

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2024

LOWER COURT- The State ex rel. Duncan
vs City of Mentor 2023 Ohio 3115

MOTION FOR AN EXTENSION OF TIME
TO PETITION CERTIORARI TO THE JUSTICE
ALOTTED TO THE SIXTH CIRCUIT

In accordance with Rule 13(5) Richard Duncan requests an extension of time until January 15th, 2024 to file his Writ. The Ohio Supreme Court issued a ruling on 9/07/23 and Duncan believes such violates his and future litigant rights to a 5th Amendment taking case and just compensation in Ohio. The Ohio Court decided an important federal question that conflicts with relevant decisions of this Court(see attached opinion).

Good cause justifies this extension as; 1. Duncan is a pro se litigant 2. Duncan needs to review the rules of the Supreme Court and many cases such as First English Evangelical Lutheran Church v. Los Angeles County 482 US 304 (1987) 3. Duncan is not familiar with Rule 33 Document Preparation Booklet Format and needs to review it. 4. Duncan has a full schedule otherwise.

Respectfully submitted and requested;

Richard Duncan
Richard Duncan

Richard Duncan 1101 East Blvd, Aurora, Ohio 44202

SERVICE

A copy of this request has been served on Joseph Szeman, lawyer for the City of Mentor, by first class mail this October 10th 2023 to the address of 8500 Civic Center Blvd. Mentor, Ohio 44060.

Richard Duncan
Richard Duncan

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SUPREME COURT, U.S.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Duncan v. Mentor*, Slip Opinion No. 2023-Ohio-3115.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2023-OHIO-3115

**THE STATE EX REL. DUNCAN, APPELLANT, v. THE CITY OF MENTOR,
APPELLEE.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Duncan v. Mentor*, Slip Opinion No. 2023-Ohio-3115.]

Mandamus—Appropriation proceedings—Property owner had adequate remedy in the ordinary course of law for his takings claim and was not entitled to writ to commence appropriation proceedings—Court of appeals lacked subject-matter jurisdiction over property owner’s remaining claims—Court of appeals’ judgment dismissing complaint affirmed.

(No. 2023-0336—Submitted June 27, 2023—Decided September 7, 2023.)

APPEAL from the Court of Appeals for Lake County, No. 2022-L-106,
2023-Ohio-416.

Per Curiam.

{¶ 1} Appellant, Richard Duncan, filed a complaint in the Eleventh District Court of Appeals requesting a writ of mandamus to compel appellee, the city of Mentor, to commence appropriation proceedings for an alleged taking of his property. The Eleventh District granted Mentor’s motion to dismiss Duncan’s complaint, and he now appeals. We affirm the Eleventh District’s judgment.

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} Duncan’s complaint averred that he owned a three-acre parcel of land in Mentor which included a pond and that in 2021, he applied to Mentor for a permit that would allow him to place a houseboat on the pond. It further stated that after Mentor denied the permit, Duncan appealed the denial to Mentor’s Board of Building and Zoning Appeals (the “zoning board”) and that the zoning board rejected Duncan’s appeal after a hearing.

{¶ 3} In November 2022, Duncan filed a complaint in the Eleventh District. He argued that the denial of the permit constituted a taking of his property, and he requested a writ of mandamus to compel Mentor to commence appropriation proceedings. The complaint also included three additional counts: a count to quiet title, a count to “estop” Mentor from enforcing or giving effect to the regulations it relied on to deny the permit, and a count titled “Landlocked Properties Must Get Access” in which Duncan asserted that Mentor illegally refused him use of several easements.

{¶ 4} Mentor filed a motion to dismiss for failure to state a claim upon which relief could be granted and for lack of subject-matter jurisdiction. The Eleventh District granted Mentor’s motion and dismissed Duncan’s complaint. Regarding the takings claim, the Eleventh District found that Duncan had failed to exhaust his administrative remedies because he did not appeal the zoning board’s decision to the court of common pleas. The Eleventh District also dismissed Duncan’s other three counts for lack of subject-matter jurisdiction.

{¶ 5} Duncan appealed to this court as of right.

II. LEGAL ANALYSIS

A. Standard of Review

{¶ 6} We review de novo a decision granting a motion to dismiss for failure to state a claim upon which relief can be granted. *Alford v. Collins-McGregor Operating Co.*, 152 Ohio St.3d 303, 2018-Ohio-8, 95 N.E.3d 382, ¶ 10. In conducting this review, we accept all factual allegations in the complaint as true, and to affirm the dismissal, it must appear beyond doubt that the relator can prove no set of facts that would entitle the relator to the relief requested. *Id.* We also review de novo decisions granting a motion to dismiss for lack of subject-matter jurisdiction, and regarding that issue, we consider whether the complaint raises any cause of action cognizable by the forum. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12.

B. Duncan's Takings Claim

{¶ 7} In his complaint, Duncan argued that Mentor took his property by denying him a permit to place a houseboat on his property. He requested a writ of mandamus to compel Mentor to commence appropriation proceedings.

