The Driggs Corporation v. Maryland Aviation Administration
No. 68, September Term, 1997

Administrative Law: party who does not have burden of proof does not lose right to judicial review of final administrative decision by resting after losing motion challenging legal sufficiency of evidence presented by party having burden of proof.

IN THE COURT OF APPEALS OF MARYLAND

No. 68

September Term, 1997

THE DRIGGS CORPORATION

v.

MARYLAND AVIATION ADMINISTRATION

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Karwacki, Robert L. (retired, specially assigned),

JJ.

Opinion by Wilner, J.

Filed: January 14, 1998

The underlying dispute that generated this appeal arises from the termination by appellee, Maryland Aviation Administration (MAA), of an $11.5 million contract it had entered into with appellant, The Driggs Corporation (Driggs), to extend and upgrade Runway 10-28 at Baltimore-Washington International Airport. We are not directly concerned here with the merits of that dispute — whether MAA acted properly in terminating the contract with Driggs. After an extensive hearing, the Maryland State Board of Contract Appeals (BCA) held that MAA did not act unlawfully in doing what it did.

The issue presented to us by the parties is whether the Circuit Court for Anne Arundel County erred in dismissing Driggs's petition for judicial review of the BCA decision on the ground that, by declining to produce evidence after BCA had denied its motion for summary disposition, Driggs had acquiesced in the decision. We shall hold that the court did err in that ruling. There is, unfortunately, another issue, not addressed by the parties but apparent from the record, that requires consideration as well and that will ultimately govern this appeal. The fact is that the petition for judicial review was premature. As we shall explain, there remained at issue the question of damages, which (1) was part of MAA's claim, (2) had been bifurcated by BCA, and (3) had not apparently been resolved by BCA when the petition was filed. Ordinarily, only final administrative decisions resolving the entire claim before the agency are appropriate for judicial review, and the order sought to be reviewed in this case did not qualify either as a final decision or as the kind of special interlocutory order for which immediate judicial review is available.

FACTUAL BACKGROUND

The contract in question was approved by the Board of Public Works on April 14, 1993. It called for Driggs to complete certain work (Phases 1 and 2) on Runway 10-28 within 200 days after issuance of a Notice to Proceed. The completion date was eventually extended by MAA to December 31, 1993. The contract also incorporated two clauses mandated by a State Procurement Regulation. One, required by COMAR 21.07.02.07, was a Termination for Default clause, authorizing MAA to terminate the contract "[i]f the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified in this contract, or any extension thereof . . . ." In the event of such a termination, the clause made Driggs and its surety liable for any damage to the State resulting from Driggs's failure to complete the work within the specified time. The other clause, mandated by COMAR 21.07.02.09, was a Termination for Convenience provision, authorizing the State to terminate the contract "whenever the procurement officer shall determine that such termination is in the best interest of the State." If the State invoked that clause, it would be liable to Driggs for certain costs and expenses enumerated in the clause.

On October 21, 1993, MAA invoked the Termination for Default clause and terminated the contract on the grounds that Driggs had (1) "failed to prosecute the contract work with such diligence as would have assured completion of Phases 1 and 2 within the time and as required by the terms of the contract" and (2) also failed "in its obligation to submit a schedule by August 13, 1993 showing a realistic plan to complete Phases 1 and 2

by December 31, 1993."

Driggs filed a complaint with BCA, asking that the termination be overturned because of excusable delays, waiver by MAA of its right to terminate for default, and material breaches by MAA. It also asked that the termination for default be converted to a termination for convenience and that it be awarded damages accordingly. MAA answered the complaint, asking that Driggs's claim challenging the termination for default be dismissed. In an accompanying counterclaim, MAA asserted that, because of its default, Driggs was responsible to MAA "for all damages occasioned by [Driggs's] default" and asked that BCA affirm the termination.

On October 18, 1994, after some discussions between BCA and the parties, BCA decided that, as the procurement officer had not yet resolved the question of what damages MAA would be entitled to because of the termination for default, that issue was not properly before BCA but, when resolved by the procurement officer, would be dealt with by BCA in a separate proceeding. The pending proceeding would therefore be limited to "entitlement, i.e., the propriety of the procurement officer's final decision terminating Driggs' contract for default." That was confirmed when the hearings actually commenced and MAA advised that it was not planning to offer any evidence as to damages but intended to proceed only on the issue of liability. That bifurcation decision set the stage for the prematurity problem noted above.

