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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ANDERSON COUNTY
CIRCUIT COURT

R. SCOTT SPROUSE, CIRCUIT COURT JUDGE

Appellate Case No.: 2021-000285

MOATS CONSTRUCTION, INC. ……..……..…… Appellant,

v.

CITY COUNCIL OF THE CITY OF ANDERSON ……..…… Respondent.

FINAL BRIEF OF RESPONDENT

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May 4, 2022

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2. Is the Appellant's due process argument properly before the Court when the Appellant did not make this argument at the Circuit Court appellate level or, in the alternative, has Appellant failed to show a denial of its due process rights?

STATEMENT OF THE CASE

This matter involves the timeliness of Appellant's appeal to the Circuit Court from the Anderson City Council's Determination in a procurement matter.[1] The "Determination of City Council" was issued on March 17, 2020. (R. p. 7.) The Appellant's Notice of Appeal to the Circuit Court states that "Appellant received written notice of the entry of the [March 17, 2020] Decision and Order on March 23, 2020." (R. p. 8.)[2] The Notice of Appeal to the Circuit Court was filed on September 29, 2020, approximately six (6) months after the

[1] Additional background information is set forth in the Determination of City Council. (R. p. 7.)

[2] At the Circuit Court hearing, the Appellant's attorney stated that "the City Council denied Mr. Moats' motion" and Mr. Moats "was sent a letter that we were cc'd on back in March [2020]." (R. p.17; Transcript p. 3, l. 19-21.) When specifically asked by the Circuit Court when the Appellant received the notice, Moat's attorney stated that "[t]he letter was dated March 23, 2020." (R. p. 18; Transcript p. 4, l. 21-23.) He did not deny that Moats received the notice but stated that there's no record whether "it was via regular mail or email" but that "he knows it wasn't via certified mail." (R. pp. 18-19; Transcript p. 4, l. 23 – p. 5, l. 2.) He also stated that "we were aware that a letter had been sent by [the City attorney] in some form or another." (R. p. 19, Transcript p. 5, l. 5-8.) In addition, the Appellant's Brief states that "[t]he Goodwyn Law Firm, LLC did in fact provide Moats notice of the decision." The Appellant's suggestion(s) in its Brief that notice of the decision was directed to the attorney(s) and carbon copied to the Appellant, or that the notice letter was only sent to the attorneys, is inconsistent with the statements Appellant's attorney made to the Circuit Court. The notice was not presented to the Circuit Court and is not part of the Record in this appeal.

Appellant received notice of the decision. On January 21, 2021, the Respondent filed a Motion to Dismiss the Appellant's appeal to the Circuit Court. (R. pp. 12-13.) Following a hearing on February 8, 2021, the Circuit Court granted the City's Motion to Dismiss, finding that the Appellant failed to file the appeal within thirty (30) days as required by SCRCP Rule 74. (R. pp. 1-3, Form 4 Order; R. pp. 4-6, Order dated 2/12/21; R. pp. 15-21, Transcript of hearing.) No post-trial motions were filed. The primary issue in this appeal is whether the Circuit Court erred in its dismissal of the Appellant's appeal, based on its finding that the Appellant failed to file a timely appeal of the City Council's Determination to the Circuit Court.

STANDARD OF REVIEW

S.C. Code Ann. §1-23-380(5) of the Administrative Procedures Act provides as follows:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE APPELLANT'S APPEAL FROM THE CITY COUNCIL'S DETERMINATION, BASED ON ITS FINDING THAT THE APPELLANT'S NOTICE OF APPEAL WAS NOT TIMELY.

In this case, the Appellant (also referred to herein as "Moats") is challenging the dismissal of its appeal to the Circuit Court, even though Moats' attorney expressly acknowledged that Moats received notice of the City Council's decision in March of 2020 and even though there is no dispute that Moats did not file or serve the appeal within thirty (30) days thereafter as required by SCRCP 74. As shown by the transcript of the February 8, 2021 hearing, Moats' attorney represented to the Circuit Court that the City Council denied Moats' appeal in March of 2020 and sent Mr. Moats (and his attorneys) a letter dated March 23, 2020.[3] In the Notice of Appeal to the Circuit Court, Moats' attorney unequivocally stated that "Appellant received written notice of the entry of the [March 17, 2020] Decision and Order on March 23, 2020." (R. p. 14.) At no place in the Record does Moats deny that he received notice of the City Council decision more than thirty (30) days before the appeal was filed.

In his Order of February 12, 2021, Circuit Court Judge Scott Sprouse granted the City's Motion to Dismiss the appeal as untimely, finding that the appeal was not filed within the thirty (30) day limit set forth in SCRCP 74. (R. pp. 4-6.) Rule 74 provides the following:

> Notice of appeal to the circuit court must be served on all parties *within thirty (30) days after receipt of written notice of the judgment, order or decision* appealed from. In all such appeals the notice of intention to appeal shall be filed with the clerk of the court to which the appeal is taken and with the inferior court or administrative agency or tribunal within the time provided … by this rule. (Emphasis added.)

[3] See FN 2 hereinabove.

Appellant does not argue that the 30-day time limit of Rule 74 is inapplicable or argue for the application of a different rule or time period. Rather, its argument is that Rule 74 "was never triggered" because "service of the notice of the decision of City Council was never properly effectuated on Moats." However, Appellant conceded at the Circuit Court hearing and in its Notice of Appeal to the Circuit Court that it received notification of the decision in March of 2020 (and its attorney has acknowledged that their office provided Appellant notice of the decision). There is no requirement in Rule 74 - or in caselaw pertaining thereto - that requires the notice to be served in a particular way, including by certified mail. The rule only requires that "written notice of the judgment" be received, which is not legitimately in dispute.

As noted in the Appellant's Brief, S.C. Code Ann. §1-23-350 requires only that "Parties shall be notified either personally or by mail of any decision or order." In ***Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC***, 422 S.C. 211, 215–16, 810 S.E.2d 856, 858 (2018), our Supreme Court stated the following:

> When determining whether the service of the notice of appeal is timely, we look to the date the parties received written notice of entry of an order of judgment. Unlike the notice of appeal, there is no requirement that *the written notice of entry of an order or judgment* be served upon the parties. All that is required to trigger the time to appeal is that the parties *receive* such notice. (Emphasis original.)[4]

[4] The Supreme Court also found that "an email providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR triggers the time to appeal *as long as the email is received from the court, an attorney of record, or a party." Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018). (Emphasis original.) Note that, as in SCACR 203(b)(1), SCRCP 74 states that the 30-day period begins upon "receipt of written notice" of the order or judgment appealed from.

At the Circuit Court hearing, the Appellant's attorney stated to the Court that Mr. Moats was sent a letter in March of 2020 notifying him of the City Council decision.[5] The Notice of Appeal to the Circuit Court specifically states that "Appellant received written notice of the entry of the [March 17, 2020] Decision and Order on March 23, 2020." Although the Appellant's Brief states that the "Respondents have not shown that they properly served notice of the decision upon Moats directly," the Record clearly shows that Appellant's attorney acknowledged to the Circuit Court that Moats received notice of the City Council Determination in March of 2020. Any contrary statements or arguments by the attorneys in the Appellant's Brief should be disregarded.[6]

The Appellant's Brief states that "[no] evidence was presented by the City's counsel that Moats was directly informed of the decision via mail." Not only is this not accurate, but, as shown by the hearing transcript (R. pp. 15-21), the issue at the Circuit Court hearing was not whether or even when Moats received the notification. Rather, Appellant's primary argument related to the *manner* in which it was served, specifically whether the City was, or should have been, required to send the notification via certified mail.[7] Not only is the Appellant's current argument that it did not receive notice of the

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[5] See FN 2 hereinabove.

[6] For example, the Brief fails to mention that the Appellant's attorney told the Circuit Court that the letter, dated March 23, 2020, was sent to Moats and cc'd to the attorneys, which is contrary to the suggestion in the Brief that the letter was only sent to the attorneys. The Brief also fails to mention that the Notice of Appeal to the Circuit Court states that "Appellant received written notice of the entry of the [March 17, 2020] Decision and Order on March 23, 2020." (R. p. 8.)

