VERMONT SUPERIOR COURT
Rutland Unit
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CIVIL DIVISION
Case No. 22-CV-00030

City of Rutland, Plaintiff v. Kamberleigh Johnston and Marjorie Johnston, Defendants	DECISION ON PENDING MOTIONS

RULING ON MOTION FOR SUMMARY JUDGMENT AND OTHER PENDING MOTIONS

This is an action for ejectment under 12 V.S.A. § 4761. Plaintiff, the City of Rutland (the "City") alleges that Defendants Kamberleigh Johnston and Marjorie Johnston (the "Johnstons") are trespassers on two residential properties acquired by the City in 2021 through tax sale deeds. The City is represented by Beriah Smith, Esq., and the Johnstons are representing themselves. Pursuant to Rule 56 of the Vermont Rules of Civil Procedure, the City moves for summary judgment on its claim. The Johnstons oppose the motion, arguing that the City's title is defective and they are entitled to possession pursuant to lease agreements made with prior owners/lessors. In addition, the Johnstons have filed three motions: one seeking dismissal of the City's Amended Complaint; another seeking to strike the City's pending motion and the City's claim for waste; and a third for miscellaneous relief. For the reasons discussed below, the City's motion is GRANTED and the Johnstons' three motions are DENIED.

Factual Background

The following relevant facts are not in dispute.[1] This case concerns two properties commonly known as 49 and 52 Pine Street, each consisting of a single-family house on a lot in

[1] We note that the Johnstons did not submit a separate statement of disputed facts, as required by Rule 56(c). *See* V.R.C.P. 56(c)(1). Instead, the Johnstons appear to have cut and pasted parts of the City's summary judgment memorandum into their opposition memorandum, and then provided a response or additional argument. This renders the Johnstons' brief exceedingly difficult to understand. Under Rule 56(e), the Court can consider the City's facts undisputed based on the Johnston's failure to respond according to the rules. *See* V.R.C.P. 56(e)(2); *Boyd v. State*, 2022 VT 12, ¶ 8 n.1, 275 A.3d 155 214 Vt. 269 (where plaintiff "did not directly respond to defendant's statement of facts[,] . . . . "for purposes of summary judgment, defendant's facts are deemed undisputed"). However, the Court finds it unnecessary to do so, as it appears the material facts are not disputed by the parties in any event.

Rutland. In 2010, when Marjorie Johnston was the record title owner of both properties, mortgage lenders filed foreclosure complaints on the two properties in the Rutland Superior Court. *See* Pl.'s Rule 56(c)(1) Statement of Undisputed Material Facts ("SUMF") ¶¶ 4, 7-8. In June 2014, those lenders recorded certificates of non-redemption, together with final judgments and decrees of foreclosure, for both properties. *Id*. ¶ 9. Then, in May 2015, the superior court issued an order confirming that, by and through a public auction sale held in January 2015, the 52 Pine Street property had been sold to the mortgage lender, and Ms. Johnston's interest in the property had been foreclosed. *See* Pl.'s Suppl. SUMF, ¶¶ 54-56 (citing confirmation order issued in Docket No. 174-2-10 Rdcv, Pl.'s Ex. 26). In mid-January 2016, the court issued an order confirming that 49 Pine Street had been sold at public auction in November 2015, to another mortgage lender, and that Ms. Johnston's interest in that property had been foreclosed as well. *See id*. ¶¶ 57-59 (citing confirmation order issued in Docket No. 334-4-10 Rdcv, Pl.'s Ex. 27). Ms. Johnston thus did not redeem either property prior to the dates of judicial sales. *See id*. ¶ 60.

On December 31, 2015, after both properties had been sold, and roughly two weeks before the Court issued its confirmation order as to the 49 Pine Street property, Marjorie Johnston and her son, Kamberleigh, entered into a so-called "Perpetual Lease Agreement" ("PLA") with regard to several properties within Rutland, including 49 and 52 Pine Street. Pl.'s SUMF ¶ 13. The Agreement provided that it "lasts as long as the trees grow and the water continues to flow," and that its intent was "to allow Kamberleigh Johnston to maintain each lease for the amount of a penny a year." Pl.'s Ex. 10. The Agreement was recorded in the City land records, and also stated that the City would be required to formally recognize the Agreement and list the holder of the perpetual lease as the person responsible for "any and all tax payments" regarding the properties. *See id*. However, the City never recognized the Agreement, nor listed Mr. Johnston as the party responsible for property taxes due on 49 or 52 Pine Street. *See* Pl.'s SUMF ¶ 48.

In June 2017, Mr. Raymond Jette, a resident of Franklin County and a friend of Ms. Johnston's, paid a total of $81,001.00 to purchase both properties from two mortgage companies. Pl.'s Suppl. SUMF ¶ 27 (citing Pl.'s Ex. 13). In March 2018, Mr. Jette and Ms. Johnston signed four documents, each entitled "Perpetual Lease Agreement," and had each Agreement recorded in the City's Land Records. Pl.'s SUMF ¶¶ 35-37. Two of these Agreements pertained to the "land" and the "structure/house" at 52 Pine Street, *see* Pl.'s Exs. 15 & 16, and the two other Agreements pertained to the "land" and the "structure" at 49 Pine Street, *see* Pl.'s Exs. 17 & 18. Under each of the Agreements, Ms. Johnston agreed to pay Mr. Jette (as owner) $100.00 per year, and each Agreement indicated that "[t]he lease lasts as long as the trees grow and the water continues to flow." *Id*. ¶¶ 15-18.

In March 2020, the Johnstons both signed and had recorded a new "Perpetual Lease Agreement," under which Mr. Johnston agreed to pay his mother $30.00 per year to allow him to lease the attic portions of the two structures located at 49 and 52 Pine Street. Pl.'s Ex. 20. The Agreement identified Mr. Jette as the owner of 49 Pine Street, but the Agreement indicated that it was between the Johnstons, alone. *Id*. However, the City never recognized this Agreement, or any of the prior PLAs, and thus never listed either of the Johnstons as persons responsible for applicable property taxes. Pl.'s SUMF ¶ 48.

In early August 2020, the City notified Mr. Jette and the Johnstons that both Pine Street properties were delinquent on property taxes and that a tax sale would be held unless all taxes and related costs were paid. *See* Pl.'s Exs. 28 & 29; Aff. of Kathleen Langlois (Nov. 14, 2022), at 1-2.[2] At that tax sale, held September 3, 2020, the City purchased 49 Pine Street for $17,860.49 and 52 Pine Street for $18,18.85. *See* Pl.'s Ex. 21. Following the sales, neither property was redeemed within the one-year redemption period set by 32 V.S.A. § 5260. On September 3, 2021, the City received and recorded two tax collector's deeds, one for each property, each stating that "all right, title and interest of Raymond C. Jette, and all those claiming under him, is hereby conveyed in accordance of 32 Vermont Statutes Annotated Chapter 133." *Id*.

Currently, the Johnstons claim a possessory interest both 49 and 52 Pine Street as arising from the various PLAs between themselves and/or Mr. Jette. The City has served both the Johnstons with notices against trespass for each residential property, but the Johnstons have refused to vacate.

Discussion

Summary judgment shall be granted when the moving party shows that there is no genuine issue as to any material fact "and the movant is entitled to a judgment as a matter of law." V.R.C.P. 56(a). Thus, if "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to her case upon which she has the burden of proof," then summary judgment is warranted. *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 13, 178 Vt. 244, 249-50. "The court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record." V.R.C.P. 56(c)(3). "The nonmoving party may survive the motion if it responds with specific facts raising a triable issue, and it is able to demonstrate sufficient evidence to support a prima facie case." *Kelly v. Univ. of Vt. Med. Ctr.*, 2022 VT 26, ¶ 15, 280 A.3d 366 (quotation omitted). In determining whether there is a disputed issue of material fact, courts "resolve all reasonable doubts and inferences . . . in favor of the nonmoving party." *Id*. (citation omitted). A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with "specific facts that would justify submitting [its] claims to a factfinder." *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." *Id*. ¶ 48. However, "[w]here a genuine issue of material fact exists, summary judgment may not serve as a substitute for a determination on the merits." *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 10, 179 Vt. 545 (citation omitted).

The Court first addresses the City's ejectment claim and the Johnstons' defenses and challenges to the City's title to the properties. Next the Court considers the validity of the PLAs and the Johnstons' assertions of possessory interests in the properties. Finally, the Court turns to determination of the Johnstons' pending motions.

[2] Mr. Jette died in 2019, but the record shows that notices of tax sales were also mailed to Kim N. Jette, the court-appointed fiduciary of his estate.

I. Statutory Ejectment.

The City seeks ejectment and a writ of possession under 12 V.S.A. § 4761. This action, which is not accompanied by any request for unpaid rent, and is not based on any rental agreement between the parties, is one that sounds in tort, not contract. *See Sabourin v. Woish*, 116 Vt. 385, 387-88, 78 A.2d 333, 334 (1950). To prevail in such an action, the City must establish that it has valid legal title, as well as an immediate, equitable right to possession of the premises. *See Trustees of Caledonia County Grammar Sch. v. Kent*, 84 Vt. 1, 10, 77 A. 877, 880 (1910) (stating that "legal title in the plaintiff, with the right of immediate possession, is enough for recovery" in ejectment action). Further, "it is a common maxim in the law that a plaintiff in ejectment must recover, if at all, on the strength of his own title, and not on the weakness of his adversary's." *Darling v. Ennis*, 138 Vt. 311, 315, 415 A.2d 228, 231 (1980); *see Perry v. Whipple*, 38 Vt. 278, 284 (1865) ("[I]n ejectment the plaintiff who has no prior possession to aid him, must show title in himself, even against one in possession without title.").

Here, the undisputed facts establish the City's title and right to enter and possess the properties. For example, the City produced evidence that it gave proper advance notice of the public tax sale and then purchased the two properties at a tax sale held on September 3, 2020. There is also no dispute that, following a one-year period of non-redemption, the City received duly signed tax collector's deeds for each property, and then recorded those deeds in the City's land records. Moreover, it is well settled that, following the expiration of a statutory period for redemption, a party that obtains title through the execution of a warrant to collect on unpaid property taxes has the equitable right to immediate possession. *See, e.g.*, *Aldis v. Burdick*, 8 Vt. 21, 24-25 (1832) ("After the expiration of the [statutory time period] given for redemption, the law casts the seizin upon the creditor without any act on his part and gives him the possession of the debtor or his tenant with an immediate right of entry."); *see also Mattocks v. Stearns*, 9 Vt. 326, 338 (1837) (if occupant "continues to hold and occupy premises after the term [for redemption] has expired, he is a wrong doer, and liable in ejectment"); 25 Am. Jur. 2d *Ejectment* § 12 (generally, ejectment action may be maintained by the purchaser at a judicial sale, foreclosure sale, or execution sale).

