

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL.,)	Case No. 04CV001080
ROBERT MERRILL, TRUSTEE, et al.)	
)	Judge Eugene A. Lucci
Plaintiffs-Relators)	
)	<u>MOTION OF THE STATE OF OHIO</u>
vs.)	<u>FOR MORE DEFINITE STATEMENT</u>
)	<u>AND FOR COMPLIANCE WITH</u>
STATE OF OHIO, DEPARTMENT)	<u>CIVIL RULES 10(D) AND 9(F)</u>
OF NATURAL RESOURCES, et al.)	<u>AND BRIEF IN SUPPORT</u>
)	
Defendants-Respondents)	


Now come Defendants-Respondents the State of Ohio, Department of Natural Resources, Sam Speck, Director, Ohio Department of Natural Resources, and the State of Ohio (hereinafter collectively “the State of Ohio” or “the State”), by and through counsel, Attorney General Jim Petro, and move this Court pursuant to Civ. R. 12(E) for an Order requiring Plaintiffs-Relators to make more definite statements of their allegations of fact as they relate to the claimed real property interests that are at issue in this case, and to attach to their pleading copies of any and all written instruments under which those real property interests are claimed, or to state the reason for their omission as required by Civ. R. 10(D).

Further, the State moves for an Order requiring Plaintiffs-Relators to make more definite statements as to the time any alleged taking occurred, as required by Civ. R. 9(F). Without more definite statements, including copies of written instruments and specific time references, Plaintiffs-Relators’ Complaint is so vague, ambiguous and substantially insufficient that the State cannot reasonably be required to frame a response.

A brief in support of this motion that sets forth the defects complained of and details desired is attached hereto and made a part hereof.

Respectfully submitted,

JIM PETRO
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BRIEF IN SUPPORT

I. **Plaintiffs-Relators must make a more definite statement under Civ. R. 12(E) because the Complaint is so vague, ambiguous and insufficient with regard to their alleged real property interests that the State cannot reasonably be required to frame a responsive pleading.**

In their Complaint, Plaintiffs-Relators request declaratory and injunction relief with regard to their alleged real property ownership. They also petition this Court for a writ of mandamus compelling the State to initiate appropriation proceedings as a result of an alleged taking of their real property without just compensation. In any complaint for a writ of mandamus, a relator must allege the existence of a clear legal right to the relief prayed for; the existence of a clear legal duty on the State's part to perform an act; and that the relator has no plain and adequate remedy in the ordinary course of the law. R.C. 2731.01, *et. seq.*

In this action, the clear legal right to the relief prayed for begins with the allegation that the Plaintiffs-Relators possess certain real property interests alleged to have been taken by the State. Plaintiffs-Relators' mailing addresses are given in the caption of the Complaint. The Complaint itself describes the Plaintiffs-Relators as "owners of real property abutting Lake Erie," or "owners of record of real property abutting Lake Erie" at certain addresses "located in Lake, Ashtabula, Cuyahoga, Lorain, Ottawa, Erie, Sandusky or Lucas Counties." There is no further description in the Complaint of the Plaintiffs-Relators' alleged property interests.

At best, on the face of the Complaint, the State is able to infer that the Plaintiffs-Relators are claiming ownership of some unspecified real property as well as certain other rights. It is not known from the Complaint where the allegedly affected properties are located; how much area of land such might include; whether the property interests are fee simple or some lesser interest; whether a mortgage holding is involved; or other such information as to Plaintiffs-Relators' interests. No deed, leases, or contracts are attached to the Complaint. The Complaint is so vague that the State, and indeed the Court itself, is not apprised of the extent of the alleged injury. The State cannot reasonably admit or deny Plaintiffs-Relators' allegations because the State simply does not know and cannot infer what interests are claimed to have been taken. The specific extent of the property claimed to be taken by the State is never apparent.

It is fundamentally unreasonable for Plaintiffs-Relators to expect the State to speculate upon the indefinite nature of their alleged property rights, as pled in their Complaint. The State cannot reasonably be required to research all pertinent real property records in order to develop the factual, documentary basis for Plaintiffs-Relators' property claims for the sole purpose of formulating a response to their Complaint. Plaintiffs-Relators surely have specific, documented property interests in mind that stimulated their initiation of this action. Yet, not a single deed, lease, or transfer instrument is attached to the Complaint, nor is there any mention of a single county recordation reference for such instruments. In fairness, the Ohio Rules of Civil Procedure require Plaintiffs-Relators to amend their vague and ambiguous Complaint so that the State and the Court can ascertain what they are complaining about. See, *i.e.*, *Shrewsberry v. Wilson* (1960), 113 Ohio App. 556.

Civ.R. 12(E) is not the only basis for this motion. Civ.R. 10(D) specifically anticipates the defects complained of and serves as an independent basis for modification of the Complaint. In both instances, the Court and parties begin the litigation with sufficient factual disclosure to proceed.

