STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS OF LINDA WARBURTON AND JOHN WARBURTON, Claimants, vs. EARL COURTNAGE, LINDA WARBURTON, AND JOHN WARBURTON individually and as partners d/b/a AWESOME BLOSSOM ROSE GARDEN, Respondent.	)	Case Nos. 1707-2010 and 1711-2010 FINAL AGENCY DECISION GRANTING SUMMARY JUDGMENT

* * * * * * * * * * *

The respondent has moved for summary judgment in these matters based on two arguments. In the first argument, the respondent contends that the appeals were not timely filed. In the second, the respondent argues that the fact of a partnership between the claimants and the respondent has been conclusively established through a district court proceeding and, because of the existence of that partnership, he is entitled to summary judgment. The claimants have failed to respond as directed by this tribunal. The respondent's motion as to the timeliness of the appeal is well taken and summary judgment is appropriate on that basis. The fact that the claimants are precluded from denying the existence of a partnership does not provide a basis for granting summary judgment. While the timeliness of the appeal is dispositive, the hearing officer will nonetheless set forth the reasons why he finds that the collateral estoppel issue cannot serve as a basis for granting summary judgment.

I. FACTS THAT ARE NOT IN DISPUTE

A. Timeliness of the Appeals.

1. Linda and John Warburton filed their respective wage and hour claims in 2010. Each claim alleges that they entered into an employment agreement with the respondent whereby he agreed to pay them each $20.00 per hour for their work.

2. On October 5, 2010, the Wage and Hour Unit issued a redetermination finding that Linda and John were not due additional wages because they had entered into a partnership agreement with the respondent and they had failed to prove the existence of any employment agreement with the respondent. The redetermination in plain and unmistakable terms advised Linda and John of their appeal rights, noting that they must file an appeal of the redetermination no later than October 25, 2010. Document 11, administrative file. The determination was sent to John and Linda on October 5, 2010. Id.

3. Neither John nor Linda filed an appeal by October 25, 2010.

4. On October 26, 2010, Linda, both on her own behalf and on behalf of John, contacted the Wage and Hour Unit and acknowledged that they had missed the appeal deadline but that they intended "to fight the claim." Respondent's Motion, Exhibit C. See also, administrative file, Document 8. On October 26, 2010, Linda, again on her own and on John's behalf, wrote a letter to the Wage and Hour Unit indicating "Sorry this is late, we are writing to let you know we have been looking for an attorney . . . ." (Emphasis added). Respondent's Motion, Exhibit D. See also, administrative file, Document 5.

B. Facts Relevant to Collateral Estoppel as to the Existence of a Partnership.

5. The claimants' complaints before this tribunal allege that they were employees of the respondent and had an employment agreement where they would each be paid $20.00 per hour for their work.

6. The respondent sued the claimants in Montana District Court alleging that he and the claimants were partners in the flower business that spawned the wage and hour case before this tribunal. In that district court case, the district court entered judgment finding that the claimants and the respondent were partners in that business.

7. The district court case involved the same parties and the identical issue of the existence of the partnership which is a material, though not dispositive, issue in the wage and hour case presently before this tribunal.

C. Facts Relevant to Both Issues.

8. The respondent filed its motion for summary judgment on February 22, 2011.

9. On February 24, 2011, this tribunal issued an order to Linda and John to respond to the Motion for Summary Judgment no later than March 18, 2011. This tribunal further pointed out that the claimants' failure to respond to the motion could be deemed "an admission by the claimants that the motion is well taken which could result in the respondent's motion being granted."

10. On March 2, 2011, John and Linda filed a letter with this tribunal stating that "John & Linda will still go forward for our wages as we were never part owners of the Awesome Blossom Rose Garden." Despite this tribunal's admonition in its February 24, 2011 order, John and Linda's letter contained no response to the motion for summary judgment other than to say that John and Linda intended to go forward with their claim. The claimants have provided no other response to the motions for summary judgment.

II. DISCUSSION

A. Standards for Summary Judgment.

Summary judgment is an appropriate method of dispute resolution in administrative licensing proceedings where the requisites for summary judgment otherwise exist. Matter of Peila (1991), 249 Mont. 272, 815 P.2d 139. The general purpose of this rule is to dispose promptly of actions in which there is no genuine issue of fact, thereby eliminating unnecessary trial, delay, and expense. Westmont Tractor Co. v. Continental I, Inc. (1986), 224 Mont. 516, 731 P.2d 327; following Harland v. Anderson (1976), 169 Mont. 447, 548 P.2d 613.

Summary judgment is appropriate where "the pleadings . . . and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mont. R. Civ. P. Rule 56(c). A response to a properly supported motion for summary judgment may not rest upon mere allegations or denial but must be supported by affidavits or as otherwise specified by the rule. Mont. R. Civ. P. Rule 56(e). That subsection further provides that "if the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." In the case before this tribunal, the respondent has the burden of showing a complete absence of any genuine issue and that he is entitled to judgment as a matter of law. Sherrad v. Prewett, 2001 MT 228, 306 Mont. 511, 36 P.3d 378; see also, Cereck v. Albertson's, Inc. (1981), 195 Mont. 409, 637 P2d 509. If this burden is met, the claimants must come back with something more than mere assertions to demonstrate that a material issue of fact remains. If the respondent meets its burden and the claimant fails to respond, summary judgment must be entered in favor of the respondent. Rule 56(e).

