



Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

OCTOBER TERM, 2021

Daniel Sidman* v. State of Vermont	}	APPEALED FROM:
	}	Superior Court, Orange Unit, Civil Division
	}	CASE NO. 20-CV-00121
		Trial Judge: Thomas A. Zonay

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals pro se from the trial court's dismissal of his complaint under Vermont Rule of Civil Procedure 75 as time-barred. He contends that he was seeking and is entitled to equitable relief. We affirm.

Plaintiff sued defendant in April 2020.* He alleged that he was entitled to homestead property tax credits for tax years 2017 and 2018 (which would have been awarded in calendar years 2018 and 2019) and that the State had erred in not sending these funds to the Town of Randolph on his behalf. Plaintiff asserted that he took the steps necessary to claim these credits and that he had been informed that the State lost his paperwork. He asked the court to direct the State to award him these credits. Plaintiff stated that his property had been sold at a tax sale in September 2019 and he suggested that this was due in part to the State's failure to award him the credits to which he was entitled.

The State moved to dismiss the complaint for lack of subject matter jurisdiction, failure to state a claim, and as barred by sovereign immunity. As to the first ground, the State relied on the law governing property-tax credits, 32 V.S.A. §§ 6061-6074. It argued that plaintiff's exclusive remedy for the denial of his claim for property-tax credits was an appeal to the Commissioner of the Department of Taxes. See *id.* § 6072. Because plaintiff failed to exhaust his administrative remedies, the State argued that the complaint should be dismissed for lack of subject matter jurisdiction. We do not recount the State's remaining arguments here.

Plaintiff responded by filing an amended complaint. The State moved to strike the complaint because, among other reasons, it repeated the same allegations as the original complaint, and it included reference to settlement negotiations between plaintiff and the State. The State also reiterated its request for dismissal. While these requests were pending, plaintiff

* Plaintiff also sued the Town of Randolph, but he settled with the town and voluntarily dismissed his claim against it.

filed a document entitled “Equitable Appeal Against Case Dismissal.” The court heard oral argument on the motions, following which it directed the State to respond to plaintiff’s filing concerning equitable relief. The State did so. It explained that it was difficult to respond because plaintiff’s specific equitable theory was unknown, but it nonetheless responded on the merits.

The court granted the State’s request to strike the amended complaint on the grounds identified by the State. In a separate order, it denied the State’s motion to dismiss. The court concluded that, while there were clearly procedures available for appealing the denial of a homestead tax credit, the appeal provision cited by the State did not apply under these circumstances because plaintiff claimed that the State lost his paperwork, not that the State denied his claim for a tax credit. Construing the facts in the light most favorable to plaintiff, the court determined that plaintiff would not have had the opportunity to file an appeal in the absence of a decision by the Department of Taxation. The court found no other statute that provided an administrative process by which a person might seek a remedy for a physically lost claim. It thus was unpersuaded that dismissal was warranted on the ground that plaintiff failed to exhaust his administrative remedies.

The court further concluded that the facts pled were sufficient to put the State on notice of a claim under Rule 75. That rule provided a mechanism by which courts could review “any action or failure or refusal to act by an agency of the state or a political subdivision therefore, including any department . . . that is not reviewable or appealable under [V.R.C.P.] 74.” V.R.C.P. 75. The court found that there was no administrative avenue available to plaintiff to seek a remedy for his lost paperwork, or, relatedly, the homestead tax credit he claimed to be owed. And, while plaintiff did not articulate a specific cause of action through which he sought relief, he clearly sought review of the Department’s conduct. The court found that plaintiff properly complied with the rules in serving a complaint and summons on defendant and the complaint contained the grounds upon which plaintiff asserted his claim and demanded relief. While not artfully drafted, the court found that, under these circumstances, plaintiff’s claim was properly brought as an action seeking review of government action under Rule 75 and it could not say that there were no circumstances under which plaintiff might be entitled to relief. As part of its decision, the court also rejected the State’s sovereign immunity argument.

The State moved for reconsideration, arguing in relevant part that plaintiff could not state a claim under Rule 75 because the record undisputedly showed that such a claim was time barred. Plaintiff responded to the motion and also sought to file a second amended complaint.

