

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KURT KANAM,

Appellant,

v.

DEPARTMENT OF NATURAL
RESOURCES, OFFICE OF MELISSA
FERRIS and the OFFICE OF STACY BIRK,

Respondents.

No. 49806-5-II

UNPUBLISHED OPINION

JOHANSON, J. — Kurt Kanam appealed to the Pollution Control Hearings Board (PCHB) regarding the Department of Natural Resources' (DNR) impoundment of two vessels, and the PCHB dismissed the appeal as untimely. Kanam sought judicial review under the Administrative Procedures Act (APA), ch. 34.05 RCW, and further requested that the superior court order the DNR to issue a final decision on his mooring buoy license application. Kanam appeals the superior court's summary dismissal of his claims and argues that the superior court erred because (1) Kanam complied with the APA's service requirements, (2) the state lacks authority over the ocean and over one of the impounded vessels, and (3) he provided evidence that his mooring buoy license application was complete. We affirm the superior court's order granting summary judgment in the DNR's favor.

FACTS

In April 2016, the DNR took custody of two vessels owned by Kanam and anchored in Thurston County. The DNR later informed Kanam of the May 31 appeal deadline. On June 7, Kanam filed a notice of appeal to the PCHB, which subsequently entered a final order dismissing the appeal as untimely. These facts are undisputed.

Kanam sought review of the PCHB's final order in the superior court. In his complaint, Kanam requested that the superior court "compel the Office of Stacey Birk to issue a buoy permit" and issue a declaratory judgment that his vessels were lawfully moored. Clerk's Papers (CP) at 142. Attached to Kanam's complaint was a purported e-mail from a DNR employee, Stacy Birk, stating that the DNR had received his "map with Post-It notes showing the location of [his] buoy and utility building" and would "continue [its] review." CP at 151. In its answer to Kanam's complaint, the DNR admitted that the vessels were attached to a buoy on state-owned aquatic lands.

The DNR moved for summary judgment. Regarding Kanam's petition for judicial review, the DNR contended that Kanam failed to invoke the superior court's jurisdiction because he had not served his complaint on the PCHB. The DNR provided evidence that the PCHB had not "been served with or otherwise received a copy of any petition for judicial review of the" final order. CP at 42. An assistant attorney general's declaration also stated that the attorney general's office had received Kanam's complaint on August 15.

Related to Kanam's request to compel the DNR to issue him a mooring buoy license, the DNR provided a declaration that as of October, it had yet to make a final decision on his application. The DNR explained that before it could issue a final decision on Kanam's application,

Kanam had to provide coordinates for a proposed buoy location and information about the buoy's design components.

In Kanam's opposition to summary judgment, he did not discuss the DNR's subject matter jurisdiction argument. Rather, Kanam stated that the DNR's actions violated the commerce clause and that he believed the DNR was withholding his mooring buoy license for nefarious reasons.

The superior court granted the DNR's summary judgment motion. It ruled that it lacked subject matter jurisdiction over the petition for review of the PCHB's final order because Kanam had not served the PCHB and that Kanam's request to compel issuance of a mooring buoy license was not yet ripe for judicial review. Kanam appeals the order.

ANALYSIS

I. LEGAL PRINCIPLES: SUMMARY JUDGMENT

We review de novo a superior court's decision granting summary judgment and engage in the same inquiry as the superior court. *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007). Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We review the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Under summary judgment's burden-shifting scheme, once a moving party provides evidence to support a conclusion that it is entitled to judgment as a matter of law, the nonmoving party must set forth facts that sufficiently rebut the moving party's contentions and reveal a genuine issue as to a material fact. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

II. PCHB'S DISMISSAL

Kanam challenges the superior court's ruling that Kanam's failure to serve the PCHB deprived the superior court of jurisdiction over his APA-based appeal. Kanam argues that as a matter of law, service on the state attorney general sufficed to obtain judicial review of the PCHB's decision. Kanam alternatively argues that the DNR lacked authority to seize his vessels because "the State of Washington does not own the ocean."¹ Br. of Appellant at 4. These arguments fail.

A. LEGAL PRINCIPLES

Provisions of the APA apply to Kanam's effort to obtain judicial review of the PCHB's decision. RCW 43.21B.180. Under the APA, a petition for judicial review must be filed with the court and served "on the agency, the office of the attorney general, and all parties of record . . . after service of the final order." RCW 34.05.542(2). A petitioner must comply with RCW 34.05.542(2) in order "[t]o invoke the superior court's jurisdiction over his petition for review." *Diehl v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 153 Wn.2d 207, 217, 103 P.3d 193 (2004).

"Service of the petition on the agency shall be by delivery of a copy of the petition" to the office of the agency's director or other chief administrative officer or chairperson of the agency, at its principal office. RCW 34.05.542(4). Service of a copy of the petition upon an agency's attorney of record is also sufficient. RCW 34.05.542(6). "The only reasonable reading of [the agency]" in RCW 34.05.542(2) "is that 'the agency' is the body whose final order is the subject of

¹ In addition, Kanam argues that one of his vessels belonged to "the Kikiallus Indian Nation" and accordingly that the state could not take the vessel into custody. Br. of Appellant at 4. We do not address this claim because Kanam fails to provide—and the record contains—no information to support that Kanam was a member of "the Kikiallus Indian Nation" or that such a person owned one of the vessels. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

the petition for judicial review.” *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 953-54, 963, 235 P.3d 849 (2010) (affirming dismissal with prejudice of a petition that was not served on the Board of Tax Appeals).

B. ANALYSIS

The DNR moved for summary judgment on the basis that Kanam had failed to serve the PCHB when he sought review of the PCHB’s final order under the APA, so that the superior court lacked jurisdiction over the matter. The DNR relied on the APA’s service requirements, which required that Kanam serve a copy of his petition for review upon the PCHB, as well as the attorney general’s office and the DNR. RCW 34.05.542(2); *Sprint Spectrum*, 156 Wn. App. at 956-57.

In support of its motion, the DNR provided evidence that Kanam had never served the PCHB with “a copy of any petition for judicial review of the Board’s July 19 . . . Final Order.” CP at 42. The DNR having provided evidence to support a conclusion that it was entitled to judgment as a matter of law on this issue, the burden shifted to Kanam to come forward with facts that rebutted the DNR’s contentions and revealed a genuine issue as to a material fact. *See Ranger Ins. Co.*, 164 Wn.2d at 552.

In opposition to summary judgment, however, Kanam made no arguments about and provided no evidence to rebut his failure to serve a petition for review on the PCHB. Because Kanam failed to meet his burden under summary judgment’s burden-shifting scheme, the superior court properly determined that Kanam had not served the PCHB and concluded that Kanam’s “failure to serve the [PCHB] with the Complaint deprive[d] [it] of subject-matter jurisdiction to hear his appeal” from the PCHB’s decision. CP at 134.

Now, Kanam seeks to avoid summary judgment by arguing for the first time on appeal that the superior court should have held that service of his complaint on the attorney general's office was sufficient.² But service on the attorney general's office sufficed only if it were "service upon [the PCHB's] attorney of record." RCW 34.05.542(6). Kanam points to no evidence, and the record before us belies, that the attorney general's office represented the PCHB at any point in these proceedings before Kanam filed his complaint in superior court. Accordingly, Kanam's argument fails.

As an alternative ground to reverse the superior court, Kanam reiterates his summary judgment opposition argument that the State lacks authority over the ocean.³ But "[t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state." WASH. CONST., art. 17, § 1; *see also* 43 U.S.C. § 1311(a) (determining that title and ownership to lands beneath navigable waters within state boundaries and the right to manage and lease such lands is assigned to the respective state). Kanam's legal argument is incorrect. Neither are we persuaded otherwise by Kanam's cited authority, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) (When states enter the union, they receive ownership of all lands under waters subject to the ebb and flow of the tide.).

² Kanam also cites to 28 U.S.C. § 5—an unrelated statute that establishes federal Supreme Court justices' salaries.

³ We note that in the proceedings below, the DNR admitted—and Kanam did not contest—that the impounded vessels "were attached to a buoy on state-owned aquatic lands." CP at 26. Kanam attacks the state's authority over aquatic lands within its borders rather than contradicting this undisputed fact.

We affirm the superior court’s grant of summary judgment dismissing Kanam’s petition for review for lack of subject matter jurisdiction. Next, we address Kanam’s argument related to his mooring buoy license application.

III. MOORING BUOY LICENSE APPLICATION

Kanam argues that in support of his action brought under the APA, he provided evidence that his mooring buoy license application was complete and therefore that he “is entitled to a final decision on [the] application.” Br. of Appellant at 6. Kanam’s argument fails.

A. LEGAL PRINCIPLES

The APA states that a petition for review of an agency action other than a rule’s adoption or an order’s entry is untimely unless filed and served within 30 days “after the agency action.” RCW 34.05.542(3). Interpreting this provision, we have held that “only *final* agency actions are subject to judicial review.” *Wells Fargo Bank, NA v. Dep’t of Revenue*, 166 Wn. App. 342, 356, 271 P.3d 268 (2012) (emphasis added).

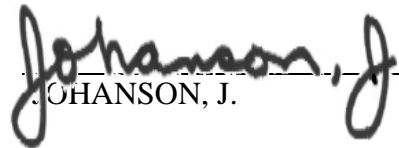
B. ANALYSIS

In support of its summary judgment motion, the DNR provided a declaration that as of October it had not yet made a final decision on Kanam’s application. That was because Kanam had yet to “update his application regarding the design components of his mooring buoy, or the latitude and longitude of its proposed location.” CP at 48. Relying on this declaration, the DNR argued that Kanam could not obtain judicial review of a decision on his mooring buoy license application until the DNR issued a final decision. The superior court agreed, stating the rule that “[j]udicial review of an agency decision is not available until the agency has issued a final decision.” CP at 134; *see Wells Fargo Bank*, 166 Wn. App. at 355.

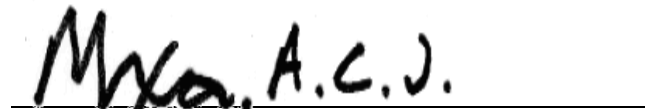
Kanam points to an e-mail attached to his complaint, purportedly sent by a DNR employee, as showing that his application was complete, so that he was entitled to a decision. But this e-mail does not say that Kanam’s application is complete; it simply states that the DNR received a map from Kanam showing the location of his buoy and that the DNR would “continue [its] review.” CP at 17. Notably, the DNR showed that Kanam’s application was incomplete because he had failed to provide information including “design components of his mooring buoy”—information also missing from the purported e-mail he now relies upon. CP at 48. Thus, Kanam’s argument fails because even viewed in the light most favorable to him, his evidence creates no genuine issue of material fact that his application was incomplete. *See Keck*, 184 Wn.2d at 370.

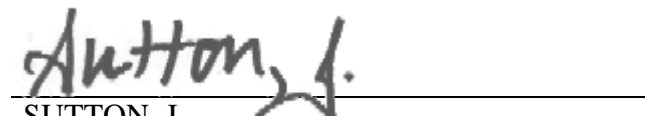
For these reasons, we affirm the superior court’s order granting summary judgment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


JOHANSON, J.

We concur:


MAXA, A.C.J.


SUTTON, J.