{¶ 8} “When a property owner alleges the taking of private property, mandamus is the correct action to force the state to institute appropriation proceedings.” *State ex rel. New Wen, Inc. v. Marchbanks*, 159 Ohio St.3d 15, 2020-Ohio-63, 146 N.E.3d 545, ¶ 15. To be entitled to a writ of mandamus, Duncan must establish (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of Mentor 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.

{¶ 9} The Eleventh District dismissed Duncan’s takings claim because he did not appeal the denial of the permit to the court of common pleas as authorized by R.C. 2506.01(A). This provision states that any final decision of a board of a

political subdivision may be appealed to the court of common pleas of the county in which the principal office of the political subdivision is located. *See also* Mentor Codified Ordinances 1131.06(f); *The Chapel v. Solon*, 40 Ohio St.3d 3, 4, 530 N.E.2d 1321 (1988) (a city's denial of a building permit may be appealed pursuant to R.C. 2506.01). Duncan argues, however, that to bring a mandamus action to compel the commencement of appropriation proceedings for an alleged taking of property, he need only exhaust his administrative remedies before the government agency that denied his permit and does not need to seek judicial review of the agency's decision. Duncan is wrong.

{¶ 10} This court recently held in two decisions that judicial review of an administrative decision is an adequate remedy in the ordinary course of the law that must be pursued before a property owner may bring a mandamus action to compel the commencement of appropriation proceedings. In *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, we held that an appeal to the Franklin County Court of Common Pleas from a decision of the Ohio Oil and Gas Commission affirming an order of the Ohio Department of Natural Resources' Division of Oil and Gas Resources Management is an adequate legal remedy that must be pursued before bringing a mandamus action to compel appropriation proceedings. *Id.* at ¶ 5, 8, 15. We reasoned that if the court of common pleas had vacated the order, "[n]o taking would have occurred." *Id.* at ¶ 8. And in *State ex rel. US Bank Trust, Natl. Assn. v. Cuyahoga Cty.*, __ Ohio St.3d __, 2023-Ohio-1063, __ N.E.3d __, we held that an appeal to the court of common pleas from an adjudication of foreclosure by a county board of revision is an adequate legal remedy that must be pursued before a relator may bring a mandamus action to compel appropriation proceedings. *See id.* at ¶ 29, 31. In *US Bank Trust*, we explained that the reasoning in *Kerns* was not limited to appeals from decisions of the Ohio Oil and Gas Commission. *US Bank Trust* at ¶ 30.

{¶ 11} Here, Duncan could have appealed the zoning board’s decision to the court of common pleas. *See* R.C. 2506.01(A). If the court of common pleas had reversed the denial of the permit, “[n]o taking would have occurred,” *Kerns* at ¶ 8. Like the property owners in *Kerns* and *US Bank Trust*, Duncan “had the ability to obtain complete relief—i.e., to avoid the alleged takin[g] and any need for appropriation proceedings—by asserting [his] rights as allowed by statute,” *US Bank Trust* at ¶ 30. The Eleventh District thus correctly dismissed Duncan’s request for a writ of mandamus because he had an adequate legal remedy by way of appeal to the court of common pleas.

C. Duncan’s Remaining Claims

{¶ 12} In addition to his takings claim, Duncan’s complaint included three additional counts: a count to quiet title, a count to “estop” Mentor from enforcing or giving effect to the regulations it relied on to deny the permit, and a count titled “Landlocked Properties Must Get Access” in which Duncan asserted that Mentor illegally refused him use of several easements. The Eleventh District dismissed these three counts for lack of subject-matter jurisdiction.

{¶ 13} Because the Ohio Constitution does not grant courts of appeals original jurisdiction over these claims, the Eleventh District correctly dismissed them. *See* Ohio Constitution, Article IV, Section 3(B)(1); *see also State ex rel. Neer v. Indus. Comm.*, 53 Ohio St.2d 22, 23-24, 371 N.E.2d 842 (1978) (courts of appeals have “original jurisdiction only in quo warranto, mandamus, habeas corpus, prohibition, procedendo, and in any cause on review as may be necessary to its complete determination”). Duncan argues that the Eleventh District “should be able to hear all his claims * * * as it makes sense for judicial economy and time and effort to litigate them in one case and to avoid preclusion or res judicata later on in a later suit.” But Duncan provides no authority in support of this argument. And preclusion and res judicata would not apply to these other claims, because they were

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dismissed for lack of subject-matter jurisdiction. *See State ex rel. Duncan v. Am. Transm. Sys., Inc.*, 166 Ohio St.3d 416, 2022-Ohio-323, 186 N.E.3d 800, ¶ 8.

III. CONCLUSION

{¶ 14} Because Duncan could have appealed the denial of a houseboat permit to the court of common pleas, he had an adequate remedy in the ordinary course of the law and was not entitled to a writ of mandamus to compel Mentor to commence appropriation proceedings. And the court of appeals lacked subject-matter jurisdiction over Duncan's remaining claims. We therefore affirm the Eleventh District Court of Appeals' judgment granting Mentor's motion to dismiss Duncan's complaint.

Judgment affirmed.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ., concur.

Richard Duncan, pro se.

Joseph P. Szeman, Mentor Director of Law, for appellee.
