

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-404

AUGUST TERM, 2006

Leon Beliveau

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APPEALED FROM:

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v.

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Chittenden Superior Court

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City of Burlington

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DOCKET NO. S308-05 CnC

Trial Judge: Richard W. Norton

Ben W.

Joseph

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from the superior court=s dismissal of his action requesting public documents from, and injunctive relief against, the City of Burlington. We reverse.

In February 2005, the City of Burlington=s code enforcement office sent plaintiff a letter requesting that he

call the office to set up a time for a required routine inspection of his rental premises. In response, plaintiff sought a copy of the 1965 zoning ordinance book, which he claimed contained a local population authoritative statement needed to create and enforce the Minimum Housing Standards Ordinance. The office responded that it could not satisfy plaintiff's request because it was not the custodian of the requested record. The office suggested that plaintiff direct his request to the Burlington city clerk's office, and further informed plaintiff that he could appeal the denial of his request to the director of the office of enforcement and, if necessary, the superior court. See 1 V.S.A. " 318(a)(2), 319.

Not satisfied with what he obtained from the city clerk's office, plaintiff filed an appeal to the director of enforcement, who denied the request for the same reason it was initially denied. Plaintiff then appealed to the superior court. In the superior court, plaintiff's appeal from the denial of a request for public records evolved into a claim for injunctive relief. Stating that the City had failed to provide him with the 1965 zoning ordinance book, which supposedly contained authorization for the City to enforce its Minimum Housing Standards Ordinance, plaintiff requested that the court enjoin the City from enforcing that ordinance. The City responded by stating that (1) there is no 1965 zoning ordinance book, but rather only a 1965 cumulative supplement to the revised ordinances of 1962, which was provided to him; (2) the City has no knowledge of any local population authoritative statement; and (3) the City's authority to enforce the Minimum Housing Standards Ordinance is provided by statute rather than by any such statement contained in an earlier ordinance.

Plaintiff then asked the superior court to determine when residential districts were established in the City of Burlington. The City moved to dismiss the case for failure to state a claim for which relief can be granted, stating that there is no 1965 zoning ordinance book, and that both statutory law and the city charter plainly authorized enforcement of the Minimum Housing Standards Ordinance. See 24 V.S.A. ' 5003(a) (AFor the purposes of promoting the public health, safety, morals or general welfare, and for the purpose of making dwellings and dwelling premises safe, sanitary and fit for human habitation, a municipality may adopt, amend and revise an ordinance for the establishment and enforcement of minimum standards for dwellings.@). In opposing the motion, plaintiff stated that his claim was that the City had stolen from the local population all public documents containing information pertaining to when residential districts had been established in the City

of Burlington.

The superior court granted the City's motion to dismiss, ruling that the court did not have the power to issue advisory opinions. On appeal, plaintiff repeats his claims that (1) the City does not have the legal authority to enforce the Minimum Housing Standards Ordinance; and (2) the 1965 zoning ordinance book is the public document that contains the local population authoritative statement that the City needs to enforce that ordinance. He contends that the superior court erred by dismissing his case for failure to state a claim because he has requested that the City produce a document showing when residential districts were created in Vermont. The City responds that ' 5003(a) plainly authorizes it to enforce the Minimum Housing Standards Ordinance, and that the document plaintiff seeks does not exist.

This is a public records case that commenced as an appeal from an administrative denial of a request for a certain document that the agency claims does not exist. The superior court correctly concluded that addressing certain issues plaintiff raised concerning the City's enforcement authority would be issuing an advisory opinion, in the absence of any live controversy. But plaintiff has persisted with his original request for a certain document—the 1965 zoning ordinance book, which we understand from the record actually to be a full text of the Burlington zoning ordinance as discussed at a meeting of the Burlington Planning Commission on November 20, 1967. He claims this Abook@ contains a statement authorizing the City's enforcement of its Minimum Housing Standards Ordinance.

Although the City contends that the document does not exist, plaintiff has plainly stated a claim for which relief could be granted. The City may be able to prevail on a motion for summary judgment, but it cannot prevail on the merits of plaintiff's claim based on its motion under V.R.C.P. 12(b)(6). See Powers v. Office of Child Support, 173 Vt. 390, 395 (2002) (AThe purpose of a motion to dismiss is to test the law of the claim, not the facts which support it.@). Moreover, there is no indication in the record that the superior court converted the City's motion to dismiss into a motion for summary judgment, with notice and an opportunity for the parties to submit additional materials. See Fitzgerald v. Congleton, 155 Vt. 283, 293 (1990) (upon converting motion to dismiss into motion for summary judgment, trial court must notify parties of changed status

and give them reasonable opportunity to submit extra-pleadings materials as allowed under V.R.C.P. 56(e)).

Because plaintiff did state a claim for which relief could be grantedCthe production of a certain documentCthe matter must be remanded for the court to consider that claim. On remand, the court must consider, and if necessary hold a hearing and take evidence on, whether the public record plaintiff seeks in fact exists and can be produced by the City.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice