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2015 IL App (5th) 140312-U

NO. 5-14-0312

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

HYPERACTIVE GAMING, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Williamson County.
)	
v.)	No. 14-CH-25
)	
WILLIAMSON POST 147, AMERICAN LEGION,)	
)	
Defendant)	
)	Honorable
(Midwest Electronics Gaming, Intervenor-)	Carolyn B. Smoot,
Appellant).)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* Under the Video Gaming Act, the Illinois Gaming Board has exclusive authority over a dispute between two licensed terminal operators concerning which entity has the exclusive right to place and operate video gaming terminals in a licensed veterans organization's establishment.

¶ 2 This is an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) from an order granting a preliminary injunction. The dispute is between two entities that are licensed to own and operate video gaming terminals pursuant to the Video Gaming Act (the Act) (230 ILCS 40/1 *et seq.* (West 2012)), and

concerns which entity has the exclusive right to place and operate video gaming terminals in a licensed establishment.

¶ 3 The plaintiff, Hyperactive Gaming, LLC (Hyperactive Gaming), maintains that it has acquired terminal operator rights under a valid, binding, and enforceable use agreement with the defendant, Williamson Post 147, American Legion (the American Legion), that grants it the exclusive right to place and operate video gaming terminals in premises owned and operated by the American Legion. The intervenor, Midwest Electronics Gaming (Midwest Electronics), maintains that it has the only valid, binding, and enforceable use agreement with the American Legion for placing and operating video gaming terminals in the establishment.

¶ 4 Midwest Electronics placed video gaming terminals in the American Legion's establishment, and on the same day, Hyperactive Gaming filed a complaint against the American Legion seeking, among other relief, an injunction preventing the American Legion from allowing any entity to begin operating video gaming terminals in the establishment. The trial court entered a temporary restraining order against the American Legion, allowed Midwest Electronics to intervene in the lawsuit, and conducted a hearing on Hyperactive Gaming's request for a preliminary injunction.

¶ 5 After a hearing, the circuit court found that Hyperactive Gaming possesses a clear ascertainable right that is in need of protection, that it will likely succeed on the merits of its lawsuit, that it lacks an adequate remedy at law, and that it will suffer irreparable injury without the entry of the preliminary injunction. Therefore, the circuit court entered a preliminary injunction preventing the American Legion from activating any video

gaming terminals, until further order of the court, in order to preserve the status quo until the court considers the merits of the dispute. Midwest Electronics appeals the preliminary injunction. For the following reasons, we vacate the circuit court's preliminary injunction and dismiss this appeal for a lack of subject matter jurisdiction. We remand this cause to the circuit court with directions to dismiss the complaint due to a lack of subject matter jurisdiction.

¶ 6

BACKGROUND

¶ 7 The dispute in the present case is derived from the newly formed video gaming industry that the legislature created by passing the Act. The Act legalized the use of video gaming terminals for gambling purposes within certain licensed establishments, licensed veterans organizations, licensed fraternal organizations, and licensed truck stops. Any person or entity that seeks to place and operate video gaming terminals at any location in Illinois must obtain a license from the Illinois Gaming Board (the Gaming Board) before it can place and operate video gaming terminals. 230 ILCS 40/25 (West 2012). Any establishment, veterans organization, fraternal organization, or truck stop that wants to have video gaming terminals placed at its location must also obtain a license from the Gaming Board. *Id.* The Act and the rules promulgated by the Gaming Board for implementing the Act contain strict requirements that an applicant must meet before the Gaming Board will grant it a license. 230 ILCS 40/45 (West 2012); 11 Ill. Adm. Code 1800.420(a)(1)-(3) (2012). In addition, the terms for placing and operating video gaming terminals must be established by a "written use agreement" between the licensed terminal operator and the owner or representative of the licensed establishment, licensed

veterans organization, licensed fraternal organization, or licensed truck stop. 230 ILCS 40/25(e) (West 2012).

¶ 8 Written use agreements are subject to minimum standards established by the rules promulgated by the Illinois Gaming Board for implementing the Act. Section 1800.320 of the Gaming Board's rules provides that use agreements shall "[o]nly be between a licensed terminal operator and a licensed establishment, licensed truck stop establishment, licensed veterans establishment, or licensed fraternal establishment" and must "[p]rohibit any assignment other than from a licensed terminal operator to another licensed terminal operator." 11 Ill. Adm. Code 1800.320(a), (d) (2010).

