VERMONT SUPERIOR COURT
Environmental Division
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org

Docket No. 22-ENV-00103

East Hill Road Wastewater Permit

ENTRY REGARDING MOTION

Title: Motion to Clarify Statement of Questions #1, and Dismiss Questions #2 and #3 (Motion #1)

Filer: Alexander Pojedinec, a self-represented litigant

Filed Date: February 8, 2023; February 23, 2022; April 20, 2023

Response to motion filed on February 23, 2023, by Kayle Hope, a self-represented litigant

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Title: Motion to Amend Statement of Questions

Filer: Kayle Hope, a self-represented litigant

Filed Date: February 23, 2023

(No direct response filed)

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Title: Motion to Dismiss (Motion #2)

Filer: Alexander Pojedinec, a self-represented litigant

Filed Date: March 10, 2023

Memorandum in Oppositions filed on March 17, 2023, by Kayle Hope

Revised Motion to Dismiss, filed on March 22, 2023, by Alexander Pojedinec

Memorandum in Opposition to revised Motion to Dismiss, filed on March 24, 2023, by Kayle Hope

Reply in Support of Motion to Dismiss, filed on April 4, 2023, by Alexander Pojedinec

Response to Brief, filed on April 25, 2023, by Kayle Hope

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Title: Motion for Extension of Time to Respond to Interrogatories/Request to Produce (Motion #3)

Filer: Kayle Hope, a self-represented litigant

Filed Date: April 20, 2023

Memorandum in Opposition, field on April 28, 2023, by Alexander Pojedinec

Reply in Support of Motion, filed on May 2, 2023, by Kayle Hope

The motion to dismiss is GRANTED. The remaining motions are MOOT.

This matter is an appeal by Kayle Hope ("Appellant") of the Wastewater System and Potable Water Supply Permit (#WW-5-9018; hereinafter referred to as "WW Permit"), issued to Alexander Pojedinec and Emily Schlesinger[1] ("Applicant"). Presently before the Court is Applicant's motion to clarify and dismiss specific Questions in the Appellant's Statement of Questions, Appellant's motion to amend her Statement of Questions, Applicant's motion to dismiss the appeal for undue delay and Appellant's failure to notify, and Appellant's motion for an extension to produce discovery. Both Applicant and Appellant are self-represented in this appeal. Attorney Kane Smart represents the Agency of Natural Resources ("ANR") in this appeal. ANR has chosen not to file responses to the pending motions.

Background

ANR issued the WW Permit on September 15, 2022. The WW Permit authorized the siting of a new on-site wastewater treatment system and well at 3814 East Hill Road in Plainfield, Vermont ("the Property"). On October 14, 2022, 30 days after the WW Permit was issued, Appellant filed her Notice of Appeal with this Court. Appellant did not serve notice on Applicant within 14 days of filing her Notice of Appeal as required by V.R.E.C.P. 5(b)(4)(B). Applicant only learned of the appeal on January 27, 2023, when notified by ANR's counsel. Appellant has, to date, never served Applicant with her Notice of Appeal, see Mot. to Dismiss at 1 ("We still have

[1] Only Alexander Pojedinec has entered an appearance to defend the WW Permit in this matter.

yet to be served initial notification of appeal and appearance documents by the appellants."), but as of February 27, 2023,[2] has been sending emails with all court filings, as required.

On January 4, 2023, the Court received Appellant's Statement of Questions, 78 days after the notice of appeal was filed, or 57-days late. See Statement of Questions (filed Jan. 4, 2023); V.R.E.C.P. 5(f) (requiring an appellant to file their Statement of Questions within 21 days after filing their notice of appeal). Appellant did not seek an extension to file the Statement of Questions late; rather, she informed the Court on December 2, 2022, 24-days after her Statement of Questions were due under Rule 5(f), that she "will file the questions by next week." Misc. Doc. at 1 (filed Dec. 2, 2022). Neither this extension "request" nor the Statement of Questions were served upon Applicant, as is required by the Rules. See V.R.E.C.P. 5(f). Appellant's Statement of Questions was filed over 4 weeks later. Appellant's original Statement of Questions asks three Questions:

1. Does this permit and plan comply with septic rules in the State of Vermont?
2. Historically, test pits dug on that property indicated the soils were not good and that the property is very wet. Was the local wetland ecologist consulted about this permit before it was approved?
3. Does this adversely affect my ability to build on my property in the future?

Statement of Questions at 1 (filed Jan. 4, 2023).

After Applicant learned of the appeal from ANR's counsel, Applicant filed his notice of appearance on February 2, 2023 and his motion to clarify and dismiss on February 8, 2023. See Mot. to Clarify, Dismiss, and Set Schedule (filed Feb. 8, 2023). Specifically, Applicant asked that

[2] This date changes among the filings. The Court has filings saying filings are being shared by email as of February 2 or February 22. See Appellant's Mem. in Opp. at 2 ("Further, the Applicant and I have been in communication over email since February 2, 2023 and I have since served him copies of all filings."); but see Applicant's Mot. to Dismiss at 2 (noting first filing Applicant received from Appellant was February 22, 2023). During the initial status conference, however, the Court discussed this issue of service, had the parties share emails, and reiterated the requirement that they share all filings with each other. That conference occurred on February 27, 2022.

Question 1 be clarified because it was overbroad and vague and asked that Questions 2 and 3 be dismissed as "irrelevant." Id. at 1–2. Applicant requested the Court set an expedited schedule for amending the questions, discovery, and trial. Id. at 3. Additionally, in Applicant's opening paragraph, Applicant identifies the injustice cause from "significant delays in the case due to appellant's failure to properly serve and notify [Applicant] for nearly four months that [he] was party to their lawsuit, as is their pro se responsibility" and from her failure "to submit their Statement of Questions to the court in a timely manner within the 21 days required" by the Environmental Court rules. Mot. to Dismiss, Clarify, and Set Schedule at 1 (filed Feb. 8, 2023). Accordingly, Applicant "ask[ed] the court to dismiss the case" for this delay. Id.

As such, while not specifically referenced, Applicant raised the untimely filing of the Statement of Questions and the failure to serve process in his original motion with this Court as grounds to dismiss this appeal.

Appellant timely filed an opposition to the motion to dismiss, though she raised no arguments in support of her opposition. See Resp. to Mot. and Permission to Am. Questions at 1 (filed February 23, 2023). Appellant also sought leave from the Court to amend her Statement of Questions. Id. Appellant subsequently filed an Amended Statement of Questions on February 24, 2023, and a Second Amended Statement of Questions on February 27, 2023. The February 24, 2023 version was not immediately served on Applicant. It is not clear from her filings when or whether Appellant served her Second Amended Statement of Questions on Applicant.

This Court set an initial status conference in this matter for February 27, 2023. Applicant filed a request to continue the initial status conference. Applicant's request to continue was due to Appellant's failure to serve notice of this action on him and Applicant's desire to take advantage of free legal counseling prior to the meeting, which he represented would not be available until March 2, 2023. See Request to Move Status Conference (filed Feb. 15, 2023). The Court did not reschedule and held the first status conference on February 27, 2023. During that initial status conference, it was represented to the Court that Appellant had not served Applicant with any Court filings, nor had she ever served process for the notice of the appeal. The Court had the parties exchange email addresses and cautioned the self-represented litigants of the

importance of service requirements. It was on this day that the Second Amended Statement of Questions was filed with the Court. The Court rescheduled the conference for March 27, 2023.

On March 10, 2023, Applicant filed another motion to dismiss, again asserting that Appellant had caused undue delay and failure to notify, which he asserts caused him significant harm. In this filing, Applicant again raises Appellant's untimely filing of the Statement of Questions and her failure to serve notice as the grounds for dismissal. While Appellant does not indicate on what grounds he seeks dismissal, the Court interprets the motion as pursuant V.R.C.P. 12(b)(5) and V.R.A.P. 42(b), which apply to this proceeding pursuant V.R.E.C.P. 5(a)(2).

On March 17, Appellant filed her opposition to Applicant's motion to dismiss. See Mem. in Opp. (filed Mar. 17, 2023). In support of her opposition, Appellant argues that her notice of appeal was timely filed before the Court, that her untimely Statement of Questions is not grounds for dismissal, and that she misunderstood the notice requirements, such that the appeal should not be dismissed. Through her filings, Appellant argues that there is no prejudice from her failure to notify because it did not actually delay the proceedings as it took her until January 4, 2023 to consult with her engineer and draft the Statement of Questions, the first status conference was not set until February 27, 2023, and that ANR provided Appellant's notice of the appeal (actual notice on January 27, 2023, inquiry notice on October 19, 2022), despite acknowledging that she knows "this doesn't absolve the appellant from the notification requirements . . . ." Id. at 2; Supp. Opp. at 2–3 (filed Mar. 24, 2023).

On March 29, 2023, the Court took the motions to dismiss under advisement.

Discussion

Though not specifically cited, the Court interprets both of Applicant's motions to dismiss as V.R.C.P. 12(b)(4)–(5) motions to dismiss for lack of process and insufficiency of process, and a V.R.A.P. 42(b) motion to dismiss for want of prosecution. The Court considers Applicant's motion to clarify and dismiss pursuant V.R.C.P. 12(b)(1), (4)–(5), and V.R.E.C.P. 5(b)(1), (b)(4), and (f). The Court evaluates Applicant's V.R.C.P. 12(b)(4)–(5) motion first, as the Court has determined it is dispositive.

These motions are complicated by the fact that both Appellant and Applicant are self-represented and therefore not familiar with their obligations under our procedural rules. However, we note that "although pro se litigants receive some leeway from the courts, they are still bound by the ordinary rules of civil procedure." Zorn v. Smith, 2011 VT 10, ¶ 22, 189 Vt. 219 (quotation omitted). Accordingly, the Court offers leeway in interpreting the litigants' arguments, but applies the Vermont Rules of Civil Procedure and Vermont Rules of Environmental Court Proceedings in their ordinary course.

While there is not a large body of Vermont case law pursuant V.R.C.P. 12(b)(4) or (5), the rule is "based on Federal Rule 12(b)." Reporter's Notes, V.R.C.P. 12; compare V.R.C.P. 12(b)(4)–(5) with Fed. R. Civ. P. 12(b)(4)–(5). Because these provisions are substantially similar, the Court may use federal cases interpreting the federal rule as persuasive authority when interpreting our state court procedural rules. Drumheller v. Drumheller, 2009 VT 23, ¶ 29, 185 Vt. 417.

Like V.R.C.P. 12(b)(4) and (5), Fed. R. Civ. P. 12(b)(4) and (5) authorize dismissal of a complaint if it has not been served as required. On a Rule 12(b)(4) or (5) motion to dismiss, the plaintiff bears the burden of establishing that service was sufficient. See Burda Media, Inc. v. Viertel, 417 F.3d 292, 298 (2d Cir. 2005) (observing that plaintiffs "carry the burden of pro[of]" where a defendant "move[s] to dismiss for insufficient service of process under Rule 12(b)(5)"). The parties may submit evidence for the Court's consideration, and plaintiff is entitled to the benefit of any factual doubt. Craig v. City of Hobart, No. CIV-09-0053-C, 2010 WL 680857, at *1 (W.D. Okla. Feb. 24, 2010). "In deciding a Rule 12(b)(5) motion, a Court must look to Rule 4,[3] which governs the content, issuance, and service of a summons." Felton v. Monroe Cmty. Coll., 528 F. Supp. 3d 122, 132 (W.D.N.Y. 2021) (quoting DeLuca v. AccessIT Grp., Inc., 695 F. Supp. 2d 54, 64 (S.D.N.Y. 2010)). Here, the plaintiff is the appealing party, the Appellant.

Unlike the federal rule, the service requirements in ANR appeals to the Environmental Court are described in V.R.E.C.P. 5(b)(4)(B). The rule requires that:

[3] V.R.E.C.P. 5(b)(4)(B) requires the initial service following the notice of appeal by done pursuant V.R.C.P. 5, rather than V.R.C.P. 4. Accordingly, the Court finds that V.R.C.P. 5's more relaxed notice provision defines the process for the requirement, rather than V.R.C.P. 4.

> Upon the filing of a notice of appeal from an act or decision of the secretary of the agency of natural resources, a district commission, or a district coordinator, the appellant shall serve a copy of the notice of appeal *in accordance with Rule 5 of the Vermont Rules of Civil Procedure* upon the secretary, district commission, or district coordinator as appropriate and upon any party by right as defined in 10 V.S.A. § 8502(5), the Natural Resources Board, and every other person to whom notice of the filing of an appeal is required to be given by 10 V.S.A. § 8504(c) or (e), as appropriate. In addition, if the appeal is from an act or decision of the secretary or a district commission, the appellant shall publish a copy of the notice of appeal not more than 14 days after serving the notice as required under this subparagraph, at the appellant's expense, in a newspaper of general circulation in the area of the project which is the subject of the act or decision appealed from.

V.R.E.C.P. 5(b)(4)(B). Parties by right, as defined in 10 V.S.A. § 8502(5), specifically includes the applicant. See 10 V.S.A. § 8502(5)(A). As such, the Rule 5 requires appeals of ANR decisions, such as the present appeal, must follow the notice procedures outlined in V.R.C.P. 5, and provide such service of process to, among others, Applicant.

V.R.C.P. 5 outlines several acceptable means of service for "[n]on-electronic filers (Self-represented party or other participant who is not required and has not elected to electronically file in the case)." From those, Appellant could serve the Applicant by: (1) delivery (i.e., handing the notice of appeal to them), (2) mailing the notice by ordinary first-class mail, (3) emailing the notice if the party consents or no valid physical or postal address is known, or (4) if the Appellant is prevented by rule or court order from contacting the Applicant, the filer may serve notice by leaving it with the clerk. V.R.C.P. 5(b)(2)(B).

Finally, motions to dismiss for lack or insufficiency of service of process are subject to the Rule 12 waiver provision. "A defense of . . . insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading" or

amendment pursuant Rule 15. V.R.C.P. 12(h).[4] In other words, if the party does not raise it, they waive it.

Thus, as a preliminary matter, the Court must determine whether Applicant raised insufficiency of process in his first motion before the Court. We conclude that he has.

In his first motion to the Court, filed February 8, 2023, Applicant's filing asks the Court to dismiss Questions 2 and 3, and clarify Question 1. However, in his opening paragraph, Applicant identifies the injustice caused from "significant delays in the case due to appellant's failure to properly serve and notify [Applicant] for nearly four months that [he] was party to their lawsuit, as is their pro se responsibility" and failure "to submit their Statement of Questions to the court in a timely manner within the 21 days required" by V.R.E.C.P. 5(f). Mot. to Dismiss, Clarify, and Set Schedule at 1 (filed Feb. 8, 2023). Accordingly, Applicant "ask[ed] the court to dismiss the case." Id. The Court finds that this is consistent with V.R.C.P. 12(g), and effectively, is the consolidation of multiple grounds to dismiss in one singular filing. Therefore, the Court concludes that Applicant appropriately raised the failure to serve him as grounds to dismiss the case and consolidated his defenses of failure to serve process, failure to sufficiently serve process, and untimely filing along side his motion for clarification of Question 1 and dismissal of Questions 2 and 3 for lack of subject matter jurisdiction.

Having concluded that his V.R.C.P. 12(b)(4) and (5) motion was properly raised, the burden is on Appellant to establish that service was sufficient. Burda Media, 417 F.3d at 298. We conclude that she has not demonstrated sufficient service.

In Appellant's original opposition to the motion, she provided no more than informing the Court that she "oppose[s] the motion to dismiss filed on 2/8/23" while simultaneously seeking leave to file an amended statement of questions. See Opp. at 1 (filed Feb. 23, 2023). However, in response to Applicant's March 5 filing, in which he more thoroughly describes the facts giving rise to his request for dismissal for failure to serve process, Appellant puts forward a stronger

[4] Rule 12(g) allows for the consolidation of multiple motions to dismiss under Rule 12 in one filing.

argument in opposition. As such, the Court considers the arguments raised in her second opposition memorandum. Zorn, 2011 VT 10, ¶ 22 (affording "pro se litigants . . . some leeway").

Appellant presents three arguments in opposition to the Rule 12(b)(4)–(5) motion. First, the appeal was timely, and all other deficiencies are not grounds for dismissal. Second, ANR gave notice when ANR entered its notice of appearance on October 19, 2022, thus providing Applicant with the "functional equivalent of what the [appellate] rule requires." Finally, Appellant's error was reasonably justified because Appellant thought the Court was required to provide a list of persons who they were required to send notice pursuant V.R.E.C.P. 5(b)(4)(A). When she learned those lists are not provided in appeals of ANR decisions (i.e., appeals filed under V.R.E.C.P. 5(b)(4)(B)), she mistakenly assumed she did not need to send notice anymore because Attorney Smart had sent notice of appearance on behalf of ANR. The Court finds these arguments unavailing.

First, neither the Civil Rules nor the Rules of Environmental Court Procedure create a bright line rule that no other defects beyond timely filing a notice of appeal may result in dismissal. Indeed, while Appellant is correct that "[f]ailure of an appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal," this argument fails because those shortcomings may still be grounds "for such action as the court deems appropriate, *which may include dismissal of the appeal*." V.R.E.C.P. 5(b)(1) (emphasis added). One expressly contemplated ground for dismissal is the failure to serve process. V.R.C.P. 12(b)(4), (5) (authorizing dismissal for "(4) insufficiency of process, (5) insufficiency of service of process"). Thus, Rule 12(b) expressly contemplates that defective service of process presents potential grounds for dismissal, even if the appeal was otherwise timely. Further, appellate courts have dismissed cases for numerous other defects beyond the timeliness of the appeal. These include, for example, failure to timely provide the trial transcript, Sw. Administrators, Inc. v. Lopez, 781 F.2d 1378 (9th Cir. 1986), failure to order necessary parts of the record within the required timeline, Thomas v. Computax Corp., 631 F.2d 139 (9th Cir. 1980); Gunther v. E. I. Du Pont De Nemours & Co., 255 F.2d 710 (4th Cir. 1958); or failing to deposit the filing fee or take any other steps for almost six months, Stuart v. Pearce, 275 F.2d 283 (6th Cir. 1960). As such, the

Court concludes that dismissal is well within the scope of this Court's authority for her failure to provide notice, as well as her other untimely filings.

Second, notice of appearance from Attorney Smart is not an action of the litigant that is the "functional equivalent" of Appellant providing Applicant with actual proper notice. First, Appellant's argument relies on In re Shantee Point, Inc., which is not particularly relevant to this issue. 174 Vt. 248, 259 (2002). We begin by noting that Shantee presented a somewhat different set of facts than the ones we are presented with here. Shantee addressed defects within the physical document filed as a notice of appeal, not the notice of process requirements. In that case, a litigant sought to appeal a decision of this Court to the Vermont Supreme Court. Id. at 259. The notice of appeal, however, was "ambiguous." Id. at 260. The Court ruled that "[i]f a *litigant's* action is the functional equivalent of what the rule requires, we will find compliance." Id. (emphasis added). The Court held that because the litigant timely filed the appeal, and because the document clearly indicated "an intent to appeal and [gave] sufficient notice of that intent, there [was] compliance with the requirement to file a notice of appeal." Id. The Vermont Supreme Court, accordingly, concluded that the party "sufficiently complied" with the relevant rules. Id. There was not, however, any allegation that notice of said notice of appeal was defective or insufficient similar to what is lacking here. Finally, despite this ruling, the Court noted, that "[a]n error in compliance with [the rules] will affect the validity of an appeal only if it is prejudicial to another party." Id.

The Court finds this difference to be factually material but will apply the Shantee standard here as Appellant failed to substantially comply with the process requirements due of her. Unlike Shantee, Appellant did not substantially comply with the relevant process requirements because Applicant did not get any notice of the appeal from Appellant and Applicant was prejudiced by that non-compliance with V.R.E.C.P. 5 and V.R.C.P. 5. First, Appellant never informed Applicant of the appeal in any fashion. Rather, Appellant argues that Applicant got the "functional equivalent" of notice from ANR. This is not the "litigant's action [that] is the functional equivalent," however, but the action of another non-appealing party. Further, even if this was true, the rules contemplate dismissal for insufficiency of service, such as serving the wrong Agent.

The Court cannot conclude that Attorney Kane's notice of appearance was "a litigant's action [that] is the functional equivalent of what the rule requires" of Appellant and therefore cannot conclude there was sufficient compliance with the rules.

Third, Appellant argues her error was a reasonably justified innocent mistake. Appellant points to the initial notification letter sent from the Court to justify her mistaken belief that the clerk must provide the appellant with a list of interested persons, and that it was not until later that she learned that does not apply in wastewater appeals. Even if the Court accepts that this was an innocent mistake, the error lost its innocence with the passage of time.

The initial notification letter specifically guides Appellant to the correct notice provision: "From a District Commission, District Coordinator or the Secretary of the Agency of Natural Resources, follow V.R.E.C.P. 5(b)(4)(B): Take special notice that no list of interested parties will be provided by the tribunal, other than the service list on the decision appealed from." Initial Notification Letter (entered Oct. 19, 2022). The WW Permit appealed clearly represents that it was issued by the Secretary of the Agency of Natural Resources. Yet, Appellant's mistake is grounded in the belief that it was an appeal from the decision of the municipal panel. Even assuming Appellant genuinely operated under this belief, this mistake ceased to be innocent when Appellant never reached out to this Court asking for this list, before or after the 14-day notice period concluded. Rather, Appellant took advantage of the ensuing three months to consult with her engineer and develop her Statement of Questions, unchallenged by the unknowing Applicant. While the Court appreciates that Appellant is pro se, she is still "bound by the ordinary rules of civil procedure." Zorn, 2011 VT 10, ¶ 22 (quoting Vahlteich v. Knott, 139 Vt. 588, 591 (1981)). Pro se status is not a "passport to waste the court's time indefinitely." Id. Thus, we conclude that, even assuming that the initial failure was an innocent mistake, it is not reasonably justified in light of the wholesale failure to ever serve notice on Applicant in this matter.

As such, the Court cannot find that Appellant has met her burden of demonstrating notice was properly served on Applicant, as required under V.R.E.C.P. 5(b)(1), (4) and V.R.C.P. 5.

Finding service deficient, the Court is tasked with another determination. Motions to dismiss under Federal Rules 12(b)(4) and 12(b)(5) differ from the other motions permitted by Rule 12(b) in that dismissal is not invariably required where service is ineffective; the Court has discretion to either dismiss the action or quash service but retain the case. Miller v. Cousins Properties, Inc., 378 F.Supp. 711, 716 (D.Vt.1974); 5B Fed. Prac. & Proc. Civ. § 1354 (Wright & Miller, 3d ed.). Some federal courts have gone further and denied a motion under Rule 12(b)(5) when there has been substantial compliance, the mistake was innocent, and the respondent was not prejudiced. See, e.g., Gray v. Allied Waste Services of Washington, 2012 WL 2871422, *4 (D. Md. 2012) ("Because Plaintiff is pro se and Defendant received actual notice, dismissal for ineffective service of process is inappropriate at this stage.").

The Court cannot conclude that denying the motion to dismiss is appropriate under these circumstances. As discussed above, while the Court believes that the mistake was at least initially innocent, the Court cannot find substantial compliance with Rule 5 occurred here, and Applicant demonstrated that he has suffered substantial prejudice as a result of Appellant's failure to notify. Here, there was no substantial compliance on the part of the Appellant. Appellant never sent the required notice, and by her own representation, did not send Applicant any other filings until February 2, 2023,[5] over three months after service was required. Further, Appellant only began to send copies of filings to Applicant after Applicant entered his notice of appearance in the matter, which he was only informed of by Attorney Smart on January 27, 2023. This delay was prejudicial to Applicant. Applicant was deprived of nearly four months of time to prepare his case on appeal, and during that time, Applicant took 78-days to consult with experts and prepare her initial Statement of Questions (which was filed 57-days late pursuant the requirements in V.R.E.C.P. 5(f)).[6] Since entering his appearance, Applicant has repeatedly

[5] See Mem. in Opp. at 2 ("Further, the Applicant and I have been in communication over email since February 2, 2023 and I have since served him copies of all filings."). But see Mot. to Dismiss at 2 (noting first filing Applicant received from Appellant was February 22, 2023).

[6] To the extent that Appellant argues that this was not a prejudice because it took her this long to draft her Statement of Questions, we are not persuaded. Her untimely filing of the Statement of Questions is yet another example of her procedural shortcomings.

asserted his interest in a speedy resolution, filing a request to set a tight schedule and asking the Court to reject further delays. This is because, during the more than three months that Applicant thought the WW Permit was secured due to Appellant's failure to notify him, Applicant took substantial steps toward executing the WW Permit, including contracting with well-drilling services, excavation services, and other contracts, some of which are on extended waitlists should they be required to reschedule; purchasing thousands of dollars of materials in anticipation of building this spring; and signing short-term leases in Vermont with the expectation of being able to move to the property this summer. Accordingly, the Court finds it improper to decline to dismiss under these circumstances.

