

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-04200

Johnathan J. Billewicz, Lillian E. Billewicz,
and J and M Investment Trust,
Plaintiffs

v.

Kevin L. Kite, Casella Waste Management and
Hauling, Premier Roofing Solutions, and
Vincent Thomas Striglia, Driver Of Black
Dodge Ram Truck, Vermont License Plate
361Aa207,
Defendants

DECISION ON MOTIONS

RULING ON DEFENDANTS' MOTIONS TO DISMISS AND OTHER PENDING MOTIONS

Plaintiffs Johnathan J. Billewicz, Lillian E. Billewicz, and J and M Investment Trust (collectively "Plaintiffs") bring this tort action asserting claims for trespass, invasion of privacy, and negligent and intentional infliction of emotional distress. Defendants are two individuals and two companies, each alleged to have committed such torts by temporarily entering on certain real properties in the Town of Fair Haven which Plaintiffs allege are owned by the Trust. Plaintiffs represent themselves. Defendant Kevin L. Kite is represented by Robin O. Cooley, Esq. Defendant Casella Waste Management and Hauling ("Casella") is represented by Mark F. Werle, Esq. Defendants Premier Roofing Solutions ("Premier Roofing") and Vincent Striglia represent themselves. Defendants all move to dismiss Plaintiffs' Amended Complaint, arguing that Plaintiffs fail to state any cognizable legal claims.¹ Plaintiffs oppose the motions by seeking leave to file a second Amended Complaint, which they argue would sufficiently avoid the defects identified by Defendants and state valid legal claims. For the reasons discussed below, Plaintiffs' motion to amend their first Amended Complaint is DENIED, and Defendants' motions to dismiss are GRANTED.

¹ On January 3, 2023, Plaintiffs filed motions for default judgment against Defendants Premier Roofing Solutions (through Jake Helm) and Striglia. Those motions are DENIED for failure to comply with Rule 55(c) of the Vermont Rules of Civil Procedure and in light of Defendants' appearance and motions to dismiss filed shortly thereafter.

Factual Background

The allegations in Plaintiffs' Amended Complaint, filed December 1, 2022, indicate the following:

Plaintiffs Johnathan and Lillian Billewicz are both current residents of the Town of Fair Haven. Am. Compl. ¶¶ 1-2. Plaintiff J and M Investment Trust is a trust established under the laws of Vermont, and the alleged owner of real property located at 5 Union Street and 7 Union Street in Fair Haven. *Id.* ¶¶ 3, 9-10. Mr. Billewicz is a beneficiary of the Trust, and Ms. Billewicz is the Trust's sole trustee. *Id.* ¶¶ 11-12. Mr. Kite is a Vermont attorney engaged in private practice;² Defendants Casella and Premier Roofing are Vermont companies; and Mr. Striglia is an employee of Premier Roofing. *Id.* ¶¶ 4-7. In October and/or November of 2022, Defendants or their employees temporarily entered into or on the real properties at 5 and 7 Union Street without having received permission from Plaintiffs to do so. *Id.* ¶¶ 14-20. Defendants lack ownership or a right to possess those real properties. *Id.* ¶¶ 21-24. When Casella entered the subject properties, it placed two trash dumpsters on the properties. *Id.* ¶ 38. Later, employees of Premier Roofing removed items belonging to the Billewiczs from inside structures located on the properties and threw them into the two Casella dumpsters. *Id.* ¶ 40. This led to damage to and/or destruction of the personal belongings of the individual Plaintiffs. *Id.* ¶ 39. Plaintiffs also allege that, as a result of Defendants' actions, Plaintiffs have suffered an invasion of privacy and related damages, as well as mental anguish or emotional distress, and related damages. *Id.* ¶¶ 43-51, 71-79.

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.").

² The Court takes judicial notice that Mr. Kite represents the Town of Fair Haven in litigation between Plaintiffs and the Town, including litigation involving Plaintiffs' assertions that the Trust, and not the Town, is the valid holder of title to real properties at 5 and 7 Union Street in Fair Haven. *See, e.g., Billewicz v. Town of Fair Haven*, No. 21-AP-244, 2022 WL 424881 (Vt. Feb. 2022) (unpub. mem.); *Billewicz v. Town of Fair Haven*, 2021 VT 20; Vt. R. Evid. 201(c) (court may exercise its discretion to take judicial notice).

All Defendants move to dismiss Plaintiffs' Amended Complaint on similar grounds. They argue that Plaintiffs have failed to plead the necessary elements of claims for negligent and intentional infliction of emotional distress. They also argue that Plaintiffs do not (and cannot) allege that they had lawful possession of 5 or 7 Union Street at the time the alleged trespass and invasion of privacy occurred, and that such claims necessarily depend on J and M Investment Trust holding valid legal title to the properties. Plaintiffs oppose Defendants' motions, but do not dispute the merits of Defendants' arguments. Instead, they have filed a motion to amend their first Amended Complaint, arguing that their proposed second Amended Complaint would "address" their failure to properly allege that they have lawful possession of the premises in question and would otherwise cure the deficiencies.³

As an initial matter, in light of Plaintiffs' failure to offer any direct or substantive opposition to Defendants' motions to dismiss, the Court finds that dismissal of Plaintiffs' first Amended Complaint is warranted. The only question remaining, therefore, is whether this case may go forward on the basis of Plaintiffs' proposed second Amended Complaint.

Under Rule 15(a) of the Vermont Rules of Civil Procedure, after a party has amended its pleadings once as a matter of course, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." While that standard is "liberal, it is not without teeth." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10. A trial court may deny a motion to amend when the "amendment would be futile," meaning that the "amended complaint cannot withstand a motion to dismiss." *Vasseur v. State*, 2021 VT 53, ¶ 7. Such is the case here.

First, with respect to the claims for negligent and intentional infliction of emotional distress, Plaintiffs' proposed second Amended Complaint includes no new allegations demonstrating that Plaintiffs were at risk of any immediate physical harm or otherwise in a zone of danger while Defendants were on the property. *See, e.g., Brueckner v. Norwich Univ.*, 169 Vt. 118, 125, 730 A.2d 1086, 1092 (1999) ("To establish a claim for negligent infliction of emotional distress, a plaintiff must make a threshold showing that he or someone close to him faced physical peril" or that "(1) he was within the 'zone of danger' of an act negligently directed at him by defendant, (2) he was subjected to a reasonable fear of immediate personal injury, and (3) he in fact suffered substantial bodily injury or illness as a result." (citations omitted)). Nor do Plaintiffs add any allegations to demonstrate that Defendants engaged in actions that "were so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable." *Davis v. Am. Legion, Dep't of Vt.*, 2014 VT 134, ¶ 20. Accordingly, Plaintiffs' motion for leave to amend is denied as to these claims.

Second, Defendants are correct that Plaintiffs' trespass and invasion of privacy claims cannot stand absent an allegation that they had lawful possession of 5 and 7 Union Street, which in turn requires that J and M Investment Trust holds valid title to these properties. The Court notes that Plaintiffs' allegations that the Trust "has derivative constructive possession and a

³ In addition, Plaintiffs indicate that they wish to voluntarily dismiss their claims for intentional infliction of emotional distress.

constructive possessory interest in” 5 and 7 Union Street are “conclusory allegations or legal conclusions masquerading as factual conclusions,” which the Court is not required to accept as true. *Colby*, 2008 VT 20, ¶ 10 (quotation omitted) (rejecting as conclusory plaintiff’s allegation that she “suffered intentional infliction of emotional distress” as a result of a “malicious and wrongful” termination). Plaintiffs have failed to cite a single Vermont case that recognizes a party’s right to claim trespass under circumstances where they do not possess at least a portion of the subject premises. Further, under Vermont law, constructive possession cannot be found unless the property is actually occupied and possessed, at least in part, by the party asserting the claim. *See N.A.S. Holdings, Inc. v. Pafundi*, 169 Vt. 437, 441, 736 A.2d 780, 784 (1999) (constructive possession is a “doctrine under which a claimant achieves possession of an entire plot of land through actual occupation of a part”). Thus, Plaintiffs’ failure to allege that they were in actual possession of at least a part of the subject properties in October and November of 2022 is fatal to their proposed amended claims for trespass. Likewise, Plaintiffs’ proposed amendment that Defendants’ actions (or perhaps only Kite’s) “were substantial and highly offensive to a reasonable person” is a legal conclusion. None of the conduct alleged by Plaintiffs satisfies the demanding standard of being “substantial interference” that “would be highly offensive to a reasonable person.” *Weinstein v. Leonard*, 2015 VT 136, ¶ 29 (noting that “liability is incurred only when defendant’s conduct is repeated with such persistence and frequency as to amount to a course of hounding the plaintiff” (quotation omitted)). Therefore, the motion for leave to amend is also denied as futile as to these claims.

Moreover, the Court notes that every avenue by which Plaintiffs might allege as part of their proposed second Amended Complaint that J and M Investment Trust holds lawful title to 5 and 7 Union Street has been foreclosed and thus any such attempt would be futile. The Court takes judicial notice that this case is the *sixth* in a series of actions filed in state and federal court by the same group of Plaintiffs against the Town of Fair Haven and/or with regard to properties formerly owned by Plaintiff J and M Investment Trust.⁴ The first four of these actions are described in detail in *Billewicz v. Town of Fair Haven, Vt.*, No. 5:22-cv-73, 2022 WL 4115966, at *1-2, 5-6 (D. Vt. Aug. 11, 2022) (“*Billewicz IV*”).⁵ In each of those cases, Plaintiffs asserted a variety of tort claims that rested on their alleged status as the holder of valid legal title to the subject properties. In every case, Plaintiffs sought to challenge the validity of tax sales and related actions that transferred ownership of 5 and 7 Union Street to the Town of Fair Haven. And in all of them, courts issued decisions resulting in final judgments on the merits that rejected

⁴ Taking such notice is an appropriate exercise of the Court’s discretion. *See* Vt. R. Evid. 201(b), (c); *see also Global Network Commc’ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (judicial notice of a document filed in another court is permitted to “establish the fact of such litigation and related filings”); *In re Russo*, 2013 VT 35, ¶ 16 n.4 (courts “may take judicial notice of court decisions” when deciding on a motion to dismiss for failure to state a claim).

⁵ The fifth action, *Billewicz v. Town of Fair Haven*, No. 22-CV-04159 (“*Billewicz V*”) was filed in this Court, just prior to the instant action, and was recently dismissed for failure to state a claim. Although Plaintiffs had amended their complaint to omit any reference to 5 and 7 Union Street, the cause of action alleged the Town breached its fiduciary duty owed to all taxpayers (including Plaintiffs) when it refused to accept payment of delinquent taxes claimed to be owed on the properties.

the Plaintiffs' challenges and likewise found that the Town – not Plaintiffs – was the valid legal owner of the properties.⁶

Plaintiffs' Reply Memoranda in support of its motion for leave to amend confirm that its theory of ownership presented here is based on precisely another such attack. For example, in response to Kite's opposition to the second Amended Complaint, Plaintiffs argue that

they are the lawful owners of the properties due to the failure of the Town of Fair Haven to strictly comply with Tax Statute 32 V.S.A. 5259. This failure rises to a jurisdictional level, without authorization and thus any actions by the Town subsequent to the action is a nullity.

