The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

David P. Eby, Leonard Willey and all Others Similarly Situated

v.

State of New Hampshire

NO. 217-2010-CV-300

ORDER

The Petitioners, David Eby and Leonard Willey, instituted this putative class action lawsuit against the State of New Hampshire seeking a declaratory judgment that RSA 77:38, *et seq* (Supp. 2010) (repealed effective May 23, 2011) (the "Gambling Winnings Tax") was illegal and unconstitutional. In October 2011, this Court found that the Gambling Winnings Tax did not violate the New Hampshire Constitution with respect to Petitioner Eby and granted summary judgment for the State. However, the Court found that, with respect to Mr. Willey, summary judgment was not appropriate because a genuine issue of material fact existed as to whether or not he was a professional gambler. Petitioners eventually conceded that Mr. Willey does not meet the criteria for a professional gambler that the Court set forth in its October 2011 Order but reserved their right to challenge the criteria on appeal.

Presently, both Mr. Eby and Mr. Willey seek summary judgment based on the provisions of the 2012 amendments to RSA 491:22. The State objects and moves for dismissal. For the reasons stated in this Order, the State's motion is GRANTED and the Petitioners' motion is DENIED.

I

The facts in this order are truncated and the Court's prior Order of October 20, 2011 is incorporated by reference. Effective July 1, 2009, the State of New Hampshire instituted the Gambling Winnings Tax. The statute provided for a tax of 10 percent on gambling winnings of New Hampshire residents from anywhere derived and gambling winnings of non-residents of New Hampshire derived from New Hampshire entities. RSA 77:39. The statute defines gambling winnings as those "from lotteries and games of chance including, but not limited to, bingo, slot machines, keno, poker tournaments and other gambling winnings subject to federal income tax withholdings." RSA 77:38, III. In 2011, the Gambling Winnings Tax was repealed, effective May 23, 2011.

Petitioners Eby and Willey brought this action seeking a declaration that the Gambling Winnings Tax was unconstitutional on its face and as applied to Petitioners and a refund of taxes paid under the statute. Further, the Petitioners sought to represent a class that would presumably have two subclasses: those who paid a tax pursuant to the Gambling Winnings Tax and those who are professional gamblers that also paid the tax. By agreement of the parties, the Court deferred the decision on class certification and entertained Cross-Motions for Summary Judgment on liability. See, e.g. BookLocker.com, Inc. v. Amazon.com, Inc., 650 F.Supp.2d 89, 99 (D.Me. 2009).

On October 20, 2011, this Court considered the parties Cross-Motions for Summary Judgment and held that the Gambling Winnings Tax was lawful as applied to Mr. Eby. However, as to Mr. Willey, the Court held that there were genuine issues of material fact as to whether or not he was a professional gambler and determined that summary judgment was not appropriate. The Court held that the case would be set for

trial on the issue of whether or not Mr. Willey is a professional gambler.

On August 13, 2012, the Petitioners filed a Motion to Continue, conceding that Mr. Willey did not meet the Court's formulation of the legal test for a professional gambler. Petitioners sought a briefing schedule on the effect of the 2012 amendments to RSA 491:22, while reserving their right to object to the Court's formulation of the legal test to determine if a person is a professional gambler. The Court granted the motion.

The concession that Mr. Willey does not meet the criteria for a professional gambler is fatal to his attempt to represent a class of professional gamblers. As the Supreme Court of the United States previously noted, the class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasaki, 442 U.S. 682, 700–701 (1979). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Wal-Mart Stores, Inc. v. Dukes, et al, 131 S.Ct. 2541, 2550 (2012) (citation and quotation omitted). This standard is embodied in New Hampshire Superior Court Rule 27-A, which requires class representatives to satisfy the traditional requirements of numerosity, commonality, typicality, and adequate representation. In re Bayview Crematory, LLC, 155 N.H. 781, 784–785 (2007) (because Superior Court Rule 27-A and Federal Rule of Civil Procedure 23 are so similar, the New Hampshire Supreme Court relies on federal cases interpreting Rule 23 as analytical aids).

However, although neither meets the criteria for a professional gambler, both Petitioners now assert that each has standing as a class representative to seek a declaratory judgment in this case pursuant to New Hampshire laws 2012, chapter 262:1, amending

RSA 491:22, the declaratory judgment statute.

The standing issue does not affect the earlier decision involving Mr. Eby. The Court granted summary judgment against Petitioner Eby almost a year ago on the merits, finding that he had standing to challenge the Gambling Winnings Tax, but that the Gambling Winnings Tax was constitutional as to him. The issue of standing created by the enactment of the 2012 amendments to RSA 491:22 has no application to that decision. To the extent Mr. Eby has made new arguments on the merits, they are untimely because the Court rendered a decision against him over a year ago. Superior Court Rule 59-A. Therefore, the State's Motion to Dismiss must be granted as to him, regardless of the 2012 amendments to RSA 491:22. The Court must, however, address Mr. Willey's contention that the amendments to RSA 491:22 confer standing upon him to seek a declaratory judgment regarding the constitutionality of the Gambling Winnings Tax.

II

On June 22, 2012, the Governor signed House Bill 1510 ("HB 1510") into law, which amended RSA 491:22 to provide in relevant part:

> I. Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive. *The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced. The preceding sentence shall not be deemed to convey standing to any person (a) to challenge a decision of any state court if the person was not a party to the action in which the decision was rendered, or (b) to challenge the decision of any board, commission,*

agency, or other authority of the state or any municipality, school district, village district, or county if there exists a right to appeal the decision under RSA 541 or any other statute and the person seeking to challenge the decision is not entitled to appeal under the applicable statute....

(emphasis added).

Mr. Willey argues that this statute gives him standing to challenge the constitutionality of the Gambling Winnings Tax. In support, Mr. Willey argues that HB 1510 was a "clarifying" amendment that the Legislature enacted to restore the traditional New Hampshire view that a financial injury is not necessary for taxpayers to bring a declaratory judgment action against a government entity.[1] He reasons that, by virtue of paying the Gambling Winnings Tax, he is a "taxpayer" within the meaning of amended RSA 491:22, I. Further, he asserts that the State of New Hampshire is a "taxing district" within the meaning of the statute because the Gambling Winnings Tax was applicable on a statewide basis. Accordingly, Mr. Willey avers that he has "an equitable right and interest in the constitutional administration" of taxation and that "[t]hat right provides [him] with standing to petition for relief and [he] shall not have to demonstrate that [his] personal rights were impaired or prejudiced." Petitioners' Memorandum In Support Of Motion For Summary Judgment ("Petitioners' Memorandum"), 10 (quotations omitted). The Court disagrees.

In Baer v. NH Dept. of Ed., 160 N.H. 727, 730 (2010), the Court recognized that prior precedent contained two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action. In Baer, the Court took a narrow view of the

[1] The State argues that since the statute will not be in effect until January 1, 2013, it should not be applied in this case. However, the State does not point to any legislative intent to require that the statute be interpreted prospectively. Because the Court believes that even if the statute were applied to the petitioners, they would not be entitled to relief, the court will assume that the statute would be applicable if this case were pending, as it likely will be after January 1, 2013.

authority conferred on courts to hear cases pursuant to the declaratory judgment statute, holding that "[a] party will not be heard to question the validity of a law, or any part of it, unless he shows that some right of his is impaired or prejudiced thereby." Baer, 160 N.H. at 730 (emphasis omitted), quoting Asmussen v. Commissioner, NH Dept. of Safety, 145 N.H. 578, 587 (2000).

The legislative history of the 2012 amendment to RSA 491:22 makes it plain that the purpose of the amendment was to "restore[] the long established right of local taxpayers to file for a declaratory judgment, which asks a court what the law is when a governmental action is challenged." Petitioners' Memorandum, 9, quoting N.H.H.R. Jour. at 23 (2012). To determine whether this action may be maintained, then, it is appropriate to review the cases prior to Baer in which the Court allowed persons who did not claim that they were injured by governmental action to proceed with a suit. When those cases are considered, it is plain that Mr. Willey may not proceed.

III

A declaratory judgment action is intended to grant relief from uncertainty concerning the status or legal rights existing between adverse parties. Portsmouth Hospital v. Indemnity Ins. Co., 109 N.H. 53, 56 (1968). "It is intended to permit a determination of a controversy before obligations are repudiated and rights invaded." Id. at 55. In order to obtain a declaratory judgment, "the controversy must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character." Salem Coalition for Caution, Inc. v. Salem, 121 N.H. 694, 696 (1981), quoting Wuelper v. University of N.H., 112 N.H. 471, 473–474 (1972).

Illustrative is Orford v. New Hampshire Air Resources Commission, 128 N.H.

539, 541 (1986), in which the Court held that a declaratory judgment action challenging an administrative rule prohibiting all open-burning refuse dumps could not be brought where the plaintiffs sought to establish that the administrative rule, as applied to open-burning dumps that *do not* cause pollution, would be beyond the regulatory reach of the Commission. The Court recognized that RSA 541-A:7, which allowed for a declaratory judgment action to challenge an administrative rule, provided a right to challenge the validity of a rule if a Petitioner merely *alleged* that the rule interferes with a right or privilege. Id. However, the Court stated:

> [W]e do not construe [the statute] as dispensing with the usual requirement in declaratory judgment actions that a plaintiff establish facts from which the trial court may determine that an actual controversy exists. (citation omitted). Such a construction would run afoul of the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions (citation omitted). A declaratory judgment action cannot be based on a hypothetical set of facts, or constitute a request for advice as to future cases (citation omitted).

Id. at 540–541.

The Court emphasized that the issue before it was not merely standing, but the constitutional principle of justiciability:

> In the instant case the plaintiffs have conceded that the rules are valid to the extent that they apply to open-burning dumps that emit 'air pollution' as defined in the statute. Their sole challenge is to the rules as applied to dumps that do not cause air pollution. This challenge therefore must be based on the premise that *their* dumps do not cause air pollution. In order to satisfy principles of justiciability, the plaintiffs were required to prove this premise. They were not entitled to declaratory relief based merely on a hypothetical existence of an open-burning dump that could operate without emitting air pollution.

Id. at 542 (emphasis in original).

A similar result was reached in Salem Coalition for Caution, where the Court held that a declaratory judgment action challenging the vote on an article of the Salem Town Warrant that would approve dog racing in Salem could not be maintained. 121 N.H. at

697. According to the agreed statement of facts, the selectmen had not yet certified the vote on the warrant, no one had applied to the New Hampshire Greyhound Racing Commission in an effort to conduct dog races, and, according to the Court, "it is possible that no such application will ever be made." Id. at 696. The Court stated that "[w]hile the petition raises interesting questions of law, in view of the posture of the case at this time, any decision by this court on the merits of the plaintiffs' claim would simply constitute advice as to future cases, based upon a hypothetical set of facts.... Actions for declaratory judgment should be confined to justiciable controversies of sufficient immediacy and reality as to warrant action by the courts." Id. at 697.

The justiciability requirement arises from Part II, Article 74 of the New Hampshire Constitution and limits the ability of courts to give advisory opinions. Harvey v. Harvey, 73 N.H. 106, 106 (1904). The New Hampshire Supreme Court has emphasized that "Part II, Article 74 of the State Constitution empowers the justices of the supreme court to render advisory opinions, outside the context of concrete, fully-developed factual situations and without the benefit of adversary legal presentations, only in carefully circumscribed situations." Opinion of the Justices, 150 N.H. 355, 356 (2003). However, it does not authorize the Superior Court to render advisory opinions in any circumstance. Indeed, the New Hampshire Supreme Court has held that, as a matter of New Hampshire constitutional law, the authority to render advisory opinions "cannot be extended by legislative action." Harvey v. Harvey, 73 N.H. at 107.

When these principles are applied to the instant case, it is apparent that it cannot proceed. First, to construe RSA 491:22 in the way Mr. Willey advances would allow the Superior Court to issue orders regarding hypothetical questions and would violate the

fundamental rule that statutes are to be construed in ways that comport with the Constitution. Petitioner Willey concedes that he is not a professional gambler and there is nothing before this Court to suggest that there are any professional gamblers in the State of New Hampshire who have paid the Gambling Winnings Tax. Any order issued by the Court would be entirely hypothetical and would amount to nothing more than an advisory opinion; the Court would first need to construct an imaginary professional gambler and then apply the statute to him or her. Cf. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 340 (4th Cir. 1998). Based on the facts before it, the Court could not possibly craft an "intelligent and useful decision...made through a decree of a conclusive character," Salem Coalition for Caution, 121 N.H. at 696, and the New Hampshire Supreme Court's precedents prohibit this Court from attempting to do so.

It follows that the State's Motion to Dismiss must be GRANTED.

SO ORDERED.

12/4/12
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/