IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

LARRY E. EALY,	:	CASE NO. 2005 CV 6344
Plaintiff,	:	(Judge Steve A. Yarborough) (Visiting Judge by Assignment for
vs.	:	Judge Dennis J. Langer)
RHINE McLIN, et al.	:	**FINAL AND APPEALABLE DECISION, ORDER AND ENTRY**
Defendants.	:	**SUSTAINING DEFENDANTS' MOTION FOR SUMMARY**
	:	**JUDGMENT**

This matter is before the Court on the Motion for Summary Judgment filed on September 25, 2006 by Defendants, City of Dayton, Ohio and Mayor Rhine McLin. On October 11, 2006, Plaintiff filed a document captioned "Answer to Defendants Summary Judgment." Plaintiff's filing does not have a Certificate of Service indicating that the Defendants received a copy.

I. FACTS

Plaintiff filed this lawsuit against the City of Dayton and Mayor Rhine McLin alleging that the Defendants violated his constitutional rights when Mayor McLin ruled him out of order during the public comment portion of a Dayton Commission Meeting after Plaintiff exceeded his allotted speaking time. Defendants filed a counter-claim seeking to have the Plaintiff declared a vexatious litigator because of his alleged perpetual

filings of frivolous lawsuits against the City of Dayton, its employees, and officials, among others.

Defendants' Motion for Summary Judgment is supported by a sworn affidavit of a person competent to give testimony at trial on the matters contained in the affidavit. Plaintiff, however, has filed no admissible evidence in opposition to the Motion. Therefore, the Court must accept the Defendants' version of the facts.

A. Plaintiff's claim

The City of Dayton Commission holds weekly public meetings to, among other things, vote on legislation, address public issues and allow public comments from citizens. (Affidavit of Clarence Williams, Sr. ("Williams Aff.") ¶¶'s 3-4)(Copy attached to Defendants' Motion for Summary Judgment as Exhibit 1). It is the duty of the Mayor of the City of Dayton, with the assistance of the Clerk of the Commission, to run the Commission meetings and see that the meetings are conducted in an orderly manner without interference or disruption. (Williams Aff. ¶4). The Clerk of the Commission requires each citizen who wishes to speak during the public-comment portion of the meeting to register. (Williams Aff. ¶4). Each citizen is instructed that they are allowed three minutes to address the commission. (Williams Aff. ¶5). On August 13, 2003, Plaintiff signed the registration form to speak at the public-comment portion of the commission meeting, and was informed that he was allowed three minutes. (Williams Aff. ¶.6). Plaintiff exceeded his three minutes and was asked to stop speaking. (Williams Aff. ¶7). When Plaintiff refused to stop speaking and began arguing with the Mayor, Mayor McLin hammered her gavel and ruled him out of order. (Williams Aff. ¶7).

Subsequently, Plaintiff filed this instant lawsuit against the City of Dayton

and Mayor McLin alleging that "Mayor Rhine McLin, named herein deprive (sic) plaintiff of his constitutional rights by ruling him out of order for going over the three minute speaking time August 13, 2003." (Compl. ¶1)

B. Plaintiff's other lawsuits

Within six months prior to filing this lawsuit, Plaintiff filed five separate *in forma pauperis* lawsuits against the City of Dayton, Mayor McLin and other Dayton employees and officials.

1. *Larry E. Ealy v. Rhine McLin*, Montgomery County Common Pleas Case No. 05-CV-2034.

On March 16, 2005, Plaintiff filed a civil suit against Mayor McLin captioned: *Larry E. Ealy v. Rhine McLin*, Montgomery County Common Pleas Case No. 05-CV-2034. Plaintiff sought $2,000,000 claiming that the Mayor violated his First Amendment Rights when she ruled Plaintiff out of order for using racial slurs and speaking over his allotted time at the September 3, 2003 Dayton Commission Meeting. (A certified copy of the Complaint, as well as the Common Pleas Court and Court of Appeals Order Dismissing the Complaint are attached to Defendants' Motion for Summary Judgment as Exhibit 2). The Trial Court dismissed the lawsuit for failure to prosecute and the Plaintiff appealed. The Second District Court of Appeals dismissed the appeal for failure to file a brief.

2. *Larry E. Ealy v. Judge John S. Pickrel*, Montgomery County Common Pleas Case No. 05 CV 02605

On March 25, 2005, Plaintiff filed a civil suit against Dayton Municipal Court Judge John Pickrel, captioned *Larry E. Ealy v. Judge John S. Pickrel*, Montgomery County Common Pleas Case No. 05 CV 02605. Plaintiff sought $2,700,000 from Judge Pickrel, alleging that Judge Pickrel violated Plaintiff's First Amendment rights by convicting

Plaintiff of disorderly conduct at the September 3, 2003 Dayton Commission Meeting and barring Plaintiff from Dayton City Hall for four years as part of the sentence. The Plaintiff filed a dismissal entry in that case. (A certified copy of the Complaint as well as the notice of voluntary dismissal is attached to Defendants' Motion for Summary Judgment as Exhibit 3).

3. *Larry E. Ealy v. Jerry D. Schwartz*, Montgomery County Common Pleas Court Case No. 05-CV-02792

On May 13, 2005, Plaintiff filed a civil suit against Dayton Assistant Prosecutor Collette Moorman, the Montgomery County Sheriff, a Montgomery County Sheriff's Deputy and a Dayton Municipal Court bailiff, captioned *Larry E. Ealy v. Jerry D. Schwartz*, Montgomery County Common Pleas Court Case No. 05-CV-02792. Plaintiff sought $1,000,000 from the Defendants alleging that they conspired to bring false domestic violence charges against the Plaintiff and detained the Plaintiff momentarily at the Dayton Municipal Court. The claims against Colette Moorman and the Dayton Municipal Court bailiff were dismissed for failure to state a claim upon which relief may be granted and also for failure to prosecute. (A certified copy of the Complaint as well as the Court's Order are attached to the Defendants' Motion for Summary Judgment as Exhibit 4).

4. *Larry E. Ealy v. Honorable Judge James F. Cannon, et al.*, Supreme Court of Ohio Case No. 05-1328

On July 20, 2005, Plaintiff filed a Complaint in Mandamus against Dayton Municipal Court Judge James F. Cannon, Dayton Assistant Prosecutor Addie King, and Deputy Dayton Clerk of Court Ann Murray, captioned *Larry E. Ealy v. Honorable Judge James F. Cannon et al.*, Supreme Court of Ohio Case No. 05-1328. Plaintiff requested that the

Ohio Supreme Court order Judge Cannon to dismiss criminal charges of domestic violence filed against him and also recall a warrant for Plaintiff's arrest. The Ohio Supreme Court denied the Motion without a written decision. (A certified copy of the Complaint as well as the Court's Order are to the Defendants' Motion for Summary Judgment as Exhibit 5).

II. LAW AND ANALYSIS

A. Summary Judgment Standard

In Harless v. Willis Day Warehousing, Inc., (1978), the Ohio Supreme Court stated in order for summary judgment to be appropriate, it must appear that:

(1). There is no genuine issue of material fact;

(2). The moving party is entitled to judgment as a matter of law;

(3). Reasonable minds can come to but one conclusion and that conclusion is adverse the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

54 Ohio St.2d 64, 66.

Once the moving party comes forward with evidence establishing that it is entitled to summary judgment, the non-moving party bears the burden of coming forward with specific facts and evidence showing that there is a genuine issue of material fact for trial. *Van Fossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, 117. The non-moving party has the burden "to produce evidence on any issue for which that party bears the burden of production at trial." *Leibreich,* 67 Ohio St.3d at 269; *Wing v. Anchor Media Ltd.* (1991), 59 Ohio St.3d 108, 111. Therefore, the non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Benjamin v. Deffet Rentals* (1981),

66 Ohio St.2d 86; *Harless*, 54 Ohio St.2d at 66. The non-moving party must respond with affidavits or other appropriate evidence to controvert the facts established by the moving party. *Id.* Further, the non-moving party must do more than show there is some metaphysical doubt as to the material facts of the case. *Matsushita Electric Ind. Co. v. Zenith Radio* (1980), 475 U.S. 574.

B. The facts are uncontested, there is no genuine issue of material fact, and the Defendants are entitled to summary judgment as a matter of law.

1. Plaintiff's claims against the Defendants.

While Plaintiff does not state what constitutional right was violated, presumably he is referring to his First Amendment free-speech rights. Our Second District Court of Appeals has previously held that the Dayton Commission's three-minute time restriction for public comment is not unconstitutional and does not violate the First Amendment. *State of Ohio v. Loretta Cephus*, 161 Ohio App.3d 385, 830 N.E.2d 433, 439 (Montgomery Cty. 2005). The Court stated that

> While restrictions on the content of speech can only be justified by a compelling state interest...in a limited public forum such as commission meetings, content-neutral time, place, and manner restrictions on communication are permissible so long as they are narrowly tailored to serve a significant governmental interest. The significant governmental interest at issue here is the ability of the Dayton City Commission officials to conduct official business in an orderly manner without interference or disruption."

Id.

Here, the time limit is a proper time, place and manner restriction that serves the City's significant governmental interest of conducting its official business without interference or disruption. As such, there is no constitutional violation and Defendants are entitled to summary judgment rendered in their favor on Plaintiff's claims.

Not only is there no constitutional violation, but Mayor McLin is immune from liability because her actions were part of her official functions of running the Dayton Commission Meeting. *Finch v. City of Vernon*, 877 F.3d 1497, 1505-1507 (11th Cir. 1989)(city council members have absolute immunity for actions taken to maintain order in council meeting by cutting off a citizen speaker.) With respect to the City of Dayton, the Plaintiff's claim also fails because he does not allege or come forward with any evidence of a municipal custom or policy that was the moving force behind the non-existent constitutional violation. *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978).

C. Defendants are entitled to summary judgment in their favor on their vexatious litigator counterclaim.

The General Assembly passed R.C. 2323.52, the Vexatious Litigator Statute, to impose limitations on conduct of persons who have habitually, persistently, and without reasonable grounds engage in vexatious litigation. *Gains v. Harman,* 148 Ohio App.3d 357, 773 N.E.2d 583, 586 (Mahoning Cty. 2002). The Statute defines "Vexatious Conduct " to mean:

> Any conduct of a party in a civil action that *satisfies any of the following*:
>
> (a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action;
>
> (b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension , modification, or reversal of existing law.
>
> (c) The conduct is imposed solely for delay.

Moreover, the Statute defines a "Vexatious litigator" as:

> Any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a

> court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions.

The Statute provides that a common pleas court that finds an individual to be a vexatious litigator may order that the vexatious litigator be prohibited from filing any actions or prosecuting any pending actions before the Courts of the State of Ohio, without specific leave of Court. *R.C 2323.52*

Here, Plaintiff's actions in filing this instant lawsuit, as well as his filing of the four other *pro se in forma pauperis* lawsuits against the City of Dayton and its employees and officials within a six month period are not warranted by existing law and cannot be supported by a good faith argument for an extension or reversal of existing law. Moreover, such unwarranted conduct over such a short period of time is habitual and persistent. In addition, Plaintiff's failure to prosecute the actions establishes that the suits serve merely to harass and are imposed solely for delay. Further, Plaintiffs' response to Dayton's Counterclaim in the instant matter serves merely to make unfounded and scandalous comments about the conduct of public officials, which are irrelevant to the subject matter and serve merely to harass or maliciously injure those against whom they are made. Plaintiff's civil lawsuits are an improper attempt to use the civil system to avoid criminal prosecution.

Just as there was no basis in this instant action, there was no basis for Plaintiff's lawsuit filed in the Ohio Supreme Court against Dayton Municipal Court Judge Cannon, Assist. Prosecutor Addie King and Deputy Dayton Clerk of Court Ann Murray. In that case, Plaintiff sought a writ of mandamus to have the Municipal

Court Judge dismiss criminal charges filed against him. The Ohio Rules of Criminal Procedure do not allow for "summary judgment" on a complaint prior to trial. *State v. McNamee* (1984), 17 Ohio App.3d 175. If a motion to dismiss goes beyond the face of the complaint, he can present his challenge only as a motion for acquittal at the close of the state's case. Crim. R. 29(A); *See State v. Varner* (1991), 81 Ohio App.3d 85, 86. As a general rule, "premature declarations," are strictly advisory and an improper exercise of judicial authority. *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14. Were the courts to allow such a procedure, trial courts would be flooded with pretrial motions to dismiss alleging factual predicates in criminal cases. *State v. Varner* (1991), 81 Ohio App.3d 85, 86.

In addition, there was no basis to Plaintiff's complaint against Assistant Prosecutor Collette Moorman alleging a conspiracy to bring domestic violence charges against him. The Court specifically found that the Plaintiff failed to state a claim upon which relief could be granted and also found that the Plaintiff failed to prosecute his case. Plaintiff's lawsuit against Dayton Municipal Judge Pickrel also lacked any basis. There was and is absolutely no merit to Plaintiff's claim that a trial judge overseeing a jury trial convicting the Plaintiff of disorderly conduct violates his First Amendment Rights. Finally, Plaintiff's prior lawsuit against Mayor McLin involving the same subject matter as this instant suit likewise lacks any basis in the law. Moreover, Plaintiff's complaint and his subsequent appeal were both dismissed for failure to prosecute.

Plaintiff's numerous frivolous filings and then his failure to prosecute are clear evidence of vexatious litigation that R.C. 2323.52 seeks to prohibit.

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Therefore, this Court hereby grants the Defendants summary judgment in their favor and finds that the Plaintiff is a vexatious litigator pursuant to R.C. 2323.52. The Court further orders pursuant to R.C. 2323.52 that the Plaintiff is prohibited from doing the following:

A. Instituting legal proceedings in the court of claims, the court of common pleas, municipal court or county court;

B. Continuing any legal proceedings that the Plaintiff had instituted in any of the courts specified in section A, above; and

C. Making any application, other than an application for leave to proceed under division (F)(1) of R.C. 2323.52, in any legal proceedings instituted by the vexatious litigator or another person in any of the courts specified in division (D)(1)(A) of R.C 2323.52.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

Hon. Judge Stephen A. Yarborough

TO THE CLERK OF COURTS:

1. **Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.**

2. **Please send a certified copy of this Decision and Order to the Ohio Supreme Court in accordance with R.C. 2323.52(H), so that the Decision and Order may be published in a manner that the Ohio Supreme Court determines is appropriate and that will facilitate the Clerks of Court of the Courts of this State of Ohio in refusing to accept pleadings or other papers submitted for filing by the Plaintiff.**

Hon. Judge Stephen A. Yarborough

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

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I hereby certify this to be a true and correct copy.
Witness my hand and seal this 12/5 day of 2006.
Clerk
Clerk of Common Pleas
Court of Montgomery County, Ohio
By Deputy