

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



Docket No. 23-ENV-00048

Shea Property Services Subdivision Appeal

ENTRY ORDER

Title: Motion to Dismiss (Motion: 4)

Filer: Brice Simon, Esq.

Filed Date: May 30, 2023

Appellant's Reply in Opposition to Motion to Dismiss, filed on June 12, 2023, by Edward Spaulding.

Applicant's Reply to Memorandum in Opposition to Motion to Dismiss, filed on June 20, 2023 by Attorney Brice Simon.

The motion is GRANTED.

Title: Motion to Dismiss the Motion to Dismiss (Motion: 4)

Filer: Edward Spaulding

Filed Date: June 12, 2023

Applicant's Memorandum in Opposition, filed on June 20, 2023 by Attorney Brice Simon.

The motion is DENIED.

This is an appeal by Edward Spaulding (Mr. Spaulding) of an April 10, 2023 decision of the Town of Waitsfield Development Review Board (DRB) decision granting Shea Property Services (Applicant) approval for a 5-lot subdivision at property located on Center Fayston Road, Waitsfield, Vermont having a parcel number of 99031.001 (the Property). Mr. Spaulding appealed that decision to this Court on May 11, 2023. Presently before the Court is Applicant's

motion to dismiss the pending appeal pursuant to Vermont Rules of Civil Procedure (V.R.C.P.) Rule 12(b)(1) and Mr. Spaulding's motion to dismiss the pending motion to dismiss.¹

Prior to addressing Applicant's motion, we must address Mr. Spaulding's "motion to dismiss the motion to dismiss." The Court understands Mr. Spaulding's motion to challenge whether the Court can consider Applicant's motion. The signature block in Applicant's motion to dismiss contains an error in which it states that Attorney Simon is "Counsel of Appellant Scott Wood." Scott Wood is not a party to this action and, therefore, Mr. Spaulding asserts that this presents grounds to not consider Applicant's motion. This request ignores the fact that Applicant's motion specifically states it was made on behalf of Applicant, through counsel, Brice Simon. See Motion to Dismiss (filed May 30, 2023) at 1. Attorney Simon signed the document. *Id.* at 8. There can be no legitimate confusion that the motion was made on behalf of Applicant and signed by counsel in compliance with V.R.C.P. 11 even if the signature block contained this error. Thus, Mr. Spaulding's "motion to dismiss the motion to dismiss" is **DENIED**. Having reached that conclusion, we turn to the Applicant's motion to dismiss.

Applicant argues that the Court lacks jurisdiction to hear the appeal because it was untimely filed or because Mr. Spaulding failed to participate in the proceedings below. V.R.C.P. Rule 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. When reviewing such a motion, this Court accepts all uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party. Rheume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.

To perfect an appeal from an appropriate municipal panel, an appellant must file a notice of appeal in this Court within 30 days of the date of the decision appealed from "unless the court extends the time as provided in Rule 4 of the Vermont Rules of Appellant Procedure." Vermont Rules of Environmental Court Procedure (V.R.E.C.P.) 5(b)(1) (governing appeals from municipal panels to the Environmental Division). Failure to file a timely notice of appeal deprives this Court

¹ The Court notes that these filings were initially submitted in June. While these motions were under advisement, on the record at the Court's August 7, 2023 status conference in this matter, the Court ruled on Mr. Spaulding's June 12, 2023 "Motion for Extension of Time for Further Training," in which he asked for additional time to obtain assistance through pro se trainings. In so doing, the Court afforded Mr. Spaulding until August 31, 2023 to attend trainings for self-represented litigants or hire his own counsel. The Court informed the parties that it would not rule upon the pending motions until after this date.

of jurisdiction over that appeal. In re Gulli, 174 Vt. 580, 583 (2002) (citing Mohr v. Vill. Of Manchester, 161 Vt. 562, 562 (1993) (mem)).

Pursuant to V.R.A.P. 4(d), this Court may extend the time to file a notice of appeal if: “(A) the relief is requested by motion filed no later than 30 days after the expiration of the time prescribed by Rule 4(a); and (B) the party shows excusable neglect.”

