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

Docket No. 105-9-19 Vtec

Town of Pawlet v Daniel Banyai

PARTIAL ENTRY REGARDING MOTION

Title: Motion to Amend Judgment Motion for Reconsideration (Motion: 21)
Filer: Robert J. Kaplan, Esq.
Filed Date: March 3, 2023

The motion is GRANTED in part and DEFERED in part pending Respondent's Reply deadline.

Presently before the Court is Daniel Banyai's ("Respondent") Motion for reconsideration and to Amend the Court's February 8, 2023, Post-Judgment Decision ("Motion"), filed pursuant V.R.C.P. 59(e) through counsel, Robert Kaplan, Esq. Mot. (filed Mar. 3, 2023). Respondent's motion comes after this Court's February 8, 2023, Decision on the Town of Pawlet's (the "Town") post-judgment Motion for Contempt in this matter. See Town of Pawlet v. Banyai, No. 105-9-19 Vtec (Vt. Super. Ct. Envtl. Div. Feb. 8, 2023) (Durkin, J.) [hereinafter "the Contempt Decision"].[1] Relevant to Respondent's present motion, the Court found Respondent in contempt of this Court's March 5, 2021 Judgment Order,[2] and again ordered the removal of certain improvements on his property by specific deadlines set forth therein. The Court further held that, should Respondent fail to meet these deadlines, he would be jailed pursuant 12 V.S.A. § 123, and the Town would be permitted to enter and assist Respondent in completing the work that the Court originally directed by its March 5, 2021 Order.

[1] To the extent that this decision uses terms defined by the Contempt Decision, which are not additionally defined herein, the terms shall have the same definition as in the Contempt Decision.

[2] The Court's judgement order was affirmed by the Vermont Supreme Court. Town of Pawlet v. Banyai, 2022 VT 4.

Respondent, through the pending motion, asks that the Court amend the Contempt Decision to: (1) extend the compliance deadlines; (2) strike the requirement that he remove the earthen berms installed for his shooting ranges; and (3) strike the provision ordering his imprisonment upon failure to meet the compliance deadlines. The Town filed an opposition to Respondent's motion on March 17, 2023. While Respondent is entitled to reply to that opposition, which would be due on or before March 31, 2023, the Court found it important to rule on the Motion with respect to the compliance deadlines before the Respondent's reply is due. This is because Respondent's reply deadline is after the current March 25 deadline lapses and runs right into the March 26 to April 2 Town inspection period. The Court found it appropriate to rule on Respondent's request for an extension prior to Respondent's final response because the Court is granting that extension, and Respondent is therefore not prejudiced by a ruling prior to the deadline for filing his reply, relative to the compliance deadlines alone. The Court makes no ruling on the remainder of Respondent's motion at this time.

The Rules of Civil Procedure, including Rule 59, apply to these post-judgment proceedings in the Environmental Court. V.R.E.C.P. 3. While there is not a large body of Vermont case law under Rule 59, the rule is "based on the Federal Rules of Civil Procedure." Reporter's Notes, V.R.C.P. 1; compare V.R.A.P. 59 with F.R.C.P. 59. Because these provisions are substantially similar, the Court may use federal case law interpreting the federal rule as persuasive authority. Drumheller v. Drumheller, 2009 VT 23, ¶ 29, 185 Vt. 417; See Reporter's Notes, Rule 59 ("This rule is substantially similar to Federal Rule 59").

Rule 59(e) provides four primary grounds for relief: (1) "to correct manifest errors of law or fact upon which the judgment is based"; (2) to allow a moving party to "present newly discovered or previously unavailable evidence"; (3) "to prevent manifest injustice"; and (4) to respond to "an intervening change in the controlling law." See Montanio v. Keurig Green Mountain, Inc., 276 F. Supp. 3d 212, 216 (D. Vt. 2017) (citing 11 C. Wright & A. Miller, et al., Federal Practice and Procedure, Civil § 2810.1 (3d ed.)); see Reporter's Notes, V.R.C.P. 59 (giving "the court broad power to alter or amend a judgment").

The Vermont Supreme Court has held that the courts "may reconsider issues previously before it, and generally may examine the correctness of the judgment." Drumheller, 2009 VT 23, ¶ 36 (quoting Ray E. Friedman & Co. v. Jenkins, 824 F.2d 657, 660 (8th Cir.1987)); see also Bell v. Bell, 162 Vt. 192, 195 (1994) (stating that the purpose of a Rule 59(e) motion "is to examine the correctness of matters before the court at trial").

However, "[r]econsideration of a court's order is an 'extraordinary remedy to be employed sparingly in the interest of finality and conservation of scarce judicial resources." Daiello v. Town of Vernon, No. 356-8-14 Wmcv, slip op. at 1 (Vt. Super. Ct. Civ. Div. June 12, 2017) (Kainen, J.) (quoting USA Certified Merchants LLC v. Koebel, 273 F. Supp. 2d 501, 503 (S.D. N.Y. 2003)) *reversed on other grounds by* Daiello v. Town of Vernon, 2018 VT 17, 207 Vt. 139; see N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶ 41, 184 Vt. 303 ("The narrow aim of Rule 59(e) is to make clear that the [trial] court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment" (quotations omitted)). The standard in considering these motions "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F. 3d 225, 257 (2d Cir. 1995). "Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998).

Respondent moves for reconsideration on three elements of the Court's decision. Relevant to this partial decision, Respondent requests the Court extend the time to deconstruct and remove the school building because he argues that the deadline set by the Court is impractical. Respondent does not point to intervening changes in the controlling law in support of his motion. Rather, Respondent presents "newly discovered evidence" to support his assertion that the Court's deadlines are impractical, and therefore relies on "manifest errors of law or fact upon which the judgment is based" or "to prevent manifest injustice . . . ." Keurig Green Mountain, Inc., 276 F. Supp. 3d at 216. The Town opposes the motion, arguing that the Respondent's arguments do not meet the standard for reconsideration and that the extension should be denied because the Contempt Decision's March 25 deadline not only provided 45-days

to remove the buildings, but came more than a year after the Supreme Court affirmed this Court's initial order that he remove the buildings.

The Court agrees with the Town that the deadlines it imposed were not unreasonable in light of the circumstances and all available evidence presented to the Court during the November 4, 2022 contempt hearing. In the Court's Contempt Decision, the Court again, after its initial judgment order was affirmed on appeal to the Vermont Supreme Court, ordered that Respondent "complete the deconstruction and removal from the Property of the School Building, the Façade, the shipping containers, and all stair/ladder/platforms." The Contempt Decision, relying on the evidence presented to it at the show cause hearing, ordered that those improvements must no longer be anywhere within the boundaries of the Respondent's property by March 25, 2023, giving the Respondent an additional 45-days to complete what this Court initially ordered on March 5, 2021, which was affirmed by the Supreme Court on January 14, 2022. See Town of Pawlet v. Banyai, No. 105-9-19 Vtec, Decision on Merits slip op. at 5–11 (Vt. Super. Ct. Envtl. Div. Mar. 5, 2021) (Durkin, J.); *aff'd* Town of Pawlet v. Banyai, 2022 VT 4.

Relying on a February 21, 2023 letter from Larmon House Movers, Inc., a company that removes buildings, Respondent now requests that the deadline to remove the school be extended from March 25 to May 24, 2023. Motion at 1 (citing Resp't's Ex. A (showing a letter from one potential house mover, dated February 21, 2023)). Respondent asserts that the "extension is reasonable and warranted under the circumstances since it is premised on the professional" house mover's assessment of feasibility4. Id. As such, Respondent requests that the Court reconsider the deadlines relying on "newly discovered evidence."

Newly discovered evidence is that which is "truly newly discovered or . . . could not have been found by due diligence." United States v. Potamkin Cadillac Corp., 697 F.2d 491, 493 (2d Cir. 1983) (quoting Westerly Elecs. Corp. v. Walter Kidde & Co., 367 F.2d 269, 270 (2d Cir. 1966)). The newly discovered evidence must be facts that existed at the time of the trial, and the moving party must have been excusably ignorant of the facts despite their due diligence. Ryan v. U.S. Lines Co., 303 F.2d 430, 434 (2d Cir. 1962); Campbell v. Am. Foreign S.S. Corp., 116 F.2d 926, 928 (2d Cir. 1941). Failure to show excusable ignorance or due diligence will generally result in the denial of the motion to reconsider. Titcomb v. Norton Co., 307 F.2d 253, 265 (2d Cir. 1962).

Courts, however, have occasionally reconsidered despite these shortcomings if it was necessary to prevent manifest injustice. Cf. Ope Shipping, Ltd. V. Underwriters at Lloyds, 100 F.R.D. 428, 435 (S.D.N.Y. 1983) ("Even if that evidence through such exercise could have been located, its introduction at a new trial is warranted by the need to prevent a miscarriage of justice.").

