

Circuit Court for Prince George's County
Case No. CAL16-26366

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0056

September Term, 2018

IN THE MATTER OF PESSOA
CONSTRUCTION CO., INC.

Kehoe,
Arthur,
Shaw Geter,

JJ.

Opinion by Arthur, J.

Filed: March 22, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In a proceeding before the Maryland State Board of Contract Appeals, the attorney for a corporation withdrew from the representation of his client. The corporation's adversary, the State Highway Administration, moved to dismiss the proceeding because the applicable rules require a corporation to be represented by counsel. Although the corporation was served with the motion to dismiss, it did not respond. The Board of Contract Appeals granted the unopposed motion.

On the corporation's petition for judicial review, the Circuit Court for Prince George's County affirmed. On the corporation's appeal from that decision, we too affirm.

BACKGROUND FACTS

Pessoa Construction Co. is a Maryland corporation. In 2010 Pessoa entered into a multi-million dollar contract with the State Highway Administration for the widening and replacement of the bridge over a busy highway intersection in Prince George's County.

Disputes arose over Pessoa's performance. In brief, it appears that Pessoa requested additional compensation and a remission of liquidated damages that the State had imposed.

On March 6, 2015, the procurement officer for the State Highway Administration denied Pessoa's request. On approximately March 31, 2015, Pessoa, through counsel, filed a timely appeal of that decision in the Board of Contract Appeals.

Pessoa agrees that on April 7, 2015, the Board sent a one-page docketing notice to the corporation's counsel. Among other things, the notice states:

Please be advised that COMAR 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.

On May 7, 2015, Pessoa, through new counsel, filed a timely complaint, in which it requested over \$3.7 million in additional compensation, plus interest, and the remission of liquidated damages. On May 27, 2015, Pessoa filed a notice of substitution of counsel, in which its new counsel, who had filed the complaint, replaced its previous counsel, who had filed the notice of appeal.

About eight months later, on February 11, 2016, Pessoa's new counsel moved to withdraw his appearance. Among other things, the motion to withdraw asserted that Pessoa had been "given reasonable notice that Counsel intends to withdraw and the opportunity to retain new counsel." In addition, the motion asserted that Pessoa "may continue with this matter in person and unrepresented by counsel." The latter assertion was incorrect.

Although Pessoa's counsel served the corporation with the motion to withdraw, Pessoa did not respond. Nor did the State Highway Administration.

On March 10, 2016, the Board signed an order granting the unopposed motion to withdraw. The Board sent a copy of the order to Pessoa. The Board's order did not repeat its previous advice that under COMAR 21.10.05.03 a corporation like Pessoa must be represented by counsel.

On March 11, 2016, the day after the Board signed the order granting the motion to withdraw, the State Highway Administration moved to dismiss the proceeding because

Pessoa was no longer represented by counsel. In that motion the State Highway Administration observed that Pessoa had been given reasonable notice of its attorney's intention to withdraw; that despite that notice, Pessoa did not retain new counsel before the filing of the motion to withdraw; that, in the month after the filing of the motion to withdraw, Pessoa had still not retained new counsel; and that, at the outset of the litigation, Pessoa had been advised that it was required to be represented by counsel.

Although the motion to dismiss was served on Pessoa, it did not respond, just as it did not respond to its counsel's motion to withdraw. On April 5, 2016, the Board granted the unopposed motion and ordered that the appeal be dismissed, with prejudice.

On June 16, 2016, Pessoa, through its original attorney, filed a petition for judicial review in the Circuit Court for Prince George's County.¹ After briefing and argument, the circuit court issued an opinion and order dated February 2, 2018, and docketed on February 5, 2018, in which it affirmed the Board's dismissal of Pessoa's complaint. This timely appeal followed.

¹ In view of the two-month gap between the Board's order and Pessoa's petition, one might reasonably question whether the petition was timely. *See* Md. Rule 7-203 (stating that "a petition for judicial review shall be filed within 30 days after the latest of: (1) the date of the order or action of which review is sought; (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner[>"). Pessoa, however, represented that it did not receive notice of the order until June 1, 2016. Apparently because of Pessoa's representation, the circuit court denied a motion to dismiss the petition on the ground that it was untimely.

