

Pursuant to Civ. R. 54(B), this court enters final judgment as to the issue decided herein, which is less than all the claims in the case and makes the express determination that there is no just reason for delay.



FILED  
LORAIN COUNTY  
2019 NOV 22 PM 3:30  
COURT OF COMMON PLEAS  
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO  
JOURNAL ENTRY  
D. CHRIS COOK, Judge

Date 11/22/19 Case No. 19CV197579

JAMES LARKIN, et al.  
Plaintiff

MICHAEL A CHUPARKOFF  
Plaintiff's Attorney (216) 503-9240

VS

CITY OF NORTH RIDGEVILLE, et al.  
Defendant


R. BRIAN MORIARTY  
Defendant's Attorney (216) 566-8228

This matter came before the Court on separate Defendant, City of North Ridgeville's, Motion To Dismiss For Failure To State A Claim, filed October 10, 2019; Plaintiffs' Response To Defendant City of North Ridgeville's Motion To Dismiss For Failure To State A Claim, Or In The Alternative, Plaintiffs' Motion To Amend Plaintiffs' Complaint, filed October 22, 2019; and, Plaintiffs' complaint, filed March 4, 2019.

The Motion To Dismiss is well-taken and hereby GRANTED.

See Judgment Entry. No Record.

VOL \_\_\_\_\_ PAGE \_\_\_\_\_

  
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D. CHRIS COOK, Judge

cc: Chuparkoff, Esq.  
Moriarty, Esq.  
Darling, Esq.



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**I. INTRODUCTION**

This matter came before the Court on separate Defendant, City of North Ridgeville's, Motion To Dismiss For Failure To State A Claim, filed October 10, 2019, and Plaintiffs' Response To Defendant City of North Ridgeville's Motion To Dismiss For Failure To State A Claim, Or In The Alternative, Plaintiffs' Motion To Amend Plaintiffs' Complaint, filed October 22, 2019, and Plaintiffs' complaint, filed March 4, 2019.

**II. ABBREVIATED STATEMENT OF FACTS**

Plaintiffs' complaint alleges that separate Defendant, Martha Torrez ("Torrez"), owns property in the City of North Ridgeville that is subject to a 30 foot "Buffer Zone" at the rear of her property.<sup>1</sup>

Plaintiffs further allege that their properties are, "... the dominant estates receiving the benefit of the Buffer Zone ..."<sup>2</sup>

Plaintiffs further allege that Torrez, "... intentionally violated, breached and defaulted in the agreements, covenants and restrictions of the Subdivision Plat and Deed by clearing and cutting trees, plants, shrubs, grass and other natural growth and vegetation from the Buffer Zone."<sup>3</sup>

<sup>1</sup> See Plaintiffs' Complaint, Par. 7.

<sup>2</sup> *Id.* at Para. 12.

<sup>3</sup> *Id.* at Para. 18.



Further, Plaintiffs' allege that Torrez, ". . . intentionally violated, breached and defaulted in the agreements, covenants and restrictions of the Subdivision Plat and Deed by building/constructing a 10' x 16', 160 square foot building in the Buffer Zone."<sup>4</sup>

Finally, Plaintiffs' allege that Torrez, ". . . intentionally violated, breached and defaulted in the agreements, covenants and restrictions of the Subdivision Plat and Deed by installing concrete footers and placing a swing set and other manmade items and structures in the Buffer Zone."<sup>5</sup>

### III. ANALYSIS

#### STANDARD OF REVIEW – CIV. R. 12(B)(6)

Dismissal of a claim is appropriate where, after accepting as true all factual allegations of the claim and resolving all reasonable inferences in favor of the nonmoving party, "it appears beyond doubt that the nonmoving party cannot prove any set of facts entitling him to the requested relief." *LaSalle Bank, N.A. v. Kelly*, 9th Dist. Medina No. 09CA0067-M, 2010-Ohio-2668, ¶ 19, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 75 Ohio St.3d 545, 548 (1992).

Typically, for a defendant "[t]o prevail on a Civ.R. 12(B)(6) motion to dismiss, it must appear on the face of the complaint that the plaintiff cannot prove any set of facts that would entitle him to recover." *Raub v. Garwood*, 9th Dist. Summit No. 22210, 2005-Ohio-1279, ¶ 4.

The granting of a motion to dismiss filed under Civ.R. 12(B) or a motion for judgment on the pleadings filed under Civ.R. 12(C) is reviewed *de novo* by [a court of appeals]. *Savoy v. Kramer*, 9th Dist. Summit No. 27418, 2015-Ohio-437, ¶ 5. See also: *Evanston Ins. Co., et al. v. Procentury Ins. Co.*, 9<sup>th</sup> Dist. Lorain No. 2019-Ohio-4214, at ¶ 15.

