2011 IL App (1st) 102721-U
No. 1-10-2721

Third Division
July 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROGRESSIVE CASUALTY INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	10 CH 12781
	)	
STATE OF ILLINOIS DEPARTMENT OF INSURANCE	)	
and PEOTONE BANK & TRUST CO.,	)	Honorable
	)	Carolyn Quinn,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

ORDER

HELD: The circuit court properly dismissed plaintiff's complaint for administrative review for failure to exhaust its administrative remedies.

¶ 1 Progressive Casualty Insurance Company (Progressive), the plaintiff, filed a complaint for administrative review in the Circuit Court of Cook County, Illinois, against the defendants, the Illinois Department of Insurance (Department) and Peotone Bank and Trust Company (Peotone).

The Department filed a section 2-619(a)(9) motion to dismiss Progressive's complaint and argued that Progressive failed to exhaust its administrative remedies before seeking judicial review of the order entered by the Director of the Department (the Director). The Department argued that Progressive was required by section 2402.280(c) of the Administrative Code to request a hearing before the Director within ten days from the date the order was entered. 50 Ill. Admin. Code § 2402.280(c) (2010) ("A motion for rehearing *** shall be filed within 10 days of the date of the mailing of the Director's Order.") Progressive argued (1) that the exhaustion doctrine did not apply to its complaint because it appealed from a final, appealable order, and (2) that even if the exhaustion doctrine applied, it did not bar its complaint because the issue of law and futility exceptions applied. The circuit court granted the Department's motion to dismiss.

¶ 2 We find that the Director's order was not final or appealable because Progressive failed to exhaust its administrative remedies by requesting a rehearing before the Director before seeking judicial review in the circuit court. We also find that the issue of law and futility exceptions do not apply in this case. Therefore, the circuit court did not err when it granted the Department's section 2-619 motion to dismiss. Accordingly, we affirm the circuit court's order.

¶ 3 BACKGROUND

¶ 4 On March 26, 2010, Progressive filed a complaint for administrative review in the circuit court. In its complaint, Progressive alleged that it issued a policy to Peotone for directors and officers liability, internet banking liability and financial institution bond coverage. In May of 2008, Peotone submitted a renewal application to Progressive, which was accepted.

¶ 5 Progressive alleged that in early 2009, Peotone's financial condition began to deteriorate, and

in May of 2009, Progressive learned that Peotone had received a draft cease and desist order from the Federal Deposit Insurance Corporation (FDIC), which eventually became a final order, but was not made a part of the record on appeal. Progressive further alleged that in October of 2009, it informed Peotone that in accordance with its policies and the Illinois Insurance Code (the Code) (215 ILCS 5/143.16 and 143.16a (West 2010)), Progressive intended to cancel the policies issued to Peotone on December 13, 2009. Before Progressive cancelled its policies, Peotone filed a complaint with the Department which challenged Progressive's right to cancel. Thereafter, a hearing officer was appointed and a hearing was held by the Department.

¶ 6 Hearing Officer's Findings of Fact

¶ 7 On February 19, 2010, after hearing testimony and reviewing the transcripts and the exhibits introduced into evidence, the hearing officer made findings of fact, conclusions of law and recommendations. We will only delineate those findings of fact, conclusions of law and recommendations that are relevant to this appeal. Mr. Schwartz, the attorney for Peotone, testified that (1) in May of 2008, when Progressive accepted Peotone's application for insurance, it was entirely foreseeable that Peotone's investments might perform poorly and that claims might result; (2) under section 143.16(a) (215 ILCS 5/143.16a (West 2010)) of the Insurance Code, the risk is measurably increased if the insured changes something about its business or the subject of what is being insured; and (3) there was no change in Peotone's business compared to the risks that were accepted, therefore, there was no measurable increase in the risk that Progressive accepted.

¶ 8 Mr. Campbell, the president and CEO of Peotone, testified that the FDIC issued its final order on October 9, 2009. He stated that there were no operational changes or changes in the

management of Peotone. Mr. Campbell and Mr. Carber, senior vice president of Peotone, testified that no claims were made against the bank as a result of the FDIC's order.

