VERMONT SUPERIOR COURT
Environmental Division
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Burlington, VT 05401
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Docket No. 105-9-19 Vtec

Town of Pawlet v Daniel Banyai

ENTRY REGARDING MOTION

Title: Motion to Amend and for Reconsideration of Post-Judgment Decision on Motion for Contempt and Fines (Motion #21)

Filer: Robert J. Kaplan, attorney for Daniel Banyai

Filed Date: March 03, 2023

Town of Pawlet Memorandum in Opposition filed on March 17, 2023 by Merrill E. Bent, attorney for the Town of Pawlet.

Reply to Memorandum in Opposition filed on March 31, 2023 by Robert J. Kaplan, attorney for Daniel Banyai.

The remainder of the motion is DENIED.

Presently before the Court is the remainder of Daniel Banyai's ("Respondent") Motion to Amend our Post-Judgment Decision on Motion for Contempt and Fines ("motion"), filed pursuant V.R.C.P. 59(e). By this Court's March 24, 2023 Entry Order, we addressed a limited portion of the Motion that required our immediate attention. See Town of Pawlet v. Banyai, No. 105-9-19 Vtec (Vt. Super. Ct. Envtl. Div. Mar. 24, 2023) (Durkin, J). Respondent's motion comes after this Court's Decision on the Town's Post Judgment Motion for Contempt in this matter. See Town of Pawlet v. Banyai, No. 105-9-19 Vtec (Vt. Super. Ct. Envtl. Div. Feb. 8, 2023) (Durkin, J) [hereinafter the "Contempt Decision"]. Relevant to Respondent's present motion, the Court found Respondent in contempt of this Court's March 5, 2021 Judgement Order,[1] and again ordered the removal of

[1] The Vermont Supreme Court affirmed this Judgment Order. See Town of Pawlet v. Banyai, 2022 VT 4.

certain improvements on his property at 541 Briar Hill Road in Pawlet, Vermont (the "Property") by specific deadlines. The Court further held that, should Respondent fail to meet these deadlines, he would be jailed pursuant 12 V.S.A. § 123, and the Town would be permitted to enter and assist Respondent in completing the work. Respondent now asks that the Court amend the Contempt Decision to: (1) extend the compliance deadlines therein; (2) strike the requirement that he remove the berms installed for the shooting ranges; and (3) strike the portion of the Contempt Decision ordering his imprisonment upon a failure to meet the compliance deadlines. The Town opposes Respondent's motion.

The Rules of Civil Procedure, including Rule 59, apply to these post-judgment proceedings in the Environmental Division. V.R.E.C.P. 3. While there is not a large body of Vermont case law under Rule 59, the rule is "based on the Federal Rules of Civil Procedure." Reporter's Notes, V.R.C.P. 1; compare V.R.A.P. 59 with F.R.C.P. 59. Because these provisions are substantially similar, the Court may use federal case law interpreting the federal rule as persuasive authority. Drumheller v. Drumheller, 2009 VT 23, ¶ 29, 185 Vt. 417; See Reporter's Notes, Rule 59 ("This rule is substantially similar to Federal Rule 59").

Rule 59(e) provides four primary grounds for relief: (1) "to correct manifest errors of law or fact upon which the judgment is based"; (2) to allow a moving party to "present newly discovered or previously unavailable evidence"; (3) "to prevent manifest injustice"; and (4) to respond to "an intervening change in the controlling law." See Montanio v. Keurig Green Mountain, Inc., 276 F. Supp. 3d 212, 216 (D. Vt. 2017) (citing 11 C. Wright & A. Miller, et al., Federal Practice and Procedure, Civil § 2810.1 (3d ed.)); see Reporter's Notes, V.R.C.P. 59 (giving "the court broad power to alter or amend a judgment"). The Vermont Supreme Court has held that the courts "may reconsider issues previously before it, and generally may examine the correctness of the judgment." Drumheller, 2009 VT 23, ¶ 36 (quoting Ray E. Friedman & Co. v. Jenkins, 824 F.2d 657, 660 (8th Cir.1987)); see also Bell v. Bell, 162 Vt. 192, 195 (1994) (stating that the purpose of a Rule 59(e) motion "is to examine the correctness of matters before the court at trial").

However, "[r]econsideration of a court's order is an 'extraordinary remedy to be employed sparingly in the interest of finality and conservation of scarce judicial resources."

Daiello v. Town of Vernon, No. 356-8-14 Wmcv, slip op. at 1 (Vt. Super. Ct. Civ. Div. June 12, 2017) (quoting USA Certified Merchants LLC v. Koebel, 273 F. Supp. 2d 501, 503 (S.D. N.Y. 2003)) *reversed on other grounds by* Daiello v. Town of Vernon, 2018 VT 17, 207 Vt. 139; see N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶ 41, 184 Vt. 303 ("The narrow aim of Rule 59(e) is to make clear that the [trial] court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment" (quotations omitted)). The standard in considering these motions "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." Shrader v. CSX Transp., Inc., 70 F. 3d 225, 257 (2d Cir. 1995). "Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998).

The Court addressed the request to extend the deadlines in its March 24, 2023 Entry Order, due to the time constrictions inherent in that request. See Town of Pawlet, No. 105-9-19 Vtec (Mar. 23, 2023). The Court now addresses the remaining two basis for Respondent's request for reconsideration. Namely, Respondent asks that the Court (1) strike the requirement that Respondent deconstruct the shooting range berms because he argues they are beyond the scope of the NOV; and (2) strike the portion of its Order which would imprison Respondent if he remains in contempt of the Court's order beyond the established deadlines. We therefore now address those two remaining requests.

I. The Shooting Ranges' Berms

Respondent argues that the Court should amend the aspect of the Contempt Decision regarding the removal and deconstruction of the berms because that order exceeds the Court's subject matter jurisdiction and violates existing precedent. Specifically, Respondent argues that the berms constructed to create the shooting ranges and used as part of his training facility are outside the scope of the 2019 Notice of Violation ("NOV") originally giving rise to this appeal, and therefore are beyond the enforcement authority of this Court. Respondent does not direct the Court to any intervening changes in the controlling law in support of his motion or newly

discovered evidence. Rather, Respondent relies on arguments that the Order represents a "manifest error[] of law or fact upon which the judgment is based . . . ." Keurig Green Mountain, Inc., 276 F. Supp. 3d at 216. The Town opposes the motion.

The Court concludes that the Order relative to the berms is within the scope of this Court's jurisdiction and the Contempt Decision need not be amended to correct a manifest error in law or fact in this regard. Most critically, through the NOV, Respondent was clearly directed to "eliminate the unpermitted uses on the property, remove all unpermitted buildings, and not allow unpermitted uses to resume on the property" within seven days of the date of the NOV. NOV; Pawlet, 2022 VT 4, ¶ 7. The NOV notified Respondent that the only permitted use was the garage/apartment, and this Court confirmed that a June 8, 2019, zoning permit did not authorize the shooting range improvements, a conclusion and order appealed by Respondent and affirmed by the Supreme Court. See Town of Pawlet, No. 105-9-19 Vtec at 21 (Mar. 5, 2021) ("We further declare that the June 8, 2019 zoning permit did not authorize the multiple buildings, shooting ranges and tactical firearms training facility that Mr. Banyai was operating."); *aff'd* Town of Pawlet v. Banyai, 2022 VT 4, ¶¶ 3, 31–40. Asking the Court to reconsider its judgment based on this new legal argument is asking the Court to give the movant a "[fourth] bite at the apple." Sequa Corp., 156 F.3d at 144. Reconsideration is not that vehicle. Id.

Thus, the NOV clearly contemplates the berms, and this contempt proceeding is not an opportunity to collaterally attack the NOV or this Court's March 5, 2021 Decision and Judgment Order. See Pawlet, 2022 VT 4, ¶ 40. In fact, the Supreme Court unequivocally informed Respondent that "he cannot rely . . . on his general assertion that the improvements on and uses of his property are not subject to municipal zoning." Id. As noted in this Court's Contempt Decision, the NOV informed Respondent that he was violating Article VIII, Section 2 of the Town of Pawlet Unified Zoning Bylaws ("Bylaws"), which provides that "[n]o building construction or land development[2] may commence and no land or structure may be devoted to a new or

[2] The Bylaws define "development" as including, in relevant part, "any mining, excavation, or landfill, and any change in the use of any building or other structure, or land, or extension of use of land. Or any human-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining,

changed use within the municipality without a zoning permit duly issued . . . ." Resp't's Ex. A at 1 [hereinafter "NOV"] (emphasis added). The NOV specified that Respondent had "erected multiple structures in violation of this provision, and [was] operating a training facility/shooting school in violation of this provision." Id. (emphasis added). The NOV ordered that, to cure the violation, Respondent "must eliminate the unpermitted uses on the property, remove all unpermitted buildings, and not allow unpermitted uses to resume on the property." Id. The NOV specified that "[t]he only permitted use on the 541 Briar Hill Road property is a 24' by 23' garage / apartment" that the Town had previously approved. Id. (emphasis in original). As such, as the Court determined on March 2, 2021, as affirmed by the Supreme Court January 14, 2022, and reiterated again by this Court February 8, 2023, that the berms are clearly contemplated in the NOV because they constitute unpermitted land development under the Bylaws.

As such, the Court declines to reconsider its Order that Respondent deconstruct the berms and **DENIES** Respondent's motion in this regard. Respondent must deconstruct all the berm developments in/around/near/on Range 1 and Range 2. Those berms in/around/near/on Range 1 and 2 must be leveled and returned to a more natural flattened landscape by May 9, 2023. If Respondent is uncertain of what degree of deconstruction will be satisfactory, Respondent is again directed to communicate with the Town early and often.

II. Order of Imprisonment

Respondent requests the Court reconsider its prospective sanctions of imprisonment, to be imposed if Respondent remains in contempt beyond specific compliance schedule deadlines, arguing that they are punitive rather than coercive. Specifically, Respondent argues that the prospective order of imprisonment for ongoing noncompliance is impermissible because it (1) provides that Respondent may be imprisoned regardless of the level of his noncompliance or whether he is capable of complying, (2) orders imprisonment for failure to comply with an ultra

dredging, filling, grading, paving, excavation or drilling operations, or storage of equipment or materials." Ex. ZZ (filed Dec. 20, 2022).

vires order,[3] and (3) assigns "the keys to the jail" to the Town, rather than the Respondent. Respondent does not direct the Court to any intervening changes in the controlling law in support of his motion or newly discovered evidence. Rather, Respondent's argument asserts "manifest error[] of law or fact upon which the judgment is based" or otherwise alleges manifest injustice. Keurig Green Mountain, Inc., 276 F. Supp. 3d at 216. The Town opposes the motion.

As to Respondent's first argument, Respondent asserts that the Court's order allows him to be imprisoned "irrespective of the level of his compliance." Mot. to Reconsider at 5. In support of his argument, Respondent asserts the Court erred because it failed to take into consideration whether he is able to fully comply. Id. at 5 (citing Sheehan v. Reya, 171 Vt. 511, 512 (2000)). Additionally, Respondent argues that the order of imprisonment should be reconsidered because it allows for his imprisonment for contempt even if he only partially complies. Finally, Respondent also protests the method for gauging compliance. Though he does not assert that the methodology is unreliable or difficult, he asserts that it doesn't present him the opportunity to present a defense as to why he didn't comply.

None of Respondent's proffered bases for reconsideration here demonstrate a manifest error or law or fact upon which the judgment is based, nor do they identify a manifest injustice. The Court ordered full compliance, not partial compliance, and provided an extended 135-days opportunity for Respondent to bring the Property into compliance. If Respondent meets that compliance schedule, he avoids fines and imprisonment. Should Respondent fail to meet the compliance schedule, even in part, he will not have complied with the Contempt Decision.

Further, the Court applied considerable reasoning based on the evidence it had before it at the time of the show cause hearing in the Contempt Decision. See Contempt Decision at 20–21. The Court considered the season, Respondent's building capabilities, Respondent's equipment and support network, the delays that will be caused by the mud season, the limitations of finding professional help, the fact that one of the buildings was already on a registered trailer ("school"), the another was quite small ("façade"), that the others

[3] For the reason's discussed above, the Court concludes that the requirement to remove the shooting range's berms is within the scope of the NOV and this Court's order, and thus is not ultra vires. As such, the Court does not address this argument here.