The DRB entered its decision on April 10, 2023. Thus, the deadline to file a notice of appeal in this Court was May 10, 2023.² Mr. Spaulding filed his notice of appeal in this Court on May 11, 2023. See Notice of Appeal (filed May 11, 2023). On or about May 1, 2023, Mr. Spaulding was in contact with the Judiciary’s Help Desk regarding his appeal. Spaulding Ex. 2. On May 5, 2023, Mr. Spaulding initiated an action in the Vermont Superior Court, Washington County Civil Division. See Applicant Ex. C (Civil Division Case Summary). In so doing, he filed the DRB’s decision twice with the Civil Division as both an “Initial Filing” and “Complaint.” See Applicant Exs. C—E. Mr. Spaulding did not file a notice of appeal in the Civil Division. See Applicant Ex. C.

The DRB’s decision contains language as to how a potential interested person may appeal the decision. It states:

Pursuant to Title 24 VSA § 4471 and 4472, an interested person who has participated in the review of this application may appeal this decision to the Environmental Division of the Superior Court by filing a Notice of Appeal directly to the Court, 32 Cherry Street, Suite 303, Burlington, Vermont 05401, by certified mail within thirty (30) days of the date this decision is issued. A copy of the notice must also be sent to the Zoning Administrator or the Municipal Clerk who is required to provide a list of interested persons to the appellant within five days of receipt of the Notice. The appellant is required to send a copy of the Notice, via certified mail, to each interested person.

Applicant Ex. B (DRB Decision).

² To the extent that Mr. Spaulding asserts that he did not receive a copy of the decision via certified mail until April 21, 2023 and his notice of appeal was within 30 days of that date, the relevant date for filing a notice of appeal is not the date of receipt of the decision, but “the date of the . . . decision . . . appealed from.” V.R.E.C.P. 5(b)(1); see also In re Mahar Conditional Use Permit, 2018 VT 20, ¶ 13, 206 Vt. 559. Thus, the 30-day period to file a notice of appeal is measured from April 10, 2023.

Mr. Spaulding filed a Notice of Appeal in this Court on May 11, 2023, the thirty-first day after the DRB decision. See Notice of Appeal. Mr. Spaulding did not include within the notice, or accompany the notice with, a motion to allow an untimely appeal.

Mr. Spaulding's opposition to dismissal relies heavily on the fact that he is self-represented in this matter. While this Court is careful to ensure that self-represented litigants are not "taken advantage of by strict application of the rules of procedure," Town of Washington v. Emmons, 2007 VT 22, ¶ 7, 181 Vt. 586 (mem.), we must enforce the Vermont Rules of Civil Procedure and the Vermont Rules of Environmental Court Procedure, equitably. Bloomer v. Gibson, 2006 VT 104, ¶ 14, 180 Vt. 397; see also Vt. Agency of Nat. Res. v. Denio, No. 107-9-15 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Nov. 21, 2016) (Durkin, J.) (denying a V.R.C.P. 60(b) motion because the parties' self-represented status alone did not warrant setting aside the judgment).

The DRB Decision clearly states the process by which Mr. Spaulding could have submitted a timely appeal in this Court. Instead, he initiated a different process in a different court, failing to file any notice of appeal or similar filing. When he realized the mistake he filed in this Court after the deadline to do so, and he did not file a motion to allow his untimely appeal. To Date, he has not filed such a motion, timely or otherwise.³ This Court is "unable to provide more extension than our rules explicitly allow." In re Baynai Zoning Permit Appeal, No. 21-ENV-00084, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Oct. 13, 2021) (Durkin, J.). Absent a motion to allow the untimely appeal, we must abide by the 30-day deadline to appeal the DRB Decision.⁴

³ While Mr. Spaulding may not have been aware of the need to file a motion, Applicant's motion to dismiss the appeal addressed the need for filing such a motion. This was prior to the expiration of the 30-day period to file a Rule 4 motion. In response thereto, Mr. Spaulding presented the Court with no such motion and, even with additional time to receive advice of pro bono counsel, he has not filed a motion seeking relief for his untimely appeal.

⁴ Even if this Court were to generously interpret Mr. Spaulding's opposition to the motion to dismiss as a motion itself, we fail to see how excusable neglect has been shown. The Vermont Supreme Court has recognized that there has been "an appropriate hard line when it comes to determining when neglect stems from factors totally within the control of a party or its attorney is 'excusable.'" In re Town of Killington, 2003 VT 87A, ¶ 17, 176 Vt. 60 (citations omitted). It is clear that Mr. Spaulding was attempting to file in Odyssey an appeal with the Environmental Division, even if that appeal was deficient on its face, and that he was struggling with the electronic filing system as of May 1, 2023. See Spaulding Ex. 2. While he was in contact with the Judiciary's Help Desk, however, he asked the Help Desk questions about who he was "filing against," how to file a request to waive fees, and advice on future e-filing. See *id.* He did not ask to ensure that his appeal was filed with the proper court, nor does it appear he followed up to ensure the same. Further, he did not avail himself to more straightforward means of filing such as by certified mail when these issues became apparent, despite being aware through the DRB Decision that this was permissible.

To the extent that Mr. Spaulding asks this Court to consider the date of his misfiled appeal as the date of his notice of appeal, we are without authority to do so. This Court can conclude that appeals improperly filed with the tribunal below as filed with our Court on the date they were misfiled, see V.R.E.C.P. 5(b)(1). There is no similar authority for this Court to consider a misfiled notice of appeal in another Division of the Superior Court as timely filed in this Court. In any event, that is not what occurred here. Mr. Spaulding did not misfile a notice of appeal in the Civil Division because he did not file a notice of appeal at all in the Civil Division, let alone one in compliance with V.R.E.C.P. 5(b)(3). See V.R.E.C.P. 5 (b)(3) (“The notice of appeal must specify the party or parties taking the appeal and the statutory provisions under which each party claims party status; must designate the act, order, or decision appealed from; must name the court to which the appeal is taken; and must be signed by the appellant or the appellant’s attorney. In addition the notice of appeal must (A) advise all interested persons that they must enter an appearance in writing with the court within 21 days of receiving the notice, or in such other time as may be provided in subdivision (c) of this rule, if they wish to participate in the appeal and (B) give the address or location and a description of the property or development with which the appeal is concerned and the name of the applicant for any permit involved in the appeal.”). While this Court will not dismiss an appeal “for informality of form or title in the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear,” *id.*, Mr. Spaulding did not file a notice of appeal in the Civil Division at all and the Court is without authority to consider Mr. Spaulding’s filing in the Civil Division as timely in the Environmental Division. Thus, there is no grounds for this Court to consider the Civil Division action as the relevant filing date in this Court.

Thus, Mr. Spaulding’s appeal is untimely and Applicant’s motion to dismiss is **GRANTED** and the appeal is **DISMISSED**.⁵

In sum, the ability to file his appeal in the proper court, and the failure to do so, was totally within his control and thus, likely fails to rise to the high bar of excusable neglect. In any event, interpreting Mr. Spaulding’s opposition to the pending motion to dismiss as a properly filed motion to allow the untimely appeal likely goes beyond the leeway traditionally afforded to self-represented litigants as it would allow Mr. Spaulding to circumvent not only the jurisdictional limitations presented by an untimely notice of appeal but also the rules as they relate to motions to allow untimely appeals.

⁵ Having reached this conclusion, we need not address Applicant’s motion as it relates to whether Mr. Spaulding participated in the proceedings below.

Conclusion

For the forgoing reasons, we conclude that Mr. Spaulding's appeal is untimely, and the Court is therefore without jurisdiction to hear his appeal. Thus, Applicant's motion to dismiss the appeal is **GRANTED** and the appeal is **DISMISSED**. Having reached this conclusion, all other motions pending before the Court are **MOOT**.⁶

This concludes the matter before the Court. A Judgment Order accompanies this Order.

Electronically signed this 6th day of October 2023 pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is written in a cursive, flowing style.

Thomas G. Walsh, Judge
Vermont Superior Court, Environmental Division

⁶ This includes Mr. Spaulding's Motion to Stay filed on October 4, 2023, to which Applicant responded on October 5, 2023.