UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0971

September Term, 2015

VERNARD McBETH

v.

OFFICE OF CONSUMER PROTECTION, COMMISSION ON COMMON OWNERSHIP, ET AL.

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: May 16, 2016

The Office of Consumer Protection, Commission on Common Ownership Communities ("CCOC"), denied all but one of appellant Vernard McBeth's claims against Fountain Hills Community Association ("Fountain Hills"), of which McBeth had been a member. When McBeth petitioned the Circuit Court for Montgomery County for judicial review, Fountain Hills moved the court to dismiss the petition. The court granted Fountain Hills' motion and dismissed McBeth's petition with prejudice.

QUESTIONS PRESENTED

McBeth presents three issues for review, which we have rephrased and consolidated:

I. Did the circuit court err in dismissing McBeth's petition for judicial review?

II. Did the circuit court err in denying McBeth's motion to strike Fountain Hills from the proceedings? [1]

[1] McBeth originally presented his questions in the following manner:

I. Whether appellees (including FHCA) waived any and all rights to participate in this matter and thus were improperly permitted to do so by The Honorable Gary E. Bair?

II. Whether The Honorable Gary E. Bair improperly dismissed the lower court proceeding without explanation or a hearing, and with prejudice.

A. Whether appellant's petition for judicial review was timely filed and if not was the "late filing" issue waived?

B. Whether appellant was misled by appellee(s) regarding the burden, extent and cost of transmitting the record thus prejudicing appellant?

C. Whether appellant substantially complied with the record transmission requirement(s)?

III. Whether dismissal of this action was a drastic measure causing undue harm/prejudice to appellant and contrary to public policy/community/county/ state interest?

We hold that the circuit court did not err in dismissing McBeth's petition. The court had no discretion to review the petition, as it had been filed far beyond the statutory deadline. Nor do we see any error in the court's denial of McBeth's motion to strike Fountain Hills from the proceedings. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In his original complaint, McBeth made five allegations, four of which the CCOC accepted. On May 1, 2014, following a hearing, the CCOC found that on a number of occasions Fountain Hills had failed to comply with the open-meeting requirements of the Homeowners Association Act.[2] The CCOC denied McBeth's other claims.

On May 9, 2014, McBeth moved the CCOC to reconsider. The CCOC denied the motion on May 15, 2014.

The CCOC issued a "Notice of Errata to Decision and Order" on August 1, 2014, in which it corrected a clerical error on one page of its original decision – the page containing the agency's final "conclusions of law" and "orders." The correction simply fixed the misnaming of Fountain Hills in the order. The errata notice appended the entire page containing the "conclusions of law" and "orders," as they were originally drafted, save for the corrected error.

On August 27, 2014 – 26 days after the errata notice but 104 days after the CCOC's final order – McBeth filed his petition for judicial review. After receiving notice of the petition, counsel for Fountain Hills entered his appearance on its behalf on

[2] *See* Md. Code (1987, 2010 Repl. Vol.), § 11B-111 of the Real Property Article.

September 30, 2014. Counsel withdrew his appearance on October 22, 2014. His replacement entered her appearance on December 3, 2014.

In the meantime, on October 27, 2014, McBeth moved the court for an extension of 60 days to ensure that the CCOC would transmit the record to the court in accordance with Md. Rule 7-206.[3] The court on December 24, 2014, granted the extension in part, allowing McBeth until January 30, 2015, to transmit the record to the court.

On January 30, 2015, the record still not having been transmitted, McBeth filed a "Motion to Stay and/or Continue Appeal," in which he argued that the parties had entered into settlement discussions and that granting the motion would both help the parties and not prejudice either one. On February 20, 2015, Fountain Hills opposed that motion while simultaneously moving to dismiss the petition for judicial review because it was untimely and because McBeth had not yet transmitted the administrative record. McBeth opposed the motion to dismiss and moved the court to strike Fountain Hills' filings and to exclude Fountain Hills from further court proceedings.

The circuit court issued an order, entered on the docket April 1, 2015, in which it denied McBeth's motion to stay or continue the appeal, denied McBeth's motion to strike

[3] Rule 7-206(d) states that, "[e]xcept as otherwise provided by this Rule, the agency [possessing the administrative record] shall transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after the agency receives the first petition for judicial review." Although the agency has the initial responsibility, "it is 'incumbent upon . . . [petitioner] to initiate the process of obtaining a transcript[]' and the petitioner bears the responsibility for compliance with the rules." *Montgomery Cnty. v. Post*, 166 Md. App. 381, 388 (2005) (citations omitted). The penalty for noncompliance is dismissal, but a "defense to possible dismissal is that noncompliance was caused by the agency." *Id.* (citing Rule 7-206(d)) (citations omitted). "Upon motion by the agency or any party, the court may . . . extend the time for transmittal of the record . . . for no more than an additional 60 days." Rule 7-206(e).