QUESTIONS PRESENTED

Pessoa presents three questions, which we have consolidated and restated with minor changes:

1. Did the Board of Contract Appeals use an unlawful procedure in dismissing Pessoa's appeal with prejudice upon a motion to dismiss for lack of representation by counsel?
2. Did the Board of Contract Appeals commit legal error or act arbitrarily and capriciously by not issuing a show cause order before dismissing Pessoa's appeal with prejudice for lack of representation by counsel?
3. Did the Board of Contract Appeals violate Pessoa's right of due process when it dismissed Pessoa's appeal with prejudice without correcting the misstatement by Pessoa's counsel that Pessoa could represent itself?²

STANDARD OF REVIEW

Our role in reviewing an administrative agency's decision is narrow. *Montgomery v. E. Corr. Inst.*, 377 Md. 615, 625 (2003). We look through the circuit court's decision and review the agency's decision directly. *Kor-Ko Ltd. v. Md. Dep't of the Env't*, 451

² Pessoa phrased its questions as follows:

[1.] Whether the Maryland State Board of Contract Appeals utilized an unlawful procedure in dismissing Appellant's appeal with prejudice upon a motion to dismiss for lack of representation by counsel?

[2.] Whether the Maryland State Board of Contract Appeals erred legally or acted arbitrarily and capriciously by not issuing a show cause order prior to and instead of dismissing Appellant's appeal with prejudice for lack of representation by counsel?

[3.] Whether the Board violated Pessoa's constitutional right of due process when it dismissed Pessoa's appeal with prejudice without Board notice to retain new counsel or face dismissal after Pessoa was misinformed about the requirement to have counsel?

Md. 401, 409 (2017). In general, we are “‘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.’” *Montgomery*, 377 Md. at 625 (quoting *United Parcel v. People’s Counsel*, 336 Md. 569, 577 (1994)).

DISCUSSION

In its lead argument, Pessoa asserts that the Board had no authority to dismiss its appeal on the ground of a violation of COMAR 21.10.05.03.A, which requires corporations to be represented by counsel.³ In support of its argument, Pessoa observes that the Board’s rules authorize motions to dismiss only for failure to state a claim upon which relief can be granted (COMAR 21.10.05.06.C) and for lack of jurisdiction (COMAR 21.10.06.05). In the absence of a rule expressly authorizing the dismissal of an appeal for violating the rule requiring corporations to be represented by counsel, Pessoa concludes that the Board acted unlawfully. Pessoa suggests that, under the applicable rules, the Board could, at most, have ordered it to show cause why the appeal should not

³ When the Board dismissed Pessoa’s appeal in 2016, COMAR 21.10.05.03.A stated:

An 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.

In 2018 the regulation was amended to require LLCs and “other entities” to “be represented by an attorney at law licensed in Maryland.”

be dismissed for failure to prosecute and dismissed the appeal (without prejudice) if Pessoa failed to respond.

Pessoa bases its argument on *Engineering Mgmt. Servs., Inc. v. State Highway Admin.*, 375 Md. 211 (2003). In that case the Court of Appeals held that the Board of Contract Appeals acted unlawfully when it granted a motion for “summary disposition” without first promulgating regulations to define what “summary disposition” is, or to set forth the standards and conditions under which it would be appropriate to seek and grant summary disposition, or to define the procedures that the Board would use in making such a determination. *Id.* at 235. “Absent such standards, procedures, and definitions,” the Court asserted, “the courts cannot make a determination as to whether, in application, an error of law or procedure otherwise occurred at the administrative level.” *Id.* at 235-36. Because the Board had granted a motion for summary disposition without promulgating procedural rules to govern its conduct, the Court reversed the Board and effectively remanded the case for a hearing on the merits. *See id.* Pessoa argues that we should reach the same result in this case because of the Board’s failure to promulgate a procedural rule concerning motions to dismiss on the ground that a corporation is unrepresented by counsel.

The principal problem with Pessoa’s argument is that “[j]udicial review of administrative decisions generally is limited to the issues raised before the agency.” *Engineering Mgmt.*, 375 Md. at 235 (citing *Mayor and Council of Rockville v. Woodmont Country Club*, 348 Md. 572, 582 n.3 (1998); *Insurance Comm’r v. Equitable Life Assurance Soc’y*, 339 Md. 596, 634 (1995)); accord *Motor Vehicle Admin. v. Shepard*,

399 Md. 241, 260 (2007) (“[i]t is a settled principle of Maryland administrative law that, in an action for judicial review of an adjudicatory administrative agency decision, the reviewing courts should decline to consider ‘an issue not raised before the agency’”) (Eldridge, J., concurring) (quoting *Brodie v. Motor Vehicle Admin.*, 367 Md. 1, 4 (2001)); *Delmarva Power & Light Co. v. Public Serv. Comm’n*, 370 Md. 1, 32 (2002) (“[w]e do not allow issues to be raised for the first time in actions for judicial review of administrative agency orders entered in contested cases because to do so would allow the court to resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency”); *Cicala v. Disability Review Bd. for Prince George’s County*, 288 Md. 254, 261-62 (1980) (“[a] party who knows or should have known that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceeding, may not raise an objection for the first time in a judicial review proceeding[.]”); *Arking v. Montgomery County Planning Bd.*, 215 Md. App. 589, 596-97 (2013); *Roane v. Maryland Bd. of Physicians*, 213 Md. App. 619, 636 (2013); *Capital Commercial Props., Inc. v. Montgomery County Planning Bd.*, 158 Md. App. 88, 96-97 (2004).

Before the Board of Contract Appeals, Pessoa did not raise any issue concerning the Board’s authority to dismiss a complaint because a corporation was unrepresented by counsel, in violation of the COMAR regulations. In particular, Pessoa did not argue that the Board had no power to dismiss a complaint because a corporation was unrepresented by counsel unless it promulgated a rule that expressly authorized it to do so. Nor did

Pessoa argue that, before the Board could dismiss its complaint, it was required to issue an order to show cause why the complaint should not be dismissed for failure to prosecute the case under COMAR 21.10.06.30 and to await Pessoa’s response (if any). In fact, in response to the motion to dismiss, Pessoa argued nothing at all: it completely defaulted. We cannot fault the Board of Contract Appeals for failing to consider arguments that Pessoa never asked it to consider.⁴

Even if the issue were properly before us, we would not reverse the dismissal of Pessoa’s complaint. Although the State Highway Administration called its motion a motion to dismiss, the motion could just as well have been called a motion for summary decision, for which the Board (since *Engineering Mgmt.*) has promulgated a procedural rule: COMAR 21.10.05.06.D. Under that rule, “[a] party may move for summary decision on any *appropriate issue* in the case” (*id.*) (emphasis added), a concept that is certainly broad enough to include the issue of whether a corporation is entitled to prosecute an appeal when it is unrepresented by counsel, in violation of the Board’s rules.

⁴ In *Engineering Mgmt.*, 325 Md. at 229-36, the Court considered whether the Board could grant a motion for summary disposition in the absence of a procedural rule on that subject even though the issue had *not* been raised before the agency. The Court considered the issue, however, only because, in the absence of a rule defining what summary disposition was and when the Board could grant it, a reviewing court would be unable to determine whether the Board had erred in granting summary disposition. *See id.* at 235. We face no such problem in this case. In *Engineering Mgmt. Servs.*, it was apparently unclear whether a motion for summary disposition was the administrative equivalent of a motion for summary judgment, which the Board could grant only if the facts were undisputed; or whether it was a novel procedure under which the Board could resolve some factual disputes without the need for a trial. In this case, by contrast, there is no uncertainty as to the standards that the Board employed in disposing of Pessoa’s appeal.

The Board may grant a motion for summary decision if it finds that:

(a) After resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and

(b) A party is entitled to prevail as a matter of law.

COMAR 21.10.05.06.D.

This is essentially what the Board did in summarily disposing of Pessoa's complaint. Notwithstanding the merits of Pessoa's case, the Board concluded that the State Highway Administration was entitled to prevail, because Pessoa was required to be represented by counsel, its counsel had withdrawn, and it had not engaged new counsel even though it had had a reasonable amount of time to do so. Because the motion required the Board to look beyond the four corners of Pessoa's complaint to consider a defense that overcomes Pessoa's right to recover whatever the merits might otherwise be, the motion resembles a motion for summary judgment on the ground of a pure legal defense such as *res judicata*, collateral estoppel, discharge in bankruptcy, etc. The grant of the unopposed motion was not unlawful merely because the State Highway Administration called it a "motion to dismiss" rather than a "motion for summary disposition."

In an alternative argument, Pessoa contends that the Board acted arbitrarily and capriciously by dismissing the appeal rather than ordering Pessoa to show cause why the appeal should not be dismissed for nonprosecution under COMAR 21.10.06.30 and awaiting Pessoa's response (if any). Again, however, that issue is not before us, because

Pessoa did not present it to the Board. *See supra* pp. 6-7. In any event, even if the issue were before us, we would reject Pessoa’s contention.