The Johnstons' efforts to challenge the validity and sufficiency of the City's title, on both procedural and substantive grounds, are not persuasive. First, the Johnstons assert that a lack of proper notice of the tax sales invalidates them. However, there is no dispute in the record that such notice was properly given. Indeed, while the City maintains that the Johnstons were not taxpayer/owners, and thus not owed any tax sale notices by mail, the City nevertheless gave that the Johnstons specifically, as well as the public generally (via publication), adequate and timely notices of the tax sales as required by 32 V.S.A. § 5252.

Second, the Johnstons argue that the tax sales were defective because they allegedly requested that the City sell only one building or structure to satisfy the delinquencies, rather than all the lands and improvements of 49 and 52 Pine Street. But the record contains no evidence that the Johnstons (or Mr. Jette or his estate) made a timely written request to the City "clearly identify[ing] the portion of the property to be sold," or that such request was "accompanied by certification from the District Environmental Commission and the [City's] zoning administrative officer that the portion identified may be subdivided and meets minimum lot size requirements."

32 V.S.A. § 5254(b). Nor does the statute even appear to authorize a sale of a building or structure, but not the underlying land or footprint of such a building, in order to satisfy a property tax delinquency. Accordingly, the Court finds there are no genuine issues of material fact suggesting any irregularities with regard to the steps taken by the City to collect tax delinquencies through the tax sales.

II. Effect of Claimed Perpetual Lease Agreements on City's Title.

The Johnstons also assert that the City's title to the properties is insufficient to sustain an ejectment, on grounds that that it is encumbered by the Johnstons' various PLAs.[3] As the Supreme Court has noted, "the purchaser at a tax sale gets no better title than was held by the person against whom the tax was assessed," and thus "buys strictly under the rule of Caveat emptor." *Morse v. King*, 137 Vt. 49, 51, 398 A.2d 299, 301 (1979). However, the City counters that all of the Johnstons' lease agreements are void and do not convey any cognizable rights or interest. After careful consideration, the Court agrees that none of the documents relied upon by the Johnstons are in fact valid PLAs as recognized or contemplated under Vermont law, and therefore they do not affect the City's title.

A. Statute of Limitations, City's Standing, and Res Judicata

As a threshold matter, the Johnstons assert several reasons why the City is unable even to challenge the validity of the Johnstons' various PLAs. First, the Johnstons maintain that the three-year statute of limitations in 27 V.S.A. § 348(b) bars the City's challenges regarding at least the 2015 and 2018 lease agreements. However, as the City correctly notes, that provision only limits the time in which to assert certain enumerated errors as to the validity of instruments concerning real property, *see* 27 V.S.A. § 348(b)(1)-(5), and the City does not claim that the agreements are invalid for containing any such errors. Thus, the City's claims challenging the Johnstons' agreements are not time-barred.

The Johnstons also maintain that, as a non-party to each of the supposed agreements, the City lacks standing to bring an action to invalidate them. But since the Johnstons assert the Agreements in defense against the City's ejectment action, and since there is an actual controversy between the parties as to legal title to the subject properties, there can be no question that the City has standing here. *See, e.g.*, *Cheney v. Cheney*, 26 Vt. 606, 608 (1854) (plaintiff in ejectment action must overcome defendant's evidence challenging plaintiff's title to property).

[3] In their brief, the Johnstons repeatedly argue that because their lease agreements were of record in the City's land records prior to the tax sales, the City is not even a bona fide purchaser of the properties, that is, the City's title is entirely inferior to the Johnstons. This is incorrect. There is no evidence, nor do the Johnstons even claim, that Mr. Jette's interests as owner of the properties was ever lost or destroyed under the lease agreements, or that the leases were actual deeds of conveyance of fee simple interests. Therefore, the Court construes the Johnstons' argument to be that the City's title is encumbered by or subject to the various supposed leases and as such, cannot support an action for ejectment or writ of possession.

Lastly, the Johnstons argue that res judicata bars any challenge to the validity of at least the 2015 PLA, due to a prior decision by the State Tax Department's Division of Property Valuation and Review ("PVR"). *See* Defs.' Mem. in Opp'n, at 14 ("The City didn't consult with the Vermont Department of Taxes[,] and [the] PVR in [PVR Docket No.] 2017-60 mandated that the 2015 tax appeals be listed on the grand list.").[4] At the summary judgment stage, however, a party claiming res judicata must do more than simply allege that a decision issued under a certain docket number of another court or agency carries preclusive effect of a final judgment. The Johnstons' failure to provide a copy of the PVR's final decision they rely on is fatal to their argument. Moreover, "res judicata" is cited by the Johnstons, but that is a general or "umbrella" term, *Daiello v. Town of Vernon*, 2018 VT 17, ¶ 12 n.4, 207 Vt. 139, and it is unclear whether the Johnstons are asserting claim preclusion or issue preclusion, which are separate doctrines, with distinct elements and considerations. *See id.* ¶¶ 12-13; *Faulkner v. Caledonia County Fair Ass'n*, 2004 VT 123, ¶ 4 n.3 & ¶ 19 n.6, 178 Vt. 51. Indeed, apart from claiming that the PVR's decision was final and unappealed, the Johnstons have not explained why either doctrine should be applied here.[5] Accordingly, the Johnstons' res judicata claim is unavailing.

B. The 2015 Lease Agreement

Turning to the claimed "Perpetual Lease Agreements," the Court concludes that the PLA of December 31, 2015 is of no effect because the putative owner/lessor, Marjorie Johnston, lacked legal title to the subject properties at the time the Agreement was signed. With regard to 52 Pine Street, for example, this Court's May 2015 Confirmation Order declared that Ms. Johnston's interests in the property had been conclusively foreclosed and that the property had been duly purchased at a public auction sale. *See Johnston v. City of Rutland*, No. 454-8-16 Rdcv, slip op. at 3-4 (Vt. Super. Ct. Jul. 13, 2020) (per the May 2015 order, "the Appellant lost [52 Pine Street] to a foreclosure"). In fact, Ms. Johnston actually lost legal title to that property in June 2014, upon the recording of a final judgment and decree of foreclosure regarding that property. *See Mortgage Lenders Network, USA v. Sensenich*, 2004 VT 107, ¶ 7, 177 Vt. 592 (holding that the "foreclosure decree is a final judgment," after which "the mortgagor retains only the contingent equitable right to redeem the property, not full legal title to the property"). Indeed, for that same reason, as of December 2015, Ms. Johnston had only an equitable right of

[4] The PVR is an agency to which those aggrieved by a city or town's annual grand list may appeal. *See* 32 V.S.A. § 4461. While the Johnston's opposition brief makes no further argument other than the sentence cited above, careful review of their Answer (filed March 4, 2022) and Counterclaims (filed March 10, 2022) sheds some further light on their contention, which seems to be that the PVR's decision in Docket No. 2017-60 required the City to list Mr. Johnston as the lease owner and include the value of the lease on the 2017-18 (and subsequent) grand lists, and thus precludes the litigation of the validity of the 2015 PLA here.

[5] It is also unclear when the PVR issued the alleged decision; it is not even mentioned in two property valuation merits decisions issued in July and August of 2020 by the Rutland Civil Division, each of which found that the 2015 agreement was not a "perpetual lease" within the meaning of 32 V.S.A. § 3610. *See Johnston v. City of Rutland*, No. 514-10-17 Rdcv, slip. op. at 4-8 (Vt. Super. Ct. Aug. 19, 2020); *Johnston v. City of Rutland*, No. 454-8-16 Rdcv, slip op. at 5-11 (Vt. Super. Ct. Jul. 13, 2020).

redemption to 49 Pine Street, not valid legal title. Accordingly, Ms. Johnston lacked legal title to grant any leasehold interests, rendering the 2015 lease agreements invalid.

Moreover, even if Ms. Johnston did own sufficient title and interest, the 2015 agreement is void for uncertainty. "[A] deed of a certain number of acres out of a known tract of land, without specifying the part of the land of which it is to be taken, is void for uncertainty." *Goodsell v. Rutland-Canadian R.R. Co.*, 75 Vt. 375, 380, 56 A. 7, 8 (1903). Here, the 2015 agreement purports to grant a lease of "1/4 of the garage/shed on the lot known as 52 Pine St." Pl.'s Ex. 10. Yet, "where exactly in the shed/garage this 1/4th interest is located is not described in the lease, nor is any right of access to the shed/garage included in the lease." *Johnston v. City of Rutland*, No. 514-10-17 Rdcv, slip. op. at 7 (Vt. Super. Ct. Aug. 19, 2020). Likewise, the agreement purports to lease "[a] plot of land approximately 20 foot by 20 foot on the lot known as 49 Pine St." This is equally vague and insufficient to specify the exact location of the leased property. Therefore, the Agreement as to 49 and 52 Pine Street is void for uncertainty.[6]

C. The 2018 Lease Agreements

The Court also concludes that the four 2018 "Perpetual Lease Agreements" are invalid for several reasons. First, although the agreements state that they last "as long as the trees grow and the water continues to flow," they lack essential terms of inheritance. A "perpetual lease" is defined by the Legislature as including "every leasehold interest in land located in Vermont . . . arising out of or created by an instrument of lease *which conveys to a person designated as lessee, his or her heirs, executors, administrators and assigns*, the right to possess, enjoy and use the land in perpetuity or substantially in perpetuity." 32 V.S.A. § 3610(a) (emphasis added). Thus, the conveyance to the lessee's "heirs, executors, administrators and assigns" is critical and must be explicit. As Judge Mello explained with regard to the omission of these terms in the Johnstons' 2015 PLA:

> [T]he rights purportedly contained in the "Perpetual Lease Agreement" were not conveyed to Kamberleigh Johnston and his heirs, executors, administrator and assigns, as required by the applicable statute. *See* [32 V.S.A.] § 3610(a) ("The term 'perpetual lease' as used in this section includes every leasehold interest in land located in Vermont . . . arising out of or created by an instrument of lease which conveys to a person designated as lessee, *his or her heirs, executors, administrators and assigns*, the right to possess, enjoy and use the land in perpetuity or substantially in perpetuity . . . ." (emphasis added)). The stated duration of the "Perpetual Lease Agreement" ("as long as the trees grow and the water runs") alone is insufficient to satisfy the "perpetuity or substantially in perpetuity" requirement of the definition, in the absence of a conveyance to Kamberleigh, his heirs, executors, administrators and assigns. Thus, Kamberleigh

[6] Thus, the Johnstons' assertion that they requested that the 2015 lease agreement be excepted from any City tax sale of 49 or 52 Pine Street, and that such agreement was never actually extinguished or voided by any such sale is of no moment given the Court's conclusion that the agreement is void and has no legal effect.

> Johnston's lease [the 2015 lease] is not a "perpetual lease" within the meaning of § 3610.

Johnston v. City of Rutland, No. 514-10-17 Rdcv, slip. op. at 6. Here, too, Raymond Jette's supposed "perpetual leases" to Marjorie Johnston in 2018 are missing the essential words of inheritance and are not perpetual leases within the meaning of the statute.

Second, the Agreements are generally invalid because they do not convey or pass any rights or interests to Ms. Johnston in relation to any real property of the owner. *See, e.g.*, *Brault v. Welch*, 2014 VT 44, ¶ 13, 196 Vt. 459 ("In interpreting deeds, the court must start with the language of the deed itself . . . ."); *Evarts v. Forte*, 135 Vt. 306, 309, 376 A.2d 766, 768 (1977) ("[I]f an instrument that purports to be a complete contract does not contain, or erroneously contains, the substantial terms of a complete contract, it is ineffective as a legal document."). For example, the parties merely "AGREE" to a "GRANT OF PERPETUAL LEASES for the land," which is an agreement to a type of agreement for property. However, nowhere does the owner/lessor actively transfer or convey to the lessee rights to possess, enjoy, occupy or otherwise use specified real property. *Cf.* 32 V.S.A. § 3610(a) (a "perpetual lease" must arise out of or be created by "an instrument of lease which conveys . . . *the right to possess, enjoy and use the land* in perpetuity or substantially in perpetuity" (emphasis added)); *see Kipp v. Estate of Chips*, 169 Vt. 102, 104 n.1, 732 A.2d 127, 129 n.1 (1999) (granting clause of valid deed "actively transfers the land *from* the grantor *to* the grantee/s" (emphasis added)); *Johnson v. Barden*, 86 Vt. 19, 21, 83 A. 721, 722 (1912) (clause stating that grantor does "give, grant, bargain, sell, convey, and confirm unto the said [grantees]" the farm in question is a valid conveyance); *Stevens v. Dewing*, 2 Vt. 411, 416-17 (1830) (granting words, "lease, let, rent, and confirm to said Martin, . . . and his heirs" a "certain piece, lot, or tract, of land," constituted a valid conveyance). The lack of conveyance or transfer of property interests is further underscored by the preceding sentence which recites the owner's "desire[] to grant to the perpetual lease holder rights under the terms and conditions set forth in this Agreement." *See* Pl.'s Exs. 15-18. Importantly, there are no "terms and conditions" within any of the Agreements that actually give the lessee rights to hold, enjoy, or use any lands or premises. Thus, this statement of the owners' intent is empty and without effect. *See* 25 Am. Jur. 2d *Deeds* § 13 ("The absence of words of conveyance cannot be supplied, and if no words importing a grant can be found in the deed, it is void although in other respects formal and regular."). Similarly, each Agreement contains a circular statement that "the intent of this perpetual lease is to allow M[arjorie] Johnston to maintain each lease." *Id*. This too is ineffective and does not constitute an actual, valid conveyance of any property rights or interests in the 2018 Agreements.

The conclusion that the 2018 Agreements fail to convey any interests in real property is not surprising in light of the other language included by the parties, which suggests that the parties did not intend to accomplish the lease of any specified real property, but rather to create written instruments that would qualify as "perpetual leases" for purposes of a property taxation statute, 32 V.S.A. § 3610. That statute is solely "aimed at making owners of perpetual leases of land the effective owners of the property for purposes of taxation." *Lesage v. Town of*

Colchester, 2013 VT 48, ¶ 27, 194 Vt. 377.[7] The 2018 Agreements are replete with assertions and claims that the instruments are qualifying "perpetual leases," and that the City must modify its grand list so as to make Ms. Johnston as the sole effective property owner of 49 and 52 Pine Street. *See* Pl.'s Exs. 15-18 (stating that "[t]he [C]ity of Rutland must . . . comply with 32 V.S.A. 3610 requirements," "[t]he Grand List for 2018-2019 must be amended to accurately reflect the lease arrangement," and "[a]ny attempt by the City of Rutland to fail to correct the grand list will be prima facie evidence of a common benefits violation").

Similarly, the financial terms of the Agreements cast further doubt on the proposition that the agreements were the result of arms-length transactions and were intended to have any legitimate purpose apart from forcing changes to the City's grand list and taxing authority relating to the properties. As the City's briefs point out, the cumulative rents owed to Mr. Jette under the agreements ($200 per year, for each property) fall dramatically short of even the ordinary carrying costs of these properties (e.g., mortgage obligations, physical maintenance and insurance costs, property tax obligations, etc.). The annual "rents" appear so low as to be purely nominal or de minimis, inserted into the agreements only to ensure that the agreements might qualify as "perpetual leases" for purposes of § 3610. *Cf. Trustees of Caledonia County Grammar Sch. v. Kent*, 86 Vt. 151, 155-56, 84 A. 26, 28 (1912) (to qualify as a perpetual lease, agreement must contain a reservation of reversion in the grantor for non-payment of rents at the end of regular stated periods, during all future time). While Mr. Jette certainly enjoyed the right to bind himself to a contract that would necessarily lose money, thereby generously benefitting Ms. Johnston, the notion that he would do so in perpetuity as to two properties he acquired only months prior for $81,000 is untenable.

Indeed, the ultimate goal of the 2018 "Perpetual Lease Agreements" does not appear to be to accomplish a bona fide real estate transaction or for the Johnstons to benevolently assume a property owner's ordinary tax burdens. In paragraphs 32-36 of their Counterclaims, the Johnstons assert that, because of the PLAs, the City is "using the wrong method to determine" the value of the subject properties, and that the City's claimed tax delinquencies or "debts" are "invalid." Specifically, relying on 32 V.S.A. § 3609, the Johnstons assert that the City must appraise and list real estate that is the subject of these various PLAs "at a sum of which the [annual rent payable under the lease] is six percent." Thus, as far as the Court can tell, the Johnstons' theory is that that lands encumbered by a qualifying PLA may no longer be appraised and listed based upon their highest and best use, fair market value, or other ordinary factors of appraisal.

[7] The theory underlying the statute is that a perpetual lease holder has nearly a fee simple interest, and thus, should bear the property tax obligations ordinarily borne by owners of fee simple interests. *See Weyerhaeuser Co. v. Town of Hancock*, 151 Vt. 279, 281, 559 A.2d 158, 160 (1989) ("[I]t is clear that the Legislature intended to allow the taxation of leaselands [that are] essentially equivalent to fee simple interests."). Perpetual leases have long roots in Vermont law, and were considered to be well suited for a developing agrarian economy and Vermont's natural landscape at earlier times. *See Univ. of Vt. & State Agric. Coll. v. Ward*, 104 Vt. 239, 262, 158 A. 773, 783 (1932).

In light of the foregoing, the 2018 Agreements can only be understood as deliberate efforts to avoid ordinary property tax obligations. No legitimate, nontax economic substance can be found in the PLAs, and their terms reveal no actual purpose other than to upset the City's grand list and its ordinary taxing authority as it relates to these properties. As Judge Mello aptly observed in another case with regard to the Johnstons' 2015 lease agreement, the 2018 agreements "do[] not appear to have any legitimate business or estate planning purpose; [their] purpose appears to be, rather, to complicate the ability of the City to perform its proper statutory taxing duties." *Johnston v. City of Rutland*, No. 514-10-17 Rdcv, slip. op. at 7 (Vt. Super. Ct. Aug. 19, 2020). This apparent improper purpose lends further credence to the conclusion that the Agreements have no cognizable legal effect. *Cf. TD Banknorth, N.A. v. Dep't of Taxes*, 2008 VT 120, ¶¶ 16-33, 185 Vt. 45 (asset conveyances that would "'exalt artifice above reality,'" allowing taxpayers to "almost completely avoid payment of" of taxes otherwise owed, and which involve little or no economic risk or other substance apart from tax avoidance, are "absurd" and thus may be disregarded by taxing authorities) (quoting *Winn-Dixie Stores, Inc. v. Commissioner*, 254 F.3d 1313, 1316 (11th Cir. 2001)).[8]

D. The 2020 Lease Agreement

Lastly, the language of the Johnstons' purported 2020 PLA lease is nearly identical to the 2018 Agreements (except that the Agreement is between Marjorie Johnston as lessor and Kamberleigh Johnston as lessee). Therefore it is invalid for the reasons discussed above. Moreover, given the Court's conclusion that the 2018 PLAs are invalid and do not convey any property rights or interests to Marjorie Johnston, she did not possess any valid rights to convey to Kamberleigh Johnston in the 2020 instrument. Accordingly, as with the 2018 PLAs, the 2020 Agreement does not constitute an actual, valid conveyance of any property rights or interests.

In short, the City has demonstrated that it is entitled to a judgment as a matter of law on the issue of the validity of the Johnstons' 2015, 2028, and 2020 PLAs, and its motion for summary judgment on this claim for declaratory judgment is granted. In addition, summary judgment is granted to the City on its claim for ejectment.

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[8] It bears noting that, unlike the asset conveyances at issue in *TD Banknorth*, 2008 VT 120, ¶ 32, the Johnstons' various PLAs do not even meet the "literal requirements" of the tax statute, so as to potentially achieve or qualify for any tax avoidance. Property subject to a perpetual lease must be listed twice. *See Sherburne Corp. v. Town of Sherburne*, 145 Vt. 581, 586, 496 A.2d 175, 178 (1985). First, "[p]erpetual or redeemable leases upon which rent is reserved . . . shall have an appraisal value *as personal estate*," and listed *to the lessor* at an amount of which the rent is six percent. 32 V.S.A. § 3609 (emphasis added). Second, a qualifying perpetual lease "shall be set in the grand list as real estate *against the lessee*," *id*. § 3610(e) (emphasis added), and have an appraised value of "its market value as determined by the listers or appraisers, taking into consideration all limitations upon use of the land by the lessee that substantially diminish the value of his or her right to occupy, use, or enjoy the land," *id*. § 3610(c), with a credit due for annual rent paid, *id*. § 3610(f). *See Dodge v. Town of Worcester*, 129 Vt. 441, 442-43, 282 A.2d 799, 800 (1971). Accordingly, the Johnstons' attempt to have the appraisal method mandated by 32 V.S.A. § 3609 control the properties and represent the City's sole mechanism for collecting taxes is unfounded.

