

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Civil Action No. 2013-CP-40-2177

Vivint, Inc.,

Respondent,

v.

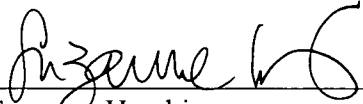
South Carolina Contractors'
Licensing Board,

Appellant.

NOTICE OF APPEAL

The South Carolina Contractors' Licensing Board appeals the order of the Honorable Robert E. Hood dated June 18, 2013. Appellant received written notice of entry of this order on July 15, 2013.

July 24, 2013


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RECEIVED

JUL 24 2013

S.C. Supreme Court

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS
 Vivint, Inc.

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-2177
 South Carolina Contractors' Licensing Board

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Verdict Non-Compliant); Rule 43(k), SCRPC (Settled); Other Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other

RICHLAND COUNTY
 FILED
 JUN 26 AM 10:02
 JEANETTE W. McBRIDE
 C. CLERK & CLERK

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Plaintiff's Motion for a Preliminary Injunction is GRANTED. See attached order.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|---|---------------------------------------|--------------------------------|
| | | \$ |
| | | \$ |
| | | \$ |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Re Hood Judge Code 2164 Date June 18, 2013

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 26 day of June, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Karl Bowers
 ATTORNEY(S) FOR THE PLAINTIFF(S)

Susan Hawkins
 ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Vivint, Inc.,) Civil Action No. 2013-CP-40-2177

Plaintiff,)

vs.)

South Carolina Contractors' Licensing)
Board,)

Defendant.)

ORDER

RICHLAND COUNTY
FILED
2013 JUN 26 AM 10:01
JEANETTE W. McBRIDE
C.C.P. & G.S.

Before the Court is Vivint, Inc.'s motion for a preliminary injunction. The Court grants Vivint's motion on the conditions discussed herein.

BACKGROUND

This case arises out of Vivint's efforts to renew its license to provide residential security services in South Carolina. According to the complaint, Vivint is one of the largest residential security and home automation providers in North America, serving nearly 700,000 customers in the United States and Canada. Vivint has continuously maintained a license in South Carolina since 2006, and it provides life and safety services to approximately 12,000 South Carolinians.

Since 2010, Vivint has been in the process of attempting to renew its license, which is required every two years. S.C. Code Ann. § 40-79-240(A). The Alarm System Business Act imposes only two requirements for a licensee to renew its license: (1) a licensee must submit a new criminal background check if any employee who was previously required to submit a criminal background check has been convicted of a

SCANNED

crime; and (2) a licensee must submit proof of a current comprehensive general liability insurance policy. *Id.* §§ 40-79-240(C) & (E).

Vivint alleges that the South Carolina Contractors' Licensing Board unlawfully considers materials and information beyond these two statutory criteria when evaluating license renewal applications. In support of these allegations, Vivint has included as an exhibit to its complaint a copy of the license-renewal form used by the Board—"Document 140," in the agency's parlance—that contains six "Renewal Questions" requiring a licensee to submit certain information that goes beyond either of the two statutory criteria for renewing a license. Vivint seeks a preliminary injunction prohibiting the Board from taking any adverse action against Vivint's license until this Court has an opportunity to review the lawfulness of the Board's conduct and processes.

At the time Vivint filed this suit, it had pending a renewal application with the Board.¹ Between the commencement of this litigation and the hearing on Vivint's motion for a preliminary injunction, the Board held a hearing on Vivint's renewal application. At that hearing, the agency moved to deny the application, citing South Carolina Code § 40-79-130(1)(b) as the basis for its decision.

