STATE OF VERMONT

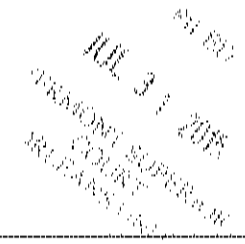
SUPERIOR COURT
Orleans Unit

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 Reconsider

On March 31, 2015, the Court entered an order ("the Order") dismissing this matter for lack of jurisdiction. Plaintiff Seymour Lake Association ("SLA") seeks reconsideration of that order, and the Vermont Agency of Natural Resources ("the State") opposes the motion.

As the Rules of Civil Procedure contain no formal standards for motions to reconsider, courts often analyze them under the provisions of Vt. R. Civ. P. 59. The Court retains broad discretion to review orders under that Rule. *See Drumheller v. Drumheller*, 2009 VT 23, ¶ 29, 185 Vt. 417, 432. Nonetheless, a motion to reconsider should not be a vehicle to relitigate matters previously adjudicated by the court. Nor may motions to reconsider be rightly based on new theories or evidence not put forth in the original motion. *See Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982). As the District of Vermont has rightly noted: "'The standard for granting [a motion to reconsider] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" *Latouche v. North Country Union High School Dist.*, 131 F. Supp. 568, 569 (D. Vt. 2001) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

SLA urges the Court to reconsider the Order on two principal grounds. First, it asserts that by dismissing the case on jurisdictional grounds, the Court failed to address its "central claim." Second, it claims that the Court erred in holding that the Vermont Tort Claims Act bars claims against the State seeking prospective

injunctive relief for the allegedly tortious conduct described in the Complaint. The Court will address each of these issues in turn.

To the extent that the Order failed to address the "central claim" made by SLA, it was by design. The Court held that SLA's complaint was truly a challenge to the State's determination of whether to exercise its authority to regulate the water levels in Lake Seymour under Condition H of Seymour Lake Dam's federal license. Under 10 V.S.A. § 8503, the proper venue to contest such agency decision making is the Superior Court's Environmental Division.

While the claims asserted in SLA's Complaint raised issues concerning whether the federal license preempted state law, the Court held that those issues were rightly addressed in the Environmental Division through the appeals process of Section 8503. The Division's expertise in the environmental area would be beneficial in evaluating the preemption issue and would help assure "consistent interpretations of [environmental law]." *Vt. Agency of Natural Res. v. Weston*, 2003 VT 58, ¶ 16, 175 Vt. 573, 577. The Court is not persuaded that its conclusion in that regard should be changed.

SLA offers no other compelling reasons for the Court to reconsider its decision that it lacks jurisdiction in this matter. Instead, SLA reiterates the arguments it made in the original motion: that 30 V.S.A. §§ 401-402 require the water levels in Lake Seymour to be maintained at "normal and natural" levels, that State officials are bound to comply with the law, and that this Court has jurisdiction to hear such claims via Vt. R. Civ. P. 75.

As stated in the Order, however, relief in the nature of mandamus under Rule 75 is unavailable in this case for a number of reasons. First, Rule 75 may not be invoked where, as here, there exists an alternative statutory route to contest the State's action. Section 8503 provided a plain and certain avenue by which SLA could have challenged the State's decisions concerning how to regulate the water levels of the lake.[1] Second, even if Rule 75 were available, SLA failed to take action against the State within the time limits established by the rule.

As to SLA's claim for injunctive relief based on the novel theory that the State may be liable in nuisance for failing to regulate a dam owned by a third party,

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[1] Whether SLA can still take advantage of that appeal route is irrelevant to the question of whether the Legislature has provided an alternative remedy. Order, at 9-10. In any event, as noted in the Order, it is by no means clear that SLA could not present new evidence and new data to the State in support of their position and, if rejected, seek review of that determination under Section 8503.

the Court held that such claims were barred by sovereign immunity. In support, the Court cited a number of federal decisions holding that money damages are the only form of relief permitted under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674. *See, e.g., Smith v. Potter*, 187 F. Supp. 2d 93, 98 (S.D.N.Y. 2001); *LaShay v. Dep't of Social and Rehab. Servs.*, 160 Vt. 60, 67-68 (1993) (Vermont courts look to case law interpreting Federal Tort Claims Act for guidance in determining the extent of the Vermont Tort Claims Act (VTCA)).

SLA now counters that the FTCA waiver of immunity is narrower than that contained in the VTCA because a related section of federal law -- 28 U.S.C. § 1346(b)(1) -- contains a specific provision limiting the liability of the United States to "money damages." SLA gains more traction with this assertion.

The FTCA does cross-reference Section 1346(b), which indicates that the United States may be a defendant in actions for "money damages." The VTCA has no such provision. The failure to include that express limitation in the VTCA could well indicate a legislative intent to waive the State's immunity for injunctive as well as monetary relief. On the other hand, the general waiver provisions of the FTCA and VTCA contain nearly identical language, Order, at 14 n.7; the Vermont Supreme Court has repeatedly indicated that the VTCA was modeled upon and interpretations of it are to be guided by constructions of the FTCA; *id.*, at 13-14; the FTCA has long been interpreted to permit only claims for monetary relief; and the Court is aware of no Vermont Supreme Court decision imposing injunctive relief against the State pursuant to the VTCA.

Neither party, however, has expansively briefed the potential impact of Section 1346 on the question of whether the Vermont Legislature intended to permit injunctive relief against the State when it passed the VTCA. Nor has either side provided full legislative history to the Court concerning the VTCA or the scope of its intended waiver. The Court concludes that it should not make a final decision as to whether the VTCA should be interpreted to permit injunctive relief without the benefit of such briefing. Prior to seeking such submissions, however, it is appropriate to examine the remaining grounds for dismissal raised by the State.

The State has asserted a phalanx of other theories in support of its contention that SLA's nuisance claim is barred by sovereign immunity. Foremost among these is Section 5601(e)(7). That statute provides that the State's waiver of immunity under the VTCA is inapplicable with regard to: "Any claim for which a remedy is provided or which is governed specifically by other statutory enactment."

In this case, it is plain that the SLA is challenging the failure of the State to exercise its authority under the relevant federal license to require maintain of a certain water level of Lake Seymour. As discussed above and in greater detail in the Order, the Legislature afforded the SLA a direct means of challenging that decision pursuant to 10 V.S.A. § 8503. That remedial scheme foreclosed the SLA's attempt to invoke Rule 75. In light of Section 5601(e)(7), the existence of that statutory remedy also makes the waiver provisions of the VTCA inapplicable in this case. As a result, the State has not waived its sovereign immunity with regard to the SLA's claim for injunctive relief based on an alleged nuisance.[2]

WHEREFORE, Plaintiff's Motion to Reconsider is granted with regard to the Court's determination that the VTCA does not permit injunctive relief and denied as to whether this matter should be dismissed for lack of jurisdiction.

Dated at Newport, Vermont, this 31st day of July, 2015.

Timothy B. Tomasi
Superior Court Judge

[2] As it does not provide a remedy for monetary damages, the Court acknowledges that Section 8503 may not provide a complete remedy in all cases. Section 5601(e)(7), however, does not require that the alternate remedy provide the exact same relief as exists under the VTCA. In any event, in this case, the SLA has repeatedly stated that it seeks only an injunction forcing the State to exercise its authority to maintain the water level of Lake Seymour. With regard to that claim, Section 8503 provided a complete remedy.