

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judge Humphreys and
Senior Judge Overton

EDWARD H. BENDER

MEMORANDUM OPINION*

v. Record No. 1783-02-1

PER CURIAM

APRIL 29, 2003

VIRGINIA MARINE RESOURCES COMMISSION

FROM THE CIRCUIT COURT OF NORTHAMPTON COUNTY
Glen A. Tyler, Judge

(Edward H. Bender, pro se, on brief).

(Jerry W. Kilgore, Attorney General; Carl
Josephson, Assistant Attorney General, on
brief), for appellee.

Edward H. Bender appeals the ruling of the Circuit Court of Northampton County denying his motion for summary judgment and dismissing his petition for appeal. On appeal, he contends the trial court erred by 1) denying his motion for summary judgment, 2) dismissing his appeal, and 3) awarding VMRC attorney fees. Upon reviewing the record and briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the decision of the trial court. See Rule 5A:27.

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

Background

On August 22, 2001, Edward H. Bender petitioned the circuit court "for relief from the . . . provisions of VMRC regulation 4 VAC 20-890-10 et seq." He alleged 4 VAC 20-890-25 failed to conform with "required statutory authority" and that 4 VAC 20-890-30 was an "unconstitutional restriction on interstate commerce." Bender served a copy of the petition only on "Carl Josephson, Assistant Attorney General . . . in accordance with Rule 2A:4."

On November 2, 2001, Bender moved the court for summary judgment. Citing Rule 2:21, he alleged VMRC was in default for failing to respond to his petition.

On June 14, 2002, the court entered its order denying Bender's motion for summary judgment. The court also dismissed Bender's appeal and awarded VMRC attorney fees.

Analysis

I.

Bender failed to provide the clerk of the circuit court with VMRC's address when he filed his petition. Instead, he specifically and deliberately caused process to be served upon a named assistant attorney general.

Bender sought judicial review of fisheries regulation amendments adopted by VMRC. Pursuant to Code § 28.2-215, such review is governed by Code § 2.2-4025 et. seq., the Administrative Process Act (APA). The procedure for judicial

review under the APA is as provided by the Rules of the Supreme Court of Virginia. Code § 2.2-4026. Rule 2A:4 specifically requires that a petitioner shall take steps to cause a copy of the petition to be served on the "agency secretary." Pursuant to Code § 8.01-290, Bender was required to furnish the clerk in writing the name and address of each defendant. Bender failed to include VMRC's address. It is the responsibility of the party initiating a cause of action to inform the clerk upon whom process should be served. See Rule 2:4. Service of process on the assistant attorney general was not the equivalent of service of process on the agency secretary, as required. Therefore, VMRC was not served with process, was not in default,¹ and the trial court correctly denied Bender's motion for summary judgment.

II. and III.

Code § 8.01-271.1, places upon a party the responsibility to sign the pleading, motion, or other paper and certify

that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass

¹ See Rule 2:7 which provides in pertinent part, "[a] defendant is 'in default' if he had not filed a pleading and . . . a period of more than twenty-one days has elapsed after . . . due service of a subpoena in chancery upon him"

or to cause unnecessary delay or needless increase in the cost of litigation.

Moreover,

[i]f a pleading, motion, or other paper is signed or made in violation of this rule, the court . . . shall impose upon the person who signed the paper or made the motion . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

Code § 8.01-271.1.

The court noted Bender's frequent litigation against VMRC, including previous unsuccessful attempts to appeal VMRC fishery regulations. The court found Bender was aware of the APA and the Rules and that he was involved in previous litigation which specifically held he must serve the agency secretary to initiate an action.² Bender's motion for summary judgment was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. We hold that the trial court did not abuse its discretion by awarding sanctions, including attorney fees, to VMRC and that it permissibly dismissed Bender's action. See *Bandas v. Bandas*, 16 Va. App. 427, 438, 430 S.E.2d 706, 712 (1993).

² See *Bender v. Va. Marine Resources Comm'n*, No. 1145-99-1 (Va. Ct. App. January 27, 2000).

Accordingly, we summarily affirm the decision of the trial court. See Rule 5A:27.

Affirmed.