

VERMONT SUPERIOR COURT

SUPERIOR COURT  
Orange Unit

CIVIL DIVISION  
Docket No. 40-2-12 Oecv

Wendy McCullough  
Plaintiff

v.

Elbert Barnaby  
Defendant

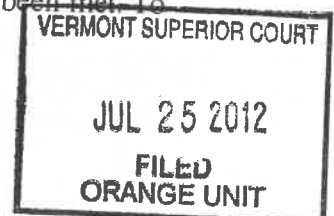
DECISION ON MOTION TO AMEND

Plaintiff has sought to amend her complaint to assert claims against the Town of Tunbridge. Although Plaintiff's pleading is confusing and somewhat inconsistent, it appears Plaintiff wishes to continue the action against Elbert Barnaby. A motion to dismiss that claim on the pleadings has been denied.

V.R.C.P. 15(c) allows for relation back of amendments under certain circumstances, most importantly when the proper defendant has knowledge of the action, would not be prejudiced in maintaining a defense on the merits and knew or should have known that but for a mistake the action would have been brought against that party. Primarily at issue here is whether the Town can be added by an amendment which relates back to the time the suit was initially filed when the action against Barnaby is not discontinued.

As a starting point, the substantive requirements of V.R.C.P. 15(c) are alleged to have been met here concerning lack of prejudice and notice. Thus, if the amendment sought to change the party or naming of the party, i.e. substitute the Town for Barnaby, there would be little question on the pleadings before the court at this time that the amendment would be allowed. It is not at all clear that the Plaintiff did not intend to discontinue the claim against Barnaby, as the responsive pleading to the motion to dismiss states that the motion is "moot" in light of the amendment. Nonetheless, at present, the complaint has not been amended to specifically drop Barnaby from the action.

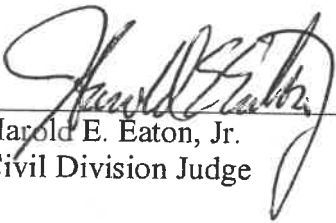
Most directly at issue here is whether an amendment under Rule 15 (c) which changes the party or naming of the party requires the dropping of the originally named party. Courts which have decided whether dropping the initial defendant in order for an amendment to relate back are sharply divided. See, e.g. *Weiner v. Sherburne Corp.*, 348 F. Supp. 797 (D. Vt. 1972)(requiring it); but see, *Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007)(not requiring it). In the Court's view, the better reasoned cases support not requiring the release of a defendant under Rule 15(c) where the notice and lack of prejudice requirements of the rule have been met. To



hold otherwise would place the Plaintiff at risk of releasing a potentially responsible party when the cause of action may be, as is the case here, in its nascent stages.

Therefore, whether the Plaintiff intended to release Barnaby or not, the amendment sought to add the Town of Tunbridge is allowed and the motion to amend is GRANTED. Plaintiff is responsible for service on the Town of Tunbridge consistent with the Rules of Civil Procedure.

Dated at Chelsea this 25th day of July, 2012.

  
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Harold E. Eaton, Jr.  
Civil Division Judge