

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-237

FEBRUARY TERM, 2002

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| Earth Construction, Inc. | } | APPEALED FROM: |
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| v. | } | Caledonia Superior Court |
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| State of Vermont | } | DOCKET NO. 298-12-98 Cacv |
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| | } | Trial Judge: Walter M. Morris, Jr. |
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In the above-entitled cause, the Clerk will enter:

Plaintiff Earth Construction, Inc. appeals from the superior court's dismissal of its complaint alleging various wrongful acts against defendants, the Agency of Transportation and its former secretary, Patrick Garahan. We reverse and remand.

Plaintiff entered into four road construction contracts with the Agency in the early 1990's. The Agency terminated those contracts between December 1992 and October 1993. Plaintiff wrote several letters to Agency employees regarding the termination of the contracts. In January 1995, the secretary of the Agency and its director of construction and maintenance informed plaintiff that they had been advised by counsel not to respond to his letters requesting information. In February 1995, the executive secretary of the Transportation Board sent plaintiff a letter stating that while plaintiff had clearly exhausted its administrative remedies under the Agency's grievance procedure, documents submitted by plaintiff to the Board failed to identify contract provisions in dispute. The letter suggested that plaintiff retain counsel to file a competent document so that the Board could review the merits of any claims, if jurisdiction were found. Plaintiff submitted letters to the Board, and in late 1996, the Board set a date on which plaintiff would be given an opportunity to explain why it believed that it was entitled to a hearing before the Board. Plaintiff appeared before the Board on July 10, 1997 to address issues concerning the termination of its construction contracts.

In an August 28, 1997 letter, the Board indicated that it had considered, pursuant to 19 V.S.A. 5(d)(4) (Board shall "provide appellate review, when requested in writing, regarding legal disputes in the execution of contracts") issues raised in plaintiff's letters and in its appearance before the Board. In response, the Board stated that there was insufficient evidence to indicate that plaintiff had availed itself of the appeal process outlined in the specifications governing construction contracts with the Agency. The Board recognized that there had been correspondence between plaintiff and the Agency, but noted that the matters under dispute had not reached the Board before the bonding companies took over the remaining work. According to the Board, when the bonding companies took over the projects, they also inherited the appeal rights associated with the contracts. The Board also stated that many of the issues plaintiff raised were beyond the scope of what the Legislature intended when it enacted 19 V.S.A. 5(d)(4). The Board acknowledged that it had addressed appeals concerning interpretations of contracts, but indicated that "issues such as breach of contract, wrongful termination and obstruction of justice are areas of legal complexity more appropriately

handled by the judicial system." Accordingly, the Board stated that it would "take no further action on these matters nor call for a hearing."

Sixteen months later, on December 29, 1999, plaintiff filed the instant complaint in superior court, seeking damages based on its claim that the Agency's wrongful actions in terminating the construction contracts led to its financial ruin. Plaintiff's lengthy and rambling complaint, which was amended on July 21 and August 13, 1999, appears to allege, among other things, that the Agency and its agents wrongfully terminated the four contracts, conspired to deny plaintiff its due process rights, and fraudulently converted plaintiff's assets. The complaint also alleges that the Transportation Board violated the law by refusing to hear the merits of its grievances. On August 9, 1999, the superior court denied defendants' motion to dismiss with respect to all of the counts, except those sounding in defamation or personal injury, which were deemed to be filed outside the applicable statute of limitations. The court also granted plaintiff leave to amend its complaint to include allegations concerning exhaustion of administrative remedies.

On August 24, 1999, following plaintiff's filing of its second amended complaint, defendants filed a renewed motion to dismiss, alleging that plaintiff's complaint had not been filed within the thirty-day time limit required under V.R.C.P. 74 and V.R.C.P. 75. On February 21, 2001, the superior court granted the motion to dismiss, ruling that plaintiff's complaint is essentially an appeal from the Transportation Board's August 28, 1997, and that it was not timely filed under Rules 74 and 75. According to the court, to the extent that the Board addressed issues raised by plaintiff under 19 V.S.A. 5(d)(4), the proper avenue of appeal was through Rule 74. See 19 V.S.A. 5(c) ("Final orders of the board may be reviewed on the record by the superior court pursuant to Rule 74 of the Vermont Rules of Civil Procedure."); V.R.C.P. 74(b) (appeals must be filed "within the time provided by Rules 3 and 4 of the Rules of Appellate Procedure"); V.R.A.P. 4 (appeals must be filed within thirty days of date of order appealed from). Further, in the court's view, to the extent that the Board declined to address plaintiff's claims as beyond its jurisdiction, that decision was a refusal to act, to which plaintiff was required to file a notice of appeal within thirty days under V.R.C.P. 75(c). Based on this analysis, the court dismissed plaintiff's complaint in its entirety.

