STATE OF VERMONT
WASHINGTON COUNTY

Washington Superior Court
Docket No. 533-9-05 Wncv

DALE WELLS, et al.,
Plaintiffs,

v.

TOWN OF CABOT SELECTBOARD,
Defendant

MARLYNN ROULEAU,
Intervenor

DECISION
Intervenor Rouleau's Motions for Dismissal and Summary Judgment

Plaintiffs challenge a permit granted to Marlynn Rouleau under the Town of Cabot's sewage ordinance by the Town's sewage officer. Marlynn Rouleau is not the Defendant in this Rule 75 action, but has participated without objection from the time of the first status conference. In essence, there has been consent to an implied Motion to Intervene. The implied Motion is granted, and she is granted Intervenor status in the case.

Plaintiffs are represented by Attorney Christopher Roy. Defendant Town of Cabot is represented by Attorney Paul Gillies. Intervenor Marlynn Rouleau is represented by Attorney Lauren Kolitch.

Intervenor Rouleau has filed two motions to dismiss for lack of sufficient process and service of process, and a motion for summary judgment on the issue of whether the permit was correctly granted. Plaintiffs have filed an Opposition. The Town has appeared in this case but has not submitted any briefing related to these motions.

Background

The record in this case, including, insofar as it has been submitted, the record of the proceedings before the Town, reveals the following. The Town of Cabot has had a sewage ordinance in place at all times relevant to this case. See 24 V.S.A. §§ 3631–3635 (on-site sewage systems). As an element of a greater plan involving the construction of a new seasonal camp, Intervenor Rouleau applied to the Town's sewage officer for a sewage permit, claiming to be exempt from the requirements of the ordinance. The sewage officer granted the permit, evidently on the basis of exemption. Plaintiffs then challenged the permit before the Selectboard in what became characterized in the Selectboard's proceedings as a petition for revocation. See Ordinance § 4.7. The Selectboard eventually voted unanimously to reject the petition for revocation, apparently without explanation. In this case, Plaintiffs seek review of the Selectboard's action.

Jurisdiction Over the Process

Intervenor Rouleau argues that this case should be dismissed because Plaintiffs have never served the other parties with a complaint and summons as required by Rule 75. See V.R.C.P. 75(b). Presumably under the impression that Rule 74, not Rule 75, procedure applies, Plaintiffs initiated this case by filing a notice of appeal with the Town. See V.R.C.P. 74(b). Rule 74 procedure, however, only applies when the right to review is statutory. If there is no statutory right to review, Rule 75 procedure applies to whatever review a party may be entitled. Rule 75 requires service of a complaint and summons in accordance with Rule 4. V.R.C.P. 75(b). The court is not aware of any statutory right to review of the Town's actions in this case. Rule 75 procedure therefore applies to this case. See *Richards v. Town of Norwich*, 169 Vt. 44, 46–48 (1999) (concluding Rule 75 applies to review of Town decision on septic permit). Under Rule 75(b), Plaintiffs should have initiated this case with service of a complaint and summons. Plaintiffs' failure to serve Defendant Town with a complaint and summons is substantially out of compliance with the applicable requirements of Rule 75 and Rule 4.

Void process, however, may be waived by a party's conduct. *Myers v. Brown*, 143 Vt. 159, 165 (1983). It is not "prohibited by law." *Id.* at 164 (quoting *In re Burlington Electric Dep't*, 141 Vt. 540, 546 (1982)).

The Town's attorney has entered an appearance without contesting process. To the extent that Intervenor Rouleau was entitled to any service of process in this case, her conduct demonstrates a waiver of the otherwise void process. Plaintiffs initiated this case with their notice of appeal, which was transmitted to the court on September 7, 2005 by the Town. Intervenor Rouleau received a copy of the notice of appeal, which adequately describes the controversy Plaintiffs intended to bring to superior court. Neither the Town nor the Intervenor appeared at a status conference scheduled for September 27, 2005, but Intervenor Rouleau sent a letter to the court requesting to appear by telephone or to have the conference rescheduled. A subsequent conference was scheduled for November 7, 2005. Intervenor Rouleau's motion to continue the rescheduled conference was granted. Intervenor Rouleau then appeared at the November 16, 2006 status conference. At that conference, the court granted Plaintiffs' contemporaneously filed "motion to amend pleadings" and required any motions for summary judgment to be filed by March 16, 2006. Intervenor filed the motions now under consideration on June 27, 2006, over nine months into the litigation of this case.

