

STATE OF INDIANA)
) ss:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION 12
CAUSE NO. 49D12-1108-MI031834

JOHN ANEVSKI,)
)
Petitioner,)
)
vs.)
)
INDIANA OFFICE OF,)
ENVIRONMENTAL ADJUDICATION;)
)
and)
)
INDIANA DEPARTMENT OF,)
ENVIRONMENTAL MANAGEMENT,)
)
Respondents.)

FILED

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SEP 27 2012

Elizabeth J. White
CLERK OF THE MARION CIRCUIT COURT

ORDER GRANTING RESPONDENTS' JOINT MOTION TO DISMISS AND ORDER DENYING THE PETITIONER'S REQUEST FOR ALTERNATIVE RELIEF UNDER RULE 54(B)

This case is before the Court on Respondents', Commissioner of the Indiana Department of Environmental Management and the Office of Environmental Adjudication, Joint Motion to Dismiss Counts one (1) through twelve (12) and Counts fourteen (14) through sixteen (16) on grounds of "failure to state a claim upon which relief can be granted" under Rule 12(B)(6), which was filed on August 6, 2012. On August 16, 2012 Petitioner, John Anevski, filed a brief in opposition to the Motion to Dismiss and requested alternative relief under Rule 54(B) seeking "direct entry of final judgment" to all remaining claims. The Court having reviewed the pleadings, hereby finds as follows:

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FACTUAL BACKGROUND

On July 20, 2011, the Office of Environmental Adjudication (“OEA”) issued its Findings of Fact, Conclusions of Law, and Final Order in favor of the Indiana Department of Environmental Management (“IDEM”) and against John Anevski. Anevski then petitioned this Court for review of OEA’s Final Order on August 18, 2011 by filing a Complaint and Verified Petition for Judicial Review (“Petition”). Anevski, in his petition, sought review on sixteen counts. (Compliant 7-11).

On June 12, 2012, this Court denied Anevski’s Petition for Judicial Review as to Count thirteen (13) and entered judgment in favor of OEA and IDEM. After the July 23, 2012 status conference, on August 6, 2012, the Respondents filed a Joint Motion to Dismiss and Memorandum of Law In Support of Respondent’s Joint Motion to Dismiss. On August 31, 2012, the Petitioner responded claiming the Motion was untimely and requested alternative relief under Ind. T.R. 54(B). On August 31, 2012, the Respondents filed their Reply in Support of Respondents’ Joint Motion to Dismiss and Joint Response to Petitioner’s Request for Alternative Relief Under Rule 54(B).

Timeliness of Respondent’s Motion to Dismiss

In the Court’s Order dated January 31, 2012, the Court established deadlines for briefing on the Petitioner’s Petition for Judicial Review. The Petitioner only briefed and addressed Count 13 of his Petition for Judicial Review and failed to address the other issues raised in his Petition for Judicial Review. Thus, the Court finds that the Respondent would have no reason to file a Motion to Dismiss under Ind. T.R. 12(B)(6) because the Court had ordered the parties to meet the deadlines for briefing on Petitioner’s Petition for Judicial Review. Since the Petitioner failed to comply with the Court’s Order of January 31, 2012 to brief all the issues in the Petition for

Judicial Review, the Court hereby finds that Petitioner's argument that the Respondent's Motion to Dismiss under Ind. T.R. 12(B)(6) is untimely is without merit. Furthermore, at the July 23, 2012 status hearing, Petitioner and Respondents' attorneys requested that the Court establish deadlines to file a Motion to Dismiss and an Ind. T.R. 54(B) Motion. Thus, this Court finds that the Respondents' Motion to Dismiss was timely filed.

Ind. T.R. 54(B)

Ind. T.R. 54(B) states "When more than one (1) claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment..." Ind. T.R. 54(B). When the trial court utilizes Ind. T.R. 54(B), the trial court must determine "there is no just reason for delay".

Entering a Judgment on Count 13 only will not increase judicial efficiency as Count 13 and the remaining counts involve the same underlying facts and circumstances adjudicated by the OEA. Thus, the Court hereby DENIES the Petitioner's Request for Alternative Relief Under Ind. T.R. 54(B).

Standard of Review for a Motion to Dismiss

When reviewing a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept as true the facts alleged in the complaint. *Hudgins v. McAtee*, 596 N.E.2d 286, 288 (Ind. Ct. App. 1992). A Rule 12(B)(6) motion tests the legal sufficiency of the complaint. *Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1349 (Ind. Ct. App. 1998). It is a widely accepted premise that motions to dismiss are not favored by law. *McCoy v. Like*, 511 N.E.2d 501 (Ind. Ct. App. 1987). Only where it appears that under no

set of facts could plaintiffs be granted relief is dismissal of the complaint appropriate. *Brenner v. Powers*, 584 N.E.2d 573 (Ind. Ct. App. 1992).

Petition for Judicial Review: Authority of State Trial Court

Judicial review of a state agency decisions are governed by the Administrative Orders and Procedures Act (“AOPA”). “The burden of demonstrating the invalidity of agency action is on the party seeking judicial review.” Ind. Code § 4-21.5-5-14(a). The exclusive means for judicial review is when the party petitioning for review demonstrates that it was prejudiced by agency action that was: (1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code § 4-21.5-5-14(d).

This Court lacks jurisdiction under the AOPA to permit the filing of a Compliant with other allegations not permitted by law. This Court cannot declare party’s rights prospectively or address claims that were not adjudicated in the administrative agency. Therefore, the declaration of party’s rights stated in Count 1: preclusion; Count 2: statute of limitations; Count 4: preponderance of the evidence standard; Count 5: compliance with erosion control plan; and Count 12: declaratory judgment, as well as allegations not previously decided by the OEA in Count 3: breach of contract; Count 6: absence of ascertainable standards, retroactive regulation, unconstitutionality; Count 7: improper penalty; Count 8: waiver; Count 9: estoppels: Count 10: hearsay: Count 11: wrongful injunction; Count 14: abuse of process; Count 15: detrimental reliance; and Count 16: fraud are not within the grounds of judicial review under I.C. § 4-21.5-5-

14(d). No pleaded facts or set of facts establishes that administrative decisions of OEA or IDEM were: (1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Thus, the Court hereby Finds that the Respondents' Joint Motion to Dismiss shall be GRANTED.

Since the Court DENIED the Petitioner's Petition for Judicial Review on Count 13, no issues remain for this Court to decide.

ORDER

Therefore, the Court hereby **ORDERS** that the Respondents' Joint Motion to Dismiss shall be **GRANTED** and that all remaining counts in Petitioner's Compliant and Verified Petition for Judicial Review shall be **DISMISSED WITH PREJUDICE**. This includes Counts 1 through 12 and 14 through 16. IT IS THEREFORE ORDERED, ADJUDGED & DECREED that judgment shall be entered accordingly and placed in the Record of Judgment and Orders. (RJO).

SO ORDERED, ADJUDGED, AND DECREED THIS 27th OF SEPTEMBER 2012.



Heather A. Welch, Judge
Marion Superior Court, Civil 12

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