STATE OF OHIO)
)SS:
CARROLL COUNTY)

IN THE COMMON PLEAS COURT

CASE NO. 16400-83-148

ROGER STARKEY, ET UX.,
PLAINTIFFS

JUDGMENT ENTRY

VS

LARRY MAMONE, CHIEF
OHIO DEPARTMENT OF NATURAL RESOURCES,
DEFENDANT

I. Case Review

On May 27, 1983, plaintiffs herein filed their Complaint for the issuance of a Writ of Mandamus against defendant to compel the reclamation of strip-mined areas on their real property by the State of Ohio.

After an extension of leave to plead, defendant, on July 13, 1983, filed a Motion for Summary Judgment (Civil Rule 56) and a Motion to Dismiss (Civil Rule 12-B-1) alleging lack of subject matter jurisdiction. Defendant's motions were accompanied by a thorough brief and six (6) supporting affidavits.

On August 15, 1983, plaintiffs filed their Reply to defendant's motions in brief form accompanied by an affidavit from Roger Starkey.

Originally assigned for oral hearing on August 8, 1983, defendant's motions were continued several times, by agreement of the parties to explore settlement, and were finally argued on January 13, 1984. At the conclusion of counsels' arguments, the motions were taken "under advisement".

II. Issues

Defendant raises two issues in the motions sub judice, to wit:

1) is plaintiffs' Complaint procedurally defective and

subject to a Civil Rule 12-B-1 dismissal for lack of subject matter jurisdiction, and

2) as a matter of law, are plaintiffs entitled to a Writ of Mandamus.

III. Facts

There do not appear to be any genuine issues of material fact in dispute, the parties agreeing that:

A) plaintiffs are the owners of the real property, located in Carroll County, Ohio, which are the premises in question,

B) sometime in 1976, defendant issued permits to the S.D. Nold Company to conduct strip-mine operations on plaintiffs' land, and accepted bonds from this operator in the form of cash time certificates of deposit and a surety bond from Erie Insurance Company,

C) sometime in 1978, the operator, S.D. Nold Co., ceased mining, but failed to reclaim plaintiffs' property as required by law,

D) on June 13, 1980, defendant forfeited all of the performance bond of S.D. Nold Co., time certificates and surety, to the State of Ohio,

E) as a direct result of the S.D. Nold Co. mining operations and failure to reclaim, there currently exists on plaintiffs' lands a "lake" approximately 3.0 acres in size and roughly 45 feet in depth,

F) upon failure of the operator to reclaim, plaintiffs made demand upon defendant, pursuant to O.R.C. Chapter 1513, to reclaim at state expense and to restore the affected land to its original contour and condition, including the lake area,

G) a portion of the plaintiffs' affected land is being reclaimed by Erie Insurance Co.,

H) defendant has formulated a reclamation plan which declares the lake area to be a fish and wildlife habitat, but provides for the reclamation of the remainder of the affected land surface not being reclaimed by the Erie Insurance Company.

The major dispute is over the so-called "lake" area. Plaintiffs argue defendant has a mandatory duty to reclaim the lake by removing it. Defendant apparently agrees the state's "duty" to reclaim exists, but argues the mode and manner of reclamation by the state is left to his discretion according to statutory guidelines.

IV. Law

This Court will consider first the defendant's Motion to Dismiss for lack of subject matter jurisdiction per Ohio Civil Rule 12-B-1.

Defendant contends that O.R.C. Section 2731.04, requiring a mandamus action to be captioned in the name of the state on relation of the petitioners and that the complaint be verified by affidavit, is "jurisdictional", and since plaintiffs did neither of the above, their Complaint must be dismissed per Maloney v. Sacks, 173 O.S. 237 (1962), etc.

Both O.R.C. 2731.04 and Maloney, supra, pre-date the adoption of the Ohio Rules of Civil Procedure on July 1, 1970. The Ohio Supreme Court has repeatedly held that where a statute conflicts with a rule, the rule controls. In this light, Civil Rule 11, in pertinent part, states "except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit" (emphasis added). Civil Rule 1 does not exempt mandamus from the application of Ohio's Civil rules (also see St. ex rel. Millington v. Weir, 60 O. App. 2d. 348 (1978) and St. ex rel. Madison v. Cotner, 66 O.S. 2d. 448 (1981). The Court concludes that the failure of

plaintiffs to "verify" their Complaint is no longer jurisdictionally required; Civil Rule 11 overruling O.R.C. 2731.04 in that regard.

The Court further concludes that plaintiffs' failure to caption their case "St. ex rel...." is also not fatal. O.R.C. Section 2731.09 expressly provides for amendment of the pleadings in a mandamus action, and such amendment may also be made pursuant to Civil Rule 15-A.

Therefore, defendant's Civil Rule 12-B-1 Motion to Dismiss should be overruled and denied. We turn now to an examination of defendant's Civil Rule 56 Motion for Summary Judgment.

"The salutary purpose of Rule 56, of the Rules of Civil Procedure is to permit the speedy and expeditious disposal of cases where the pleadings do not, as a matter of fact, present any substantial question for determination", Washington Cty. Farm and Assn. v. Baltimore and O.R.R. Corp., 60 O.O. 2d. 174 at 177 (1972).

"Under Civil Rule 56, a motion for summary judgment shall be granted if (1) the pleadings, ..., affidavits, ... timely filed in the action demonstrate that there is no genuine issue of material fact and (2) the party moving for summary judgment is entitled to judgment as a matter of law," Citizens Ins. Co. v. Burkes, 56 O. App. 2d. 88 (1978); headnote #1, emphasis added. Also see Temple v. Wean United, Inc., 50 O.S. 2d. 317 (1977).

The movant carries the burden of demonstrating no genuine issues of material fact exist, and that he is entitled to judgment after construing the evidence most strongly in favor of the non-moving party (see Harless v. Willis Day Warehousing Co., 54 O.S. 2d. 64 (1978).

As indicated under "III. Facts" supra, there are no genuine issues of material fact in this case. The real question is the interpretation of O.R.C. Chapter 1513, a legal

issue. Defendant has met the first test for a summary judgment per Citizens Ins. Co. and Temple, supra.

Left for determination is the rather narrow question of whether mandamus will apply.

First, summary judgment can apply to a mandamus action (St. ex rel. Wilson v. Preston, 173 O.S. 203 (1962).

Mandamus will lie to permit a private person to compel a public officer to perform an official act where the officer is under a clear legal duty to do so and where the individual has a recognized interest from said officer's failure to act when the duty exists (per St. ex rel. Pressley v. Ind. Comm., 11 O.S. 2d. 141 (1967); Syllabus #9).

However, courts have no power to issue writs of mandamus which interfere with a governmental agency's exercise of discretion (see St. ex rel. Brunson v. Bedner, 28 O. App. 2d. 63 (1971).

There is a recognized distinction between a mandamus to make an administrative agency take some required action and one simply to force that agency to grant or allow the relief sought by the applicant (Gates Mills Investment Co. v. Pepper Pike, 59 O. App. 2d. 155 (1978).

Mandamus lies only to enforce the performance of a ministerial act or duty, a ministerial duty being defined "as one which a person performs in a given state of facts in a prescribed manner in obediance to the mandate of legal authority, without regard to or in the exercise of his own judgment ....", 35 O. Jur. 2d. 258, section 15 (also refer to St. ex rel. Wright v. Morrison, 80 O. App. 135 (1947) and St. ex rel. Marshall v. Keller, Admr., 15 O.S. 2d. 203 (1968).

"It is too well-settled to require citation of authority that where a public officer in the performance of a public duty is required to use official judgment and discretion, his exercise of them, in the absence of fraud, bad

faith, or abuse of discretion, will not be controlled by mandamus," St. ex rel. Gilder v. Ind. Comm., 100 O.S. 500 (1919) at 503 (emphasis added). See also St. ex rel. Coen v. Ind. Comm., 126 O.S. 550 (1933) and 35 O. Jur. 2d. 267, section 23.

"This court has consistently held that in order for a writ of mandamus to issue, the relator must demonstrate (1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law", St. ex rel. Berger v. McMonagle, Judge, 6 O.S. 3d. 28 (1983).

And as noted recently in St. ex. rel. Willis v. Sheboy, 6 O.S. 3d. 167 (1983) at Syllabus #2, "the function of mandamus is to compel the performance of a present existing duty as to which there is a default".