No evidence suggests that Intervenor Rouleau ever suffered any actual lack of notice regarding Plaintiffs' effort at review in this court. Intervenor Rouleau appears to have fully participated in the litigation before the Town, which, after all, centered on her right to the permit for which she had applied in the first place. Intervenor Rouleau then appeared and participated in this case for over nine months before raising the process issue.

A claim that a court lacks jurisdiction due to insufficient process or service of process must be timely raised. *Myers*, 143 Vt. at 164; V.R.C.P. 12(h)(1). By appearing and participating in this case, and not timely raising these issues, Intervenor waived any claim of lack of jurisdiction based on insufficient process or service of process.

Summary Judgment

Intervenor Rouleau's summary judgment motion must be understood in the context of the permissible scope and nature of review of this case. The proceedings before the Town were quasi-judicial in nature, and thus review in the nature of certiorari generally is available under Rule 75. See *Richards*, 169 Vt. at 47. Such review is confined to substantial legal issues affecting the merits of the case. *Id.* at 48 (citing *Molesworth v. Univ. of Vermont*, 147 Vt. 7, 7 (1986)).

Plaintiffs do not set out the legal issues affecting the merits of the case in their November 16, 2005 amended pleading with clarity or specificity, perhaps due to confusion over the nature and scope of their entitlement to review. Plaintiffs' confusion over the nature of review in this case is evident in the amended pleading. There, Plaintiffs purport to have "jurisdiction" under either Rule 74 or Rule 75. Both rules are procedural, however.

Generally, Plaintiffs claim the following: 1) that the materials submitted by Marlynn Rouleau in support of the application do not comport with the requirements of the ordinance; 2) that she is not entitled to any exemption from ordinance requirements; and 3) that the Town denied Plaintiffs due process.

In her summary judgment motion, Intervenor Rouleau essentially asks the court to determine whether she is entitled under the ordinance to the septic permit, or to an exemption from the permit requirement, based on the facts as they were, she claims, presented to the Town.

Intervenor Rouleau's implicit characterization of the posture of this case misconceives the nature of the court's review. The court's role under Rule 75 is not to determine whether the Selectboard made the right decision based on the facts before it, but whether it made a substantial legal error in arriving at the result that it did. See *Rhodes v. Town of Woodstock*, 132 Vt. 323, 325 (1974) (certiorari review is limited to "keeping the inferior tribunal within the limits of its jurisdiction and insuring that that jurisdiction is exercised with regularity").

Plaintiffs' blanket argument in response that summary judgment is premature because they have yet to engage in discovery sufficient to develop evidence for use at a "merits hearing" is similarly inconsistent with the nature of a Rule 75 proceeding. Review in the nature of certiorari is not de novo; it "brings up the record" from the lower tribunal for review. *State v. Forte*, 159 Vt. 550, 554 (1993). The court may take testimony to facilitate its review of the governmental action under scrutiny, depending on the nature of the claim. *Id.* at 555; see also *id.* at 554 n.2 (evidence may be needed to prove the substance of quasi-judicial proceedings). Other than to facilitate the superior court's review, however, the determination of factual issues remains the exclusive province of the Town. See *Burroughs v. West Windsor Bd. of School Dir.*, 141 Vt. 234, 237 (1982).

Whether there is a need to take evidence depends on the specific legal issues raised by Plaintiffs in the particular circumstances of the case and the quality and completeness of the record of the proceedings before the Town. At the moment, this court's review is stymied by the

poor definition of the legal issue upon which Plaintiffs base their request for review, and a lack of clarity as to the extent to which the record of the Town's proceedings may be sufficient to enable the court to evaluate that issue.

To help advance the litigation, Plaintiffs are ordered to submit within ten days a more particular statement of their claim. In order to determine appropriate procedure for the case, the court needs to know what is the specific manner in which Plaintiffs claim the Selectboard acted improperly. Plaintiffs' statement shall conform to the limitations of the review available under Rule 75 as discussed above. This case will be set for a status conference shortly thereafter at which the parties shall be prepared to address the extent to which, if any, the court may need to take testimony, or the record of the Town's proceedings otherwise may need to be expanded, prior to a dispositive motion or hearing.

Order

For the foregoing reasons, Intervenor Rouleau's motions to dismiss and motion for summary judgment are denied. Plaintiffs shall make a more definite statement of their claim within ten days. This case will be set for a status conference shortly thereafter.

Dated at Montpelier, Vermont this 13th day of November 2006.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge