ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-307

JANUARY TERM, 2010

Bruce Paynter	}	APPEALED FROM:
	}	
v.	}	Rutland Superior Court
	}	
Town of Pittsford Planning Commission and Selectboard	}	DOCKET NO. 270-4-08 Rdcv
	}	Trial Judge: William Cohen

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals pro se from the trial court's dismissal of his challenge to the Town of Pittsford's new town plan, brought pursuant to Vermont Rule of Civil Procedure 75. The court granted summary judgment to the Town, concluding that plaintiff's case was filed beyond the time limitations provided in Rule 75. We conclude that the Town is entitled to judgment as a matter of law and affirm entry of summary judgment in the Town's favor.

In September 2000, Pittsford adopted a comprehensive town plan. The plan expired five years later in September 2005. See 24 V.S.A. § 4387(a) (setting forth that all plans shall expire every five years). In 2006, Pittsford began drafting a new plan. During this process the planning commission discussed readopting the old plan as a temporary measure to give the planning commission time to thoroughly consider a complete revision. Following several planning commission meetings and the planning commission's recommendation, the Pittsford Selectboard adopted an updated comprehensive town plan on August 22, 2007. The introduction described it as "the interim Town Plan."

On April 8, 2008, plaintiff filed a pro se complaint in Rutland Superior Court, challenging adoption of this so-called interim plan. Plaintiff termed his complaint a Rule 75 action, and initially included three counts. The crux of plaintiff's initial complaint was that the interim plan was invalid because it did not comply with the adoption procedures articulated in 24 V.S.A. § 4384(a) requiring public input. Plaintiff was granted permission to amend his complaint following two subsequent requests.

In December 2008, the Town moved for summary judgment. Also in December and then again in January, plaintiff made his third and forth requests to amend his complaint. Later in January 2009, plaintiff filed a motion to voluntarily dismiss several counts from his complaint.

On July 20, 2009, the court ruled on the pending motions. The court granted plaintiff's motion to voluntarily dismiss five counts. The court also granted the Town's motion for summary judgment on the grounds that the Rule 75 petition was not timely filed. In addition, the

court denied plaintiff's third and fourth motions to amend, concluding that this effort would have been futile due to the untimely filing of his petition. Plaintiff appeals.

On appeal, plaintiff argues that his claims were not untimely, as found by the trial court. According to plaintiff, he had two years in which to challenge the validity of the town plan pursuant to 24 V.S.A. § 4483. He also requests for leave to carry on his case as "an ordinary civil action."

We review an appeal from summary judgment de novo using the same standard as the trial court. Madden v. Omega Optical, Inc., 165 Vt. 306, 309 (1996). Summary judgment will be granted when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3).

Rule 75 provides: "The time within which review may be sought shall be as provided by statute, except that if no time limit is specified by statute, the complaint shall be filed within 30 days after notice of any action or refusal to act . . . ." V.R.C.P. 75(c). Plaintiff's case was filed more than eight months after the plan was adopted. Based on this uncontested fact, the trial court determined that plaintiff filed his complaint beyond the required filing period and granted the Town summary judgment. On appeal, plaintiff argues that the thirty-day time limitation is not applicable in his case because there is a statute that gives an alternate time-limitation. Plaintiff points to one section in the Municipal and Regional Planning and Development chapter, which states: "No person shall challenge for purported procedural defects the validity of any plan or bylaw as adopted, amended, or repealed under this chapter after two years following the day on which it would have taken effect if no defect had occurred." 24 V.S.A. § 4483(b). Therefore, under plaintiff's construction, he had two years to file an action to challenge the adoption of the Town's plan.

We do not resolve the question of whether the thirty-day filing period is applicable to plaintiff's case[1] because we conclude that on the merits the Town was entitled to summary judgment as a matter of law. Following the court's denial of plaintiff's third and fourth requests to amend[2] and the voluntary dismissal of five counts, only two counts remain for our review:

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[1] We note that the time limitations of Rule 75 are not jurisdictional. Fyles v. Schmidt, 141 Vt. 419, 422 (1982).

[2] On appeal, plaintiff does not challenge the court's denials of his motions to amend. In his reply brief, plaintiff relies on his proposed Count IX to support his argument that his challenges to the town plan are procedural in nature, and therefore subject to the two-year period referenced in § 4483(b). To the extent that this can be regarded as an attempt to appeal the denial of his motion to add Count IX, we conclude that the trial court did not abuse its discretion in denying plaintiff's request. See Hickory v. Morlang, 2005 VT 73, ¶ 5, 178 Vt. 604 (mem.) (explaining that we will reverse trial court's decision to deny a motion to amend for abuse of discretion). "In determining whether to allow a party to amend its complaint, the trial court should consider four factors: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." Id. (quotation omitted). We agree with the trial court that amendment would be futile. Count IX alleged that the Town intended its new plan to be a temporary measure and that altering it to having a five-year term was a substantial change, which required additional hearings pursuant to 24 V.S.A. § 4385(b). We disagree. As discussed infra

first, plaintiff's original Count II, which alleges that new subdivision regulations proposed by the planning commission in April 2008 would be invalid if adopted due to the absence of a valid town plan; and, second, plaintiff's enumerated Count VI, which claims that because the adopted town plan was intended to be temporary, it is invalid.

We address the latter claim first. Plaintiff alleges that the Town repeatedly referred to the adopted plan as a temporary or stop-gap measure and that such an interim plan does not comport with the statute's intent that town plans "shall remain in effect for the ensuing five years unless earlier readopted." 24 V.S.A. § 4387(b). Our primary goal in construing statutes is "to give effect to the Legislature's intent." In re Bennington Sch., Inc., 2004 VT 6, ¶ 12, 176 Vt. 584 (mem.). Therefore, we first examine the statute's plain language and will "assume the common and ordinary usage of language in a statute unless doing so would render it ineffective, meaningless, or lead to an irrational result." Id. ¶ 13. In this case, we conclude that the Town's adoption of its plan was consistent with the statute's plain language. Even accepting plaintiff's statements that the planning commission intended the plan to be temporary, nothing in the plan itself limits its application for a specific period of time. Furthermore, the statute envisions that a plan may not always remain in effect for a full five years. The statute allows towns to readopt a plan before the five year term expires, as indicated by the language in § 4387(b), which states the plan should be valid for a five-year term "unless earlier readopted." Thus, we conclude that the plan is not prohibited by the statute.

As to plaintiff's challenge of the proposed new subdivision regulations, we agree with the Town that this claim is not ripe for consideration. Plaintiff's complaint alleges that "[o]n April 8, 2008 during a regular Selectboard meeting, [the Chairman of the Planning Commission] informed the Selectboard that [it] was going to start the process by which a New Subdivision Regulation could be adopted." Because, even under plaintiff's version of the facts, the regulations are proposed and have not been adopted, there is no final decision from the Selectboard for us to review. Therefore, any decision regarding the regulation would be advisory and beyond the scope of our review. See Beaupre v. Green Mountain Power Corp., 168 Vt. 596, 597 (1998) (mem.) (declining to issue advisory opinion).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

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the plan never contained a time-limitation. Therefore, having the plan be in effect for up to five years, as provided by the statute, is not a substantial change.