SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5449-15T1

IN THE MATTER OF ALLEGED VIOLATION OF THE UNDERGROUND FACILITY PROTECTION ACT, N.J.S.A. 48:2-73 ET SEQ. BY DAVID HERZOG, STAR DEVELOPERS, LLC.

Argued December 4, 2017 – Decided February 21, 2018

Before Judges Ostrer and Whipple.

On appeal from the Board of Public Utilities, Docket No. GS16020164K.

David Herzog, appellant, argued the cause pro se and on behalf of appellant Star Developers, LLC.

Renee Greenberg, Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Renee Greenberg, on the brief).

PER CURIAM

Star Developers, LLC, and David Herzog, appeal from the final order of the Board of Public Utilities, imposing a $6000 penalty for violating the Underground Facility Protection Act (the Act), N.J.S.A. 48:2-73 to -91. See N.J.S.A. 48:2-88 (authorizing

penalties for a violation). Specifically, the Board found that Star[1] engaged in excavation before it was authorized. See N.J.S.A. 48:2-82(a) (stating that an excavator must notify One-Call Damage Prevention System "not less than three business days" before beginning work). The excavation activity damaged a service line of a natural gas utility.

The Board entered its order by default, because Star failed to respond to the Board's Notice of Probable Violation. See N.J.A.C. 14:2-6.4 (describing notice of probable violation); N.J.A.C. 14:2-6.6 (authorizing final order of penalty assessment by default where alleged violator fails to submit timely answering certification). The Board found that its staff served the notice by regular and certified mail, see N.J.A.C. 14:2-6.4(a) (requiring service pursuant to N.J.A.C. 1:1-7); N.J.A.C. 1:1-7.1 (stating that service shall be made by, among other methods, certified mail, return receipt requested, or by ordinary mail). The Board found the certified mail was "unclaimed," and the regular mail was not returned.

On appeal, Star contends that it should not be penalized because a third-party contractor it hired had prematurely

[1] Unless otherwise indicated, we use "Star" to refer collectively to David Herzog and the LLC.

performed the excavation without its permission. At oral argument, David Herzog, who appeared pro se for himself and his company,[2] asserted for the first time that he never received the Notice of Probable Violation. We reject these arguments.

We dispatch Star's claim it was not served. Service is complete upon mailing. N.J.A.C. 1:1-7.1(c). There is also a rebuttable presumption that mail properly addressed, stamped, and posted is received. SSI Med. Servs. v. HHS, Div. of Med. Assistance and Health Servs., 146 N.J. 614, 621, 625 (1996).

We acknowledge that the record lacks proof of the Board's service. The Board has included in the record a copy of an envelope addressed by hand to Star with an "unclaimed" U.S. Postal Service stamp; and a print-out from the Postal Service reflecting that the piece of mail was certified and unclaimed. Yet, the Board did not provide a certification from an employee who authenticated the document. The Board also did not establish that the certified mail was accompanied by a return receipt request, nor did it prove there was an ordinary mailing, which was not returned.

[2] Star should have retained an attorney. See R. 1:21-1(c). David Herzog asserted in response to a clerk's office inquiry that Star was a sole proprietorship. Perhaps, he meant that it was a single-member LLC; but that would not relieve it of the obligation to retain counsel.

However, "proof of service shall not be necessary unless a question of notice arises." N.J.A.C. 1:1-7.2(b). Star was obliged to raise the issue of lack of service before the agency. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (stating generally "appellate courts will decline to consider questions or issues not properly presented to the trial court" absent questions of jurisdiction or a substantial public interest); ZRB, LLC v. N.J. Dep't of Envir. Prot., 403 N.J. Super. 531, 536 n.1 (App. Div. 2008) (applying Nieder to appeals from administrative agency orders). Certainly, Star should have raised the service argument before oral argument, to enable the Board an opportunity to meet it fairly. See Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012) (stating that referring to a question for the first time in appellate argument is not "sufficient to require the Appellate Division to address it").[3]

Furthermore, there is sufficient record evidence to support the Board's decision on the merits. In re Petition of Jersey Central Power & Light Co., 85 N.J. 520, 527 (1981) (stating that "the Board's rulings are entitled to presumptive validity and will

[3] We acknowledge that Star contended in its brief that David Herzog was "shocked" to receive the Final Order of Penalty Assessment. We note it was mailed well over a year after Star's default. However, Star does not expressly deny receiving the Notice of Probable Violation, let alone provide a supporting certification to that effect.

not be disturbed unless [an appellate court] find[s] a lack of 'reasonable support in the evidence'" (quoting In re New Jersey Power & Light Co., 9 N.J. 498, 509 (1952)). Star does not dispute that Rachel Herzog, on its behalf, called the One-Call office and requested a so-called "ticket" to permit Star's excavation at the address in question. The operator provided her a new ticket and made clear that excavation could begin the following week. As is evident from the recording of the call, which is before us, Rachel Herzog made no mention of a third-party contractor.

After the excavator struck the utility service line, the Board staff wrote to Star, requesting information. David Herzog responded in a letter that he was on vacation out-of-state when "the workers started to work without my consent. We don't know why somebody went ahead" before they were permitted to begin work. He did not contend that the workers were employees of a contractor other than Star. Notably, on appeal, Star — without leave to expand the record — has supplied an invoice from the third-party contractor it contends was responsible. Yet, the invoice only itemizes work that was performed after the date permitted by the One-Call ticket.

Finally, in asserting that it hired someone else to excavate, who then struck the service line, Star essentially admits that it falsely represented to the One-Call operator that it would perform

the excavation. Having done so, it was not unreasonable for the Board to hold it responsible for violating the Act by commencing activity prematurely.

Affirmed.