

VERMONT SUPERIOR COURT
Windham Unit
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CIVIL DIVISION
Case No. 21-CV-03586

Erin Kehoe et al v. Lisa Beshay et al

Decision on Motion to Dismiss
by Defendants Partridge and Windham Board of Civil Authority (Motion 4)

Defendants Carolyn Partridge and Windham Board of Civil Authority have moved to dismiss the plaintiffs' claims against them, asserting that under 24 V.S.A. § 901 this action must be filed against the municipality, i.e., the Town of Windham. The plaintiffs oppose this motion, arguing that the statute on which the defendants rely relates to actions for damages, not to actions in equity seeking court orders requiring an entity such as the Board of Civil Authority to attend to statutory duties. They also argue that the individual defendant, Carolyn Partridge, is a proper party because she is alleged to have engaged directly in improper conduct that was inconsistent with her duties as a town officer.

A motion to dismiss a party's claims, alleging that the party has failed to state a valid claim or demand for relief, "should not be granted unless it is beyond doubt 'that there exist no facts or circumstances that would entitle the plaintiff to relief.'" *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999) (citation omitted). Such motions "are disfavored and are rarely granted." *Colby v. Umbrella, Inc*, 2008 VT 20, ¶ 5, 184 Vt. 1. On review, Vermont courts assume the truth of all the claimant's factual allegations and reasonable inferences from the claimant's pleadings and construe the opponent's contravening allegations as false. See *Richards*, 169 Vt. at 48–49.

The plaintiffs' amended complaint against Defendants Carolyn Partridge and the Windham Board of Civil Authority alleges that Defendant Partridge is a member of the Windham Board of Civil Authority and of the School Board, and that the Windham Board of Civil Authority is a municipal board of elected officials whose duties include purging the voter checklists. The plaintiffs assert that the court has jurisdiction to address the plaintiffs' claims under 17 V.S.A. § 2603(a), which provides that "[t]he result of any election for any office . . . or public question may be contested by any legal voter entitled to vote on the . . . public question to be contested," and under 17 V.S.A. § 2617, which provides that "[i]n all cases for which no other provision has been made, the Superior Court shall have general jurisdiction to hear and determine matters relating to elections and to fashion appropriate relief."

The plaintiffs' claims against Defendant Partridge include that she knowingly made false statements to the individual defendants regarding whether they were eligible to vote in Windham, and that she encouraged those defendants to vote in an election on November 2, 2021, on the question of whether the Windham School should remain open, despite being aware that they were not residents of Windham and were not eligible to vote there. They ask the court to order Defendant Partridge to pay fines for alleged statutory violations.

The plaintiffs' claims against Defendant Windham Board of Civil Authority include that the Board has "a non-discretionary statutory duty to remove persons from the checklist who are not residents," and that

they have failed in that duty as to the three individual defendants, whom they allege are and were at the time of the November 2021 vote not residents of the Town. They seek specific injunctive relief against the Board, in the nature of mandamus, that they be ordered to remove the non-resident defendants from the voter checklist.

The statute on which the defendants rely states:

Where an action is given to any appointed or elected municipal officer or town school district officer, the action shall be brought in the name of the town in which the officer serves and in the case of a town school district officer in the name of the town school district. If the action is given against such officers, it shall be brought against such town or town school district, as the case may be.

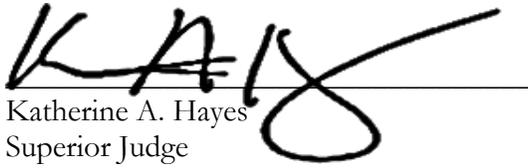
24 V.S.A. § 901(a). An action for review of a government action such as this one is governed by V.R.C.P. 75, which provides that:

Any action or failure of refusal to act by an agency of the state or a political subdivision thereof, including any department, board, commission, or officer, . . . may be reviewed in accordance with this rule if such review is otherwise available by law.

The Reporter's Notes to the rule explain that "the rule will apply on both the state and local levels to nonstatutory proceedings . . . in the nature of mandamus or prohibition to prevent an abuse of executive discretion or an excess of jurisdiction where no other remedy is available."

The Vermont courts have repeatedly held that 24 V.S.A. § 901(a) bars claims against individual town employees or officers for their actions as such, and requires that such claims must be brought against the town itself. *Holmberg v. Brent*, 161 Vt. 153, 155-156 (1993); *Gallipo v. City of Rutland*, 173 Vt. 223, 238-239 (2001); *Civetti v. Turner*, 2020 VT 23, ¶ 17, 212 Vt. 185. The plaintiffs' claims against Ms. Partridge are based on her role as a member of the Board of Civil Authority, and therefore those claims should be stated against the Town of Windham. The court therefore grants the request that the individual claims against Defendant Partridge. Any amendment to the plaintiffs' complaint to name the Town in her stead, pursuant to Section 901(a), should be filed within 30 days of this order.

The court concludes that Section 901(a) applies with equal or even greater weight to the plaintiffs' claims against the Board. Although the plaintiffs' claims regarding the alleged improprieties in managing the voter checklist for the Town are largely within the control of the Board of Civil Authority, by statute, the town clerk also has significant statutory obligations in maintaining and controlling the list. See 17 V.S.A. §§ 2124(c), 2141, 2142, 2144, 2144b, 2146, 2147, 2150, 2152. If the court concludes that some or all of the remedies that the plaintiffs seek against the Board of Civil Authority are warranted, in order to be effective, any such order would need to be issued to the Town as the entity that employs and controls both the Board of Civil Authority and the town clerk. The court determines based on the statute's plain language and the need for any relief to be effective, that 24 V.S.A. § 901(a) applies to the claims against the Board of Civil Authority. The Board's request that the claims against it should be dismissed is therefore granted. Any amendment to the plaintiffs' complaint to name the Town in the stead of the Board of Civil Authority should be filed within 30 days of this order.



Katherine A. Hayes
Superior Judge
March 17, 2022