

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY

ROBERT J. FITRAKIS,	:
	:
Plaintiff,	: Case No. 12CV013888
	:
v.	: Judge Mark A. Serrott
	:
OHIO SECRETARY OF STATE	:
JON HUSTED, et al.	:
	:
Defendants.	:

**REPLY OF DEFENDANT SECRETARY OF STATE JON HUSTED
TO PLAINTIFF FITRAKIS'S MEMORANDUM CONTRA TO
MOTION TO DISMISS FILED DECEMBER 3, 2012**

After 45 days and 2 separate extensions of time, Plaintiff Fittrakis remains unable to rebut the allegations outlined in Secretary of State's motion to dismiss. Indeed, he does not even try. Apparently recognizing that he cannot save the operative complaint, Plaintiff instead pins his hopes on a hypothetical amended complaint, which he claims he will file at some unspecified time in the future. Plaintiff urges the Court to refrain from dismissing his lawsuit, insisting this as-of-yet unfiled complaint will cure the undisputed procedural and substantive defects highlighted in the Secretary's motion to dismiss. This Court should reject Plaintiff's invitation to further delay the proceedings and dismiss Plaintiff's lawsuit in its entirety.

I. This Court should deny Plaintiff's thinly disguised request for additional time.

As an initial matter, Plaintiff's "response" simply represents yet another attempt to delay these proceedings. The Secretary filed his motion to dismiss on December 3, 2012 making Plaintiff's response due no later than December 18, 2012.¹ Plaintiff, however, sought and

¹ Although the Secretary filed his motion to dismiss and memorandum in support on December 3, 2012, the motion did not appear on the docket until December 4, 2012. Even giving Plaintiff the benefit of this extra day, his response was due no later than December 18, 2012.

received two separate extensions of time resulting in an extra *four weeks* to respond to the Secretary's motion. In granting Plaintiff's second request for an extension of time, the Court warned that "no further extensions will be granted." Entry Granting Plaintiff's Motion to Further Extend Time to Respond to Defendant Ohio Secretary of State's Motion to Dismiss.

Despite this Court's express mandate, on January 17, 2013, Plaintiff's counsel reached out to counsel for the Secretary and asked for consent to file *yet another request for an extension*. Plaintiff's counsel represented that "[t]his prospective litigation is a major undertaking against defendants with virtually unlimited resources and a willingness to apply those resources most aggressively" and that additional time was necessary to "complete the consultations, research, and writing with respect to our responses." *See* January 17, 2013 Email from Clifford Arnebeck to Richard N. Coglianesse (Exhibit A). Given this Court's admonition that there would be no additional extensions, counsel for the Secretary advised Plaintiff's counsel that he could not consent to the extension. *Id.* Unable, therefore, to seek directly the extension he wanted, Plaintiff filed his "response" promising to respond at some point in the future with an amended complaint that will allegedly cure the admitted defects in the operative complaint.

Plaintiff's response amounts to nothing more than a thinly disguised request for more time to respond. Plaintiff fails to offer any justification for further delaying the proceedings. *Forty-five* days elapsed since the Secretary filed his motion to dismiss—more than three times the period provided for under the rules. The Secretary respectfully requests that this Court put an end to Plaintiff's dilatory tactics and grant his motion to dismiss without further delay. Indeed, Plaintiff's failure to comply with this Court's order and provide a meaningful response to the Secretary's motion in itself justifies dismissal. *See*, Civ. R. 41(B)(1) ("Where the plaintiff fails

to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.”).

II. This Court should not consider Plaintiff's unverified assertions about what he purportedly will allege in the future.

Tellingly, Plaintiff does not attempt to defend the allegations in his operative complaint. Rather, he asks this Court to ignore the defects in the pleading and look instead to vague, unverified assertions in his brief about what he intends to allege in the future in an amended complaint he has yet to file. Plaintiff's assertions are irrelevant to and should not be considered in evaluating the Secretary's motion to dismiss.

The Rules of Civil Procedure and case law interpreting them define the universe of material that may properly be considered when ruling on a motion to dismiss. When reviewing motions under Civ.R. 12(B)(6), a court is confined to the pleadings, and documents and evidence outside the complaint are irrelevant. *Cramer v. Javid*, 10th Dist. No. 10-AP-199, 2010-Ohio-5967, P8 (citing *Keenan v. Adecco Emp. Servs., Inc.*, 3d Dist. No. 1-06-10, 2006 Ohio 3633, P14. Courts evaluating jurisdictional challenges under Civ.R. 12(B)(1) may consider the pleadings as well as additional “outside matter attached to a motion to dismiss” that bear on jurisdiction. *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St. 2d 211, 215, 358 N.E. 2d 526 (1976). Plaintiff here asks this Court to go beyond the pleadings or outside materials relevant to jurisdiction and consider bald allegations in a brief regarding the purported contents of a currently nonexistent amended complaint. Neither the rules nor the case law permit the court to consider such assertions.

Reliance on such assertions would be particularly inappropriate here, where the complaint at issue seeks a writ of mandamus. Reflecting the extraordinary nature of such relief, a complaint for a writ of mandamus must comply with special additional requirements and must

be verified by affidavit. *See* R.C. 2731.04. If Plaintiff could defend against a motion to dismiss with unverified allegations of what he purportedly intends to assert in the future, it would fundamentally undermine the purpose of these requirements, as well as the rules governing the content and form of pleadings.

Accordingly, the Court in this case should evaluate the Secretary's motion to dismiss based solely on the allegations in the operative complaint. As the Secretary explained—and as Plaintiff largely concedes—the defects in that complaint require dismissal.

III. Neither Plaintiff's response nor his promises of a future complaint cure the defects in Plaintiff's case.

Even if this Court were to consider the assertions Plaintiff claims he will include in his future amended complaint, nothing in Plaintiff's response cures the defects in this case.

A. Plaintiff does not dispute that his claims are moot.

Plaintiff does not and cannot dispute his claims are moot. As the Secretary explained in his motion to dismiss and supporting memorandum, the remedy Plaintiff seeks in this lawsuit relates expressly to the November 6, 2012 election. *See* Mem. at 5-6. That election has come and gone. The ES&S software at issue in this litigation was used, and, as Plaintiff himself concedes, no harm resulted. Pl. Resp. at 2. As a result, there is no justiciable controversy for the Court to resolve. *See* Mem. at 5-6. No amendment to the complaint could cure this fatal defect, as Plaintiff's silence on this point confirms. Plaintiff's claims are moot and must be dismissed.

B. Plaintiff implicitly concedes the operative complaint fails to establish standing, and his promises of future assertions cannot cure this defect.

Plaintiff's claims must be dismissed for the additional reason that Plaintiff lacks standing to pursue his "Ohio taxpayer action." *See* Complaint at pp. 4-5 ("Second Claim for Relief: Ohio Taxpayer's Action."). As the Secretary's Memorandum points out, Plaintiff's mere status as a taxpayer does not suffice to establish standing under Ohio law: "a taxpayer cannot bring an

action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy.” *See* Mem. at 3-5. Plaintiff does not and cannot dispute this statement of the law. Nor does he attempt to defend the allegations in the operative complaint under this standard. Instead, he once again relies on the hypothetical future amended complaint.

Forced to acknowledge that Ohio law requires a plaintiff to allege and prove damage “in a character different from that sustained by the public generally,” Pl. Resp. at 3, Plaintiff makes two arguments in an attempt to save his complaint from dismissal. Both lack merit.

