DOCKET NO. CV-06-4019420	:	SUPERIOR COURT
C.R. KLEWIN NORTHEAST, LLC.	:	J.D. OF HARTFORD
VS.	:	AT HARTFORD
JAMES T. FLEMING, COMMISSIONER DEPARTMENT OF PUBLIC WORKS FOR THE STATE OF CONNECTICUT, M. JODI RELL, GOVERNOR OF THE STATE OF CONNECTICUT; and NANCY WYMAN, COMPTROLLER OF THE STATE OF CONNECTICUT	:	FEBRUARY 7, 2006

OBJECTION TO MOTION TO DISMISS

Plaintiff objects to defendant's Motion to Dismiss dated January 26, 2006, for the following reasons.

A. Nature of the Suit

In its Verified Complaint, dated December 13, 2005, the plaintiff, C. R. Klewin Northeast, LLC, alleged that pursuant to its Contract with the Department of Public Works ("DPW") it constructed a facility at Manchester Community College (the "Project") (¶ 5, 6); that in settlement of a dispute concerning the Project, a Compromise was reached by which DPW agreed that plaintiff should be paid $1,200,000 (¶ 9, 10); that after the compromise was recommended by the DPW commissioner to the Governor and after the Attorney General recommended acceptance of it, the Governor and certified that the DOT Commissioner should pay said amount to the plaintiff. (¶ 11, 12)

Defendant have failed and refused to pay the compromise. (¶ 16) The relevant statutes provide that the Commissioner of Public Works is responsible for the administrative functions and planning of all capital improvements undertaken by the state. C. G. S. § 46-1 (¶ 2); the Governor, upon recommendation of the Attorney General, may authorize the

compromise of any disputed claim against the state or any department and shall certify to the proper officers or department the amount to be paid under such compromise and such certificate is authority to such officer or department to pay said amount. C. G. S. § 3-76(c) (¶ 3) The Comptroller is to settle all accounts. Article Fourth, Section 24 of the Connecticut Constitution; C. G. S. § 3-112 (¶ 4)

Specifically, C. G. S. § 3-112 provides that the comptroller shall register all warrants or orders for the disbursement of public money and give orders to the treasurer for the sums so allowed.

The plaintiff seeks by writ of mandamus an order that the defendants implement the compromise and pay plaintiff the $1,200,000.00 or order such further legal or equitable relief as it deems just and proper.

B. The Motion to Dismiss

The claims made in the Motion to Dismiss and plaintiff's respective responses are:

I. The Doctrine of Sovereign Immunity Does Not Bar A Suit For Mandamus

Sovereign immunity is no defense to an action for mandamus. Sovereign immunity has never been considered a bar to mandamus actions seeking to compel public officials to perform the duties imposed upon them in their official capacities. Haneke v. Secretary of HEW, 535 F2c. 1291, 1296 n. 14 (D. C. Cir. 1976); Anselmo v. King, 902 F. Supp. 273, 277 (D. D. C. 1995); Bowen v. Massachusetts, 487 U. S. 879, 899, 109 S. Ct. 2722, 2734-2735, 101 L. Ed. 2d. 749 (1988); Moosup Trucking Co., Inc. v. John A. MacDonald State Highway Commissioner, 5 Conn. Sup. 114, 117 (1937) ("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…; see, also, Cox v. Aiken, 86

Conn. App. 587, 592, 596 (an injunction action against the Department of Social Services for action in excess of it s statutory authority is not barred by sovereign immunity.)

Thus, there is no need for any legislation authorizing a suit for mandamus for in such a case there is no sovereign immunity defense available to any agency, officer, commissioner or elected official of the State.

II. The Prerequisites to Pursuing an Action For Mandamus Have Been Fulfilled.

A mandamus plaintiff has to fulfill the following (1) the duty sought to be enforced must be a duty that is mandatory and not discretionary; (2) the party applying for the writ must have a clear legal right to have the duty performed; and (3) there is not other specific adequate remedy. Bloom v. Gershon, 271 Conn. 96, 106 (2004)

a. An Application to the Claims Commissioner is Not a Adequate Remedy.

In regard to prerequisite (3), above, the defendants argue that an adequate remedy lies with the Claims Commissioner, C. G. S. § 4-160, because plaintiff is seeking an award of money damages and defendants cite in support of the argument the case of Department of Public Works v. ECAP, 250 Conn. 553 (1999).

In ECAP, the DPW did not seek an order of mandamus but sought an injunction to prevent a contractor from pursuing an arbitration concerning the contractor's claim that the DPW has breached a purported settlement agreement with the DPW. C. G. S. § 4-61 provided for the arbitration of construction contract disputes arising "under" the contract. It was held that a settlement agreement does not arise "under " a contract and, therefore, the arbitration provisions under § 4-61 did not apply. In footnote 8 to the opinion, the Supreme Court noted that the contractor had a remedy under C. G. S. § 4-61 (Claims Commissioner Statute) concerning the contractor's claims that the state has breached an

agreement to settle a dispute. The lower court's opinion, State Department of Public Works v. ECAP Construction Co., 22 Conn. Rptr. 229, 98 – CBAR – 0472 (Sattor, J., 1998) (copy attached) indicates that the parties were in dispute as to the existence of any settlement. The DPW Commissioners claimed that he had not approved of any settlement; and the Attorney General had not approved of any settlement pursuant to C. G. S. § 3-7.

Thus, the ECAP case did not involve any certified and approved compromise such as exists in our case as to which the appropriate state official had a ministerial duty to abide by and perform the plaintiff no clear legal right to any settlement which, could lend itself to a mandamus remedy.

The ECAP case has no application to the entirely different facts of the instant case.

Defendants also rely on the case of Alter and Associates, LLC v. Lantz, 90 Conn. App. 15 (2005). In Alter a disappointed bidder on a contract with the Commissioner of Correction south an injunction or a writ of mandamus to compel the defendant to go forward with a bid proposal. It was held that plaintiff was not entitled to injunctive relief because there was no claim that the defendant engaged in fraud, corruption or bid rigging, essential for an injunction claim to avoid the defense of sovereign immunity. The court further held that plaintiff's alleged injury could be remedied by a claim for monetary damages brought to the claims Commissioner [who could waive the defense of sovereign immunity]. The court also stated that mandamus was inappropriate because the duties sought to be enforced were ministerial [there being no approved settlement for a liquidated sum].

Alter has no baring on our case because in this case plaintiff is not seeking an injunction and need not satisfy the prerequisites for an injunction against a State entity; and

plaintiff is not seeking monetary damages. It is only seeking specific performance of a ministerial duty. Alter did not involve a ministerial duty.

Since sovereign immunity is not a bar to this mandamus action. The State is subject to suit without its consent and there is no need to seek the [unnecessary] approval of the Claims Commissioner whose function is to resolve the bar of sovereign immunity, a bar which, does not exist in any case. Cox v. Aiken, 86 Conn. App. 587, 596 (2004) A litigant is not required to engage in a futile act.

Furthermore, the jurisdiction of the Claims Commissioner I limited to claims against the State for "monetary damages." Bloom v. Gershon, 271 Conn. 96, 111 (2004) Plaintiff suit is not for "monetary damages."

The issue was resolved by the United States Supreme Court in Bowen v. Massachusetts, 487 US 879, 893-901, 101 L. Ed. 2A 749, 108 S. Ct. 2722. It was held that in a suit to enforce the medicade Act's provision requiring that the Secretary of HEW shall pay certain amounts for Medicaid services was not a suit seeking money in compensation for a damages sustained by a failure of the federal government to pay as mandated; but it was a suit seeking to enforce the statutory mandate itself, which happens to be for the payment of money; the fact that the mandate was for the payment of money is not be confused with the question of whether such payment, in these circumstances, is a payment of money as damages or as specific relief. It was held that this was specific relief, not relief in the form of damages. "The fact that a judicial remedy may require one party to pay money to another is sufficient reason to characterize the relief as 'money damages'." Same, Board of Administration v. Wilson, 61 Cal. Rptr 2d 207, 52 Cal. App. 4th 1109, rev. den. (Mandamus, which seeks order compelling official to perform a mandatory duty, is not an

action against state for money, even though the result compels a public official to release money wrongfully obtained."); Anselmo v. King, 902 F. Supp. 273, 275 (D.D.C. 1995) (where a mandamus action seeks funds to which a statute entitles a plaintiff rather than money compensation for losses a plaintiff may have suffered by virtue of the withholding of those funds, the relief sought is specific relief and not classical money damages. This action for mandamus is not an action for money damages and sovereign immunity is not implicated.)

The Connecticut cases are in agreement. See, e. g. , Branard v. Staub, Controller, 61 Conn. 570 (1892) (Mandamus is proper remedy to compel the State Controller to pay the plaintiff a sum claimed by him to be due as his salary as the Governor's executive secretary. Motion to quash, denied.); State v. Staub Comptroller, 61 Conn. 553 (1892) (Mandamus is a proper remedy to compel the State Controller to pay towns certain sums for school purposes as directed by statute. Where the law fixes the amount of claim, or if the account is liquidated, in that, the amount is agreed upon by the parties, and manner of its payment, the comptroller's duty is to draw his order in payment of it. This is a ministerial act. Whenever any public officers, however high is commanded by any constitution or statute to perform a ministerial act, the performance may be compelled by mandamus.); Mossup Trucking Co. v. MacDonald, State Highway Comm., 5 Conn. Sup. 114 (1937) (Where a contractor seeks payment of a liquidated claim for services performed, mandamus is the proper remedy to require the State Highway Commissioner to certify the sum due to the State Comptroller so the latter may be enabled to issue his warrant or order upon the State Treasurer); Alcorn, Attorney General v. Dowe, 9 Conn. Sup. 440 (1941) (Mandamus is the proper remedy to require the comptroller to make payment to the plaintiff for any difference in pay between

his state salary and his military salary in accordance with the applicable statute. Compliance with the statute is a ministerial act. Alcorn, Attorney General v. Dowe, 10 Conn. 346 (same); State v. D' Aulisa, 133 Conn. 414 (1947) (Mandamus is a proper remedy to require a town comptroller to pay teachers' and superintendents' salaries. The duty is ministerial.); Brown v. Lawlor, 119 Conn. 155 (1934) (Mandamus is a proper remedy to compel payment of retirement pensions to fireman and policemen.)

b. The Plaintiff has a clear legal right to have the duty performed.

One of the requirements for a writ of mandamus, is that the plaintiff should have a clear legal right to have the duty performed. Bloom v. Gershon, 271 Conn. 96, 106.

The above statutory obligations placed on the DPW Commissioner and the Comptroller established that the plaintiff has a clear legal right to have the claimed duties performed. By his recommendation to the Governor, the Attorney General has agreed that that is the case. The defendants make no argument in opposition to this claim and they have abandoned any claim that the duties sought to be enforced are not ministerial [see footnote 2 of defendant's Memorandum]. Instead they rely on concepts that govern actions seeking declaratory judgment or injunctions. (Def.'s Memorandum, p. 5) Those theories of recovery have no application to a mandamus action.

In a mandamus action, a plaintiff need not prove that a statute has waived sovereign immunity, it need not prove that an official violated a constitutional right, and it need not prove that an official acted in excess of statutory authority.

Defendants' arguments based on the above criteria do not apply to this mandamus action. Bloom, supra, at p. 106.

As above explained, in a mandamus case, the plaintiff must establish three things, (1) that the law imposed on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the plaintiff has a clear legal right to have the duty performed; and (3) there is not other specific remedy. Bloom, supra, at pg. 106.

There is in this case a binding compromise, which has properly accepted, certified and authorized; the duty created by this compromise is ministerial, i. e. , it is mandatory; that there is not need to pursue any claim before the claims commissioner since he has no jurisdiction; and this is a claim for specific relief which is not a claim for money damages. (It might be a claim for money damage only if the plaintiff had claimed that it had suffered some damage for failure to abide by the Compromise, such as seeking recovery for a lost opportunity to invest the $1,200,000 in an interest bearing account or instrument. No such relief is being pursued.)

III. The Short Memeory of the AAG's Office.

As above shown, Hugh Alcorn, the State's Attorney General, was of the opinion that mandamus is a proper remedy to require the Comptroller to perform his duty to make monetary salary payment's. Alcorm, Attorney General, supra.

In 1992, Attorney General Blumenthal issued an opinion that mandamus is a proper remedy to enforce the Comptroller's statutory duties mandated by C. G. S. § 3-112. This is the same statute relied upon by plaintiff. Op. Atty. Gen. No. 92-035 (copy attached)

Ruled of Professional Conduct 3.3(3) requires an attorney to disclose to the court Connecticut legal authority that is directly adverse to the position of the client and not already disclosed by opposing counsel.

The Attorney General's office has failed to abide by rule 3.3(3). Not only has the Attorney General's office failed to cite to the court the above contrary positions taken by its own office but, also has failed to cite to the court the other contrary Connecticut cases discussed above that are directly in conflict to the position it now advances on behalf of the defendant's

Instead, the Attorney General's Office has argued it s position as if this was a case seeking a declaratory judgment or an injunction the requirement s for which are inappropriate to what is required in a mandamus action. The Rule of Professional Conduct do not encourage such an approach to the law.

CONCLUSION

For the above reasons, there is no merit to the defendants' Motion to Dismiss and it should be denied.

PLAINTIFF,

By: _____

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ORDER

The above Objection is sustained/overruled this ____ day of _____, 2006.

The Court

By_____
Judge/Asst. Clerk

CERTIFICATION

I HEREBY CERTIFY that a copy of the foregoing Notice was sent via certified mail, return receipt requested, on December 28, 2007 to:

Assistant Attorney General Nancy Arnold
Assistant Attorney General Eileen M. Meskill
Office of the Attorney General
55 Elm Street
Hartford, CT 06106

_____
Eliot B. Gersten
Commissioner of the Superior Court