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NO. CV 06 4019420

C.R. KLEWIN NORTHEAST, LLC : SUPERIOR COURT  
v. : JUDICIAL DISTRICT OF HARTFORD  
JAMES T. FLEMING ET AL. : APRIL 18, 2006

MEMORANDUM OF DECISION ON MOTION TO DISMISS

A contractor provides services to the state of Connecticut. Disputes arise as to the value of those services; negotiations ensue, and a compromise is agreed to between the contractor and the administrator of the state agency to which the services were provided. The chief legal officer of the state, the Attorney General, recommends to the chief executive officer of the state, the Governor, that the compromise be accepted. The chief executive officer agrees and authorizes the agency administrator to pay the compromise amount in full settlement of the disputed claim.

At this point the contractor might think his chances of being paid are good. But, suppose nine months pass, and the agency administrator has not paid him despite his demands for payment. Can he bring a mandamus action to require payment of the amount authorized by the Governor? Or does the doctrine of sovereign immunity preclude his resort to the court? Those are the questions

cc. Gersten, Clifford & Rome, LLP (P)  
AA-6 Eileen McEill (D)  
Rptr. Jud. Decisions  
4/18/06 (alp)

raised by the motion to dismiss this mandamus action now before the court.

I

Pursuant to a contract entered into in October 1998, the plaintiff, C.R. Klewin Northeast, LLC (Klewin), constructed the New Resource Learning Center and renovated the Lowe Building at Manchester Community College. Klewin's work was certified as accepted by the state on December 23, 2004. As is not unusual in construction projects, disputes arose during construction between Klewin and the state Department of Public Works (the department), which had charge of the project. Those disputes are summarized in a letter of December 28, 2004 from the deputy commissioner of the department for design and construction to an assistant attorney general.<sup>1</sup>

That letter reveals that the department had declared Klewin's work on the project substantially complete in December 2000, and that Klewin's initial claim for extra costs relating to delays and

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<sup>1</sup> This letter was mistakenly referred to in the complaint as "a recommendation by the Commissioner to the Governor"; see ¶ 11; and was not attached to the complaint. At the court's request and without objection by the defendants a copy was provided to the court for its consideration in deciding the motion to dismiss the complaint. The copy of the letter has been marked as court's exhibit # 1.

extra work on the project amounted to \$2,678,256. After negotiations, Klewin agreed to compromise its claim to \$1,200,000. In the letter of December 28, 2004 the department advised the attorney general's office that it had "carefully examined, reviewed and verified the amount stated in this agreement" and that "this settlement is in the best interest of the State of Connecticut as there is still substantial financial exposure, above the tentative settlement amount, related to this claim...." Court's exhibit 1, p. 4. The department believed "that the opinion of an arbitrator, judge or referee would almost certainly exceed the proposed settlement amount." Id.

In its letter the department also made the Attorney General aware that Klewin had agreed to the compromise in part because the department "would diligently pursue payment to Klewin of the negotiated settlement amount." Id., 3. It recommended the proposed settlement for acceptance and also asked "that the [assistant attorney general] give this matter your immediate attention and that you expedite acceptance of the negotiated settlement." Id., 4.

The Attorney General thereupon recommended acceptance of the compromise to the Governor.<sup>2</sup> This recommendation was made pursuant to General Statutes § 3-7 (c), which provides as follows:

Upon the recommendation of the Attorney General, the Governor may authorize the compromise of any disputed claim...against the state or any department or agency thereof, and shall certify to the proper officer or department or agency of the state the amount to be...paid under such compromise. Such certificate shall constitute sufficient authority to such officer or department or agency to pay...the amount therein specified in full settlement of such claim.

On March 8, 2005 the Governor signed such a certificate, authorizing the department to compromise Klewin's claim in the amount of \$1,200,000 "in full satisfaction of any and all claims [Klewin] may have against the State of Connecticut." Complaint, ¶ 13 and exhibit B.

Not having received payment by December 13, 2005, Klewin applied for an order for the defendants<sup>3</sup> to show cause why a writ

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<sup>2</sup> The document by which the Attorney General conveyed his recommendation was not provided to the court, but the complaint alleges that the Attorney General recommended acceptance of the compromise to the Governor, and, for the purpose of considering and deciding a motion to dismiss, the facts alleged in the complaint must be deemed by the court to be true. Duguay v. Hopkins, 191 Conn. 222, 227 (1983).

<sup>3</sup> The defendants are James T. Fleming, Commissioner of the department, M. Jodi Rell, the Governor, and Nancy Wyman, the state Comptroller.

of mandamus should not issue commanding them to implement the compromise and pay Klewin \$1,200,000. The defendants were required to appear at the Superior Court on January 9, 2006 to show cause why the writ of mandamus should not issue.

The defendants responded with a motion to dismiss for lack of subject matter jurisdiction because the doctrine of sovereign immunity bars the action.

## II

There can be no question that the state's sovereign immunity claim is properly raised by a motion to dismiss. Federal Deposit Inc. Corp. v. Peabody N.E., Inc., 239 Conn. 93, 99 (1996). Nor can there be any doubt that, with only a few exceptions, the common law doctrine of sovereign immunity bars suits against the state except where the state has authorized or consented to suit. Canning v. Lensink, 221 Conn. 346, 349 (1992). And this is so whether the defendant is the state itself, one of its agencies or departments or, as here, individual officers or employees of the state. *Id.*