¶ 9 In the present case, on June 22, 2010, the American Legion entered into a contract with another entity that is not a party to this lawsuit, B&B Harris Management, LLC (B&B). The contract, which was titled as a "Video Gaming Terminal Use Agreement," granted B&B the exclusive right to place and operate video gaming terminals in the American Legion's establishment for a period of five years following the date on which the first video gaming terminal is installed and becomes operational.

¶ 10 The agreement also stated that it was "binding upon and inure[d] to the benefit of the parties hereto and their respective heirs, personal representatives, successors and permitted assigns." In addition, the contract provided that B&B could "not assign and/or transfer this Agreement and its rights and/or obligations hereunder except: (i) to another licensed terminal operator; or (ii) as may be permitted by the Video Gaming Law."

¶ 11 The rules promulgated by the Gaming Board, effective February 22, 2010, also require that use agreements "[c]ontain a provision that releases the video gaming location

from any continuing contractual obligation to the terminal operator in the event that the terminal operator has its license revoked or surrenders its license." 11 Ill. Adm. Code 1800.320(e) (2010). B&B's use agreement with the American Legion provided that an "Event of Default" occurs if "either party surrenders its License or has its License terminated, canceled or revoked by the [Gaming Board]." Under the agreement, if B&B defaults because its license is terminated, cancelled, or revoked by the Gaming Board, the American Legion "shall be released from any continuing contractual obligation to the Terminal Operator arising out of this Agreement."

¶ 12 B&B became a licensed terminal operator on January 19, 2012, for a period of one year. At that time, the American Legion had not yet obtained its license under the Act. The American Legion did not become a licensed video gaming establishment until February 2014.

¶ 13 In October 2012, B&B applied to renew its terminal operator's license. On February 21, 2013, the Gaming Board denied B&B's request to renew its terminal operator's license. The Gaming Board's minutes of its February 21, 2013, meeting state that its denial of B&B's license renewal was "[b]ased on staff's investigation." The record in the present case contains a letter dated February 25, 2013, in which a representative of the Gaming Board explained the reason for the Gaming Board's denial of B&B's license renewal request. The representative explained that B&B "owned, provided and/or continued to operate grey games [for illegal gambling purposes] in Illinois, including at least 3 Illinois retail establishments, both before and while it was licensed by the [Gaming Board] as a Terminal Operator." According to the

correspondence, "grey games" contain "a circuit, meter, or switch capable of removing and recording the removal of credits when the award of credits is dependent upon chance." The Gaming Board concluded that B&B gave false statements concerning its operation of grey games and that its "actions and conduct do not best serve the interests of the citizens of Illinois."

¶ 14 B&B submitted a request for a hearing, which the Gaming Board denied on March 20, 2013. Pursuant to the rules promulgated by the Gaming Board, "[t]he Board's denial of a request for hearing is a final decision and the denial of licensure becomes a final order on the date the Board denies the request for hearing." 11 Ill. Adm. Code 1800.615(g) (2012).

¶ 15 On March 19, 2013, the day before the Gaming Board denied B&B's request for hearing, B&B assigned all of its rights under the use agreement with the American Legion to Hyperactive Gaming. B&B and Hyperactive Gaming executed the assignment in connection with an asset purchase agreement, which the parties also entered into on the same day. The terms of the asset purchase agreement, including the compensation that B&B was or is to receive under the agreement, are not part of the record on appeal.

¶ 16 On October 3, 2013, the American Legion entered into a new use agreement with Midwest Electronics entitled "Video Gaming Terminal Use Agreement," which purports to grant Midwest Electronics the exclusive right to place and operate video gaming terminals in the American Legion's establishment. The agreement is for a five-year term beginning on the day after the operation of video gaming terminals began.

¶ 17 On February 26, 2014, the Gaming Board approved the American Legion's application to become a licensed video gaming establishment. That same day, Hyperactive Gaming contacted the American Legion to schedule the installation of video gaming terminals, and the American Legion informed Hyperactive Gaming that it was going to allow Midwest Electronics to install video gaming terminals instead.

¶ 18 The next day, on February 27, 2014, Midwest Electronics placed video gaming terminals at the American Legion's facility, and Hyperactive Gaming filed its complaint against the American Legion. Count I of the complaint seeks an injunction for enforcement of its rights under the use agreement it received in the assignment from B&B. Count II of the complaint requests a declaratory judgment finding that the B&B use agreement is valid, binding, and enforceable. Count III of the complaint alleges a cause of action against the American Legion for breach of contract. Along with the complaint, Hyperactive Gaming also filed a motion requesting a temporary restraining order.

¶ 19 On March 4, 2014, the circuit court granted the motion for a temporary restraining order and prohibited the American Legion from allowing the activation of any video gaming terminals at its premises. The court set the matter for a hearing on Hyperactive Gaming's request for a preliminary injunction.

¶ 20 On April 4, 2014, the circuit court granted Midwest Electronics' motion to intervene over Hyperactive Gaming's objection. On May 2, 2014, after a hearing and taking the matter under advisement, the circuit court granted Hyperactive Gaming's request for a preliminary injunction and requested the parties to submit a written order.

¶ 21 The circuit court entered the written preliminary injunction order on May 23, 2014. In the order, the court found that Hyperactive Gaming established that it (1) had a clear ascertainable right, which was in need of protection; (2) will likely succeed on the merits; (3) lacks an adequate remedy at law; and (4) will suffer irreparable injury without entry of the injunction. Based on these findings, the circuit court enjoined the American Legion from activating any video gaming terminals at its establishment in order to maintain the status quo until the court can determine the merits of the dispute.

¶ 22 Midwest Electronics now appeals the circuit court's order granting the preliminary injunction. The American Legion has not appealed the circuit court's order.

¶ 23 DISCUSSION

¶ 24 The parties have not raised any issue with respect to the circuit court's subject matter jurisdiction to hear the merits of their controversy. However, prior to oral argument in this appeal, we *sua sponte* entered an order directing the parties to be prepared to discuss issues concerning subject matter jurisdiction at oral argument. Specifically, we directed the parties to address the following issue at oral argument: Does the Illinois Gaming Board have either exclusive or primary jurisdiction over the dispute involved in this case? At oral argument, both parties maintained that the circuit court had either exclusive or primary jurisdiction over the dispute. In addition, after oral argument, Hyperactive Gaming filed supplemental authority in support of its argument that the circuit court had jurisdiction over the issues raised in its complaint.

¶ 25 We disagree with the parties and believe that the Gaming Board has exclusive authority over the issues raised in this controversy. Although none of the parties

challenged the court's subject matter jurisdiction, we have an independent duty to consider subject matter jurisdiction even when no party has raised it as an issue. *In re Rico L.*, 2012 IL App (1st) 113028, ¶ 109, 977 N.E.2d 1100.

¶ 26 The Illinois Constitution gives circuit courts original jurisdiction over all justiciable matters. Ill. Const. 1970, art. VI, § 9. However, the legislature may divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, but it must do so explicitly. *Employers Mutual Cos. v. Skilling*, 163 Ill. 2d 284, 287, 644 N.E.2d 1163, 1165 (1994). The determination of whether the legislature intended to vest exclusive jurisdiction over a particular matter in an administrative agency is a question of statutory interpretation. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶ 27, 959 N.E.2d 1133. The interpretation of a statute is a question of law, which we review *de novo*. *Zurek v. Petersen*, 2015 IL App (1st) 150508, ¶ 3, 33 N.E.3d 853.

¶ 27 While this appeal was pending, we issued our opinion in the case of *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2015 IL App (5th) 140092. We believe that our jurisdictional analysis in that case also applies to the jurisdictional issue in the present case. In *J&J Ventures Gaming*, we held that the Gaming Board has exclusive jurisdiction over a dispute between two licensed terminal operators concerning which terminal operator has the right to place and operate video gaming terminals in a licensed establishment. *J&J Ventures Gaming*, 2015 IL App (5th) 140092, ¶ 29.

¶ 28 In *J&J Ventures Gaming*, an unlicensed entity, Action Amusement, entered into an exclusive location agreement with the establishment, Wild Country, purporting to

grant the unlicensed entity the right to place and operate video gaming terminals in Wild Country's premises. *Id.* ¶ 8. The parties entered into this exclusive location agreement prior to the Gaming Board establishing any rules for implementing the Act. *Id.* ¶ 9.

¶ 29 Action Amusement never became a licensed terminal operator, but instead assigned its rights under the exclusive location agreement to another unlicensed entity, Action Gaming. *Id.* ¶ 11. The assignment purported to grant Action Amusement monetary compensation that was directly tied to Action Gaming's future video gaming operations in several establishments included in the assignment. *Id.* Action Gaming applied for a license to be a terminal operator, but the Gaming Board denied its application because it failed to meet the requirements for licensing. *Id.* ¶ 16. Action Gaming requested a hearing, and before the Gaming Board rendered its final decision denying the request for a hearing, Action Gaming transferred its rights under several exclusive location agreements to J&J Ventures Gaming. *Id.* ¶ 18.

¶ 30 Meanwhile, Wild Country entered into a new agreement for the placement of video gaming terminals with a new licensed terminal operator, Accel Entertainment. *Id.*

¶ 20. A dispute arose between J&J Ventures Gaming and Accel Entertainment concerning which licensed terminal operator had the exclusive right to place and operate video gaming terminals in Wild Country's establishment. *Id.* ¶ 22. The trial court entered a judgment in favor of J&J Ventures Gaming prohibiting Accel Entertainment from operating video gaming terminals in the licensed establishment. *Id.* ¶ 26

¶ 31 On appeal, we *sua sponte* raised the same jurisdictional issue that we have raised in the present case, *i.e.*, whether the circuit court has jurisdiction over the merits of the

controversy raised in the complaint or whether the Gaming Board has exclusive or primary jurisdiction over the controversy. *Id.* ¶ 29. We analyzed the Act's regulatory scheme and concluded that "the legislature intended for the Gaming Board to have exclusive jurisdiction over all agreements purporting to control the placement of video gaming terminals within a licensed establishment." *Id.* ¶ 32. We emphasized the Gaming Board's broad powers over all gaming operations governed by the Act (including licensing requirements and minimum standards for written use agreements) and the legislature's intent that the Gaming Board strictly regulate this newly created gambling industry to protect the public's interest. *Id.* ¶¶ 47, 60.

¶ 32 The agreements at issue in *J&J Ventures Gaming* purported to control the placement and operation of video gaming terminals, and we concluded that enforcement of those agreements as a "written use agreement" under the Act has the potential of allowing unlicensed entities to receive compensation that is directly tied to video gaming operations. *Id.* ¶ 31. Agreements and assignments that potentially allow unlicensed entities to profit from video gaming in a manner contrary to the legislature's intent could directly impact the public's interest in the gaming industry. *Id.* ¶ 54. We noted that gambling contracts were void under the common law, and use agreements that control the placement and operation of video gaming terminals are enforceable in Illinois only by virtue of the Act. *Id.* ¶ 36. We concluded that the legislature intended for the Gaming Board to have exclusive authority over agreements purporting to control the placement and operation of video gaming terminals. *Id.* ¶ 60.

¶ 33 Likewise, in the present case, the parties' controversy involves two licensed terminal operators making competing claims to the exclusive right to place video gaming terminals in a licensed establishment. Hyperactive Gaming bases its claim on a written use agreement that was originally between the American Legion and B&B. When B&B applied to renew its terminal operator's license, the Gaming Board denied its renewal application because it operated "grey games" for illegal gambling purposes both before and after the Gaming Board granted its license. The Gaming Board also was concerned that B&B made false statements concerning its operation of the illegal machines. Based on its staff's investigation, the Gaming Board concluded that B&B's "actions and conduct do not best serve the interests of the citizens of Illinois."

¶ 34 B&B requested a hearing, and the day before the Gaming Board denied its request, it assigned its rights under the use agreement to Hyperactive Gaming pursuant to an asset purchase agreement. The record does not reveal the compensation that B&B received or is to receive under the terms of the asset purchase agreement. Nonetheless, this type of transaction has the potential of allowing an entity that is not qualified for licensure to receive compensation directly tied to video gaming operations, which may be contrary to the public's interest in this new industry. The validity of such a transaction invokes the Gaming Board's authority over "all gaming operations governed by this Act." 230 ILCS 40/78(a) (West 2012).

¶ 35 Furthermore, at the time the Gaming Board decided not to renew B&B's license, the Gaming Board's rules required that use agreements contain "a provision that releases the video gaming location from any continuing contractual obligation to the terminal

operator in the event that the terminal operator has its license revoked or surrenders its license." 11 Ill. Adm. Code 1800.320(e) (2013). The Gaming Board enacted section 1800.320, which sets out the minimum requirements for use agreements, as part of its authority to regulate the "conditions under which all video gaming in the State shall be conducted." 230 ILCS 40/78 (West 2012).

