

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of
Business Interface of Maryland, LLC *

Under Department of Human Services * Docket No. 3065
Baltimore City Department of Social Services
Contract No. FIA-17-062 *

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ORDER

Having read and considered Respondent's Motion for Reconsideration, the Board states as follows:

Respondent disputes this Board's conclusion that it cannot make any findings of facts as to the timeliness of Appellant's Notice of Claim (and Claim) without a full evidentiary hearing, contending that an evidentiary hearing is not necessary insofar as Appellant's assertion that its claim arose on May 15, 2017 is not supported by any evidence. To support its contention, Respondent relies on two sentences from *University of Maryland v. MFE Incorporated/NCP Architects, Inc.*, 345 Md. 86 (1997): the Court of Appeals stated that "[t]he [Board of Contract Appeals] dismissed [Appellant's] appeal on the ground that it was untimely. It should have dismissed the appeal because it had no subject matter jurisdiction." *Id.* at 104-05. Unfortunately, however, Respondent either failed to read or understand the case and simply relied on these two sentences, which, taken out of context, purport to support its position.

In *MFE*, the Court of Appeals determined that the Board did not have subject matter jurisdiction to hear a claim brought by a state agency (i.e., University of Maryland) on a procurement contract for architectural services. The Board had determined that the appeal filed by the architects was untimely and thus the Board did not have jurisdiction to hear the claim. The Board's decision was affirmed by both the Circuit Court and the Court of Special Appeals. The

Court of Appeals, however, held that the issue depriving the Board of “jurisdiction” was not one of timeliness; rather, the Board did not have *subject matter jurisdiction* to hear a class of claims that had not been expressly provided for by the legislature because, at that time, the procurement laws did not allow a state agency to bring claims against a contractor. The Court undertook an exhaustive analysis of the legislative intent to exclude these types of claims, and ultimately reversed and vacated the lower courts’ and Board’s decisions.

The Court of Appeals did not “clearly provide that if a contractor untimely files its notice of claim and claim, this Board lacks jurisdiction to hear the case,” as Respondent would have us believe. The Court never reached the timeliness issue because it found that the Board was not authorized to hear claims filed by a state agency against a contractor. Respondent has conflated two very separate and distinct issues related to timeliness of claims and jurisdiction. Moreover, and surprisingly, Respondent failed to recognize that *MFE* has been superseded by statute, as the Court of Appeals explained in *University System of Maryland v. Mooney*, 407 Md. 390, 412 (2009).

Finally, we reiterate our conclusion, which is firmly based on the Court of Appeals’ decision in *Engineering Mgmt. Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211, 241 (2003), a case decided several years after *MFE*, and which is directly on point. In *EMS*, the Court clearly provided that “[t]he issue of untimely notice of a claim would be a defense and a factual question to be determined during the course of a full hearing on the merits, and not a jurisdictional bar to the pursuit of a contractor’s claim.” *Id.* at 241. The Court explained that the filing of a timely claim is not a condition precedent to the existence of a claim, or to the exercise of the Board’s jurisdiction. *Id.* at 236-40. Likening the timeliness requirement to a statute of limitations, the Court explained that because a condition precedent can be met by estoppel (or

inducement, fraud, or waiver), these types of factual defenses can only be determined upon a full hearing on the merits. *Id.*

As we said before, in the context of a motion to dismiss for the alleged failure to file a timely claim, we must assume the truth of all well-pleaded facts and all reasonable inferences that may be drawn therefrom. *See, e.g., U.K. Constr. & Mgmt., LLC*, MSBCA No. 2773 (2011). At the early stages of the litigation, such as here, ambiguities are resolved in favor of the appellant and the Board examines the claim from the perspective of assuming the truth of all facts alleged by appellant. *Id.* at 2.

Our decision was intended to be instructive, therefore it bears repeating. In the context of a motion to dismiss, when facts regarding the timeliness of a claim are in dispute (i.e., when there is a dispute as to when a contractor knew or should have known that it had a claim), we are required to assume the truth of the facts pled by appellant (and all reasonable inferences therefrom) in appellant's favor. We cannot, and will not, make any findings of fact regarding the timeliness of Appellant's Notice of Claim or Claim without a full evidentiary hearing on the merits. If, however, the material facts regarding timeliness (or any other defense) are not genuinely in dispute, a party may file a motion for summary decision, in which case the Board may dispose of an appeal by entering judgment in favor of the moving party.¹ But that is not what was filed by Respondent. Respondent filed a Motion to Dismiss,² and there was no allegation that the material facts are not genuinely in dispute.

ACCORDINGLY, it is this 30th day of April, 2018, hereby:

¹There is a clear distinction between the dismissal of an appeal and the entry of judgment where there is no genuine dispute of material fact. The Board may dismiss a case at any time for lack of subject matter jurisdiction, but that is not the issue in this case, as clarified by the Court of Appeals in the *EMS* case. Under *EMS*, timeliness of a claim is not a matter of subject matter jurisdiction. It is a factual defense.

²Respondent did not file a motion to dismiss, or in the alternative, for summary decision, alleging that there was no genuine dispute of material fact.

ORDERED that Respondent's Motion for Reconsideration is denied.

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/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Ann Marie Doory, Esq.

/s/
Michael J. Stewart, Esq.

