

Cite as 2009 Ark. App. 868

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA09-92

ARKANSAS RESIDENTIAL BUILDING
CONTRACTORS COMMITTEE OF
THE ARKANSAS CONTRACTORS
LICENSING BOARD,

APPELLANT

V.

JAG ENTERPRISES, INC.,

APPELLEE

Opinion Delivered 16 DECEMBER 2009

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. CV-2007-1126-III]

THE HONORABLE DAVID B.
SWITZER, JUDGE

COMMITTEE AFFIRMED; CIRCUIT
COURT REVERSED

D.P. MARSHALL JR., Judge

This case is about subject matter jurisdiction—the jurisdiction of the Arkansas Residential Building Contractors Committee of the Arkansas Contractors Licensing Board and the jurisdiction of the circuit court to review the Committee’s decision.

I.

JAG Enterprises, a general contractor, was constructing a series of duplexes in Hot Springs. Paul Brewer, who works for the Contractors Licensing Board, began investigating the project. At first, Brewer thought that the project was commercial and asked JAG to provide a list of its subcontractors. Brewer wanted this list because if the project was commercial, then the subcontractors needed licenses. If the project was

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residential, however, then JAG (not the subcontractors) needed a license. JAG supplied the list of its subcontractors and Brewer spoke with some of them. The subcontractors said that JAG had told them that they would not need licenses because of the way JAG had divided the lots.

The Board's lawyer contacted JAG's lawyer and explained the different licensing requirements for commercial and residential projects. The Board's lawyer followed up with a letter stating that JAG needed to decide whether it wanted the project deemed commercial or residential. JAG's lawyer replied by letter, stating that JAG had "decided to declare this a series of residential projects." To no avail, both Brewer and the Board's lawyer then attempted to get more information from JAG.

After determining that the project was residential, the Residential Building Contractors Committee charged JAG with acting as a residential contractor without a license. Ark. Code Ann. § 17-25-505 (Repl. 2001). The Committee sent JAG notice of the hearing, but the notice was returned unclaimed. The Committee continued the hearing and then sent JAG's lawyer a letter via certified mail setting a new hearing date. JAG's lawyer signed the return receipt showing that he received the letter. JAG, however, failed to appear at the hearing. The Committee heard testimony, received other evidence, and ultimately found JAG in violation of the statute. The Committee imposed a civil penalty of \$104,000.00.

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JAG then petitioned for judicial review in the Garland County Circuit Court. The Committee moved to dismiss, arguing that JAG had failed to exhaust its administrative remedies and, therefore, the circuit court did not have jurisdiction to consider the case. Taking the offense, JAG moved for judgment on the pleadings, arguing (among other things) that the Committee did not have subject matter jurisdiction over JAG. The circuit court agreed with JAG, so it reversed and dismissed the case. The court declined to address the Committee's exhaustion argument based on its ruling that the Committee lacked jurisdiction over JAG to begin with. The Committee appeals.

II.

The Committee's final argument, which we must take first, is that the circuit court lacked jurisdiction to hear JAG's appeal because JAG failed to exhaust its administrative remedies. The common-law exhaustion rule is that

no one is entitled to judicial relief for a supposed or threatened injury until the prescribed statutory administrative remedy has been exhausted. A basic rule of administrative procedure requires that an agency be given the opportunity to address a question before a complainant resorts to the courts. The failure to exhaust administrative remedies is grounds for dismissal.

Old Republic Surety Co. v. McGhee, 360 Ark. 562, 566, 203 S.W.3d 94, 97–98 (2005) (internal citations omitted). The rule comes with several exceptions, including where

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the administrative process is for some reason inadequate. *Barr v. Arkansas Blue Cross & Blue Shield, Inc.*, 297 Ark. 262, 267, 761 S.W.2d 174, 177 (1988).

The Committee urges that this case is much like *Romine v. Arkansas Dep't of Environmental Quality*, 342 Ark. 380, 40 S.W.3d 731 (2000). There, a waste hauler failed to participate in administrative proceedings about whether the business owed statutory fees. When ADEQ filed an enforcement action in circuit court, the waste hauler counterclaimed asserting constitutional defects in the fee statute. The circuit court dismissed that counterclaim based on the waste hauler's failure to exhaust its administrative remedies. 342 Ark. at 381, 40 S.W.3d at 732. The supreme court affirmed the exhaustion ruling. 342 Ark. at 382–83, 40 S.W.3d at 732–33.

Here, JAG failed to participate in the Committee hearing about whether JAG needed a residential contractor's license. And JAG failed to exercise its clear statutory right to appeal the Committee's decision to the Contractor's Licensing Board. Ark. Code Ann. § 17-25-511 (Repl. 2001). Therefore, the Committee concludes, *Romine* and like cases required the circuit court to dismiss JAG's suit without reaching the merits.

The Committee is mostly correct. Under *Romine*, JAG's failure to exhaust its administrative remedies barred its challenge on the merits of whether JAG was a residential building contractor as a matter of fact under the particulars of Ark. Code

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Ann. § 17-25-502 (Repl. 2001). This analysis, however, is not the end of the case.

JAG's primary contention has always been that the Committee lacked subject matter jurisdiction to take any action in this dispute. This contention does not open up the case. But it does raise an issue that the circuit court had the authority to adjudicate. *Edwards v. Edwards*, 2009 Ark. 580, at 3–4, ___ S.W.3d ___, ___. The Committee acknowledges that JAG's appeal to circuit court was timely under the Administrative Procedure Act. Ark. Code Ann. § 25-15-212 (Repl. 2002). And in circuit court, JAG could and did challenge the Committee's subject matter jurisdiction—a challenge that is always open to any litigant notwithstanding any prior waiver. *Muldoon v. Martin*, 103 Ark. App. 64, 65, 286 S.W.3d 201, 202 (2008); see generally 2 DAVID NEWBERN & JOHN J. WATKINS, ARKANSAS PRACTICE SERIES: CIVIL PRACTICE AND PROCEDURE § 2:9 (4th ed. 2006). This case therefore boils down to the disputed jurisdiction over JAG.

III.

In an appeal from an administrative agency, our review “is directed not to the decision of the circuit court but to the decision of the administrative agency.” *Anderson v. BNSF Railway Co.*, 375 Ark. 466, 468–69, 291 S.W.3d 586, 589 (2009). Under the Administrative Procedure Act, we “may reverse or modify the agency's decision if the decision: (1) violates the constitution or a statute; (2) exceeds the

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agency's statutory authority; (3) is affected by an error of law; (4) is procedurally unlawful; (5) is unsupported by substantial evidence in the record; or (6) is arbitrary, capricious, or is an abuse of discretion." *Anderson*, 375 Ark. at 469, 291 S.W.3d at 589.

JAG's contention is that the Committee lacked authority to investigate JAG's licensure issues and impose a penalty. The Committee counters that it had subject matter jurisdiction over JAG's activities. The Committee is correct. "The Residential Building Contractors Committee may conduct hearings regarding alleged violations of this subchapter or regulations promulgated thereunder" Ark. Code Ann. § 17-25-510 (Repl. 2001). JAG's alleged violation—operating as a residential contractor without a license—fits squarely within the Committee's statutory jurisdiction. Does the Committee have statutory authority, after an investigation and a hearing, to impose a penalty on an entity that the Committee concludes has acted as a residential contractor without a license? Yes. Ark. Code Ann. §§ 17-25-504, 17-25-505, 17-25-510 (Repl. 2001). The circuit court therefore erred on the law by concluding otherwise.

Committee affirmed; circuit court reversed.

VAUGHT, C.J., and GLADWIN, J., agree.