¶ 9 Mr. Baty, the attorney for Progressive, testified that (1) the policies allowed for cancellation in the event that the risk as originally accepted had measurably increased; (2) when Peotone received its initial policies, its financial condition indicated that profitability was strong; (3) an on-site review of Peotone on June 30, 2009, revealed that the bank no longer met the underwriting requirements; (4) when Peotone's policy was renewed in May of 2008, it had 13.52% in non-performing assets and by the third-quarter of 2009 it had 231% in non-performing assets; and (5) Progressive's standards for underwriting is that a bank not exceed 40% in non-performing assets.

¶ 10 Hearing Officer's Conclusions of Law and Recommendations

¶ 11 After making findings of fact, the hearing officer made the following conclusions of law: (1) the Director of Insurance has jurisdiction over the subject matter and parties to the proceeding; (2) Progressive did not produce evidence which showed that Peotone's policies were cancelled because of a measurable increase in the risk originally accepted; and (3) the cancellation of Peotone's policies was contrary to the Insurance Code. The hearing officer recommended that Progressive's cancellation of Peotone's policies should not stand.

¶ 12 The Director's Order

¶ 13 On February 19, 2010, the Director of Insurance issued an order which adopted, confirmed and approved the hearing officer's findings of fact, conclusions of law and recommendations, and made the order a final, appealable administrative decision pursuant to the Illinois Administrative Procedure Act (APA) (5 ILCS 100/1-1 *et seq*. (West 2010)) and the Illinois Administrative Review

Law (ARL). 735 ILCS 5/3-101 *et seq*. (West 2010). Finally, the Director ordered Progressive to reinstate Peotone's policies within 35 days.

¶ 14 Complaint for Administrative Review

¶ 15 On March 26, 2010, 35 days after the Director issued the order, Progressive filed a complaint for administrative review. The Department filed a section 2-619(a)(9) motion to dismiss Progressive's complaint. The Department argued that, because Progressive did not request a hearing before the Director within ten days from the date the February 19, order was entered, Progressive failed to exhaust its administrative remedies before seeking judicial review, as required by section 2402.280(c) of the Administrative Code. 50 Ill. Admin. Code § 2402.280(c) (2010) ("A motion for rehearing *** shall be filed within 10 days of the date of the mailing of the Director's Order.")

¶ 16 In its response, Progressive argued that the exhaustion doctrine did not apply to its complaint because it appealed from a final, appealable order. Progressive also argued that even if the exhaustion doctrine applied, it would not bar its complaint because the issue of law and futility exceptions applied. According to Progressive, whether the Director misinterpreted the Insurance Code, was an issue of statutory construction that did not implicate the agency's expertise. Finally, Progressive argued that the futility exception also applied because a request for rehearing would have been futile because it is unlikely that the Director would have reversed himself.

¶ 17 After a hearing, the circuit court issued an order on August 16, 2010, which granted the Department's motion to dismiss Progressive's complaint with prejudice. The court found that prior to seeking judicial review, Progressive was required to exhaust its administrative remedies by filing a petition for rehearing within ten days of the Director's order. The court also found that the issue

of law exception did not apply because the final administrative decision was based on questions of law and fact which implicated the agency's expertise. The court further found that the futility exception did not apply because Progressive failed to show that the Director routinely denies motions for rehearing or that its motion would have been heard by the same hearing officer. Finally, the court found that its findings were supported by *Illinois HMO Guaranty Association v. Shapo*, 357 Ill. App. 3d 122 (2005).

¶ 18 On September 14, 2010, Progressive filed a notice of appeal and presents two issues for our review: (1) whether the exhaustion doctrine bars Progressive's administrative review action when the APA and the ARL permit judicial review of the Director's final and appealable orders; and (2) whether the issue of law and the futility exceptions apply and bar dismissal of Progressive's administrative review action.

¶ 19 FDIC Appointed As Receiver

¶ 20 On April 23, 2010, while Progressive's administrative review action was pending in the circuit court, the Illinois Department of Financial and Professional Regulation closed Peotone and appointed the FDIC as the receiver of the bank. On November 2, 2010, the FDIC filed a motion in the appellate court and requested leave to substitute for Peotone as the real party in interest. The appellate court granted the FDIC's motion on November 10, 2010.

¶ 21 ANALYSIS

¶ 22 I. Jurisdiction

¶ 23 The threshold issue a reviewing court must address is whether it has jurisdiction over an appeal. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 251-52 (2010). The FDIC argues

(1) that the federal court has exclusive jurisdiction over this appeal because Congress withdrew jurisdiction from all courts to take any action that would restrain or affect the FDIC's powers as receiver to exercise its statutory powers and functions (12 U.S.C. §1821(j)), and (2) that Progressive seeks declaratory relief which, if granted, would impermissibly limit the FDIC's powers as receiver to collect money owed to Peotone.

¶ 24 Our supreme court addressed the jurisdiction issue - whether the federal court has exclusive jurisdiction over receivership claims - raised by the FDIC in *Armstrong v. Resolution Trust Corporation*, 157 Ill. 2d 49 (1993). In *Armstrong*, after the plaintiff dismissed nine individuals, the bank was joined as a defendant prior to the bank going into receivership. *Armstrong*, 157 Ill. 2d at 53-54. Subsequently, the RTC was appointed receiver for the bank and substituted as a party defendant. *Armstrong*, 157 Ill. 2d at 53-54. The RTC argued that the appellate court erred in finding that the circuit court retained jurisdiction to hear the case because section 1821(d) of "the Financial Institutions Reform Recovery, and Enforcement Act of 1989 (FIRREA) stripped the State courts of subject matter jurisdiction." *Armstrong*, 157 Ill. 2d at 54-55. The RTC also argued that section 1821(d) allows administrative review or the pursuit of legal remedies only in the Federal district court. *Armstrong*, 157 Ill. 2d at 55-56. The *Armstrong* court found that the FIRREA is a complex statute and held that State courts share concurrent jurisdiction with the federal court over receivership claims. *Armstrong*, 157 Ill. 2d at 58-61. Like the plaintiff in *Armstrong*, plaintiff herein filed a complaint in the circuit court before Peotone went into receivership. Therefore, following *Armstrong*, we hold that this court may exercise concurrent jurisdiction with the federal courts. *Armstrong*, 157 Ill. 2d at 58-61. Accordingly, we will consider this appeal.

¶ 25 II. The Exhaustion of Administrative Remedies Doctrine

¶ 26 A. Standard of Review

¶ 27 In this case, the Department filed a motion to dismiss predicated upon section 2-619(a)(9) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619 (West 2010). The circuit court granted the Department's motion. Reviewing courts review orders granting motions to dismiss based upon section 2-619 of the Code *de novo*. 735 ILCS 5/2-619 (West 2010); *Shapo*, 357 Ill. App. 3d at 130, citing *Consolidated Freightways Corp. of Delaware v. Human Rights Comm'n,* 305 Ill. App. 3d 934, 938 (1999) (applying *de novo* review to a section 2-619 dismissal for failure to exhaust administrative remedies).

¶ 28 B. Progressive Was Required to Exhaust its Administrative Remedies by Seeking a Rehearing

¶ 29 The circuit court relied on *Shapo* and granted the Department's motion to dismiss because Progressive was required to exhaust its administrative remedies before it filed its petition for administrative review in the circuit court. Progressive argues that the exhaustion doctrine does not bar its administrative review action because the APA and ARL permit judicial review of a Director's final and appealable orders. The Department argues that by following *Castaneda* and *Shapo*, the circuit court correctly granted the motion to dismiss. *Castaneda v. Illinois Human Rights Comm'n,* 132 Ill. 2d 304, 308 (1989); *Shapo*, 357 Ill. App. 3d at 133.

¶ 30 In *Castaneda*, our supreme court addressed the issue of whether exhausting administrative remedies was required to make an order final and reviewable before seeking review in the courts. After the plaintiff in *Castaneda* received the order from the Illinois Human Rights Commission, he

sought review in the appellate court. *Castaneda*, 132 Ill. 2d at 308. After reviewing sections 3-101 and 3-102 of the ARL, the supreme court found that the legislature intended to adopt the common law exhaustion of remedies doctrine in the ARL. *Castaneda*, 132 Ill. 2d at 321. The *Castaneda* court held that a party must seek a rehearing before the Commission in order to exhaust their administrative remedies and render such decisions final and reviewable. *Castaneda*, 132 Ill. 2d at 308.

¶ 31 The facts in this case are similar to the facts in *Shapo*. In *Shapo*, health care providers filed complaints against the plaintiff with the Department and the Department made a decision in favor of the health care providers. *Shapo*, 357 Ill. App. 3d at 125-26. Without filing a petition for rehearing with the Department, the plaintiff filed a petition for administrative review in the circuit court. *Shapo*, 357 Ill. App. 3d at 126. The circuit court dismissed the plaintiff's administrative review action. *Shapo*, 357 Ill. App. 3d at 126. On appeal, the plaintiff challenged the dismissal of its administrative review action contending that the trial court erroneously found that a party aggrieved by a decision of the Director must file a petition with the Director before seeking review in the circuit court. *Shapo*, 357 Ill. App. 3d at 130. The *Shapo* court followed *Castaneda* and held that the exhaustion of remedies doctrine required the plaintiff to file a motion for rehearing with the Department before filing a complaint for administrative review in the circuit court. *Shapo*, 357 Ill. App. 3d at 133. The *Shapo* court reasoned that the "procedures set forth by the Illinois Administrative Review Law are subject to the exhaustion of remedies doctrine articulated in *Castaneda*." *Shapo*, 357 Ill. App. 3d at 139. Therefore, "the Director's characterization of his decision as 'final' and his reference to the procedures set forth in the ARL did not relieve plaintiff

of its obligation under *Castaneda* to exhaust its administrative remedies by filing a motion for rehearing pursuant to the rehearing regulation included in section 2402.280(c) of the Illinois Administrative Code." *Shapo*, 357 Ill. App. 3d at 139; see also 50 Ill. Adm. Code §2402.280(c) (West 2010).

¶ 32 Section 2402.280(c) of the Administrative Code clearly provides that "[a] motion for rehearing or a motion for the reopening of a hearing shall be filed within 10 days of the date of mailing of the Director's Order." 50 Ill. Adm. Code §2402.280(c) (2010). Section 3-101 of the ARL provides that "[i]n all cases in which a statute or a rule of the administrative agency requires or permits an application for a rehearing or other method of administrative review to be filed within a specified time (as distinguished from a statute which permits the application for rehearing or administrative review to be filed at any time before judgment by the administrative agency against the applicant or within a specified time after entry of such judgment), and an application for such rehearing or review is made, no administrative decision of such agency shall be final as to the party applying therefor until such hearing or review is had or denied." 735 ILCS 5/3-101 (West 2010). Section 3-102 of the ARL provides that if "an administrative decision has become final because of the failure to file any document in the nature of objections, protests, petition for hearing or application for administrative review within the time allowed *** such decision shall not be subject to judicial review." 735 ILCS 5/3-102 (West 2010). The *Shapo* court noted that the court in *Castaneda* "found that section 3-102 clarified the ambiguity in section 3-101, that sections 3-101 and 3-102 of the ARL reflected a legislative intent to codify the exhaustion of remedies doctrine, and that the 'underlying principle' of section 3-102 was that 'aggrieved parties who fail to exercise all

procedural remedies available to them in the allotted time relinquish any opportunity for judicial review.' " *Shapo,* 357 Ill. App. 3d at 132, citing *Castaneda*, 132 Ill. 2d at 320.

¶ 33 We agree with the *Shapo* court that requiring a party, plaintiff herein, to file a petition for rehearing in order to preserve its right to seek administrative review in the circuit court was consistent with the purposes underlying the exhaustion of remedies doctrine. *Shapo*, 357 Ill. App. 3d at 133. Here, plaintiff failed to file a motion for rehearing, and by doing so failed to exhaust its administrative remedies; therefore, the dismissal of plaintiff's complaint for administrative review was consistent with section 2402.280(c) of the Administrative Code (50 Ill. Adm. Code §2402.280(c) (2010)), and with sections 3-101 and 102 of the ARL (735 ILCS 5/3-101, 102 (West 2010)). *Shapo*, 357 Ill. App. 3d at 134. Accordingly, we hold that the circuit court did not err when it granted the Department's motion to dismiss plaintiff's complaint for administrative review. *Shapo*, 357 Ill. App. 3d at 134; also see *Castaneda*, 132 Ill. 2d at 308.

