

2014 IL App (1st) 133706-U

No. 1-13-3706

November 14, 2014

FIFTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

KIERCUL, INC., and CHESTER KIERCUL, President,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiffs-Appellants,)	
)	
v.)	
)	No. 13 CH 14877
THE CITY OF CHICAGO, a Municipal Corporation,)	
THE LICENSE APPEAL COMMISSION, and THE)	
DEPARTMENT OF BUSINESS AFFAIRS &)	The Honorable
CONSUMER PROTECTION,)	Sophia H. Hall,
)	Judge, presiding.
Defendants-Appellees.)	

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment

ORDER

¶ 1 *Held:* We affirm the circuit court's decision to dismiss plaintiffs' complaint for administrative review based on lack of jurisdiction as plaintiffs filed an untimely petition for rehearing before the Liquor Appeal Commission.

¶ 2 Plaintiffs, Kiercul, Inc., an Illinois corporation, and Chester Kiercul, owner of Kiercul, Inc., appeal from the circuit court's dismissal of their complaint for administrative review

based on lack of jurisdiction. Kiercul, Inc., owned and operated Capitol Club, a bar located at 4244-48 N. Milwaukee Avenue in the City of Chicago, and held a liquor license from the City. Following an incident where a battery was committed in the bar, the City charged plaintiffs with several violations of the Municipal Code of Chicago (the Code) (§ 1-4-010, *et seq.* (eff. Jun. 27, 1990)). The Local Liquor Control Commission (LLCC) found plaintiffs liable, revoked the liquor license, and fined plaintiffs a total of \$2,000. On appeal, the License Appeal Commission (LAC) reversed in part and affirmed in part regarding liability and affirmed the revocation of plaintiffs' liquor license. Plaintiffs filed a petition for rehearing. The Appeal Commission dismissed the petition as it was filed two days after the statutory time limit. Plaintiffs filed a complaint for administrative review, but the circuit court dismissed the complaint based on lack of jurisdiction because of the untimely petition for rehearing. For the reasons stated below, we affirm the judgment of the circuit court confirming the decision of the LAC and dismissing the complaint.

¶ 3 In March 2012, the City's Local Liquor Control Commissioner charged plaintiffs with three violations of the Code: failure to cooperate with a police investigation (Chicago Municipal Code (the Code) § 4-60-141(b) (amended May 17, 1995)), failure to display an up-to-date tax emblem on a coin-operated pool table (Chicago Municipal Code § 4-156-180 (amended Dec. 15, 1999)), and hanging signs over the public way without a proper permit (Chicago Municipal Code § 10-28-010(b)(10) (amended Dec. 12, 2012)).

¶ 4 A hearing was held before the LLCC in June and July of 2012. The LLCC issued a written order and decision on August 20, 2012, finding against plaintiffs on all three charges. With regard to count I, the LLCC held that after a battery occurred against a patron in the bar, Chester Kiercul failed to cooperate with the investigating police officer because he had

an employee clean up the patron's blood on the floor. Further, the LLCC concluded that Chester Kiercul also failed to cooperate when the officer asked for the video footage from the surveillance cameras inside the bar and Chester Kiercul told the officer that the cameras were dirty and refused to surrender the tapes or discuss them further. The LLCC concluded that Chester Kiercul therefore failed to cooperate with the police's investigation in violation of section 4-60-141. The LLCC also concluded that the City had established the violations alleged in counts II and III. The LLCC revoked plaintiffs' business license for count I; imposed a fine of \$500 for count II; and imposed a fine of \$1,500 for count III.¹

¶ 5 Plaintiffs timely appealed the LLCC ruling to the LAC. Following oral arguments, the LAC issued a written order on April 3, 2013. The LAC reversed the LLCC's decision that Chester Kiercul failed to cooperate with the police when he ordered an employee to clean up the blood because he was not charged with contaminating a crime scene and there was no evidence that he was instructed by police to refrain from cleaning up the blood or that doing so impeded any criminal investigation. However, the LAC affirmed the LLCC's finding that there was substantial evidence that Chester Kiercul failed to cooperate with the police in violation of section 4-60-141 when he did not produce the surveillance videotapes and refused to discuss the tapes. The LAC also affirmed the penalty imposed for count I, *i.e.*, to revoke the liquor license. However, the LAC observed in its written opinion that the LLCC's order failed to specify whether its decision to revoke the liquor license was based on both of the failures to cooperate (cleaning up the blood and refusal to provide videotapes), or if the

