DOCKET NO.: DBD-CV-19-5015311-S	SUPERIOR COURT
NANCY BURTON	J. D. OF DANBURY
V.	AT DANBURY
EVERSOURCE ENERGY CONNECTICUT	JUNE 5, 2024

OFFICE OF THE CLERK
SUPERIOR COURT GA 3
2024 JUN -5 P 2:33
JUDICIAL DISTRICT
DANBURY
STATE OF CONNECTICUT

MEMORANDUM
RE: MOTION TO DISMISS (#111.00)

The Nature of the Proceedings

Plaintiff Nancy Burton ("plaintiff") owns property on Cross Highway in Redding, Connecticut that is adjacent to a 3-phase overhead primary distribution electric service which operates at 13,800 volts. Plaintiff's property also faces mature maple trees which she values greatly. Plaintiff commenced this action in July of 2019 seeking to stop certain trimming and cutting of those trees which she alleged was planned by "Eversource Energy Connecticut." Defendant The Connecticut Light and Power Company dba Eversource Energy ("defendant") is the entity which intends to pursue, and has partially pursued, such cutting and trimming plans. Plaintiff's amended complaint of September 5, 2019 (#110.00) is now the operative complaint. Defendant has moved to dismiss (#111.00) the amended complaint for lack of subject matter jurisdiction.

For the reasons set forth below, the defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

Procedural History

Plaintiff applied for ex parte injunctive relief on the basis of her original, verified complaint. That application was denied by the court (Winslow, J.) on July 1, 2019 (#100.34). A hearing was scheduled for July 22, 2019 for defendant to show cause why a temporary restraining order should

135

not issue. That hearing was thereafter continued multiple times, at least six times between July 15, 2019 and September 5, 2019, on plaintiff's motion. Defendant's motion to dismiss was filed September 9, 2019. Further continuances were sought by both parties and granted. Thereafter, plaintiff (#123.00) sought and obtained a stay of the proceedings for COVID-related reasons.

Ultimately, a hearing on the defendant's motion to dismiss was held on December 11, 2023. Prior to such hearing, the pleadings relevant to the issue were:

- defendant's motion (#111.00) with exhibits (#112.00) and supporting memorandum of law filed on September 9, 2019
- plaintiff's memorandum in opposition of October 9, 2019 (#114.00)
- plaintiff's supplemental memorandum of law of November 7, 2019 with annexed affidavit (#116.00)
- defendant's supplemental memorandum of November 17, 2023 (#125.00).

The December 11, 2023 hearing began with plaintiff reporting that the parties had reached an agreement on the underlying issues in dispute. Defendant replied there had been a meeting and a discussion including a partial, tentative agreement but that a complete agreement did not yet exist. The parties proceeded to argue the motion to dismiss and requested leave to file post-hearing memoranda. Plaintiff filed her post-hearing memoranda (#132.00) styled a reply, on December 27, 2023. Defendant responded on January 10, 2024 (#133.00). Plaintiff sought to file another pleading in response to defendant's January 10, 2024 filing and was granted (Medina, J., #134.01) until February 9, 2024 to do so. No new filings have occurred. The matter was taken under advisement as of February 9, 2024.

Findings of Fact

Based on the court's review[1] of all of the parties' respective submissions, including the affidavits referenced below as well as the plaintiff's complaints and the arguments made, the court finds the following facts.

Plaintiff was unhappy with what she describes as a "massive tree-cutting campaign in the Town of Redding" that she says was carried out in 2015 by defendant. When she learned in 2019 that defendant was going to undertake further tree trimming/cutting she protested. Plaintiff's amended complaint includes a lengthy list of grievances she has regarding the subject matter not only with the defendant but with other, non-party entities such as the Town of Redding and private contractors. Plaintiff alleges defendant's actions violate Connecticut's Unfair Trade and Practices Act ("CUTPA") (count one), Connecticut Environmental Protection Act ("CEPA") (count two) and § 16-234 of the General Statutes (count three).

Plaintiff and defendant engaged in substantial, extended communications, some in writing, between March of 2019 and early July of 2019. This dialogue included a meeting at the site on May 29, 2019. A second meeting occurred in 2023 prior to the December 11, 2023 hearing. The 2019 on-site meeting was offered to plaintiff by defendant and involved plaintiff and Mr. David Boyle, an arborist employed by defendant. Defendant submitted an affidavit from Mr. Boyle in support of its motion (Exhibit A to # 112.00; hereinafter, The "Boyle Affidavit").

