VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00078

Town of Readsboro v Marchegiani and Scott

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion 1); Motion to Strike (Motion 2)
Filer: Adam Waite
Filed Date: September 2, 2022 (Motion 1); September 21, 2022 (Motion 2)

Motion to Dismiss is DENIED; Motion to Strike is MOOT

DECISION ON MOTIONS

The Town of Readsboro (Town) filed the present enforcement action in this Court seeking an order from this Court assessing fines, enjoining Respondents' continued violation by requiring they remove the enlarged portion of the deck to bring it back to its preexisting, nonconforming size, and awarding attorney's fees and costs. Respondents Brian Marchegiani and Casey Scott (Respondents) own the Readsboro Inn and allegedly extended the deck on their Inn beyond its previous size, which the Zoning Administrator asserts increased the degree of nonconformity in violation of the Readsboro Zoning Bylaws (Bylaws) § 3.1(a) and (f).

This matter is before the Court on Respondents' Motion to Dismiss for failure to state a claim for which relief may be granted. Respondents argue they are entitled to dismissal on these grounds because (1) the Town did not comply with all the requirements of 24 V.S.A § 4451 when issuing the Notice of Violation (NOV) prior to filing suit, and (2) the Complaint fails to allege facts sufficient to state a claim because the complaint fails to provide which section of the Bylaws make the deck nonconforming. In the alternative, Respondents move the Court to require the Town to provide a more definite statement pursuant V.R.C.P. 12(e). The Town opposes Respondents' motion, arguing (1) the NOV substantially complied with the procedural due process requirements such that a reasonable person would be on notice of the violation, their options, and the consequences of inaction, (2) Respondents' failure to appeal bars any collateral attacks on the NOV, and (3) a more definite statement is not necessary for Respodents to respond. Pl.'s Mot. in Opp. to Mot. to Dismiss at 5 (filed Sept. 9,

2022). In support of its opposition, the Town filed an affidavit from the Acting Zoning Administrator, Omar Smith. Aff. of Omar Smith, Acting Zoning Administrator (filed Sept. 9, 2022).[1]

In response, Respondents filed a Motion to Strike the affidavit, arguing that the affidavit is immaterial to the Court's consideration of their Motion to Dismiss. Defs.' Mot. to Strike at 2 (filed Sept. 21, 2022). The Town disagrees, arguing that the affidavit is material to the facts and procedural posture of the case and should result in the Respondents' Motion to Dismiss being converted to a motion for summary judgment. Pl.'s Opp. to Mot. to Strike at 1–2 (filed Sept. 23, 2022).

DISCUSSION

a. Statutory Requirements of the Notice of Violation

First, Respondents argue that this enforcement action must be dismissed because the underlying NOV is statutorily inadequate, and that those omissions deprived Respondents of due process. Defs.' Mot. to Dismiss at 3–4 (filed Sept. 2, 2022). Specifically, Respondents assert the NOV was inadequate because it failed to provide (1) clear directions on how to cure the alleged violation, (2) the facts giving rise to the violation, (3) the section of the Bylaws that makes the deck a nonconformity, and (4) notice that a failure to appeal would render the NOV final and binding. Id. at 3.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In so providing, however, the Supreme Court was setting forth the floor, not the ceiling, of procedural due process requirements. See Bracy v. Gramley, 520 U.S. 899, 904 (1997) ("[T]he Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.").

The Legislature has enacted heightened seven-day warning and notice of violation requirements for seeking penalties in municipal zoning enforcement. 24 V.S.A. § 4451(a). The statute provides that "no action may be brought under [the enforcement; penalties] section unless the alleged offender has had at least seven days' warning notice by certified mail." Id. The seven-day warning notice must "state that a violation exists, that the alleged offender has an opportunity to cure the violation within the seven days, and that the alleged offender will not be entitled to an additional warning notice for a violation occurring after the seven days." 24 VS.A. § 4451(a)(1).

Additionally, the statute provides requirements for Notices of Violation issued under the Municipal and Regional Planning and Development chapter. 24 V.S.A. § 4451(a)(2). The Statute requires these Notices of Violation to state:

> (A) the bylaw or municipal land use permit condition alleged to have been violated;

[1] The Affidavit cites several accompanying exhibits, which were not filed with the Court.

> (B) the facts giving rise to the alleged violation;
>
> (C) to whom appeal may be taken and the period of time for taking an appeal; and
>
> (D) that failure to file an appeal within that period will render the notice of violation the final decision on the violation addressed in the notice.

24 V.S.A. § 4451(a)(1)(A)–(D). If not appealed, the Notice of Violation becomes final on all parties and this Court. 24 V.S.A. § 4472. Under those circumstances, the parties may not collaterally challenge the allegations contained therein, and the Court is bound the allegations contained in the notice.

With regards to the seven-day warning notice requirements, the Court concludes Respondents received "at least seven days' warning notice by certified mail." 24 V.S.A. § 4451(a)(1); Compl. ¶ 5. First, the seven-day warning informed Respondents that a "violation exists as follows: The deck was replaced and is enlarged and extended from its previous size and has increased the degree of nonconformity in violation of the Town of Readsboro Zoning Bylaw, Section 3.1, a, and f." Compl. Ex. 1; 24 V.S.A. § 4451(a)(1). Second, the seven-day warning notice informed Respondents that they have an opportunity to cure. The statutory requirements do not demand that the Notice provide clear and definite steps for what must be done to cure the violation, only that they provide the opportunity to cure the violation. 24 V.S.A. § 4451(a)(1). The warning informed Respondents that they may "correct this violation by removing the enlarged and extended portion of the deck," bringing it back to its original dimensions, and that they "have seven days from the date of this notice to correct this violation." See Compl., Ex. 1 (Violation Notice); 24 V.S.A. § 4451(a)(1). Finally, the seven-day warning informed Respondents that "further action may be taken without the seven-day notice and opportunity to correct the violation if the violation of the bylaw or ordinance is repeated after the seven-day notice period and within the next succeeding 12 months." Compl., Ex. 1 (Violation Notice). As such, the Court concludes that the Town has satisfied the warning requirements necessary before the Court may seek penalties. 24 V.S.A. § 4451(a)(1).

Turning to the Notice of Violation requirements, the Court finds that while the notice sufficiently provides the facts giving rise to the violation and the section of the Bylaws violated, the notice fails to warn Respondents that a failure to appeal would render the NOV final. Specifically, the Court finds that nowhere within the four-corners of the NOV does it explicitly warn of the consequences of Respondents' inaction. At best, the NOV informs Respondents that they only have two options—(1) cure the violation within seven days, or (2) appeal the NOV—and that a failure to take either action would result in enforcement. See Compl., Ex. 1 (Violation Notice). The Town argues that this "substantially compl[ies]" with the notice requirements such that a reasonable person could have easily understood that a failure will result in enforcement. Pl.'s Opp. to Mot. to Dismiss at 6. While true that the NOV mostly complies, it does not meet the statutory requirement that it state "that failure to file an appeal within that period will render the notice of violation the final decision on the violation addressed in the notice." 24 V.S.A. § 4451(a)(1)(D). As such, the Court concludes the NOV is insufficient to warrant finality. The allegations contained therein must be established by the Town during the enforcement merits hearing and may be challenged by the allegations contained therein. Cf. In re Benoit Conversion Application, Nos. 143-7-08 Vtec, 148-8-04 Vtec, 126-7-04 Vtec, slip op. at 15 (Vt. Super. Envtl. Div. Oct. 14, 2021) (noting that municipalities that issue inadequate NOVs "do so at their own peril").

The Court now addresses whether the Complaint adequately states a claim, despite the absence of the NOV's finality.

b. Failure to State a Claim

The Court conducts municipal enforcement actions for violations of bylaws under the Vermont Rules of Civil Procedure. V.R.E.C.P. 3(5)–(6). Pursuant to the Vermont Rules of Civil Procedure, a Rule 12(b)(6) "motion to dismiss serves to identify an insufficient cause of action . . . where essential elements are not alleged." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1. The Court, in reviewing a motion to dismiss, must "accept all facts as pleaded in the complaint [and] accept as true all reasonable inferences derived therefrom . . . ." Felis v. Downs Rachlin Martin PLLC, 2015 VT 129, ¶ 12, 200 Vt. 465. However, the Court is "not required to accept as true 'conclusory allegations masquerading as factual conclusions' in 12(b)(6) analysis." Colby, 2008 VT 20, ¶ 10 (quoting Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002)).

"A motion to dismiss for failure to state a claim is not favored . . . ." Ass'n of Haystack Prop. Owners, Inc. v. Sprague, 145 Vt. 443, 446–47 (1985). The Court should not dismiss a cause of action for failure to state a claim unless it appears "beyond doubt that there exist no facts or circumstances, consistent with the complaint, that would entitle the plaintiff to relief." Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575. Plaintiff's burden to state a claim under Vermont's "notice-pleading standard is exceedingly low." Id.

The Complaint alleges that Respondents' own the Readsboro Inn in Readsboro, VT, a municipality with duly adopted bylaws in effect. Compl. ¶¶ 3–4. Respondents were issued a warning by certified mail, notifying them "that the wooden deck which Defendants had replaced had been enlarged and extended from its previous size" which "increased the degree of nonconformity in violation of the Readsboro Zoning Bylaw, Section 3.1, a. and f." Id. ¶¶ 5–6. Despite communications between the Zoning Administrator and the Respondents occurring, Respondents allegedly remain in violation of the Bylaws, as they have not removed the portion of the deck beyond the dimensions of the original deck. Id. ¶¶ 7–9, 12. For relief, the Town is requesting the Court (1) order Respondetns bring their property into compliance, (2) issue fines for each day of noncompliance, and (3) award reasonable attorney's fees and costs. Id. Relief ¶¶ 10–12 (citing prayer for relief section).[2]

The Legislature has provided two means of enforcement for municipalities: legal penalties pursuant 24 V.S.A. § 4451, and equitable remedies pursuant § 4452. Before a municipality may bring an enforcement action for legal penalties pursuant § 4451, the municipality must serve Defendant a seven-day warning notice that meets specific statutory criteria. See 24 V.S.A. § 4451(a) ("No action may be brought under this section unless the alleged offender has had at least seven days' warning notice by certified mail."). As discussed above, the Respondents received a seven-day warning notice that states a violation exists, that the Respondents had an opportunity to cure the violation within the seven days, and that the Respondents would not be entitled to an additional warning notice. In its complaint, the

[2] The Complaint contains paragraph numbers 10 through 12 twice. As such, the Court cites the body of the complaint as "Compl. ¶ #" and the requests for relief as "Compl. Relief ¶ #."

Town has alleged: Bylaws have been duly adopted and apply to the Respondents' property; Respondents expanded the deck in violation of those Bylaws; Respondents received a seven-day warning by certified mail informing them of the violation, their opportunity to cure, and that they are not entitled to additional warning; and Respondents have not cured the violation. As such, the Town has sufficiently alleged "facts or circumstances, consistent with the complaint, that would entitle the [Town] to relief" pursuant 24 V.S.A. § 4451. Bock, 2008 VT 81, ¶ 4.

Unlike the penalties provision, the remedies provision does not carry any seven-day warning requirements. 24 V.S.A. § 4452. In its complaint, the Town has alleged that Bylaws have been duly adopted and apply to the Respondents' property, Respondents expanded the deck in violation of those Bylaws, and those violations are on-going. Compl. ¶¶ 3–12. As such, the Town has sufficiently alleged "facts or circumstances, consistent with the complaint, that would entitle the [Town] to relief" pursuant 24 V.S.A. § 4452. Bock, 2008 VT 81, ¶ 4.