There are limits, however, to the protection from suit afforded the state and its officers by sovereign immunity. "In those cases in which it is alleged that the defendant officer is

proceeding under an unconstitutional statute or in excess of his statutory authority, the interest in the protection of the plaintiff's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine." J. Block, "Suits against Government Officers and the Sovereign Immunity Doctrine", 59 Harvard L. Rev. 1060, 1061 (1946), cited with approval in Horton v. Meskill, 172 Conn. 615, 624 (1977). See also Simmons v. Parizek, 158 Conn. 304, 307 (1969). When seeking the benefit of one of these exceptions, the plaintiff must plead in the complaint facts which clearly demonstrate that the claimed exception applies. Barde v. Board of Trustees, 207 Conn. 59, 64 (1988). In ruling on a motion to dismiss "a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." Lawrence Brunoli, Inc. v. Branford, 247 Conn. 407, 410-11 (1999). A motion to dismiss "invokes the existing record and must be decided upon that alone." Perrys, Inc. v. Waterbury Redevelopment Agency, 157 Conn. 122, 124 (1968).<sup>4</sup>

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<sup>4</sup> Thus, the court must decline the state's invitation to go outside the record, implicit in its references to matters not contained in the complaint or the motion to dismiss. See Defendant's Memorandum of Law in Support of Motion to Dismiss,

III

The state has not consented to this action. Therefore, for it to survive the motion to dismiss Klewin must have pleaded facts that clearly demonstrate that one of the exceptions to sovereign immunity applies. There is no claim that the action or inaction of the defendant state officers violates any provision of the federal or state constitutions. Does the complaint adequately allege that the defendants acted in excess of their statutory authority in failing to pay the compromise amount certified for payment by the Governor?

The complaint alleges that the Governor has certified, pursuant to § 3-7(c), that Klewin's claim has been settled in the amount of \$1,200,000. By operation of that statute such a certificate "shall constitute sufficient authority to [the proper] officer or department or agency to pay...the amount therein specified in full settlement of such claim." The proper officer here is the defendant Fleming, the commissioner of public works. This statute and the Governor's position as the repository of the "supreme executive power" of the state; Conn. Const., art. IV, § 5; create a duty on the part of the defendant Fleming, a depart-

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Jan. 26, 2006, p. 8 fn. 2 and pp. 8-9.

ment head in the Executive Branch of state government; see General Statutes § 4-5; to pay the authorized amount.

In addition, the defendant Fleming, as the commissioner of public works, by statute must certify to the Comptroller that articles or services for which a settled claim against the state has been made were in fact received or performed. General Statutes § 3-117(a). The defendant Wyman is the state comptroller. The same statute, § 3-117(a), requires her to draw an order on the Treasurer for payment of any claim against the state which has been settled after the agency which ordered or received the articles or service for which such claim was made certifies that the articles or services were, in fact, received or performed.

Thus, the complaint sufficiently alleges that the failure of these two defendants to pay Klewin's claim as authorized by the Governor is in violation of their duties under state law.<sup>5</sup>

"...(A)ctions that seek injunctive or declaratory relief against a state officer acting in excess of statutory author-

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<sup>5</sup> Whether those duties can be enforced via a writ of mandamus is not a question which is before the court now. So, issues of whether the duty imposed is mandatory and not discretionary, whether Klewin has a clear legal right to have the duty performed and whether there is an adequate alternative remedy must await a hearing on the merits. See D'Eramo v. Smith, 273 Conn. 610, 615 (2005).



ity...do not conflict with the policies underlying the doctrine of sovereign immunity." Miller v. Egan, 265 Conn. 301, 314 (2003).

"The principle that the sovereign cannot be sued without its consent does not prohibit a suit for injunctive relief against one of its officers who is acting without authority." Weaver v. Ives, 152 Conn. 586, 590-91 (1965).

We previously have explained the reasons underlying the exception to the doctrine of sovereign immunity for actions seeking declaratory or injunctive relief against a state officer for conduct in excess of statutory authority. "Sovereign immunity rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property."...Because a court may tailor declaratory and injunctive relief so as to minimize any such interference, and in order "to afford an opportunity for voluntary compliance with the judgment," actions that seek injunctive or declaratory relief against a state officer acting in excess of statutory authority or pursuant to an unconstitutional statute do not conflict with the policies underlying the doctrine of sovereign immunity.

Miller v. Egan, supra, 265 Conn. 314.

Although these cases involve requests for injunctions not writs of mandamus, no reason appears why the same rationale should not apply to the latter which, after all, are in the nature of

mandatory injunctions<sup>6</sup>, and at least one court has so held. "The rule that a State is immune from suit in its own courts does not apply to an action of mandamus brought to compel a public officer to perform public duties delegated to him, since the State, as well as individuals is interested in the fulfillment of the purposes of the office which he holds." Moosup Trucking Co. v. MacDonald, 5 Conn. Sup. 114, 117 (1937).

IV

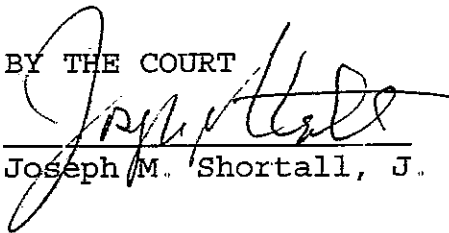
The complaint seeks relief from the inaction of state officers which is alleged to be in excess of or in contravention of their duties. It is not barred by the doctrine of sovereign immunity. Accordingly, the motion to dismiss is DENIED.

Since this court is familiar with the facts underlying this action and the respective claims of the parties, it would serve the goal of judicial economy if any further proceedings were heard by this court. Therefore, this court retains jurisdiction over all future proceedings in this case.

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<sup>6</sup> Black's Law Dictionary defines "mandamus" as "a writ issued...to compel a...government officer to perform mandatory or purely ministerial duties" and a "mandatory injunction" as "an injunction that orders an affirmative act or mandates a specified course of conduct." Black's Law Dictionary (7<sup>th</sup> Ed. 1999).

BY THE COURT

  
Joseph M. Shortall, J.