¹ As to count II, the LLCC found that there was no valid tax emblem on the pool table (an "automatic amusement device") in the bar, in violation of section 4-156-180 of the Code. For count III, the LLCC held that the three signs outside the bar encroached on the public way and plaintiffs lacked the requisite permit for the signs, in violation of section 10-28-010(b)(10) (which prohibits the construction, installation or maintenance of a structure or device over a public way without a permit). As these violations are not at issue on appeal to this court, we will not discuss them further.

LLCC's recommendation of revocation would have remained based on either ground, standing alone. The LAC noted that it lacked authority to remand for clarification and could only affirm or reverse the revocation. Because reversal would allow plaintiffs to avoid any penalty, the LAC affirmed the revocation. The LAC observed that although revocation came "close" to being unconscionable under the circumstances, the evidence regarding plaintiffs' past history of discipline² was "sufficient to find that revocation is not unconscionable."³ The LAC's April 3, 2013, order was accompanied by a signed certificate of service and was mailed to plaintiffs' attorney of record on the same day.

¶ 6 Plaintiffs filed a petition for rehearing before the LAC on April 25, 2013. The parties did not dispute below, and do not dispute on appeal, that plaintiffs' petition for rehearing was filed two days after the 20-day statutory time limit under the Illinois Liquor Control Act. Section 7-10 of the Illinois Liquor Control Act provides that "[w]ithin 20 days after the service of any rule, regulation, order or decision of said commission upon any party to the proceeding, such party may apply for a rehearing in respect to any matters determined by said commission." 235 ILCS 5/7-10 (West 2012). Plaintiffs asserted in their petition for rehearing that their attorney was involved in a murder trial at the time his office received the LAC's order on April 17, 2013, and "that there is no substantial prejudice herein as the Petition is 2 days late and thus is subject to equitable tolling, and the issues raised in the Commission's ruling, as the Commission suggests, merit consideration by the Circuit Court."

² The City provided records from the Department of Business Affairs and Consumer Protection related to Kiercul, Inc., which showed six prior violations between the years of 1994 and 2008 for operating after permitted hours, operating without a tobacco license, placing advertising matter in automobiles, failing to notify the police, and two violations of selling alcohol to a minor.

³ In a concurring opinion, Commissioner Donald O'Connell indicated that he "reluctantly concur[red]" and observed that "the lack of authority on the part of this Commission to either alter the penalty or remand the case to the local forces a decision amounting to the lesser of two inappropriate rulings."

¶ 7 The LLCC filed a motion to dismiss the petition for rehearing based on lack of jurisdiction because it was untimely filed and asserted that the time limit should not be equitably tolled because this was not authorized by statute and it was not appropriate under the circumstances given that nothing extraordinary had prevented plaintiffs' counsel from timely filing a petition for rehearing.

¶ 8 Oral arguments on the motion to dismiss were held on May 22, 2013. Plaintiffs' counsel asserted that the LAC's April 3, 2013, order was "logged" in his office as being received April 17, 2013, that he was a sole practitioner and was involved in trying a murder case at the time, and by the time he discovered the order and "got hold [*sic*] of the petitioner, immediately that day [*sic*] came to the Commission *** and within 45 minutes filed the petition for rehearing."

¶ 9 On June 4, 2013, the LAC entered an order granting the motion to dismiss and denying the petition for rehearing because it was not filed within 20 days after service of the LAC's order. The LAC held that mailing a copy of the order to the attorney of record was deemed to be service of the order under to the Liquor Control Act. The LAC reasoned that, as a statutorily created entity with limited jurisdiction, it was not authorized to "expand its jurisdiction through the concept of equitable estoppel." The order further provided that "[t]his decision should not be considered as ruling that the licensee did or did not establish the facts necessary to argue equitable estoppel. The issue has been made of record for purposes of appeal."

