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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BARAGA

FOUCAULT-FUNKE AMERICAN LEGION
POST 444,

Plaintiff,

v

File No. 10-6062-CZ
Hon. Charles R. Goodman

GUY ST. GERMAINE, Executive Director of the WESTERN UPPER PENINSULA HEALTH DEPARTMENT, and the WESTERN UPPER PENINSULA HEALTH DEPARTMENT,

Defendants.

and

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervenor-Defendant.

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OPINION AND ORDER ON MOTIONS FOR SUMMARY DISPOSITION and INTERVENOR'S REQUEST FOR INJUNCTIVE RELIEF

At a session of said Court held in the Courthouse in the City of Houghton, Houghton County, Michigan on this 23rd Day of December, 2010.

Present: HONORABLE CHARLES R. GOODMAN, Chief 12th Circuit Judge

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This matter is before the Court because all parties have filed motions for Summary Disposition. The Michigan Department of Community Health has also requested that the Court issue a permanent injunction which would require American Legion Post 444 to comply with the requirements of Michigan's Smoke Free Air Act, 2009 PA 188 (Act) in all areas of their Baraga, Michigan, facility.

PROCEDURAL HISTORY

On August 6, 2010, Plaintiff filed a Complaint Seeking Declaratory Relief alleging that the Smoke Free Air Act is unconstitutional. Named as Defendant in Plaintiff's initial complaint was the Western Upper Peninsula Health Department, along with its executive director. By stipulation, the Michigan Department of Community Health was later added as an Intervenor-Defendant.

Defendants and Intervenor-Defendant sought, from the Court, the issuance of a preliminary injunction, enjoining Plaintiff from violating the provisions of the Smoke Free Air Act. After

conducting a hearing, the Court granted the preliminary injunction as requested. After the grant of a preliminary injunction, Plaintiff filed a First Amended Complaint, and although Plaintiff has not totally abandoned its constitutional arguments, the American Legion Post now emphasizes its claim that the Smoke Free Air Act simply does not apply to certain areas of their facility.

MOTIONS FOR SUMMARY DISPOSITION

The Smoke Free Air Act exempts from its provisions the gaming areas of casinos that were in existence on the effective date of the Act. See MCL 333.12606b. The Act defines a casino by making reference to the Michigan Gaming Control and Revenue Act, being MCL 432.201 et seq.

Plaintiff's Motion for Summary Disposition emphasizes its position that its premises, or at least a portion thereof, qualifies as a "casino" and thus, Plaintiff asserts, the Smoke Free Air Act, constitutional or not, cannot be enforced in what Plaintiff argues is the gaming area of its facility. At oral argument, Plaintiff's counsel candidly stated that on the basis of its "exemption argument", the Post did not expect the Court to rule on its claims of constitutional invalidity.

Before this Court can address Plaintiff's claim of statutory exemption, however, this Court must first determine if it has jurisdiction to do so; in other words, does this Court, at this time, have jurisdiction to decide if Plaintiff, or any other entity for that matter, is exempted from the provisions of the Smoke Free Air Act as claimed?

(Even though the Smoke Free Air Act makes reference to the Gaming Control and Revenue Act, supra, for the purpose of defining the term "casino", clearly the Plaintiff is not required to comply with the terms and requirements of the Gaming Act. Plaintiff's pull-tab operation is conducted under the auspices of the Traxler-McCauley-Law-Bowman Bingo Act, being MCL 432.101 et seq, and as such, the operation is excluded from the jurisdiction of the Michigan Gaming Control Board. See MCL 432.203)

Plaintiff Post asserts that whether the Smoke Free Air Act is constitutional or not, the Act simply does not apply to it since the Post is exempted from its purview by virtue of the provisions of MCL 333.12606b, which according to Plaintiff, authorizes it to allow smoking in certain areas of its Baraga facility. MCL 333.12606b reads in applicable part:

> "A casino that is in existence on the effective date of this section may allow smoking in the gaming area of the casino."

Plaintiff asserts that it qualifies as a "casino" because located within its Baraga premises is a pull-tab machine. The machine was located within the Baraga American Legion Post building well in advance of the effective date of Michigan's Smoke Free Air Act. To define what constitutes a casino, the Smoke Free Air Act refers to the definition of "casino" as set forth within Michigan's Gaming Control and Revenue Act, supra. See MCL 333.12601(1)(a). The Gaming Control and Revenue Act, specifically MCL 432.202(g), defines a casino as:

> "a building in which gaming is conducted."

The statute defines gaming to mean:

> "to deal, operate, carry on, conduct, maintain or expose or offer for play any gambling game or gambling operation." MCL 333.202(x)

A gambling game is defined as follows:

> "any game played with cards, dice, equipment or a machine, including any mechanical, electro-mechanical or electronic device which shall include computers and cashless wagering systems, for money, credit, or any representative of value, including, but not limited to, faro, monte, roulette, keno, bingo, fan tan, twenty-one, blackjack, seven and a half, klondike, craps, poker, chuck a luck, Chinese chuck a luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game, or any other game or device approved by the board, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player." MCL 333.202(v)

The Post argues that the pull-tab machine is a "gambling game" as defined above, and thus, "gaming" is conducted on its premises and therefore, the Post is, in fact, a casino and entitled to the exemption as outlined in MCL 333.12606b. Defendants deny Plaintiff's assertion of exemption.

Defendants go on to argue that this Court lacks jurisdiction to decide the issue of "statutory exemption" as claimed by Plaintiff because, Defendants assert, Plaintiff has failed to exhaust administrative remedies which were and are available to it as provided through the Smoke Free Air Act and the Administrative Procedures Act of 1969, being MCL 24.201, et seq.

Courts generally are to decline jurisdiction if the statutory scheme under review makes administrative remedies available. As stated by the Court of Appeals in the case of *Papas -v- Gaming Control Bd*, 257 Mich App 647, 657 (2003).

> "As long as the statutory language chosen by the Legislature establishes the intent to endow the state agency with exclusive jurisdiction, courts must decline to exercise jurisdiction until all administrative proceedings are complete."

The Department of Community Health has the primary responsibility to oversee and enforce the Public Health Code, being MCL 333.1101, et seq, which includes the Smoke Free Air Act. In order to enforce the Act, the Department of Community Health is required to identify those persons and/or entities who are subject to the Act's mandates. If a person or entity disagrees with the determination of the Department and does not believe that a statute applies to them (as is the case here), the Administrative Procedures Act provides to that person or entity a right to seek from the agency a determination as regards the statute's applicability. MCL 24.263 says:

> "On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents

an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case."

The Public Health Code invokes and incorporates the Administrative Procedures Act, (see MCL 333.1205; MCL 333.2233) and thus, the Department of Community Health has created a rule outlining the procedure for making a request for an administrative declaratory ruling. R 325.1211.

The Administrative Procedures Act, once administrative remedies are exhausted, does provide for review by the circuit court. See MCL 24.264; MCL 24.301. In fact, the statute which provides for circuit court jurisdiction regarding the applicability of a statute to a person and/or entity mandates that the matter first be submitted to the appropriate agency. MCL 24.264 reads as follows:

> "Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted." Emphasis added

The case now before this Court is similar to the situation reviewed by the Michigan Court of appeals in the case of *Greenbriar Convalescent Center, Inc. -v- Dep't of Public Health*, 108 Mich App 553 (1981). In the *Greenbriar* case, the petitioner owned and operated a nursing home and had sought to build an addition to its facility. The petitioner brought suit in the Livingston County Circuit Court challenging the Department's determination that the petitioner's proposed addition to its nursing home was subject to review by the Department under the Public Health Code and the Social Security Act. In other words, *Greenbriar* sought from the circuit court a declaratory ruling as to the applicability of the Public Health Code to its intended activity, i.e., the construction of an addition to its nursing home. The Court of Appeals ruled that the Livingston County Circuit Court should have dismissed *Greenbriar's* case as it related to the Public Health Code, since *Greenbriar* had failed to seek a declaratory ruling from the appropriate agency and thus, the Circuit Court lacked subject matter jurisdiction. The same is applicable to the case before this Court. Unless and until Plaintiff avails itself of the administrative remedies as provided by MCL 24.263, this Court lacks subject matter jurisdiction to decide Plaintiff's claim of statutory exemption.

Plaintiff's complaint, of course, raises constitutional issues. Plaintiff must avail itself of its administrative remedies, however, before it is permitted to bring its constitutional claims to this Court for decision. By asserting a non-constitutional argument, i.e., statutory exemption, Plaintiff has waived its right to have its constitutional claims decided in this forum at this time.

As stated by the Michigan Supreme Court in the case of *People -v- Riley*, 465 Mich 442, 447 (2001)

> "The Court of Appeals focus on the Confrontation Clause issue fails to heed this Court's admonition that constitutional issues should not be addressed where the case may be decided on non-constitutional grounds. Or, as we said in *Booth Newspapers, Inc -v- Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), 'there exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case.'"

The principle enunciated by the Supreme Court in the *Riley case, supra,* was reaffirmed by them in the case of *J&J Construction Company -v- Bricklayers and Allied Craftsman, Local One,* 468 Mich 722, 734 (2003), wherein the court said:

> "This Court will not unnecessarily decide constitutional issues, *People v Riley,* 465 Mich 442, 447; 636 NW2d 514 (2001), and it is an undisputed principle of judicial review that questions of constitutionality should not be decided if the case may be disposed of on other grounds. *MacLean v Michigan State Bd of Control for Vocational Ed*, 294 Mich 45, 50;292 NW 662 (1940)."

The language of the above cited cases is clearly applicable to the matter now before this Court. Plaintiff has an administrative remedy available to it on its claims of "statutory exemption". Before bringing its claims to this Court, Plaintiff is mandated to first seek a declaratory ruling on the "exemption issue" from the Department of Community Health as per the requirements of the Administrator's Procedures Act. Even though Plaintiff's complaint disputes the constitutional validity of the Act in question, this Court cannot consider constitutional questions if the matter may be decided on non-constitutional grounds. Obviously if Plaintiff is successful in its claim that it is a "casino", it would then not be necessary to resolve this case on the constitutional issues which the Plaintiff has raised.

Plaintiff, however, goes on to argue that even if an administrative remedy is mandated, it should not be required to avail themselves of it, because to do so would be futile and basically a waste of time. Plaintiff has opined that it is highly unlikely that its position that it is a "casino" would be met with success in an administrative forum. Plaintiff argument was addressed by the Court of Appeals in the decision rendered in the case of *Citizens for Common Sense and Government -v- Attorney General*, 243 Mich App 43, 52 (2000). In that case the Court of Appeals said:

> "However, as this Court has noted, 'courts should not presume futility in an administrative appeal but should assume' 'that the administrative process will, if given a chance, discover and correct its own errors.'" *Greenbriar, supra* at 562, quoting *Canonsburg General Hosp -v- Dep't of Health*, 492 Pa 68, 74; 422 A2d 141 (1980).

In *Huron Valley Schools -v- Secretary of State*, 266 Mich App 638, 649-650 (2005), Court of Appeals said:

> "A mere expectation that an administrative agency will act a certain way is insufficient to satisfy the futility exception."

Plaintiff's argument, therefore, that the requirement to exhaust administrative remedies should be waived due to "futility" must fail. Because Plaintiff has failed to exhaust its administrative remedies, this Court lacks subject matter jurisdiction to decide the issues presented in Plaintiff's First Amended Complaint. Plaintiff is required to exhaust its administrative remedies before filing suit in this court.

DEFENDANT'S REQUEST FOR INJUNCTIVE RELIEF

Article 4 sec 51 of the Constitution of the State of Michigan provides that the health and welfare of the people of the State of Michigan is to be considered a legislative priority. The Public Health Code, of which the Smoke Free Air Act is a part, thus contains the following provision:

> "This code shall be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2)

This Court is to construe the Public Health Code, including the Smoke Free Air Act, in such a manner so as to facilitate the desired purpose of the Act which is to protect members of the public from harm caused by the inhalation of second-hand smoke and the health hazards linked to the smoking of tobacco products.

With that goal in mind, the Legislature provided the Department of Community Health, pursuant to MCL 333.12613, with authority to seek injunctive relief so as to assist the Department of Community Health with enforcement of the Smoke Free Air Act. MCL 333.12613 specifically authorizes the Department of Community Health to avail itself of the remedy set forth within MCL 333.2255, which states:

> "Notwithstanding the existence and pursuit of any other remedy, the department, without posting bond, may maintain injunctive action in the name of the people of this state to restrain, prevent, or correct a violation of the law, rule, or order which the department has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health."

The Department of Community Health now avails itself of the statutorily provided remedy permitting it to seek injunctive relief which would mandate Plaintiff to comply with the provisions of the Smoke Free Air Act. The Michigan Court of Appeals in the case of *Kernen -v- Homestead Development Company*, 232 Mich App 503 (1998) outlined the factors which are to be considered in determining the appropriateness of granting injunctive relief. The factors are:

(a) the nature of the interest to be protected,
(b) the relative adequacy to the plaintiff of injunction and of other remedies,
(c) any unreasonable delay by the plaintiff in bringing suit,
(d) any related misconduct on the part of the plaintiff,
(e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
(f) the interests of third persons and of the public, and
(g) the practicability of framing and enforcing the order of judgment.

The Court will now review the afore set forth factors in order to properly consider Intervenor-Defendant's Request for Injunctive Relief.

FACTOR "A"

The interest sought to be protected through the issuance of an injunction is, of course, the public health. The protection of the public health is a priority of the State of Michigan as mandated by the Constitution, and certainly the preservation and betterment of the health of the people of Michigan is a legitimate area of governmental interest. This factor weighs in favor of the granting of injunctive relief.

FACTOR "B"

The Intervenor-Defendant is charged with the responsibility to oversee and enforce the provisions of Michigan's Smoke Free Air Act. The Act is presumed to be constitutionally valid. The legislature, so as to ensure that the provisions of the Smoke Free Air Act are followed, provided Intervenor-Defendant with the ability to seek and obtain injunctive relief and, thus, the Department of Community Health's request for a permanent injunction is properly before the Court and statutorily authorized.

FACTOR "C"/"D"

These factors are not relevant

FACTOR "E"

As previously noted by the Court in its Opinion and Order dated October 15, 2010, harm to the public is presumed where a law which has been properly enacted is not followed, and, of course, it would not be in the public interest if persons opposed to a law were authorized to ignore it while it was being reviewed, especially when the law deals with something as important as the public health.

Plaintiff asserts that it and other Michigan businesses are being negatively impacted by the Smoke Free Air Act. Many, if not all, laws have economic ramifications, i.e., the income tax. Economic ramifications of a law, however, generally are not a proper reason to permit or allow non-compliance. Plaintiff also claims that they are exempted from the provisions of the Smoke Free Air Act as regards the "gaming area" of their facility. This Court, however, is without jurisdiction to decide that issue at this time.

FACTOR "F"

The State of Michigan has determined that it is in the best interest of its citizenry to minimize or prevent the usage of tobacco products; thus, the interest of third-parties and of the public would be served by the issuance of injunctive relief, so as to minimize

exposure to a substance which has been deemed harmful to the public health. For this Court to deny injunctive relief at this time could result in widespread noncompliance with the Act which would run contrary to the manner in which the Public Health Code is to be construed.

FACTOR "G"

Framing and enforcing an injunctive order in this case is not particularly difficult. Intervenor-Defendant requests that Plaintiff be required to comply with the provisions of the Smoke Free Air Act.

Based upon the foregoing analysis, the Court finds that the Intervenor-Defendant has satisfied its burden as regards the issuance of injunctive relief.

CONCLUSIONS

The Motion for Summary Disposition as filed by Plaintiff is hereby **DENIED.** Defendant's Motions for Summary Disposition are **GRANTED** pursuant to the provisions of MCR 2.116(C)(4). Plaintiff's First Amended Complaint is dismissed without prejudice.

Intervenor-Defendant's request for Injunctive Relief is **GRANTED,** and an Injunction is hereby issued requiring Plaintiff to comply with the provisions of Michigan's Smoke Free Air Act, being 2009 PA 188 in all areas of its facility. The Injunction hereby issued shall remain effective pending determination by the Department of Community Health regarding the applicability of the Smoke Free Air Act to the "gaming area" of Plaintiff's Baraga, Michigan, facility.

IT IS SO ORDERED

BARAGA COUNTY CIRCUIT COURT

Charles R. Goodman
Chief 12th Circuit Court Judge