

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

PAULA J HENDERSON,

CASE NO.: 2011 CV 08074

Plaintiff(s),

JUDGE DENNIS J. ADKINS

-VS-

STATE OF OHIO DEPT OF COMMERCE DIV. OF
FINAN INS,

Defendant(s).

**DECISION, ORDER, AND ENTRY
SUSTAINING APPELLEE'S MOTION TO
DISMISS AND FINDING APPELLANT'S
MOTION TO INCLUDE ADDITIONAL
EVIDENCE AS MOOT**

This matter is before the Court on several motions. On February 13, 2012, Paula J. Henderson (“Henderson”) filed *Appellant’s Motion for Admission of Additional Evidence*. On February 27, 2012, the Ohio State Department of Commerce, Division of Financial Institutions (the “Division”) filed *Memorandum Contra of Appellee Ohio Department of Commerce, Division of Financial Institutions to Appellant’s Motion for Admission of Additional Evidence Filed on February 13, 2012*. On March 5, 2012, Henderson filed *Reply to Appellee’s Memorandum Contra to Appellant’s Motion for Admission of Additional Evidence*.

On February 16, 2012, the Division filed *Appellee Ohio Department of Commerce, Division of Financial Institutions’ Motion to Dismiss*. On March 1, 2012, Henderson filed *Appellant’s Memorandum Contra to Appellee’s Motion to Dismiss*. On March 8, 2012, the Division filed *Appellee, Ohio Department of Commerce, Division of Financial Institutions’, Reply to Appellant, Paula J. Henderson’s Memorandum Contra to Appellee’s Motion to Dismiss*.

On February 16, 2012, Henderson and the Division filed a *Joint Motion to Stay the Briefing Pending Decisions on the Parties’ Motions*. These matters are now properly before the Court.

I. Facts and Procedural History

The Division is charged with the responsibility of administering and enforcing the Ohio Mortgage Broker Act. *Notice of Appeal from the State of Ohio Department of Commerce, Division of Financial*

Institutions (“*Notice of Appeal*”), Exhibit A (November 7, 2011). Henderson sent in an application to the Division to renew her loan originator license pursuant to Ohio Revised Code Chapter 1322. *Id.* On July 26, 2011, the Division issued Henderson a notice that it had conducted an investigation and found that Henderson had failed to comply with several requirements with respect to the application. *Id.* The Notice notified Henderson that her request had been refused and informed Henderson of the opportunity for a hearing if requested within 30 days. *Id.* The Division was unable to obtain service on Henderson at the address provided, so the Division published the Notice, pursuant to R.C. Chapter 119, in the Dayton Daily Court Reporter for three consecutive weeks. *Id.* According to the Division, Henderson failed to request a hearing and failed to defend against the Division’s allegations. *Id.* On October 24, 2011, the Division issued a Division Order which refused to renew Henderson’s loan originator license. *Id.* The instant matter arises out of the *Notice of Appeal* to the Division’s Order, filed by Henderson on November 7, 2011.

II. Law and Analysis

The Division, in its motion to dismiss, asserts that Henderson failed to exhaust her administrative remedies when she failed to request a hearing. Henderson argues that she did not receive notice of the publication of the official Notice and only received emails regarding failure to pay a \$150.00 application fee.

The Ohio Revised Code provides the following on notice:

When any notice sent by registered mail, as required by sections 119.01 to 119.13 of the Revised Code, is returned because the party fails to claim the notice, the agency shall send the notice by ordinary mail to the party at the party's last known address and shall obtain a certificate of mailing. Service by ordinary mail is complete when the certificate of mailing is obtained unless the notice is returned showing failure of delivery.

If any notice sent by registered or ordinary mail is returned for failure of delivery, the agency either shall make personal delivery of the notice by an employee or agent of the agency or shall cause a summary of the substantive provisions of the notice to be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known address of the party is located. When notice is given by publication, a proof of publication affidavit, with the first publication of the notice set forth in the affidavit, shall be mailed by ordinary mail to the party at the party's last known address and the notice shall be deemed received as of the date of the last publication. An employee or agent of the agency may make personal delivery of the notice upon a party at any time. (Emphasis added.)

R.C. 119.07. Further, the Ohio Second District Court of Appeals has noted the following on administrative hearings:

R.C. 119.12 provides that “any party desiring to appeal [from an administrative action] shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal.” A failure to timely request an administrative hearing constitutes a failure to exhaust administrative remedies. (Internal citations omitted.) R.C. 119.12 does not provide a right to appeal a case on the merits when no administrative hearing occurred due to the applicant's failure to make a timely request to the licensing board. (Internal citation omitted.) “To allow a claimant *** to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process.” (Internal citation omitted.)

Carmack v. Caltrider, 164 Ohio App.3d 76, 2005-Ohio-5575 ¶ 6 (2nd Dist.).

This Court finds that the Division’s attempt to notify Henderson by ordinary mail at the address provided is in accordance with R.C. 119.07. However, failure of delivery led to publication in the Dayton Daily Court Reporter for three consecutive weeks in accordance with R.C. 119.07. Therefore, this Court finds that notice was sufficient.

Further, pursuant to *Carmack, supra*, failure to timely request a hearing constitutes a failure to exhaust administrative remedies. Henderson’s failure to request a hearing presents the proscribed process of raising issues for the first time on appeal. Pursuant to *Carmack, supra*, to allow Henderson to raise an issue for the first time in this administrative appeal would not be proper. Therefore, this Court finds that Division’s motion well taken.

III. Conclusion

Based on the foregoing, this Court **SUSTAINS** the Division’s *Motion to Dismiss* in its entirety. Further, because Henderson’s *Notice of Appeal* is dismissed, consequently, *Appellant’s Motion for Admission of Additional Evidence* is **MOOT**.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE DENNIS J. ADKINS

To the Clerk of Courts:

Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

PETER B HOSHOR
(937) 433-4090
Attorney for Plaintiff, Paula J Henderson

CATHERINE J. CALKO
(614) 466-2980
Attorney for Defendant, State Of Ohio Dept Of Commerce Div. Of Finan Ins

Bob Schmidt, Bailiff (937) 496-7951 schmidtr@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: PAULA J HENDERSON vs STATE OF OHIO DEPT OF
COMMERCE DIV. OF FINAN INS
Case Number: 2011 CV 08074
Type: Decision

So Ordered

A handwritten signature in black ink, appearing to read "Dennis J. Adkins".

Dennis J. Adkins