

NO. CV 06 4019420

C.R. KLEWIN NORTHEAST, LLC : SUPERIOR COURT

V. : JUDICIAL DISTRICT OF HARTFORD

JAMES T. FLEMING ET AL. : AUGUST 8, 2006

MEMORANDUM OF DECISION ON DEFENDANTS MOTION TO COMPEL COMPLI-
ANCE WITH THEIR FIRST SET OF DISCOVERY REQUESTS

In this action for mandamus the plaintiff has moved for summary judgment, claiming that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Contemporaneous with the plaintiff's filing of its motion, the defendants filed their "first set" of interrogatories and requests for production. They claim that they require the information sought through this discovery in order to "present facts essential to justify opposition" to the motion for summary judgement; Practice Book § 17-47; and the court has postponed argument on the motion until August 28, 2006 in order for this discovery to take place.

Because the plaintiff has objected to most of the interrogatories and requests for production, and the defendants have filed the requisite affidavit certifying that bona fide attempts have been made to resolve the parties' differences without being able to reach an accord; § 13-8(b); it is ripe for the court to rule

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J. O'Connell,
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on the objections so that discovery can move forward in a timely fashion.

Having considered the defendants' memorandum in support of their motion to compel compliance with discovery and the plaintiff's memorandum in opposition, the court's rulings on the plaintiff's objections to the defendants' interrogatories and requests for production are as follows:

1. Objections are OVERRULED as to interrogatories # 2, #14 (as revised in the letter of July 31, 2006 to plaintiff's counsel from assistant attorney general Eileen Meskill) and # 33 and request for production #1.

For any document(s) which plaintiff's counsel believes are protected by the attorney-client privilege or the attorney work product privilege, he shall prepare a privilege log listing all such documents and containing for each such document its title, the subject matter of the document, the type of document (e.g., memorandum, e-mail, letter, etc.), the date of the document, the author of the document, any person(s) or entity(ies) to which it was sent, the claim of privilege asserted and the factual and/or legal basis for the privilege asserted.

2. Objections are SUSTAINED as to all other interrogatories and requests for production for which an order compelling compliance was requested. Those interrogatories and requests for production do not request information which pertains to any fact which the court considers material. In addition, with regard to interrogatories #17 and #34, the information sought cannot be provided by the plaintiff "with substantially greater facility than it could otherwise be obtained" by the defendants. Practice Book § 13-2.

The defendants argue vigorously that they should be allowed to engage in "probing" discovery into the full range of the plaintiff's dealings with the state *outside of this contract*, particularly as they might have involved former Governor John Rowland, because they are material to the court's "discretion to consider equitable principles when deciding whether to issue the writ [of mandamus]". Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, 278 Conn. 408, 418 (2006). This court, however, does not have a roving commission to inquire into all of the activities of a plaintiff seeking a writ of mandamus to determine whether anything it has done gives the court pause in

issuing the writ.¹ The Supreme Court makes it clear in Jalowiec that the "equitable discretion [to deny the writ] is exercised in instances wherein the party seeking the writ has engaged in improper conduct or otherwise has violated equitable principles." Id., 419. And, Jalowiec, itself, and the cases it cites also make it clear that the "fraudulent or inequitable conduct"; Id., 420; which will justify a court in denying the writ must occur *in the context of the particular dispute which is before the court.*

The Supreme Court does not cite in Jalowiec and this court has not found any cases in which a court considering a mandamus petition has gone outside of the dispute before it to look for unclean hands on the part of the petitioner, nor have the

¹ For example, the defendants perceive impropriety in a legal challenge mounted by the president of the plaintiff to the authority of a legislative committee to inquire into certain "ethics matters" involving his relationship with former Governor Rowland. See D'Amato et al. v. Government Administration & Elections Committee et al., superior court, Judicial District of Hartford (Docket No. CV 05-4012032, Mar. 9, 2006). The court, however, sees nothing wrong with the subject of a legislative inquiry raising legal questions about the jurisdiction and authority of the particular committee to conduct the proposed inquiry. See, e.g., Sullivan v. McDonald et al., superior court, Judicial District of Waterbury (Docket No. CV 06-4010696, June 30, 2006) (Motion to reconsider pending), in which the Judicial Branch joined in the challenge to the Judiciary Committee's authority; Office of the Governor v. Select Committee of Inquiry, 271 Conn. 540 (2004).

defendants cited the court to any such cases. For example, in Sullivan v. Morgan, 155 Conn. 630 (1967), relied on by the defendants for the proposition that the writ might be denied if its issuance would be "contrary to the public interest"; Id., 635; the former state employee seeking an order mandating his reemployment had delayed over four years in seeking reinstatement to the position from which he had been terminated. That delay, if found to be unreasonable by the court, would justify denial of the writ because, otherwise, government services would have been disrupted and two salaries would have been paid by the state for the same service. Id., 634.

The defendants also cite a 1921 decision of a New York City trial judge who denied a city contractor a writ mandating payment for street paving services because he had failed to cooperate in a corruption inquiry conducted by the city comptroller under a city charter provision then in effect. People ex rel. H.J. Mullen Contracting Co., Inc. v. Craig, 114 Misc. 216, 187 N.Y.S. 123 (1921). Apart from the negligible precedential value of such a decision, the case is unpersuasive on the defendants' claim that this court should look beyond the contract for which the plaintiff seeks payment. The comptroller's inquiry with which the contractor

failed to cooperate in Mullen was into the very contract for which the contractor was seeking a writ mandating payment. Id., 187 N.Y.S. 126.

It is obvious from the defendants' submissions that they are in possession of substantial information which they can present in connection with the plaintiff's motion for summary judgment. See, e.g., Defendants' Motion for Reconsideration and Request for Continuance, p. 8. Nevertheless, the court has granted the continuance and some of the attendant discovery they have requested in order to ensure that evidence of any "fraudulent or inequitable conduct" that may be in the plaintiff's possession will be uncovered. If the plaintiff engaged in any improper conduct, in regard to employment of the former Governor or in any other respect, that affected the settlement which the present Governor certified for payment by the state, this court wants to know about it and will consider it in deciding whether the plaintiff is entitled to a writ of mandamus.²

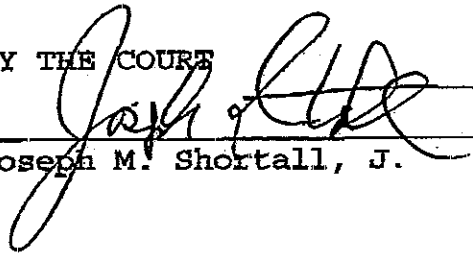
² An internal investigation conducted in April 2005 by the governor's office and the department of public works concluded that "negotiations in this matter were handled appropriately and that inappropriate communications or activities did not occur." See Memorandum to defendant Fleming made part of Exhibit C attached to the affidavit of assistant attorney general Susan Quinn Cobb dated July 24, 2006.

The plaintiff will comply with the court's order by 3:00 PM on Wednesday, August 9, 2006.

The discovery contemplated includes deposition of the plaintiff's president, Michael D'Amato, which will take place at 1:00 PM on Friday, August 11, 2006. Because Mr. D'Amato has agreed through counsel to be present for his deposition, the motion to compel his presence is DENIED.

At his deposition Mr. D'Amato may be questioned regarding any averments made in his affidavit of June 28, 2006, submitted in support of the motion for summary judgment. He may be questioned about the subject matters of interrogatories #2, 14 and 33 and request for production #1. He may be questioned about his personal involvement in efforts to comply with the approved interrogatories and request for production. He may not be questioned about the subject matter of any interrogatory or request for production to which objection has been sustained.

BY THE COURT



Joseph M. Shortall, J.