STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 801-12-15 Wncv
Stephen Whitaker, Plaintiff v. Agency of Administration, Department of Public Service, Vermont State Colleges, Defendants	

Opinion and Order on Plaintiff's Motion for Preliminary Injunctive Relief

On December 22, 2015, this matter came for hearing before the Court on Plaintiff's motion for a temporary restraining order. Plaintiff Stephen Whitaker alleges that the Legislature already has decided to stop funding Vermont Interactive Technologies (VIT), a nonprofit corporation offering videoconferencing and other services. He asserts that the Legislature intends to determine ownership issues related to VIT's property at a later date and, in the interim, has barred any State or private entity from assuming ownership of VIT's property until that time. *See* 2015, No. 26, § 34(b) ("Act 26"). Despite that legislative command, Plaintiff claims that the Defendants already have or are about to assume ownership of VIT property, are preparing to dismantle VIT's technological infrastructure in a manner that will greatly diminish its value, and are expected to rededicate that property to their own uses. He seeks preliminary injunctive relief to prevent the Defendants from taking such action at least until the Legislature properly determines ownership and other issues related to VIT's dissolution.

After affording the parties the opportunity for an evidentiary hearing, the Court makes the following determinations.[1]

Analysis

Plaintiff's motion for an injunction faces a high hurdle. "An injunction is an extraordinary remedy, the right to which must be clear." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000). Plaintiff's request for preliminary injunctive relief requires the Court to consider: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of

[1] Plaintiff has sought a temporary restraining order and a preliminary injunction. The instant ruling disposes of both requests.

success on the merits; and (4) the public interest." *In re J.G.*, 160 Vt. 250, 255 n.2 (1993). To establish irreparable harm, a party "must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (internal quotations omitted). In addition, the purported irreparable harm "must be shown to be actual and imminent, not remote or speculative." *Id.*

For the following reasons, Plaintiff has failed to establish that he has a clear right to an injunction.

Mr. Whitaker has not shown a likelihood of success on any of his legal claims. Most importantly, Mr. Whitaker's standing in this case is highly questionable. He has asserted a political interest as a "known advocate" in the dissolution of VIT, as a member of non-profit groups that benefit from VIT services, and as someone who has used VIT services to participate in public hearings and meetings. But, he has not clearly asserted any property or other enforceable legal rights of his own that are at stake. The generalized injuries of which he complains do not appear to distinguish him from any other member of the public to the extent that they might allow him to claim standing. *See Parker v. Town of Milton*, 169 Vt. 74, 78 (1998) (For standing purposes, "[t]he injury must be an 'invasion of a legally protected interest,' not a generalized harm to the public." (citation omitted)). The fact that Plaintiff claims that these assets should be considered held in a public trust does not alter the standing analysis. *Id.* Nor can the Court conclude from the language of Act 26 that the Legislature intended to allow individual citizens the authority to enforce its provisions. *See Carr v. Peerless Ins. Co.*, 168 Vt. 465, 474 (1998); *Cort v. Ash*, 422 U.S. 66, 78 (1975).[2]

In addition, Plaintiff's principal contention is that the Defendants are "assuming ownership" of VIT's equipment in violation of Act 26. The Defendants' evidence persuasively showed otherwise. Defendants' testimony established that the 2015 Legislature had not initially chosen to fund VIT at all. It then gave VIT some funds to use for purposes of "dissolution." *See* Act 26, § 19. All employees of VIT are employees of the Vermont State College System (VSC). Those employees are or have been terminated or reassigned by VSC as of December 18 or 31. VIT is housed at fourteen locations throughout the State. Most of the locations are in VSC

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[2] The Court also questions whether it has subject matter jurisdiction in this matter. Suits against the State are typically "barred unless immunity is expressly waived by statute." *Kane v. Lamothe*, 2007 VT 91, ¶ 6, 182 Vt. 241, 244 (internal quotation omitted); *see Earle v. State*, 2006 VT 92, ¶ 9, 180 Vt. 284, 289 (same); *City of S. Burlington v. Dep't of Corr.*, 171 Vt. 587, 590 (2000) (noting jurisdictional nature of sovereign immunity). As the parties have yet to brief the issue and it is possible that Plaintiff might be permitted to bring his claims against the heads of the named entities named in their official capacities, *see Kozera v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983) (litigant may not name the United States but may sue officials for injunctive relief to police conduct beyond their authority), the Court will not rely on sovereign immunity in this ruling.

facilities. The space where the VIT equipment is housed is leased from the VSC or other entities for the price of $1.00 per year. For the upcoming year, VSC needs to replace the VIT equipment with new video equipment so that it can conduct some of its classes. Absent preservation action, the VIT equipment would have been left in uncertain settings with little or no oversight, control, or supervision. Indeed, James Porter, Director of Telecommunications and Connectivity with the Department of Public Service, testified that, in similar wind down situations that have occurred in the past, electronic equipment had been damaged because steps were not taken to preserve the property. He also confirmed that no State entity was now taking "ownership" of the VIT equipment.

