

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS  
CIVIL DIVISION

BRUCE A. VANCE, et al.,	:	
	:	
Plaintiffs,	:	Case No. 16CVH04-3295
	:	
vs.	:	JUDGE FRENCH
	:	
STATE OF OHIO, et al.,	:	
	:	
Defendants.	:	

**DECISION AND ENTRY DENYING DEFENDANTS’  
MOTION TO DISMISS,  
FILED SEPTEMBER 15, 2015**

This matter is before the Court upon the Motion to Dismiss, filed by Defendant, State of Ohio and Ohio Governor John R. Kasich (hereinafter “Defendants”), on September 15, 2015. On November 9, 2015, Plaintiffs, Bruce A. Vance, et al. (hereinafter “Plaintiffs”), filed a Memorandum Contra to Defendants’ Motion to Dismiss, and on January 29, 2016, Plaintiffs filed a Supplemental Brief in Opposition to Defendants’ Motion to Transfer and to Dismiss. In addition, on September 9, 2016, after this action was transferred to the Franklin County Court of Common Pleas, Plaintiffs filed a Position Statement Regarding Pending Motions, and Defendants filed a Summary of Arguments Supporting Defendants’ Motion to Dismiss.

**I. Background**

On June 26, 2015, Plaintiffs filed their original Class Action Complaint in the Court of Common Pleas of Ashtabula County. On July 27, 2015, Plaintiffs filed an Amended Class Action Complaint in the Court of Common Pleas of Ashtabula County, and on September 15, 2015, Defendants filed a Motion to Transfer Venue and to Dismiss. On November 9, 2015, Plaintiffs filed a Memorandum in Opposition to Defendants’

Motion to Transfer Venue and to Dismiss, as well as a Motion for Leave to File Second Amended Complaint.

Thereafter, on January 19, 2016, Plaintiffs filed a Motion Requesting Recusal of Judge Harris of the Ashtabula Court of Common Pleas. On January 20, 2016, Judge Harris granted Plaintiffs' Motion Requesting Recusal, and on January 22, 2016 the case was transferred to the docket of Judge Gary Yost of the Ashtabula Court of Common Pleas.

On January 22, 2016, Plaintiffs filed a Notice of Dismissal of Defendant Governor John R. Kasich, and on January 29, 2016, Plaintiffs filed a Supplemental Brief in Opposition to Defendants' Motion to Transfer and to Dismiss.

On February 16, 2016, Judge Yost held a Pending Motions Hearing, and on February 24, 2016, Judge Yost granted the portion of Defendants' Motion requesting a transfer of venue, and ordered that the action be transferred to the Franklin County Court of Common Pleas.

On April 6, 2016, this action was officially filed/transferred to this Court. However, the Court notes that while the action was pending in the Ashtabula Court of Common Pleas, Judge Yost did not issue a ruling on Plaintiffs' Motion for Leave to File Second Amended Complaint, or the portion of Defendants' Motion requesting dismissal of Plaintiffs' Amended Complaint. As such, the Court finds that these motions remain pending, and that a separate Decision on Plaintiffs' Motion for Leave to File Second Amended Complaint is being issued. The portion of Defendants' Motion requesting dismissal of Plaintiffs' Amended Complaint, is now before the Court.

## II. Standard of Review

“A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *Powell v. Vorys* (C.A.10 1998), 131 Ohio App.3d 681, 684, quoting, *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St. 545, 548, 605 N.E.2d 378. “In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, ‘it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.’” *Powell*, at 684, quoting, *O’Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. “In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings, and may not consider or rely on evidence outside the complaint.” *Powell*, at 684, citing, *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098, 1100. “When a court rules on a motion to dismiss for failure to state a claim, the complaint's factual allegations must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Sharon Ent., Inc. v. Kenworth of Cincinnati, Inc.* (1998), 131 Ohio App.3d 746, 749, citing, *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182, *Mitchell v. Lawson Milk Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 753, 756. “A motion to dismiss can be granted only where the party opposing the motion, here, the [Plaintiff], is unable to prove any set of facts which would entitle it to the relief requested.” *Sharon*, citing, *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418, 650 N.E.2d 863, 865-866, *York v. Ohio St. Highway Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063.

### III. Discussion

Initially, the Court notes that in a separate Decision it has granted Plaintiffs leave to file a Second Amended Complaint. Therefore, the Court finds that Defendants' Motion to Dismiss the First Amended Complaint is technically moot. However, because Plaintiffs' proposed Second Amended Complaint will remove Counts II and IV altogether, will remove the Governor as a party, and will *not* add any new claims or parties, the Court will address the arguments of Defendants' Motion to Dismiss that will still apply to Plaintiffs' Second Amended Complaint.

