

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-04159

<p>Johnathan J. Billewicz, J&M Investment Trust, and Lillian E. Billewicz, Plaintiffs</p> <p>v.</p> <p>Town of Fair Haven, Vermont, Defendant</p>	<p>DECISION ON MOTION</p>
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RULING ON DEFENDANT’S MOTION TO DISMISS

Plaintiffs Johnathan J. Billewicz, Lillian E. Billewicz, and J&M Investment Trust (collectively “Plaintiffs”) bring this action against Defendant Town of Fair Haven for “breach of fiduciary duty” based on Fair Haven’s refusal to accept payment of delinquent property taxes. Plaintiffs seek an award of damages as well as an order requiring Fair Haven’s tax collector to accept the Trust’s property tax payment. Plaintiffs represent themselves and Defendant is represented by Kevin L. Kite, Esq. Pursuant to Rule 12(b)(6) of the Vermont Rules of Civil Procedure, Defendant moves to dismiss the Amended Complaint, arguing that Plaintiffs fail to state any cognizable legal claim. Plaintiffs oppose the motion, asserting that Fair Haven breached its a fiduciary duty owed to them in their capacity as residents and taxpayers. For the reasons discussed below, Defendant’s motion to dismiss is GRANTED.

Factual Background

The allegations in Plaintiffs’ Amended Complaint, which for purposes of addressing Defendant’s motion are accepted as true, indicate the following:

Plaintiffs Johnathan and Lillian Billewicz are both current residents and taxpayers of the Town of Fair Haven. Am. Compl. ¶¶ 1-2. Plaintiff J&M Investment Trust is a trust established under the laws of Vermont, and it also pays property taxes to the Town. *Id.* ¶¶ 3, 8. Mr. Billewicz is a beneficiary of the Trust, and Ms. Billewicz is the Trust’s sole trustee. *Id.* ¶¶ 4-5. The Trust is (and was) delinquent on property taxes owed to the Town. *Id.* ¶ 8. At a meeting of the Town’s Selectboard in August of 2022, the Town’s Manager and Delinquent Tax Collector, Joseph Gunter, announced that Ms. Billewicz and her family owe the Town unpaid (“back”) property taxes. *Id.* ¶ 9. At a Town Selectboard meeting held on November 15, 2022, Ms. Billewicz, acting in her capacity as trustee for the Trust, presented a check for \$10,500, to the Town’s Manager and Delinquent Tax Collector, Mr. Gunter. *Id.* ¶ 10. This check was refused, however, by the Chair of the Town of Fair Haven Selectboard, Robert Richards. *Id.* ¶ 11.

Plaintiffs allege that “as current taxpayers to the Town of Fair Haven[, they] have been damaged by the Town’s actions denying the acceptance of revenue to the Town coffers for the financial operation of the Town and for the common good.” *Id.* ¶ 18.

Discussion

In reviewing a motion to dismiss, the Court accepts “all facts alleged in the complaint as true and in the light most favorable to the nonmoving party.” *Coutu v. Town of Cavendish*, 2011 VT 27, ¶ 4; *see also Winfield v. State*, 172 Vt. 591, 593, 779 A.2d 649, 652 (2001) (when considering a motion to dismiss under Rule 12(b)(6), the court must “assume that all well pleaded factual allegations in the complaint are true, as well as all reasonable inferences that may be derived therefrom”). However, to the extent a party asserts “conclusory allegations or legal conclusions masquerading as factual conclusions,” the Court is not required to accept them as true. *Rodrigue v. Illuzzi*, 2022 VT 9, ¶ 33 (quotation omitted). “The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the law of the claim, not the facts that support it.” *Samis v. Samis*, 2011 VT 21, ¶ 9. Dismissal is proper when there is no set of facts and circumstances alleged in the complaint which, if proved, would entitle the plaintiff to relief. *Id.*; *see also Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 11 (“[W]here the plaintiff does not allege a legally cognizable claim, dismissal is appropriate.”).

Plaintiffs assert a single claim, entitled “Breach of Fiduciary Duty of Town Tax Collector and Selectboard.” Am. Compl. at 2. They allege that “[t]he relationship between public officials and the public is fiduciary in nature,” and that “Fair Haven Town Officials breached this fiduciary duty to the taxpayers of Fair Haven and to Plaintiffs by refusing to accept back taxes as revenue for the financial operation of the Town and for the common good.” *Id.* ¶ 14. Plaintiffs seek to recover damages caused by the alleged breach of duty and to compel the Town to accept the tax payment. However, the Court concludes that no such cause of action exists. Thus, dismissal of the action is appropriate.

