

Bantel

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

AMERICAN ASPHALT, INC.,)
)
 Petitioner,)
)
 v.)
)
 NEBRASKA DEPARTMENT OF)
 REVENUE AND MARY JANE EGR,)
)
 Respondents.)

Case Number CI 03-2349

DEPT. OF JUSTICE
AUG 26 2003
ORDER STATE OF NEBRASKA

This matter is before the court on the respondents' motion to dismiss, filing #1. The respondents allege the court lacks subject matter jurisdiction to hearing his matter, due to insufficiency of service of process.

On June 27, 2003, the petitioner filed with the clerk of the district court a "Petition on Appeal of Claim for Refund." The petition on appeal alleges that it is an appeal from a "final decision" of the respondent Egr made on May 28. The court file, of which the court takes judicial notice, reveals that filed with the petition was a praecipe for summons directing the clerk to "issue summons for certified mail service upon the [r]espondents." On July 7, 2003, the petitioner's counsel filed two affidavits of service - one indicating that service of a copy of the petitioner's petition on appeal was made on the respondent Egr by certified mail on July 2 and one indicating that service of a copy of the petitioner's petition on appeal on the respondent Department of Revenue was made on July 2 by certified mail.

Pursuant to NEB. REV. STAT. § 77-2708(2)(f) (Cum. Supp. 2002) and NEB. REV. STAT. § 77-27,128 (Reissue 1996), the petitioner's appeal is brought under the Nebraska Administrative Procedure Act. NEB. REV. STAT. §§ 84-901 through -920 (Reissue 1999). NEB. REV. STAT. § 84-917(2)(a) (Reissue 1999) provides, *inter alia*, that "[p]roceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency . . . [and that] . . . [s]ummons shall be served withing thirty days of the filing of the petition in the manner provided for service of a summons in section 25-510.02." Insofar as relevant, NEB. REV. STAT. § 250510.02(1) (Reissue 1995) provides that the respondents "... may be served

by leaving the summons at the office of the Attorney General with the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail service addressed to the office of the Attorney General.” Clearly, the petition on appeal filed on June 27 was filed within thirty days of May 28. The question presented is whether there was proper service on the respondents.

In *Concordia Teachers College v. Nebraska Dep't. of Labor*, 252 Neb. 504, 509, 563 N.W.2d 345, 349 (1997), the Nebraska Supreme Court, addressing a virtually identical issue, stated:

... After considering the language of § 84-917(2)(a) in its plain, ordinary, and popular sense, it is apparent that the Legislature intended that a summons be served within 30 days of the filing of the petition for review as a prerequisite to the exercise by the district court of its jurisdiction over the subject matter on an appeal from an adverse decision of an administrative agency. As Concordia failed to invoke the subject matter jurisdiction of the district court in that it failed to serve the proper summons within 30 days of filings its ‘Amended Petition’ [i.e., it mailed a copy of its amended petition to the Department of Labor Commissioner rather than to the Attorney General], the district court did not acquire authority to review the Commissioner’s ruling under the APA.

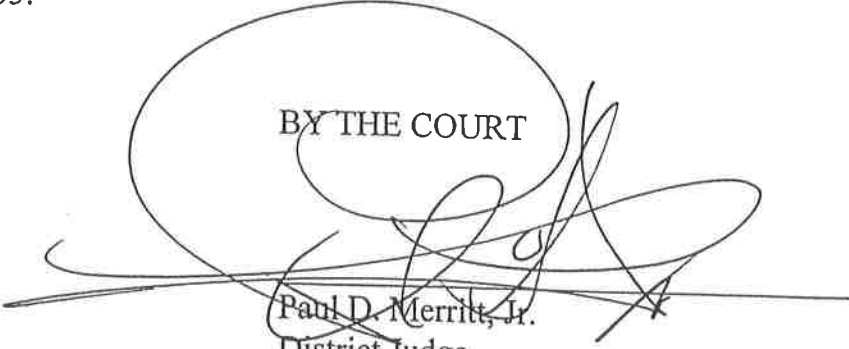
Since the petitioner failed to serve the proper summons within thirty days of the filing of its petition on appeal, the court has not acquired subject matter jurisdiction to review the decision of the respondent Egr. The respondents’ motion to dismiss, filing #1, is granted. Since nothing can be done by the petitioner, at this point in time, to enable the court to acquire subject matter jurisdiction, this case is dismissed, at the petitioner’s costs.

A copy of this order is sent to counsel of record.

Dated August 25, 2003.

SO ORDERED.

BY THE COURT



Paul D. Merritt, Jr.
District Judge

c: Mr. Michael J. Whaley, Mr. L. Jay Bartel