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**IN THE
COURT OF APPEALS OF INDIANA**

INDIANA DEPARTMENT OF FINANCIAL)
INSTITUTIONS, JUDITH G. RIPLEY, Director,)
individually and in her representative capacity,)

Appellant-Defendant,)

vs.)

PAYDAY TODAY, INC., by Robert Matijevich,)
President, and SMS FINANCE, INC., by)
Suresh Karlapudi, President,)

Appellees-Plaintiffs.)

No. 45A04-0607-CV-367

APPEAL FROM THE LAKE COUNTY CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-0603-PL-124

July 18, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Lake Circuit Court entered a preliminary injunction against the Indiana Department of Financial Institutions (“the IDFI”) enjoining it from revoking the lender licenses of Payday Today, Inc. and SMS Finance, Inc. The IDFI appeals and raises the following dispositive issue,¹ which we restate as: whether the trial court lacked subject matter jurisdiction to grant a preliminary injunction because the Appellees failed to exhaust their administrative remedies. We reverse and remand this matter to the trial court with instructions to dismiss the Appellees’ complaint for lack of subject matter jurisdiction.

Facts and Procedural History

In 2006, the IDFI revoked Payday Today’s lender licenses after determining that it had improperly sought treble damages, attorney fees, and other damages in its collection efforts. The IDFI concluded that in numerous collection proceedings, Payday Today sought treble damages and attorney fees by alleging fraud on a financial institution, which is contrary to law because licensees under the Small Loan Act² are not financial institutions. The IDFI also asserted that Payday Today did not prove or attempt to prove that its borrowers’ checks were used to defraud it as required by the Small Loan Act.

Payday Today filed a Petition for Review and Petition for Stay of its license revocation with the IDFI. The stay was granted, an administrative law judge was appointed, and a hearing was scheduled for April 11, 2006. On March 29, 2006, Payday Today and SMS Finance (collectively “the Appellees”) filed a complaint for declaratory

¹ The IDFI also asserts that the trial court abused its discretion in granting the preliminary injunction because the Appellees did not demonstrate irreparable harm for which there was no adequate remedy at law.

² Ind. Code ch. 24-4.5-7.

judgment and temporary restraining order in the Lake Circuit Court. At the time the complaint was filed, SMS Finance's license had not been revoked, but the IDFI had issued an "Order to Show Cause Why License Should not be Revoked" for the same reasons that Payday Today's license was revoked.

The IDFI moved to dismiss the Appellee's complaint arguing that 1) the trial court lacked subject matter jurisdiction because the Appellees failed to exhaust their administrative remedies, or in the alternative, that 2) the Appellees failed to state a claim upon which relief may be granted because they did not establish irreparable injury or damage, a required element in their claim for equitable relief. The Lake Circuit Court denied the IDFI's motion to dismiss and entered a preliminary injunction against the IDFI enjoining it from revoking the Appellees' lender licenses. The IDFI now appeals.³ Additional facts will be provided as necessary.

Discussion and Decision

The existence of subject matter jurisdiction in a trial court is a requirement for the entry of a valid judgment. City of Marion v. Howard, 832 N.E.2d 528, 531 (Ind. Ct. App. 2005), trans. denied. The absence of subject matter jurisdiction is not an issue subject to waiver, and it renders a judgment void. Id.

Pursuant to the Administrative Orders and Procedures Act ("the AOPA"), "[a] person may file a petition for judicial review . . . only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review." Ind Code § 4-21.5-5-4(a)

³ In its reply brief, the IDFI argues that certain sections of the Appellees' brief should be stricken. The IDFI failed to file a motion to strike as required by Appellate Rule 34, and therefore, we take no action on its request.

(2004). It is well settled that a claimant with an available administrative remedy must pursue that remedy before being allowed access to the courts. See Johnson v. Celebration Fireworks, Inc., 829 N.E.2d 979, 982 (Ind. 2005); Advantage Home Health Care, Inc. v. Ind. State Dep't of Health, 829 N.E.2d 499, 503 (Ind. 2005).

The exhaustion doctrine is supported by “strong policy reasons and considerations of judicial economy[.]” Johnson, 829 N.E.2d at 982.

The exhaustion doctrine is intended to defer judicial review until controversies have been channeled through the complete administrative process. The exhaustion requirement serves to avoid collateral, dilatory action . . . and to ensure the efficient, uninterrupted progression of administrative proceedings and the effective application of judicial review. It provides an agency with an opportunity “to correct its own errors, to afford the parties and the courts the benefit of [the agency’s] experience and expertise, and to compile a [factual] record which is adequate for judicial review.”

Id. (citation omitted). “Even if the ground of complaint is the unconstitutionality of the statute, which may be beyond the agency’s power to resolve, exhaustion may still be required because ‘administrative action may resolve the case on other grounds without confronting broader legal issues.’” Advantage Home Health Care, 829 N.E.2d at 503 (citation omitted).

However, “exhaustion of administrative remedies is not required if the statute is void on its face, and it may not be appropriate if an agency’s action is challenged as being ultra vires and void.” Ind. Dept. of Env'tl. Mgmt. v. Twin Eagle LLC, 798 N.E.2d 839, 844 (Ind. 2003). More generally, if an action is brought upon the theory that the agency lacks the jurisdiction to act in a particular area, exhaustion of remedies is not required. Id. (citation omitted).

Further, exhaustion of administrative remedies may be excused if the exercise would be futile. Johnson, 829 N.E.2d at 984. But the “exhaustion requirement is much more than a procedural hoop that can be lightly dispensed with on the grounds of futility.” Id. (citing Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1224 (Ind. 2000)). “To prevail upon a claim of futility, ‘one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.’” Id. (quoting M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass’n, 809 N.E.2d 834, 840 (Ind. 2004)).

The Appellees contend that the IDFI’s interpretation of the Small Loan Act is contrary to our court’s interpretation of the act.⁴ Therefore, they assert that the IDFI’s actions are ultra vires and exhaustion of their administrative remedies would be futile. In essence, the Appellees claim that they are entitled to an interpretation of the relevant statutes by our court before they are required to exhaust their administrative remedies. Br. of Appellees at 19.

In Johnson, the Appellant Celebration Fireworks asserted that exhaustion of administrative remedies was unnecessary because the issue raised was one of statutory

⁴ Specifically, the Appellees have relied on our court’s opinion in Cash in a Flash, Inc. v. Hoffman, 841 N.E.2d 644, 648 n.4 (Ind. Ct. App. 2006), in which our court stated:

We must note that it would seem redundant to require a plaintiff to prove common law fraud in order to seek treble damages and attorney’s fees pursuant to I.C. § 34-24-3-1 if they have sustained the burden of proving fraud on a financial institution under I.C. § 35-43-5-8. Thus, as in this case, if a plaintiff proves fraud on a financial institution under I.C. § 35-43-5-8, the trial court has discretion to award treble damages and attorney’s fees pursuant to I.C. § 34-24-3-1 without requiring the plaintiff to prove the elements of common law fraud.

Shortly after the Hoffman decision issued, our General Assembly amended Indiana Code section 35-43-5-8, which now provides that “the term [state or federally chartered or federally insured financial institution] does not include a lender licensed under IC 24-4.5.” See P.L. 10-2006, Sec. 80 & P.L. 57-2006, Sec. 80.

interpretation. 829 N.E.2d at 983. Specifically, Celebration Fireworks argued that exhaustion of administrative remedies was not necessary because “it challenged the Fire Marshal’s action requiring a wholesaler to obtain separate Certificates of Compliance for each of its wholesale locations as ultra vires and void.” Id. In support of its argument, Celebration Fireworks relied on our supreme court’s decision in Twin Eagle. In that case, the court determined that exhaustion of administrative remedies was unnecessary “[t]o the extent the issue turns on statutory construction, [and] whether an agency possesses jurisdiction over a matter [as that] is a question of law for the courts.” Id. (quoting Twin Eagle, 798 N.E.2d at 844).

Our supreme court rejected Celebration Fireworks’s argument and observed,

This case differs from Twin Eagle in material respect. Unlike the state agency in Twin Eagle, there is absolutely no question in the present case of the Fire Marshal’s legal authority to license fireworks wholesalers; the question here is at most a mixed question of law and fact –and, quite likely . . . a pure question of fact –as to whether each of the individual outlets selling fireworks is itself a wholesaler.

Id. Moreover, the court rejected Celebration Fireworks’s futility argument stating, “the mere fact that an administrative agency might refuse to provide the relief requested does not amount to futility. . . . And even if Celebration is unsuccessful in an administrative challenge, resort to the Commission may produce a reasoned explanation of the considerations going into the Fire Marshal’s position.” Id. at 984.

In this case, Payday Today’s license was revoked for the following reasons:⁵

1) Payday Today sought treble damages, attorney fees, and other damages in its collection efforts in violation of Indiana Code section 24-4.5-7-409;

⁵ SMS Finance’s license had not yet been revoked when the Appellees’ complaint for declaratory judgment was filed.

- 2) Payday Today “continued to operate in a matter that the [IDFI] had determined to be in violation of the [Small Loan Act] despite repeated and specific directives from the [IDFI] instructing [Payday Today] to cease such practices[;]”
- 3) Payday Today “wrongfully filed misleading and inaccurate complaints” seeking treble damages and attorney fees claiming it had been a victim of Check Deception and/or Fraud on a Financial Institution;
- 4) Payday Today “filed complaints wrongfully seeking attorney fees and various other damages, claiming it has been a victim of a violation of I.C. § 26-2-7;”
- 5) Payday Today “continued to claim the right, despite the clear directive of its regulator, to seek treble damages and/or attorney fees;” and,
- 6) Payday Today “has provided the courts with inaccurate, incomplete, and misleading complaints.”

Appellant’s App. pp. 71-72.

In this case, there is no question that the IDFI has the legal authority to regulate the payday loan industry and to revoke payday lenders’ licenses. See generally Ind. Code art. 24-4.5. Moreover, review of the IDFI’s revocation (or potential revocation) of the Appellees’ lender licenses presents mixed questions of law and fact. While we agree with the Appellees’ assertion that they are unlikely to prevail in the administrative proceedings given the parties’ conflicting interpretations of the Small Loan Act, the fact that the IDFI might refuse to provide the requested relief does not amount to futility. See Johnson, 829 N.E.2d at 984.

For these reasons, we conclude that the Appellees have not established that the IDFI’s action is ultra vires or that exhaustion of their administrative remedies would be futile. The Appellees were therefore required to exhaust their administrative remedies before petitioning for judicial review. Accordingly, we reverse and remand this matter to

the trial court with instructions to dismiss the Appellees' complaint for lack of subject matter jurisdiction.

Reversed and remanded for proceedings consistent with this opinion.

DARDEN, J., and KIRSCH, J., concur.