The trial court granted reconsideration and dismissed the complaint, agreeing with the State that the claim was time-barred. The court set forth the procedural history of this case and acknowledged that plaintiff did not cite Rule 75 in his complaint and that the court had first raised Rule 75 as the basis for the claim in its order denying the motion to dismiss. The court found that the parties were given an opportunity to address the issue of whether a Rule 75 complaint was time barred in the motions and replies and as the question was one of law, the court determined that it was appropriately addressed in response to the motion for reconsideration.

After reviewing again the relevant law and evidence, the court maintained its conclusion that Rule 75 was the appropriate statutory avenue for plaintiff’s complaint that the Department lost his filings. It also agreed with the State, however, that the claim was time barred. As argued by the State, Rule 75(c) required that, where a failure to act was alleged, the claim must be filed

“within six months after expiration of the time in which action should reasonably have occurred.” Under 32 V.S.A. § 6066a(a), July 1 was the date by which the Commissioner must act on timely filed claims for homestead tax credits. Plaintiff asserted that he timely filed his claims but did not receive an approval or denial from the Commissioner. Thus, the court concluded, July 1 represented the “expiration of the time in which action should reasonably have occurred,” which served to put plaintiff on notice that he had six months to seek review of the Commissioner’s inaction. Plaintiff filed no complaint until April 2020, well outside the six-month period for either the filings for tax year 2017 and 2018. The court added that plaintiff’s response to the motion for reconsideration did not substantially address any of the State’s arguments or otherwise provide support for the court to conclude that the claim was not time-barred under Rule 75. Because the court had not considered the impact of the time limitation in Rule 75 in its order, it found it appropriate to do so on reconsideration and it concluded that the claim must be dismissed as time barred under Rule 75(c). This appeal followed.

Plaintiff essentially argues that the court erred in dismissing his complaint because he is entitled to some form of equitable relief. According to plaintiff, the court erred in determining that he was seeking relief exclusively under Rule 75. He maintains that denying his request for relief under these circumstances is unfair.

Our review is de novo, Heffernan v. State, 2018 VT 47, ¶ 7, 207 Vt. 340, and we find no error. Plaintiff has invoked notions of equity in a very general sense but a general appeal to “fairness” does not suffice. Plaintiff must articulate some recognized equitable theory of relief. He failed to articulate a recognized equitable claim in this case until, arguably, his reply brief in which he appears to rely on a constructive-trust theory. He failed to raise this claim below and this Court does not address arguments raised for the first time in a reply brief. See Bull v. Pinkham Eng’g Assocs., 170 Vt. 450, 459 (2000) (“Contentions not raised or fairly presented to the trial court are not preserved for appeal.”); In re Wal-Mart Stores, Inc., 167 Vt. 75, 86 (1997) (declining to address issue raised for first time in reply brief and recognizing that “issues not briefed in the appellant’s or the appellee’s original briefs may not be raised for the first time in a reply brief” (quotation omitted)). Absent a well-pled and presented colorable theory for equitable relief, plaintiff is limited to his legal remedies.

We note that there are two potential legal remedies in play here: Rule 75/mandamus as suggested by the trial court or statutory appeal of a constructive denial of the credits pursuant to 32 V.S.A. § 6072. We need not determine which, if either, applies here, nor whether sovereign immunity is an obstacle, because neither of these avenues is available to plaintiff now. The Rule 75 claim is time-barred because, as the trial court explained, plaintiff did not file his suit until April 2020, well outside the six-month period from July 1—the date by which the Commissioner must act on timely filed claims for homestead tax credits—for either the filings for tax year 2017 and 2018. See 32 V.S.A. § 6066a(a). An appeal under 32 V.S.A. § 6072 is unavailable because plaintiff did not file an appeal to the Commissioner within sixty days of the latest possible time he was on notice that he did not get the credit—the October 31 due date for his first tax installment. Thus, regardless of which legal theory, if either, applies, plaintiff’s claim is time-barred.

Plaintiff also asserts that the court erred in striking his first amended complaint because it included settlement discussions. He complains that the court failed to provide a supporting rationale. In fact, the court set forth reasoned grounds for its decision to strike the complaint pursuant to Rule 12(f) and plaintiff fails to show any abuse of discretion. In any event, plaintiff fails to show any harm that resulted from this alleged error in light of our conclusions that any

legal claim is time-barred and that plaintiff failed to preserve any claim to a specific form of equitable relief.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice