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NO. COA09-1606

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

JERRY M. HAYNIE, RELIABLE SERVICE
PLUS HEATING/COOLING, INC.,
Petitioners,

v.

Wake County
No. 09 CVS 3496

NORTH CAROLINA STATE BOARD OF
EXAMINERS OF PLUMBING, HEATING AND
FIRE SPRINKLER CONTRACTORS,
Respondents.

Appeal by petitioner from order dated 20 May 2009 by Judge A. Leon Stanback, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 May 2010.

Wood, Rabil & Peake, L.L.P., by Thomas R. Peake, II, for petitioner-appellant.

Young, Moore & Henderson, P.A., by John N. Fountain and Reed N. Fountain, for respondent-appellee.

BRYANT, Judge.

On 13 January 2009, respondent, the North Carolina Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors ("the Board"), conducted an administrative hearing regarding petitioner Jerry Milton Haynie, d/b/a Reliable Service Plus Heating/Cooling, Inc. The Board rendered a final agency decision by order dated 23 January 2009 permanently revoking petitioner's license to engage in business as heating contractor. On 20 February 2009, petitioner,

acting *pro se*, filed a document in Wake County Superior Court entitled "Judicial Review of Proceedings Appeal of Order," which contained no text beyond the caption and an attached copy of the Board's order. On the same date, petitioner also filed a document entitled "Motion for Stay of Proceedings Appeal Order." On 1 April 2009, the Board moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. On 15 April 2009, petitioner filed a "Motion to Dismiss Board Order" and, on 16 April, filed a "Motion to Amend the Pleadings" and a "Petition for Judicial Review." Following a hearing on 20 April 2009, by order entered 21 May 2009, the trial court denied petitioner's request for a stay, allowed respondent's motion to dismiss, and affirmed the Board's order. On 19 June 2009, petitioner filed a notice of appeal. On 22 June 2009, petitioner filed a Motion for Relief under Rule 60 in the trial court. Thereafter, petitioner both submitted an appellate brief and moved this Court to remand to the trial court for a Rule 60 determination. On 22 February 2010, we denied petitioner's motion to remand. On 6 May 2010, upon reconsideration of the "Motion to Remand for Rule 60 Determination," we remanded to the trial court to conduct an evidentiary hearing on the Rule 60(b) motion pending before it.¹

¹ This appeal was held in abeyance pending the trial court's consideration of petitioner's Rule 60(b) motion. See *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 407 (1979) (holding that "the better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending"), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980); see also *Hall v. Cohen*, 177 N.C. App. 456, 628 S.E.2d 469

By order dated 29 October 2010 and filed in this Court 8 November 2010, the trial court made numerous findings of fact and indicated that it would be inclined to deny petitioner's Rule 60 motion were his appeal not pending before this Court. As discussed below, we affirm the trial court's 21 May 2009 order.

Facts

Prior to entry of the Board's 23 January 2009 order, petitioner held a license to engage in business as a heating contractor; the license was issued to Jerry Milton Haynie, Owner, Reliable Service Plus Heating & Cooling. By order dated 2 March 2006, the Board made various findings about petitioner's code violations and unprofessional conduct in connection with jobs he performed in 2002 and 2004. The 2006 order placed petitioner's license on supervised probation until 2 April 2008 and notified petitioner that, in the event of further violations, the Board could impose additional sanctions including revocation. By additional order dated 11 February 2008, the Board found petitioner was in violation of the 2006 order but granted relief by informing petitioner that his license would not be permanently revoked if he complied with various requirements, including payment of fees to reactivate and renew his license. When petitioner failed to pay the fees, he was notified by the Board that his license was revoked. In October 2008, petitioner sought reinstatement of his license, contending that he had made reasonable efforts to comply with the 2006 order from the Board. The Board disagreed and also

(2006); *Davis v. Sellers*, 115 N.C. App. 1, 443 S.E.2d 879 (1994).

made findings about code violations and poor quality in petitioner's work on several jobs during 2002-2004. The Board also found that petitioner had violated his license probation terms in 2007. On this basis, the Board permanently revoked petitioner's license to engage in business as a plumbing, heating and fire sprinkler contractor. Petitioner then sought judicial review.

Petitioner's brief to this Court contains two arguments: the trial court erred and abused its discretion in (I) denying his motion to amend his petition and allowing the Board's motion to dismiss and (II) affirming the Board's order without properly considering petitioner's exceptions.

I

Petitioner first argues that trial court erred and abused its discretion in denying his motion to amend his petition and allowing the Board's motion to dismiss. We disagree.

We first note that the trial court's 21 May 2009 order did not contain a denial of petitioner's motion to amend. Rather, the trial court denied petitioner's request for a stay, allowed respondent's motion to dismiss, and affirmed the Board's order. Further, our careful review of this order reveals that, despite the decretal portion of the order indicating that the Board's motion to dismiss was allowed, the trial court actually conducted the full judicial review which petitioner sought, using the whole record test to review the Board's decision. Finding 6 states that the Board's motion to dismiss was "well-taken in that the pleadings

filed by [p]etitioner in [the trial court] are wholly inadequate." However, findings 7 and 8 state that the trial court, in its discretion, applied the whole record test to review the Board's decision despite the inadequacy of petitioner's pleading. Finding 9 states that petitioner's motion to amend was not filed until 16 April 2009, and that counsel for the Board did not receive copies of same until after the 20 April 2009 hearing. Petitioner did not raise or argue the amended pleading at the hearing, although he did make the same contentions during the oral argument. Finally, in finding 10, the trial court states that it "has carefully reviewed each of these pleadings and concludes that full consideration of each would not alter the conclusion there is no basis to conclude the Board has committed error under [the APA.]"

Thus, the trial court did *not* deny petitioner's motion to amend in the order from which he appeals and, therefore, this issue would not be properly before us. However, the trial court *did* consider his amended pleading, *did* hear his oral argument of the contentions contained in the amended petition, and *did* apply the whole record test in reviewing the Board's decision. Thus, we do not comprehend how petitioner has been prejudiced by the trial court's actions or what benefit he would hope to gain if we were to remand this case to the trial court for entry of an order allowing or denying his motion to amend. Petitioner has received the full judicial review which he sought and to which he was entitled under the APA. Petitioner's arguments on this point are overruled.

Petitioner also argues that the trial court erred and abused its discretion in affirming the Board's order without properly considering petitioner's exceptions. We disagree.

As discussed *supra*, the trial court's order makes clear that it had the amended petition before it and had heard petitioner's oral contentions prior to conducting its whole record test. In his brief to this Court, petitioner states that the trial court erred by "conducting its review of the Board's Order without properly considering [his] exceptions." Petitioner asserts that the trial court may have applied the wrong standard of review, suggesting that he made exceptions as to purported errors of law in the Board's order, which would require a de novo review by the trial court. See *Blalock v. N.C. Dept. of Health and Human Serv.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001).

However, we have carefully reviewed petitioner's amended petition and reject this contention. Petitioner's purported amended petition contains only two statements which could conceivably be called exceptions:

This hearing was requested by the respondent on 10/22/08 in time to review the revoked status placed on the respondent's license well after the fact that the board had opportunities to review the actions earlier made by the Agency's director Dale Dawson But [sic] did not.

. . .

Respondent ask [sic] that the error made by the Agency's technical investigator [sic] admission fully determines what he stated in the transcript that, I did not do a proper or theral [sic] investigation to conclude

findings of matters complained against Jerry
M. Haynie. . . .

Hearings before the Board are governed by the Administrative Procedures Act ("APA"). N.C. Gen. Stat. § 150B-1 *et seq.* (2009). Section 150B-45 provides for judicial review in the superior court of final agency decisions. N.C. Gen. Stat. § 150B-45 (2009). Section 150B-46 provides, in pertinent part, that "[t]he petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C. Gen. Stat. § 150B-46 (2009). We have previously held that a "petition was not sufficiently explicit to allow effective judicial review" where the party seeking review "did not except to any finding of fact or conclusions of law, but made only generalized complaints as to certain procedural aspects of the hearing before respondent." *Vann v. North Carolina State Bar*, 79 N.C. App. 173, 174, 339 S.E.2d 97, 98 (1986) (applying the predecessor statute to N.C.G.S. § 150B-46).

If a petition consisting of only generalized complaints is insufficient to sustain judicial review, petitioner's initial filing here, completely lacking in content, was likewise inadequate, even under a liberal construction of the APA. *Id.* Further, petitioner's amended petition does not improve on this situation as we are unable to comprehend an exception to any finding of fact or conclusion of law. Frankly, we are unable to understand anything about petitioner's contentions to allow us to call them even "generalized complaints as to certain procedural aspects of the hearing before respondent." On these facts, we believe the trial court was very generous in exercising its

discretion and conducting a whole record test review of the Board's decision on petitioner's behalf. This argument is overruled.

Affirmed.

Judges ELMORE and Judge ERVIN concur.

Report per Rule 30(e).