

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

THE OFFICE OF THE AUDITOR OF
ACCOUNTS, in its official capacity, and
DOUGLAS R. HOFFER, as a citizen of the
State of Vermont,
Plaintiffs

v.

THE OFFICE OF THE ATTORNEY
GENERAL and CHARITY R. CLARK, in
her official capacity as the Attorney
General of the State of Vermont,
Defendants

Docket No. 23-CV-4963

RULING ON DEFENDANTS' MOTION TO DISMISS

The Auditor of Accounts has sued the Attorney General, claiming that the Attorney General improperly refused to provide the Auditor with a legal opinion requested pursuant to 3 V.S.A. § 359 and improperly barred the Auditor from obtaining counsel to litigate this case. The Auditor seeks a writ of mandamus and a declaratory judgment. The Attorney General now moves to dismiss for lack of subject matter jurisdiction under V.R.C.P. 12(b)(1), and alternatively for improper venue under Rule 12(b)(3) and for failure to state a claim under Rule 12(b)(6).

Douglas R. Hoffer is the Auditor of Accounts, a constitutional office under the Vermont Constitution elected every two years. The Auditor brings this action both in his office's official capacity and as a Vermont citizen ("Citizen Hoffer"). Charity R. Clark is

the Attorney General, a statutory office established pursuant to Title 3, Chapter 7. The Auditor has sued the Attorney General and her office in their official capacities.

The court addresses venue as a threshold issue. In the Complaint, the Auditor alleges that “[t]he Court has venue pursuant to 12 V.S.A. § 402.” Compl. ¶ 6. That statute provides: “An action before a Superior Court shall be brought in the unit in which one of the parties resides, if either resides in the State; otherwise, on motion, the complaint shall be dismissed.” 12 V.S.A. § 402(a). No facts are alleged to support the venue claim.

The Auditor’s Office, the Attorney General’s Office, and the Attorney General in her official capacity all “reside” in Montpelier for venue purposes. *See* 3 V.S.A. § 260 (“The following State officers shall have their offices in Montpelier in quarters to be designated from time to time by the Governor: . . . Auditor of Accounts, and Attorney General.”); State v. Fisher, 134 Vt. 339, 340 (1976) (venue in Washington County was proper because “the principal situs of plaintiff [the State of Vermont] is Montpelier, its capital”); Gero v. Pallito, No. 0048-11 CnC, 2011 WL 13362809, at *2 (Vt. Super. Ct. May 09, 2011) (Toor, J.) (“the Commissioner’s official residence is in Washington County only; . . . in his official capacity[,] he is not a ‘resident’ of Chittenden County; and . . . therefore venue is not proper in the Chittenden Unit.”).

The only party who might reside in Chittenden County is Citizen Hoffer. Curiously, however, the Auditor has utterly failed to respond to the Attorney General’s venue argument either in his opposition or sur-reply. Nor does the Auditor indicate in his declarations where he personally resides. The court is thus left with no evidence to support venue at all. *Cf. G.F.C. Fashions, Ltd. v. Goody’s Family Clothing, Inc.*, 1998 WL 78292, at *3 n.4 (S.D.N.Y. Feb. 24, 1998) (holding that “general and conclusory allegations” could not “support a finding of venue” under federal venue statute); Breathwit Marine Contractors, Ltd. v. Deloach Marine Servs., LLC, 994 F. Supp. 2d 845,

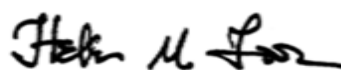
848 (S.D. Tex. 2014) (“[T]he court is not obligated to credit conclusory [venue] allegations, even if uncontroverted.”). Without any indication that Hoffer resides in Chittenden County, venue here is improper. Moreover, the Auditor’s failure to respond to the venue argument amounts to a concession on that issue. *See Pharmacists Mut. Ins. Co. v. Myer*, 2010 VT 10, ¶ 18, 187 Vt. 323 (where a party “filed no opposition to the motion to dismiss,” his “failure to oppose the motion effectively waived the claims”).

The Attorney General asks for dismissal or, alternatively, transfer of this case to Washington County. *See Mot. to Dismiss* at 17–18. Dismissal is the remedy for improper venue. *See* 12 V.S.A. § 402(a) (“otherwise, on motion, the complaint shall be dismissed”). The court has no authority to transfer venue under these circumstances. *See U.S. Bank Trust Nat. Ass'n v. Gittens*, No. 22-CV-00199, 2022 WL 1242621, at *1 (Vt. Super. Ct. Mar. 10, 2022) (Toor, J.); *Cavalry SPV 1, LLC v. White*, No. 23-SC-00788, 2023 WL 3939270, at *1 (Vt. Super. Ct. June 01, 2023) (Richardson, J.) (“Plaintiff does not cite to any authority in this Court that allow it to transfer venue from one county to another. The remedy under Section 402 for an action filed in the wrong venue is dismissal.”).

Order

The motion to dismiss for improper venue under Rule 12(b)(3) is granted. The case is dismissed without prejudice.

Electronically signed on April 18, 2024 pursuant to V.R.E.F. 9(d).



Helen M. Toor
Superior Court Judge