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SUPERIOR COURT

2018 AUG 2 PM 3 55

JUDICIAL DISTRICT OF
NEW BRITAIN

DOCKET NO. HHB CV 18 6044479

JOE MARKLEY ET AL. : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF NEW BRITAIN

STATE ELECTIONS
ENFORCEMENT COMMISSION : AUGUST 2, 2018

MEMORANDUM OF DECISION
ON MOTION TO DISMISS (#105)

Under the Uniform Administrative Procedures Act (UAPA) a party in a contested case may petition an administrative agency for reconsideration of an adverse final decision. General Statutes § 4-181a (a)(1). The agency "shall decide whether to reconsider the final decision" within twenty-five days of the filing of the petition. Id. "The failure of the agency to make that determination within twenty-five days of such filing shall constitute a denial of the petition." Id.

But, suppose the petition appears on the agency's meeting agendas and the agency takes action on the petition after the twenty-five days has run. Do the agency's actions breathe legal life into a petition that was already denied by operation of the statute? Do the agency's actions permit the court to conclude that the agency must have decided "whether to reconsider the final

decision" before the twenty-five days had run? Those are the questions raised by a motion to dismiss filed by the defendant State Elections Enforcement Commission (commission) in this case and the plaintiffs' objection to the motion.

I

On February 14, 2018 the commission issued a final decision on a complaint filed against the plaintiffs here, finding that the plaintiffs, a state Senator and a state Representative, had violated certain state statutes and regulations governing political campaign financing and imposing fines on them for their violations. The same day the plaintiffs filed a petition for reconsideration of its decision (petition), pursuant to § 4-181a (a) (1).

The petition appeared on the commission's agendas for meetings scheduled for March 14 and 21, 2018, meetings that were cancelled due to inclement weather. See Memorandum in Opposition to Motion (plaintiffs' memorandum), docket entry #108, 1 (July 13, 2018). On March 23, 2018 the commission met and denied plaintiffs' petition. Memorandum of Law in Support of Defendant's Motion to Dismiss, docket entry # 106, exhibit B (June 29, 2018). Notice of that action was mailed to the plaintiffs on March 28, 2018. Id.

General Statutes § 4-183 governs the time periods within which parties must appeal from an adverse administrative agency action. Subdivision (c)(2) of the statute addresses the situation where the petition to reconsider is denied because the agency fails to act within twenty-five days of its filing; in that case an appeal must be taken within forty-five days from the date when the twenty-five days expired. Subdivision (c)(3) deals with the situation where the agency decides to reconsider its final decision; in that case an appeal must be taken within forty-five days from the date when the agency mails its final decision after reconsideration.

Based on the commission's decision of March 23 denying their petition to reconsider, plaintiffs commenced this appeal on May 7, 2018, within the 45-day appeal period provided for in General Statutes *subsection(c)(3)* of § 4-183.

The commission claims, however, that the plaintiffs' appeal was untimely filed. It argues that, pursuant to § 4-181a (a)(1), it had only twenty-five days after plaintiffs filed their petition within which to decide whether to reconsider its final decision, that it had not made that decision by the twenty-fifth day, March 11, 2018, and that the effect of its failure to act was that the

plaintiffs' petition was denied on that twenty-fifth day "by operation of law." *Id.*, 1. Hence, the deadline for plaintiffs to file their appeal, pursuant to *subsection(c)(2)* of § 4-183, was forty-five days later, i.e., April 25, 2018. An appeal like the plaintiffs', filed on May 7, 2018, is untimely.

The commission maintains that the petition's appearance on its agendas for meetings scheduled on dates after the twenty-five day time limit had run and its action in denying the petition on March 23 could not revive a petition that had already been denied. To hold otherwise, it argues, would be to empower the commission to act in contradiction of its statutory authority. See *Department of Public Safety v. Freedom of Information Commission*, 103 Conn. App. 571, 584 (2007).

The commission has filed a motion to dismiss because failure to file and to serve an administrative appeal within the applicable statutory time limit deprives the court of subject matter jurisdiction over the appeal. See *Glastonbury Volunteer Ambulance Association, Inc. v. Freedom of Information Commission*, 227 Conn. 848, 854-57(1993).

II

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *MacDermid, Inc. v. Leonetti*, 310 Conn. 616, 626 (2013). "A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide." (Internal quotation marks omitted.) *Hinde v. Specialized Education of Connecticut, Inc.*, 147 Conn. App. 730, 740-41 (2014). In deciding whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, and construe them in the manner most favorable to the pleader. The interpretation of pleadings is always a question of law for the court. See *Harborside Connecticut Ltd. Partnership v. Witte*, 170 Conn. App. 26, 34 (2016).

A motion to dismiss may be decided on the basis of the complaint alone, the allegations in the complaint supplemented by undisputed facts evidenced in the record, or by the complaint supplemented by undisputed facts and the court's resolution of

disputed facts after an evidentiary hearing. See *Conboy v. State*, 292 Conn. 642, 650-51 (2009).

In this case the court has considered the allegations set forth in the plaintiffs' complaint and the facts asserted in an affidavit submitted by the commission, which are not disputed by the plaintiffs.¹ "If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." *Conboy v. State*, 292 Conn. 642, 652 (2009).

III

The language of § 4-181a (a)(1) effecting a denial of the petition if not acted on by the commission within twenty-five days of its filing is mandatory: "The failure of the agency to make that determination [whether to reconsider its final decision] within twenty-five days of such filing *shall* constitute a denial

¹ On July 24, 2018, at oral argument on this motion, counsel for the plaintiffs did not dispute statements made in an affidavit of Michael J. Brandi, the commission's executive director and general counsel, submitted to the court as exhibit A to the commission's reply brief in support of its motion to dismiss. See docket entry #112.

of the petition." (Emphasis added.) Plaintiffs suggest no avenue by which the court can ignore that plain and unambiguous language by holding that later action by the commission revives a petition that has already been denied by operation of the statute. Furthermore, for the court to do so would introduce uncertainty into a statutory structure that was intended by the legislature to set clear deadlines and relatively short time limits for administrative agency action on reconsideration of their decisions. See *Zaneski-Nettleton v. State Dept. of Social Services*, Superior Court, Judicial District of New Britain, Docket No. CV 16 5018573, 16-17 (January 29, 2018).²

Nor can the court conclude from the appearance of the petition on the commission's agendas for March 14 and 21, 2018 or the commission's denial of the petition at its meeting on March 23, 2018 that the commission "decid[ed] whether to reconsider the final decision" of February 14, 2018 by March 11, 2018, within the twenty-five days that followed plaintiffs' filing of their petition. There is nothing in the record that would support such a conclusion.

² The court does wonder what procedural incentive an administrative agency has to take seriously petitions for it to reconsider a final decision when simple inaction on its part will result in denial of the petition.

Plaintiffs maintain, in effect, that the court should infer from the appearance of their petition on the commission's agendas and its denial by the commission on March 23 that the commission *must have* decided to reconsider its decision within the statutory 25-day period.³ This might have been a reasonable and logical conclusion for the court to draw if there were evidence in the record that plaintiffs' petition was placed on the agenda prior to March 11, 2018, of which there is none. Furthermore, there is direct evidence in the record, in the form of Mr. Brandi's affidavit⁴, that the commission did not decide to place plaintiffs' petition on its agenda at any time. According to Mr. Brandi, it appeared on the agenda as a result of his decision, as a member of the commission's staff, to place it there.

Section 4-181a(a)(1) requires that the "agency" decide whether to reconsider its final decision within twenty-five days. General Statutes § 4-166(1) defines "agency," for purposes of the

³ Plaintiffs' objection to the motion also refers to the commission's "publically taking the position that it would discuss and consider plaintiffs' objections to the decision" and promising "good faith proceedings." Plaintiffs' memorandum, *supra*, 2. There is nothing in the record supporting these allegations, assuming they are material to the court's decision on a question of statutory interpretation.

⁴ See footnote 1.

UAPA to mean "each state board, commission, department or officer authorized by law to make regulations or to determine contested cases" Thus, in this case it is the commission that must have decided whether to reconsider its final decision within twenty-five days, not a staff member like Mr. Brandi.

In the absence of any evidence to the contrary the court must conclude that the commission failed to decide whether to reconsider plaintiffs' petition within twenty-five days of its filing. Therefore, the petition was denied by operation of the statute, § 4-181a (a) (1), as of March 11, the twenty-fifth day after it was filed. Subsection (c) (2) of § 4-183 required that plaintiffs' appeal be filed by no later than April 25, 2018, the forty-fifth day after that denial. An appeal filed on May 7, 2018, as was this one, is too late.

IV

This appeal raises, *inter alia*, significant issues concerning the intersection between the free speech rights of political candidates and the regulation of campaign financing. See Summons & Complaint, docket entry #100.30. Because the time limits of § 4-183 (c) are jurisdictional requirements that have not been met, however, the appeal must be, and it hereby is, DISMISSED.

BY THE COURT



Joseph M. Shortall
Judge Trial Referee