III. The Johnstons' Motions To Dismiss, To Strike, and for Miscellaneous Relief.

On October 10, 2022, Marjorie Johnston filed a Motion to Dismiss Plaintiff's Amended Complaint. On November 15, 2022, the Johnstons filed a Motion to Strike the City's Summary Judgment Motion and Count III of the Complaint. Both motions are without merit or are otherwise moot.

Ms. Johnston's motion to dismiss is denied as untimely. The time to seek dismissal of the Complaint or Amended Complaint in this action has long expired. *See* V.R.C.P. 12(a), (b)(6) (responsive pleading or motion for failure to state a claim due within 21 days of service of process). Moreover, the Johnstons previously filed a motion to dismiss in this case in April 2022, which the Court denied. Assuming, however, that the motion should be treated as one for summary judgment, the Court will address the arguments Ms. Johnston asserts in the motion. *Cf.* V.R.C.P. 12(c) (motion for judgment on the pleadings, if made "[a]fter the pleadings are closed but within such time as to not to delay trial," and if relying on "matters outside the pleadings," may be "treated as one for summary judgment and disposed of as provided in Rule 56").

As an initial matter, Johnston's reliance on *Federal National Mortgage Association v. Johnston*, 2018 VT 51, 207 Vt. 473, is misplaced. The question there was whether Rule 41(a)(1)'s "two-dismissal rule" (i.e., that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has already dismissed the action once) should have been enforced against the plaintiff-owner of 49 Pine Street in 2017, when that party filed a notice of voluntary dismissal in a second eviction case brought by the same party against the Johnstons. *See id.* ¶¶ 1-4. The Supreme Court held that whether that rule applies, so as to require the dismissal of the second case to be with prejudice, is an issue that becomes ripe and can be determined only in a third action, if and when such action is filed. *See id.* ¶ 6. But the City of Rutland was not the plaintiff in any prior eviction action against the Johnstons regarding 49 Pine Street, so the two-dismissal rule certainly does not apply here.

Ms. Johnston also argues that she is "shielded from debt demands in this case" by 14 V.S.A. § 2850 because Mr. Johnston was voluntarily appointed his mother's "limited guardian" in 2015 by the Rutland Probate Division (in Docket No. 80-2-15 Rdpr). However, the instant action is not an attempt to collect unpaid rent or other debts from Ms. Johnston, and so does not fall within the scope of 14 V.S.A. § 2850. This case is primarily a statutory ejectment action, sounding in tort for alleged wrongdoing; the remedies sought by the City are possession and a declaration of the parties' rights and title regarding certain real property, not the recovery of amounts owed. *See Sabourin*, 116 Vt. at 387-88; *Rutland R.R. Co. v. Chaffee*, 71 Vt. 84, 85-86, 42 A. 984, 984 (1899) ("[A] judgment in ejectment settles the plaintiff's title to, and right in, the land, and establishes his right of property."); *Barnes v. Tenney*, 52 Vt. 557, 558 (1880) ("[T]he writ in an action of ejectment . . . runs against the body.").[9] Even the City's claim for waste (Count II) seeks compensatory damages, for alleged injuries to the premises, not the recovery of

[9] Additionally, the argument based on 14 V.S.A. § 2850 was rejected once already in this case (*see* "Entry Regarding Motion," filed June 9, 2022, at 2), so the argument also fails under the "law of the case doctrine." *See Gardner v. Jeffreys*, 2005 VT 56, ¶ 14, 178 Vt. 594.

debts owed. The Court has considered the remaining arguments in the motion to dismiss, and they are either without merit or without any bearing on the City's claims.

The Johnstons' motion to strike challenges the City's Supplemental Statement of Facts, dated November 14, 2022. The supplemental statement modifies certain assertions contained in the City's original statement, dated September 9, 2022, which allege that Mr. Jette acquired the subject properties by way of a foreclosure sale. The supplemental statement concedes that Mr. Jette actually purchased the properties from two mortgage companies who themselves acquired title through foreclosure sales. The amended assertions are hardly material, as no party is questioning the validity of Mr. Jette's title in 2018 at the time he entered into the four lease agreements with Ms. Johnston. Further, Rule 56 does not bar such a correction or modification, so long as the corrections are supported by admissible evidence in the record, as is the case here.[10] Nor have the Johnstons shown any prejudice by the City's supplemental statement, and the Court does not find any, particularly since the City's supplemental statement essentially agrees to the very facts asserted by the Johnstons.

The remainder of the points raised in the Johnstons' motion to strike are in the nature of surreply arguments concerning the City's summary judgment motion. Having considered and addressed the arguments as such, the Court will otherwise deny the Johnstons' motion to strike as moot.