The letter from Larmon House Movers, Inc. is not truly newly discovered evidence, as it was generated after the show cause hearing and the issuance of Contempt Decision and, with reasonable due diligence, could have been available prior to the hearing. During the contempt hearing, it was clear to the Court that Respondent knew the school building needed to be removed but took no steps to deconstruct and remove it. The Contempt hearing occurred in November, just prior to winter enveloping our region, and thus Respondent was aware of the difficulties the season would present, but provided no evidence to the Court supporting the need for more time. Rather, Respondent's only evidence was that he had moved the school building onto a trailer, arguing both that he substantially complied with the Court's order, and that he had removed the trailer from the Court's jurisdiction. The Court concluded that this argument was without merit and rejected it, but used the evidence that the school building was on the trailer to support the finding that Respondent was capable of meeting this compliance schedule.[3]

Because the Respondent knew that the school needed to be removed, as demonstrated by his own testimony, Respondent could have had this evidence from Larmon House Movers or another capable company available at trial. Additionally, because Respondent's testimony demonstrated that he knew the building needed to be removed, this means that Respondent has known he had a duty to remove the building on January 14, 2022, the date the Supreme Court affirmed this Court's original order. Thus, the reason that Larmon House Movers estimates that they would now need additional time is by Respondent's own hand. While these 45-days included winter and mud-season, Respondent had over a year, with all available seasons, to comply with this Court's 2021 order, once affirmed by the Vermont Supreme Court.

[3] The Court noted that "Respondent testified that he [put the school on the trailer] as a step towards complying with the Court's Order" and considered the trailer in concluding that the evidence supported he would be able to meet the deadlines imposed in the compliance schedule. Contempt Decision at 12, 21.

The Court takes additional issue with Respondent's newly proffered exhibit. First, the exhibit and Motion do not demonstrate that Respondent contacted any other contractors, home-movers, laborers, or otherwise sought out alternative avenues to remove the school. Second, the Court is troubled by the Respondent's newly proffered exhibit, which only references the removal of one building and only shows a proposal rather than a contract. See Resp't's Ex. A (filed Mar. 3, 2023) ("Thank you for contacting our company requesting a *proposal* for the removal of your *building*." (emphasis added)). The Contempt Decision required numerous other items to be removed before March 25, 2023 in addition to the school building.

The Court's first hope is that Respondent has already completed or made arrangements to deconstruct and/or remove the façade, shipping containers, and stair/ladder/platforms himself during this time, and only sought an extension for the removal of the larger building. Respondent, through his motion, only requests a change in the deadline for removing the school building, so we presume that we need not consider extending the deadline for the removal of these other items. The Court therefore considers the request to amend only the first deadline as it relates to the School building, and does not consider an extension of time to remove these other items, since no such extension was requested. So, to be clear, the Respondent remains under an obligation to deconstruct and/or remove the façade, shipping containers, and stair/ladder/platforms by no later than March 25, 2023.

Further, the Court did not arbitrarily set these deadlines, but rather, applied considerable reasoning based on the evidence it had before it at the time of the show cause hearing. See Contempt Decision at 20–21. The Court considered the season, Respondent's building capabilities, Respondent's equipment and support network, the delays that will be caused by the mud season, the limitations of finding professional help, the fact that the school building was already on a registered trailer, the another was quite small ("façade"), and that the others (stair/ladder/platforms and shipping containers) are readily moveable. We also concluded that the delay and timing of this labor is much by Respondent's own doing.

However, the Court finds that it is ultimately in the best interest of all parties involved for Respondent to do the work of bringing his property into compliance himself rather than requiring the Town to complete the compliance directives. If extending the deadline to May 25, 2023,

accomplishes that goal, then the Court finds that it would serve the interests of justice and finality best to extend the deadline. Further, the Court finds the new deadline is not prejudicial to the Town, as it is close in time to the second deadline set by the Court, and before the final deadline.

To reduce the burden to the Town created by moving the first deadline to this date, the Court concludes that it will be less strain on all parties' resources to consolidate the first and second deadlines, and their accompanying inspections.[4] The Court keeps the final deadline as is. As such, the Court alters the compliance schedule in the interest of justice as follows:

1. The Court imposes fines of $200 per day starting from January 14, 2022 and running until all violations are cured, with such fines constituting a lien upon the Property upon filing the Pawlet Land Records. These fines are purgeable if Respondent meets the deadlines provided below.
   i. By Friday, **March 31, 2023**, Respondent must file an affidavit with the Court, confirming that he has complied with this Court's order that he remove the façade, all shipping containers, and all stair/ladder/platforms.
   ii. By **May 25, 2023**, Respondent must complete the deconstruction and removal from the Property of the School Building. This means that those improvements must no longer be anywhere within the boundaries of the Property. Additionally, Respondent must deconstruct all the berm developments in/around/near/on Range 1 and Range 2. This means that those berms in/around/near/on Range 1 and 2 must be leveled and returned to a more natural flattened landscape. If Respondent is uncertain of what degree of deconstruction will be satisfactory, Respondent is directed to communicate with the Town early and often.
   iii. By **June 23, 2023**, Respondent must deconstruct and remove the remaining unpermitted buildings that are subject to the Court's Order. For clarity, that means that Respondent must deconstruct and remove the following: the Barn (Resp't's Ex. B); the "Grain" silo (Resp't's Ex. P, Town's Exs. 2, 19); the Run-In (Town's Ex. 6, Resp't's Ex. D); and the Chicken Coop (Town's Ex. 8, Resp't's Ex. C). This means that those improvements must no longer be anywhere within the boundaries of the Property.
2. Respondent must permit the Town to conduct two site inspections—one within seven (7) calendar days following each deadline—to verify that he has met those deadlines. This means that the Town is permitted to enter and/or otherwise inspect Respondent's Property between: (1) **May 26–June 2, 2023**; and (2) **June 24–July 1, 2023**. The Town Attorney may be accompanied on each site inspection by up to two Town officials and one or more members of the Rutland County Sheriff's Department. Respondent must permit the Town to conduct a site inspection by foot, ATV or other motorized vehicle,

[4] The Court is deferring judgment on the Respondent's motion to reconsider the removal of the Berms until after receipt of the Reply or the deadline to Reply has lapsed. If necessary, the Court will again amend the requirements of this May 25, 2023, deadline to reflect its decision regarding the berms.

and/or drone. The Town's attorney and its agents are not required to inspect the Property utilizing all those instruments, but may elect to use all or any of those techniques in their discretion.

CONCLUSION

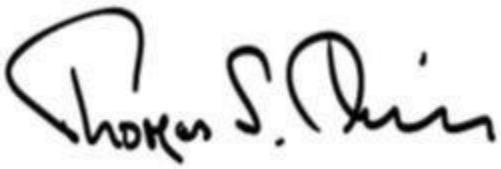
The Court **GRANTS in part** Respondent's motion to amend the judgment and extends the first and second deadline to **May 25, 2023**. The Court **DEFERS** judgment on the remaining portions of Respondent's motion (i.e., the berm removal and imprisonment terms) until after Respondent has had an opportunity to Reply to the Town's Opposition by March 31, 2023. The remainder of the Court's Contempt Decision remains intact, subject to the pending motion to reconsider the order as it pertains to the berms/shooting ranges and the 12 V.S.A. § 123 order. In so extending the deadlines, the Court alters its February 8, 2023 Contempt Decision and Order to provide:

1. The Court imposes fines of $200 per day starting from January 14, 2022 and running until all violations are cured, with such fines constituting a lien upon the Property upon filing the Pawlet Land Records. These fines are purgeable if Respondent meets the deadlines provided below.
   i. By Friday, **March 31, 2023**, Respondent must file an affidavit with the Court, confirming that he has complied with this Court's order that he remove the façade, shipping containers, and stair/ladder/platforms.
   ii. By **May 25, 2023**, Respondent must complete the deconstruction and removal from the Property of the School Building. This means that those improvements must no longer be anywhere within the boundaries of the Property. Additionally, Respondent must deconstruct all the berm developments in/around/near/on Range 1 and Range 2. This means that those berms in/around/near/on Range 1 and 2 must be leveled and returned to a more natural flattened landscape. If Respondent is uncertain of what degree of deconstruction will be satisfactory, Respondent is directed to communicate with the Town early and often.
   iii. By **June 23, 2023**, Respondent must deconstruct and remove the remaining unpermitted buildings that are subject to the Court's Order. For clarity, that means that Respondent must deconstruct and remove the following: the Barn (Resp't's Ex. B); the "Grain" silo (Resp't's Ex. P, Town's Exs. 2, 19); the Run-In (Town's Ex. 6, Resp't's Ex. D); and the Chicken Coop (Town's Ex. 8, Resp't's Ex. C). This means that those improvements must no longer be anywhere within the boundaries of the Property.
2. Respondent must permit the Town to conduct two site inspections—one within seven (7) calendar days following each deadline—to verify that he has met those deadlines. This means that the Town is permitted to enter and/or inspect Respondent's Property between: (1) **May 26–June 2, 2023**; and (2) **June 24–July 1, 2023**. The Town Attorney may be accompanied on

each site inspection by up to two Town officials and one or more members of the Rutland County Sheriff's Department. Respondent must permit the Town to conduct a site inspection by foot, ATV or other motorized vehicle, and/or drone. The Town's attorney and agents are not required to inspect the Property utilizing all those instruments but may elect to use all or any of those techniques in their discretion.

The Court will issue a second Entry Order after March 31, 2023, to address the remaining issues raised in Respondent's motion. The Court reminds the Respondent that in all other respects, he remains obligated by this Court's March 5, 2021, Judgment Order and the subsequent orders of this Court.

Electronically signed at Newfane, Vermont on Friday, March 24, 2023, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division