(stair/ladder/platforms and shipping containers) are readily moveable, and the fact that the delay and timing of this labor is much by Respondent's own doing. What's more, there is nothing within the Contempt Order prohibiting Respondent, either by motion or by stipulation with the Town, to seek reasonable short-term extensions of compliance deadlines, should those extensions be meritorious. While this Court would caution against such requests given the extensive notice Respondent has had of the compliance deadlines, and the need to comply, the parties would be free to stipulate to extensions should unexpected or emergency circumstances arise impacting Respondent's ability to comply and not of his own making. The Court does not find that Respondent has demonstrated that the Court's Order requiring that he fully comply—rather than allowing him to partially comply—presents a manifest error of law or otherwise causes manifest injustice.

As to Respondent's other proffered bases for reconsideration, Respondent argues that the Contempt Decision impermissibly assigns "the keys to the jail" to the Town, requiring the Town demonstrate his non-compliance to the Court, and thereafter allowing the Town to enter the Respondent's property and complete the deconstruction and removal of the structures after his imprisonment. To support his argument that this is a manifest error, Respondent correctly notes that a sanction of imprisonment "must be purgeable, i.e., they must be capable of being avoided by defendants through adherence to the court's order." Mot. to Reconsider at 6 (quoting Sheehan, 171 Vt. at 512).

Here, the imprisonment can be avoided through adherence to the Court's order. Rather that immediately order the imprisonment of Respondent and provide the Town the immediate opportunity to enter the Property and bring it into compliance, the Court gave Respondent one more opportunity bring his property into compliance. If Respondent complies, all fines are purged and there is no imprisonment. In other words, Respondent can avoid imprisonment through adherence to the Court's Order. Sheehan, 171 Vt. at 512. Thus, Respondent's complaint here is mistaken: we crafted our Contempt Order to reflect that Respondent holds the keys to his jail cell up until the established deadlines.

As to Respondent's argument that the Court impermissibly gave the Town the keys to the jail by authorizing the Town to complete the compliance schedule, we conclude again that

Respondent has misinterpreted our Order. First, as noted above, Respondent can avoid the sanction all together. Second, he maintains control of the keys here through his ability to comply with the compliance schedule. While the Town is only authorized to enter the Property to complete the work outlined in the compliance schedule once the deadlines have passed, the sanction does not strip Respondent of his right to complete the work in the first instance or through agents if he fails to do so. Indeed, the Contempt Decision notes that "fines will continue to accrue until [Respondent's] agents or the Town complete[s] the work" and that "nothing prevents Respondent, or his family and friends, from assisting the Town to ensure timely compliance and Respondent's timely release." Contempt Decision at 26, 28; see also id. ("Respondent's imprisonment will terminate upon the satisfactory completion of the work by the Town, his contractors, or his friends and family."). As such, Respondent maintains the jail keys in that he may avoid the sanction all together through compliance prior to the relevant deadlines, or through agents should he be imprisoned for failure to comply by the deadlines. Finally, the subject of this original dispute was Respondent's operation of an unpermitted firearm training facility and school. The sanction of imprisonment is tailored to convince and coerce Respondent to finally comply with all components of the 2021 Judgment Order by deadlines that have been extended multiple times in response to Respondent's requests. The Court's sole goal is to coerce Respondent to finally comply with the 2021 Judgment Order, which was made final by the January 2022 affirmation by the Vermont Supreme Court.

As such, the Court declines to reconsider its Order that Respondent be imprisoned upon a demonstration of his noncompliance with the Court's order and **DENIES** Respondent's motion in this regard.

Conclusion

For the foregoing reasons, the Court **DENIES** Respondent's motion to amend the Contempt Decision regarding the berms and the imprisonment sanction. In total, when considering the Court Contempt Decision, the Court's March 24, 2023 Entry Order granting a partial amendment to judgment, and this decision declining to amend the remaining portions of the judgment, the Court's Order stands as follows:

The Court holds Daniel Banyai in **CONTEMPT** of this Court's March 5, 2021 Order, its outstanding subsequent orders and issues the following sanctions and fines to coerce Respondent's compliance with the Court's Orders.