The Boyle Affidavit and plaintiff's amended complaint each address the communications between the parties, albeit with different and at times, competing conclusions. The court finds that none of the factual disputes arising out of issues such as the discouraged use of "stubbing" trimming techniques or the feasibility of a plastic "sleeve" to protect power lines from contact with

[1] The court's review included consideration of all of the parties' arguments and claims whether mentioned explicitly herein or not.

tree branches have a bearing on the legal issue of whether plaintiff failed to exhaust available administrative remedies. The Boyle Affidavit states (and defendant does not contest) that the energized electric lines at the defendant's property serve 887 of defendant's customers and that a tree-triggered outage has occurred on that same street.

Defendant's motion is also supported by the affidavit of Alan C. Carey, its manager of Distribution Vegetation Management (Exhibit B to #112.00; hereinafter, the "Carey Affidavit"). It is undisputed that defendant is a public service utility company which distributes electricity to Connecticut customers. Defendant's operations are regulated by the Connecticut Public Utilities Regulatory Authority ("PURA"). PURA is an administrative agency. Following multiple major storms in 2011-2012 which caused significant power outages, then Governor Malloy announced disaster preparedness and recovery initiatives to try to avoid such outages in the future. One of those initiatives was to task PURA with the responsibility of overseeing tree trimming plans of utilities such as defendant. To fulfill that obligation, PURA created PURA Docket 12-10-10 pursuant to which it reviewed the utilities' practices including tree trimming and vegetation removal. PURA provides reports to the General Assembly on its oversight actions and issues decisions under its PURA Docket including a decision dated June 25, 2014 entitled "PURA Investigation Into The Tree Trimming Practices of Connecticut's Utility Companies" (Exhibit 1 to Carey Affidavit).

Legal Standard

"[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Fay* v. *Merrill*, 336 Conn. 432, 445, 246 A.3d 970 (2020). "A motion to dismiss tests, inter alia, whether, on the face of the record, the

court is without jurisdiction." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 626, 79 A.3d 60 (2013). "A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide." (Internal quotation marks omitted.) *Hinde* v. *Specialized Education of Connecticut, Inc.*, 157 Conn. App. 730. 740-41, 84 A.3d 895 (2014)."

"[T]he exhaustion of [administrative remedies] doctrine implicates subject matter jurisdiction, [therefore the court] must decide as a threshold matter whether that doctrine requires dismissal of the [plaintiff's] claim." (Internal quotation marks omitted.) *Flanagan* v. *Commission on the Human Rights & Opportunities*, 54 Conn. App. 89, 91, 733 A.2d 881, cert. denied, 250 Conn. 925, 738 A.2d 656 (1999).

Discussion

A. Exhaustion of administrative remedies

In *Direct Energy Services, LLC* v. *Public Utilities Regulatory Authority*, 347 Conn. 101 (2023) our Supreme Court clearly laid out the applicable legal principles which this court concludes require granting defendant's motion to dismiss. In *Direct Energy*, the court wrote: "The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. . . . Under that doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Citation omitted; internal quotation marks omitted.) *Piteau* v. *Board of Education,* 300 Conn. 667, 678, 15 A.3d 1067 (2011).

"A primary purpose of the doctrine is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of [g]overnment, that agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them to administer. . . . Therefore, exhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." (Citations omitted; internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield,* supra, 263 Conn. at 564-65, 821 A.2d 725. *Direct Energy* 234 Conn at 146. The Supreme Court added that the exhaustion doctrine is "typically" applied when a party ". . . has completely bypassed an available administrative process." Id. In this case, plaintiff completely bypassed the available PURA administrative process, as discussed further below.

B. Connecticut Statutes

Title 16 of the General Statutes governs "Public Service Companies." Chapter 283 of Title 16 governs "Telephone, Gas, Power and Water Companies." Section 16-234 of chapter 238 provides a detailed statutory framework for multiple matters including "conducting vegetation management." "Vegetation management" is defined to include pruning or removal of trees under §16-234 (a)(4). Section 16-234 (c)(1) sets forth the circumstances under which notice of anticipated vegetation management steps must be provided to abutting property owners such as the notice provided to plaintiff.