Finally, on December 5, 2022, the Johnstons filed a motion entitled "Defendant(s) Motion to Strike Plaintiff's letter dated 11/21/22 and 60 day Enlargement of time to file necessary paperwork due to changed conditions . . . and related Relief." The Court will consider this a request for miscellaneous relief. On November 21, 2022, the City filed a letter in this action addressed to the Rutland Civil Division's Operations Manager using the Odyssey electronic filing system. The purpose of the letter seems to be to notify the Court that the City did not intend to respond to the Johnstons' November 14, 2022 Motion to Strike. To the extent the letter contains argument in opposition to that motion, the Court has not considered those arguments. However, the Court will not strike the letter from the record or the docket in this case, as it remains pertinent for what it states and the fact that it was filed, and the Johnstons have shown no prejudice or other legal grounds for removing it.

The Johnstons' motion also requests 60 days to file "necessary paperwork" due to "changed conditions." The Johnstons refer to a pending appeal of a PVR property valuation

[10] The City's "Rule 56(c)(3) Reply to Defendants' Assertions of Disputed Material Facts," dated November 14, 2022, replies to each assertion of disputed fact contained in the Johnstons' opposition brief. For example, in response to the Johnstons' allegation that the foreclosure sales occurred before Mr. Jette purchased the properties, the City's Rule 56(c)(3) Reply includes a statement agreeing with that claim, and refers to the City's supplemental statement of facts. The City's supplemental statement of facts is thus consistent with Rule 56(c)(3). Moreover, "[i]f a party fails to properly support an assertion of fact," the Court has discretion to "give [such party] an opportunity to properly support or address the fact." V.R.C.P. 56(e)(1). The Court exercises its discretion to allow the City's supplemental statement of facts, and denies the Johnstons' motion to strike.

decision, but the Court otherwise does not understand what "paperwork" is to be filed, in what court, or why more time is needed to file it. Moreover, well more than 60 days have actually elapsed since the Johnstons' motion seeking such time. Accordingly, the Johnstons' motion for miscellaneous relief is denied.

The Johnstons' motion for miscellaneous relief correctly observes that the City did not formally move for summary judgment as to their counterclaims, and that such relief cannot be requested for the first time on reply. In its May 18, 2022 Entry re Motions, the Court noted that the Johnstons' "rambling and disjointed counterclaim is almost impossible to understand." However, the Court identified four potential legal claims that could be discerned from the allegations: the underlying tax sale was defective, the City violated the Public Record and Open Meeting Laws, and the City failed to hold a proper abatement hearing. The Court considers the Johnstons' counterclaims to be limited to these claims.

The City's motion for summary judgment as to its claim for ejectment necessarily relies on the assertion that the City did not make any errors in the process through which it attempted to collect unpaid taxes by execution sale of real property. Indeed, in opposing the City's motion, one of the Johnstons' primary defenses is that the tax collector deeds were defective and invalid, due to certain procedural irregularities. It also appears that the Johnstons make the same assertion as one of their counterclaims, that is, that the tax sale deeds should be declared defective and invalid due to errors or irregularities in the procedural steps taken by City officials to collect the taxes and costs. In granting the City's summary judgment motion, the Court has concluded that the undisputed facts establish that there were no procedural irregularities related to the tax sale, and the City is entitled to judgment as a matter of law. Accordingly, the Johnstons' counterclaim on that identical issue does not survive the grant of summary judgment in the City's favor on its claim for ejectment. On the other hand, with respect to the Johnstons' claims of potential Public Records and Open Meetings Act violations and failure to conduct an abatement hearing, the City did not file a properly supported motion for summary judgment. Therefore, those counterclaims have not been addressed by the Court.

Order

For the foregoing reasons, the parties' pending motions are decided as follows:

1. Plaintiff City of Rutland's motion for summary judgment on its claim for ejectment is GRANTED (Motion 13).

2. The City's motion for summary judgment on its claim for declaratory relief is also GRANTED, and the Court hereby declares that:

(a) the City has valid legal title to the 49 and 52 Pine Street properties (including all lands and the improvements); and

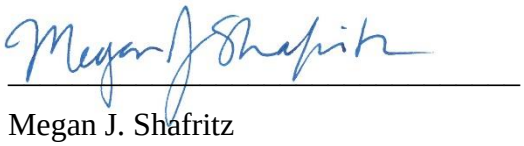
(b) the 2015, 2018, and 2020 "Perpetual Lease Agreements" asserted by the Johnstons are void and invalid as a matter of law, and thus give the Johnstons no legal title to, or

rights of possession or possessory interests in, 49 or 52 Pine Street (including any of the lands and/or improvements therein or thereon).

3. The Johnstons' Motion to Strike and Motion for miscellaneous relief, and Marjorie Johnston's Motion to Dismiss are DENIED (Motions 17, 18, 20).

It is further HEREBY ORDERED that the parties may file any additional dispositive motions that may be appropriate as to the remaining claims and counterclaims in this matter within 14 days of the date of this Order. If no such motions are filed, the Court will schedule a status conference to discuss next steps, including potential trial dates.

Electronically signed on May 22, 2023 at 11:15 AM pursuant to V.R.E.F. 9(d).



Megan J. Shafritz
Superior Court Judge