COMAR 21.10.06.30 states:

If a record discloses the failure of either party to file documents required by these regulations, respond to notices or correspondence from the Appeals Board, [or] comply with orders of the Appeals Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Appeals Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If the offending party fails to show cause, the Appeals Board may take such action as it deems reasonable and proper under the circumstances.

Pessoa did not fail to file documents required by the Board’s rules, fail to respond to notices or correspondence from the Board, or fail to comply with the Board’s orders (as opposed to its rules). Hence the rule might apply only if Pessoa could be said to have “indicate[d] an intention not to continue the prosecution or defense of an appeal, or otherwise indicate a clear intention not to continue the prosecution . . . of an appeal” when it failed to respond to its adversary’s motion to dismiss. It is not entirely clear why an agency should be expected to inquire about why a party has failed to respond to a motion rather than simply grant the unopposed motion. Nonetheless, assuming solely for the sake of argument that the rule might apply in that instance, the Board still would not have been compelled to issue a show cause order before dismissing the appeal, because the rule does not state that the Board “shall” issue an order, but only that it “may” do so. The Board was not required to issue a show cause order on its motion when Pessoa failed to engage new counsel or failed to respond to a motion to dismiss.

Finally, Pessoa argues that it was deprived of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights. As the principal ground for that conclusion, Pessoa cites the Board’s failure to correct the misstatement by Pessoa’s former counsel, that the corporation could represent itself. Again, that issue is not properly before us, because Pessoa did not raise it in the Board of Contract Appeals. *See supra* pp. 6-7. “Even though one may have a constitutional right to a particular procedure, that right may be subjected to a reasonable requirement that some action be taken within a specified time in order to exercise the right.” *Heft v. Maryland Racing Comm’n*, 323 Md. 257, 270 (1991).

Even if the due process issue were before us, we would find Pessoa’s arguments to be unpersuasive. At the outset of the litigation, the Board advised Pessoa, which is not an inexperienced litigant,⁵ that it was required to be represented by counsel. While the Board did not correct Pessoa’s former counsel’s subsequent misstatement that Pessoa could represent itself, Pessoa unquestionably had notice that the statement might have been incorrect when the State Highway Administration moved to dismiss the appeal on the ground that Pessoa was violating the Board’s rules because it was purporting to

⁵ A review of the Board’s online records reveals at least one, previous appeal by Pessoa: *Pessoa Constr. Co., Inc. v. Maryland Aviation Admin.*, MSBCA 2652 (2009). In addition, Pessoa has engaged in litigation in Maryland courts, *Town of Chesapeake Beach v. Pessoa Constr. Co.*, 330 Md. 744 (1993)), where a corporation ordinarily must be represented by counsel. *See* Md. R. 2-131(a)(2) (stating that “[e]xcept as otherwise provided by rule or statute . . . a person other than an individual may enter an appearance only by an attorney[]”).

represent itself. At that point, Pessoa had any number of options, the most sensible of which was probably to ask an attorney to explain the discrepancy between its former counsel's representation and the assertions in its adversary's motion to dismiss. If Pessoa had sought an explanation and hired an attorney to enter an appearance on its behalf, it would have obliterated the entire basis for the motion to dismiss. Pessoa, however, did nothing. It apparently did not consult with an attorney; it certainly did not engage an attorney; it definitely did not request more time to engage an attorney or to oppose the motion; and it did not oppose the motion even though it had a reasonable time to do so.

In short, Pessoa did not lose its property rights (its claim) because of the absence or insufficiency of any procedural safeguards; it lost its rights because it failed to avail itself of the procedures that were at its disposal. The Board's decision, therefore, did not deprive Pessoa of due process of law. *Heft v. Maryland Racing Comm'n*, 323 Md. 257, 270-71.

When the Board permits a corporate party's attorney to withdraw, it might make sense for the Board to repeat its admonition that a corporation must be represented by counsel. *Cf.* Md. Rule 2-132(c) (stating that, when a court has permitted an attorney to withdraw "and the client has no attorney of record and has not mailed written notification to the clerk of an intention to proceed in proper person, the clerk shall mail a notice to the client's last known address warning that if new counsel has not entered an appearance within 15 days after service of the notice, the absence of counsel will not be grounds for a continuance" and shall "warn the client of the risks of dismissal, judgment by default, and assessment of court costs"). Nonetheless, in the circumstances of this case, where the

motion to dismiss put Pessoa on notice of its obligation to engage counsel, the Board cannot be said to have violated Pessoa's constitutional rights by failing to incorporate that reminder into the order that permitted Pessoa's former counsel to withdraw.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**