NO. CV 06 4019420

C.R. KLEWIN NORTHEAST, LLC : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF HARTFORD

JAMES T. FLEMING ET AL. : SEPTEMBER 20, 2006

MEMORANDUM OF DECISION

The questions posed by this case are: Did the plaintiff, C.R. Klewin Northeast, LLC (Klewin) and the state department of public works (DPW) reach an agreement to compromise at the amount of $1,200,000 a claim which Klewin made against the state? Did the defendant M. Jodi Rell, the governor, pursuant to Conn. General Statutes § 3-7 (c), approve that agreement and authorize the defendant James T. Fleming, the commissioner of DPW, to pay $1,200,000 in full and final settlement of Klewin's claim? When the governor formally approves an agreement to compromise a claim against the state and authorizes payment of the amount of the compromise, pursuant to § 3-7 (c), can that authorization be enforced by way of the extraordinary remedy of mandamus?

The parties to this mandamus action have filed cross motions for summary judgment. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue

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as to any material fact and that the moving party is entitled to judgment as a matter of law. "A material fact is one that would alter the outcome of the case. The trial court, in deciding a motion for summary judgment, must view the evidence in a light most favorable to the nonmoving party. The test is whether a party would be entitled to a directed verdict on the same facts. The party seeking summary judgment has the burden of presenting evidence showing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law, and the party opposing the motion must provide an evidentiary foundation to demonstrate that a genuine issue over a material fact actually exists." (Internal citations omitted.) Southbridge Associates, LLC v. Garofalo, 53 Conn. App. 11, 14 (1999). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." Nolan v. Borkowski, 206 Conn. 495, 500 (1988).

Having reviewed the pleadings as well as the affidavits and other materials submitted in support of the respective motions, the court agrees with the parties that the resolution of this case depends on an application of established principles of the law of mandamus to the rather unusual and undisputed facts of this case.

I

Pursuant to a contract entered into in October 1998, Klewin constructed the New Resource Learning Center and renovated the Lowe Building at Manchester Community College. The work was substantially completed in November 2000, and Klewin was paid the contract price by DPW. In August 2001 Klewin submitted a claim for payment of almost $2.7 million in additional costs it claimed to have incurred for extra work on the project. After the claim was audited by DPW, Klewin submitted a revised claim in the amount of $1.5 million in February 2002. From that time until September 2004 there were further contacts between Klewin and DPW concerning the former's claim but, at least in DPW's opinion, no agreement on a resolution. On September 14, 2004 there was a meeting at DPW attended by Michael D'Amato, president of Klewin, David O'Hearn, deputy commissioner of DPW and other DPW personnel. Mr. D'Amato was informed that DPW did not acknowledge any agreement on its part to pay the revised claim of $1.5 million, that it valued Klewin's claim for "extras" at $770,000, that it might consider increasing that amount by $159,000 for perimeter roof blocking at the project, that interest charges might also be considered and that the defendant Fleming would be updated on Klewin's claim the

following day. The minutes also record that Mr. D'Amato would accept a compromise amount of $1.2 million if the matter could be resolved in a short period of time.

On December 28, 2004 deputy commissioner O'Hearn wrote to an assistant attorney general, providing him with a detailed analysis of the issues raised by Klewin's claim and requesting that the attorney general approve the "negotiated settlement" of the claim in the amount of $1.2 million.[1] Mr. O'Hearn's letter concluded, "the proposed settlement represents the best possible alternative for the State given all the issues stated above. We ask that you give this matter your immediate attention and that you expedite acceptance of the negotiated settlement."

Pursuant to Conn. General Statutes § 3-7 (c)[2], the attorney general wrote to the governor recommending approval of the

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[1] At about the same time, on December 23, 2004, the project was certified as accepted by DPW.

[2] "Upon the recommendation of the Attorney General, the Governor may authorize the compromise of any disputed claim by or 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 received or paid under such compromise. Such certificate shall constitute sufficient authority to such officer or department or agency to pay or receive the amount therein specified in full settlement of such claim."

settlement.[3] On March 8, 2005 the governor, also pursuant to § 3-7 (c), signed an "Authorization and Certificate as to Compromise" which gave authorization to DPW to compromise Klewin's claim in the amount of $1.2 million, "in full satisfaction of any and all claims [Klewin] may have against the State of Connecticut." When payment had not been received by December 2005 Klewin brought this mandamus action against the governor, commissioner Fleming and the state comptroller, Nancy Wyman, praying for an order that the defendants "implement the Compromise . . . and pay Klewin $1,2000,000."