For similar reasons, the Court also declines to quash. This is because, here, the difference between quashing the process without dismissal is functionally similar to denying the dismissal, but with added delay. If the Court quashed, the service is repeated (which is functionally moot now), and the Court finds itself in the same situation as denying the motion outright. Finally, the Court finds that, in most cases where this option was used, the issue was not the absence of service of process, but the insufficiency of that service. See, e.g., Stanga v. McCormick Shipping Corp., 268 F.2d 544 (5th Cir. 1959) (serving wrong agent of corporation); N. Cent. Utilities, Inc. v. Consol. Pipe & Supply Co., 62 F.R.D. 676 (W.D. La. 1974) (serving Secretary of State who forwarded service of process to the correct party); S.J. v. Issaquah School Dist. No. 411, 470 F.3d 1288, 1293 (9th Cir. 2006) (remanding case to consider 12(b)(5) motion because court's have discretion, and on remand, finding "substantial compliance" and declining to dismiss); Washington v. City of Oklahoma City, 2021 WL 798384, *4 (W.D. Okla. 2021) (serving individual officers rather than the entity of which an officer is an agent). Here, the service was not served on the wrong party, but rather, was never served on anyone prior to Appellant's nearly four-month delay. At best, the service was provided by the wrong party, but even that actual notice from Attorney Smart was at a delay of over three months. The Court does not find this case presents the appropriate circumstances to quash the process.

The Court does not reach this conclusion lightly, as dismissal here forecloses the appeal. V.R.E.C.P. 5(b)(1) ("An appeal under this rule shall be taken . . . within 30 days of the date of the

act, decision, or jurisdictional opinion appealed . . . ."). The Court is guided to this conclusion, however, by this Court's rules, the Vermont Rules of Appellate and Civil Procedure, and the applicable case law. While Appellant is correct that "[f]ailure of an appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal," those shortcomings may be grounds "for such action as the court deems appropriate, which may include dismissal of the appeal." V.R.E.C.P. 5(b)(1); see V.R.A.P. 3(b)(1)(D) (same); see also V.R.C.P. 12(b)(5). Here, the Court concludes that dismissal is appropriate. The appeal is therefore hereby **DISMISSED.**

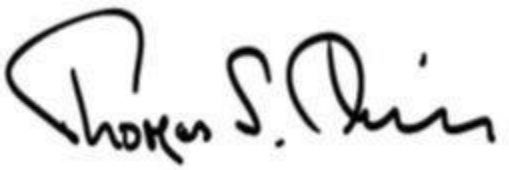
Conclusion

For the reasons discussed above, the Court **DISMISSES** the appeal for the procedural defects that arose from Appellant failing to serve process on Applicant when she filed her notice of appeal. The Court concludes that Applicant moved to dismiss pursuant to this failure to serve process in his initial consolidation of defenses motion with this Court, and that Appellant has failed to demonstrate in her opposition to that motion that she served the notice of appeal on Appellant, or even substantially or functionally complied with that requirement. Further, the Court finds that such failure to serve notice, while initially innocent, lost that innocence during the substantial passage of time, that there was no substantial compliance with the notice requirement, and Applicant was prejudiced both by his reliance in the finality of his permit and the loss of time to pursue his defense in this matter. Accordingly, the Court concludes that dismissal is not only proper, but also the appropriate necessary remedy and therefore **DISMISSES** the appeal. In so holding, the Court does not reach the merits of Applicant's motion to dismiss for untimely filing of the Statement of Questions, nor does the Court reach the merits of Applicant's motions to dismiss certain questions for lack of subject matter jurisdiction, or Appellant's subsequent requests to amend the Statement or Questions or extend discovery deadlines, as those motions are now **MOOT**.

This concludes the current proceedings in this Docket before this Court. A Judgment Order accompanies this Entry order.

So Ordered.

Electronically signed at Newfane, Vermont on Wednesday, May 17, 2023, pursuant to V.R.E.F. 9(d).



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