#### DECISION

Plaintiffs' claim against the City of North Ridgeville can be found in Count Three of Plaintiffs' complaint which reads, "Specific Performance Against The City For Code Enforcement."<sup>6</sup>

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<sup>4</sup> *Id.* at Para. 20.

<sup>5</sup> *Id.* at Para. 21.

<sup>6</sup> *Id.* at Pg. 8.



Further, in Plaintiffs' prayer for relief, they demand as follows,

"c. As to Count Three for *Specific Performance*, Plaintiffs request that this Court order North Ridgeville to . . . enforce the terms and conditions of the building permit it issued to Torrez, and . . . enforce the terms and conditions of the City's building, zoning and/or land development code . . ." (Emphasis added.)<sup>7</sup>

It is clear that Plaintiffs have put North Ridgeville on notice that they are seeking redress under the legal theory of specific performance. The City argues in its Motion To Dismiss that in order for specific performance to lie, there must be an underlying claim for breach of contract.

This Court agrees.

The Ohio Supreme Court has repeatedly limited the doctrine of specific performance, an equitable remedy, to contract claims.

It is well settled that specific performance of a contract is a matter of grace depending upon the circumstances of each particular case as it may appear, and courts of equity invariably refuse to lend their aid, unless the clearest principles of equity and good conscience demand the enforcement of the particular contract. But if the court grants or refuses specific performance of a contract, a reviewing court will not disturb the finding, unless it can be made to appear that the finding below was erroneously reached,—that it was based upon an error or misapprehension.

*Stoppel v. Plageman*, 16 Ohio Dec. 273, 1905 WL 853, (1905).

And,

It is sufficient to say that the facts and circumstances disclosed by the testimony and uncontradicted, do not present in our judgment such a case as should induce a chancellor to enforce a specific performance of the contract.

*Id.*

Decades later, the Ohio Supreme Court noted,

Specific performance of a contract is a distinctively equitable remedy. *Commrs. of Muskingum County v. State* (1908), 78 Ohio St. 287,

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<sup>7</sup> *Id.* at Pg. 10.



305. In *Huntington v. Rogers* (1859), 9 Ohio St. 511, 516, the court said: \* \* \* specific performance \* \* \* rests in the sound legal discretion of the court, in view of all the circumstances of the case. It is not a matter of right, but of grace; and the defendant will succeed in procuring the dismissal of the \* \* \* [action] if he can convince the court that the exercise of their jurisdiction will be inequitable under the circumstances.

Thus, the trial court's judgment cannot be disturbed on appeal absent a showing of abuse of discretion. The term abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's action is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

*Sternberg v. Board of Trustees* (1974), 37 Ohio St.2 115, 118. See also, *Sandusky Properties v. Aveni* (1984), 15 Ohio St.3d 273.

In addition, the Ninth District Court of Appeals has also recognized that the doctrine of specific performance is limited in application to contract claims,

Since specific performance is an equitable remedy, available under some circumstances to protect rights under contracts, **it is necessary that there be not only a contract, but a valid, binding contract**, 'unobjectionable in any of its features.' (Emphasis added.)

*Beilder v. Davis* (1943), 72 Ohio App. 27, 9<sup>th</sup> Dist., Lorain.

Regardless, Plaintiffs concede in their response to the motion that they are not claiming a breach of contract – accordingly, it follows that they cannot maintain an action for specific performance.

Plaintiffs further argue in their response: "Whether Plaintiffs (or more aptly, their counsel) was correct to use 'specific performance' in the caption to Count Three, or whether it would have been more artful to reference a 'writ of mandamus' in the caption, that should not take away the underlying facts and claims laid out in paragraphs 38 through 46..."<sup>8</sup>

More artful to reference a writ of mandamus in the caption?

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<sup>8</sup> It is noted in paragraph 45 of the complaint, plaintiffs allege: "Additionally North Ridgeville has been grossly negligent and/or deliberately indifferent to the rights of the Plaintiffs....." Also, in paragraph 46, plaintiffs allege: "As a proximate result of the City's breach of its duty to enforce its Code, and its gross negligence and/or deliberate indifference to the rights and protection of the Plaintiffs...."



Mandamus is a writ, issued in the name of the state to an inferior tribunal etc. Further, RC 2731.04 reads: "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.

