

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00404

FINICKY PET FOODS, INC.

APPELLANT

VERSUS

THE CITY OF OCEAN SPRINGS, MISSISSIPPI

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
NO. CI-2004-00138

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

ATTORNEYS FOR APPELLEE:

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STATEMENT OF THE ISSUES

The Appellee, City of Ocean Springs, Mississippi, responds to the following issues presented by the Appellant for the Court's consideration:

I. Whether the trial court erred in ruling that Finicky Pet Foods, Inc.'s claim was barred by the statute of limitations.

STATEMENT OF THE CASE

I. The Nature of the Case, Course of Proceedings, and Disposition.

On November 5, 2003, Plaintiff Finicky Pet Foods, Inc., (hereinafter sometimes referred to as "Finicky" or "Plaintiff"), filed a notice of claim pursuant to Miss. Code § 11-46-11 (2007). On May 28, 2004, Finicky filed its complaint against the City of Ocean Springs (hereinafter sometimes referred to as "Ocean Springs," "City" or "Defendant"), alleging that the City arbitrarily and capriciously *suspended* and *revoked* the permits previously issued. R. 4-16. The City filed a Motion to Dismiss based on the fact that Finicky did not properly appeal the Board of Aldermen's decision, which made the basis of its claim, to the circuit court. The circuit court dismissed all of the claims in Finicky's complaint (Finicky did not appeal this decision), but allowed Finicky to amend its complaint to bring negligent *issuance* claims based on the original issuance of the permits. R. 24-36. Finicky amended its complaint on February 18, 2005. R. 95-108. The City answered timely and affirmatively asserted the claim as time-barred. The City of Ocean Springs filed a motion to dismiss on March 23, 2005 based on the fact that under Finicky's Amended Complaint it failed to comply with the one year statute of limitations. The court granted the motion and Finicky has appealed to this court.

II. Statement of Facts.

Plaintiff is a Florida Corporation qualified to do business in Mississippi. It operates a fish processing facility along the Pascagoula River in Pascagoula, Mississippi. However, early in 2002, Plaintiff sought to move its operations within the city limits of Ocean Springs. Plaintiff intended the new site to be located at 106 Industrial Park Circle in Ocean Springs and began seeking the necessary permits. Plaintiff was granted several building permits beginning on

March 1, 2002 until June 11, 2002. R. 7-16. On or about June 20, 2002, an article appeared in the *Ocean Springs Record* regarding the Plaintiff's move to Ocean Springs. Due to the overwhelming public response, a meeting was held at the Ocean Springs City Hall where several members of the Board of Aldermen heard a large crowd's objections to the new plant. Residents of the Bienville Place Homeowners Association, Inc., also filed a Petition to Revoke Permits against Finicky. On July 2, 2002, the Board of Aldermen issued an injunction freezing all further refurbishing efforts and staying Plaintiff from occupying the premises. The City immediately hired the services of ECO Systems of Jackson and Mitigating Environmental Liability of Pascagoula to study the environmental concerns of the citizens of Ocean Springs. On October 15, 2002, after the presentation of the environmental impact study and holding a public hearing, the Board of Aldermen voted to permanently revoke all permits issued to Finicky. R. 130. The minutes of the October 15, 2002 meeting were approved at the next meeting of the Board held November 6, 2002. R. 130. As a result, Finicky served its Notice of Claim on November 5, 2003 and filed suit on May 28, 2004 alleging Ocean Springs improperly revoked the permits. Service was made on June 28, 2004.

SUMMARY OF THE ARGUMENT

Finicky failed to properly file an appeal of the board of aldermen's decision as set forth by Miss. Code § 11-51-75 (Rev. 2002) within the prescribed ten (10) day time period. Given that it did not properly file its appeal to the circuit court, the circuit court dismissed its claim, and Finicky did not appeal this issue. Finicky has thus concocted this "negligent issuance" argument under the Mississippi Tort Claims Act. However, the one year statute of limitations has run since Finicky filed its notice of claim on November 5, 2003, more than a year from the board's

revocation of Finicky's permits. Finicky's argument that the board's approval of the minutes on November 6, 2002 constitutes the running of the statute of limitations date is incorrect as held recently in *Pruitt v. Zoning Board for the City of Laurel*, 2007-CP-01516-COA, 2007-CP-01518-COA (Miss. 2008), and numerous precedent cases. The approval of the minutes is merely an administrative act, having nothing to do with the accrual of any action. Therefore, Plaintiff's action is barred by the one year statute of limitations.

ARGUMENTS AND AUTHORITIES

I. Standard of Review

The Court of Appeals will review a motion to dismiss under a de novo standard, including the proper application of the MTCA. *City of Jackson v. Brister*, 838 So. 2d 274, 278 (Miss. 2003) (citing *Maldonado v. Kelly*, 768 So. 2d 906, 908 (Miss. 2000)). "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Lang v. City of Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1236 (Miss. 1999). Further, the trial court's decision will not be overturned on appeal "unless [it is] manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Bell v. City of Bay St. Louis*, 467 So. 2d 657, 661 (Miss. 1985).

II. Plaintiff failed to timely file an appeal from a municipality decision and failed to file a notice of claim within the one year statute of limitations and is therefore barred from bringing this lawsuit

Ocean Springs is a "political subdivision" of the State of Mississippi as defined under Miss. Code Ann. § 11-46-1(i) (2003), which states, "Political subdivision" means any body politic or body corporate other than the state responsible for governmental activities only in

geographic areas smaller than that of the state, including, but not limited to, any county, municipality” As such, this action is brought pursuant to Miss. Code Ann. § 11-46-1, *et seq.* (2003). Additionally, any potential claims against any officials or other employee of the City of Ocean Springs are governed by the MTCA as well. Miss. Code Ann. § 11-46-15 (Supp. 1992).

As to the time for bringing such actions, the MTCA provides that:

All actions brought under the provisions of this chapter shall be commenced within one (1) year next *after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after*; provided however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of [...] one hundred twenty (120) days from the date the [...] official of a municipality, county or other political subdivision receives the notice of claim, during which time no action may be maintained by the claimant unless the claimant has received a notice of denial of the claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice. However, should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant’s receipt of notice of denial of claim from the governmental entity.

Miss. Code Ann. § 11-46-11(3) (Supp. 2002) (emphasis added). The Plaintiff’s ability to proceed with its claims depends on the timeliness of its filing of its Notice of Claim on November 5, 2003.

Finicky argues that the statute of limitations began to run on November 6, 2002, the date the October 15, 2002 minutes were approved by the Board. Finicky insists the date the minutes were approved is the date its cause of action accrued, as Finicky would not have suffered damage until the permits were permanently revoked. Plaintiff bases its argument on *Nichols v.*

Patterson, 678 So. 2d 673, 676-77 (Miss. 1996) which declares that any action taken by a board can only be evidenced by entries on the minutes. Under Finicky's theory, the statute of limitations in this action would not expire until November 5, 2003 and was effectively tolled by the timely notice of claim.

However, since Finicky can now only rely on a negligent *issuance* argument it cannot claim that the *revocation* date reflected in the minutes is the date the statute would have run. The fact is that the statute of limitations ended on June 11, 2003, one year from the issuance of the last permit, the last date of any alleged negligence. However, the circuit court disagreed with this argument and found that the last date for Finicky to file its notice of claim was on October 15, 2003, one year after the permits were revoked.

Whether the running of the statute of limitations date is either June 11, 2003 or October 15, 2003, Miss. Code Ann. § 21-15-33 (Supp. 1991) clearly states the minutes of a city must be approved and adopted by a majority within thirty (30) days or at the next meeting. "Upon such approval, said minutes shall have the legal effect of being valid from and after the date of the meeting." *Id.* The November 6, 2002 approval of the October 15, 2002 minutes occurred at the next meeting and within thirty (30) days. The signing of the minutes "within [thirty (30)] days of the meeting is a condition precedent for the minutes to date back and become valid from and after the date of the [October 15, 2002] meeting." *See City of Biloxi v. Cawley*, 278 So. 2d 389, 392 (Miss. 1973).

Aside from the Mississippi Tort Claims Act one year statute, Finicky also failed to properly file an appeal of the Board's decision as set forth by Miss. Code § 11-51-75 (Rev. 2002) within the prescribed ten (10) day time period. Given that it did not properly file its appeal to the

circuit court, it has thus concocted this “negligent issuance” argument under the Mississippi Tort Claims Act.

From the time the Board of Aldermen issued its ruling on the building permits, which was October 15, 2002, the Plaintiff had ten days, until October 25, 2002, to file an appeal to the Circuit Court of Jackson County, Mississippi. The statute reads in pertinent part,

“[a]ny person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities. The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment.”

Miss. Code § 11-51-75 (Rev. 2002).

As the Court is well aware, the law is settled in this regard. This Court issued an opinion directly on point to the case at hand just one month ago in *Pruitt v. Zoning Board for the City of Laurel*, 2007-CP-01516-COA, 2007-CP-01518-COA (Miss. 2008). This Court reaffirmed that an appeal from an adverse decision of the city council must be filed within ten days on the decision. “The statute’s ten (10) day time limit in which to appeal . . . is both mandatory and jurisdictional.” *Id.* (citing *Bowen v. DeSoto County Bd. of Supervisors*, 852 So. 2d 21, 23 (3) (Miss. 2003)). If the appeal is not filed within ten days, the action should be dismissed as untimely. *Id.*

The Pruitts’ petition to rezone was denied by the zoning board on April 17, 2007. The Pruitts did not appeal to the circuit court until May 3, 2007, clearly more than ten days after the

city council's decision, but before the approval of the minutes. This Court, in affirming the trial court's dismissal of the Pruitts' appeal, stated that the statute of limitations for appeals from decisions of these entities is properly addressed by Mississippi Code Annotated § 11-51-75 which provides for a ten (10) day period to appeal municipality decisions. *Id.*

This situation also arose in the case of *McPhail v. City of Lumberton*, 832 So.2d 489 (Miss. 2002). The Supreme Court stated unequivocally that a party aggrieved by a Board's decision has ten (10) days to appeal such decision to the appropriate Circuit court. This case arose when McPhail, a municipal court judge, had his appointment to that position terminated by the Board of the City of Lumberton. The Board's decision was rendered in April of 1999, and the suit was not filed until June 30, 2000.

The Court stated that the act of a municipality which leaves a party aggrieved is appealable to the circuit court where all of the issues of the controversy are finally disposed of by order of the municipal authorities. *McPhail*, 832 So.2d at 491 (citing *Garrard v. City of Ocean Springs*, 672 So.2d 736, 738 (Miss.1996)). The matter was finally disposed of on May 4, 1999, when the Board failed to sustain a motion to take up the mayor's veto of McPhail's reinstatement. *Id.* Then, when an appeal of a decision rendered by municipal authorities is not perfected within the statutory time constraint of ten days, no jurisdiction is conferred upon the appellate court, i.e., the circuit court. *Id.* at 492. The Court went on to affirm the dismissal of McPhail's appeal for the reasons stated above.

The purpose of language in Section 11-51-75 setting the date of adjournment as the date the time limit begins is threefold. First, it sets a date certain. Here, Finicky representatives were present at the October 15, 2002 meeting and represented by counsel for the matters presented.

The meeting they attended adjourned after the Board's decision was rendered. The date of adjournment is certain. Finicky's own argument points out that the date minutes are approved can be dynamic and thus potentially confusing. Second, notification of appeal is important to be given quickly so as to prevent unnecessary delay and provide certainty in government processes. Finally, it is important that the running of the appeal time for § 11-51-75 be the same as the running for the Tort Claims Act as the date of adjournment is certain and not subject to rearrangement.

The Mississippi Tort Claims Act reads in relevant part, "[a] governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [a]rising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license . . . unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature[.] Miss. Code Ann. § 11-46-9(h) (Rev. 2007) (emphasis added).

Section 11-46-9(h) clearly states that the City of Ocean Springs will not be held liable for the issuance of a permit unless malicious or arbitrary and capricious conduct occurred. Finicky represented to the City, in the issuance of the permits, that the building was fit for its intended use. The City relied on Finicky's representations and issued certain permits to it. Finicky should be barred or estopped from alleging the City acted arbitrarily and capriciously in issuing the permits when the issuance of the permits is the very act which Finicky sought. Finicky accepted the benefits it was seeking and never argued against any issuance until its revocation argument was dismissed. Only now does it adopt an argument that is clearly inconsistent with its previous position. As stated above, Plaintiff Finicky failed to timely file its appeal within the ten (10) day

period, therefore this cause of action is time barred and was properly dismissed by the circuit court.

CONCLUSION

The statute of limitations in this matter began to run, at the very latest, on October 15, 2002, the date the permits were revoked. Since Finicky filed its Notice of Claim against Ocean Springs on November 5, 2003, which is outside the one-year statute of limitations. Plaintiff's claims are therefore time-barred. Finicky's argument that the board's approval of the minutes on November 6, 2002 constitutes the running of the statute of limitations date is incorrect as held by numerous precedent cases. The approval of the minutes is merely an administrative act, having nothing to do with the accrual of any action. Therefore, Plaintiff's action is barred by the one year statute of limitations.

For the foregoing reasons, the City asks this Court to affirm the trial court's dismissal with prejudice of all of Finicky's claims against the City.

Respectfully submitted,

CITY OF OCEAN SPRINGS, MISSISSIPPI

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CERTIFICATE OF SERVICE

I, Matthew S. Lott, hereby certify that I have mailed, via United States First Class Mail, the original and three copies of BRIEF OF APPELLEE to the Clerk of the Court of Appeals of the State of Mississippi, Betty Sephton, Post Office Box 249, Jackson, MS 39205-0249, for filing in the record. I have also served the following, by the method so indicated:

James L. Farrior, III, Esquire (via First Class U.S. Mail)
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Biloxi, MS 39535

Honorable Dale Harkey (via hand delivery)
Circuit Court Judge
3104 South Magnolia Street
Pascagoula, MS 39567
(via hand delivery)

This the 17th day of November, 2008.


MATTHEW S. LOTT

ADDENDUM