Finally, with regards to the Town's claim for attorney's fees, "Vermont follows the 'American Rule,' under which each party bears the cost of its own attorney's fees absent a statutory or contractual provision authorizing an award of attorney's fees." Town of Milton Bd. of Health v. Brisson, 2016 VT 56, ¶ 29, 202 Vt. 121. The Town has not alleged any such statutory or contractual provision here. The Court has, however, recognized an "equitable exception" to this rule. Id. at ¶ 30. While such a sanction is "appropriate 'only in exceptional cases and for dominating reasons of justice,'" id. at ¶ 30 (quoting In re Gadhue, 149 Vt. 322, 328–30 (1987)), dismissal is not favored and should only be granted if it appears "beyond doubt that there exist no facts or circumstances, consistent with the complaint, that would entitle the plaintiff to relief." Bock, 2008 VT 81, ¶ 4; Haystack, 145 Vt. at 446–47.

The Court concludes the Town has stated a claim for which relief may be granted. Respondents' Motion to Dismiss is **DENIED**.

c. Motion for More Definite Statement

Because the enforcement action was not dismissed, the Court turns to Respondents' request for a more definite statement. The Court conducts municipal enforcement actions for violations of bylaws under the Vermont Rules of Civil Procedure. V.R.E.C.P. 3(5)–(6). Under the Vermont Rules of Civil Procedure, "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." V.R.C.P. 12(e). "The purpose of the complaint is to 'inform the defendant as to the general nature of the action and as to the incident out of which a cause of action arose.' Accordingly, Rule 12(e) is 'designed to remedy unintelligible pleadings, not merely to correct for lack of detail.'" Cf. Greater New York Auto. Dealers Ass'n v. Env't Sys. Testing, Inc., 211 F.R.D. 71, 76 (E.D.N.Y. 2002) (citations omitted) (discussing F.R.C.P. 12(e)).

The Court does not find that the Town's Complaint is so vague, ambiguous, or unintelligible that the Respondents are unable to produce an answer. The Complaint clearly alleges the facts or actions relevant to the underlying enforcement action—i.e., allegedly, Respondents own a property in a Town

with duly adopted Bylaws, built a deck that was larger than their original deck which increased the degree of non-conformity in violation of those Bylaws, and have refused to bring the deck back into compliance. The Court finds a person of ordinary intelligence could discern what is alleged in each paragraph and frame an answer. Respondents' request for a more definite statement is **DENIED**.

d. Motion to Strike Affidavit of Zoning Administrator Omar Smith

Finally, because the Court has concluded that the Town has alleged a sufficient cause of action within the four-corners of its Complaint, despite the inadequacies of its NOV, the Court now concludes that Respondents' Motion to Strike the affidavit of Omar Smith, and its accompanying exhibits, is **MOOT** for purposes of this motion.

CONCLUSION AND ORDER

For the forgoing reasons, the Court concludes that the Town has sufficiently alleged "facts or circumstances, consistent with the complaint, that would entitle the [Town] to relief." Bock, 2008 VT 81, ¶ 4. In its complaint, the Town has alleged: Bylaws have been duly adopted and apply to the Respondents' property; Respondents expanded the deck in violation of those Bylaws; Respondents received a seven-day warning by certified mail informing them of the violation, their opportunity to cure, and that they are not entitled to additional warning; and Respondents have not cured the violation. As such, Respondents' Motion to Dismiss **DENIED**.

The Court does not find that the Town's Complaint is so vague, ambiguous, or unintelligible that the Respondents are unable to produce an answer. As such, Respondents' Motion for a More Definite Statement is **DENIED**.

Finally, because the Court ruled on the Motion to Dismiss from within the four-corners of the Complaint, Respondents' Motion to Strike the Affidavit of Omar Smith is **MOOT**.

Electronically signed November 28, 2022 pursuant to V.R.E.F. 9(D).

Tom Walsh

Thomas G. Walsh, Judge
Superior Court, Environmental Division