With the concurrence of the parties and in accordance with BCA's past practice and with established Federal procurement law, the termination for default was treated as an MAA

claim against Driggs, upon which MAA had the burden of proof.[1] Accordingly, MAA proceeded first with its case, to establish sufficient grounds for its decision to terminate the contract. In hearings extending over 40 days, it produced 11 fact witnesses, three expert witnesses, and 281 exhibits. Driggs not only cross-examined the MAA witnesses but, either through them or otherwise, placed into evidence 217 exhibits of its own. In addition to certain procedural defenses, it vigorously contested the accuracy of many of the assertions made by MAA with respect to Driggs's diligence and its ability to complete the work within the allotted time. It pressed the point that, at the time of the termination, it still had 135 days

[1]There is no dispute with respect to that point. MAA has conceded in its brief before us that "[b]ecause the termination for default was the State's claim, MAA had the burden of proving that Driggs had defaulted, i.e., that MAA reasonably believed that Driggs would not complete by December 31, 1993 and that Driggs had refused to meet that date." It made the same concession in the circuit court and clearly acquiesced before BCA in that procedure. No objection was made when the Chairman of BCA ruled that, because it was dealing with an "affirmative claim" by MAA, the agency would proceed first, to establish, at least *prima facie*, the appropriateness of the termination for default. As we indicated, that approach is in conformance with established Federal procurement law and practice. *See Lisbon Contractors, Inc. v. U.S.*, 828 F.2d 759, 764 (Fed. Cir. 1987): "[I]t is long-established government contract law in cases brought to the boards of contract appeals (BCA's) that the government bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for default." That burden is placed on the government regardless of whether the action before the BCA is instigated by the government or the contractor. As the *Lisbon* court observed, imposition of the burden of proof of default in BCA cases "falls naturally on the government inasmuch as the government is only being made to bear the burden of proof on its own 'claim' of default. Only after the default issue is resolved, does the board turn to any 'claim' by the government or the contractor for monetary compensation." *Id. See also SMS Data Products Group, Inc. v. U.S.*, 17 Cl. Ct. 1 (1989); *J. Parr Const. Design, Inc. v. U.S.*, 24 Cl. Ct. 228 (1991); *Daff v. U.S.*, 31 Fed. Cl. 682 (1994); *Hannon Elec. Co. v. U.S.*, 31 Fed. Cl. 135 (1994); *Appeal of Walsky Construction Co.*, ASBCA No. 41,541, 94-1 BCA ¶ 26,264 (1993), *modified*, 94-2 BCA ¶ 26,698 (1994); *Appeal of Custodial Guidance Systems, Inc.*, GSBCA No. 6531, 83-1 BCA ¶ 16,278 (1983); *Appeal of System Development Corporation*, VABCA No. 1976R, 87-3 BCA ¶ 20,167 (1987); *Appeals of Air-O-Plastik Corp.*, GSBCA No. 4925, 81-2 BCA ¶ 15,338 (1981).

left to complete the work.[2]

Near the end of MAA's case, Driggs indicated, as it had at the outset of the hearing, that it would be filing a motion for summary disposition, *i.e*, a motion testing whether MAA had presented a *prima facie* case establishing the validity of the termination. The BCA Chairman explained that, although BCA used the administrative terminology "motion for summary disposition," the motion would be in the nature of a motion for judgment, asserting that Driggs was entitled to prevail as a matter of law on the issues covered by the motion. He advised that

> "the Board will review the evidence of the record compiled up to the time that the motion is made in the light most favorable to the party against whom the motion is directed, and will resolve reasonable inferences from conflicts in the oral and written testimony comprising the record compiled to the date of the motion. It will resolve such inferences in the favor of the party against whom the motion is directed, and if, having done so, there is lacking a factual predicate pursuant to which, as a matter of law, the moving party is entitled to prevail, the motion will be denied."

When Driggs suggested that, in a non-jury court proceeding, the court, entertaining a motion for judgment at the end of the plaintiff's case, was not required to view the evidence in a light most favorable to the non-moving party, the Chairman iterated that the proceeding was an administrative one and that BCA would apply the standard of review he

[2] MAA never denied that Driggs had that amount of time left to complete the contract. It pointed out, however, that, when asked to supply schedules showing projected work progress and completion dates, Driggs produced schedules indicating that the work would not, in fact, be completed by December 31.

had announced. He further advised, however:

> "The party who made that motion could then stand up and rest, at which point in time another motion could be presented in which the standard of review, if you will, by the Board of the evidence of record would be somewhat different. There we would be focusing on whether the State had met its burden to demonstrate that the termination for default was appropriate in the context that the hearing and notice was mandated by the Administrative Procedure."

Presumably on that premise, Driggs orally moved for summary disposition at the end of MAA's case. BCA initially took the motion under advisement but, in a 22-page memorandum opinion filed January 2, 1996, it denied the motion. In its memorandum, BCA reiterated that, in considering a motion for summary disposition, the Board determines only whether there are material facts in dispute and what legal principles govern the issues in dispute. It once again made clear that, in ruling on such a motion, it must resolve "all conflicting evidence and all legitimate inferences raised by the evidence . . . in favor of the party . . . against whom the motion is directed" and that "[t]he purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact." Accordingly, it confirmed that summary disposition was not appropriate "if a genuine issue of material fact is in dispute" or if undisputed facts are susceptible of more than one permissible factual inference.

With that introduction, BCA proceeded to examine the issues raised by Driggs, the positions taken by the parties with respect to those issues, and some of the evidence bearing

on the issues. In the course of that examination, BCA identified a number of specific and substantial factual conflicts. Its overall conclusion was that "there are material facts in dispute concerning whether [Driggs] was in breach of the contract concerning timely performance and whether [Driggs] would have cured any such breach of its contract had its contract not been terminated for default." Resolving all reasonable inferences in favor of MAA, BCA concluded that MAA had a reasonable belief that (1) Driggs would not or could not complete Phases 1 and 2 by December 31, 1993, (2) December 31 was the appropriate completion date for Phases 1 and 2, and (3) completion of Phases 1 and 2 by December 31 was critical. Accordingly, BCA determined that "the record at this juncture *may be read* to continue to support prima facie the State's belief in the summer of 1993 that the contractor refused or failed to prosecute Phases 1 and 2 with such diligence as to insure their completion by December 31, 1993, and that such failure was material and, if not deliberate, was not excusable . . . ." (Emphasis added.) After considering and rejecting certain other procedural defenses raised by Driggs, BCA therefore denied the motion.

Three weeks after the filing of the memorandum opinion, Driggs informed BCA that it saw no "economic benefit to continuing the administrative proceeding and deferring our remedy in the courts until next fall," and it therefore decided to rest its case. It asked for an expeditious decision. It is clear, however, that neither the parties nor BCA expected that a final decision would be rendered without further input from the parties and that Driggs was in no way acquiescing in any conclusion that MAA acted properly in terminating the contract for default. On February 2, 1996, BCA set a schedule for the filing of post-hearing briefs,

and, indeed, extensive briefs were filed. Driggs filed an initial brief of 74 pages; MAA filed a 114-page brief; Driggs then filed a 24-page reply brief, which was met with a 25-page reply brief from MAA. Each of those briefs addressed the myriad of factual disputes in the record. On June 25, 1996, BCA rendered a 56-page opinion in which it made specific findings with respect to the disputed matters and held that MAA acted reasonably in terminating the contract.

From that decision, Driggs sought judicial review in the Circuit Court for Anne Arundel County. MAA responded with a motion to dismiss Driggs's "appeal," asserting that "Driggs, by its words and conduct, consented to the final decision by [BCA]" and that, "[o]n the authority of Osztreicher v. Juanteguy, 338 Md. 528, 659 A.2d 1278 (1995), Driggs' consent bars it from invoking the *appellate jurisdiction* of this Court."[3] (Emphasis added.) MAA's position was that, when BCA denied the motion for summary disposition, "[t]he burden shifted to Driggs to controvert the State's case" and that, when it rested without going forward with any evidence, it tacitly accepted BCA's ruling and therefore acquiesced in the final decision. The court apparently accepted MAA's interpretation of both *Osztreicher* and the respective burdens of proof, for it granted MAA's motion and dismissed the petition. The written order dismissing the petition was filed on January 13, 1997. On January 23,

[3] In replacing the former Chapter 1100 Rules with the Title 7, Chapter 200 Rules in July, 1993, we made clear, even through the new nomenclature, that those actions are not "appeals," as they do not seek review of any judicial decision, but rather invoke the statutory original jurisdiction of the circuit courts to exercise a limited review of Executive Branch decisions. *See Gisriel v. Ocean City Elections Board*, 345 Md. 477, 693 A.2d 757 (1997) and *Colao v. County Council*, 346 Md. 342, 697 A.2d 96 (1997).

Driggs filed a motion to alter or amend that order, complaining that the court had misconstrued *Osztreicher*. The motion was denied on February 25, and, on March 7, Driggs noted an appeal to the Court of Special Appeals. Before any significant proceedings in that court, we granted *certiorari* on our own initiative to consider the singular issue raised.

DISCUSSION

(A) Motion To Dismiss

It would appear that the Attorney General's Office has been laboring under the misimpression that an action for judicial review of an administrative agency's final order is in the nature of an "appeal," invoking the appellate jurisdiction of the circuit court. Based on that misunderstanding, it has, on behalf of MAA, moved to dismiss this appeal from the judgment of the circuit court on the ground that the notice of appeal was untimely. As noted, the order dismissing Driggs's petition was filed on January 13, 1997. Driggs filed a motion to alter or amend that order on January 23 — the tenth day after the order was filed. By virtue of Maryland Rules 2-534 and 8-202(c), the filing of that motion suspended the allowable time for noting an appeal from the January 13 order until 30 days after the date upon which the post-judgment motion was denied. The motion was denied on February 25, and the appeal was noted on March 7, 1997.

MAA's motion to dismiss is based upon the erroneous supposition that, because Driggs's petition to the circuit court invoked the appellate, rather than the original, jurisdiction of that court, Rules 2-534 and 8-202(c) have no application and that, as a result,

(1) the post-judgment motion did not suspend the time for noting an appeal and (2) the time for noting an appeal expired 30 days after January 13. In support of its motion, MAA cites *Pollard v. State*, 339 Md. 233, 661 A.2d 734 (1995). Unfortunately, it has misconstrued that case as well. *Pollard* dealt with a true appeal to the circuit court— from a judgment of the District Court — and the issue was whether, in a criminal appeal to be tried *de novo* in the circuit court, the court had authority under Rule 7-112 to reinstitute the appeal after having dismissed it for failure of the defendant to appear for trial. We held that the court did have such authority — that the reference in Rule 7-112 to Rules 2-534 and 2-535 was not intended to limit the court's post-judgment revisory power to civil appeals. *Pollard* in no way supports the notion that Rule 2-534 does not apply in an action for judicial review of an administrative agency order. As we have made clear, a petition for judicial review of an administrative agency order invokes the original, not the appellate, jurisdiction of the circuit court, and, accordingly, Rule 2-534 applies to the action. MAA's motion to dismiss this appeal is denied.

(B) <u>Validity of Order Dismissing Petition for Judicial Review</u>

As we have observed, the sole basis for MAA's motion to dismiss Driggs's petition for judicial review in the circuit court and the sole basis for the court's granting of that motion, was the view that, by resting its case after the denial of its motion for summary disposition, Driggs effectively invited and therefore acquiesced in the decision of BCA and, as a result, is not allowed to challenge that decision on "appeal." For that proposition, MAA

cites only *Osztreicher v. Juanteguy, supra*, 338 Md. 528, 659 A.2d 1278. The precise basis of MAA's theory is somewhat unclear; its argument can be cast either as a misconstruction of *Osztreicher* or as a misinterpretation of the burden it had before BCA. We shall address both possibilities.

(1) *Osztreicher* and Motion for Judgment

Osztreicher arose from a medical malpractice case filed in the circuit court after a waiver of proceedings before the Health Claims Arbitration Office. While the case was still before the Health Claims Arbitration Office, the plaintiff had named three possible expert witnesses, among them a Dr. Stewart Battle, but later indicated that he did not intend to call Dr. Battle to testify. When the case reached the circuit court, despite the absence of any further communication from the plaintiff with respect to his expert witnesses, the defendant deposed Dr. Battle. In the course of the deposition, he inquired as to the amount of income Dr. Battle earned from forensic endeavors and was given an approximate figure. The day before trial was to commence, the defendant served a subpoena on Dr. Battle, directing him to produce at trial certain financial records, including tax records indicating the amount of income received in the prior two years from "medical/legal and/or forensic activities." The court denied the plaintiff's motion to quash the subpoena, offering instead to review *in camera* the documents produced, to determine which of them might be suitable for use in cross-examination.

The plaintiff responded that Dr. Battle would refuse to testify if required to produce

those documents and that, without Battle's testimony, he would be effectively precluded from putting on a case. He moved for a mistrial, and, when that motion was denied, he declined to present any evidence, notwithstanding that he did have another expert witness who was prepared to testify. On that state of affairs, the court granted the defendant's motion for judgment, following which the plaintiff noted an appeal.

We dismissed the appeal, beginning our discussion by confirming the well-established principle that "[t]he right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal." *Id*. at 534, quoting from *Rocks v. Brosius*, 241 Md. 612, 630, 217 A.2d 531, 541 (1966). We then recounted some of the circumstances that, in earlier cases, we had determined to constitute acts of acquiescence. Citing a number of out-of-State cases, we concluded, at 535, that "[a] party who does not offer evidence *on an issue as to which that party has the burden of proof* acquiesces in the adverse judgment entered *on that issue*." (Emphasis added.) Examining then the circumstances of the particular case, we observed that the denial of Ozstreicher's motion to quash the subpoena did not leave him without a case to present. Implicit, of course, was the fact that, had he proceeded with the case and lost, he could have challenged on appeal the validity of the court's ruling on the motion to quash. By refusing to present any evidence, however, when it was he, as the plaintiff, who had the burden of both production and persuasion, he effectively "acquiesced in, if not consented to," the entry of the judgment he then sought to challenge. *Id.* at 535.

The case now before us is significantly different from the circumstances in *Osztreicher*. MAA contends in its brief that "the *Osztreicher* doctrine of acquiescence . . . does not depend upon . . . who has the burden of proof." That assertion is palpably wrong; the doctrine of acquiescence very much depends on who has the burden of proof. There is nothing strained, unfair, or illogical in a conclusion that, when a party who has the burden of producing persuasive evidence on an issue deliberately declines to do so, that party necessarily acquiesces in an adverse judgment, for, through that deliberate conduct, the party leaves the court with no other choice than to enter that judgment; the party effectively invites the judgment. That is not the case, however, when it is the adverse party who has the burden of producing the persuasive evidence. Maryland law, and, indeed, civil procedure generally throughout the country, has long recognized the ability of the party not having the burden of proof (B) to test the legal sufficiency of the evidence produced by the party having that burden (A) through a motion made at the end of A's case.

In Maryland court proceedings, such a motion is now termed a motion for judgment (Md. Rule 2-519); formerly, it was known as a motion to dismiss, if made in a non-jury case, or a motion for directed verdict, if made in a jury case. *See* former Md. Rules 535 and 552. At earlier times, it was often referred to as a demurrer to the evidence. *Rwy. & Elec. Co. v. Anderson*, 168 Md. 224, 227, 177 A. 282 (1935). The purpose of such a motion, whatever its denomination, is "to allow a party to test the legal sufficiency of his opponent's evidence before submitting evidence of his own." *Smith v. State Roads Comm.*, 240 Md. 525, 539, 214 A.2d 792, 799-800 (1965); *J. Whitson Rogers, Inc. v. Board*, 285 Md. 653, 660, 402

A.2d 608, 612 (1979).

The issue traditionally presented by such a motion is a purely legal one — whether, as a matter of law, the evidence produced during A's case, viewed in a light most favorable to A, is legally sufficient to permit a trier of fact to find that the elements required to be proved by A in order to recover have been established by whatever standard of proof is applicable. To frame the legal issue, the court must accept the evidence, and all inferences fairly deducible from that evidence, in a light most favorable to A; it is not permitted to make credibility determinations, to weigh evidence that is in dispute, or to resolve conflicts in the evidence.[4]

It has always been understood and recognized, however, that a party who makes and loses such a motion has an option. The party (B) may proceed to present additional evidence in an effort to controvert, or further controvert, the evidence produced in A's case, in which event B effectively withdraws the motion for judgment and may not complain on appeal about the denial of it (Md. Rule 2-519(c)), or B may rest on the denial of the motion and

[4]As was pointed out by Driggs to BCA, in adopting Rule 2-519 in 1984, this Court made a significant change in practice when such a motion is made by B at the close of A's case in a non-jury action. In that one situation, the Rule no longer requires the court to view the evidence in a light most favorable to A and to consider only the legal sufficiency of the evidence, so viewed, but allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact. As the BCA chairman responded, BCA, as an administrative agency not directly subject to Rule 2-519, treated the motion for summary disposition — the functional equivalent of a motion for judgment — in the more traditional manner. No one objected to that approach.