II

"A writ of mandamus is an extraordinary remedy, available in limited circumstances for limited purposes. . . . The writ is proper only when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other

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[3] The attorney general declined to provide the court with a copy of his letter to the governor, claiming that it is protected by the attorney-client privilege, and Klewin has not challenged that claim. The complaint alleges; Verified Complaint, Dec. 13, 2005, ¶ 12; and the answer of defendants Rell and Fleming admits; Answer, June 19, 2006, ¶ 12; that the attorney general recommended the proposed agreement to the governor, pursuant to § 3-7.

specific adequate remedy." (Internal quotation marks omitted.) Morris v. Congdon, 277 Conn. 565, 569 (2006). Moreover, "(t)here is authority for the proposition that, even when a plaintiff has a clear legal right to the writ, principles of equity and justice may militate against its issuance." Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, 278 Conn. 408, 418 (2006). The Supreme Court in Jalowiec Realty, however, made it clear that the equitable discretion a court has to deny the writ may not be exercised "simply because [the court] disagrees with the legally mandated outcome"; Id., 420; rather, "(t)his equitable discretion is exercised in instances wherein the party seeking the writ has engaged in improper conduct or otherwise has violated equitable principles." Id., 419. In the absence of evidence of "fraudulent or inequitable conduct" on the part of the plaintiff the Court reversed the trial court's denial of the writ in that case. Id., 420.

The plaintiff here claims that the governor's action under § 3-7 (c) authorizing the compromise of Klewin's claim creates in him a clear legal right to the performance of a mandatory duty by the commissioner of DPW and the comptroller; viz., the payment of $1.2 million, for which he has no other adequate remedy. The

defendants deny all these claims and assert in addition that "the equities weigh strongly against issuing a mandamus at this time." Memorandum of Law, August 23, 2006 (Defendant's Memorandum), 25.

Prior to moving for summary judgment the defendants filed a motion to strike the complaint on the ground that the plaintiff has adequate alternative remedies which preclude issuance of a writ of mandamus; viz., a suit in contract against the state, if authorized by the claims commissioner, pursuant to Conn. General Statutes § 4-160[4], or a civil action or binding arbitration under Conn. General Statutes § 4-61, pertaining to disputes arising out of public works contracts. That motion was denied. To summarize, this court held that, in a case like this, where the governor has already approved payment to a claimant in a specified amount, resort to the claims commissioner is an inadequate remedy because of the uncertainties whether the commissioner would recommend payment of the claim by the general assembly, whether the general

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[4] The claims commissioner may approve immediate payment of claims not exceeding $7,500. Conn. General Statutes § 4-158. For claims exceeding that amount he may recommend to the general assembly payment or rejection, and the general assembly may accept or reject that recommendation; where it rejects the recommendation, it may grant or deny the claimant permission to sue the state. § 4-159. Finally, the claims commissioner may authorize suit against the state on any claim when he "deems it just and equitable." § 4-160.

assembly would accept or reject that recommendation, whether the claims commissioner or the general assembly would authorize suit, the delay in recovering by way of such an action, should it be authorized, the added expense to Klewin and the possibility that it would lose the suit or recover less than the governor has already approved. "Any other relief, the existence of which will preclude the resort to the remedy by mandamus, must not only be adequate, but it must be specific, that is, . . . adapted to secure the desired result effectively, conveniently, completely and directly upon the very subject matter involved." Chamber of Commerce v. Murphy, 179 Conn. 712, 721 (1980). Transcript of proceedings, May 25, 2006, 33-36. For essentially the same reasons this court held that an action or arbitration under § 4-61 would be inadequate. Id., 37.

Klewin seeks immediate payment of $1.2 million as authorized by the governor. Neither of the remedies suggested by the defendants "will place the [plaintiff] *in statu quo*, that is, in the same position he would have been had the duty been performed. . . . Indeed, [the alternative] remedy must be more than this: it must be a remedy which itself enforces in some way the performance of the particular duty, and not merely a remedy which

in the end saves the party to whom the duty is owed unharmed by its nonperformance." State v. Erickson, 104 Conn. 542, 549 (1926).

In denying the motion to strike the court has already determined that the plaintiff has satisfied the third requirement for issuance of the writ, i.e., that, assuming he has a clear legal right to payment of the $1.2 million, he has no adequate remedy other than mandamus.[5] So, the court must determiine whether Klewin has that clear legal right to performance of a mandatory duty by the defendants.

III

The statute in question, subsection (c) of § 3-7, reads as follows:

> Upon the recommendation of the Attorney General, the Governor may authorize the compromise of any disputed claim by or 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 received or paid under such compromise. Such certificate shall constitute sufficient authority to such officer or department or agency to pay or re-

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[5] This holding does not conflict with Department of Public Works v. ECAP Construction Co., 250 Conn. 553 (1999), which indicated in dicta that a person claiming that the state has breached a settlement agreement may request permission from the claims commissioner to bring suit on the agreement. Id., 562 n. 8. In that case there had never been a request for the governor to approve the settlement under § 3-7 (c), let alone approval by the governor. Id., 556.

ceive the amount therein specified in full settlement of such claim.

Neither the parties nor the court have found any cases construing or applying this statute. Like all statutes, its meaning "shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." Conn. General Statutes § 1-2z. In addition, the text of the statute as a whole must be considered in determining its meaning. Wiseman v. Armstrong, 269 Conn. 802, 820 (2004).

To "authorize" *someone* means "to give legal authority; to empower" that person. Black's Law Dictionary (7th ed. 1999). To authorize *something*, however, means "to formally approve; to sanction [as in] the city authorized the construction project." Id. Thus, when the statute says the governor "may authorize the compromise of any disputed claim", it is clear from the accepted legal meaning of those words that the governor is formally approving or sanctioning that "compromise", that "agreement between two or more persons to settle matters in dispute between them." Id.

Reading the statute as a whole confirms that the governor's action under § 3-7 represents her approval on behalf of the state of the particular agreement entered into between a state

department or agency and another party. Having approved the settlement, the governor goes on to "certify", i.e., "to authenticate or verify in writing"; Id.; to the proper state officer or department "the amount to be received or paid under such compromise." If a specific compromise had not been approved by the governor, there would be no reason for her to specify the particular amount to be paid or received by the state. The words "to be received or paid" also connote that the amount has been finally determined by the governor's approval.

If the text of the statute is considered ambiguous, resort may be had to "extratextual evidence" to ascertain its meaning. § 1-2z. The legislative history of § 3-7, sparse though it is, indicates that it is the action of the governor under the statute which results in binding the state to the agreement. Subsection (c) originated in 1917 in House Bill No. 36, section 2 of which empowered the "board of control" to "authorize the compromise of any disputed claim by or against the state...." The board of control consisted of the governor, attorney general, treasurer and comptroller of the state.[6] In comments before the finance committee considering the bill, William Corbin, state tax

[6] The governor was substituted in the statute for the board of control by Public Acts 1937, No. 340.

commissioner, testified, "Very often the state has a claim which may be found to be incorrect, and in like manner corporations have claims against the state, the justice of which is apparent but no means of adjusting except through a suit. . . . If the Board of Control is given this power to compromise claims it will certainly not be abused and will result in saving." Conn. Joint Standing Committee Hearings, Finance, 1917 Sess., pp. 97-98. This comment indicates that the board of control, now the governor, acting under this statute, effects a final resolution of a disputed claim on behalf of the state by "authoriz(ing) the compromise" of that claim.

The statute's plain language and its legislative history, therefore, demonstrate that the governor's certificate is a final approval of the settlement of a disputed claim by the repository of the "supreme executive power" of the state. Conn. Const., art. IV, § 5.[7] As such it creates a clear legal right on the part of

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[7] The attorney general's opinion attached to the defendants' memorandum of law in support of their motion for summary judgment; Opinions, Conn. Atty. Gen. No. 99-011 (Oct. 15, 1999); answers in the negative the question whether a state agency head can enter into an agreement binding the state to accept a lesser amount in settlement of a disputed claim *before* the governor's certificate under § 3-7 is obtained. The court here holds that, *after* that certificate is obtained, there is a binding agreement which gives Klewin a clear legal right to be paid the settlement amount

the other party to the settlement to payment of the amount certified by the governor.