On appeal, plaintiff first argues that the superior court erred in concluding that the Board "heard" plaintiff's grievances, and that its August 28, 1997 letter was a final order. We find no merit to these arguments. Plaintiff submitted documents and appeared before the Board to assert its claims. The Board deliberated on the matter and, for the reasons stated above, determined in its letter to plaintiff that it would take no further action on the matter and would not grant plaintiff a hearing on the merits of its claims. The letter was plainly a final decision concerning the matter before it, which arose from plaintiff's failure to obtain satisfaction from the Agency. See In re LD & MD, Inc. v. State, 154 Vt. 384, 388 (1990) (though Agency of Human Services issued its decision in letter form, it plainly was final order regarding matter at hand); In re Central Vermont Ry., 148 Vt. 177, 178 (1987) (test of finality is whether order makes final disposition of subject matter before tribunal). The fact that the Board did not hold a hearing or address the merits of plaintiff's claims does not make its disposition of the matter any less final.

Next, plaintiff argues that the superior court erred in finding that his complaint was essentially an appeal from the Board's August 28, 1997 letter. For the most part, plaintiff contends that he could not have been appealing from that letter because there was no hearing, no record, and no decision to appeal from. Based on the same reasoning, he contends that Rule 74 does not apply. These are essentially the same arguments that we rejected above, and thus are unavailing.

Plaintiff also argues, however, that his complaint includes claims that are beyond the scope of the Board's authority and thus may be raised in an original proceeding before the superior court. He contends that the superior court erred in relying upon Rule 75, which applies only to actions or refusals to act that are "not appealable under Rule 74." See V.R.C.P. 75(a). According to plaintiff, the effect of the court's ruling is that every cause of action that follows some governmental action or failure to act falls under the auspices of either Rule 74 or 75 and thus can never be brought as an ordinary civil action.

We agree that the superior court erred in ruling that, to the extent the Board declined to address some of plaintiff's claims because they are outside the Board's jurisdiction, the proper avenue of appeal is Rule 75. Appellate review of the Board's decision was available under Rule 74, and not under Rule 75. Plaintiff is precluded from challenging the Board's determinations in its August 28, 1997 letter. Further, if it turns out that the Board had jurisdiction over claims to which

it declined to exercise its jurisdiction, plaintiff is foreclosed from appealing the Board's refusal to address those claims. But that does not mean that plaintiff may not bring an original complaint in superior court raising claims that are both outside the scope of the Board's authority and within the applicable statute of limitations. Given the state of the record on appeal, we make no determination as to whether any of plaintiff's claims fall into that category and thus may survive independently. On remand, the superior court must examine the claims and make that determination.

Finally, we reject plaintiff's argument that defendants cannot prevail on their "statute-of-limitations" defense because it was raised within a motion to dismiss rather than as an affirmative defense in an answer to the complaint. Defendants are not raising a statute-of-limitations defense at all. Rather, they are claiming that the superior court lacked jurisdiction over plaintiff's complaint because plaintiff failed to timely appeal the Board's decision. See V.R.C.P. 12(b)(1), (6) (every defense shall be asserted in responsive pleading, except that lack of jurisdiction and failure to state claim upon which relief may be granted, among others, may be made by motion). Under Rule 74, appeals from Transportation Board orders must be filed within the jurisdictional time frame provided under V.R.A.P. 4, which incorporates 12 V.S.A. 2383 (notice of appeal from any appealable order of any board, court, or other tribunal shall be filed within thirty days). See LD & MD, Inc., 154 Vt. at 386-87 (superior court lack jurisdiction over appeal of agency action filed beyond thirty-day time limit established in 2383); Village of Northfield v. Chittenden Trust Co., 128 Vt. 240, 241 (1969) (failure to file notice of appeal within period specified by 2383 ends court's authority to grant review).

Reversed and remanded.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

James L. Morse, Associate Justice