¶ 34 III. The Exceptions to the Exhaustion Doctrine Do Not Apply

¶ 35 Next, the plaintiff argues that even if we assume the exhaustion doctrine is applicable, two exceptions apply. Progressive maintains that both the issue of law and the futility exceptions to the exhaustion doctrine apply. The *Shapo* court discussed the exhaustion doctrine exceptions and stated that "[a]n aggrieved party may seek judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where *** the agency cannot provide an adequate remedy or where it is patently futile to seek relief before the agency" and "where no issues of fact are presented or agency expertise is not involved." *Shapo*, 357 Ill. App. 3d at 130-31, citing *Castaneda,*

132 Ill. 2d at 308-09.

¶ 36 A. Issue of Law Exception

¶ 37 Progressive argues that the exhaustion doctrine does not bar its administrative review action because the "issue of law" exception applies. Progressive argues that its complaint involves statutory construction only, namely, whether Progressive cancelled Peotone's policies because the risk originally accepted has measurably increased (215 ILCS 5/143.16a (West 2010)), which is purely a question of law and does not implicate the agency's expertise. Progressive also argues that *Shapo* did not address the issue of law exception, but this case involves the interpretation of a statutory provision and not the resolution of a factual dispute.

¶ 38 Progressive relies on *Office of Cook County State's Attorney v. Illinois Local Labor Relations Bd.*, 166 Ill. 2d 296, 305 (1995), and argues when the issue is one of law and statutory interpretation, it falls outside the agency's expertise. The facts in this case are distinguishable from the facts in *Cook County State's Attorney*. In *Cook County State's Attorney*, our supreme court found that the statutes and case law addressing the issue in that case provided sufficient grounds to resolve the issue as a matter of law and that fact-finding was unnecessary. *Cook County State's Attorney*, 166 Ill. 2d at 305. Following *Castaneda*, the court held that the exhaustion doctrine was not at bar to a judicial determination because questions of fact were not involved and the agency's expertise would not aid in the resolution of the issue before the court. *Cook County State's Attorney*, 166 Ill. 2d at 306, citing *Castaneda*, 132 Ill. 2d at 309.

¶ 39 In this case, as the circuit court noted, the hearing officer was not only required to construe

the meaning of "measurably increased" in section 143.16a as a matter of law, but was also required to apply the law to the facts after hearing the testimony of witnesses. After hearing the testimony, the record reflects that the hearing officer made findings of fact and conclusions of law and determined that, based upon its factual findings, the risk Progressive had originally accepted had not measurably increased at the time Progressive attempted to cancel Peotone's policies. We find that this case did not involve the resolution of a pure question of law, but involved a hearing officer exercising his expertise by hearing testimony, making findings of fact and conclusions of law and arriving at a decision by applying the law to the facts in the case. Therefore, because agency expertise was required, the issue of law exception does not apply.

¶ 40 B. Futility Exception

¶ 41 Progressive further argues that it was not required to file a rehearing petition because the futility exception applies. Progressive maintains that the same Director would have jurisdiction over the proceeding and it would be unreasonable to assume that the Director would reverse himself. Peotone argues that Progressive has not demonstrated that the Director routinely denies petitions for rehearing.

¶ 42 We find that Progressive's argument was squarely rejected in *Shapo* where the plaintiffs cited three prior denials by the Director of motions for rehearing and argued that the Director would have similarly denied their motion for rehearing. *Shapo*, 357 Ill. App. 3d at 139. The *Shapo* court reasoned that the Director's denials did not establish an existing standard or practice by which the Director denies such motions as a matter of course. *Shapo*, 357 Ill. App. 3d at 139. Furthermore, the

Shapo court stated that "the fact that there are clear indications that the agency may or will rule adversely is generally inadequate to terminate the administrative process or to avoid the exhaustion requirement." *Shapo*, 357 Ill. App. 3d at 139, citing *Castaneda,* 132 Ill. 2d at 328. We agree with the reasoning of the court in *Shapo*. Therefore, we hold that the futility exception does not apply to the facts in this case.

¶ 43 CONCLUSION

¶ 44 The circuit court did not err when it dismissed Progressive's complaint for administrative review for failing to exhaust its administrative remedies. In addition, we find that the circuit court did not err when it found that neither the issue of law nor the futility exceptions apply in this case. Accordingly, we affirm the order of the circuit court dismissing this case.

¶ 45 Affirmed.