

[Cite as *State ex rel. Macey v. Byrd*, 2016-Ohio-4703.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 103646

---

**STATE EX REL., JOHN E. MACEY, INDIVIDUALLY,  
ETC.**

PLAINTIFF/RELATOR  
-APPELLANT

vs.

**NAILAH K. BYRD, ET AL.**

DEFENDANTS/RESPONDENTS  
-APPELLEES

---

**JUDGMENT:  
AFFIRMED**

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-15-847419

**BEFORE:** McCormack, J., Kilbane, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** June 30, 2016

**ATTORNEYS FOR APPELLANT**

Jason D. Hochman  
Steven B. Potter  
David C. Weiner  
Dinn, Hochman & Potter, L.L.C.  
5910 Landerbrook Drive  
Suite 200  
Cleveland, OH 44124

Terrence E. Kelley  
621 Wooster Pike  
Terrace Park, OH 45174

**ATTORNEYS FOR APPELLEES**

Cuyahoga County Department of Law  
Robert J. Triozzi, Director of Law

Robin M. Wilson  
Ruchi V. Asher  
Assistant Directors of Law  
County Administration Headquarters  
2079 East 9th Street  
Cleveland, OH 44115

TIM McCORMACK, J.:

{¶1} Plaintiff/relator-appellant John E. Macey appeals from the judgment of the trial court dismissing his complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. For the reasons that follow, we affirm.

#### Procedural History

{¶2} Macey filed a complaint in June 2015 and an amended complaint in September 2015 against defendants/respondents-appellees Nailah K. Byrd, Cuyahoga County Court of Common Pleas Clerk of Courts; Clifford Pinkney, Cuyahoga County Sheriff; and W. Christopher Murray, II, Cuyahoga County Treasurer (collectively “the county”).<sup>1</sup> In his complaint, he requested a writ of mandamus, declaratory judgment, and “other relief” that includes strict liability and liability under 42 U.S.C. 1983.

{¶3} Macey stated in his complaint that he formerly owned property in Lakewood, Ohio, upon which a foreclosure suit was commenced in November 2007. The property was sold at a sheriff’s sale in June 2013. After satisfying the writ of execution, there remained excess funds in the amount of \$19,088.21 due and owing to Macey. Macey further stated that the clerk of courts failed to provide statutorily mandated notice of the excess funds due Macey. Finally, Macey alleged that the county’s clerk of courts, sheriff, and treasurer failed to hold the excess funds in a trust

---

<sup>1</sup> Although Macey filed his complaint as a “class action pursuant to [Civ.R. 23],” the trial court noted that the matter had not been certified as a class action. We therefore address the allegations as they relate solely to Macey.

account in his name, in violation of statute; rather, the county appropriated the funds and deposited them into the county's general fund.

{¶4} The county moved to dismiss Macey's complaint under Civ.R. 12(B)(6), stating that Macey failed to state a claim upon which relief can be granted. Regarding the request for mandamus, the county provided that Macey waived his rights to the excess funds and he has an adequate remedy at law. The county also argued that declaratory judgment is not appropriate because Macey's complaint did not demonstrate the existence of a real controversy between the parties and, to the extent a controversy exists, declaratory judgment will not resolve the controversy.

{¶5} The trial court determined that Macey has an adequate remedy at law, stating as follows:

[Macey] may file a claim for disbursement of excess funds. Such claim should be made in the original foreclosure action. Even if the funds were transferred to the general fund, the court may still order the sheriff to disburse the funds. Accordingly, the extraordinary remedy of mandamus is not appropriate.

The court therefore granted the county's motion to dismiss Macey's complaint. Macey now appeals, claiming the trial court erred by granting the county's motion to dismiss.

Civ.R. 12(B)(6)

{¶6} A motion to dismiss for failure to state a claim, under Civ.R. 12(B)(6), is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). We review an order dismissing a complaint for failure to state a claim for relief de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44. In so reviewing, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Sheldon v. Burke*, 8th Dist. Cuyahoga No. 103576, 2016-Ohio-941, ¶ 6, citing *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6.

{¶7} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that 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. In particular, the dismissal of mandamus actions under Civ.R. 12(B)(6) is proper if there is an adequate remedy in the ordinary course of law. *See State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320, ¶ 11, citing *State ex rel. Weaver v. Ohio Adult Parole Auth.*, 116 Ohio St.3d 340, 2007-Ohio-6435, 879 N.E.2d 191, ¶ 8.

## Writ of Mandamus

{¶8} Mandamus is a writ, “issued in the name of the state to an inferior tribunal \* \* \* commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” R.C. 2731.01. Mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear; it should not issue in doubtful cases. *State ex rel. Angelo v. Carroll*, 8th Dist. Cuyahoga No. 100326, 2013-Ohio-5321, ¶ 4, citing *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977). ““The facts submitted and the proof produced must be plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ.”” *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967), quoting 35 Ohio Jurisprudence 2d 285, Discretion as to Issuance, Section 37. Mandamus is not a matter of right; rather, the issuance of a writ of mandamus rests within the sound discretion of the court to which application for the writ is made and depends on the facts and circumstances of the case, including the relator’s rights and conduct, the equity and justice of the relator’s case, and public policy. *Id.*

{¶9} In order for a writ in mandamus to issue (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987).

{¶10} If there is a “plain and adequate remedy in the ordinary course of law,” regardless of whether it was used, relief in mandamus is precluded. R.C. 2731.05; *State*

*ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 676 N.E.2d 108 (1997); *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 564 N.E.2d 86 (1990).

{¶11} In order for a remedy at law to be adequate, the remedy must be complete in its nature, beneficial, and speedy. *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.*, 22 Ohio St.3d 1, 7, 488 N.E.2d 181 (1986), citing *State ex rel. Merydith Constr. Co. v. Dean*, 95 Ohio St. 108, 123, 116 N.E. 37 (1916). The issue is whether the remedy is adequate under the circumstances. *State ex rel. Dayton*, citing *State ex rel. Butler v. Demis*, 66 Ohio St.2d 123, 124, 420 N.E.2d 116 (1981).

{¶12} Here, Macey alleges that he was entitled to \$19,088.21 in excess funds resulting from the sale of his foreclosed upon property. He further alleges that he never received notice of the excess funds as required by R.C. 2329.44. In filing his mandamus action, Macey requested the court to compel the county (clerk) to issue the statutorily mandated notice, the sheriff to deliver the excess funds to the clerk as mandated by R.C. 2329.44, and the county to deposit the excess funds into a trust account designated for Macey.

{¶13} R.C. 2329.44 provides the statutory process by which excess funds remaining after a judicial sale are distributed:

- (A)\_ On a sale made pursuant to this chapter, if the officer who makes the sale receives from the sale more money than is necessary to satisfy the writ of execution, with interest and costs, the officer who made the sale shall deliver any balance remaining after satisfying the writ

of execution, with interest and costs, to the clerk of the court that issued the writ of execution. The clerk then shall do one of the following:

- (1)\_ If the balance is twenty-five dollars or more, send to the judgment debtor whose property was the subject of the sale a notice that indicates the amount of the balance, informs the judgment debtor that he is entitled to receive the balance, and sets forth the procedure that the judgment debtor is required to follow to obtain the balance. This notice shall be sent to the judgment debtor at the address of the judgment debtor in the caption on the judgment or at any different address he may have provided, by certified mail, return receipt requested, within ninety days after the sale. If the certified mail envelope is returned with an endorsement showing failure or refusal of delivery, the clerk immediately shall send the judgment debtor, at the address of the judgment debtor in the caption on the judgment or any different address he may have provided, a similar notice by ordinary mail. If the ordinary mail envelope is returned for any reason, the clerk immediately shall give a similar notice to the judgment debtor by an advertisement in a newspaper published in and of general circulation in the county, which advertisement shall run once a week for at least three consecutive weeks.

{¶14} The statute clearly requires the performance of certain definite acts by the clerk when excess funds remain after a judicial sale: notice must be sent and funds must be paid. *See Sheskey v. Tyler-Smith*, 118 Ohio Misc.2d 169, 2002-Ohio-2737, 770 N.E.2d 161, ¶ 15 (C.P.). “By the law regulating judgments and executions, it is made the duty of the sheriff, or other officer making sale of land, or other property, on execution, if there be a surplus of money after satisfying the execution, to pay the same over to the judgment debtor, or his legal representative, on demand.” *Sheskey* at ¶ 9, quoting *Douglas v. Wallace*, 11 Ohio 42, 45, 1841 Ohio LEXIS 80 (1841). In accordance with this statute, the clerk must also provide notice to the judgment debtor of the amount of the excess funds, a statement that informs the judgment debtor he is

entitled to receive the funds, and the procedure the judgment debtor is required to follow in order to obtain the excess funds. R.C. 2329.44(A)(1). The duty exists regardless of whether the judgment debtor (relator) entered an appearance in the underlying foreclosure action. *Sheskey*.

{¶15} A judgment debtor's receipt of the excess funds, however, is not automatic. Regardless of whether the county issued the notice, certain acts are required of the judgment debtor before he is entitled to receive the excess funds. R.C. 2329.44(B)(1) provides that "the clerk of the court that issued the writ of execution, *on demand and whether or not the notice required by division (A)(1) or (2) of this section is provided as prescribed*, shall pay the balance to the judgment debtor or his legal representatives." (Emphasis added.) The failure to make a demand for the excess funds therefore waives the debtor's right to share in the excess funds. *Sheskey* at ¶ 10. Additionally, the clerk is not required to pay the balance to the judgment debtor until the debtor pays to the clerk \$25 to compensate the clerk for the costs incurred in the providing the notice. R.C. 2329.44(B)(2).

{¶16} In light of the foregoing, it is evident that R.C. 2329.44 mandates that the clerk provide notice to the judgment debtor of the amount of the excess funds, a statement that informs the judgment debtor that he or she is entitled to receive the funds, and the procedure the judgment debtor is required to follow in order to obtain the excess funds. The statute also requires that, upon demand, the county (through its proper officials) shall pay the excess funds to the judgment debtor, with certain exceptions not applicable here.

Although the county argues that Macey received notice of the funds in a judgment entry in the underlying foreclosure case, the court accepts the factual allegations in the complaint as true in a motion to dismiss under Civ.R. 12(B)(6). In accepting Macey's allegations as true, Macey was entitled to the excess funds, and consequently entitled to statutory notice of the excess funds, but he did not receive the proper notice regarding the funds in accordance with the statute.

{¶17} However, as the trial court determined, Macey has an adequate remedy at law: he may file a motion to disperse the funds in his underlying foreclosure action, and “even if the funds were transferred to the [county's] general fund, the court may still order the sheriff to disperse the funds.” Under the statute, Macey is entitled to the excess funds from the judicial sale of his property. We are concerned with the fact that the county apparently failed to provide Macey the proper statutory notice as mandated in R.C. 2329.44; this lack of statutorily mandated notice though will not prevent Macey from obtaining the excess funds due him. As he stands in court today, Macey essentially has notice of his funds. Irrespective of the notice required under R.C. 2329.44, Macey may now move the court for distribution of the excess funds to which he is entitled. Once he makes this demand, the county's officials must pay the same over to Macey, the judgment debtor. R.C. 2329.44(B)(1). Compelling the county to issue notice of the excess funds and informing Macey of the process by which he may obtain the funds, would therefore, be a vain act. Mandamus will not issue to compel a vain act. *State ex*

*rel. Johnson v. McClelland*, 8th Dist. Cuyahoga No. 100427, 2013-Ohio-5442, ¶ 3, citing *State ex rel. Cotton v. Ghee*, 84 Ohio St.3d 54, 701 N.E.2d 989 (1998).

{¶18} Accordingly, because there is an adequate remedy available in the ordinary course of law, we find the extraordinary remedy of writ of mandamus inappropriate under the circumstances. The trial court therefore properly dismissed Macey’s claim for mandamus.

{¶19} Macey also seeks a declaration that the present application of R.C. 9.39 and 2329.44 is unconstitutional. In order to obtain relief under the Declaratory Judgment Act, R.C. 2721.01, et seq., a party must establish: (1) a real controversy exists between the parties; (2) the controversy is justiciable; and (3) speedy relief is necessary to preserve the rights of the parties. *Burger Brewing Co. v. Ohio Liquor Control Comm.*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). “A primary purpose of the declaratory judgment action is to serve the useful end of disposing of uncertain or disputed obligations quickly and conclusively.” *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 46, quoting *Ohio Farmers Indemn. Co. v. Chames*, 170 Ohio St. 209, 213, 163 N.E.2d 367 (1959).

{¶20} Macey fails to demonstrate that a real controversy exists between the parties. Regardless of R.C. 2329.44 and 9.39, Macey may now move the court in the underlying foreclosure action to distribute the excess funds due him. And as the trial court stated, the court may still order the sheriff to disperse the funds, despite those funds having been

transferred to the county's general fund. The court therefore properly dismissed Macey's claim for declaratory judgment.

{¶21} Finally, Macey claims that the county's actions as they relate to the excess funds resulted in an unconstitutional taking. However, because Macey may request those funds and the court may order the sheriff to disperse the funds, there is no illegal taking. In order to maintain a takings claim, there must have been a request for compensation that was denied. *See Williamson Cty. Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Therefore, where Macey has not moved for distribution of the excess funds, and been denied those funds, he fails to state a claim under 42 U.S.C. 1983. The trial court properly dismissed Macey's takings claim.

{¶22} For the foregoing reasons, Macey's assignment of error is overruled.

{¶23} Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

---

TIM McCORMACK, JUDGE

MARY EILEEN KILBANE, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR