

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application
of DAVID F. JUNG, JOHN ROBINSON
and JAMES HAYS,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION AND JUDGMENT
INDEX NO. - 2478-03

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondents,

-against-

THE CANADA LAKES PROTECTIVE ASSOCIATION
and THE STEWART'S LANDING ASSOCIATION,

Proposed Intervenor.

(Supreme Court, Albany Co. Special Term - May 23, 2003)
(RJI No. 0103-ST3521 - Calendar No. 23)

(Justice Bernard J. Malone, Jr., Presiding)

APPEARANCES: Crane, Greene & Parents, Esqs.
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Albany, New York 12207

Hon. Eliot Spitzer, Attorney General
(Joseph Koczaja, Esq., AAG, of Counsel)
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Attorneys for Proposed Intervenor
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MALONE, J:

The motion of the petitioners for an order awarding them a preliminary injunction directing the respondent (DEC) to not maintain a summer water level at Canada Lake in excess of 1,543.1 feet above sea level is denied. The cross-motion of DEC for an order dismissing the petition upon the objection in point of law that it fails to state a cause of action for mandamus is granted. The application for alternative relief sought in the cross-motion of DEC is denied as moot. The cross-motion of the proposed intervenors, the Canada Lakes Protective Association and the Stewart's Landing Association (the Associations), for permission to intervene is granted¹. The cross-motion of the petitioners for an order striking all of the submissions of the proposed intervenors is denied.

The petitioners own homes on the shore of Canada Lake in Fulton County, New York. They bring this article 78 proceeding to compel DEC to lower the water level of the lake by approximately 8.5 inches in order to prevent erosion damage to their properties. They assert that the lower water level is mandated by agreements that DEC entered into in 1978 and 1986 with the Associations addressing the level at which the water would be maintained by DEC.

¹Intervention is being permitted in view of the anticipated appeal in order to permit the Associations to protect the interests of their members. The Associations represent approximately 280 camp owners and home owners who live on the shores of the lakes and creek described below.

Canada Lake is part of the West Canada Lake System which includes Lily Lake, West Lake, Canada Lake and Green Lake. The water level of these lakes is controlled by the Stewart's Landing dam, built in 1923 at the headwaters of Sprite Creek which flows into the West Canada Lake System.

DEC acquired title to the dam by deed from Fulton County which deed contains the restriction that water levels at the dam must be maintained between 1,541 feet and 1,543.91 feet above sea level. DEC is charged with the statutory duty of maintaining and operating the dam (L 1973, ch 619). Beginning in 1975, DEC entered into a course of consultations with the Associations about what level the water at the dam would be maintained at. On September 28, 1978, a DEC employee sent the Associations a copy of the Stewart's Landing Dam Water Level Operating Schedule (Schedule) dated September 13, 1978 which set a summer water level of 1542.83 feet and a winter level of 1536.41 feet. The Schedule specifically reserves DEC's right to change the water levels subject only to notice of such changes being given to the Associations. The water levels set forth in the Schedule were followed until July 16, 1986 when DEC sent a new Water Level Control Schedule (1986 Schedule) for Stewart's Landing dam to the Associations setting forth a summer water level of 1543.1 feet and a winter level of 1536.41 feet. Once again the 1986 Schedule retained DEC's right to change the water levels subject to notice to the Associations. It is the Schedule and 1986

Schedule that the petitioners contend are binding contracts between the Associations and DEC and of which they are intended third-party beneficiaries.

The dam is located three miles west of Canada Lake and four miles to the east of the dam is a gauge (Gauge) upon Green Lake bridge, which Gauge has been used for 80 years to establish the water levels at the dam. It is the petitioners contention that modern GPS instrumentation has established that the dam itself and the Gauge may be eight inches higher above sea level than was established by the altimeter devices used when the Dam was built in 1923. They have commenced this proceeding seeking a judgment of mandamus to compel DEC to lower the water levels at the dam. The Associations have offered several dozen affidavits from its members in support of their intervention motion which contend that granting the petitioners the relief they seek would wreak havoc and destruction upon their properties.

DEC seeks dismissal of the petition upon the ground that it has discretion in setting the water levels at the dam and, therefore, the petition fails to state a cause of action in mandamus because that remedy is only available to compel the performance of a ministerial act. Although the petition speaks of arbitrary and capricious conduct, the opposing papers submitted by the petitioners establish that mandamus to compel is the true remedy they seek and the motion and cross-motion are being decided

upon that premise.

The "remedy of mandamus may only be utilized to compel the performance of a purely ministerial act which involves no exercise of judgment or discretion" (New York State Inspection, Security and Law Enforcement Employees, District Council 82 v Cuomo, 103 AD2d 312, 320). The Court agrees with DEC's contention that it has discretion in setting the water levels at the dam. The legislation authorizing the transfer of the dam to DEC provides that DEC "shall maintain and operate such dam in accordance with appropriate provisions of law." The petitioners have set forth no provision of law which requires that the water levels be maintained at a specific number of feet above sea level. The deed conveying the dam to DEC gives it the discretion to maintain the water levels between 1,541 feet and 1,543.91 feet above sea level. In setting water levels within those parameters, DEC has to exercise discretion, thereby precluding the remedy of mandamus to compel.

The petitioners entire case therefore reduces to their proposition that the Schedule and 1986 Schedule are binding contracts between the Associations and DEC and the water levels set forth in the Schedule and 1986 Schedule cannot be changed by DEC. The Court rejects that contention. The 1986 Schedule changing the prior water levels set forth in the Schedule demonstrates that DEC can unilaterally change the water levels without the consent of the Associations. Moreover, the Schedule and 1986 Schedule are not

contracts. "Unless the agreement or contract requires performance by each party, ascertainable by a standard of measurement, the agreement is unenforceable for lack of consideration" (Gutman v Sal-Vio Masons, Inc., 72 Misc2d 729, 731). Neither the Schedule nor the 1986 Schedule requires any performance by the Associations, ascertainable by a standard of measurement, and therefore neither is a contract between the Associations and DEC.

Furthermore, a contract which is not to be performed within one year is void if not in writing and signed by the party to be charged (General Obligations Law section 5-701 [a][1]). The 1986 Schedule, which supercedes the Schedule, is not signed. Accordingly, both the Schedule and 1986 Schedule are simply not contracts, despite whatever references DEC employees may have previously made to them as "agreements" (see, State of New York v Upstate Storage, Inc., 145 AD2d 714), and are therefore not capable of supporting a mandamus to compel cause of action.

The Petitioners argue that even if the Schedule and 1986 Schedule are not binding contracts mandamus will lie to compel a government official to comply with his or her agency's own rules, citing Matter of Simmons v Hammons, 221 AD2d 546. In Simmons, there was a regulation of the Department of Social Services stating, "Each social service district must provide a monthly allowance for rent * * *" (emphasis supplied). The City of New York denied this monthly allowance to the petitioner in that case and that decision

was overturned and the City was ordered to comply with the regulation which afforded it no discretion to deny the monthly allowance. This Court fails to discern how that case has any impact upon this litigation. Here both the Schedule and the 1986 Schedule reserve to DEC the right to change the water levels at the Dam. Section (4)(B) of the 1986 Schedule specifically allows the Associations to petition DEC for a deviation from the water levels control schedule set forth therein and states that if such a deviation is approved the Associations would be given 30 days notice. That language specifically recognizes DEC's discretion to change the water levels. The existence of that discretion bars the mandamus to compel claim, requiring the dismissal of the petition.

In view of the dismissal of the petition, this Court is not of the view that the petitioners are entitled to injunctive relief. The Court does not reach the issue of whether the Associations are necessary parties to the proceeding since they are being permitted to intervene as respondents. Finally, the Court denies the cross-motion to strike the submissions of the intervenors.

All papers, including this decision and judgment, are being returned to the Attorney General. The signing of this decision and judgment shall not constitute entry or filing under CPLR section 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

This memorandum shall constitute both the decision and the judgment of the Court.

IT IS SO ORDERED AND ADJUDGED.

DATED: ALBANY, NEW YORK
JUNE 16, 2003


BERNARD J. MALONE, JR., J.S.C.

PAPERS CONSIDERED:

Order to show cause dated April 23, 2003;
Affidavit in support by John P. Stockli, Jr., Esq., sworn to April 22, 2003;
Affidavit in support by David F. Jung, sworn to April 22, 2003, with exhibits;
Affidavit in opposition by Mary Liverzey sworn to May 9, 2003;
Notice of motion to dismiss petition dated May 9, 2003;
Affirmation in support of motion to dismiss by Joseph Koczaja, Esq., dated May 9, 2003, with exhibits;
Affidavit in support by Mark D. Sanza, Esq., sworn to May 8, 2003, with exhibits;
Order to show cause dated May 9, 2003;
Affirmation in opposition by Linda J. Clark, Esq., dated May 16, 2003, with exhibits;
Notice of cross-motion to strike dated May 22, 2003;
Affidavit in opposition by John P. Stockli, Jr., Esq., sworn to May 22, 2003;
Reply affirmation by Linda J. Clark, Esq., dated May 22, 2003;
Affidavit of Thomas K. Mitchell sworn to May 17, 2003, with exhibit;
Affidavit of John Robinson sworn to May 19, 2003;
Affidavit of Raymond T. Liuzzo sworn to May 15, 2003;
Affidavit of Nancy Evans Hays sworn to May 16, 2003;
Affidavit of Samuel W. Gowan sworn to May 19, 2003, with exhibit;
Affidavit of James D. Hays sworn to May 16, 2003;
The Affidavits in the black binder submitted by the intervenors.