At this Court's hearing on Vivint's motion for a preliminary injunction, the parties agreed on the following information about the agency-level proceedings: (1) the Board did not base its decision to deny Vivint's application on either of the two statutory criteria on which the Board may lawfully deny a renewal application; (2) the Board has not yet reduced its decision to writing; and (3) until the Board memorializes its decision

¹ In 2010, Vivint applied to renew its license, but the Board denied that renewal application via an order dated June 8, 2011. On appeal, the Administrative Law Court reversed the Board's decision and remanded the case back to the agency.

in writing, the ruling is ineffective, which means that Vivint's license is still fully active, and Vivint is licensed to operate in South Carolina, even though the South Carolina Department of Labor, Licensing and Regulation's website did not indicate that Vivint is licensed to operate in this state.

Vivint argues that because it is making constitutional challenges to the agency's conduct and procedures, an injunction is necessary to keep its license from being revoked until the Court has an opportunity to fully review this matter. In response, the Board argues that Vivint will not suffer irreparable harm in the absence of an injunction because Vivint may be able to persuade the Administrative Law Court to overrule the Board's decision, assuming it is ever reduced to a written order and assuming Vivint timely appeals the Board's decision to the Administrative Law Court.

The parties have filed memoranda regarding their respective positions. On May 30, 2013, the Court held a hearing on Vivint's motion, during which both parties were represented by counsel. After fully considering the parties' oral and written submissions and the law governing these issues, the Court agrees that a preliminary injunction is appropriate in the unique circumstances of this case.

DISCUSSION

The Court has "the power of equity to enjoin illegal exercise of governmental power." James B. Richardson, Jr., "Judicial Review of Agency Decisions," in *South Carolina Administrative Practice and Procedure*, 495 (Randolph L. Lowell ed., 2d ed. 2008). Injunctive relief is vested in the Court's discretion, and it should issue when reasonably necessary to preserve the status quo while litigation is pending. *Hook Point, LLC v. Branch Banking & Trust Co.*, 397 S.C. 507, 510-11, 725 S.E.2d 681, 683 (2012).

The Court may order a preliminary injunction when three factors are satisfied: (1) absent injunctive relief, the movant will be irreparably harmed; (2) the movant is likely to succeed on the underlying merits; and (3) there is no adequate remedy at law. *Id.* at 511, 725 S.E.2d at 683. The Court finds that all three criteria are met here.

I. Irreparable Harm Without an Adequate Legal Remedy

With respect to the presence of an irreparable harm for which there is no adequate legal remedy, the Board argues that no irreparable harm will befall Vivint in the absence of an injunction because when the Board denied Vivint's renewal application in 2011, the Board agreed to stay the effect of any adverse licensing decision against Vivint pending the results of an appeal. However, the Board's counsel represented to this Court that the Board would not agree to stay the effect of its not-yet-written denial of Vivint's renewal application in the event that Vivint chooses to appeal that ruling. The Board cannot cite its own prior agreement to stay the effect of an order as proof of the absence of an irreparable harm when it has represented to this Court that it will not consent to a stay of its forthcoming order. Additionally, if Vivint's license is denied based on unlawful criteria, the Court finds that statutory liability limitations could leave Vivint without a legal remedy that would adequately compensate the company for losses and damages that could arise from the Board's alleged misconduct.

In its opposition brief, the Board also argues that Vivint has an adequate legal remedy because Vivint can appeal any adverse agency-level decision to the Administrative Law Court. The Court disagrees. In *Storm M.H. v. Charleston County Board of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012), the Supreme Court held that whether a party must exhaust available administrative remedies is a

determination committed to the trial court's discretion, and that exhaustion is not required when administrative remedies are futile or when there is an immediate need that would be aggravated by "the potential delay of an administrative appeal." Additionally, a party is not required to seek relief first from the Administrative Law Court when its primary claim involves the unconstitutionality of agency conduct. *See Video Gaming Consultants, Inc. v. S.C. DOR*, 342 S.C. 34, 38, 644 (2000) ("ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.").

The Court finds that each of these exceptions to the doctrine of exhaustion of administrative remedies is applicable here. Accordingly, the Court rejects the Board's arguments regarding the presence of an irreparable harm for which there is no adequate legal remedy, and finds that these prongs of the preliminary-injunction analysis are satisfied.

