

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK J. DEVLIN,

Plaintiff-Appellant,

v

ATTORNEY GENERAL,

Defendant-Appellee.

UNPUBLISHED

January 21, 2010

No. 287827

Ingham Circuit Court

LC No. 08-000769-AW

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals by right the summary dismissal of his complaint for mandamus. We affirm.

On June 3, 2008, plaintiff filed his complaint for mandamus against attorney general Michael A. Cox in his official capacity. Plaintiff averred that casinos and other businesses owned by Indian tribes in Michigan are selling spirits, beer, and wine on their premises, but are doing so without a license issued by the Michigan Liquor Control Commission as required by law. Plaintiff further averred that defendant, as the State's chief law enforcement officer, had knowledge of these "tribal liquor license violations." And, although "hundreds of thousands of felony violations have been committed by Michigan tribal casino management" . . . defendant "fails and refuses to take any corrective action, whether it be a civil suit against the tribes for a declaratory and injunctive Order . . . or criminal actions against tribal management." Plaintiff alleged that he and other travelers on State highways are in danger because "[a]ll of the tribal casinos are located within a minute or two drive to State highways" and underage customers, as well as intoxicated persons, are likely to leave the casinos and drive on State highways. Accordingly, plaintiff alleged, defendant's failure to enforce State liquor licensing laws under these circumstances constituted a clear abuse of discretion and warranted the issuance of a writ of mandamus to command him to act.

On June 25, 2008, in response to plaintiff's complaint, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8). Relying on *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999), defendant argued that plaintiff was not entitled to this extraordinary remedy because (1) plaintiff had no "clear legal right to the specific enforcement of any provision of the State liquor laws against a third party," (2) defendant had no "clear legal duty to enforce the State liquor laws on tribal lands and against

tribal management,” and (3) plaintiff failed to establish that the “enforcement of the State liquor laws on tribal lands and against tribal management[] is ministerial in nature.”

On July 16, 2008, plaintiff responded to defendant’s motion for summary dismissal, arguing that he was entitled to a writ of mandamus for the reasons set forth in his complaint. In summary, plaintiff argued that the State liquor law applies on tribal land but, in violation of his constitutional duty, defendant failed and refused to enforce those liquor laws. Plaintiff claimed that such decisions were arbitrary and capricious and warranted the issuance of the requested writ.

On July 18, 2008, an order denying reassignment of the case to another judge was entered. The order provided that the case had been assigned to Judge William Collette by blind draw and considered for reassignment to Judge James Giddings “in accordance with MCR 8.111(D).” Judge Giddings signed the order denying reassignment. Nevertheless, the subsequent proceedings in this case were conducted before Judge Giddings.

On July 31, 2008, defendant filed his reply to plaintiff’s response to defendant’s motion for summary disposition. Defendant argued that plaintiff’s response was not persuasive and did not accurately set forth the law. Plaintiff had “no clear legal right to the enforcement of the State’s liquor laws against an Indian Tribe either through civil or criminal sanctions, and no clear legal duty exists in the Office of Attorney General to initiate such enforcement actions.” Plaintiff’s “surrebuttal” brief filed on August 13, 2008, basically repeated his same arguments.

On August 13, 2008, following oral arguments on defendant’s motion for summary disposition, the trial court agreed with defendant. The court held that defendant, as attorney general, had no legal duty to specifically enforce the law in a particular way with regard to this matter. The matter was within defendant’s discretion as attorney general. There was no “specific Act that required him to carry out his duties in a particular fashion.” Accordingly, defendant’s motion for summary disposition was granted. On August 25, 2008, an order dismissing the matter with prejudice was entered. This appeal followed.

Plaintiff argues that the trial court’s summary dismissal of his mandamus complaint was erroneous because defendant arbitrarily, capriciously, and corruptly refuses to enforce the State liquor law against tribal entities although it applies to them and can be enforced against them. We disagree. A trial court’s decision on a motion for summary disposition is reviewed de novo, but its decision with regard to a request for mandamus is reviewed for an abuse of discretion. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *White-Bey*, *supra* at 223.

Mandamus is a writ issued by a court of superior jurisdiction to compel a public officer to perform a clear legal duty. *Jones v Dep’t of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003). To obtain a writ of mandamus, a plaintiff must establish that (1) he has a clear legal right—not possessed by citizens generally—to the performance of the specific duty sought to be compelled, (2) the defendant has a clear legal duty to perform it, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy. *Inglis v Public School Employees Retirement Bd*, 374 Mich 10, 13; 131 NW2d 54 (1964); *White-Bey*, *supra* at 223-224. A plaintiff bears the burden of demonstrating entitlement to this extraordinary remedy. *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004).

In this case, although repeatedly challenged by defendant, plaintiff has failed to establish that he has a clear legal right, not possessed by citizens generally, to compel defendant to enforce the State's liquor laws with respect to Indian tribes in any particular manner. To the contrary, plaintiff admits that he was pursuing this matter on behalf of himself and other travelers on State highways who are purportedly placed in danger by persons who leave the tribal casinos and travel on State highways. "[I]t has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Univ Medical Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143; 369 NW2d 277 (1985), citing *Inglis, supra*. Thus, plaintiff clearly failed to establish this first prerequisite for the issuance of a writ of mandamus. Accordingly, we affirm the trial court's summary dismissal of plaintiff's complaint for mandamus, albeit for a different reason. See *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

Next, plaintiff argues that this case, which had been randomly assigned to one judge when it was filed, was reassigned to, and decided by, another judge in contravention to an order denying reassignment of the matter. However, as defendant argues, plaintiff never raised this issue in the trial court where the matter could have been properly addressed. Thus, plaintiff waived review of this issue on appeal. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro