwell returned to the Lyndhurst Police Department to inquire about his public records request. There he spoke to Kathy Lombardo, who informed Bardwell that she did not have any outstanding public records requests. Bardwell then left the premises and returned a short time later with an additional public records request that was different from his original request. Upon receiving this new request, Lombardo contacted the Chief of Police, who told Lombardo to fax the request to the City's Law Director, which she did.

{¶ 8} On July 20, 2009, Paul Murphy, the Law Director for the City of Lyndhurst, sent Bardwell an email stating that his records request of July 17, 2009 was filled, and he could review the records during regular business hours. Murphy then explained to Bardwell that the City was unaware of his records request of May 2009, but that once it was received, it would be fulfilled in compliance with law. Bardwell responded to Murphy on July 21, 2009 and stated that he already filed the mandamus action.

Legal Analysis

{¶ 9} In order for this court to issue a writ of mandamus, Bardwell must establish that he possesses a clear legal right to the requested relief and that the city of Lyndhurst possesses a clear legal duty to perform the requested act. *State ex rel. Manson v. Morris* (1993), 66 Ohio St.3d 440, 613 N.E.2d 232, citing *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 451 N.E.2d 225. Furthermore, because mandamus is the specific statutorily designated remedy for public records requests, the element of lack of an adequate remedy at law is not necessary. *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth.* (1997), 78 Ohio St.3d 518, 678 N.E.2d 1388. Generally, the relator in a mandamus action has the burden of proof by clear and convincing evidence to establish his case. *State ex rel. Pressley v. Indus. Comm. Of Ohio* (1967), 11 Ohio St.2d 141, 161, 228 N.E.2d 631.

{¶ 10} In this matter, we find that Bardwell has not met his burden. Our review of the affidavits and videotape indicate that even though Tomaro asked for Bardwell's identity, Bardwell voluntarily took the records request from the police station instead of refusing to take the request back or just leaving it at the station.

Accordingly, we cannot find any duty to fulfill a withdrawn records request.

{¶ 11} Based upon these facts, we find that Bardwell actually submitted his public records request on July 21, 2009, when he responded to Murphy's email. Consequently, because Bardwell filed his writ of mandamus on July 20, 2009, but did not file his request for public records until the next day, we find that Bardwell failed to demonstrate by clear and convincing evidence that the city of Lyndhurst had a clear duty to fulfill his public records request when they had not received the request before the mandamus action was filed. *State ex rel. Medina Cty. Gazette v. Brunswick* (1996), 109 Ohio App.3d 661, 672 N.E.2d 1070.

{¶ 12} The city of Lyndhurst also filed a counterclaim against Bardwell and asked this court to declare Bardwell a vexatious litigator and order sanctions against Bardwell. For the following reasons, we deny respondents' counterclaim. This court does not have the statutory authority to declare an individual a vexatious litigator. See R.C. 2323.52. Additionally, unlike the Supreme Court of Ohio, which amended its rules and gave itself the authority to declare an individual a vexatious litigator, this court has not adopted a similar rule.

{¶ 13} We also deny respondents' claim for sanctions. In determining whether a pro se party's conduct violates Civ.R. 11, the trial court should consider whether the party signing the document: (1) has read the document; (2) harbors good grounds to support the document to the best of the person's knowledge, information, and belief, and (3) did not file the document for purposes of delay. *Mitchell v. W. Reserve Area Agency on Aging*, Cuyahoga App. Nos. 83837 and 83877, 2004-Ohio-4353. If the pro se party fails to meet one of these requirements and the failure was willful, as opposed to merely negligent, the person may be subject to sanctions, including an award of reasonable attorney fees. In determining whether the violation was willful, the court must apply a subjective bad faith standard. *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857. Conversely, R.C. 2323.51 requires an objective standard and is determined without reference to what the individual knew or believed. *Ceol v. Zion Indus., Inc.* (1992), 81 Ohio App.3d 286, 610 N.E.2d 1076. Additionally, any decision to grant sanctions rests within the sound discretion of the trial court. *Taylor v. Franklin Blvd. Nursing Home, Inc.* (1996), 112 Ohio App.3d 27, 677 N.E.2d 1212.

{¶ 14} In this matter, we find no violation of R.C. 2323.51 nor Civ.R. 11, because we do not find Bardwell's conduct to be willful. In light of Bardwell's belief that he submitted a records request and because Officer Tomaro

incorrectly asked Bardwell for his name and purpose for the records, we find that good grounds existed to file the writ.

{¶ 15} Accordingly, this court grants the respondents' motion for summary judgment and denies relator's motion for summary judgment. The court further denies respondents' counterclaim. Relator to bear costs. It is further ordered that the clerk shall serve upon all parties notice of this judgment and date of entry pursuant to Civ.R. 58(B).

Writ denied.

ANN DYKE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
KENNETH A. ROCCO, J., CONCUR