The statute describes procedures for a property owner such as plaintiff to pursue, which procedures permit a complaint to be lodged at the municipal level with the local tree warden or with the commissioner of transportation. In the event the property owner remained dissatisfied, she could appeal to PURA which has a statutory obligation to hold a hearing within sixty (60) days of receipt of the homeowner's written appeal. §16-234 (c)(6)(A). The parties' memoranda dispute the interpretation of some of the provisions in chapter 283. What is not in dispute is that plaintiff elected to file her action in Superior Court instead of availing herself of the administrative remedies available to her.

C. Plaintiff's Opposition

Plaintiff's original opposition (#114.00) contained no statutory arguments and focused entirely on her disagreement with certain factual assertions in the Boyle Affidavit. Those factual disputes could have and should have been pursued administratively. They provide no legal basis upon which to deny the motion.

Plaintiff's first supplemental filing (#116.00) again relies upon alleged factual disputes but also advances the claim that by allowing Mr. Boyle to meet with her, defendant ". . . waived any potential claim that plaintiff failed to exhaust administrative remedies." Plaintiff avers that defendant, through Mr. Boyle, made an agreement with her regarding the tree pruning, an allegation belied by the defendant's position at the December 11, 2023 hearing. Even if plaintiff is correct that an exhaustion claim could be waived, the court finds there is no evidence in the record to support a claim of waiver by defendant.

Plaintiff's remaining arguments in her first supplemental opposition are that the exhaustion doctrine does not apply when (a) there's a showing of immediate and irreparable harm or (b) the relief sought is not available from the agency. Plaintiff also argues that §16-234 is

"unconstitutionally vague." The first of those three argument fails in light of the court's order denying plaintiff's ex parte application. As for the second argument, plaintiff relies upon *Sullivan* v. *Board of Police Commissioners of the City of Waterbury*, 196 Conn. 208 (1985). But *Sullivan*, undercuts plaintiff's argument as it makes clear that when a plaintiff can obtain "meaningful relief" from the agency, she must begin there. *Sullivan*, 196 Conn. at 217-218.

As for plaintiff's constitutional argument, "the mere allegation of a constitutional violation is not enough to excuse a plaintiff from raising the alleged constitutional violation before an administrative agency." *Direct Energy Services*, 347 Conn. at 149. The essence of plaintiff's void for vagueness argument is that because section 16-234 (a)(4) of the General Statutes anticipates the issuance of standards by the Connecticut Department of Energy and Environmental Protection ("DEEP") and DEEP has not yet issued same, she (as a property owner) is "deprived of notice" rendering the statute "legally indefensible." Plaintiff's argument is unconvincing. First, she acknowledges that the statute provides that until DEEP issues its own standards, the standards shall be as set forth in the 2012 final report of the State Vegetation Management Task Force. Therefore, standards exist. The fact that they may not be on line as plaintiff would prefer is not a basis for this court to find the statute unconstitutional.

In her final written submission (#132.00), defendant argues that the facts that (a) PURA adopted a more constrained approach to permissible tree-trimming post-COVID and (b) defendant in this case agreed to limit pruning to only those tree branches at plaintiff's property which actually touched the electric lines or had visible signs of burning are two additional reasons for denying the motion to dismiss. The court disagrees. Neither of those issues change the fact that plaintiff had a clear, meaningful administrative remedy she chose to bypass. Lastly, plaintiff asked this court to

take judicial notice of other litigation she has with Frontier Communications. That litigation is irrelevant and immaterial to this case and offers no basis upon which to deny the motion.

D. Public Policy

All of the sound policy purposes for the doctrine of exhaustion of administrative remedies set forth in *Direct Energy*, 347 Conn. at 146 are present in this case. Moreover, this court must respect the fact that it is the General Assembly which has primary responsibility for setting policy for the state. *Sic* v. *Nunan*, 307 Conn. 399, 410 (2012). With its enactment of the statutory provisions and procedures described above, the General Assembly has created a clear and cohesive administrative process which plaintiff was not free to ignore.

Conclusion

For all of the foregoing reasons, defendant's motion to dismiss is granted on the grounds that plaintiff failed to exhaust available, meaningful administrative remedies.

Medina, Jr., J.
June 5, 2024