

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of
Pessoa Construction Co., Inc.

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Docket No. MSBCA 2929


Under SHA Contract No. PG 6715168

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ORDER

Having considered Respondent's Motion to Dismiss the above-captioned appeal, and having received no response thereto, it is this 5th day of April, 2016 hereby ORDERED that the Motion to Dismiss is GRANTED, and that the above-captioned appeal is Dismissed with Prejudice.


Michael J. Collins
Chairman

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

**PETITION OF
PESSOA CONSTRUCTION COMPANY INC.**

**FOR JUDICIAL REVIEW OF THE
DECISION OF THE**

**Maryland State Board of Contract Appeals
6 St. Paul Street, Suite 601
Baltimore, Maryland 21202**

Civil Action No.: CAL16-26366

IN THE CASE OF THE APPEAL OF

**Pessoa Construction Company, Inc.
Under State Highway Administration
Contract No. PG 6715168
MSBCA Docket No. 2929**

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OPINION AND ORDER OF COURT

This matter comes to this Court on review of the Maryland State Board of Contract Appeals' ("MSBCA" or "Board") granting of SHA's Motion to Dismiss Pessoa's Complaint on April 5, 2016.

Pessoa Construction Company, Inc. ("Pessoa") is a Maryland corporation engaged in the business of highway, road and bridge construction and water and sewer line construction. The State Highway Administration ("SHA") contracted with Pessoa for deck replacement and widening on the Maryland Route 201 overpass over Interstates 495/95 in Prince George's County (the "Project"). After contract disputes arose between Pessoa and SHA regarding the performance of construction contract, Pessoa appealed the SHA Contracting Officer's final decision on Pessoa's claim to the Maryland State Board of Contract Appeals ("MSBCA" or "Board"). The appeal was filed on April 6, 2015. The following day, the Board docketed the appeal and mailed notice to Pessoa that "COMAR [Code of Maryland Regulations] 21.10.05.03 provides that an individual may appear before the Board in person or may be represented by an attorney at law licensed in Maryland. Corporations, partnerships, and joint ventures shall be represented by an attorney at law licensed in Maryland."

At the outset of Pessoa's appeal, Stephen J. Annino, an attorney licensed in this state, entered his appearance as counsel for Pessoa. Thereafter, Pessoa filed a Notice of Substitution of Counsel that named Stephen Seeger, Esquire and the law firm of Peckar & Abramson ("P&A") as counsel for Pessoa as of May 7, 2015.

Between May 2015 and February 2016, the parties represent that they proceeded with the litigation before the Board – including agreeing upon a hearing schedule, engaging in written discovery and exchanging documents. According to information gleaned from the record, the matter was scheduled for a hearing before the Board on September 26, 2016. However, on February 11, 2016, P&A filed a Motion to Withdraw Appearance of Counsel. P&A’s motion, included in the administrative record of this case, contains the representation that “Counsel certifies that Client was given reasonable notice that counsel intends to withdraw and the opportunity to retain new counsel. Despite Counsel’s warning and opportunity to retain new counsel, Client has not done so.” The motion also contained a Certificate of Service indicating that the motion was sent by first class mail to Pessoa. No response or opposition to the motion was filed, and on March 10, 2016, the Board granted P&A’s Motion to Withdraw. The Board’s Order did not warn Pessoa of the need to provide replacement counsel or the date by which replacement counsel was required to avoid dismissal of the action.

Acting with great alacrity, the State Highway Administration filed a Motion to Dismiss Pessoa’s Complaint on March 11, 2016 based on Pessoa’s noncompliance with COMAR 21.10.05.03A, which requires that “[c]orporations, partnerships, and joint ventures *shall* be represented by an attorney at law licensed in Maryland.” Mr. Pessoa alleges that he sent copies of the Board’s March 10, 2016 Order and SHA’s Motion to Dismiss to P&A, and further avers that he was still communicating with P&A regarding the appeal, believing that P&A was going to take care of the Order and the Motion so that the appeal could proceed.¹

Pessoa did not file a response to SHA’s Motion to Dismiss, and on April 5, 2016, the Board entered an Order dismissing the appeal with prejudice. Pessoa filed a Petition for Judicial Review with this Court on June 16, 2016.

