

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GA BIOSCIENCE RESEARCH, INC.

Petitioner,

v.

HON. JUDGE STEPHANIE M.
HOWELLS, ADMINISTRATIVE LAW
JUDGE, OFFICE OF STATE
ADMINISTRATIVE HEARINGS,
SITTING BY DESIGNATION FOR THE
GEORGIA ACCESS TO MEDICAL
CANNABIS COMMISSION,

Respondent in Certiorari,

v.

FFD GA HOLDINGS, LLC; THERATRUE
GEORGIA, LLC; NATURES GA, LLC;
TREEVANA REMEDY, INC.,

Respondents.

CIVIL ACTION NO.
2023CV383107

ORDER ON OUTSTANDING MOTIONS

This case is before the Court on GA Bioscience Research, Inc.'s ("GABRI") Motion for Stay (Dkt. 16), Respondents' Motion to Dismiss (Dkt. 14), and Respondents' Request for Expedited Briefing and Final Hearing (Dkt. 13).¹

I. Procedural Background

Petitioner GABRI is an unsuccessful applicant for a Class 2 license to produce and sell low-THC oil pursuant to Georgia's HOPE Act, O.C.G.A. § 16-12-200 *et seq.*

¹ Respondent's Motion to Strike Jury Demand (Dkt. 15) is mooted by GABRI's withdrawal of the demand (Dkt. 26).

After the Georgia Medical Cannabis Commission provisionally awarded the available licenses to FFD GA Holdings, LLC, TheraTrue Georgia LLC, Natures GA LLC, and Treevana Remedy Inc., GABRI appealed. GABRI first filed in the Superior Court of Tift County, but the prospective licensees – the Respondents in this case – moved to dismiss the appeal, arguing the Court had no jurisdiction because O.C.G.A. § 50-13-19 did not apply. GABRI then filed a Petition for Writ of Certiorari, under O.C.G.A. § 5-4-1, *et. seq.*, in this Court. (Case No. 2022CV371520). The Petition was filed, and the Writ issued in that case on October 17, 2022. Judge Howells and the Prospective Licensees were served, and the proofs of service were filed between November 22 and 30, 2022.

The Superior Court of Tift County ultimately dismissed GABRI's case on jurisdictional grounds. GABRI's appeal of that dismissal is currently pending before the Georgia Court of Appeals, Case No. A23A0877. GABRI then voluntarily dismissed its Petition in this Court on January 23, 2023. The instant case is a renewal action of the voluntarily dismissed certiorari petition. (Dkt. 2)

II. Respondents' Motion to Dismiss

Respondents now seek to dismiss this case, based on the “prior pending action doctrine” and because GABRI's prior certiorari action was procedurally defective and cannot be renewed. (Dkt. 14). Respondents assert this action must be dismissed because procedural deficiencies rendered the original certiorari action void and incapable of being renewed. Specifically, Respondents point out that GABRI's petition was not accompanied by a bond and was not timely served on the lower

tribunal (Judge Howells) or on Prospective Licensees. Petitioner counters that the new appellate structure of O.C.G.A. § 5-3-1 *et seq* applies retroactively and specifically dispenses with these procedural requirements. Even if the certiorari requirements of O.C.G.A. § 5-4-1 *et seq* apply, GABRI asserts the alleged defects in service and posting a bond do not preclude renewal in these circumstances.

GABRI is correct that failure to post a bond in a certiorari action is an amendable defect that does not preclude renewal. *See Scott v. Oxford*, 105 Ga. App. 301, 305 (1962); *see also Buckler v. DeKalb County*, 290 Ga. App. 190, 192 (1) (2008); *Williams v. City of Douglasville*, 354 Ga. App. 313, 319 (2020). GABRI is also correct that failure to serve the lower tribunal does not “render the proceeding void,” but merely voidable. *City of Dunwoody v. Discovery Prac. Mgmt., Inc.*, 338 Ga. App. 135, 136–37 (2016) (*quoting Bass v. Milledgeville*, 121 Ga. 151, 153 (1904)). However, failure to serve the opposite party is not so easily excused.

Georgia law – in effect at the time of the original action – provided that “[a] copy of the petition and writ shall also be served on the opposite party or his counsel or other legal representative, in person or by mail; and service shall be shown by acknowledgment or by certificate of the counsel or person perfecting the service.” O.C.G.A. § 5-4-6. Though Prospective Licensees are nominally the Respondents in the original action, they were, in actuality, the opposite party. *City of Sandy Springs Bd. of Appeals v. Traton Homes, LLC*, 341 Ga. App. 551, 557 (2017) (*citing Fisher v. City of Atlanta*, 212 Ga. App. 635, 635 (1994)). Service on the opposite party must be made within the same five-day period as service on the respondent. *Ham v. City of*

Milton, 358 Ga. App. 694, 697-98 (2021) (quoting *Hudson v. Watkins*, 225 Ga. App. 455 at 456 (1997)). When there is no timely service upon the opposite party, “*there is no suit*” and dismissal is appropriate. *City of Sandy Springs Bd of Appeals v. Traton Homes, LLC*, 341 Ga. App. 551, 558 (2017) (citations omitted and emphasis added); *see also Ham*, 358 Ga. App. at 697-98.

Petitioner urges the Court to apply the new appellate procedures of O.C.G.A. § 5-3-1 *et seq.* But doing so does not save the action for several reasons. First, the final judgment in this case was more than a year ago – on September 16, 2022 – and the new procedures do not change or extend the time for a party to seek review after a final decision. O.C.G.A. § 5-3-7(b)(requiring filing of petition for review within 30 days after final judgment of the lower judicatory). Second, the new procedures still require service on all parties within the same five days provided for under the old certiorari procedures, which did not occur here. O.C.G.A. § 5-3-7(g).

Finally, even accepting that a procedural change is applied retroactively, that retroactive effect is applied to cases that are pending – but the original case is not pending because it was voluntarily dismissed by Petitioner. Despite the General Assembly’s clear intention to dispose of antiquated certiorari procedures that inhibited cases from being heard on their merits, this Court cannot reverse-engineer the procedures applicable to the case at the time it was pending. When it was pending, the case was not timely served on the opposite party, and, therefore, it cannot be renewed under O.C.G.A. § 9-2-61. *Bass v. Milledgeville*, 121 Ga. 151, 152

(1904) (a certiorari that is “void for any reason... cannot be renewed”); *see also Buckler v. DeKalb County*, 290 Ga. App. 190, 191 (2008).²

III. Conclusion

Based on the foregoing, Respondents’ Motion to Dismiss is GRANTED and this case is DISMISSED WITH PREJUDICE. The other outstanding motions – GABRI’s Motion for Stay (Dkt. 16) and Respondents’ Request for Expedited Briefing and Final Hearing (Dkt. 13) – are DENIED as moot.

IT IS SO ORDERED, this 5th day of October, 2023.



HON. RACHEL R. KRAUSE
Superior Court of Fulton County
Atlanta Judicial Circuit

² Because of the dismissal on procedural grounds, the Court does not reach the “prior pending action doctrine” argument urged by Respondents. But that argument was not dispositive or persuasive when asserted by Respondents in two similar cases. *See Symphony Medical, LLC v. FFD Ga. Holdings, LLC, et al*; Case No. 2023CV382943 (Dkt. 22) and *ACC, LLC v. FFD Ga. Holdings, LLC, et al*; Case No. 2023CV382945 (Dkt. 20).