II. Likelihood of Success on the Merits

With respect to Vivint's likelihood of success on the merits, the Court believes that Vivint has made an adequate showing that the Board has engaged in unlawful conduct.

For separation-of-powers reasons, the South Carolina Constitution forbids an executive agency from altering statutory boundaries via either regulation or policy. *See, e.g., Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute."). Additionally, due process prohibits an agency from denying a license based on

grounds that are not publicly disclosed, that are subjective, or that are not properly promulgated. *See, e.g., Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964) (finding a violation of due process where a license applicant “was not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license”). Finally, the Administrative Procedures Act specifically provides that “[p]olicy or guidance issued by an agency other than in a regulation does not have the force or effective of law.” S.C. Code Ann. § 1-23-10(4).

The Alarm System Business Act sets forth two conditions that must be satisfied in order for a licensee to renew its license: (1) it must submit a new criminal background check if an employee who was previously required to submit a criminal background check has been convicted of a crime, and (2) it must submit proof of a current comprehensive general liability insurance policy. S.C. Code Ann. §§ 40-79-240(C) & (E). However, through its license-renewal application, the Board requires licensees to submit materials and information to the agency that exceed these two requirements for renewing a license.

At the preliminary-injunction hearing, counsel for the Board represented to the Court that the Board did not base its denial decision on either of the two statutory grounds available for denying a renewal application, as set forth in South Carolina Code §§ 40-79-240(C) and (E). Given the agency’s limited authority to review renewal applications, the Court believes that the agency likely violated the separation-of-powers doctrine and due process when it denied Vivint’s renewal application for reasons other than those authorized by the South Carolina Code.

Additionally, counsel for the Board represented to the Court that the Board had not promulgated any regulations to implement the Alarm System Business Act. Accordingly, it appears that the Board also violated the Administrative Procedures Act and exceeded its authority when it attempted to enforce against Vivint what amounts to an agency policy that was never promulgated as a regulation. For these reasons, the Court finds that Vivint also satisfies the “likelihood of success” prong of the preliminary-injunction analysis.

CONCLUSION

The Court recognizes that injunctive relief can be a drastic measure that should be applied with great care. However, based on the pleadings and arguments presented thus far, it appears to the Court that the Board is jeopardizing a company’s ability to conduct business in South Carolina—a business that provides security services to thousands of South Carolinians—on grounds that are not authorized by law. Under these circumstances, the Court finds that it is appropriate to enjoin the Contractors’ Licensing Board from taking any adverse action against Vivint’s license until Vivint has received a final resolution to all administrative proceedings.

The Court is also aware, though, that there are mechanisms in place through the appellate process before the Administrative Law Court that can protect Vivint from the harms for which it seeks protection. The Court fully respects the Administrative Law Court’s procedures, and therefore the above-stated injunction does not go into effect unless and until all of the following acts occur: (1) The Board issues a written order denying Vivint’s license-renewal application; (2) Vivint timely appeals that order to the Administrative Law Court; and (3) the effect of the Board’s order is not stayed—either

by operation of court rule, statute, or Administrative Law Court order—pending resolution of the appeal to the Administrative Law Court. Only if all three of these conditions are met shall this Court's injunction take effect.

AND IT IS SO ORDERED.



The Honorable Robert E. Hood
Circuit Court Judge

June 18, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Civil Action No. 2013-CP-40-2177

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JUL 24 2013

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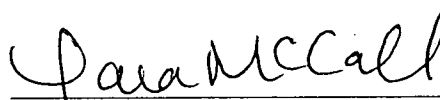
South Carolina Contractors
Licensing Board Appellant.

PROOF OF SERVICE

I hereby certify that I have this day filed the Appellant's **Notice of Appeal** and served thereof on the persons hereafter named on 24 day of July, 2013 hand delivery and by depositing same in an envelope, securely wrapped in the United States mail, properly addressed to the said persons hereafter named, at the places and addresses stated below, which are the last known addresses for same:

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