[7] The Appellant also suggested to the Circuit Court that the notification should have included language regarding Moats' right to appeal, which is required by S.C. Code Ann. §11-35-4210 of the S.C. Consolidated Procurement Code but not by the City's Procurement Code. However, the S.C. Consolidated Procurement Code is not applicable to the City Council Determination herein, this argument was not addressed by the Circuit Court's Order, no 59(e) motion was made, and this argument is not presented in the Brief. *See West v. Newberry Elec. Co-op.*, 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding an issue that was neither addressed by the

decision contrary to the transcript and the specific requirements and language of Rule 74, but the Appellant did not make this argument to the Circuit Court and it is, therefore, not properly before this Court. *See Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (citing *Al–Shabazz v. State,* 338 S.C. 354, 527 S.E.2d 742 (2000); *Kiawah Resort Assoc. v. South Carolina Tax Comm'n,* 318 S.C. 502, 458 S.E.2d 542 (1995)) ("In reviewing the final decision of an administrative agency, the circuit court sits as an appellate court. Consequently, issues not raised to and ruled on by the agency are not preserved for judicial consideration.")) *See also Hill v. S.C. Dep't of Health & Env't Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("to preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court").

Because Appellant's attorney acknowledged Appellant's receipt of the notification letter at the Circuit Court level, and because it is clear that Appellant received written notice of the City Council Determination more than thirty (30) days before filing its Notice of Appeal to the Circuit Court, the Circuit Court's dismissal of the appeal as untimely pursuant to Rule 74 should be affirmed.

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trial court in the final order nor raised in a Rule 59(e) motion was unpreserved for review by this court). In addition, the letter to Appellant was not presented to the Circuit Court and is thus not part of the Record on Appeal. Based thereon, any argument regarding the contents or sufficiency of the notification letter is not properly before this Court.

II. THE APPELLANT'S DUE PROCESS ARGUMENT IS NOT PROPERLY BEFORE THE COURT, AS THE APPELLANT DID NOT MAKE THIS ARGUMENT AT THE CIRCUIT COURT APPELLATE LEVEL. IN THE ALTERNATIVE, APPELLANT HAS FAILED TO SHOW A DENIAL OF ITS DUE PROCESS RIGHTS.

The Appellant's Brief suggests that Appellant's right to due process was violated "when the City of Anderson failed to directly provide notice of their decision to Moats."[8] This is not only entirely false as a factual matter, as discussed above, but the Appellant cites NO authority to support its claim of a procedural due process violation. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Based thereon, Appellant's argument has not been properly presented to this Court and should be deemed abandoned or waived.

Even if the due process argument was properly before this Court, it has no merit. The Appellant's Brief correctly states that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" and that no "particular form of procedure" is mandated. *See S.C. Nat. Bank v. Cent. Carolina Livestock Mkt., Inc.*, 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986). Unfortunately, that is the extent of the Appellant's due process argument and Appellant provides no additional guidance to the Court regarding the requirements of due process or its applicability to the facts of this case. Appellant's argument boils down to a conclusory

[8] Although the Appellant does not specify, it is presumed that its claim is related to "procedural" due process rather than "substantive" due process, as it deals with notice and the timeliness of an appeal.

statement that "none of what the City of Anderson did satisfies the requirements of due process."

As stated by this Court in *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009), *as amended* (May 4, 2009):

> Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review. Further, due process is flexible and calls for such procedural protections as the particular situation demands. (Internal citations omitted.)

The Appellant has failed to explain how its due process rights were violated in this case. Moats appealed the denial of its project bid to the City Manager and then to the City Council, but then Moats did not appear at the review hearing and "specifically asked" its attorneys "not to participate in the City Council's review hearing on March 9, 2020 in which City Council upheld the decision to deny Moats the bid." (Appellant's Brief at p. 3; R. p. 7, City Council Determination; R. p 19, Transcript p. 5, l. 13-15.) The undisputable facts that Moats had an opportunity to appear at the City Council hearing but chose not to do so, that Moats admittedly received notice of the decision in March of 2020, and that Moats has been given multiple levels of review related to this matter, clearly show that there was no denial of due process in this case. *See Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 781 (Ct. App. 2009), *as amended* (May 4, 2009). Based thereon, the Circuit Court's dismissal of the Appellant's appeal as untimely should be affirmed.

CONCLUSION

It is undisputable that the Appellant received written notice of the City Council Determination more than thirty (30) days prior to filing its Notice of Appeal and, therefore, that its Notice of Appeal was untimely under SCRCP 74. In addition, Appellant's due process argument is not properly before the Court and/or Appellant has failed to show a due process violation. Based thereon, the Circuit Court's dismissal of the appeal should be affirmed.

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