HHB-CV15-6028096-S

GREAT PLAINS LENDING, LLC, *et al.*,	:	SUPERIOR COURT
PLAINTIFFS	:	
	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
	:	
STATE OF CONNECTICUT DEPARTMENT OF BANKING, *et al.*,	:	
DEFENDANTS	:	JUNE 22, 2016

OBJECTION TO MOTION FOR ORDER

The Court should deny Plaintiffs' Motion for Immediate Order ("MIO") because the ordered Commissioner's determinations are not yet final. Finality is a fundamental doctrine of administrative law,[1] and Plaintiffs have not provided any reason for an exception.

If the Court does issue any order, it should affirm that at this stage, the Commissioner's chosen procedure for making determinations as ordered by the Court comports with due process and is reasonable under the circumstances.

The Court should recognize that as it has already determined that Plaintiffs received all the process they were due, Plaintiffs' failure to request a hearing to raise the defense of tribal sovereign immunity from suit for adjudication pursuant to the UAPA precludes this Court from giving life to Plaintiffs' affirmative defense on appeal.

[1] *See, e.g., Finkenstein v. Adm'r, Unemployment Comp. Act*, 192 Conn. 104, 114 (1984) (supreme court "will not set aside an agency's determination upon a ground not theretofore fairly presented for its consideration because such action on our part would deprive the agency of an opportunity to consider the matter, make its ruling, and set forth the reasons for its action").

BACKGROUND

On October 24, 2014, the Department made out a prima facie case for violation of the Connecticut small loan lenders law by Plaintiffs ("Administrative Notice"). (AR1-17). The Administrative Notice alerted Plaintiffs[2] of the Department's allegations and invited Plaintiffs to "present evidence, rebuttal evidence and argument on all issues of fact and law."[3] AR14. It is uncontested, and this Court has found, that Plaintiffs did not timely request a hearing. MOD p. 18.[4] As a result, the Commissioner deemed the allegations admitted and ordered Plaintiffs to cease & desist and pay civil penalties ("Order"). AR159-165. This Court found that "the plaintiffs had clear notice of the deadline to request a hearing and the consequences of failing to do so . . . No one denied them any constitutional rights in that regard." *Id.*

Despite Plaintiffs' failure to exhaust the available administrative remedy through a timely hearing request, the Court has entertained Plaintiffs' appeal of the Order and issued a Memorandum of Decision on November 23, 2015 ("MOD").[5] In its MOD, the Court disagreed with the Department's conclusion that the Department's administrative proceedings would not implicate tribal sovereign immunity even if Plaintiffs could validly invoke the Tribe's sovereign

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[2] Plaintiffs are not the Otoe-Missouria Tribe of Indians ("Tribe"), as claimed in the MIO. The Department has never sought to regulate the Tribe, and the Tribe is not a party to this action or the underlying administrative action.

[3] The burden of properly raising the arm of the tribe issue and proving entitlement falls squarely on Plaintiffs, not Defendants. *Gristede's Foods, Inc. v. Unkechuange Nation*, 660 F. Supp. 2d 442, 466 (E.D.N.Y. 2009).

[4] On November 12, 2014, the plaintiffs filed a motion to dismiss ("MTD"), which the commissioner denied on January 6, 2015 ("MTD Denial") without making a single factual finding. (AR150-158). The Court has already ruled that Plaintiffs' November 26, 2014 attempt to reserve their right to contest the proceedings on the merits was both inadequate and late. MOD p. 18.

[5] Appellate review of a judicial order of administrative remand is premature in situations not ripe for final judicial adjudication, like the one at hand, where the agency's proceeding will be non-ministerial. *Lieberman v. State Bd. of Labor Relations*, 216 Conn. 253, 272 (1990).

immunity. MOD p. 11.[6] That holding raised the question of whether Plaintiffs are arms of the tribe entitled to the protection of the Tribe's sovereign immunity, an issue the Commissioner had reasonably concluded did not previously need to be addressed and therefore expressly did not address. MOD p.16; AR151 fn2. The Court recognized that "review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable . . ." MOD p. 5, citing *Okeke v. Comm'r of Pub. Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012).

The Court ruled that "[t]he legislature and the department have entrusted the commissioner with the responsibility to decide whether he has jurisdiction to take enforcement action against an Indian tribe and entities purporting to be arms of the tribe and allegedly violating state banking law. The court cannot make that administrative determination for him. This point is particularly true because whether an entity is an arm of the tribe involves use of a balancing test that essentially requires the commissioner to make a 'determination of policy or judgment.' [citing cases laying out factors for arm of the tribe determinations] Further, the record that the court has to review on these issue[s] is simply incomplete." MOD pp. 15-16.

The Court "remand[ed] the case to the department for determination of the arm of the tribe issue. The court retain[ed] jurisdiction. For the sake of clarity, the court ask[ed] the commissioner to decide [three questions]." MOD p.17. As noted, the Court concluded that "[t]he commissioner had a valid reason for not reaching the arm of the tribe issue because, at the time, he reasonably, though erroneously, believed that it was unnecessary to do so in order to resolve the case." MOD p.16. The Court cited *Lagueux v. Leonardi*, 148 Conn. App. 234, 257, 85 A.3d

[6] The Department respectfully disagrees with the Court's conclusion, and continues to believe that its initial decision was correct for the reasons set forth in its earlier briefing.