¶ 10 Plaintiffs filed a complaint for administrative review in the circuit court. Defendants moved to dismiss, again asserting that the 20-day period for filing a petition for rehearing with the LAC was mandatory and that LAC had no jurisdiction over the petition for

rehearing because it was filed late. Further, as plaintiffs were required to file a petition for rehearing before they could seek judicial review of the LAC's order,⁴ and the LAC lacked jurisdiction to consider the untimely petition for rehearing and issue a final order, the circuit court consequently lacked jurisdiction to consider plaintiffs' complaint.

¶ 11 In response, plaintiffs asserted that the circuit court had jurisdiction on due process grounds and based on equitable tolling. Plaintiffs argued that Chester Kiercul had a property interest in the liquor license and he was deprived of adequate notice because the LAC decision was mailed to his attorney and not to Chester Kiercul. Plaintiffs' attorney provided an affidavit stating that he was involved in a murder trial when his office received the LAC's decision, he was not aware of its arrival because he was a sole practitioner without secretarial staff, and when the murder trial ended and he "became aware of the Ruling, [he] attempted to call Mr. Kiercul immediately. When I was finally able to make contact with him, I was told he wished to appeal, and filed the Petition for Rehearing on the same day, April 25, 2013, 2 days later than required by rule."

¶ 12 Defendants submitted a reply and the circuit court heard oral arguments. The circuit court ultimately granted defendants' motion to dismiss based on lack of jurisdiction. Plaintiffs filed a timely notice of appeal.

¶ 13 On appeal, plaintiffs contend that the circuit court should have applied the doctrine of equitable tolling because the LAC's April 3, 2013, order took a long time to reach counsel's office and plaintiffs' counsel was preoccupied with a murder trial and filed the petition as soon as he discovered that the order had arrived and spoke with plaintiffs. Plaintiffs assert that they have a meritorious defense to the decision revoking the liquor license and they

⁴ See 235 ILCS 5/7-10 (West 2012).

argue that a remand is needed because of the lack of clarity in the LLCC's ruling regarding whether either of the two bases, standing alone, was sufficient for revocation.

¶ 14 Defendants contend that the LAC is an administrative agency whose jurisdictional powers are circumscribed by statute, the failure to file the petition for rehearing by the statutory deadline deprived the LAC of jurisdiction, and, as a result, the circuit court lacked jurisdiction over the complaint for administrative review. Defendants assert that equitable tolling should not apply because the time limit for filing the petition for rehearing was a mandatory jurisdictional deadline. Further, no extraordinary circumstances prevented a timely filing of the petition and service by mailing the order to counsel is deemed service upon the party, which was also sufficient to comply with constitutional guarantees of due process.

¶ 15 "A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts [an] affirmative matter that defeats the plaintiff's claim. [Citation.] We review *de novo* the circuit court's order granting a section 2-619 motion to dismiss." *Andrews v. Gonzalez*, 2014 IL App (1st) 140342, ¶ 16. "Review of an agency's legal conclusions is *de novo*." *El Sauz, Inc. v. Daley*, 328 Ill. App. 3d 508, 513 (2002). We also review *de novo* the construction of statutory language. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 2012 IL 111286, ¶ 23. "Our primary objective in interpreting a statute is to ascertain and give effect to the legislature's intent. [Citation.] The best indication of such intent is the language of the statute itself given its plain and ordinary meaning." *Andrews*, 2014 IL App (1st) 140342, ¶ 17. We construe the words and phrases at issue in conjunction with other relevant portions of the statute and avoid rendering any term superfluous or meaningless. *Id.*

¶ 16 As previously noted, section 7-10 of the Liquor Control Act provides as follows:

"A copy of the rule, regulation, order or decision of the State commission or the license appeal commission, in any proceeding before it, certified under the seal of said commission, shall be served upon each party of record to the proceeding before the commission and service upon any attorney of record for any such party shall be deemed service upon such party. ***

Within 20 days after the service of any rule, regulation, order or decision of said commission upon any party to the proceeding, such party may apply for a rehearing in respect to any matters determined by said commission. *** No action for the judicial review of any decision of said commission shall be allowed unless the party commencing such action has first filed an application for a rehearing and the commission has acted upon said application." 235 ILCS 5/7-10 (West 2012).

¶ 17 This court has previously considered the statutory language in section 7-10 in *El Sauz*, where it held that "the 20-day period in section 7-10 for filing a petition for rehearing from a decision of the LAC is mandatory." *El Sauz*, 328 Ill. App. 3d at 514. Because the licensee in *El Sauz* filed a petition for rehearing more than 20 days after service of the LAC's decision, *i.e.*, after the expiration of the mandatory 20-day period for the filing of a petition, the court held that "the LAC was without jurisdiction to consider the petition" and affirmed the dismissal of the licensee's complaint for administrative review. *Id.* at 515-16. In addition, this court also observed that service of the LAC's decision "can be on the attorney of record," and it was irrelevant that the president of the plaintiff was not personally notified of the decision before the deadline to file the petition for rehearing expired. *Id.* at 516n1. This court also found no due process concerns in serving the licensee's attorney with the LAC's decision via regular mail because it was reasonably calculated to provide the licensee with actual

notice and the 20-day period would have been sufficient time to file a petition for rehearing, but for the fact that the attorney was absent for the majority of the 20-day period. *Id.* at 520.

¶ 18 Along similar lines, this court determined that, where a licensee altogether failed to file a petition for rehearing in the LAC before filing a complaint for administrative review in the circuit court as required by section 7-10, judicial review of the LAC's decision was not permitted because a licensee must "first file*** an application for a rehearing and the commission *** [must] act*** upon said application." *One Way Liquors, Inc. v. Byrne*, 105 Ill. App. 3d 856, 859, 862-63 (1982). The court stated that appeals from decisions of the LLCC "are purely statutory and to be legally effective they must be prosecuted in accordance with the requirements of the statute." *Id.* at 863. Moreover, the court noted that "[i]t is well established that where *** the statute provides that no appeal shall be allowed unless the party has first filed an application for rehearing and the commission has acted on the application, the circuit court cannot consider a petition for review unless an application for rehearing has both been filed and acted upon." *Id.* at 860.

¶ 19 As in *El Sauz* and *One Way Liquors*, this case involves a licensee who failed to abide by the statutory requirements regarding filing a petition for rehearing in the LAC. Plaintiffs do not dispute that the petition for rehearing was filed two days late in this case, on April 25, 2013. The record evidence reflects that the LAC's order was dated April 3, 2013, and was accompanied by a signed certificate indicating that it was mailed on that same date to plaintiffs' attorney of record. This manner of service on plaintiffs' attorney complied with section 7-10 of the Liquor Control Act. 235 ILCS 5/7-10 (West 2012).⁵ Accordingly, the

⁵ We note that the LAC's order states that a petition for rehearing must be filed within 20 days after service of the order, that the date of service is the date of the mailing of the order, and that if a party wished to pursue an administrative review action in the circuit court, the party must file a petition for rehearing within 20 days "as such petition is a jurisdictional prerequisite to the administrative review."

LAC acted correctly in the case at bar when it granted the motion to dismiss and denied the untimely petition for rehearing for lack of jurisdiction. In turn, we similarly find that the circuit court properly granted the motion to dismiss the complaint for administrative review based on lack of jurisdiction, as the LAC was unable to act upon the untimely petition for rehearing.

¶ 20 In addition, we disagree with plaintiffs that equitable tolling should apply to permit consideration of their untimely petition for rehearing. Equitable tolling may be applied when " 'the defendant has actively misled the plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way, or if the plaintiff has mistakenly asserted his or her rights in the wrong forum.' " *American Family Mutual Insurance Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 32 (quoting *Clay v. Kuhl*, 189 Ill. 2d 603, 614 (2000)). Extraordinary circumstances " 'include legal disability, an irredeemable lack of information, or situations where the plaintiff could not learn the identity of proper defendants through the exercise of due diligence.' " *Id.* (quoting *Thede v. Kapsas*, 386 Ill. App. 3d 396, 403 (2008)). However, although "equitable tolling is recognized in Illinois, it is rarely applied." *American Family Mutual Insurance*, 2014 IL App (1st) 131631, ¶ 33. In fact, "Illinois has consistently held that time limitations upon bringing actions before administrative agencies are matters of jurisdiction which cannot be tolled." *Reilly v. Wyeth*, 377 Ill. App. 3d 20, 33-34 (2007).

¶ 21 For example, in the context of proceedings under another administrative scheme, this court held in *Robinson v. Human Rights Commission*, 201 Ill. App. 3d 722, 728 (1990), that the requirement under the Illinois Human Rights Act (775 ILCS 5/7A-102(A)(1) (West 1998)), that a charge must be filed within 180 days after the date of an alleged violation, was a jurisdictional provision and it was therefore not subject to the equitable defenses of waiver,

estoppel, or tolling. The court held that "[a]n administrative agency obtains its power to act from the legislation creating it and has no power to act beyond that granted by the legislation." *Id.* at 726-27. The court held that the 180-day provision was a jurisdictional time limit and the Human Rights Act did not provide the administrative agency with authority to consider any untimely filed charges. *Id.* at 728. The court "strongly question[ed] the applicability of the equitable principle of tolling to any jurisdictional time limitation even under circumstances where an agency has arguably contributed to a late filing. An agency's authority is strictly limited to the statute created it[.]" *Id.* at 729.

¶ 22 Similarly, in the context of administrative proceedings regarding unemployment benefits, the court held that the plaintiff was not entitled to belatedly amend his complaint under equitable tolling principles to add a defendant where the plaintiff sought review of a decision of the Board of Review of the Illinois Department of Employment Security finding him ineligible to receive unemployment benefits. *Van Milligen v. Department of Employment Security*, 373 Ill. App. 3d 532, 542 (2007). Pursuant to section 3-103 of the Review Law (735 ILCS 5/3-103 (West 2004)), the complaint to review the administrative decision had to be filed within 35 days of the date that the administrative decision was served on the party. *Id.* at 536. The court observed that there was a "significant distinction" between a statute of limitation and a statute that "both confers jurisdiction on a court and fixes a time within which such jurisdiction may be exercised," and that equitable tolling "usually applies to statutes of limitations, not limitations periods that are inherent parts of the right of action created." *Id.* at 542. The court held that where a statute "creates a substantive right unknown to the common law and makes time an inherent element of the right so created," the statute is not a statute of limitations, but rather "it is an inherent part of the right of action created." *Id.*

See also *Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill. 2d 202, 209 (1985) (holding that the 35-day filing period limitation in the Administrative Review Act (Ill. Rev. Stat. 1983, ch. 110, par. 3–103) was jurisdictional as it was an inherent part of a statutorily created right that was unknown to common law, and therefore judicial review was barred as the taxpayer failed to file complaint for review within the 35-day period); *Weatherly v. Illinois Human Rights Commission*, 338 Ill. App. 3d 433, 438 (2003) (concluding that, as the 180-day filing limit in the Illinois Human Rights Act was a jurisdictional provision, the employee's amended complaint was properly dismissed for lack of jurisdiction as it was untimely filed and holding that the principles of equitable tolling and estoppel did not apply); *Charleston Community Unit School District No. 1 v. Illinois Educational Labor Relations Board*, 203 Ill. App. 3d 619, 623 (1990) (holding that according to Illinois case law, statutory time limits on bringing actions before administrative agencies involved a question of jurisdiction that was not subject to tolling, and therefore the administrative agency had no jurisdiction to proceed on the tardily filed charge).

¶ 23 As in the cases discussed above, the 20-day period in the Liquor Control Act at issue here is also a mandatory jurisdictional provision. *El Sauz*, 328 Ill. App. 3d at 514-16. The Liquor Control Act both creates a statutory right unknown to common law, and "fixes a time within which such jurisdiction may be exercised." *Van Milligen*, 373 Ill. App. 3d at 542. Accordingly, we do not find that equitable tolling applies in this case.

¶ 24 Although plaintiff relies on *Bank of Herrin v. Peoples Bank of Marion*, 105 Ill. 2d 305 (1985), and *Chicago Corp. v. White*, 49 Ill. 2d 433 (1971), we find these cases inapposite. Both cases involved late notices of appeal to the Illinois Appellate Court and the application of Illinois Supreme Court Rule 303(e) (eff. Jul. 1, 1984). They did not involve an agency

with limited jurisdiction created and circumscribed by statute, or the application of the principles of equitable tolling.

¶ 25 For the reasons stated, we affirm the judgment of the circuit court of Cook County granting the motion to dismiss plaintiffs' complaint for administrative review.

¶ 26 Affirmed.