B. The Claimants' Appeals are Untimely.

In order to obtain a hearing before a hearing officer after a determination or redetermination is made, a party must appeal the determination or redetermination "within 15 days" after the determination or redetermination is mailed by the department. Mont. Code. Ann. § 39-3-216(3). The only exception that the legislature has provided to the 15 day filing requirement is a proviso that "the department shall by rule provide relief for a person who does not receive the determination by mail." Id. Admin. R. Mont. 24.16.7537[1] provides that a party who has received an adverse decision from a compliance specialist may request a formal hearing. The request must be made within 15 days of the date that the final determination or redetermination is mailed to the party.

In accordance with the dictates of Mont. Code. Ann. § 39-3-216(3), the department has by rule provided a mechanism for relief from the 15 day limit for parties who did not receive their determination or redetermination by mail. Admin. R. Mont. 24.16.7544. That rule provides that a party may request relief from the consequences of an otherwise untimely appeal with an allegation that the party did not timely receive notice by mail of the determination or redetermination. Id. That showing must be made by clear and convincing evidence in order to rebut the presumption contained in Mont. Code Ann. § 26-1-602 that a letter duly directed and mailed was received in the regular course of mail. Id.

An administrative tribunal, unlike a Montana district court, is a forum of limited jurisdiction, with only those powers specifically granted to it by the legislature. Auto Parts of Bozeman v. Emp. Rel. Div. U.E.F., ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193. There is no rule or statute that would permit this tribunal to entertain a late appeal except as provided in Mont. Code Ann. § 39-3-216(3).

In this case, it is clear from the administrative record that the claimants did not timely appeal the redeterminations in their cases. There is no suggestion in the administrative file that any good cause existed for the delay in filing their appeals, much less good cause due to a failure to timely receive the notice of redetermination in the mail. Moreover, the claimants have not availed themselves of the opportunity to respond to the motion for summary judgment despite specific direction from this tribunal to do so. Thus, there is no evidence whatsoever that there is any basis upon

[1]The respondent has incorrectly cited Admin. R. Mont. 24.17.837 regarding the time for appeal. The rule applicable to this wage claim is Admin. R. Mont. 24.16.7537. While the language of Admin. R. Mont. 24.17.837 is identical to the language of Admin. R. Mont. 24.16.7537, Admin. R. Mont. 24.17.837 relates to prevailing wage cases, not cases brought under Mont. Code Ann. § 39-3-204.

which this tribunal can waive the appeal time limits set forth in Mont. Code. Ann. § 39-3-216(3). In light of this, the respondent's motion is well taken and summary judgment must be granted on that basis.

C. The Fact That the Claimants are Collaterally Estopped From Denying the Existence of a Partnership Does Not Entitle the Respondent to Summary Judgment on the Merits of the Wage Claim.

The respondent also seeks summary judgment on the basis that the ancillary district court case between the parties has resulted in a finding that the claimants were in a partnership with the respondent. Under the circumstances of this case, the fact that the claimants are collaterally estopped from denying the existence of the partnership, without more, does not as a matter of law entitle the respondent to summary judgment on the merits.

As the respondent correctly notes, in order for collateral estoppel to apply to a proceeding, three elements must exist: (1) the issue decided in the previous litigation must be identical to the issue to be decided in the pending litigation, (2) there must be a final judgment on the merits in the earlier proceeding, and (3) the litigant in the previous proceeding must be the same litigant in the instant proceeding or be in privity with the litigant in the previous proceeding. Baltrusch v. Baltrusch, 2006 MT 51, ¶18, 331 Mont. 281, 130 P.3d 1267; Brault v. Smith, 209 Mont. 21, 26, 679 P.2d 236, 238 (1984). The fact that an appeal may still be taken from the judgment in the previous proceeding does not bar the application of collateral estoppel. Rather, collateral estoppel may still be invoked even if the earlier proceeding is appealed. Baltrusch, ¶23, (noting that several federal courts have applied the doctrine of collateral estoppel to prevent re-litigation of issues even where the judgment in the prior proceeding is not a final judgment due to the pendency of an appeal in that proceeding). Unquestionably, in light of the issues framed in the claimants' wage and hour complaints as well as the issues between the parties in the district court case, the claimants are collaterally estopped from denying the existence of a partnership with the respondent before this tribunal.

The existence of a partnership, without more, does not create an employment relationship. See, e.g., Cook v. Lauten, 335 Ill. App. 92, 97, 80 N.E. 2d 280, 282 (1948). However, where an agreement exists that creates an employment relationship between a partner and the partnership, unpaid wages may be recoverable. Hovine, Verick, & Amrine, P.C., v. Comm'r of Labor, 237 M. 525, 774 P.2d 995 (1989) (Fact that claimant was a stockholder did not prevent him from seeking wages under the Montana Wage and Hour Act where the entity in which he was a stockholder was an "employer" for purposes of the Act and a written employment

agreement designating the stockholder as an employee of the entity existed between the entity and the stockholder).

In this case, the claimants have denied that they had a partnership with the respondent and have asserted that they had an employment agreement with the respondent. The district court's determination found only that the claimants and the respondent were in a partnership agreement. It did not address the separate issue of whether an employment agreement existed between the claimants and the respondent. As Hovine teaches, the existence of a partnership does not preclude recovery if a separate employment agreement also exists. Thus, under Hovine, the sine qua non of the respondent's motion for summary judgment is a finding that no employment agreement existed. Since the district court case between the parties did not address that issue, the fact that the claimants are collaterally estopped from denying the existence of the partnership does not as a matter of law necessitate a finding that no employment agreement existed. Accordingly, the hearing officer cannot grant summary judgment on that basis.

III. ORDER

Based on the foregoing, judgment is entered on behalf of the respondent against claimants John and Linda Warburton because their appeals were untimely under Mont. Code. Ann. § 39-3-216(3). Linda and John Warburton's claims are hereby dismissed.

DATED this 25th day of March, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

WARBURTON.FAD.GHD