

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6583

APPEAL OF JRK CONTRACTOR LLC t/a JRK BUILDERS

OPINION OF THE BOARD

(Hearing held October 31, 2018)
(Effective Date of Opinion: November 16, 2018)

Case No. A-6583 is an administrative appeal filed August 21, 2018, by JRK Contractor LLC t/a JRK Builders (the "Appellant"). Appellant charged error on the part of Montgomery County's Board of Registration in its revocation of Building Contractor's License BC 218983. Appellant alleged that the Board of Registration "failed to serve Respondent" and alleged a due process violation.

Building Contractor's License BC 218983 was held by Appellant. See Exhibit 9, ex. A.

Pursuant to section 2A-8 of the County Code, the Board scheduled a public hearing for October 31, 2018. Pursuant to sections 2A-7 and 2A-8 of the County Code, and Board of Appeals' Rule of Procedure 3.2, the County filed a Motion to Dismiss the administrative appeal on September 11, 2018, and Appellant filed an Opposition to County Motion to Dismiss on September 24, 2018. The Board, pursuant to Board Rule 3.2.5, decided the Motion to Dismiss, and the opposition thereto, at a motions hearing after the close of oral argument on October 31, 2018. Daniel S. Willard, Esquire, appeared on behalf of Appellant. Associate County Attorney Erin Ashbarry represented Montgomery County.

Decision of the Board: County's Motion to Dismiss **granted**;
Administrative appeal **dismissed**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. The Board of Registration revoked Appellant's Building Contractors License BC 218983 by Order dated July 10, 2018. See Exhibit 9, ex. A.

2. On July 10, 2018, Eric Friedman, Director, Montgomery County Office of Consumer Protection, personally enclosed in three manila envelopes a copy of the Order of the Board of Registration revoking Appellant's license BC 218983 and addressed them to: Appellant's resident agent, Fernando Guedes, Senior; a member of Appellant, Fernando Guedes, Junior, at his home address; and Appellant's principal place of business. See Exhibit 7, ex. 5.

3. On July 10, 2018, Director Friedman placed the three envelopes in the outgoing mail bin in his office and observed an employee of the County's mail room pick up the three envelopes for mailing. It is then the normal business practice of the mail room, prior to mailing, to affix U.S. postage on all outgoing County mail. None of the envelopes were returned to the County. See Exhibit 7, ex. 5.

4. On July 13, 2018, Director Friedman personally sent another copy of the Board of Registration's Order to Appellant's resident agent, Fernando Guedes, Senior, and to Fernando Guedes, Junior, via Federal Express. Both packages were delivered on July 13, 2018. See Exhibit 7, ex. 5.

MOTION TO DISMISS — SUMMARY OF ARGUMENTS

1. Counsel for the County argued that the County had received three complaints concerning Appellant which the Office of Consumer Protection investigated and found had merit. Counsel argued that under the County Code, section 31C-8, before the County can revoke a building contractor's license, the license holder is entitled to a hearing. She argued that the County referred the case to the County's Office of Zoning and Administrative Hearings ("OZAH"), which held a hearing in May 2018. Counsel argued that Appellant did not appear at the hearing and the County presented its case, which took three hours and included seven witnesses.

Counsel argued that OZAH recommended that the Board of Registration revoke Building Contractor's License BC 218983, and that the Board of Registration adopted OZAH's recommendation in its entirety. She argued that the Board of Registration's Order was dated July 10, 2018, and that Director Friedman mailed that Order to Appellant five separate times: by first class mail on July 10, 2018 to the resident agent, the President, and the business address of Appellant and by Federal Express on July 13, 2018 to the resident agent and the President of Appellant.

Counsel for the County argued that the Board's Rules on applications for administrative appeals are very clear and must be followed. She argued that Board Rule

2.1 states “[u]nless the applicable law specifies a shorter time, an appeal from an administrative decision must be filed 30 days after the day the decision was mailed.” Counsel argued that there is no other applicable law specifying a different time for filing an appeal to the Board in this case. She argued that Appellant’s appeal was filed August 21, 2018, more than 30 days after the decision was mailed and sent by Federal Express, and was untimely. Counsel argued the Board therefore has no jurisdiction over this appeal.

Counsel for the County argued that, in *National Institute of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 196 (1980), the Court of Special Appeals noted that where a specific procedure for appeal is provided, its provision “must be scrupulously followed,” and that the Board did not have jurisdiction in that case over an appeal not filed within 30 days of mailing of the opinion. She argued that the Court dismissed the appeal in the *Hawk* case because it was not timely filed. Counsel argued that the rules of procedure are clear in this case.

Counsel for the County argued that Appellant’s main argument is that they had no notice of the initial hearing to revoke Appellant’s building contractor’s license. She argued that under section 2A-10(f) of the County Code, there is no time limit for Appellant to file a motion for reconsideration for fraud, mistake, or irregularity. She argued that Appellant should file such a motion with the Board of Registration to raise the notice argument, not with this Board, and that Appellant indeed had filed a motion for reconsideration with the Board of Registration.

Counsel argued that the only fact relevant to this motions hearing was whether the appeal was filed within 30 days of July 10, 2018. She argued that the Board of Registration is the appropriate venue to question whether service of process was proper.

2. Counsel for Appellant argued that there were several avenues to appeal the Board of Registration’s Order. He submitted a Contractor’s Reply to County’s Reply (Exhibit 10) and referenced pages 6 and 7, which were the last two pages of the Board of Registration’s Order providing Notice of Appeal rights. Counsel argued that if this case were in the circuit court, he would be able to contest whether there was proper service, and that the Board of Registration’s Order would be thrown out.

Counsel for Appellant argued that the United States Constitution guarantees advance notice and an opportunity to be heard. He argued that whatever occurred after the hearing is irrelevant. Counsel argued that there is an appeal in this matter pending before the circuit court as well. He argued that the County had failed to follow the rules of procedure because Appellant was not appropriately served.

Counsel argued that Appellant is entitled to reconsideration at any time for fraud, mistake, or irregularity. He argued that Appellant was not arguing that there was fraud in this case but that there is a basis to re-open this case after 30 days. He argued that there is a clear dispute as to what happened regarding service and that the process server needs to testify about the service dispute.

CONCLUSIONS OF LAW

1. Section 2-112(d) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals as authorized by law.

2. Section 31C-8(c) of the County Code provides that "(1) Before revoking or suspending any license, the Board [of Registration] must afford the builder an opportunity for a hearing under the Administrative Procedures Act. (2) The builder may appeal a decision of the Board to the Montgomery County Board of Appeals."

3. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in section 2-112, article V, chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

4. Board of Appeals Rule 2.1 states that "[u]nless the applicable law specifies a shorter time, an appeal from an administrative decision must be filed within 30 days after the day the decision was mailed. The required forms must be obtained at the office of the Board of Appeals."

5. Under section 2A-8 of the County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at a motions hearing. Board Rule 3.2 specifically confers on the Board the ability to grant motions to dismiss in cases where the Board lacks jurisdiction or where there is no genuine issue of material fact and dismissal should be rendered as a matter of law.

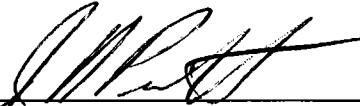
6. Under Board Rule 3.2.4, the Board has the discretion to hear oral argument on a motion to dismiss, and under Board Rule 3.2.5, the Board must decide the motion after the close of oral argument or at a worksession.

7. The Board finds that it lacks jurisdiction to hear this appeal. The Board finds that no other applicable law provides a different time to appeal the Board of Registration's Order in this case, and that therefore the appeal must be filed within 30 days after the day the decision as mailed. The Board finds the Opinion was mailed on July 10, 2018 and sent by Federal Express on July 13, 2018, and therefore the latest the appeal could have been filed was August 13, 2018. There is no dispute the appeal was filed August 21, 2018, more than 30 days after the Opinion was mailed. See Exhibit 1. Therefore, the appeal was filed untimely and the Board lacks jurisdiction over the appeal.

8. The County's Motion to Dismiss in Case A-6583 is granted, and the appeal in Case A-6583 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Member Katherine Freeman, with Vice Chair Edwin S. Rosado and Members Stanley B. Boyd and Bruce Goldensohn in agreement, the Board voted 5 to 0 to grant the County's Motion to Dismiss and to dismiss the administrative appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 16th day of November, 2018.



Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).