First, the “entire body of [Vermont] law” regarding municipal property taxation and the “methods of procedure in [its] assessment and collection . . . is statutory.” *In re Hackett*, 53 Vt. 354, 358-59 (1881); *see Town of Mt. Holly v. French*, 75 Vt. 1, 4, 52 A. 1038, 1039 (1902) (“Our statute has provided the means by which this duty [to collect and pay over taxes] may be enforced.”); *Hackett v. Amsden*, 57 Vt. 432, 434 (1885) (“*Hackett II*”) (“The right to issue [writs for enforcement against a neglectful town tax collector] is created by statute, and the manner of their procurement and enforcement prescribed by statute.”). Here, Plaintiffs cite no statutory provision expressly or impliedly authorizing their claim as citizen-taxpayers to seek redress for a town’s supposed breach of a fiduciary duty to collect and pay over taxes to the town’s treasury. Nor have Plaintiffs provided the Court with any other authority in support of their position that municipalities have a fiduciary duty with regard to the collection of taxes that is enforceable by way of a private taxpayer’s suit.

The case on which Plaintiffs principally rely, *Bogie v. Town of Barnet*, 129 Vt. 46, 270 A.2d 898 (1970), offers no support for Plaintiffs’ supposed cause of action here. *Bogie* involved a suit in equity by a delinquent taxpayer who sought to have his real estate, which had been duly purchased by the town at a tax sale, restored to him, together with damages. Because the town

had met all statutory, procedural requisites concerning the assessment and collection of taxes through the sale, the Supreme Court rejected the plaintiff's request for restoration of his ownership. *See id.* at 48-49; 270 A.2d at 899. However, the Court further held that the town was not entitled to retain the surplus between the sale price for the property and the amount of delinquent taxes due, but instead it was required to return those proceeds to the plaintiff, minus the costs of collection. *Id.* at 50, 270 A.2d at 901. The Court found that a taking of private property for public use occurred when the town purchased the plaintiff's property by "operation of law, without the agency of the owner." *Id.* at 52, 270 A.2d at 901. Thus, the town's relationship to the delinquent property owner (plaintiff) was considered subject to "restraints of fiduciary duty," that "equitably" prevented the town from retaining the re-sale windfall in the same manner as would "a real estate business for profit." *Id.* at 48-49, 52, 270 A.2d at 900-01.

Plaintiffs' reliance on *Bogie* is simply misplaced. Not only are the facts readily distinguishable from those asserted here, but the Court did not either expressly or implicitly recognize that private citizen-taxpayers may bring an action to either compel performance of a town's duty of tax collection or obtain an award of monetary damages.

The two other cases cited by Plaintiffs are equally unhelpful. Although, they were cited by the *Bogie* Court in support of its reasoning and conclusion, they reveal no independent significance. In *Chandler v. Moulton*, 33 Vt. 245, 247-48 (1860), the Court invalidated a tax sale on grounds that, a matter of prudent policy, a town constable who conducted the tax sale could not also be the purchaser at his own sale. Again, the Court said nothing about the right of a citizen taxpayer to file a case against a town for alleged neglect of its duty to collect tendered tax payments. And in *Smith & Son, Inc. v. MacAulay*, 109 Vt. 326, 196 A.2d 281 (1938), the Court held that property taxes were invalid because they were assessed by "*de facto* listers" that had not been elected in the manner required by statute. *See id.* at 333, 196 A.2d at 284 ("It is indispensable to the validity of any tax that it shall be laid upon a grand list made up in substantial compliance with the law, by officers selected according to the law."). As such, *Smith* is but one in a long line of decisions holding that a town's valid exercise its power to collect taxes by way of a tax sale depends upon proof that the town substantially complied with all statutory requirements pertaining to the assessment and collection of taxes. Notably, neither of these cases demonstrates that there exists a common law cause of action against a town for breach of fiduciary duty to collect taxes.

Second, the Court finds that Plaintiffs lack a cognizable claim to enforce a "fiduciary duty of tax collection" because there is an existing, statutory legal process that affords full redress against an elected or appointed town tax collector who neglects to properly collect or pay over taxes to the town's treasury. The relevant provision states:

A collector who unlawfully neglects to collect and pay over a tax delivered to him or her shall be accountable for such tax or the arrearages thereof to the treasurer, selectboard, trustees, committees, or other persons authorized to receive the same. Such persons may, and, upon the receipt of a petition from the Director alleging that such collector has unlawfully neglected to collect and pay over a tax delivered to him or her, shall cite him or her to appear before a justice residing in an adjoining town, to show cause why an extent should not be issued against him

or her for such arrearages and the costs of such proceedings. Such citation shall be served at least six days before the time appointed for hearing the same.

