[Cite as *Lange v. Newton Falls*, 2015-Ohio-1873.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

WERNER LANGE,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2014-T-0030**
- vs -	:	
CITY COUNCIL, CITY OF NEWTON FALLS, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2013 CV 428.

Judgment: Affirmed.

Werner Lange, pro se, 510 Superior Street, Newton Falls, OH 44444 (Plaintiff-Appellant).

A. Joseph Fritz, Newton Falls Law Director, 19 North Canal Street, Newton Falls, OH 44444 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Werner Lange, appeals the judgment entry of the Trumbull County Court of Common Pleas granting summary judgment in favor of appellees, City Council, City of Newton Falls, et al. ("Newton Falls"). For the reasons that follow, we affirm.

{¶2} Prior to the 2012 tax year, Newton Falls' tax code included a provision that gave individual residents a tax credit for municipal taxes paid by those individuals to

other municipalities ("tax credit policy"). This policy allowed Newton Falls' residents to offset their Newton Falls income tax bill by the amount of income tax paid to another municipality. Fiscal pressures resulted in Newton Falls having to re-examine their long-standing tax credit policy and, on February 21, 2012, the City Council of Newton Falls passed Ordinance 2012-06, "an ordinance repealing credit for tax paid to another municipality in the city tax code." Ordinance 2012-06 states, in part:

> WHEREAS, Council for the City of Newton Falls establishes the Tax Code for the purpose of levying and collecting income tax pursuant to Section 718 of the Ohio Revised Code, and
>
> WHEREAS, Page 8, Section 5 of the Tax Code provides for a tax credit for municipal taxes paid to another State of Ohio municipality authorized to collect income taxes, and
>
> WHEREAS, Council desires to repeal said tax forgiveness at the earliest possible time and will be repealed for Tax Year beginning 1 January 2012.
>
> COUNCIL FOR THE CITY OF NEWTON FALLS, STATE OF OHIO, HEREBY ORDAINS:
>
> SECTION I: The City Tax Code, * * * titled "Credit for Tax Paid to Another Municipality" is hereby repealed.
>
> SECTION II: This credit is removed for Tax Year 2012 and thereafter * * *.

{¶3} Following City Council's decision to repeal the tax credit, a group of Newton Falls citizens solicited signatures to place a referendum of the tax credit issue on the November 2012 ballot. The referendum petition contained 246 signatures; it was submitted by the Newton Falls Clerk of Council and was received by the Trumbull County Board of Elections. The referendum petition included 146 certified signatures, which is a sufficient number to have a referendum placed on the ballot. However, due to questions raised by a legal opinion, the certified petition was returned to the Newton

Falls Clerk of Council. Newton Falls' law director then reviewed the petitions and their propriety for placement on the ballot. In concluding that the ordinance was not subject to a referendum petition, the law director's memorandum claimed the tax credit ordinance was an administrative, rather than a legislative act, and therefore was not subject to referendum. Accordingly, the referendum was not submitted by the Newton Falls Clerk of Council to the Trumbull County Board of Elections for inclusion on the November 2012 ballot.

{¶4} On February 25, 2013, appellant filed a pro se "complaint of illegal legislative action by local government officials." Appellant amended his complaint and named, as defendants, the City Council, City Council Member Richard Zamecnik, City Council Member Phillip Beer, Mayor Lyle Waddell, and Clerk of Council Kathy King (appellees herein). Zamecnik, Beer, and Waddell each voted in favor of abolishing the tax credit for income tax paid to another municipality. Appellant's amended complaint included two causes of action. Appellant's first cause of action argued that "the expressed will of We The People was thwarted, in violation of R.C. 731.29; the Ohio Constitution, Article II, Section 1(f); and the Newton Falls City Charter, Article VII, Section 2." Appellant's second cause of action alleged that by terminating the tax credit policy, the municipal income tax exceeded 1% and "therefore is in violation of Article VIII, Section 2 of the Charter of the City of Newton Falls since it was adopted 'without a vote of the people.'" Appellant's amended complaint sought declaratory judgment and an injunction preventing Newton Falls from ending the tax credit policy in tax year 2012.

{¶5} On February 18, 2014, appellees filed a motion for summary judgment. In their motion, appellees argued that the change in the tax credit policy was an administrative action, not legislative, and therefore was not subject to a voter

referendum. Appellees also argued that the municipal income tax was not increased beyond the 1% allowed for by R.C. 718.04(C).[1] Pursuant to R.C. 718.04(C), a municipal income tax may not exceed 1% without first obtaining the approval of a majority of the electors of the municipality. Finally, appellees asserted that summary judgment in their favor was appropriate because the issues in the complaint were moot as a result of the November 2012 election having passed.

{¶6} Appellant responded to appellees' motion for summary judgment on March 17, 2014. In his response, appellant labeled appellees' motion for summary judgment as an attempt to "erect[] a three-layered firewall against judicial penetration of the substantive and genuine issues of material fact[]." Appellant attached to his opposition to summary judgment an amended prayer for relief, which stated in part:

> Cognizant of the current fiscal fragility of the City of Newton Falls and appreciative of the likely fiscal chaos a judgment granting the original prayer of relief would bring to our city, [appellant] submits this revision for relief. * * * [Appellant] has no intent of being a party, however inadvertently, to such a disaster brought on by the illegal actions of the [appellees]. * * * For relief, [appellant] merely requests this Honorable Court to require [appellees], including the City Law Director, to compose and publicly publish a letter of apology to Newton Falls taxpayers for their errors in judgment and actions * * *.

{¶7} On March 28, 2014, the trial court granted appellees' motion for summary judgment. In its judgment entry the court found appellant's first count moot. In explaining its conclusion, the trial judge stated that "[b]ecause the 2012 election has come and gone, and no one filed an action to compel the Newton Falls Clerk to return the referendum petitions to the Trumbull County Board of Elections, the issue is moot."

1. Former R.C. 718.01 was renumbered as R.C. 718.04 by 2014 Ohio H.B. No.5, effective March 23, 2015.

Accordingly, the court found that there was no justiciable issue for determination in appellant's first cause of action.

{¶8} The trial court also concluded that summary judgment in favor of appellees was appropriate on appellant's second cause of action. The court concluded that the decision of the Ohio Supreme Court in *Thompson v. Cincinnati*, 2 Ohio St.2d 292 (1965) is applicable to the facts in this case. As such, the court concluded that summary judgment was also appropriate on appellant's second cause of action.

{¶9} Appellant timely appeals the trial court's grant of summary judgment in favor of appellees. Appellant sets forth two assignments of error for our review that will be considered in a consolidated fashion:

> [1.] The trial court committed prejudicial error in granting [appellees] summary judgment based upon its opinion that there are no justiciable issues to litigate.
>
> [2.] The trial court committed prejudicial error in granting [appellees] summary judgment based upon its opinion that the issues presented were moot and therefore it had no jurisdiction to litigate those issues.

{¶10} We review a trial court's decision on a motion for summary judgment de novo. *Fed. Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012-T-0038, 2013-Ohio-2838, ¶13.

{¶11} Under Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Id. at ¶10, quoting *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977).

{¶12} The moving party bears the initial burden to demonstrate from the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, that there is no genuine issue of material fact to be resolved in the case. *Id*. at ¶12. "If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E)." *Id.*

{¶13} Appellant argues that the trial court erred by not making a judicial determination of whether "the adoption of Ordinance 2012-06 constituted an administrative action." Appellees relied on the legal advice of the Law Director for the City of Newton Falls in deciding to keep the referendum off the November 2012 ballot. The Law Director concluded that the abolition of the tax credit policy was an administrative act, not subject to referendum, because it did not create any new law.

{¶14} The trial court did not address whether appellees' decision to end the tax credit policy was an administrative or legislative decision because it determined that the issue was moot. The trial court determined that "without a pending referendum petition, there is no justiciable issue for determination in [appellant's] first cause of action." In finding appellant's first cause of action moot, the trial court relied on the fact that appellant did not file the complaint until nearly three months after the November 2012 general election. The trial court also concluded that there are "no relevant exceptions to the mootness doctrine."

{¶15} "It is well established that courts do not have jurisdiction to consider moot issues; rather, courts must decide actual cases in controversy." *Deluca v. City of Aurora*, 144 Ohio App.3d 501, 508 (11th Dist. Portage, 2001), citing *Carver v. Twp. of Deerfield*, 139 Ohio App.3d 64, 77 (11th Dist. Portage, 2000). In general, election

cases are moot where the relief sought is to have an issue placed on the ballot and the election was held before the case could be decided. *See State ex rel. Santora v. Bd. of Elections*, 174 Ohio St. 11, 12 (1962). However, a court possesses jurisdiction to address issues that would otherwise be moot when "[such] issues [* * *] are capable of repetition[.]" *State ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St.3d 165, 166 (1988), quoting *S. Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

{¶16} We agree with the trial court that appellant's first cause of action is moot. Appellant did not file his complaint until after the November 2012 election had passed. Appellant could have filed an original action prior to the November 2012 election commanding that the referendum be placed on the ballot. *See* R.C. 2731.01.[2] Appellant argues that the trial court, "in effect, excused each of [appellees'] unlawful actions by declaring their outcome as a moot issue." However, the trial court's conclusion that appellant's first cause of action was moot when the election had passed was correct. As such, the trial court did not need to address whether appellees' actions were legislative or administrative and whether the referendum was properly kept off the ballot. Likewise, we also decline to address this issue.

{¶17} We also agree with the trial court's holding that "there is no reason here to believe that this issue is capable of repetition but will always evade review." As mentioned above, appellant could have acted before the November 2012 election took place. Appellant's first cause of action evades review in this case because it was filed

2. We note that appellant did, in fact, file a writ of mandamus with the trial court on June 26, 2014, directing Ms. King, as the Clerk of Council for the City of Newton Falls, to transmit a Referendum Petition to the board of elections no later than August 6, 2014. In an August 1, 2014 judgment entry, the Trumbull County Court of Common Pleas found the petition requesting emergency relief well taken and ordered Ms. King to transmit the Referendum Petition filed by Mr. Lange to the board of elections, pursuant to R.C. 731.28, immediately and, in any event, no later than August 6 in order for the Referendum Petition to be placed on the general election ballot for 2014. Ms. King filed an appeal, which is currently pending before this court. *Lange v. King*, 11th Dist. Trumbull No. 2014-T-0073.

after the election took place. Accordingly, there was no error in the trial court granting summary judgment on appellant's first cause of action.

{¶18} The trial court also found that summary judgment was appropriate on appellant's second cause of action. In his second cause of action, appellant argued that, by ending the tax credit policy, appellees raised the municipal income tax rate above 1% without the consent of the electors of Newton Falls. R.C. 718.04(C)(2) states that "no municipal corporation shall levy a tax on income at a rate in excess of one per cent without having obtained the approval of the excess by a majority of the electors of the municipality * * *." The trial court concluded that Newton Falls' tax rate remained within the 1% of gross income allowed by statute without voter approval. We agree with the trial court that summary judgment was also proper on appellant's second cause of action.

{¶19} The Ohio Supreme Court has held that R.C. 718.04 (previously codified at 718.01) does not "provide that [a municipality] is deprived of its power to tax incomes of its residents where such residents are also subject to an income tax by another municipality." *Thompson, supra,* at 295. The Court in *Thompson* also held that "[the] plain and unambiguous language [of R.C. 718.04 is] that no *single* municipality may tax incomes at a greater rate than one per cent without prior voter approval." *Id.* In this case, Newton Falls' municipal income tax remained at 1% both before and after the City Council voted to end the tax credit policy. Accordingly, while elimination of the tax credit policy had a real and significant financial impact on those Newton Falls citizens who benefitted from the credit, the change did not violate R.C. 718.04. The holding of the Ohio Supreme Court in *Thompson* allows for income to be taxed by more than one municipality. *Id*. While appellant argues that this system is too complex and

burdensome, it is permitted by law. As such, the trial court properly granted summary judgment on appellant's second cause of action.

{¶20} Accordingly, appellant's first and second assignments of error are not well taken.

{¶21} For the reasons stated in the opinion above, the judgment the Trumbull County Court of Common Pleas is affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶22} Although I concur in the ultimate judgment that plaintiff-appellant, Werner Lange's, Complaint was properly dismissed, I do so for reasons other than those stated by the majority.

{¶23} The majority adopts the trial court's position that the failure of Newton Falls City Clerk, Kathy King, to certify the referendum petition to the board of elections became moot after the 2012 election inasmuch as there was no longer a "pending referendum petition." *Supra* at ¶ 14.

{¶24} The majority provides no explanation or justification for the position that the referendum petition is no longer pending.

{¶25} In the present case, a referendum petition on Ordinance 2012-06 was duly filed within thirty days of its passing and the board of elections attested the required number of signatures. Pursuant to R.C. 731.29: "The board shall submit the ordinance

or measure to the electors of the municipal corporation, for their approval or rejection, ***at the next general election occurring subsequent to ninety days after the auditor or clerk certifies the sufficiency and validity of the petition to the board of elections.***" (Emphasis added.) Despite having the duty to do so, King never certified the sufficiency and validity of the petition to the board of elections. That duty did not expire with the 2012 election. Regardless of what the majority intends by "pending," the referendum petition remains attested by the board of elections, but awaiting certification by the city clerk. When certified, the petition must be placed on the ballot "at the next general election," which would not be the 2012 election.

{¶26} The majority relies on the case of *State ex rel. Santora v. Bd. of Elections of Cuyahoga Cty.*, 174 Ohio St. 11, 185 N.E.2d 438 (1962), for the proposition that "election cases are moot where the relief sought is to have an issue placed on the ballot and the election was held before the case could be decided." *Supra* at ¶ 15. *Santora* is distinguishable and inapposite. The relator in *Santora* sought to have his name included with the candidates for city councilman. After the election, the office was no longer vacant. No such irreversible change of circumstances has occurred here. There is no impediment to the inclusion of the referendum petition in the next general election apart from the city clerk's refusal to certify the same.[3]

{¶27} Lange's Complaint, as filed in the present case, necessarily fails, nonetheless, in that he has failed to seek the appropriate relief of mandamus. *State ex rel. Webb v. Bliss*, 99 Ohio St.3d 166, 2003-Ohio-3049, 789 N.E.2d 1102, ¶ 23; *State ex*

3. The lower court and appellees have noted that Lange neither signed nor sponsored the referendum petition. The Ohio Supreme Court has made clear that such action is not necessary in order for "a private individual to compel a public officer to perform an official act, where such officer is under clear legal duty to do so, and where the relator has an interest, such as that of a taxpayer * * *." *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph nine of the syllabus.

rel. Oberlin Citizens for Responsible Dev. v. Talarico, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 16.

{¶28} For the foregoing reasons, I concur in judgment only.