Pls.' Resp. to Def. Kite's Opp'n to Pls.' Mot. for Leave to File Am. Compl. at 2 (filed Feb. 21, 2023). Specifically, Plaintiffs contend that no "bid" was ever received by the Town's tax collector (or made by the Town, as purchaser) at either of the tax sales held in 2014 with respect to 5 and 7 Union Street, as required by 32 V.S.A. § 5259. *See* Pls.' Opp'n to Def. Kite's Mot. for Summ. J. (filed Jan. 24, 2023); *see also* Pls.' Resp. to Def. Casella's Reply to Pls.' Opp'n to Def.'s Mot. to Dismiss (filed Feb. 21, 2023) (asserting that no bids were made at the tax sales and referring the Court to their submissions in opposition to Kite's summary judgment motion for the "full argument").

Of course, any action that could result in invalidating the Town's legal ownership of the properties would require joinder of the Town as a necessary and indispensable party under Rule 19. *See, e.g., City of Montpelier v. Barnett*, 2012 VT 32, ¶ 15 (holding that State was properly joined in action concerning property in which State had an interest "and protection of that interest might have been impaired in its absence by a decision in favor" of plaintiff). But Plaintiffs' claim against the Town challenging the validity of the tax sales based on the failure to comply with § 5259 could have and should have been asserted in *Billewicz I*; therefore, it is barred by the doctrine of claim preclusion. *See Carlson v. Clark*, 2009 VT 17, ¶ 13 (claim preclusion doctrine "bars parties from relitigating, not only those claims and issues that were previously litigated, but also those that could have been litigated in a prior action" (quotation omitted)); *cf. Billewicz I*, 2021 VT 20, ¶ 7 (noting that "Plaintiffs do not dispute that . . . the tax sale was properly conducted"; rather the "only respect in which they allege the procedure followed by the Town deviated from the statutory requirements was that the reports of sale were not recorded within thirty days of the tax sale"). Moreover, this claim, which attacks the validity of the acts of the tax collector, relating to the collection of taxes, is barred by the one-year statute of limitations set forth in 32 V.S.A. § 5294(4). *See Billewicz I*, 2021 VT 20, ¶¶ 18-30 (holding that Plaintiffs' action to void Town tax collector deeds on grounds that he failed to record a report of his doings as required by 32 V.S.A. § 5255 was subject to § 5294(4)'s one-year limitations period); *Turner v. Spera*, 140 Vt. 19, 21, 433 A.2d 307, 307-08 (1981) (taxpayer lawsuit seeking to void a tax collector's deed on grounds that collector failed to publish notice of

⁶ The only exception is *Billewicz v. Town of Fair Haven*, No. 22-CV-677 (Vt. Super. Ct. Feb. 28, 2022) ("*Billewicz III*"), in which Plaintiffs voluntarily withdrew their complaint after being served with the Town's motion for Rule 11 sanctions, and then filed their federal complaint "on the same day." *Billewicz IV*, 2022 WL 4115966, at *6.

the tax sale as required under 32 V.S.A. § 5255(a)(2) was barred by § 5294(4) because plaintiff commenced suit more than one year after levy).⁷

In short, Plaintiffs are unable to assert that they are in lawful possession of the real properties located at 5 and 7 Union Street in Fair Haven. They have failed to identify any viable and cognizable claim to establish that J and M Investment Trust holds valid title to these properties that is not precluded based on prior litigation or barred by the applicable statute of limitations. Accordingly, for the foregoing reasons, the Court concludes that leave to amend would be futile and therefore denies Plaintiffs' motion.

Order

For the foregoing reasons, Defendants' Motions to Dismiss are GRANTED (Motions 1, 2, 5, 7). Plaintiffs' motion to amend their first Amended Complaint is DENIED (Motion 9). Defendant Kite's Motion for Summary Judgment is DENIED as moot (Motion 6). Plaintiffs' Motions for Default Judgment as to Defendants Premier Roofing Solutions and Striglia are DENIED (Motions 3, 4). Defendant Kite's Motion for Rule 11 sanctions (Motion 10) remains under advisement with the Court.

Electronically signed on July 27, 2023 at 3:44 PM pursuant to V.R.E.F. 9(d).



Megan J. Shafritz
Superior Court Judge

⁷ The same result would occur under the one-year limitations period set forth in 32 V.S.A. § 5263.