32 V.S.A. § 4691. This statutory remedy is known as an “extent” or an “extent proceeding,” and our Supreme Court has found it to be within the exclusive privilege and discretion of town or State officials. *Hackett v. Amsden*, 56 Vt. 201, 206-07 (1883) (extents are “prerogative process,” and not suits *inter partes*, whose validity depends upon the right of all interested parties to be heard). Moreover, “the purpose sought to be accomplished by [extent proceedings] is to compel the restitution of the money to the town treasury.” *Hackett II*, 57 Vt. at 434. Thus, insofar as Plaintiffs are attempting to bring an action to secure or enforce the collection of property taxes to support the public fisc, Plaintiffs’ lawsuit is duplicative of statutory extent proceedings, and no such independent right of action has been recognized by law. *Cf. Burkett v. Blaisdell*, 17 A.2d 460, 461-63 (Me. 1941) (holding that, where a town refuses to exercise powers to sue an official who plundered or wasted public funds, the state’s attorney general is the proper party to file suit in equity to obtain redress (citing *Land, Log & Lumber Co. v. McIntyre*, 75 N.W. 964, 968 (Wis. 1898))).¹

Finally, in further support of their breach of fiduciary duty claim, Plaintiffs allege that, “despite” their attempt to make a payment for delinquent taxes, “the Town has proceeded to empty the Plaintiffs’ belongings from the residences and has damaged the real estate.” Am. Compl. ¶ 16. Plaintiffs also allege that they “have suffered irreparable harm to their personal belongings, unique and irreplaceable items being removed and destroyed along with damage to the real estate.” *Id.* ¶ 17. However, these allegations are unintelligible and so nonspecific as to be meaningless in connection with a claim for breach of fiduciary duty. Indeed, they are insufficient under Rule 8(a) of the Vermont Rules of Civil Procedure because they do not give “fair notice of the claim and the grounds upon which it rests.” *Bressler v. Keller*, 139 Vt. 401, 403, 429 A.2d 1306, 1307 (1981) (citing V.R.C.P. 8(a)). As the Vermont Supreme Court has explained, “[s]ufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery.” *Mancini v. Mancini*, 136 Vt. 231, 234, 388 A.2d 414, 416 (1978) (quoting 2A J. Moore, *Fed. Prac. & Proc.* § 8.13, at 1705 (2d ed. 1975)). Upon review of a motion to dismiss, the question is “whether the bare allegations of the complaint are sufficient to state a claim.” *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 7. Here, Plaintiffs’ references to “residences” and “the real estate” fail to meet that standard.²

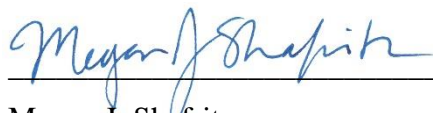
¹ Although Plaintiffs have not framed their case as one seeking review of governmental action under Rule 75 of the Vermont Rules of Civil Procedure, for this reason (among others) Plaintiffs’ Complaint also fails to establish any right to mandamus relief. *See, e.g., Island Indus., LLC v. Town of Grand Isle*, 2021 VT 49, ¶ 21 (mandamus not available unless “a party has a clear and certain right to the action sought by the request for a writ; (2) the writ is for the enforcement of ministerial duties, not those that involve the exercise of an official’s judgment or discretion; and (3) there is no other adequate remedy at law” (quotation omitted)).

² We note that, to the extent Plaintiffs are actually seeking to assert claims as the owners of real property located at 5 and 7 Union Street in Fair Haven, *see* Compl. ¶ 9, such claims would be barred by the doctrine of claim preclusion. *See Carlson v. Clark*, 2009 VT 17, ¶ 13 (claim preclusion “bars parties from relitigating, not only those claims and issues that were previously

Order

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED. Further, the pending motion for summary judgment is DENIED as moot. Final Judgment will be entered in this matter following issuance of the Court's decision addressing Defendant's pending motion for Rule 11 sanctions.

Electronically signed on July 24, 2023 at 4:57 PM pursuant to V.R.E.F. 9(d).



Megan J. Shafritz
Superior Court Judge

litigated, but also those that could have been litigated in a prior action” (quotation omitted)). The question of Plaintiffs’ ownership of 5 and 7 Union Street with respect to Fair Haven has been conclusively decided against them in prior litigation. *See, e.g., Billewicz v. Town of Fair Haven*, No. 21-AP-244, 2022 WL 424881, at *1-2 (Vt. Feb. 2022) (unpub. mem.) (rejecting claim that Fair Haven does not have “valid title to the four parcels of land that were purchased through the tax sale” as barred by claim preclusion); *Billewicz v. Town of Fair Haven*, 2021 VT 20, ¶ 1 (holding that Plaintiffs’ challenge to the “deeds purporting to convey their properties to the Town following a tax sale” as void was foreclosed by the applicable statute of limitations); *see also Billewicz v. Town of Fair Haven, Vt.*, Case No. 5:22-cv-73, 2022 WL 4115966, at *5-6, 10 (D. Vt. Aug. 11, 2022) (discussing Plaintiffs’ prior litigation concerning the properties in Vermont state court and holding that the issue of Plaintiffs’ ownership was resolved conclusively “on the merits”); *Carlson*, 2009 VT 17, ¶ 13 (noting that the “doctrine of claim preclusion rests on the fundamental precept that a final judgment on the merits puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever,” and that in actions “involving real property, the interest in repose which is the basis for the claim preclusion doctrine combines with the interest of society in stability and reliability of title to real property to encourage strict application of the doctrine” (quotations omitted)).