13 (2014) and *Comm'n on Human Rights and Opportunities v. Hartford*, 138 Conn. App. 141, 153-54, 50 A.3d 917, *cert. denied*, 307 Conn. 929, 55 A.3d 570 (2012) for its authority to issue its remand order. *Id.*

On May 6, 2016, the Commissioner issued his proposed findings of fact, proposed conclusions of law and notice of right to hearing. ("Proposed Decision"). The Proposed Decision included, *inter alia*, (a) a discussion of the law relevant to the determinations requested by the Court, (b) the facts previously found that are relevant to those determinations, (c) the facts proposed to be found that are relevant, (d) the conclusions tentatively drawn from those facts, and (e) notice of the right to a hearing where Plaintiffs "will have the right to appear and present evidence, rebuttal evidence and argument on all issues of fact and law to be considered by the Commissioner." Proposed Decision p. 23.

On May 24, 2016, Plaintiffs' filed their MIO, asking the Court to order the Commissioner to make final determinations exclusively relying on the administrative record.

ARGUMENT

A. Intervention in the Administrative Decision-Making Process is Improper

The finality doctrine precludes intervention at this stage. A final decision is an agency determination in a contested case, not a preliminary or intermediate ruling or order of an agency (such as the Proposed Decision), or a ruling of an agency granting or denying a petition for reconsideration. General Statutes § 4–166(3). A contested case, in turn, is defined as "a proceeding . . . in which the legal rights, duties or privileges of a party are required by statute to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held." General Statutes § 4–166(2). "The considerations underlying the requirement of finality of an agency decision as a prerequisite to judicial review are akin to those involved in the ripeness doctrine as applied to administrative rulings. Its basic rationale is to prevent the courts, through

avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. . . . The relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Nizzardo v. State Traffic Comm'n*, 259 Conn. 131, 144-45 (2002) (internal citations removed).

The Proposed Decision clearly conveys that the Commissioner's determination is not final, and Plaintiffs do not allege that it is. Plaintiffs make no direct argument for why the finality doctrine must be abrogated in this case, but claim that "immediate intervention by this Court is necessary to resolve whether submission of new evidence is appropriate here."[7] MIO p. 2. Evidentiary disputes are no exception to the finality doctrine, so this Court should defer resolution of Plaintiffs' concerns until the Commissioner's determination is final. *See, e.g., State v. State Employees' Review Bd.,* 231 Conn. 391, 403-04, 650 A.2d 158 (1994).

B. This Court Remanded for Decisions, not Articulations

Even if the Court is inclined to make an exception to the finality doctrine in order to address Plaintiffs' concerns, the Court should not grant Plaintiffs' MIO because Plaintiffs' concerns are grounded in a mischaracterization of the MOD.

Specifically, Plaintiffs appear to claim that the MOD called for articulation. MIO pp. 2-4. Plaintiffs are mistaken. The Court ordered the Commissioner to make determinations relevant to the arm of the tribe issue. MOD pp. 16-17. An articulation is the act of expressing something in a

[7] Contrary to Plaintiff's substantive concern, the Commissioner expressly stated that his proposed decision did *not* rely upon those proposed facts. See footnotes 14 and 16 of the Proposed Decision which expressly disclaim any reliance on Proposed Finding of Fact 19.

coherent verbal form, in this context the reasoning underlying a decision. But there was no decision on the arm of the tribe issue for the Commissioner to articulate. Rather, this Court ordered the Commissioner to address the issue for the first time. That is not an order for articulation. Indeed, Plaintiffs' argument that it was is puzzling; elsewhere in the MIO, they claim the Court ordered "an articulation on an issue not decided the first time around," and acknowledge that "[a]n articulation is not an opportunity for a trial court to substitute a new decision." MIO, pp. 1, 3. Ultimately, the Court recognized that the Commissioner was entrusted to make these determinations when necessary. MOD pp. 15-16. The Court found that no prior determination had been made because the Commissioner "reasonably, though erroneously, believed that it was unnecessary to do so in order to resolve the case." MOD p. 16.

The Court cited *Lagueux*, 148 Conn. App. at 257, and *Comm'n on Human Rights and Opportunities v. Hartford*, 138 Conn. App. at 153-54, for the proposition that its authority to remand the case was greater than those remands contemplated by General Statutes § 4-183(h) or 4-183(j). MOD pp. 16-17. Nowhere in the MOD or those cases is such authority limited to remand for articulation. Accordingly, the proper procedure on remand for articulation is irrelevant.

The Commissioner has only now been ordered to make a determination, so this Court should not—now or ever—limit the Commissioner's fact-finding or decision-making to evidence in the administrative record as of January 6, 2015. The arm of the tribe determination is fact-dependent. MOD p. 16. The determination was not made on January 6, 2015.[8] *Id.* The MOD orders the determination to be made now. MOD p. 17. It is axiomatic that the UAPA and due

[8] There is no element of Connecticut's small loan lenders law that requires an affirmative finding that the lender in question is NOT an arm of the tribe. Rather, it's an affirmative defense. See *Gristede's Foods, Inc. v. Unkechuange Nation*, 660 F. Supp. 2d 442, 466 (E.D.N.Y. 2009).

process demand an agency's final decisions in a contested case are only to be reached *after* an opportunity for hearing and all that entails. The original hearing offer was not accepted by Plaintiffs. MOD p. 18. A decision reached through consideration of evidence proffered in the past by a party that refused the hearing isn't reliable; a hearing on the issue is necessary for both sides to present evidence, rebuttal evidence and argument on all issues of fact and law.

C. The Commissioner's Chosen Procedure for Reaching Decisions Protects the Rights of All Parties and Preserves This Court's Ability to Review the Decision.

The MOD, for all intents and purposes, seeks to put the parties to where they would be if Plaintiffs had exercised their opportunity for a hearing on the Department's allegations to raise the issue of tribal sovereign immunity as a jurisdictional defense. Under that scenario, the Commissioner's decision would have followed an adversarial hearing and all that entails.

The underlying matter—the allegation of violations of Connecticut's small loan lender law by administrative notice—is a contested case. The UAPA provides that in a contested case, "each party and the agency conducting the proceedings shall be afforded the opportunity . . . at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved." General Statutes § 4-177c. Further, a "final decision . . . if adverse to a party, shall include the agency's findings of fact and conclusions of law necessary to its decision . . . ." General Statutes § 4-180(c).

The doctrine of exhaustion "provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy [i.e., opportunity for a hearing] has been exhausted." *Stepney, LLC v. Town of Fairfield*, 263 Conn. 558, 563-64 (2003). A primary purpose of the administrative law doctrine of exhaustion "is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions." *Id.*

Here, Plaintiffs object to the Commissioner's proposed findings of fact and proposed conclusions of law. Plaintiffs will have their opportunity to make those claims to this Court, but Plaintiffs must first exhaust the prescribed administrative remedy—the hearing—and obtain the Commissioner's final decisions.

D. Plaintiffs' Concerns with Arm of the Tribe Determination Procedure Caused by Plaintiffs' Failure to Exhaust Administrative Remedy.

Plaintiffs' MIO inadvertently illustrates why the Court's order for the Commissioner to now make a determination of the arm of the tribe issue is problematic. It does appear unfair for the parties to litigate this issue at this stage of the proceedings. However, the fault for this situation rests with Plaintiffs for failing to exhaust their administrative remedy—the right a hearing on all issues of fact and law such as tribal sovereign immunity—in the first place.

This Court has already determined that Plaintiffs received all the process they were due. MOD p. 18. This Court has already determined that the Commissioner's order imposing a cease & desist and civil penalties was by default, after proper notice to Plaintiffs of the consequences of failing to request a hearing. MOD pp. 17-18. This Court has already determined that arm of the tribe status is a fact-dependent determination entrusted to the agency. MOD pp. 15-16.

The scenario would be different if Plaintiffs had requested a hearing to raise this issue—as was their right—and after adjudication before the agency, the Commissioner made the decision he did. Under that scenario, the Commissioner would have the benefit of a hearing on the merits of the issue. Under that scenario, the Commissioner could have made a determination of the arm of the tribe issue at the time or been ordered, on remand, to do so as of that time. But this counter-factual is not the case, because Plaintiffs did not request a hearing.

It is true that the MTD raised the issue of tribal sovereign immunity. AR23. And it is true the Commissioner denied the MTD on January 6, 2015, reasoning that tribal sovereign immunity

was irrelevant to administrative decisions generally. AR158. And it is true that this Court has ruled that the Commissioner's reasoning was flawed. MOD p. 11.

But this Court has already determined no adequate or timely hearing request was ever made and Plaintiffs have received all the process they are due. MOD p. 17-18. The Court has not found that the MTD Denial operated to excuse[9] Plaintiffs' failure to timely request a hearing on all issues of fact and law, and arm of the tribe status is one such issue. *Id.* This Court's findings place Plaintiffs back at square one—precluded from appealing the agency's decision because they failed to exhaust their administrative remedy. Any unfairness in holding a hearing now for the arm of the tribe determinations springs from Plaintiffs' failure to exhaust.

[9] The Court should not so find, as in denying the MTD the Commissioner made no findings of fact, but rather stated his view on a pure matter of law. AR150-158.

CONCLUSION

The finality doctrine dictates that the administrative decision-making process must play out prior to judicial intervention. In any case, the Commissioner's procedure is sound. Plaintiffs have already been provided an opportunity to raise issues of facts and law, such as the jurisdictional defense of tribal sovereign immunity through arm of the tribe status, which they defaulted upon long ago. Plaintiffs' Motion for Immediate Order should be denied.

DEFENDANTS,

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CERTIFICATION OF SERVICE

I hereby certify, pursuant to Practice Book §§ 10-12 through 10-17 and the parties' agreement, that a copy of the above was electronically mailed on June 22, 2016 to all counsel and *pro se* parties of record:

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