

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 76-7-18 Vtec

Champlain Parkway SW Discharge Permit

ENTRY REGARDING MOTION

Count 1, ANR Storm Water Permit (76-7-18 Vtec)

Title: Motion to Dismiss Questions (Motion 13)

Filer: Co-counsel

Attorney: Jonathan T. Rose

Filed Date: November 6, 2019

The motion is DENIED.

The matter before the Court concerns Fortieth Burlington LLC's ("Fortieth") appeal of a Vermont Agency of Natural Resources' ("ANR") decision to issue the City of Burlington ("City") a renewed stormwater discharge permit. Presently before the Court is the City's motion to dismiss, or in the alternative for judgement on the pleadings on, Questions 2, 6(a), 6(b), 6(c), 7(b), 7(c), 7(d), 9, 13(b), and 13(c) of Appellant Fortieth's Clarified Statement of Questions.

The Court recounts the following facts and procedural history for the purpose of providing context for the pending motion.

On August 8, 2018 Fortieth filed a Statement of Questions raising 14 issues for appeal. The City moved to dismiss and/or clarify Fortieth's Statement of Questions on November 20, 2018. This Court issued a decision on April 29, 2019, which dismissed Questions 5,¹ 10, 11, and 12. Champlain Parkway SW Discharge Permit, No. 76-7-18, slip op. at 15–16 (Vt. Super. Ct. Env'tl. Div. Apr. 29, 2019) (Durkin, J.). This Court also held that the original questions 1, 2, 4, 9, and 14 were properly before the Court as presented in Fortieth's Statement of Questions. Id. In addition, the Court granted the City's motion to clarify Questions 3, 6,² 7, 8, and 13. Id. The Court ordered Fortieth to narrow and clarify these questions within 30 days. Id.

¹ The Court dismissed Question 5 by mutual agreement of the parties." Champlain Parkway SW Discharge Permit, No. 76-7-18, slip op. at 15–16 (Vt. Super. Ct. Env'tl. Div. Apr. 29, 2019) (Durkin, J.).

² In our Decision, we noted that "[b]ecause Question 4 is a logical antecedent, and intrinsic, to Question 6, we DENY the City's motion to dismiss the Question. We also DENY the City's motion to dismiss Question 6, but GRANT its motion to clarify that Question." Id.

On May 3, 2019 the City filed a motion for partial summary judgement on Questions 1 and 14. On May 29, 2019, Fortieth filed its Clarified Statement of Questions. This Court issued a Decision on August 22, 2019, granting partial summary judgement regarding Questions 1 and 14. Champlain Parkway SW Discharge Permit, No. 76-7-18, slip op. at 15–16 (Vt. Super. Ct. Envtl. Div. Aug. 22, 2019) (Durkin, J.). The Court also held that Questions 3(b), 7(a), 7(e), 8, and 13(a) of the Clarified Statement of Questions were moot. Id. Therefore, Questions 2, 3(a), 6 (a), 6(b), 6(c), 7 (b), 7(c), 7(d), 9, 13(b), and 13(c) remained.

On September 19, 2019 Fortieth filed a motion to clarify, alter, or amend this Court's August 22, 2019 decision. Shortly thereafter, on September 30, 2019, the City and ANR filed a joint request for briefing regarding issues remaining for trial. In response, this Court issued an Order that stated it would set briefing after deciding Fortieth's motion to clarify. This position was reiterated at a subsequent status conference on October 7, 2019. On November 18, 2019 Fortieth filed an additional motion to clarify, alter, or amend on the basis of recently discovered information. While the Court was considering this motion to clarify, the City filed a motion to dismiss Questions 2, 6(a), 6(b), 6(c), 7(b), 7(c), 7(d), 9, 13(b), and 13(c) of Appellant Fortieth's Clarified Statement of Questions. On November 25, 2019 Fortieth responded to the motion to dismiss, arguing that it is untimely and dependent upon this Court's conclusion concerning the motion to clarify.

Earlier today, this Court issued Entry Orders on Fortieth's September 19, 2019 motion to clarify and November 18, 2019 further support of the motion to clarify. In today's Entry Orders, this Court reinforced its August 22, 2019 Decision, which held Questions 3(b), 7(a), 7(e), 8, and 13(a) were moot and granted summary judgement on Questions 1 and 14. As the Court has decided the motion to clarify, we now turn to the City's pending motion to dismiss.

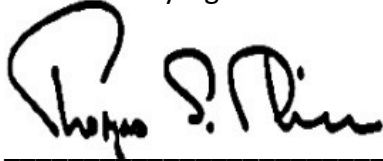
The Vermont Supreme Court has historically recognized that trial judges are given "broad discretion to manage their dockets." Pcolar v. Casella Waste Sys., Inc., 2012 VT 58, ¶ 20, 192 Vt. 343, 353 (2012) (holding that a trial judge had not abused their discretion in denying plaintiff's motion as untimely as plaintiff had "been aware of the need to proceed on [a set date] . . . for a long time"). Moreover, the Supreme Court has noted that "[s]cheduling orders are authorized, and are routinely used, to move cases to trial at a rate tailored to the particular case." Vermont Supreme Court Admin. Directive No. 17 v. Vermont Supreme Court, 154 Vt. 392, 402 (1990). Thus, the Court should exercise intelligent and flexible judgment over scheduling orders that consider the exigencies of each situation. Davis v. Duplantis, 448 F.2d 918, 921 (5th Cir.1971).

In consideration of the procedural history of this case and the impending trial scheduled for December 3–6, 2019, this Court is inclined to address concerns relevant to the Clarified Statement of Questions through pretrial briefing and not dispositive motions. In arriving at this conclusion, the Court weighs the interests of justice in progressing this case to trial while affording all parties a fair opportunity to timely address Fortieth's Clarified Statement of Questions. This Court is concerned that deciding the City's motion to dismiss, where this Court had previously directed the parties not to file dispositive motions until after we reached a decision on the motion to clarify, would result in unfair prejudice.

Therefore, the City's motion to dismiss is **DENIED**. Furthermore, we direct the parties to file pretrial briefings concerning the outstanding Questions, 2, 3(a), 6(a), 6(b), 6(c), 7(b), 7(c), 7(d), 9, 13(b), and 13(c), of Fortieth's Clarified Statement of Questions prior to the start of trial on December 3, 2019.

So Ordered.

Electronically signed on November 27, 2019 at Newfane, Vermont, pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read 'Thomas S. Durkin', is written over a horizontal line.

Thomas S. Durkin, Superior Judge
Environmental Division

Notifications:

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