First, Plaintiff contends his hypothetical future amended complaint will allege he paid statutory fees into a special fund that was used in part to pay for the ES&S software at issue. Pl. Resp. at 4. Plaintiff contends this allegation must be taken as true. As indicated previously, these allegations do not exist in the operative complaint. They are mere assertions of future intentions and should not be considered at all, much less afforded a presumption of truthfulness. In any event, Plaintiff’s vague allegation that he paid a statutory fee does not suffice to prove he has a special interest apart from that shared by the general public. *See, e.g., Brinkman v. Miami Univ.*, 12th Dist. No. CA 2006-12-313, 2007-Ohio-4372, P50.

Second, Plaintiff argues he has standing to sue under a “public right theory.” Pl. Resp. at 5. Public right standing is a “narrow exception” to the traditional standing requirements authorized only in the “rare and extraordinary” case involving significant public issues of exceptional magnitude and scope. *Brinkman.*, 2007 Ohio 4372, P51-P60. This rarely used exception does not apply in the “garden-variety” challenge or alleged constitutional violation. *Id.* Plaintiff’s allegation that “the right to vote possessed by the plaintiff and other Ohio citizens is directly affected by vote tabulation, recording, and reporting technology used by the Ohio

Secretary of State,” Pl. Resp. at 5, falls far short of the magnitude justifying invocation of public right standing.

C. Plaintiff’s complaint fails to state a claim on which relief can be granted.

Additionally, nothing in Plaintiff’s response (or promises of a future response) alters the fact that Plaintiff “can prove no set of facts warranting relief,” requiring dismissal of the action under Rule 12(b)(6). To establish a right to mandamus, Plaintiff “has the burden of establishing that he has a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law.” *State ex rel. Fain v. Summit County Adult Prob. Dep’t*, 71 Ohio St.3d 658, 658-659, 646 N.E.2d 1113 (1995). As the Ohio Supreme Court makes clear, “unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss.” *Id.*

Plaintiff does not seriously dispute that the allegations in his complaint offer mere “unsupported conclusions.” Instead, he attempts to circumvent the rule, arguing that it applies only to prisoner complaints. But the case law supports no such distinction. Although *State ex rel. Fain* and *State ex rel. Carter* involved complaints brought by prisoners, those decisions do not limit their holding to that context. To the contrary, the reasoning in those cases applies with equal force to all complaints for an extraordinary writ, as this Court’s decision in *State ex rel. Pfeiffer* proves. There, as Plaintiff concedes, the 10th District affirmed in a non-prisoner case that “unsupported legal conclusions are not considered admitted when determining whether to grant extraordinary relief and are insufficient to withstand a motion to dismiss.” *State ex rel. Bell v. Pfeiffer*, 2011 Ohio 2539, P13 (Ohio Ct. App., Franklin County May 26, 2011); *see also State ex rel. Boccuzzi v. Cuyahoga County Comm’rs*, 8th Dist. No. 86333, 2006-Ohio-1835, ¶ 12. Notwithstanding Plaintiff’s disagreement with the Court’s reasoning, that binding decision dictates dismissal.

D. Plaintiff's complaint is procedurally deficient.

Defects in Plaintiff's complaint for mandamus further require dismissal. Plaintiff here improperly brought this action in his individual capacity instead of bringing it in the name of the state on his relation. *See* Mem. at 6-7. Although Plaintiff promises to cure this defect, he has not done so. The only complaint in existence continues to suffer from these defects and must be dismissed. *Maloney v. Court of Common Pleas*, 173 Ohio St. 226, 227, 181 N.E.2d 270 (1962).

CONCLUSION

For the foregoing reasons and those outlined in the Secretary's Motion to Dismiss and Memorandum in Support, Defendant Secretary of State Jon Husted respectfully requests that this Court dismiss this action with prejudice.

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General

/s/ Richard N. Coglianesse

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Reply of Defendant Secretary of State Jon Husted to Plaintiff Fitrakis's Memorandum Contra To Motion To Dismiss* was filed electronically on January 25, 2013. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Richard N. Coglianesse

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