

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0249

SUNSHINE TRUCK STOP AND CASINO, L.L.C.

VERSUS

STATE OF LOUISIANA, THROUGH THE LOUISIANA GAMING
CONTROL BOARD AND THE LOUISIANA DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONS OFFICE OF STATE
POLICE, BUREAU OF INVESTIGATIONS, GAMING
ENFORCEMENT DIVISION AND LUCKY STAR AUTO/TRUCK
STOP, L.L.C.

Judgment Rendered: September 10, 2010.

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 574,946

The Honorable Wilson Fields, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

FW

Welch Jr. concurs without reasons

CARTER, C. J.

Sunshine Truck Stop & Casino, L.L.C. ("Sunshine"), appeals a judgment of the district court sustaining multiple exceptions urged by the State of Louisiana through the Louisiana Gaming Control Board ("the Board") and the Department of Public Safety and Corrections, and dismissing the suit brought by Sunshine.

FACTS AND PROCEDURAL HISTORY

Sunshine, the plaintiff-appellant herein, holds a Class 5 Video Poker Establishment gaming license and operates video gaming devices at its establishment in St. James Parish. Sunshine initiated this proceeding after Lucky Star Auto/Truck Stop, L.L.C., a/k/a/ Lucky Star Auto/Truck Stop, Inc. ("Lucky Star"), applied to the Board for a Class 5 Video Poker Establishment gaming license for operation of video gaming devices at its establishment, which is also located in St. James Parish.¹

Sunshine petitioned the Board for a declaratory judgment, but its petition was dismissed by the Board after consideration at an open meeting. Sunshine then petitioned the district court for review of the Board's decision and also sought a declaratory judgment declaring that Lucky Star's application for gaming license was abandoned, void, should be dismissed, or should be denied because issuance of its license was precluded. Sunshine further sought a declaration that portions of the Louisiana Gaming Statute (LSA-R.S. 27:1 *et seq.*) and the Louisiana Video Draw Poker Devices Control Law (LSA-R.S. 27:301, *et seq.*) are unconstitutional.

The Board excepted to Sunshine's petition on numerous grounds. The district court sustained dilatory exceptions raising the objections of improper cumulation of actions and lack of subject matter jurisdiction, as well as peremptory

¹ Further facts and procedural history related to Lucky Star's application to the Board are set forth in **Marcello v. Louisiana Gaming Control Board**, 04-0488 (La. App. 1 Cir. 5/6/05), 903 So.2d 545.

exceptions raising the objections of no cause of action and no right of action and dismissed Sunshine's suit.² Sunshine now appeals.

DISCUSSION

Subject Matter Jurisdiction – Appeal of Board's Decision

Subject matter jurisdiction is the legal power and authority of a court to hear and determine a particular class of actions or proceedings based upon the object of the demand, the amount in dispute, or the value of the right asserted. LSA-C.C.P. art. 2. Subject matter jurisdiction is a threshold issue because a judgment rendered by a court that has no jurisdiction over the subject matter of the action or proceeding is void. LSA-C.C.P. art. 3; **Bordelon v. Dehnert**, 99-2625 (La. App. 1 Cir. 9/22/00), 770 So.2d 433, 435, writ denied, 00-2923 (La. 3/19/01), 787 So.2d 995.

For the purpose of judicial review of administrative action, district courts are courts of limited jurisdiction and only have appellate jurisdiction to review administrative actions as provided by the legislature or the constitution. LSA-Const. art. V, §16B; **Metro Riverboat Associates, Inc. v. Louisiana Gaming Control Board**, 01-0185 (La. 10/16/01), 797 So.2d 656, 660. Louisiana's Administrative Procedure Act (the APA) governs appellate review of agencies' decisions or orders. See Metro Riverboat Associates, Inc., 797 So.2d at 662. The Nineteenth Judicial District Court is vested with appellate jurisdiction over appeals taken from final decisions or orders of the Board in adjudication proceedings. LSA-R.S. 27:26; **Metro Riverboat Associates, Inc.**, 797 So.2d at 662.

² Lucky Star was also named as a defendant in the proceedings before the district court and excepted to Sunshine's petition. By separate judgment, the district court sustained peremptory exceptions raising the objection of no cause of action and no right of action urged by Lucky Star and dismissed Sunshine's suit. Sunshine's appeal of that judgment is the subject of the companion appeal, **Sunshine Truck Stop and Casino, L.L.C. v. State of Louisiana, through the Louisiana Gaming Control Board, et al.**, 10-0276 (La. App. 1 Cir. __/__/__) (unpublished).

The APA defines “adjudication” as “agency process for the formulation of a decision or order.” LSA-R.S. 49:951(1). “Decision or order” is defined, in pertinent part, as “the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking, *required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing.*” LSA-R.S. 49:951(3) (emphasis added). Absent a constitutional or statutory requirement of a hearing, an agency disposition is not a “decision or order” under the APA. And, if a “decision or order” does not result from the proceeding, then the proceeding is not an “adjudication.” **Government Computer Sales, Inc. v. State, Through Div. of Admin.**, 98-0224 (La. App. 1 Cir. 9/25/98), 720 So.2d 53, 56. Finally, if the agency action is not a “decision or order” in an adjudication proceeding, then the district court does not have appellate jurisdiction to review the action. See **Metro Riverboat Associates, Inc.**, 797 So.2d at 662.

Sunshine filed a petition for declaratory judgment with the Board, which is allowed by Louisiana Administrative Code 42:III.116. That provision states:

- A. Any interested person may file a petition for a declaratory order or ruling as to the applicability of any statutory provision or as to the applicability or validity of any rule or order of the Board.
- B. Petitions referred to in §116.A shall be in writing and filed with the Board at its office in Baton Rouge.
- C. Petitions filed with the Board in accordance with §116 shall be disposed of promptly.

After review, we find no constitutional or statutory provision requiring a petition for declaratory judgment filed pursuant to Section 16, to be determined on the record after notice and opportunity for an agency hearing. In fact, the Board issued its decision dismissing Sunshine’s petition after consideration in an open

meeting. Considering this, the Board's order dismissing Sunshine's petition is not a decision or order in an adjudication proceeding. As such, the district court lacked subject matter jurisdiction to adjudicate Sunshine's appeal of the Board's decision and correctly sustained the dilatory exception raising the objection of lack of subject matter jurisdiction.

After Sunshine's appeal of the district court's judgment was lodged, Sunshine filed with this court a motion to supplement the appellate record with Board's entire record regarding the petition for declaratory judgment. The motion was referred to the merits of this appeal. Considering our determination regarding subject matter jurisdiction over Sunshine's appeal of the Board's decision, the motion to supplement is denied.

Subject Matter Jurisdiction – Declaratory Judgment Regarding Lucky Star's Application

Sunshine further petitioned the district court for a declaration that Lucky Star's application for gaming license was abandoned, void, should be dismissed, or should be denied because issuance of its license was precluded.

The Board is "the sole and exclusive regulatory and supervisory board for gaming operations and activities" in Louisiana. LSA-R.S. 27:31. Essentially, Sunshine's petition for declaratory judgment seeks to have the courts decide *de novo* the issue of whether a gaming license should have issued to Lucky Star. Because of the legislative grant of power to the Board in LSA-R.S. 27:31, the courts are without jurisdiction to issue such a declaratory judgment.

It is the duty of the court to examine subject matter jurisdiction *sua sponte*, even when the issue is not raised by the litigants. **McGehee v. City/Parish of East Baton Rouge**, 00-1058 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 260. Thus,

we raise and sustain the dilatory exception raising the objection of lack of subject matter jurisdiction.

Standing to challenge constitutionality

Additionally, Sunshine seeks a declaration that certain portions of the gaming control law are unconstitutional. The Board objected, raising, among other issues, the question of whether Sunshine possessed the standing required to maintain such an action and therefore had a right of action. The district court determined that Sunshine did not and sustained the peremptory exception raising the objection of no right of action.

A peremptory exception pleading the objection of no right of action tests whether the plaintiff has any interest in judicially enforcing the right asserted. LSA-C.C.P. art. 927A(6); **Louisiana State Bar Ass'n v. Carr and Associates, Inc.**, 08-2114 (La. App. 1 Cir. 5/08/09), 15 So.3d 158, 166, writ denied, 09-1627 (La. 10/30/09), 21 So.3d 292. For courts to entertain a suit, a plaintiff must have a real and actual interest in the action asserted. **Ramsey River Road Property Owners Ass'n, Inc. v. Reeves**, 396 So.2d 873, 874 (La. 1981). The concept of "standing" is utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. **Louisiana State Bar Ass'n**, 15 So.3d at 166. A plaintiff with a legally protectable and tangible interest at stake in the litigation has standing to bring the action. **Id.**

In its petition, Sunshine alleged that it is an "interested person" because it holds a Class 5 Video Poker Establishment gaming license and operates video gaming devices. Sunshine further alleged:

that it is a competitor in the State of Louisiana with all other duly licensed gaming facilities, that there is a finite amount of gaming revenues to which it can receive through the operation of its business operations; further, inappropriate licensure of a facility that should not have been licensed results in a diminution of available revenues to

legitimately licensed facilities, thereby adversely impacting all legitimate competitors.

The Louisiana Supreme Court has explained that “a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party’s own rights. To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations.” **In re Melancon**, 05-1702 (La. 7/10/06), 935 So.2d 661, 667.

In analyzing the issue of Sunshine’s standing to raise the constitutional arguments, we are mindful that Sunshine holds a gaming license that is not at risk in any cited proceeding. Rather, Sunshine has argued that its business may suffer by increased competition due to licensure of a third party. Considering this, we conclude that Sunshine lacks the standing necessary to advance these constitutional attacks on the gaming control laws.

CONCLUSION

For the foregoing reasons, we conclude that the district court correctly sustained the dilatory exception of lack of subject matter jurisdiction over Sunshine’s “appeal” of the Board’s action and the peremptory exception raising the objection of no right of action as to the constitutional challenges. We further raise and sustain the dilatory exception of lack of subject matter jurisdiction over Sunshine’s request for declaratory judgment.³ We therefore affirm the judgment of the district court dismissing Sunshine’s suit. The motion to supplement the appellate record is denied. Costs of this appeal are assessed to Sunshine Truck Stop & Casino, L.L.C.

MOTION TO SUPPLEMENT DENIED; JUDGMENT AFFIRMED.

³ Because of our decision regarding lack of subject matter jurisdiction and no right of action, we pretermitt discussion of the remaining issues as moot.