

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE EX REL. JOHN VOLECK AND
VIRGINIA VOLECK,

RELATORS,

VS.

VILLAGE OF POWHATAN POINT
BOARD OF PUBLIC AFFAIRS,

RESPONDENT.

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CASE NO. 08-BE-33

OPINION
AND
JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:

Petition for Writ of Mandamus

JUDGMENT:

Petition for Writ of Mandamus Dismissed

APPEARANCES: For Relators

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For Respondent

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: February 18, 2010

PER CURIAM:

{¶1} Relators John and Virginia Voleck have filed a petition for writ of mandamus seeking to compel Respondent Village of Powhatan Point to provide “visually-clean and chemically-pure” water to them. They contend that the water the Village provides is dirty and contaminated. The matter comes for decision based upon the parties’ respective motions for summary judgment.

{¶2} The Volecks have been residents of Powhatan Point for the past thirty-one years. Beginning in 2004, the Volecks began to complain to village officials about the quality of water supplied to them by the village. It is undisputed that the Volecks pay the village for their water. The Volecks attempted unsuccessfully to remedy the problem by purchasing and using water filters. The village reimbursed them for those filters, but the Volecks continue to be unhappy with the quality of water supplied by the village.

{¶3} The Volecks hired a civil engineer consultant, Valiant Roxby, in June 2006. He has inspected and tested the Volecks water on a regular basis and concluded that the water supply contains a significant quantity of contaminants. He characterizes the water as undrinkable and unsuitable for household use. He alleges that the village does not test for all contaminants or have a system for eliminating such contaminants from the water system. In support, he points to a 2008 Ohio EPA study which concluded that the village’s water supply “has a high susceptibility to contamination.” Roxby attributes the contamination to drainage from coal mines which are prevalent in Belmont County and other soil contaminants leaching into the village’s well field. He opines that the source of contamination does not come from the Volecks’ own household pipes.

{¶4} Powhatan Point contends that it has not been issued any violations of any applicable federal or state water standards. It maintains that it investigated the Volecks’ complaints and determined that there was no problem with the water supply, but theorizes that the problem lies in the water line from the village’s supply line to the Volecks’ home which is on their property and is their responsibility. It points out

that the Volecks' have not had their water line dug up or otherwise inspected to determine if there are any problems with that line. Nor have any other residents reported experiencing the same problems as the Volecks.

{¶5} “Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” R.C. 2731.01. “Mandamus will not lie to enforce a private right against a private person.” *State ex rel. Russell v. Duncan* (1992), 64 Ohio St.3d 538, 597 N.E.2d 142, 143, quoting *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 40 O.O.2d 141, 228 N.E.2d 631, paragraph eight of the syllabus. To be entitled to a writ of mandamus, a relator must carry the burden of establishing that: (1) he or she has a clear legal right to the relief sought, (2) the respondent has a clear legal duty to perform the requested act, and (3) the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶16.

{¶6} Mandamus is an extraordinary remedy available only when the usual forms of procedure are incapable of affording relief. *State ex rel. Woodbury v. Spitler* (1973), 34 Ohio St.2d 134, 63 O.O.2d 229, 296 N.E.2d 526. It has been observed that “[m]andamus is not well adapted to the trial of questions of fact, or the determination of controversies of a strictly private nature. Its office is rather to command and enforce the performance of those duties in which the public have some concern, and where the right is clear, and does not depend upon a complication of disputed facts which must be settled from the conflicting testimony of witnesses.” *State ex rel. Mosser Constr., Inc. v. Toledo* (1996), 111 Ohio App.3d 492, 493-494, 676 N.E.2d 602.

{¶7} At the outset, the Volecks posit that “[i]n its simplest form, this case tests whether a municipal supplier of water has satisfied its contractual duty when failing to provide clean and pure drinking water to a customer's home.” (Relator's Motion for Summary Judgment, p. 2.) This statement acknowledges the contractual nature of their cause of action. Generally, contractual rights can only be settled in an

action at law, not mandamus. *City of Mt. Vernon v. State* (1905), 71 Ohio St. 428, 453-454, 73 N.E. 515. In this instance, there is conflicting evidence as to the source of the alleged contamination of the Voleck's water. They have presented evidence that it may be coming from the village's supply line and the village has presented evidence that the problem may lie in the water line on the Volecks property going from the supply line to the home. Thus, to that extent, mandamus is an inappropriate avenue to seek relief and the Volecks have an adequate remedy in the ordinary course of law by way of a breach of contract action in law.

