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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1275

Filed: 7 August 2018

North Carolina Property Tax Commission, 17 PTC 22-26.

IN THE MATTER OF:

JUDY C. COGGINS # 1

JUDY C. COGGINS # 2

JUDY C. COGGINS # 3

BANGEO REAL ESTATE INVESTMENTS, LLC

CAMERON STREET PARTNERS I, LLC.

Appeal by appellants from orders entered 2 August 2017 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 19 April 2018.

Bailey & Dixon, LLP, by John T. Crook, for taxpayers-appellants.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson, for appellee Wake County.

DAVIS, Judge.

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Judy C. Coggins (“Coggins”), Bangeo Real Estate Investments, LLC (“Bangeo”), and Cameron Street Partners I, LLC (“Cameron Street”) (collectively the “Taxpayers”) appeal to this Court from the 2 August 2017 orders of the North Carolina Property Tax Commission (the “Commission”) dismissing their appeals from the Wake County Board of Equalization and Review (“BER”) and denying their motions to compel discovery for lack of subject matter jurisdiction. After a thorough review of the record and applicable law, we affirm the orders of the Commission.

Factual and Procedural Background

North Carolina property owners may dispute appraisals of the value of their property by requesting a hearing before a county board of equalization and review. N.C. Gen. Stat. § 105-322(g)(2) (2017). An owner of property may then “except to an order of the county board of equalization and review . . . concerning the listing, appraisal, or assessment of property and appeal the order to the Property Tax Commission.” N.C. Gen. Stat. § 105-290(b) (2017).

The present appeal involves six separate property tax appeals from the BER to the Commission. On 8 September 2016, 29 September 2016, and 26 October 2016, the BER received evidence and heard declarations with regard to the tax value of three parcels of land owned by Coggins, one parcel owned by Cameron Street, and two parcels owned by Bangeo. The BER subsequently mailed Notices of Decision assessing the value of Coggins’ parcels, Cameron Street’s parcel, and Bangeo’s parcels

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on 30 September 2016, 24 October 2016, and 16 November 2016, respectively. The Notices of Decision all contained identical language stating, in pertinent part, as follows:

You may appeal the Board's decision by filing a timely appeal with the North Carolina Property Tax Commission. The appeal must be received by the Commission or postmarked by the U.S. Postal Service within thirty (30) days from the mailing of the County Board's Notice of Decision.

The Taxpayers all retained the same law firm to represent them in their appeals to the Commission. On 26 October 2016, an attorney with the firm prepared packets containing notices of appeal of the BER's decisions to the Commission concerning the Coggins parcels. Each packet contained the original notice of appeal along with copies to be served by mail upon the Wake County Revenue Director and the Wake County Attorney. The attorney instructed a paralegal to hand-deliver and file the original notices of appeal with the Commission. The paralegal was further directed to mail the copies to the above-referenced Wake County officials after filing the originals with the Commission.

The following day, the paralegal mistakenly took the packets containing the notices of appeal to the Wake County Revenue Department in the Wake County Justice Center rather than to the Commission's office in the North Carolina Department of Revenue building. The paralegal handed the packets to an employee of the Wake County Revenue Department, who file-stamped and returned to the

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paralegal the copies of each notice of appeal. The employee retained the originals. The paralegal proceeded to mail the copies of the notices of appeal to the Wake County Revenue Director and the Wake County Attorney later that day.

The attorney prepared the notices of appeal for both Cameron Street and Bangeo in the same manner as she had for Coggins. On 21 November 2016, the paralegal delivered the packet containing the Cameron Street notice of appeal to the Wake County Revenue Department. She interacted with the same employee she had dealt with regarding the Coggins appeals. The employee once again file-stamped and returned the copies to the paralegal while retaining the original notice of appeal. Upon receiving the copies from the employee, the paralegal then mailed them to the Wake County Revenue Director and the Wake County Attorney. This same sequence of events between the paralegal and the Wake County Department of Revenue employee took place for the final time on 9 December 2016 with regard to the Bangeo notices of appeal.

On 16 February 2017, Coggins informed the attorney that her bank account had been “frozen” by Wake County due to unpaid taxes. The attorney immediately contacted the Wake County Revenue Department to make an inquiry as to why this had occurred and spoke with an employee named Kenneth McArtor. McArtor told the attorney that all of the Taxpayers’ original notices of appeal were on his desk along with the file-stamped copies that had been mailed to the Wake County Revenue

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Department by the paralegal. The following day, the attorney obtained all of the original notices of appeal for Coggins, Cameron Street, and Bangeo and hand-delivered them to the Commission along with a letter explaining the reason for the delay in filing the appeals.

On 9 March 2017, Wake County moved to dismiss each of the Taxpayers' appeals based on their failure to file the appeals with the Commission within 30 days of the mailing of the respective BER decisions. The Taxpayers filed motions to compel discovery on 1 May 2017 in which they sought to obtain information pertaining to "why the Wake County Clerk reviewed and retained the original Notice of Appeal" and "the procedure for handling appeals within the Wake County Department of Revenue." The parties' motions were heard before the Commission on 18 May 2017.

On 2 August 2017, the Commission entered orders granting Wake County's motion to dismiss and denying the Taxpayers' motions to compel discovery. In its orders, the Commission made the following pertinent conclusions of law with regard to all six of the Taxpayers' appeals:

1. *N.C. Gen. Stat. § 105-290(e)* provides in pertinent part that a notice of appeal shall be filed with the Property Tax Commission within 30 days after the date that the County Board mailed a notice of its decision[.]

....

3. The Appellant did not comply with the statutory requirement of filing the Notice of Appeal with the Commission within 30 days after the date that the

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County Board mailed its notice of its decision to the property owner.

4. The Commission has no jurisdiction to hear an appeal unless the notice of appeal is timely filed. . . .
5. The Commission has no jurisdiction to hear the Motion to Compel Discovery.

On 31 August 2017, the Taxpayers filed notices of appeal to this Court.

Analysis

On appeal, the Taxpayers argue that the Commission erred in granting Wake County's motion to dismiss and denying their motions to compel discovery. We review decisions of the Commission pursuant to N.C. Gen. Stat. § 105-345.2. "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

N.C. Gen. Stat. § 105-345.2 provides the framework for our review of decisions of the Commission and states, in pertinent part, as follows:

- (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

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- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2017).

N.C. Gen. Stat. § 105-290(e) sets out the applicable deadline for an appeal by a property owner to the Commission from a decision by a county board of equalization and review:

- (e) **Time Limits for Appeals.** — A notice of appeal . . . from a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed the notice of its decision to the property owner.

N.C. Gen. Stat. § 105-290(e) (2017). This Court has held that “because the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal.” *Gummels v. N.C. Dep’t of Human Res.*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 115 (1990) (citation omitted).

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On a number of occasions, this Court has held that a taxpayer's failure to comply with the mandatory deadline for appealing to the Commission divests the Commission of subject matter jurisdiction to hear the appeal. *In re La. Pac. Corp.*, 208 N.C. App. 457, 703 S.E.2d 190 (2010), involved the failure of a taxpayer to file its notice of appeal from the Wilkes County Board of Equalization and Review to the Commission within the thirty-day statutory deadline. *Id.* at 460, 703 S.E.2d at 192. Wilkes County sought the dismissal of the taxpayer's appeal to the Commission on the ground that it was untimely. The taxpayer contended that it had never received notice of the Wilkes County Board of Equalization and Review hearing and that such lack of notice excused it from strict compliance with the filing deadline. The Commission denied Wilkes County's motion to dismiss and remanded the case to the Wilkes County Board of Equalization and Review. *Id.*

On appeal, this Court reversed the decision of the Commission and held that "the thirty-day 'Time Limit for Appeals' set out in [N.C. Gen. Stat. § 105-290(e)] is jurisdictional." *Id.* at 461, 703 S.E.2d at 193. We concluded as follows:

Here, the taxpayer did not perfect its appeal within the statutory guideline. This deprived the reviewing body, the Commission, of jurisdiction to hear the appeal. That the substance of the appeal may have had merit does not render the time limit for appeals inapplicable. Accordingly, the Commission erred by denying the County's motion to dismiss and entertaining the taxpayer's appeal.

Id. at 462, 703 S.E.2d at 193.

In *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 446 S.E.2d 594 (1994), this Court affirmed an order of the Commission dismissing the taxpayers' appeal for lack of subject matter jurisdiction where the taxpayers missed the thirty-day deadline by one day. *Id.* at 707, 446 S.E.2d at 596. We stated that although the taxpayers' argument "that such an interpretation of the statute is hypertechnical . . . may be well taken . . . it is our duty to apply legislation as written, whatever our opinion may be as to its efficacy or as to the hardship it may impose in individual cases." *Id.* at 706, 446 S.E.2d at 596 (citation omitted).

In the present case, it is undisputed by the parties that the Taxpayers' appeals were not actually filed with the Commission until 17 February 2017 — well over thirty days after the BER mailed its Notices of Decision in all of the appeals at issue. Nevertheless, the Taxpayers argue that (1) Wake County was equitably estopped from seeking a dismissal of their appeals on timeliness grounds; and (2) good cause existed for the Commission to exercise jurisdiction over the Taxpayers' appeals based upon the excusable neglect of the Taxpayers' counsel. We address each argument in turn.

I. Equitable Estoppel

The Taxpayers initially contend that the doctrine of equitable estoppel served as a bar to Wake County's ability to seek the dismissal of their appeals.

[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a

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false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Hawkins v. M & J Fin. Corp., 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953)
(citations omitted).

This Court has held that “mere silence will not operate to create an estoppel. In order to work an estoppel the silence must be under such circumstances that there are both a specific opportunity, and a real or apparent duty, to speak.” *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 164, 356 S.E.2d 912, 916 (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 320 N.C. 794, 361 S.E.2d 80 (1987). Furthermore, “[w]hen a party is misled through his own lack of diligence and reasonable care, he may not then avail himself of the doctrine of equitable estoppel.” *N.C. Fed. Sav. & Loan Ass’n v. Ray*, 95 N.C. App. 317, 323, 382 S.E.2d 851, 855 (1989) (citation omitted).

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In the present case, the Taxpayers do not argue that the Wake County Revenue Department employee made a false representation to the paralegal with regard to the legally correct manner in which to file the Taxpayers' appeals. Furthermore, while the Taxpayers have asserted that the employee did not inform the paralegal of her mistake, they are unable to show that the paralegal lacked "the means of knowledge of the truth" as to the appropriate location in which to file the appeals. *Hawkins*, 238 N.C. at 178, 77 S.E.2d at 672. Moreover, any reliance by the paralegal upon the employee's failure to inform her of the manner in which the notices of appeal were required to be filed would have been the product of a "lack of diligence and reasonable care" on her part. *N.C. Fed. Sav. & Loan Ass'n*, 95 N.C. App. at 323, 382 S.E.2d at 855. Therefore, we hold that the doctrine of equitable estoppel is inapplicable on these facts.

II. Excusable Neglect

The Taxpayers next argue that the Commission erred in refusing "to exercise its inherent power and authority to find jurisdiction to hear the [a]ppeals" because any error on the part of the Taxpayers in filing the appeals constituted excusable neglect. We disagree.

The Taxpayers concede in their brief that our appellate courts have never applied the doctrine of excusable neglect in connection with an appeal to the Property Tax Commission. They point out, however, that this Court has, in fact, invoked the

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doctrine in cases involving appeals to the North Carolina Industrial Commission. However, we do not need to reach the broader question of whether the excusable neglect doctrine can ever apply to appeals to the Property Tax Commission because the Taxpayers in the present case have failed to show the existence of excusable neglect.

It is well established that “what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case.” *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986). Furthermore, “[d]eliberate or willful conduct cannot constitute excusable neglect . . . nor does inadvertent conduct that does not demonstrate diligence[.]” *Nieto-Espinoza v. Lowder Constr., Inc.*, 229 N.C. App. 63, 66, 748 S.E.2d 8, 11 (2013) (citation and quotation marks omitted).

In support of their contention that the untimely filing of their appeals was due to excusable neglect, Taxpayers cite *Egen v. Excalibur Resort Professional*, 191 N.C. App. 724, 663 S.E.2d 914 (2008). In that case, a paralegal for the plaintiff’s law firm received the Industrial Commission’s opinion and award via email but failed to notify the plaintiff’s attorney that the decision had been received. *Id.* at 731, 663 S.E.2d at 919. The paralegal incorrectly assumed that Plaintiff’s counsel had also received the email and that she had simply been “blind copied.” This was the first time in the paralegal’s ten years of employment that the firm had received an opinion and award

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via email. *Id.* at 731, 663 S.E.2d at 920. Based upon these facts, we held that the plaintiff's failure to file the appeal within the applicable deadline constituted excusable neglect. *Id.*

Conversely, this Court did not find excusable neglect in *Sellers v. FMC Corporation*, 216 N.C. App. 134, 716 S.E.2d 661 (2011). In that case, the defendant's counsel "was handling two intertwined cases before the Industrial Commission and an email pertaining to one case caused confusion in the other." *Id.* at 141, 716 S.E.2d at 666. The defendant's attorney incorrectly interpreted the fact that he had received transcripts for both cases as signifying that the Industrial Commission had received notices of appeal for both cases. In holding that the actions of the defendant's counsel did not amount to excusable neglect, we concluded as follows:

Failing to definitively determine whether a notice of appeal was filed does not demonstrate diligence. Due to the applicable test for excusable neglect, we do not believe trial counsel's action in failing to confirm, and merely assuming, a notice of appeal had been filed amounts to excusable neglect.

Id. at 142, 716 S.E.2d at 667; *see also Nieto-Espinoza*, 229 N.C. App. at 69, 748 S.E.2d at 12 (holding excusable neglect was not demonstrated where "carelessness if not negligence . . . caused plaintiff's counsel to enter the wrong date to re-file plaintiff's worker's compensation claim").

Here, unlike in *Egen*, the Commission itself played no role in contributing to the Taxpayers' failure to file the appeals in a timely manner. Furthermore, the error

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by the paralegal was “not extraordinary or unusual enough to constitute excusable neglect, but w[as] simply due to insufficient attentiveness.” *Sellers*, 216 N.C. App. at 142-43, 716 S.E.2d at 667. Thus, the present case does not involve excusable neglect.

* * *

Therefore, because the Taxpayers failed to file their appeals with the Commission within the mandatory thirty-day deadline contained in N.C. Gen. Stat. § 105-290(e), we hold that the Commission lacked subject matter jurisdiction over these appeals. Accordingly, the Commission did not err in granting Wake County’s motion to dismiss.¹

Conclusion

For the reasons stated above, we affirm the 2 August 2017 orders entered by the Commission.

AFFIRMED.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).

¹ We likewise affirm the Commission’s denial of the Taxpayers’ motions to compel discovery.