STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 108-4-14 Oscv

Seymour Lake Association,
Plaintiff,

v.

State of Vermont,
Agency of Natural Resources,
Dept. of Environmental Conservation,
Defendants.

Opinion and Order on Plaintiff's Motion to Amend

On March 31, 2015, the Court entered a judgment order dismissing this matter for lack of jurisdiction. Plaintiff Seymour Lake Association (SLA) filed a motion to reconsider in April. On or about May 27, nearly two months after the March 31 order, SLA filed a motion to amend the complaint to add a claim for relief under the Declaratory Judgment Act (DJA), 12 V.S.A. § 4711. On July 31, 2015, the Court entered an order granting, in part, and denying, in part, the motion for reconsideration and reaffirming its dismissal of the case for lack of jurisdiction. The remaining issue before the Court is the motion to amend. The Court makes the following determinations.

SLA's contention that leave to amend under Vt. R. Civ. P. 15 is to be freely granted when a responsive pleading has not been filed, is inapplicable under the circumstances of this case. Where, as here, the Court has entered judgment dismissing an action, "the right to amend under Rule 15 no longer attache[s]." *Northern Sec. Ins. Co. v. Mitec Electronics, Ltd.*, 2008 VT 96, ¶ 39, 184 Vt. 303, 319-20 ("presumption that leave to amend shall be freely given pursuant to Rule 15(a) disappears after judgment has been entered" (internal quotation omitted)).

Nor does the fact that a motion to reconsider had been filed when SLA submitted its motion to amend alter that conclusion. A motion to reconsider is not a vehicle to raise new legal theories not raised in the original memorandums. *See Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982). Had SLA raised its declaratory judgment argument directly in its motion to amend, it would have been inappropriate. Its attempt to amend the Complaint to raise that claim stands on the same footing. As the Supreme Court has noted in similar

circumstances: "'At this juncture, the party making a Rule 59(e) motion so that it can amend its complaint had better provide the district court with a good reason to grant its motion.'" *Northern Sec. Ins. Co.*, 2008 VT 96, ¶ 44, 184 Vt. at 320-21 (quoting *First Nat'l Bank v. Continental Illinois Nat'l Bank*, 933 F.2d 466, 468 (7th Cir. 1991)). SLA has provided no explanation for its failure to seek to amend the Complaint prior to the Court's March 31 judgment dismissing its claim. Its attempt to do so at this late stage is not appropriate.

Nonetheless, the Court is mindful the motions to dismiss are not favored in Vermont and that dismissal with leave to amend, in some circumstances, is a potential remedy available to the Court. *See Neal v. Brockway*, 136 Vt. 119 (1978). As a result, it has also considered whether allowing the proposed amendment would alter the Court's conclusion that it lacks jurisdiction in this case. The Court concludes that it would not.

While the DJA provides a procedural vehicle to resolve disputes between parties, "the Act does not increase or enlarge the jurisdiction of the court over any subject matter or parties." *Vt. State Employees' Ass'n, Inc. v. Vt. Criminal Justice Training Council*, 167 Vt. 191, 194-95 (1997); *see Nike, Inc. v. Already, LLC*, 663 F.3d 89, 95 (2d Cir. 2011) (similar federal DJA "does not expand the subject matter jurisdiction of the federal courts"). In this instance, the Court has concluded that it lacks jurisdiction over SLA's claims. The addition of a prayer for relief under the DJA does not change that result.

Indeed, the Vermont Supreme Court has rejected attempts to use the DJA, as SLA seeks to do here, to deprive agencies that have been given principal authority by the Legislature to adjudicate issues, the opportunity to do so. *See Vt. State Employees' Ass'n, Inc.*, 167 Vt. at 194-95 (DJA did not expand authority of courts to review decision of Attorney General beyond that provided by Vt. R. Civ. P. 75); *Molesworth v. Univ. of Vt.*, 147 Vt. 4, 6-7 (1986) ("Where, as here, the Legislature has delegated authority to the Trustees of the University of Vermont to determine eligibility for reduced tuition charges ... the declaratory judgments vehicle cannot be used to frustrate that legislative choice."). Even in instances where the Superior Court might assert jurisdiction under the DJA, where the Legislature has vested primary jurisdiction to resolve an issue with an administrative agency, the Vermont Supreme Court has held: "Surely a court's invocation of discretion to dismiss is proper where, as here, it did so in order to allow another tribunal, better suited ..., to resolve the dispute." *C.V. Landfill, Inc. v. Envtl. Bd.*, 158 Vt. 386, 392 (1992).

In this case, the Court has concluded that it lacks jurisdiction over this matter and amending the Complaint to add a claim under the DJA would not alter that determination. *See Vt. State Employees' Ass'n, Inc.*, 167 Vt. at 195 n.1 (allowing opportunity to amend under *Neal* not appropriate where Court lacks

jurisdiction). Accordingly, in addition to the grounds cited above, SLA's attempt to amend the Complaint is also be denied on the basis of futility.

WHEREFORE, the motion to amend is denied.

Dated at Newport, Vermont, this 7 day of August, 2015.

Timothy B. Tomasi
Superior Court Judge