{¶18} The Ohio Supreme Court has stated that where “a duty is based upon both *contract and law*, mandamus is appropriate despite the availability of another action at law.” (Emphasis added.) *State ex rel. Ms. Parsons Constr., Inc. v. Moyer* (1995), 72 Ohio St.3d 404, 406, 650 N.E.2d 472, 474, citing *State ex rel. Cope v. Cooper* (1930), 122 Ohio St. 321, 326-327, 171 N.E. 399, 401. However, the Volecks here have failed in their burden to establish that the village owes them a clear and specific legal duty under Ohio case law or statutory law that it provide them “visually-clean and chemically-pure” water that is enforceable by way of mandamus. They cite the World Health Organization's Guidelines for Drinking-water Quality which refers to safe, drinking water as a basic human right. But, they cite to no authority that indicates that these guidelines are binding upon municipalities that offer water service to its residents.

{¶19} However, that is not to suggest that municipalities that do choose to provide water to its residents are not bound by any guidelines concerning the quality of the water provided. Mandamus in this court is simply not the proper avenue to seek compliance with whatever guidelines have been set in Ohio for the quality of a municipality's water supply. As the Ohio Supreme Court has pointed out, “[u]nder [former] R.C. 6111.12¹, the statutory procedure for claims that a public water supply

¹ {¶a} R.C. 6112.12 is now codified under R.C. 6109.11 and provides the procedure for filing a complaint of impure water supply with the EPA:

{¶b} “Whenever any person files with the environmental protection agency a complaint, in writing, setting forth that it is believed that water provided by a public water system is impure and dangerous to health or does not contain quantities of fluoride as required by section 6109.20 of the Revised Code, the director of environmental protection shall forthwith inquire into and investigate the conditions contained in the complaint.”

is impure and dangerous to health is by complaint to the Environmental Protection Agency. Further, under R.C. 3745.04 * * * ‘the Environmental Board of Review has exclusive original jurisdiction over any matter which may, under * * * (R.C. 3745.04), be brought before it.’” *City of Cincinnati ex rel. Crotty v. City of Cincinnati* (1977), 50 Ohio St.2d 27, 30, 361 N.E.2d 1340.

{¶10} The EPA is vested with the authority to administer the laws pertaining to the public water supply. R.C. 3745.01. The EPA was created with the intent that it “[p]rovide for enforcement of the right of the people to environmental quality consistent with human health and welfare.” R.C. 3745.011. Likewise, R.C. 3745.08 details the procedure for filing a complaint with the EPA. The filing of a complaint prompts an investigation into the alleged violation and a hearing, if necessary. R.C. 3745.08.

{¶11} Consequently, in addition to the remedy by way of a contract action, the Volecks also have a remedy available by way of the administrative procedure set forth in R.C. 6109.11 and R.C. 3745.01 et seq. The Volecks filed such a complaint. The complaint was investigated and no violations were found. Apparently, however, the Volecks have done nothing further to administratively appeal that decision through the EPA. R.C. 3745.04. The failure to exhaust administrative remedies that were available in the ordinary course of law bars extraordinary relief in mandamus. E.g., *State ex rel. Leyendecker v. Duro Test Corp.* (1999), 87 Ohio St.3d 237, 719 N.E.2d 528; *State ex rel. Reeves v. Indus. Comm.* (1990), 53 Ohio St.3d 212, 559 N.E.2d 1311; *State ex rel. Stafford v. Indus. Comm.* (1989), 47 Ohio St.3d 76, 547 N.E.2d 1171.

{¶12} Accordingly, the Voleck’s summary judgment motion is hereby overruled, Powhatan Point’s summary judgment motion is sustained, and this cause dismissed.

{¶13} Costs taxed against Relators. Final order. Clerk to serve notice as provided by the Civil Rules.

Donofrio, J. concurs.

Vukovich, P.J. concurs.

DeGenaro, J. concurs.