1. The Court reiterates that the injunctive relief granted to the Town in our prior orders remains in effect. See Pawlet, No. 105-9-19 Vtec at 13 (Mar. 5, 2021). Thus, the Court continues to **ORDER** that Respondent "shall not conduct or permit to be conducted any school and/or firearms training activities on the Property situated at 541 Briar Hill Road, nor host classes of any type on the Property . . . ." Id. (converting preliminary injunction into a permanent injunction).
2. Further, the Court reiterates the equitable relief from the March 5 Order that Respondent must immediately deconstruct and remove all unpermitted buildings, uses, and land developments within the boundaries of his property. Id.
3. The Court imposes fines of $200 per day starting from January 14, 2022, and running until all violations are cured, with such fines constituting a lien upon the Property upon filing in the Pawlet Land Records. These fines are purgeable if Respondent meets the deadlines provided below.
    i. By Friday, **March 31, 2023**, Respondent must file an affidavit with the Court, confirming that he has complied with this Court's order that he remove the façade, all shipping containers, and all stair/ladder/platforms.
    ii. By **May 25, 2023**, Respondent must complete the deconstruction and removal from the Property of the School Building. This means that those improvements must no longer be anywhere within the boundaries of the Property. Additionally, Respondent must deconstruct all the berm developments in/around/near/on Range 1 and Range 2. This means that those berms in/around/near/on Range 1 and 2 must be leveled and returned to a more natural flattened landscape. If Respondent is uncertain of what degree of deconstruction will be satisfactory, Respondent is directed to communicate with the Town early and often.
    iii. By **June 23, 2023**, Respondent must deconstruct and remove the remaining unpermitted buildings that are subject to the Court's Order. For clarity, that means that Respondent must deconstruct and remove the following: the Barn (Resp't's Ex. B); the "Grain" silo (Resp't's Ex. P, Town's Exs. 2, 19); the Run-In (Town's Ex. 6, Resp't's Ex. D); and the Chicken Coop (Town's Ex. 8, Resp't's Ex. C). This means that those improvements must no longer be anywhere within the boundaries of the Property.
4. Respondent must permit the Town to conduct two site inspections—one within seven (7) calendar days following each deadline—to verify that he has met those deadlines. This means that the Town is permitted to enter and/or otherwise inspect Respondent's Property between: (1) **May 26–June 2, 2023**; and (2) **June 24–July 1, 2023**. The Town Attorney may be accompanied on each site inspection by up to two Town officials and one or more members of the Rutland County Sheriff's Department. Respondent must

permit the Town to conduct a site inspection by foot, ATV or other motorized vehicle, and/or drone. The Town's attorney and agents are not required to inspect the Property utilizing all those instruments but may elect to use all or any of those techniques in their discretion.

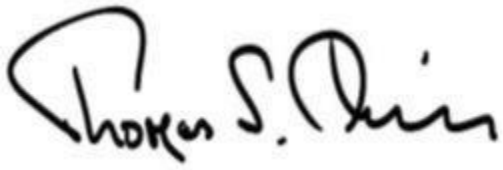
i. If the Town finds that Respondent has met the described requirements and deadlines, the fine will be purged. The Court will be satisfied that those requirements and deadlines were met when the Town and Respondent file a stipulated notice to that effect with the Court. Upon the filing of such notice, the Court will enter an order purging Respondent of the obligations of these fines.

ii. If, however, the Town finds that any one of those deadlines was not satisfied, upon the filing of photographic evidence and an accompanying sworn affidavit stating the date the evidence was collected with the Court, the Court will issue **a writ of mittimus for the imprisonment of Daniel Banyai**. Additionally, if Respondent fails to accommodate the Town's site inspections as specified here, he shall also be subject to imprisonment. The writ of mittimus will call for Daniel Banyai to immediately report to MVRCF in Rutland, or otherwise direct the Rutland County Sheriff's Office to deliver Danial Banyai to MVRCF.

iii. Upon Daniel Banyai's imprisonment, the Town will be permitted to enter the Property and complete the deconstruction and removal of those structures, uses, and developments described above. Fines will continue to accrue at the rate of $200 per day until the Respondent's agents or the Town completes the work. The Town must complete the work without unreasonable delay. Daniel Banyai will remain imprisoned until the Town or his agents complete the work. Daniel Banyai, in addition to any other legal rights and remedies available to him, will "be entitled to a review of the contempt proceedings annually" until the violations are cured and his release is procured. 12 V.S.A. § 123(b). Upon completion of the work described in the compliance order, the Town will be entitled to recover the accumulated fines, as well as reasonable compensatory damages for any work the Town had to complete on Respondent's behalf.

5. The Court **DEFERS** ruling on the Town's request for Attorney's fees until such time as compliance is achieved or further actions from the Town are required.

Electronically signed at Newfane, Vermont on Friday, April 21, 2023, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division