

[Cite as *State ex rel. Kilbane v. Fuerst*, 2009-Ohio-6830.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93939

**STATE OF OHIO EX REL.,
THOMAS J. KILBANE**

RELATOR

vs.

**GERALD E. FUERST,
CLERK OF COURTS**

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion No. 427958
Order No. 429300

RELEASE DATE: December 22, 2009

ATTORNEY FOR RELATOR

Patrick C. Mackin
33463 Lake Road
P.O. Box 77
Avon Lake, Ohio 44012-0077

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

By: Frederick W. Whatley
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
PATRICIA A. BLACKMON, J.:

{¶ 1} Thomas J. Kilbane has filed a complaint for a writ of mandamus. Kilbane seeks an order from this court, which requires Gerald E. Fuerst, Cuyahoga County Clerk of Courts, to issue a certificate of judgment lien in the amount of \$180,000, pursuant to R.C. 2329.02. Kilbane's claim for a certificate of judgment lien is premised upon the alleged final judgment that was rendered in *Kilbane v. I.P.C. Mini-Warehouse 1980 Limited, et al*, Cuyahoga County Court of Common Pleas Case No. 42304. Fuerst has filed a motion to dismiss/motion for summary judgment, which shall be treated solely as a motion for summary judgment. For the following reasons, we grant Fuerst's motion for summary judgment.

{¶ 2} In order for this court to issue a writ of mandamus, Kilbane must establish each prong of the following three-part test: (1) Kilbane possesses a clear legal right to a certificate of judgment lien in the amount of \$180,000, pursuant to R.C. 2329.02; (2) Fuerst possesses a clear legal duty to issue a certificate of judgment lien to Kilbane in the amount of \$180,000, pursuant to R.C. 2329.02; and (3) there exists no other adequate remedy in the ordinary course of the law.¹ Mandamus is an extraordinary remedy that is to be employed with caution and only issued when the right is clear.² Finally, this court will not issue a writ of mandamus in a doubtful case.³

{¶ 3} On April 26, 1982, Kilbane filed a complaint in foreclosure in *Kilbane v. I.P.C. Mini-Warehouse 1980 Limited, et al*, Cuyahoga County Court of Common Pleas Case No. CV-42304. Kilbane's action in foreclosure was premised upon: (1) a promissory note in the amount of \$180,000; (2) a personal guaranty of the promissory note as executed by Ken Kotula and David Mone; and (3) a mortgage deed on real property that was held by

¹*State ex rel. Asti v. Ohio Dept. Of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658; *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914.

²*State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex rel Connole v. Cleveland Bd. of Edn.* (1993), 87 Ohio App.3d 43, 621 N.E.2d 850.

³*State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State*

Kilbane. On October 11, 1983, the Cuyahoga County Court of Common Pleas rendered a judgment in foreclosure which provided that the real property located at the northeast corner of West 117th Street and Berea Road, Cleveland, Ohio, be foreclosed and that the property be sold at a public sale by the Sheriff of Cuyahoga County. The order of foreclosure also provided that the proceeds of the sale, following the payment of costs, taxes, assessments, penalties and interest due, be paid to Kilbane. The foreclosed property was purchased by Kilbane, on January 12, 1984, and all net proceeds of the sale were paid to Kilbane.

{¶ 4} On August 10, 2009, Kilbane submitted a “request for filing certificate of judgment lien” with Fuerst. On September 15, 2009, Kilbane filed his complaint for a writ of mandamus, premised upon the claim that Fuerst improperly failed to issue a certificate of lien judgment per R.C. 2329.02.

{¶ 5} Based upon the original judgment for foreclosure, as rendered by the Cuyahoga County Court of Common Pleas and Kilbane’s “request for filing certificate of judgment lien,” we find that Kilbane has failed to establish each prong of the aforesaid three-part test. The October 11, 1983, order of foreclosure did not award Kilbane any damages that would be subject to a

certificate of judgment lien per R.C. 2329.02. To the contrary, the foreclosure order of October 11, 1983, simply marshaled the liens applicable to the real property subject to foreclosure, ordered that the real property be sold by the sheriff, and that the net proceeds of the sale be paid to Kilbane in order to satisfy a promissory note.⁴ Thus, Kilbane has failed to establish that he possesses a money judgment that would allow for the issuance of a certificate of judgment lien per R.C. 2329.02. Kilbane has also failed to establish that Fuerst, as based upon the facts presented, possesses a duty to issue a certificate of judgment lien, per R.C. 2329.02, based upon a judgment of \$180,000.⁵ In fact, Kilbane asserts in his brief in opposition to Fuerst's motion for summary judgment, that "* * * there was a final judgment in favor of the Relator for the payment of \$180,000 plus interest, inter alia, then there was a sheriff's sale of the subject real property for \$100,000. It [is] incumbent upon the Respondent then to compute the amount due on the judgment, taking into account the original judgment, adjusting for the sale

⁴Assuming that Kilbane was awarded damages in the amount of \$180,000, the payment of the net proceeds to Kilbane, that resulted from the sale of the foreclosed property and evidently exceeded \$100,000, would have reduced any damages owed to Kilbane.

⁵See copy of "request for filing certificate of judgment lien," that seeks a certificate of judgment lien in favor of Thomas J. Kilbane against judgment debtor(s) IPC Mini-Warehouse, David Mone, and Ken Kotula in the amount of \$180,000 plus interest.

proceeds and computing the interest, court costs and other amounts due.” Kilbane has failed to establish that Fuerst possesses any duty to calculate any net amount due based upon the order of foreclosure and the sheriff’s sale that occurred on January 12, 1984.⁶

{¶ 6} Finally, Kilbane possesses or possessed an adequate remedy at law, that prevents this court from issuing a writ of mandamus.⁷ Kilbane could have moved for a deficiency judgment, if the proceeds of the sheriff’s sale were insufficient to satisfy the amount owed vis-a-vis the original promissory note and the resulting foreclosure. In addition, Kilbane could have appealed from the order of March 13, 2009, as rendered by the Cuyahoga County Court of Common Pleas in the underlying foreclosure action, that held “Thomas J. Kilbane motion to define judgment and defendants, filed 11/25/2008, is moot. The judgment found in volume 692, page 490 of the Cuyahoga County Court of Common Pleas is a valid judgment. * * * .” Clearly, Kilbane possesses or possessed other adequate remedies at law.

⁶Cf. *State ex rel. Dayton Law Library Assn. v. White*, 163 Ohio App.3d 118, 2005-Ohio-4520, 836 N.E.2d 1232; *State ex rel. Weaver v. Common Pleas Clerk of Courts*, Cuyahoga App. No. 84847, 2004-Ohio-4075.

⁷*State ex rel. Hughley v. McMonagle*, 121 Ohio St.3d 536, 2009-Ohio-1703, 905 N.E.2d 1220; *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 2005-Ohio-2591, 828 N.E.2d 107.

{¶ 7} As previously stated, this court will not grant a writ of mandamus in doubtful cases. Herein, Kilbane has failed to establish that he possesses a clear legal right to a certificate of judgment lien per R.C. 2329.02 or that Fuerst possesses a clear duty to issue a certificate of judgment lien per R.C. 2329.02. Kilbane has also failed to establish that he does not possess nor possessed another adequate remedy in the ordinary course of the law. Thus, we decline to issue a writ of mandamus on behalf of Kilbane.

{¶ 8} Accordingly, we grant Fuerst's motion for summary judgment. Costs to Kilbane. It is further ordered that the Clerk of the Eighth District Court of Appeals serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Writ denied.

PATRICIA A. BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
KENNETH A. ROCCO, J., CONCUR