

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL.	:	JUDGES:
KEVIN HUGHLEY	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
Relator	:	
	:	
-vs-	:	Case No. 2009-CA-24
	:	
F.C.C. JUDGE RICHARD BERENS	:	
	:	<u>OPINION</u>
Respondent	:	

CHARACTER OF PROCEEDING: Writ of Mandamus

JUDGMENT: Denied

DATE OF JUDGMENT ENTRY: June 29, 2009

APPEARANCES:

For Respondent

For Relator

MELISSA MONTGOMERY
Office of Ohio Attorney General
150 East Gay Street, 16th Floor
Columbus, OH 43215

KEVIN HUGHLEY #532-743 Pro Se
5900 B.I.S. Road
Lancaster, OH 43130

Gwin, P.J.

{¶1} Relator has filed a Petition for Writ of Mandamus requesting this Court issue an order requiring the trial court to rule on a motion for default judgment filed in September, 2008 by Relator in Fairfield County Common Pleas Court, Case Number 08CV975.

{¶2} A relator is entitled to a writ of mandamus if the following conditions are satisfied: (1) the relator demonstrates a clear legal right to the relief prayed for; (2) the respondent is under a corresponding legal duty to perform the actions that make up the prayer for relief; and, (3) the relator has no plain and adequate remedy in the ordinary course of law. *Doss Petroleum, Inc. v. Columbiana Cty. Bd. of Elections*, 164 Ohio App.3d 255, 2005-Ohio-5633, 842 N.E.2d 66, citing to *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225.

{¶3} As an initial matter, we note Relator has not verified the complaint by affidavit which is a sufficient reason for dismissing a petition for a writ of mandamus. *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596 817 N.E.2d 382; *Perotti v. Mahoning County Clerk*, 7th Dist. No. 05-MA-202, 2006-Ohio-673. R.C. 2731.04 provides, "Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit." Despite Relator's failure to file a verified petition, we will nonetheless proceed to a discussion of the merits to the petition.

{¶4} A meritorious claim in mandamus does not automatically exist because a motion remains pending longer than 120 days, "[U]nder Superintendence Rule 40(A)(3) a trial court is directed to rule on a pending motion within 120 days from the date the

motion was filed. . . [T]he passage of 120 days does not automatically entitle a litigant to a writ of mandamus. As stated in *State ex. Rel. Rodgers v. Cuyahoga Cty. Court of Common Pleas* (1992), 84 Ohio App.3d 684, 615 N.E.2d 689, ‘The rule may impose upon the trial court the duty to rule upon motions within one hundred twenty days for purposes of efficient court administration. That, however, does not necessarily mean that a corresponding right is created for litigants to force a trial judge to rule upon any motion within one hundred twenty days, regardless of the posture of the litigation. The need for discovery, the issues presented, the possibility of settlement, other motions pending in the case, and even other matters pending before the court could all, inter alia, be sufficient reason for the trial court within its proper discretion not to rule upon a motion within one hundred twenty days. Furthermore, allowing litigants to enforce such a rigid rule risks depriving other litigants of due process, invites gamesmanship in litigation, and could frustrate the policy of deciding cases on their merits and not on procedural technicalities.’ *State ex rel. Richard v. Gorman* (Aug. 19, 1992), Cuyahoga App. No. 63333, unreported.” *Powell v. Houser* 2007 WL 1666587; *State ex rel. Jamison v. Muskingum Cty.* 2009 WL 818957, 2 (Ohio App. 5 Dist.).

{¶15} We note the underlying case was dismissed by entry dated April 7, 2009. The entry dismisses the case based upon the trial court’s determination it lacked subject matter jurisdiction over the case. For this reason, we find the trial court implicitly denied Relator’s motion for default judgment.

{¶16} The Supreme Court held in *Madsen*, “Mandamus will not issue to compel an act that has already been performed.” *State ex rel. Scruggs v. Sadler*, 102 Ohio St.3d 160, 2004-Ohio-2054, 807 N.E.2d 357, ¶ 5. *State ex rel. Madsen v. Jones* (2005),

106 Ohio St.3d 178, *179, 833 N.E.2d 291, ----292. Because the Respondent implicitly denied the motion, the requested act has already been done. Further, Appellant has failed to establish a clear legal duty on the part of Respondent to rule on the motion and failed to establish a clear legal right to a non-implicit ruling on the motion.

{¶7} For these reasons, the requested writ of mandamus is denied.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

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