The undisputed facts of this case, which establish the context in which the governor's certificate was executed, demonstrate that a settlement had been reached between Klewin and DPW before the certificate was sought; in fact, the affidavit submitted by Mr. Fleming in support of the defendants' motion for summary judgment demonstrates that the governor's approval is not sought until after a "tentative compromise" has been reached. Affidavit of James T. Fleming, Aug. 21, 2006 (Fleming Affidavit), ¶ 7.[8]

The best evidence that there was an agreement between the parties, a "compromise" submitted for the governor's final approval, are the minutes of the September 14, 2004 meeting and the letter of Mr. O'Hearn of December 28, 2004, both of which were submitted by the defendants in support of their motion. The minutes corroborate the assertion in the affidavit submitted by

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approved by the governor.

[8] The defendants make much of the "tentative" nature of the compromise submitted to the governor for approval. It is tentative in the sense that it is not finally approved and binding on the state until the governor acts; that does not mean that the terms are not worked out and mutually agreed upon by the parties, and the facts here show that to be the case.

Mr. D'Amato in support of Klewin's motion; Affidavit of Michael D'Amato, June 28, 2006 (D'Amato Affidavit), ¶¶ 5-11; that a process of negotiation had been continuing, off and on, between Klewin and DPW for over three years, and that at the meeting of September 14 Klewin, in the person of Mr. D'Amato, stated its willingness to "accept a compromise amount of $1.2 M (sic) if the matter can be resolved in a short period of time." Affidavit of David J. O'Hearn, August 23, 2006 (O'Hearn Affidavit), Exhibit A, 1. The letter; O'Hearn Affidavit, Exhibit B, 3; conveys a request that the "negotiated settlement" in the specific amount proposed by Mr. D'Amato at the September 14 meeting be approved and that the attorney general's office "expedite" acceptance of the "negotiated settlement" because "the agreement" was reached based on, inter alia, DPW's commitment that it "would diligently pursue payment to Klewin of the negotiated settlement amount."[9]

Thus, it is clear that Klewin and DPW had agreed on the amount to be paid by the state to settle this disputed claim, and it is clear from the context of the lengthy negotiations and the

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[9] The state calls attention to the two occasions in his letter where Mr. O'Hearn describes the $1.2 million figure as a "tentative settlement value" or "tentative settlement amount." There are seven other instances where he labels the overall proposal submitted for approval as a "settlement", an "agreement" or a "negotiated settlement".

detailed settlement terms spelled out in the letter of December 28 that this was to be in full and final settlement of all of Klewin's claims related to this project. Indeed, Mr. O'Hearn affirms that "DPW and Klewin *orally agreed* to a tentative[10] settlement in the amount of $1.2 million of Klewin's claims" after the meeting on September 14 and after approval by the defendant Fleming. (Emphasis added.) O'Hearn Affidavit, ¶ 14.[11]

But, argues the state, "DPW's ability to obtain funding was a condition precedent to any future compromise and none of the state defendants owe, or are capable of performing a mandatory, non-discretionary duty to fund the proposed compromise." Defendants' Memorandum, 24. Specifically, they claim that "the parties understood that any future compromise was subject to DPW's ability to obtain funding from the Bond Commission." Id.

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[10] See footnote 8, supra.

[11] The defendants appear to believe that for an agreement to be enforceable it must be in writing and the parties must have executed a release of outstanding claims. Defendants' Memorandum 16-17. Of course, oral agreements are just as binding as written ones if the necessary elements of a contract are present. See, e.g., MD Drilling & Blasting v. MLS Construction, LLC, 93 Conn. App. 451, 456, 457 (2006); cf. Conn. General Statutes § 52-581. The defendants do not cite and the court has not found any authority for the proposition that releases must have been executed before an agreement may be found to be binding between the parties.

In support of this assertion the defendants have submitted the O'Hearn and Fleming affidavits. In his affidavit Mr. O'Hearn states that at the September 14 meeting he informed Mr. D'Amato that funding approval by the bond commission had to be obtained before the compromise could be implemented. O'Hearn Affidavit, ¶ 13. He does not state that Mr. D'Amato agreed that bond commission approval was part of the agreement discussed at that meeting, only that Mr. D'Amato "expressed some familiarity" with bond commission procedures and the need for approval of the compromise by the governor under § 3-7. Moreover, in the immediately succeeding paragraph of his affidavit, where Mr. O'Hearn avers that an oral agreement was reached by DPW and Klewin subsequent to the meeting of September 14, no mention is made of the bond commission.

The minutes of the September 14 meeting, submitted by the defendants in support of their motion, are comprehensive in reciting the discussion among the participants and make no mention whatever of such advice to Mr. D'Amato let alone an agreement by him to bond commission approval as part of any agreement to resolve his claim. Nor does Mr. O'Hearn's letter of December 28 make any mention whatever of the bond commission in laying out the details of the parties' agreement for submission to the governor.

The defendants claim that at his deposition Mr. D'Amato admitted that funding by the bond commission was a condition precedent to his agreement with DPW: that is decidedly not the case. He testified that the bond commission was "one mechanism" for funding; Transcript of deposition of Michael D'Amato, August 11, 2006, p. 25; that the bond commission is used "at times" to fund capital projects, and that he didn't know why funding from the bond commission would be needed to pay the settlement; Id., p. 26; that there was discussion among DPW employees at the September 14 meeting of submitting the compromise to the bond commission for funding; Id., pp. 43-44; but that his understanding was that "funding had to be approved from other agencies...from other places, rainy day fund, Nancy Wyman's office, and funding could be through bonding by the state." (Emphasis added.) Id., 55.

At his deposition Mr. D'Amato characterized the bond commission as "one mechanism of funding in the State of Connecticut...." "If that funding mechanism for some reason didn't work, there's other ways to fund projects within the State of Connecticut. *It doesn't mean the agreement's off the table.* It just means we got to find funding another way." (Emphasis supplied.) Id., 47-48. So, contrary to the defendants' claim, Mr. D'Amato denied at

his deposition that bond commission funding was an element of, let alone a condition precedent to, Klewin's agreement with DPW.

The material fact is whether there was an agreement between DPW and Klewin for the governor to approve. Klewin's president, Mr. D'Amato, avers that there was in the affidavit he submitted in support of Klewin's motion for summary judgment. D'Amato Affidavit, ¶ 11.[12] The defendants have failed to provide an evidentiary foundation to support their claim that there was no agreement. Indeed, some of their submissions demonstrate just the reverse. Their submissions have failed even to raise a genuine issue as to that material fact.

Regarding the defendants's argument that bond commission action is required by law to fund any such agreement, Commissioner Fleming averred that "(i)f there are no project monies available [to fund a compromise of a disputed claim arising out of a construction contract], funding *typically* comes from the approval by the Bond Commission for additional sale of bonds." (Emphasis

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[12] This was reinforced by his deposition testimony: "It's my understanding of that meeting, that we had walked out of that meeting with a deal. In fact, during that meeting, I got up and said I'm leaving because we didn't have deal, and I was a little bit irritated by their approach. He called me back to the room, and that's when we reached the $1.2 million agreement."

added.) Fleming Affidavit, ¶ 7. This doesn't sound like the description of a mandatory step in the settlement of a disputed construction claim, and no statutory or other authority was cited by the defendants for a requirement that such settlements be funded by the bond commission. At oral argument on these motions they conceded that there is no such requirement, that it is simply their *preference* to obtain funding from the bond commission.

It is not as if no other source of funding was or is available. Conn. General Statutes § 4-160 (j) provides that settlements of claims against the state shall be paid from the appropriation of the agency which received the goods or services for which payment is sought, and that all other amounts shall be paid from such appropriation as the general assembly may have made for the payment of claims. It does not exclude construction claims. DPW has a budget this fiscal year of $45,075,393; P.A. 05-251; in fiscal year 2004-05, when this settlement was approved by the governor, its appropriation was $41,811,793. P.A. 03-1. The annual reports of the defendant comptroller demonstrate that she

pays out millions of dollars annually from an "adjudicated claims account" for such settlements.[13]

The court is unaware of any law to the effect that a party is excused from performance of its obligations under a contract to pay money because it has failed to obtain the funding necessary to do so. To the contrary, in Dills v. Enfield, 210 Conn. 705 (1989), the Supreme Court held to its bargain a developer who failed to obtain the financing needed to fulfill its contract and upheld the forfeiture of his deposit to the town for which it was to have built an industrial park. The developer and the town contemplated that the former might have trouble obtaining financing at the time the contract was entered into. Id., 719-20. "If an event is foreseeable, a party who makes an unqualified promise to perform necessarily assumes an obligation to perform, even if the occurrence of the event makes performance impracticable." (Internal quotation marks and citation omitted.) Id., 720.

The claim by the defendants that they are entitled to summary judgment because the compromise submitted to the governor was

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[13] In 2003-04, the last full year for which such figures are available on the comptroller's website, she paid out $5.5 million; in 2002-03, $8.6 million. See generally, 14 Opinions Conn. Atty. Gen., 68 (April 29, 1925) on the comptroller's duty, in the absence of an appropriation to pay legal claims against the state, to draw an order on the treasurer for the payment of such claims.

conditioned on bond commission approval is supported neither by their factual submissions nor by the law. The most that the defendants' submissions establish is that DPW and Klewin contemplated that the bond commission was one source of funding for the compromise. Now that such funding has not been forthcoming, the defendants may not be excused from performance of the obligation assumed by DPW and approved by the governor for that reason.

IV

The governor's approval gives Klewin a clear legal right to payment of the $1.2 million agreed to by it and DPW. The governor's "certificate shall constitute sufficient authority to such officer or department or agency to pay or receive the amount therein specified in full settlement of such claim." § 3-7 (c). The proper officer here is the defendant Fleming. 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 his part, as a department head in the executive branch of state government; see Conn. General Statutes § 4-5; to pay the authorized amount.

In addition, the defendant Fleming, as commissioner of public works, by statute must certify to the defendant Wyman, the state

comptroller, that articles or services for which a settled claim against the state has been made were received or performed. Conn. General Statutes § 3-117 (a). The same statute requires the comptroller to draw an order on the state treasurer for payment of any claim against the state which has been settled after the agency which ordered or received the articles or services for which such claim was made certifies that the articles or services were received or performed.

A writ of mandamus has been issued before to enforce the duty of a governmental official to pay money due and payable by operation of law.[14] In State v. Staub, 61 Conn. 553 (1892), issuance of the writ was upheld to compel the state comptroller to distribute state funds which the general assembly had granted to several towns for educational purposes. In Alcorn v. Dowe, 10 Conn. Sup. 346 (1941), it was employed to compel the comptroller to pay retirement benefits. In State v. Aulisa, 133 Conn. 414 (1947), the city of Bridgeport's comptroller was ordered to certify that sufficient appropriated funds were available to pay

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[14] The United States Supreme Court has recognized the "classic distinction" between the recovery of money damages, say, for breach of contract, and the "recovery of specific property or monies", which is what Klewin seeks through this action. See Bowen v. Massachusetts, 487 U.S. 879, 899 (1988).

teachers' salaries, and in Brown v. Lawlor, 119 Conn. 155 (1934), Bridgeport's treasurer was ordered to pay pensions to retired members of the police and fire departments. The principle is well stated in State ex rel. Adams v. Crawford, 99 Conn. 378, 383 (1923), where the Fairfield County commissioners were ordered, after the sale of intoxicating liquors was forbidden during prohibition, to refund to any liquor licensee the fee he paid for his license, pursuant to a general statute providing for such a refund: "(I)t is well settled that mandamus will lie to compel the payment of money by public officials when the duty to pay it is plain and the claim is just, undisputed in amount, and based on a clear legal right." This is a specific application of the general principle established at the dawn of the country, in Marbury v. Madison, 5 U.S. 137, 166 (1803), where the Court held that, "(W)here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the law of his country for a remedy."

Having received the authority they need, the defendants Fleming and Wyman now have a mandatory and not discretionary duty to perform in the manner required by statute so as to carry into

effect the compromise reached by DPW and Klewin and approved by the governor, and that duty is enforceable by a writ of mandamus.