Fountain Hills' filings and exclude Fountain Hills from the proceedings, and granted Fountain Hills' motion to dismiss McBeth's petition. McBeth moved the court to alter, amend, or revise its judgment, but the court denied that motion in an order entered on June 10, 2015. This appeal followed.

DISCUSSION

McBeth claims that the circuit court erred in dismissing his petition for judicial review. He argues that he did not file the petition in an untimely manner and that if he did, Fountain Hills waived its right to oppose the petition on that ground. He also argues that he substantially complied with the court's requirement that he transmit the record under Md. Rule 7-206 and that dismissal caused him undue prejudice.

We conduct a de novo review of a trial judge's decision that involves a purely legal question. *Ehrlich v. Perez*, 394 Md. 691, 708 (2006). The proper standard for reviewing the grant of a motion to dismiss is whether the trial court was legally correct. *Higginbotham v. Pub. Serv. Comm'n*, 171 Md. App. 254, 264 (2006) (citations omitted).

Pursuant to Md. Rule 7-203, a petition for judicial review generally shall be filed within 30 days after the date of the order of which review is sought.[4] *Kim v. Comptroller*

[4] Under Rule 7-203(a), the deadline for filing a petition for judicial review of an ALJ's decision is 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.

of Treasury, 350 Md. 527, 532-33 (1998); *S.B. v. Anne Arundel Cnty. Dep't of Soc. Servs.*, 195 Md. App. 287, 305 (2010). Because a circuit court does not have discretion to consider late-filed petitions for judicial review, the court cannot review the administrative decision when a petition is filed beyond the 30-day period. *Colao v. Cnty. Council of Prince George's Cnty.*, 346 Md. 342, 360 (1997).

"[T]his deadline has consistently been treated as an absolute statute of limitations, subject to waiver by failure of a respondent to raise the defense in a proper manner but not subject to discretionary extension[.]" *S.B.*, 195 Md. App. at 307-08 (quoting *Colao*, 346 Md. at 364) (citations and quotation marks omitted). A petition filed beyond the period of limitations "cannot be sustained simply because the late filing was the result of a 'clerical error' on the part of a petitioner" or her attorney. *Colao*, 346 Md. at 363. Nor can a late-filed petition be accomplished by amending an existing petition. *Id.*

Here, the CCOC entered its initial order on May 1, 2014. McBeth filed a timely motion for reconsideration, which stayed the time for him to seek judicial review of the decision. *See* Montgomery Cnty. Code, ch. 2A, § 10(f) ("Any request for rehearing or reconsideration shall stay the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted such further time or a subsequent decision is rendered"); *see also Montgomery Cnty. v. McDonald*, 68 Md. App. 307, 314 (1986). When the CCOC denied this motion on May 15, 2014, the 30-day clock began to run. *See Robinson v. Montgomery Cnty.*, 66 Md. App. 234, 242 (1986). McBeth ran out of time on June 14, 2014.

McBeth filed his petition for judicial review on August 27, 2014, more than 100 days after the CCOC denied his motion to reconsider. Under these facts, it is beyond any doubt that McBeth's petition for judicial review was untimely. The circuit court had no discretion to review the petition and properly dismissed it. *Coloa*, 346 Md. at 360; *see also Robinson*, 66 Md. App. at 242.

McBeth argues, however, that the time for filing was effectively reset by the CCOC's "notice of errata," entered August 1, 2014, in which it corrected one clerical error in its original order. McBeth also seems to argue that the 30-day clock was somehow tolled by a letter he had sent to the CCOC on June 20, 2014,[5] which McBeth says directly prompted the "notice of errata."

We disagree. A simple letter sent to an agency following its final decision has no effect on the 30-day limitations period under Rule 7-203. Even if it did, McBeth claims to have sent his letter 36 days after the CCOC had denied his motion for reconsideration – i.e., after the 30 days had run their course.

Likewise, the CCOC's August 1, 2014, "notice of errata" did not reset the clock and extend the deadline for filing a petition. We are not persuaded by McBeth's suggestion that this notice constituted a *new* order simply because, in appending the page containing the clerical correction, the CCOC also included that part of the original order that noted McBeth's right to "appeal" to the circuit court "within thirty (30) days from the date of this Order[.]" This notice corrected an immaterial clerical error in an order

[5] We are forced to take McBeth at his word on this point, as he has not included any such letter in the record extract.

that already was final. It did not vacate the prior order, and it did not purport to enter any new order in its place. *Compare Hercules Inc. v. Comptroller of Treasury*, 351 Md. 101, 108-09 (1998) (holding that under Rule 7-203(a)(1), where tax court withdrew prior order and reinstated new one, 30-day clock began to run from date of reinstatement and not from date of original order).