SHA filed a Motion to Dismiss Pessoa’s Petition for Judicial Review on timeliness grounds pursuant to Maryland Rule 7-203. This court denied the timeliness argument that was presented in SHA’s Motion to Dismiss. The only question that remains before this court is whether it was an erroneous for the Board to dismiss Pessoa’s Appeal.

I. STANDARD OF REVIEW

This Court’s review is limited to determining if the MSBCA decision to dismiss the Appeal is premised upon an erroneous conclusion of law. Judicial review of an administrative agency action is narrow. *Motor Vehicle Admin. v. Sanner*, 434 Md. 20, 31 (2013), citing *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005). The “court’s statutory role upon review goes very little beyond its

¹ The court must express some consternation with this position. How does one reasonably believe that the attorney who has just withdrawn his appearance is “going to take care of” a Motion to Dismiss?

inherent power of review to prevent illegal, unreasonable, arbitrary or capricious administrative actions.” *Harford Memorial Hospital v. Health Services Cost Commission*, 44 Md. App. 489, 506 (1980) (citations omitted).

This court is “limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Milliman, Inc. v. Md. State Ret. & Pension Sys.*, 421 Md. 130, 151 (2011) (citations omitted). The Court of Appeals has stated that “. . .so long as the agency’s decision is not predicated solely on an error of law, we will not overturn it if a reasoning mind could reasonably have reached the conclusion reached by the agency.” *State Administration Bd. of Election Laws v. Bilhimer*, 314 Md. 46, 58-59 (1988).

II. DISCUSSION

This court’s role is limited to determining whether MSBCA’s April 5, 2016 Order dismissing Pessoa’s Complaint is not based on an error of law.

COMAR 21.10.05.03A requires that “[a]n individual may appear before the Appeals Board in person, or may be represented by an attorney at law licensed in Maryland. ***Corporations, partnerships, and joint ventures shall be represented by an attorney at law licensed in Maryland.***” (Emphasis added). The requirements of COMAR 21.10.05.03 are so plain and unambiguous that the MSBCA need not look beyond its actual language for its apparent purpose. While the policy requiring corporations to be represented in the proceedings before the Board is not expressly stated, it is not difficult to understand that an artificial entity, i.e. a corporation, has no inherent right to self-representation.² When an individual attempts to appear in Court on behalf of a corporation or limited liability company, that individual – unconstrained and unlettered in the rules of professional conduct and rules of procedure – may well depart from those rules (knowingly or unknowingly). *See Dutch Village Mall v. Pelletti*, 162 Wash. App. 531, 535, 256 P.3d 1251, 1252 (2011).

It is well settled in Maryland that “unless the context indicates otherwise the word ‘shall’ is presumed to have a mandatory meaning inconsistent with the exercise of discretion.” *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 259 (2012). This does not leave the MSBCA with any discretion in its application of COMAR 21.10.05.03, mandating that corporations “shall” be represented.

² This is true despite Mitt Romney’s assertion that “Corporations are people, my friend.” *See* <http://www.nytimes.com/2011/08/12/us/politics/12romney.html>

On April 7, 2015, within a day of Pessoa filing its Notice of Appeal, the MSBCA mailed to Pessoa's attorney a letter acknowledging receipt of the appeal and advising, *inter alia*, of the requirement that Corporations, partnerships, and joint ventures shall be represented by an attorney at law licensed in Maryland. Although Mr. Pessoa states in his affidavit that he does not "recall receiving a copy of the docketing notice from the Board in MSBCA No. 2929," it is well settled in Maryland that notice to an attorney is notice to the client. *Williams v. Skyline Dev. Corp.*, 265 Md. 130, 165, 288 A.2d 333, 353 (1972); *Miller v. Mitnick*, 163 Md. 113, 118, 161 A. 157, 159 (1932).

When P&A moved to withdraw their appearance in the case, they represented that they had advised Pessoa of their intention to do so. It is not clear from the record when P&A communicated this information to Mr. Pessoa. What does not appear in the record before the court is any evidence to show:

1. that Pessoa was not aware of counsel's intention to withdraw;
2. that Pessoa made any effort to obtain other counsel after being told that P&A of their intention to withdraw;
3. that Pessoa did not receive the Motion to Withdraw Appearance;
4. that Pessoa made any effort to reply to or oppose the Motion to Withdraw Appearance.

The affidavit of Mr. Pessoa does attempt to foist blame for what happened in this case onto other parties. He contends that when he received the Motion to Dismiss, the SHA and the Board "did not inform me of a date for Pessoa to respond to SHA's motion." The court agrees with the SHA's position that Pessoa's failure to act on its own behalf does not create an obligation on behalf of the State.

After receipt of the Motion to Dismiss, which Pessoa acknowledges, Pessoa presents no evidence of any efforts it made to respond, and in fact, Pessoa never filed a response. Although Pessoa contends that he sent the Board's March 10, 2016 Order and SHA's Motion to Dismiss to P&A because he "believed that P&A was going to take care of the Order and the Motion so that Pessoa's appeal could proceed," this simply makes no sense in light of P&A's withdrawal of appearance. If Pessoa contends that P&A had a legal, moral or contractual obligation to respond to the Motion to Dismiss, the record is devoid of any evidence to that effect, or the citation of any statute, rule or case to support that position.

Pessoa had a duty to prosecute its case, and needed an attorney representing it in order to do so. While there is no COMAR provision that *requires* dismissal of a case when a corporation fails to have counsel as required, it is certainly within the power and authority of the Board to dismiss the case under the facts as presented here. While Pessoa asserts that the Board acted arbitrarily in this case, the record simply does not bear that out. The Motion to Dismiss was filed on March 11, 2016 and mailed to Pessoa on that date. It was not until April 5, 2016, 25 days later, that the Board issued its ruling. In the period between the filing of the motion and the ruling, Pessoa did nothing *vis-à-vis* the Board. Even after the Board issued the Order dismissing the case on April 5, 2016, Pessoa did nothing until the Petition for

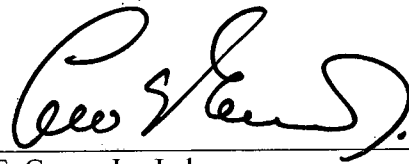
Judicial Review was filed with this court on June 17, 2016. It is clear from the record that after P&A withdrew from the case, Pessoa did nothing to monitor the status of the litigation, take affirmative action to respond to the Motion to Dismiss or obtain new counsel. Pessoa failed to act when it had an opportunity and responsibility to do so. It is a well-established principle of Maryland law that pro se parties must adhere to procedural rules in the same manner as those represented by counsel. *Tretick v. Layman*, 95 Md. App. 62, 68, 619 A.2d 201, 204 (1993). By failing to be represented by counsel when required to do so and in its failure to respond to the Motion to Dismiss, Pessoa failed to adhere to the COMAR provisions governing proceedings before the Board. Although Pessoa attempts to shift this responsibility to the MSBCA, the SHA and/or his former counsel, nothing in the record constitutes an excuse in the opinion of the court.

Nor does the record disclose that Pessoa was denied his due process rights. While counsel has advanced arguments that the notice provided by the Board was deficient, there is no question that there was notice provided in this case that the corporation have counsel, notice of the Motion to Withdraw and order granting same, and notice of the Motion to Dismiss that were provided in this case. While admiring the advocacy of counsel, the court does not believe that notice, or service of notice, was not adequate under the law. There is nothing that requires that a party be advised of a deadline to obtain new counsel once a motion to withdraw is granted, nor any requirement that an unrepresented litigant be advised of a deadline to respond to a motion to dismiss.

For the foregoing reasons, it is this 2nd day of February, 2018 by the Circuit Court for Prince George's County,

ORDERED, that the decision of the Maryland State Board of Contract Appeals' granting of SHA's Motion to Dismiss Pessoa's Complaint on April 5, 2016 is hereby **AFFIRMED**; and it is further

ORDERED, that this case is **CLOSED STATISTICALLY**.

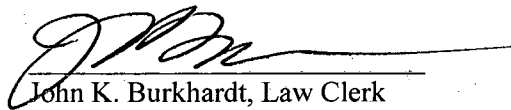


Leo E. Green, Jr., Judge

Copies sent by the Court to:

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A handwritten signature in black ink, appearing to read 'J. Burkhardt', with a long horizontal flourish extending to the right.

John K. Burkhardt, Law Clerk
to the Honorable Leo E. Green, Jr.