In a recent, highly instructive case, *State Ex Rel. Evans v. Tieman, et al.*, 157 Ohio St.3d 99, 2019-Ohio-2411, an inmate in an Ohio prison filed an original action in mandamus to compel two county prosecuting attorneys to investigate and prosecute the inmate's allegations of criminal activity in their respective counties.

The Supreme Court noted,

To be entitled to a writ of mandamus, Evans must establish by clear and convincing evidence (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of respondents to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13. Our review of the complaint shows that Evans fails to state a claim for relief in mandamus because he fails to allege facts that if proved would establish a clear legal duty to act on the part of respondents.

*State ex rel. Evans, supra*, at ¶ 11.

And with regard to a private citizen's effort to launch a criminal investigation or prosecution, the high court stated,

'A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney \* \* \*.' R.C. 2935.09(D). The statute defines "reviewing official" as a judge, magistrate, or prosecutor. R.C. 2935.09(A). 'R.C. 2935.09 must be read in pari materia with R.C. 2935.10, which prescribes the procedure to be followed once a citizen files a criminal complaint.' *State ex rel. Bunting v. Styer*, 147 Ohio St.3d 462, 2016-Ohio-5781, 67 N.E.3d 755, ¶ 15. If the offense alleged is a felony, the reviewing official must issue an arrest warrant or refer the matter to the prosecutor for investigation, 'unless [the official] has reason to believe that [the affidavit] was not filed in good faith, or the claim is not meritorious.' R.C. 2935.10(A).

*Id.* at ¶ 12.

Like in *State ex rel. Evans* above, Plaintiffs in this case also failed to file an affidavit, which is a clear prerequisite to consideration of a mandamus action,



As a preliminary matter, we note that Evans concedes he did not submit all of his accusations in the form of an affidavit, as required to trigger the statute. He is not entitled to mandamus relief based on any allegation he made that was not in the form of an affidavit. See, e.g., *State ex rel. Dew v. Vivo*, 7th Dist. Mahoning No. 12 MA 94, 2012-Ohio-3423, 2012 WL 3064502, ¶ 7 (denying mandamus relief because R.C. 2935.09(D) requires the filing of an affidavit, not a complaint or other pleading); *State ex rel. Muff v. Wollenberg*, 5th Dist. Perry No. 08-CA-11, 2008-Ohio-4699, 2008 WL 4228378, ¶ 12 (same).

*Id.* at ¶ 13.

Finally, even if this Court were to grant Plaintiffs' Motion For Leave To Amend, the mandamus action would still fail as mandamus is not a proper vehicle to compel the anticipated nonperformance of a duty by a public official,

'Mandamus will not lie to remedy the anticipated nonperformance of a duty.' *State ex rel. Home Care Pharmacy, Inc. v. Creasy*, 67 Ohio St.2d 342, 343, 423 N.E.2d 482 (1981). Evans's demand for a writ of mandamus with respect to Clerk Novinger is therefore, at best, premature.

*Id.* at ¶ 16.

Plaintiffs are mistaken in their argument that adding a reference to a writ of mandamus in the caption of a count in the complaint somehow states a cause of action for which relief may granted as it fails to meet the most basic, fundamental requirements of a proper writ.

As such, Plaintiffs' Motion To Amend Complaint is DENIED as this Court will not transmute their claim against North Ridgeville from one of specific performance to one sounding in mandamus.

#### IV. CONCLUSION

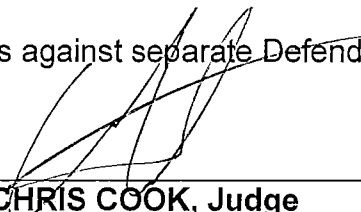
Based on the foregoing, this Court finds that Defendant, City of North Ridgeville's, Motion To Dismiss For Failure To State A Claim, is well taken. Simply put, Plaintiffs do not state in Count Three of the complaint any claim upon which relief may be granted as they are not, and never were, in privity of contract with North Ridgeville such that Plaintiffs' may avail themselves of the equitable remedy of specific performance.

Accordingly, Defendant, City of North Ridgeville's, Motion To Dismiss (as to Count Three only) is well-taken and hereby GRANTED and, Plaintiffs' Alternate Motion To Amend Complaint is not well-taken and DENIED



Separate Defendant, City of North Ridgeville, is hereby dismissed from these proceedings.

This matter shall proceed on remaining claims against separate Defendant, Martha Torrez.

  
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D. CHRIS COOK, Judge

**THE COURT FINDS NO JUST CAUSE FOR DELAY**