McBeth lastly asserts that, because the circuit court should have granted his motion to preclude Fountain Hills from proceeding any further, Fountain Hills' motion to dismiss the untimely petition was improper. The limitations period imposed by Rule 7-203 is "subject to waiver by failure of a respondent to raise the defense in a proper manner." *Colao*, 346 Md. at 364; *see also Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 705 (1999). The accepted means of challenging petitions for judicial review are by "preliminary motion under Rule 7-204 or in the answering memorandum filed pursuant to Rule 7-207." Comm. Note to Md. Rule 7-203(b).

McBeth's argument has no merit. The CCOC, in its motion to dismiss, did challenge McBeth's petition as untimely under Rule 7-203. Nor was there anything improper about the court's acceptance of Fountain Hills' challenge to McBeth's petition on this ground. Consequently, Fountain Hills did not effectively waive anything under the Rule, and the court remained without discretion to review a petition that had clearly been filed too late.

McBeth bases his claim of waiver on his separate claim that the circuit court abused its discretion in denying his motion to preclude Fountain Hills from participating in further proceedings. McBeth argues that by not filing its first response (in the form of

its motion to dismiss) until February 20, 2015, Fountain Hills violated Rule 7-204(c), which states that a party opposing a petition for judicial review must file a response "within 30 days after the date the agency mails notice of the filing unless the court shortens or extends the time." McBeth also argues that by waiting until March 30, 2015, to file any response stating its "intent to participate," Fountain Hills violated Rule 7-204(a), which states that any person who wishes to participate as a party "shall file a response to a petition" for judicial review and "shall state the intent to participate in the action for judicial review." McBeth concludes that the circuit court was required to strike Fountain Hills' filings and to preclude it from further participating.

We do not agree. Unlike Rule 7-203, which affords the trial court no discretion to disregard the 30-day limit on petitions for judicial review, Rule 7-204(c) is not mandatory. Instead, a court has broad discretion to flexibly apply Rule 7-204(c).

Rule 7-204(c) allows courts to "shorten[] or extend[]" the response's filing deadline. *See Dep't of Pub. Safety & Corr. Servs. v. Neal*, 160 Md. App. 496, 509 (2004) ("Rule 7-204 expressly grants the court discretion to extend the time for filing a response to the petition; and the [Rule's] language . . . does not preclude the court from exercising that discretion to extend the filing deadline retroactively, after it has passed").

Neal held that the circuit court properly permitted the respondent, Neal, to file her response several weeks late, and in the form of an opposition to the petitioner's motion to stay. *Id.* at 510. Neal filed the opposition fewer than four weeks after the response was due, before the petitioner had even filed its required pre-trial memorandum under Md. Rule 7-207, and well before the scheduled date for oral argument; therefore, Neal "acted

to maintain, not abandon, her party status." *Id.* In reaching its decision, this Court stressed that the circuit court had discretion to treat Neal's opposition as a "response" and that her opposition adequately expressed an "intent to participate," as required by Rule 7-204(a). *Neal*, 160 Md. App. at 509-10.

In this case, the circuit court was well within its discretion to accept the motion to dismiss as a proper "response" under the Rule even though it came in the form of a motion to dismiss and even though Fountain Hills filed it several months late. Moreover, through the motion to dismiss, if not through the two entries of appearance by counsel in the preceding months, the CCOC made its "intent to participate" in proceedings clear, even if it did not use those precise words.

More important, we cannot see how McBeth was in any way prejudiced by the circuit court's decision to permit the CCOC to participate in the proceedings. By this point in the proceedings, McBeth already had overshot his mandatory filing deadline by more than two months, had asked for and received an extension of time to successfully transmit the administrative record to the circuit court, but *still* had not transmitted the record one month after the new deadline had passed. Because the record had not yet been filed in the circuit court, McBeth had not yet filed the memorandum "setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question." Rule 7-207(a). No oral arguments had even been scheduled because of these delays.

To conclude, the circuit court properly allowed the CCOC to continue to participate in court proceedings, and the court had no discretion but to dismiss McBeth's untimely petition for judicial review.[6]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY ALL COSTS.

[6] Because we affirm the circuit court's dismissal on this ground, we need not reach the separate question of whether McBeth substantially complied with the Rule 7-206 requirement that he transmit the administrative record to the circuit court.