V

Finally, the defendants claim that Klewin is not entitled to judgment as a matter of law even if it could satisfy all three elements required for issuance of a writ of mandamus because "the equities weigh strongly against issuing a mandamus at this time." Defendants' Memorandum, 25. They invoke the court's well-recognized "discretion to consider equitable principles when deciding whether to issue the writ [of mandamus]"; Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, supra, 278 Conn. 418; and point to Klewin's refusal to cooperate with a legislative committee in its investigation into Klewin's dealings with former Governor John Rowland. Additional facts, again undisputed, are necessary to evaluate this argument.

Former Governor Rowland resigned that office effective July 1, 2004 while a special legislative committee was considering whether to recommend his impeachment. On July 8, 2004 Mr. D'Amato, as president and chief executive officer of Klewin Building Company (Klewin Building), and Mr. Rowland cosigned a letter of agreement pursuant to which the latter would provide "business

development services" as a consultant for Klewin Building at a monthly retainer of $5,000. Defendants' Memorandum, Exhibit I. The government administration and elections committee of the general assembly (the committee) determined to conduct a hearing into this and other consulting contracts entered into by Mr. Rowland after his resignation and issued subpoenas for Mr. D'Amato and other officials to appear and testify at that hearing. Rather than comply, Mr. D'Amato and the other officials instituted an action seeking injunctive and declaratory relief against enforcement of those subpoenas. Defendants' Memorandum, Exhibit C. The action was dismissed, the court concluding that "the activities of the committee in conducting hearings and issuing subpoenas fall within the legitimate legislative sphere . . . [and] are therefore absolutely protected from judicial review by our constitution's speech or debate clause." D'Amato et al. v. Govt. Administration & Elections Committee et al., superior court, judicial district of Hartford (Docket No. CV 05-4012032, Mar. 9, 2006). The case is on appeal.

"If the right to the issuance of the writ is asserted contrary to the public interest, the court might refuse its aid in mandamus proceedings." Sullivan v. Morgan, 155 Conn. 630, 635 (1967). "In the exercise of that discretion, special caution is

warranted where the use of public funds is involved and a burden may be unlawfully placed on the taxpayers." (Internal quotation marks omitted.) Hennessey v. City of Bridgeport, 213 Conn. 656, 659 (1990). In its latest pronouncement on the law of mandamus the Supreme Court has given content to the "contrary to the public interest" standard enunciated in Sullivan, supra, holding 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." Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, supra, 278 Conn. 419.

The defendants perceive impropriety sufficient to warrant denial of the writ in the legal challenge mounted by Mr. D'Amato to the authority of the committee to inquire into ethics matters involved in his relationship with the former governor.[15] The

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[15] In the course of this argument the defendants refer to possible "violations of the State's 'revolving door' statute"; Defendant's Memorandum, 26; "the former Governor's activities with respect to other state contracts"; Id.; and "the Plaintiff's relationship with the former Governor"; Id., 27; but it is clear that the *sole* ground upon which they base their request that the court exercise its equitable discretion to deny the writ is the refusal of a company related to Klewin to cooperate in the committee's inquiry: "...(T)he Plaintiff's refusal to cooperate with the GAE Committee's investigation is sufficient cause for concluding that the equities bar the mandamus relief sought here."

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 denied, Aug. 24, 2006), in which the judicial branch joined in a challenge to the authority of the judiciary committee of the general assembly to inquire into the conduct of former chief justice William Sullivan. See also Office of the Governor v. Select Committee of Inquiry, 271 Conn. 540 (2004).

Moreover, Jalowiec Realty and the cases it cites make it clear that the "fraudulent or inequitable conduct"; Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, supra, 278 Conn. 420; which will justify a court in denying the writ must occur in the context of the particular dispute which is before the court. In other words, this court does not have a roving commission to inquire into all of the activities of the plaintiff to see whether anything it has done gives the court pause in issuing the writ. The Supreme Court does not cite in Jalowiec Realty and this

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Id., 29.

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 defendants cited the court to any such cases.[16] For example, in Sullivan v. Morgan, supra, 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.[17]

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[16] The defendants seem to argue that there are two standards which govern courts' exercise of their equitable discretion in mandamus matters: unclean hands, which they disclaim, and "contrary to the public interest", upon which they claim to rely. Defendants' Memorandum, 28. There is no such distinction in the law.

[17] The defendants also cite a 1921 decision of a New York City trial judge who denied to 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

The record before this court makes it clear beyond question that Mr. Rowland had nothing whatever to do with the settlement negotiated between DPW and Klewin which is at issue in this case.[18] More telling is that, at the request of the present governor, the defendant Fleming conducted an investigation to determine whether this compromise, as well as other negotiations between Klewin and the state, were "in the State's best interest and the process for reaching the settlements and compromises has been appropriate in all respects." Defendants' Memorandum, Exhibit F. That investigation concluded that "negotiations in this matter

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value of such a decision, the case is unpersuasive on the defendants' claim that this court should look for improper conduct 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.

[18] The court postponed argument on these motions at the defendants' request to allow the deposition of Mr. D'Amato on the subject, inter alia, of what role Mr. Rowland played, if any, in the negotiation of this settlement. "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." Memorandum of Decision on Defendants' Motion to Compel, August 8, 2006, 6. The defendants' submissions in support of their motion for summary judgment contain no references to the D'Amato deposition on the subject of Mr. Rowland's role in this settlement.

were handled appropriately and that inappropriate communications or activities *did not occur*." (Emphasis added.) Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Extension of Time, July 10, 2006, Exhibit A, 4 (# 127).

In view of the strenuous efforts the defendants are making to resist payment to Klewin of the amount certified by the governor, it bears mentioning that this investigation was conducted *after* the relationship between Klewin and Mr. Rowland had come to light, and that the investigator reported that the defendant Fleming believed that the settlement recommended by Mr. O'Hearn in 2004 was "prudent and justified". Id., 3. For his part, Mr. O'Hearn told the investigator that, since he signed the letter to the attorney general's office on December 28, 2004 recommending the compromise for approval, nothing had occurred and he had not become aware of any fact which "would undermine any of the conclusions in that letter." Id.

The defendants have failed to submit anything that would support their claim that the court should exercise its discretion to deny Klewin the writ of mandamus it seeks.

VI

The plaintiff's submissions in support of its motion for summary judgment show that there is no genuine issue as to the material facts of the existence of an agreement between DPW and Klewin which was approved by the governor for payment, and the defendants have provided no evidentiary basis to demonstrate that there is any such issue. The plaintiff has also shown that it is entitled to judgment as a matter of law, i.e., that the governor's approval of the compromise between DPW and Klewin, pursuant to Conn. General Statutes § 3-7 (c), gives Klewin a clear legal right to payment of the compromise amount and creates a corresponding mandatory duty on the part of the defendants Fleming and Wyman to take the actions necessary to effect payment. Klewin has no specific adequate remedy other than mandamus for their failure to do so.

The defendants' submissions in support of their motion for summary judgment fail to raise a genuine issue as to the material fact whether Klewin engaged in "fraudulent or inequitable conduct"; Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, supra, 278 Conn. 420; such as would justify the court in exercising its equitable discretion to deny the writ of

mandamus or to establish that they are otherwise entitled to judgment as a matter of law.

The plaintiff's motion for summary judgment is GRANTED. The defendants' motion for summary judgment is DENIED.

Accordingly, it is hereby ORDERED:

1. that, within thirty days from the date of this order, the defendant James T. Fleming prepare and transmit to the defendant Nancy Wyman whatever paperwork is necessary, in the form of purchase orders, certifications and/or documentation, for defendant Wyman to draw an order on the state treasurer for payment of $1,200,000 to C.R. Klewin Northeast, LLC;

2. that, within thirty days from the date she receives such paperwork, the defendant Wyman shall draw an order on the state treasurer for payment to C.R. Klewin Northeast, LLC in the amount of $1,200,000.

It is hereby further ORDERED that, within ten days from its receipt of $1,200,000 from the state of Connecticut, C.R. Klewin Northeast, LLC shall execute on its own behalf and on behalf of any related business entities a release to DPW attesting that the payment of $1,200,000 is in full and final settlement of any and all claims it or they may have against the state of Connecticut

regarding the Learning Resource Center and Lowe Building (DPW Project # BI-CTC-353).

BY THE COURT

Joseph M. Shortall, J.