#### **A. Defendants' argument that a mandamus action, not a declaratory judgment action, is the appropriate means for adjudicating the issues presented.**

Defendants contend that the Ohio Supreme Court has long held that a declaratory judgment action is not an available remedy where an administrative agency's decision is discretionary and not subject to appeal. See, *Ohio Acad. of Nursing Homes v. Ohio Dep't of Job & Family Servs.*, 114 Ohio St. 3d 14, 19, 2007-Ohio-2620, ¶23, 867 N.E.2d 400, 404, 2007 Ohio LEXIS 1458, \*13 (Ohio 2007), holding that "when an agency's decision is discretionary and, by statute, not subject to direct appeal, a writ of mandamus is the sole vehicle to challenge the decision, by attempting to show that the agency abused its discretion."

Here, Defendants contend that the setting of the CAUV land values involves a great deal of discretion by the Tax Commissioner in evaluating the various factors that are part of the formula. More specifically, Defendants contend that the Tax Commissioner relies on an agricultural advisory committee to advise him on the economic, technological, and other developments that might be considered in the

determination of agricultural land values. O.A.C. 5703-25-32(A). Defendants further contend that although the committee makes recommendations to the Commissioner as to the values and methods to be used in developing the Commissioner's annual CAUV land value tables, the Commissioner is not bound by such recommendations, thereby using his own discretion when deciding to accept or reject the recommendations of the committee. Therefore, Defendants further argue that since the Commissioner's actions are discretionary, the Commissioner's actions are not subject to appeal, and thus declaratory judgment is not an available remedy to Plaintiffs.

However, the Court finds that Plaintiffs are not challenging the discretionary decisions of the Tax Commissioner, and have not alleged that the Commissioner abused his discretion in creating the CAUV Land Tables under O.A.C. 5703-25-32. The Court finds that Plaintiffs' original, Amended, and Second Amended Complaint each contain detailed allegations of the Commissioner's alleged failure to follow the mandatory, non-discretionary requirements of O.A.C. 5703-25-33. Therefore, when the allegations of Plaintiffs' Second Amended Complaint are read in a light most favorable to Plaintiffs, the Court finds that Plaintiffs have stated a claim upon which relief may be granted, and Plaintiffs' sole remedy is *not* a writ of mandamus.

**B. Defendants' argument that Plaintiffs' equitable restitution claims must fail.**

Defendants contend that because Plaintiffs have failed to name all necessary parties to this action, dismissal is appropriate under Civ.R. 12(B)(7). More specifically, Defendants contend that Plaintiffs' Complaint fails to acknowledge that the real property tax revenue is retained by local government. Defendants contend that the County Auditor is assigned the duty of valuing county real property, and that the County Treasurer is the

one that actually collects the taxes when due. Thus, Defendants contend that in order for Plaintiffs to receive restitution for the tax payments that they allegedly overpaid, all of the county auditors and treasurers would have to be named as defendants, as they are the officials who actually assessed, collected, and distributed the tax dollars that Plaintiffs seek in restitution.

However, as Plaintiffs argue, the Ohio Supreme Court has explicitly held that “dismissal due to a party's failure to join a necessary party is warranted only where the defect cannot be cured.” *State ex rel. Bush v. Spurlock*, 42 Ohio St. 3d 77, 81, 537 N.E.2d 641, 645, 1989 Ohio LEXIS 34, \*13 (Ohio 1989), citing 5 Wright & Miller, *Federal Practice & Procedure* (1969) 628, Section 1359. Therefore, the Court finds that because this Court could, upon motion of the parties, determine that the county auditors and treasurers are necessary parties, and because these parties can still be added, dismissal under such grounds is not presently warranted.

Defendants further contend that equitable restitution requires that the funds that are alleged to have been wrongfully taken from the claimant be in the possession of Defendants. *Santos v. Ohio Bureau of Workers' Comp.*, 101 Ohio St. 3d 74, 77, 2004-Ohio-28, ¶ 14, 801 N.E.2d 441, 445, 2004 Ohio LEXIS 59, \*9 (Ohio 2004). Therefore, Defendants contend that since the real property taxes are levied by county auditors and paid to county treasurers, not Defendants, Plaintiffs’ claim for equitable restitution must be dismissed.

However, the Court finds that Plaintiffs specifically allege that “[t]he State of Ohio has unjustly enriched itself by assessing and retaining the illegitimate property taxes paid as a result of the ODT’s misapplication of CAUV.” Plaintiffs’ Second Amended

Complaint at ¶ 111. Therefore, the Court finds that because the Complaint's factual allegations must be taken as true for purposes of a Civ.R. 12(B)(6) Motion to Dismiss, Plaintiffs have stated a claim for equitable restitution. The Court further finds that Defendants' contention that they do not have the funds that were allegedly wrongfully taken from Plaintiffs, is a matter that may be resolved by a motion for summary judgment in the future, but not by the present motion to dismiss.

**IV. Conclusion**

Therefore, based on the foregoing, the Court accordingly hereby **DENIES** Defendants' Motion to Dismiss.

**IT IS SO ORDERED.**

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