VERMONT SUPERIOR COURT
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CIVIL DIVISION

Case No. 22-CV-03106

David Buckley v. State of Vermont, Office of Professional Regulation

Opinion and Order on Defendant's Motion to Dismiss

Plaintiff David Buckley, a licensed real estate appraiser, claims that the Vermont Office of Professional Regulation (OPR) violated his rights when it determined that he violated professional practice standards and disciplined him, by letter, without affording him any reasonable opportunity to be heard. Mr. Buckley claims that the precipitating complaint against him to OPR, and OPR's decision against him in response, are baseless and frivolous. In the original complaint, he characterizes his claims as generally falling under Rule 75 and as a violation of due process. He seeks an order compelling OPR to amend its decision so that it reflects no fault on his part; he does not seek damages.

The State has filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. Nominally, it argues that: (a) mandamus is inappropriate in this case, (b) there is no sufficiently alleged basis for a "stigma plus" due process claim, and (c) the State is not a person that can be sued for damages under 42 U.S.C. § 1983. The underlying thrust of the dismissal motion, however, is that OPR conducted an investigation, determined *not* to file charges against Mr. Buckley, and closed the case following investigation having taken *no action* against him. It thus argues

that there can be no basis for relief, whether under Rule 75 or as a violation of Mr. Buckley's due process rights.

After the State filed its motion, Mr. Buckley amended the complaint. The amendment adds some details and clarifies his claims considerably by attaching the OPR "Report of Concluded Investigation" (the "Report) on which they are based. Otherwise, he clarifies that his Rule 75 claim seeks relief in the nature of prohibition (because OPR wrongfully turned an investigation into a stealth disciplinary decision) or in the nature of *certiorari* (because it was a quasi-judicial process that went against him and his procedural rights were ignored), and his due process claim is simply that discipline was imposed and he never got a hearing.

In response, the State maintains the essence of its motion and asserts that the amended complaint does not cure the deficiencies of first.

With the amendment and the benefit of Mr. Buckley's briefing, it is clear that all three of the State's *nominal* dismissal arguments miss the mark: there is no mandamus claim; there is no stigma-plus claim; and there is no claim for damages for § 1983 purposes. The underlying thrust of the dismissal motion, however, remains salient. The threshold question for all his claims is whether the Report, in fact, reflects an investigation or an adjudication, for Mr. Buckley's claims necessarily flow from his characterization of the Report as imposing discipline as the result of an adjudication (as opposed to merely constituting an investigation).

As for a constitutional right to due process, Mr. Buckley concedes that "Due process applies to the adjudicatory stage, but not the investigative stage. The

distinction between the adjudicatory and investigative stages is the imposition of discipline." Mr. Buckley's Opposition to Dismissal at 4 (filed Dec. 27, 2022). Similarly, *certiorari* must be predicated on a quasi-judicial proceeding, not a mere investigation. And the entire point of Mr. Buckley's prohibition claim is that OPR exceeded its jurisdiction because it imposed discipline, as opposed to merely conducting an investigation, without required procedural protections. As to all three claims, the State fundamentally argues that the dismissal record is not reasonably amenable to any inference of an adjudication; it shows only an investigation.

I. Standard

The Vermont Supreme Court has described the familiar standard for Rule 12(b)(6) motions to dismiss for failure to state a claim as follows:

> "A motion to dismiss . . . is not favored and rarely granted." This is especially true "when the asserted theory of liability is novel or extreme," as such cases "should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." In reviewing a motion to dismiss, we consider whether, taking all of the nonmoving party's factual allegations as true, "'it appears beyond doubt' that there exist no facts or circumstances that would entitle the plaintiff to relief." We treat all reasonable inferences from the complaint as true, and we assume that the movant's contravening assertions are false.

Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309, 316–17 (citations omitted).

II. Allegations

Mr. Buckley's claims and the State's motion turn on the nature of conduct undertaken by OPR. OPR supervises the profession of real estate appraising of

which Mr. Buckley is a licensee. *See* 26 V.S.A. §§ 3311–3325. Someone filed a professional complaint against Mr. Buckley with OPR. OPR investigated and subsequently issued the Report. It took no action of any consequence otherwise.

The Report is extremely summary in nature and includes three sections: "nature of complaint," "summary of investigation," and "reason for closing." As to the nature of the complaint against Mr. Buckley, *i.e.*, the alleged misconduct, the Report says only this: "Allegation Respondent offered information to homeowners which caused them to discard their original renovation plans and left Complainant with a useless appraisal."

The dispute between the parties arises out of the "Reason for Closing" section, which provides in its entirety:

> The State Prosecutor, in consultation with the Investigating Team, has concluded that the Respondent's conduct could be found to violate essential standards of acceptable and prevailing practice within the profession. [*See*] 3 V.S.A. § 129a(b)(2). However, the State Prosecutor is declining prosecution. The Investigative Team believes that the disciplinary process thus far will continue to be sufficient deterrent to similar conduct in the future.
>
> The closure of a complaint does not preclude re-opening and reconsideration of the underlying facts should a pattern of practice violations or administrative deficiencies become apparent from future complaints.

In Mr. Buckley's view, the Reason for Closing section essentially includes a determination that he violated professional standards and effectively reprimands him for having done so. Though he does not allege that the Report is or will be made publicly available (from OPR), he speculates that it could be made so in the future and that the unfavorable disposition of the case also could be used against

him in the future.[1] He clearly alleges that he was never given a hearing, OPR refused to modify the Report once it was issued, and OPR did not permit administrative review of the Report.

III. Analysis

The investigatory stage of an OPR disciplinary process is referred to, but not articulated in any detail in, the OPR statutes and rules. *See, e.g.*, 3 V.S.A. §§ 129(b), (c)(3), (d); Code of Vt. R. 04-030-005 (OPR Rules), §§ 3.1(D)(2), 3.20. Similarly, OPR Rules refer to a "specification of charges," but neither the Rules nor the statutes detail with any clarity how an investigation turns into a charge of misconduct and prosecution. *See, e.g.*, OPR Rules §§ 1.1(M), 3.2, 3.3(A), 3.5, 3.14, 3.15. Prosecutorial discretion as to whether to bring charges is clear: "Failure to practice competently by reason of any cause on a single occasion or on multiple occasions *may* constitute unprofessional conduct, whether actual injury to a client, patient, or customer has occurred." 3 V.S.A. § 129a(b) (emphasis added).

Consistent with the Rules generally, the statutes make plain that the imposition of discipline is a stage that occurs *after* a hearing calculated to comply with the licensee's due process rights and appropriate findings and conclusions. *See, e.g.,* 3 V.S.A. § 129(a)(3), (c), (h), § 129a(c), (d)(1). Subsections 129a(c) and (d)(1) expressly provide:

> The burden of proof in a disciplinary action shall be on the State to show by a preponderance of the evidence that the person has engaged in unprofessional conduct.

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[1] As the parties are aware, by submitting the Report into the record of this case, Mr. Buckley himself has made it publicly available.

> After hearing, and upon a finding of unprofessional conduct, a board or an administrative law officer may take disciplinary action against a licensee or applicant.

At least for certain purposes, discipline means "an action based on a finding of unprofessional conduct that suspends, revokes, limits, or conditions a license in any way, including administrative penalties, warnings, and reprimands." 3 V.S.A. § 131(f). The only relevant "findings" are those that a hearing officer would make after a hearing.

The Report, on its face, is described as a report of a "Concluded Investigation." The Summary of Investigation briefly describes an investigation only, not a specification of charges or prosecution:

> The Complainant was contacted.
> The Respondent was interviewed.
> The Investigative Team reviewed documentation and records related to the complaint.

The "Reason for Closing" section then explicitly says that a violation of professional standards "could be found"—not that one was—and that the "Prosecutor is declining prosecution." There is no suggestion anywhere that there ever was any specification of charges against Mr. Buckley, and the language of the Report is crystal clear on its face that there was no prosecution.

The Report further states that, "[t]he Investigative Team believes that the disciplinary process thus far will continue to be sufficient deterrent to similar conduct in the future." It then notes that, if a pattern of the alleged conduct develops in the future, the case could be re-opened. In other words, the

Investigative Team thought there "could be" a violation. The prosecutor presumably either disagreed or thought that any possible violation did not warrant prosecution. The implication is that a violation, if there was one, was too minor or unclear to warrant prosecution, at least in the prosecutor's view, but if the alleged conduct later was found to become a pattern, a different prosecutorial decision might result. The "deterrent," in the Investigative Teams' view, appears to simply be a reference to the fact of the complaint and investigation. The Report is signed by a case manager on behalf of the Investigative Team only.

The letter to Mr. Buckley with a copy of the Report is marked "Confidential," consistent with the confidentiality provisions of 3 V.S.A. § 131, which permits OPR to make only limited, anonymous information available to the public when there is a complaint but disciplinary charges are not filed. *See* 3 V.S.A. § 131(c). There is no allegation that OPR has treated relevant information related to Mr. Buckley in a publicly accessible manner in violation of § 131 (which might imply that OPR subjectively believed there had been some kind of prosecution).

Ultimately, the amended complaint and its attachment permit no reasonable inference that there ever was any specification of charges, prosecution, finding of a violation, or imposition of any discipline in this matter. Mr. Buckley's real objection seems to be that the Investigative Team believed that its investigation revealed evidence that "could be" sufficient to support a specification of charges if the prosecutor had been persuaded to pursue the matter. Obviously, the prosecutor determined to take no action. That was the end of the case.

Such a belief by the Investigative Team, or Mr. Buckley's speculative fears as to collateral consequences that could flow from the investigation, are insufficient to warrant the due process protections to which he has claimed to be entitled. *See Hannah v. Larche*, 363 U.S. 420, 443 (1960) ("collateral consequences" flowing from an agency investigation rather than "any affirmative determinations" it made do not "affect the legitimacy of [its] investigative function"); *cf. Teaford v. Ford Motor Co.*, 338 F.3d 1179, 1181 (10th Cir. 2003) ("suspicion that violations may have occurred . . . [not] analogous . . . to a censure or reprimand").[2]

All of Mr. Buckley's claims are predicated on the imposition of discipline. He has failed to establish as a legal matter that any discipline ever was imposed. His claims, therefore, can have no potential merit.

Order

For the foregoing reasons, the State's motion to dismiss is granted.

Electronically signed on February 3, 2023, pursuant to V.R.E.F. 9(d).

Timothy B. Tomasi
Superior Court Judge

[2] No doubt, the Report leaves open the possibility that the investigation could be reopened in the future. If that were to happen, additional investigation might also occur prior to any determination as to whether to proceed with a prosecution. If formal charges were brought regarding this matter, at that point, Mr. Buckley would be entitled to the due process rights afforded in such circumstances.