Given the lack of funding to maintain the VIT equipment, the landlords' desire to regain access to their space, and the need to maintain the VIT equipment in a secure setting, VIT and the State developed a plan to dismantle the property and maintain it in a secure location until the Legislature makes a final determination as to its disposition. Defendants have not disposed of, sold, distributed, or re-tasked the property; nor do they intend to do so without legislative approval. In the Court's view, such conduct is not an assertion of an "ownership" interest by Defendants, it is an exercise of fiduciary responsibility to protect the property at issue.

Plaintiff's individual claims also suffer from other legal deficiencies. In the first count of the Complaint, Mr. Whitaker alleges that the Department of Public Service has a "telecommunications plan," 30 V.S.A. § 202d, that "was created in a manner which is non-compliant with statute," and thus is void. Complaint ¶ 28. He appears to claim that the plan, along with unspecified violations of Vermont's open meeting and public records laws, which are the subject of a separate lawsuit, may provide a basis for injunctive relief in this case. He does not persuasively establish, however, why anything that he suspects is occurring to VIT property can only be done pursuant to a valid telecommunications plan.

The evidence he offered at hearing was no more compelling. While he claimed that Vermont's 2014 Telecommunications Plan did not go through all of the public comment periods, his testimony was countered by that of Mr. Porter, who asserted that the Plan had been properly adopted. At a minimum, Plaintiff's initial evidence in that regard does not carry sufficient down weight to establish convincingly that the Plan was not properly adopted.

In the second count of the Complaint, Plaintiff claims that actions taken by Defendants in advance of further legislative activity with regard to VIT that reduces the value of VIT property will violate his due process, equal protection, and first amendment rights, and that 29 V.S.A. § 161 or other unspecified procurement laws "must be followed with respect to the handling of VIT assets." Complaint ¶ 35. He does not persuasively assert a property right in VIT property, so it is unclear how he could have any due process right at stake. His equal protection, first amendment, and procurement law claims are wholly unexplained in the Complaint.

At this stage, he has failed to show the Court that he has any likelihood of success as to those claims.[3]

Mr. Whitaker has also failed to establish that irreparable harm will occur in the absence of the requested relief. He testified as to his belief that the Defendants were assuming ownership of VIT's equipment, dismantling it, not keeping records as to how the pieces of equipment could be reassembled, and were taking some of the equipment and using it for their own purposes. He also asserted that the dismantling of the equipment would reduce its overall value as a system.

On most of those points, the Defendants offered contrary and convincing evidence. The testimony of Yasmine Ziesler, VSC's Chief Academic and Technology Officer established that VSC and VIT are taking extensive steps to record the configuration of the technology at issue. She testified that photographs of the connections have been taken, that an inventory of the equipment has been created, that electronic files have been preserved, that "everything that can be documented is being documented," and that the equipment is being transported to a climate controlled and secure storage facility. Mr. Porter echoed that testimony and confirmed that the equipment is not being distributed to other state entities. Instead, it is being preserved so that the Legislature can decide how it might be used going forward.

On those findings, the Court cannot conclude that any alleged harm is irreparable. While Plaintiff has asserted that the equipment has more value as an assembled unit, it is equally possible, as Mr. Porter testified, that the equipment could suffer damage if not provided with ongoing oversight and monitoring by VIT staff. And, it's unclear whether the Court could order the VSC to continue to maintain VIT staff without legislative funding, or order various landlords to maintain the VIT operations past the end of the relevant lease periods. In any event, such affirmative relief is well beyond that sought by Plaintiff in his motion and implicates entities that are not part of this action. On the present record, the Court cannot conclude with conviction that the risks associated with the careful documentation and storage of the VIT equipment greatly outweigh the risks of maintaining the property in its present, uncertain and unmonitored environment.

Finally, with regard to the public interest, the evidence presented is, at best, mixed. As a general matter, lawful governmental conduct is "presumed to be in the public interest." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 424 (2d Cir. 2004).

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[3] Plaintiff also appears to allege that VIT, the corporate entity, owns the equipment at issue. If that is the case, VIT presumably is a necessary party to this litigation. Yet, it is not named as a defendant. Mr. Whitaker also does not explain how the Court could order injunctive relief against the State with regard to property owned by a separate entity. Presumably, VIT can act to protect its own interests or assents to the positions taken by the State Defendants. Similarly, if the State owns the property at issue or owns it jointly with VIT, there is no indication that VIT does not assent to the preservation efforts being undertaken.

The Court has already concluded that the actions at issue here do not plainly violate Act 26 and were undertaken to preserve, rather than destroy, public assets. While reasonable minds may disagree as to the efficacy of those policy choices, Mr. Whitaker has not convinced the Court at this stage that the public interest weighs so decidedly in another direction as to justify an award of preliminary injunctive relief.

Conclusion

Mr. Whitaker cares deeply about democracy and greatly values the opportunities that VIT has historically provided for citizen engagement in the democratic process. Many would share his feelings, and everyone would hope that Vermonters will always be afforded meaningful ways of participating in governmental activities.

In this instance, though, the Court's role is a limited one. It is to determine whether Plaintiff has carried the heavy burden of establishing a clear right to injunctive relief at the very outset of the case. On this record, he has not. Plaintiff's motion is denied.

Electronically signed on December 24, 2015 at 01:39 PM pursuant to V.R.E.F. 7(d).

Timothy B. Tomasi
Superior Court Judge