II. Plaintiffs' Complaint does not comply with the mandatory terms of Civ.R. 10(D).

Civ. R. 10(D) requires that Plaintiffs-Relators attach to their Complaint copies of written instruments upon which their real property ownership claims are founded. If they fail to do so, they must tell this Court the reason for their omission. The mandatory terms of Civ.R. 10(D) are clear and state as follows:

“When a claim or defense is founded on an account or other written instrument, a copy thereof must be attached to the pleading. If not so attached, the reason for the omission must be stated in the pleading.”

The word “instrument” has been defined as the formal expression in writing of some agreement or obligation, or some act upon which the rights of the parties are dependent. *Citizens National Bank of Washington, Pa. v. Union Central Life Ins. Co.* (1909), 12 Ohio C.C.(N.S.) 401.

Plaintiffs-Relators must concede that the deeds, titles, contracts, leases and other papers upon which their claims of property are based are, in fact, written instruments. Yet, in their Complaint, Plaintiffs-Relators have inexplicably failed to allege the existence of any written instruments upon which their claimed property rights, title or interests are founded. Plaintiffs-Relators further overlook Civ. R. 10(D) and fail to attach copies of these written instruments to their Complaint or tell this Court the reason for their omission.

Plaintiffs-Relators' noncompliance with Civ. R. 10(D) in this action is not simply a formalistic, procedural defect. It is an omission that will confuse this litigation from start to finish. Insofar as Plaintiffs-Relators are petitioning this Court for a writ of mandamus compelling the State to initiate appropriation proceedings for the alleged unconstitutional taking of real property, both the right to relief and the scope of the relief itself will call for constant reference to the interests claimed and the nature and extent of the alleged rights any particular Plaintiffs-Relators might claim to possess. Terms such as "ownership and possession of private property," "private property rights," and "property rights of fee ownership" need to be replaced with terms and/or supporting documentation that are not so vague, ambiguous and substantially insufficient. This change is necessary so that the litigation is not subject to constant confusion or allegations that might shift over time.

For example, if Plaintiffs-Relators do not specify in the Complaint the specific real property interests "taken," the State and the Court will never be sure of the extent of the preclusive effect of this litigation. In the future, none of the parties or the Court would be able to refer to the Complaint to determine if res judicata or collateral estoppel has attached to any particular piece of property. There is no valid reason for the Court and the parties to be denied this type of benefit that a well-pled complaint can confer.

Without more definite and specific statements in the Complaint regarding Plaintiffs-Relators' real property ownership and the attachment of copies of written instruments evidencing such ownership, the State of Ohio cannot reasonably be required to frame a response to the claim that property has been "taken." Plaintiffs-Relators' conclusionary allegations regarding their property ownership, without the attachment of supporting written instruments, lack sufficient particularity for the State to be required to respond. See, *i.e.*, *State ex rel. Hanson v. Guernsey County Bd. of Commrs.* (1992), 65 Ohio St. 3d 545.

Ohio courts have recognized that the method to bring to a court's attention that a complaint fails to comply with Civ. R. 10(D) is for a defendant to move for a more definite statement under Civ. R. 12(E). As the court in *Point Rental Co. v. Posani* (1976), 52 Ohio App. 2d 183 explained:

“The proper procedure in attacking the failure of a plaintiff to attach a copy of a written instrument or state a valid reason for his failure to attach same is to serve a motion for more definite statement, pursuant to Civ. R. 12(E). Had that motion been granted, as would have been proper in this case, plaintiff could properly have been required to amend his complaint within 14 days after notice of the order sustaining the motion for a definite statement, and ordered to attach a copy of the written instrument or state a valid reason for the failure to attach same. In the event a party fails to obey the order of the court, the court may strike the pleading to which the motion was directed, or make any other orders as it deems just, which would include involuntary dismissal with prejudice pursuant to Civ. R. 41 (B)(1).”

Point Rental Co., supra, at 186.

III. Plaintiffs-Relators have failed to plead the material element of time with specificity and sufficiency as required by Civ.R. 9(F).

Plaintiffs-Relators allege that “the actions and threats to act” by the State have led to the unconstitutional and unlawfully assertion of ownership and possession of private property. Upon this claim, Plaintiffs-Relators seek the extraordinary relief of mandamus to obtain compensation for a temporary taking of those lands. The element of time is critical in a temporary takings case. Plaintiffs-Relators fail to disclose when the State’s alleged “actions and threats to act” first occurred or have occurred. This failure to disclose is contrary to the dictates of Civ. R. 9(F), which states:

“For the purposes of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.”

Time is material in this action. The insufficiency of Plaintiffs-Relators’ Complaint to address the timing of the State’s alleged acts and threats is prejudicial to the State in its attempt

to respond. In order for Plaintiffs-Relators to comply with Civ. R. 9(F), they must disclose the time or times that the State's alleged acts and threats occurred with sufficient particularity to inform the Court and the State and to enable the State to prepare an effective response and defense. See, *i.e.*, *Ott v. Midland-Ross Corp.* (C.A. 6, 1975), 523 F. 2d 1367.

IV. Conclusion and Relief Requested

The Court and all the parties should not proceed with this litigation until everyone is clearly apprised of the specific real property interests that Plaintiffs-Relators are putting at stake in this case. The inability of the State to reasonably respond to the vague allegations of the Complaint will result in confusion and uncertainty during this case and possibly beyond. All this is avoidable if Plaintiffs-Relators simply conform to the requirements of Civ. R. 12(E), 10(D), and 9(F) prior to the time that the State is required to move or plead.

Pursuant to Civ.R. 12(E), 10(D) and 9(F), this Court should order Plaintiffs-Relators to make more definite and specific statements regarding their separate and distinct property interests as alluded to throughout of their Complaint. Plaintiffs-Relators should be required to describe, in detail, the location, size, nature, and extent of any property right, title, estate or interest at issue in this action. Each Plaintiff-Relator should be required to identify and adopt by reference any and all written instruments upon which they claim ownership of their property at issue.


The State further moves this Court for an order requiring Plaintiffs-Relators to comply with Civ. R. 10 (D) and to attach to their pleading copies of any and all written instruments upon which their separate and distinct property interests are claimed, including any and all written instruments submitted to their respective County Recorder and Auditor offices for recordation, taxation or property ownership identification purposes, or to state a valid reason for their failure to do so.

Each Plaintiff-Relator should be required to separately identify and describe their distinct property allegedly taken by the State. The identification and description of these properties should be stated with sufficient particularity and detail to plainly and clearly indicate the location, nature, scope and extent of the Plaintiffs-Relators' properties allegedly taken by the State.

To comply with the provisions of Civ. R. 9(F), each Plaintiff-Relator should be ordered to describe the alleged taking experienced by each of them, and to state the specific time periods when the alleged temporary taking occurred.

Respectfully submitted,

JIM PETRO
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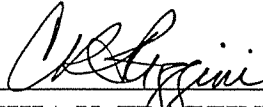
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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing **Motion of the State of Ohio for More Definite Statement and for Compliance with Civil Rules 10(D) and 9(F) and Brief In Support** was sent by regular U.S. mail, postage prepaid, this 2nd day of July, 2004 to:

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)	Judge Eugene A. Lucci
Plaintiffs-Relators)	
)	
vs.)	ORDER
)	
STATE OF OHIO, DEPARTMENT)	
OF NATURAL RESOURCES, et al.)	
)	
Defendants-Respondents)	

This matter came on to be heard upon the filing of Defendants-Respondents' Motion for More Definite Statement and for Compliance with Civil Rules 10(D) and 9(F). Upon consideration of this Motion, and for good cause shown, said Motion is hereby granted.

IT IS ORDERED that Plaintiffs-Relators shall serve an Amended Complaint upon Defendants-Respondents within fourteen (14) days after the entry of this Order. Service and filing of the Amended Complaint shall be done in accordance with the provisions of Civ. R. 5.

IT IS FURTHERED ORDERED that Plaintiffs-Relators shall include and incorporate the following matters in their Amended Complaint in order to remedy the vagueness and ambiguity of their initial averments:

- a) Plaintiffs-Relators shall make more definite and certain, the statements regarding their separate and distinct property interests as alluded to throughout their Complaint. In doing so, the location, size, nature, and extent of any property right, title, estate or interest of each Plaintiff-Relator shall be described in detail;
- b) Each Plaintiff-Relator shall identify and adopt by reference, any and all written instruments regarding their property submitted to their respective County Recorder and Auditor offices for recordation, taxation or property ownership identification purposes;
- c) To comply with Civ. R. 10 (D), Plaintiffs-Relators shall attach to their pleading copies of any and all written instruments upon which their separate and distinct

property interests are claimed, including any and all written instruments submitted to their respective County Recorder and Auditor offices for recordation, taxation or property ownership identification purposes, or state a valid reason for their failure to do so;

- d) Each Plaintiff-Relator shall separately identify and describe their distinct property allegedly taken by the State. The identification and description of these properties shall be stated with sufficient particularity and detail to plainly and clearly indicate the location, nature, scope and extent of the property of each Plaintiff-Relator allegedly taken by the State; and
- e) To comply with the provisions of Civ. R. 9(F), each Plaintiff-Relator shall describe, with sufficient particularity and detail, the alleged taking experienced by each of them, and to state the specific time periods when the alleged temporary taking occurred.

IT IS SO ORDERED.

Date

Judge Eugene A. Lucci