Defendant, in our case sub judice, admits he has the "duty" to reclaim the mined areas of plaintiffs' land per O.R.C. Section 1513.18, et seq. upon default or non-performance by the original operator. "Reclamation" means "backfilling, grading, resoiling, planting .... that has the effect of restoring an area of land affected by coal mining so that it may be used for forest growth, grazing, agricultural, recreational, and wildlife purposes, or some other useful purpose of equal or greater value than existed prior to any mining", O.R.C. Section 1513.01-0 (eff. 3-18-83). "Reclamation" per se therefore does not necessarily include restoration of land to its original contour, although contouring may be one form of reclamation.

Defendant acknowledges his ministerial duty to reclaim plaintiffs' lands (O.R.C. 1513.18 et seq.), and he has already undertaken measures to perform that duty, eg. forfeiture of the operator's performance bonds, initiating plans and studies, etc. Defendant has not refused to reclaim.

However, once defendant proceeds to reclaim under Section 1513.18, O.R.C., he claims the mode and manner of such reclamation is left to his official judgment and discretion as provided by statute, to wit: O.R.C. Sections 1513.21, .22, and .23.

Section 1513.21 provides: "From moneys appropriated for this purpose, the chief of the division of reclamation shall reclaim any land or tract of land .... in such manner that, after reclamation, such land or tract shall be suitable for agriculture, forests, recreation, wildlife, water conservation, or such other use as the chief may deem proper for such land, or tract of land ...." (emphasis added).

Section 1513.22 provides: "Before proceeding to reclaim any land or tract of land .... the chief of the division of reclamation shall determine the purpose or purposes for which such land or tract should be devoted after reclamation and shall develope a plan of reclamation for such land or tract reasonably designed to accomplish such purpose or purposes and an estimate of the cost thereof." (emphasis added).

Section 1513.23 further provides: "In determining the purpose or purposes for which any land or tract of land should be devoted after reclamation and in preparing a plan of reclamation, the chief of the division of reclamation may call to his assistance .... engineers or other employees .... for the purpose of making studies, surveys, and maps and for the purpose of devising the most effective and economical plan of reclamation" (emphasis added).

Read together, the above statutes clearly vest defendant herein with official judgment and discretion to select the post-reclamation purpose for which the affected land is to be used, based on effectiveness and economics. His refusal to drain the 3.0 acre lake and fill it in because of the high cost involved (in excess of one million dollars and

exceeding his entire annual appropriation for reclamation) and his designation of the lake as a wildlife or recreational area are clearly discretionary acts, not ministerial ones. Such decisions are not arbitrary or an abuse of discretion. It is this post-reclamation usage to which plaintiffs object and seek mandamus relief. This discretion, expressly prescribed by statute, should not be interfered with by the courts (see St. ex rel. Brunson v. Bedner, supra).

Plaintiffs have failed to show a clear legal right to mandamus in the case at bar, and defendant has met the second test for summary judgment, e.g. that he is entitled to judgment as a matter of law. While this Court is sympathetic to plaintiffs' plight and frustration, the issue before this Court is a very narrow one, e.g. will mandamus apply. Being an "extraordinary" writ, the law holds that mandamus must be sparingly applied and the requirements for same strictly construed, and this Court is required to follow that law whether it "personally" agrees or not.

Therefore, the Court concludes that defendant's Civil Rule 56 Motion for Summary Judgment should be granted.

V. Judgment

Therefore, it is hereby ordered that for the foregoing reasons:

1) defendant's Motion to Dismiss is overruled and denied,

2) defendant's Motion for Summary Judgment is sustained and granted, and final judgment entered for defendant and against plaintiffs,

3) petition for Writ of Mandamus overruled and denied,

4) costs assessed to plaintiffs; apply deposit; see record.

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William J. Martin

William J. Martin, Judge

cc:

Attorney Harry W. Schmuck
401 Central Trust Tower
Canton, OH 44702

Attorney Mary Kay Jenkins,
Assistant Attorney General
Environmental Law Section,
Division of Reclamation
Fountain Square, Bldg. B-3
Columbus, OH 43224