¶ 36 Resolution of the parties' controversy in the present case requires a determination of the meaning of section 1800.320 of the Gaming Board's rules. Midwest Electronics argues that, under section 1800.320 (and under the terms of the use agreement), the American Legion was no longer bound by the original B&B use agreement when B&B's license expired on January 19, 2013, or when the Gaming Board voted to deny B&B's renewal application on February 21, 2013, or when the Gaming Board denied B&B's request for hearing on March 20, 2013. Midwest Electronics concludes that the assignment between B&B and Hyperactive Gaming did not transfer any enforceable rights to Hyperactive Gaming.

¶ 37 Hyperactive Gaming, however, maintains that under section 1800.320 (and under the terms of the use agreement) the triggering event that would have released the American Legion from its obligations under the use agreement would have been the Gaming Board's denial of B&B's request for hearing, which was its final order. Hyperactive Gaming argues that B&B was still a licensed terminal operator and was capable of assigning its rights under the use agreement to another licensed terminal operator when it entered into the asset purchase agreement with Hyperactive Gaming the day before the Gaming Board denied B&B's request for hearing. Therefore, according to

Hyperactive Gaming, after the assignment, the original use agreement is still valid and enforceable as long as it maintains its license.

¶ 38 We believe that these issues are within the purview of the Gaming Board's authority over use agreements, and we believe that the legislature intended for the Gaming Board to have exclusive authority over such matters. There is no question that the Gaming Board has authority over use agreements, including authority to limit the assignment of use agreements and authority to define conditions for their termination. It has exercised this authority by promulgating the minimum standards for use agreements contained within section 1800.320 of its rules. For the reasons we set out in *J&J Ventures Gaming*, we believe that the legislature intended for the Gaming Board's authority over use agreements to be exclusive authority, not concurrent with the courts' jurisdiction. Whether B&B's use agreement with the American Legion remained enforceable after the Gaming Board denied B&B's application for relicensing is a matter that concerns the conditions under which video gaming in this state shall be conducted.

¶ 39 In its motion to cite supplemental authority, Hyperactive Gaming cites *Durica v. Commonwealth Edison Co.*, 2015 IL App (1st) 140076, 30 N.E.3d 499 as instructive authority in deciding the jurisdictional issues raised by this court. We find *Durica* to be distinguishable and not instructive.

¶ 40 In *Durica*, property owners filed a complaint against a public utility that they claimed had improperly removed trees from their property. *Id.* ¶ 6. The jurisdictional issue in that case involved the interpretation of the Public Utilities Act (220 ILCS 5/1-101

et seq. (West 2012)) to determine whether the Illinois Commerce Commission had exclusive jurisdiction over the dispute. *Durica*, 2015 IL App (1st) 140076, ¶ 26.

¶ 41 In interpreting the Public Utilities Act, the court noted that section 8-505.1(a) of the Public Utilities Act sets out standards and procedures for non-emergency vegetation management activities of public utilities. *Id.* ¶ 27. The last sentence of section 8-505.1(a) states that the Illinois Commerce Commission "shall have sole authority to investigate, issue, and hear complaints against the utility under this subsection (a)." *Id.* However, the court also noted that the last paragraph of section 8-505.1 provides that section 8-505.1 "shall not in any way diminish or replace other civil or administrative remedies available to a *** property owner *** under this Act." *Id.* ¶ 28. In addition, section 5-201 of the Public Utilities Act provides that a public utility may be subject to claims for damages in circuit court. *Id.* ¶ 29.

¶ 42 The court stated that the concluding paragraph of section 8-505.1, "particularly when read in conjunction with section 5-201's recognition of circuit court jurisdiction over claims for damages, leads us to conclude that, notwithstanding the earlier 'sole authority' clause, section 8-505.1 of the Public Utilities Act does *not* preclude property owners from pursuing other claims in the circuit court arising from a utility's 'vegetation management activities.'" (Emphasis in original.) *Id.* ¶ 31. The court concluded "that section 8-505.1 of the Public Utilities Act does not suggest any legislative intent to deprive tort victims of common law remedy against [the public utility]." *Id.* ¶ 44.

¶ 43 The court's analysis in *Durica* offers us no guidance in the present case. The statute regulating public utilities is not similar to the video gaming statute or the

regulatory scheme of the video gaming industry under the Act. The Act does not abrogate the common law, but creates a new industry that was unknown at common law. Entities may operate video gaming terminals for gambling purposes in this state only by virtue of the Act. The Act requires that video gaming be conducted according to new rules and new procedures set out in the Act and promulgated by the Gaming Board. Unlike the statute at issue in *Durica*, the Act includes a regulatory scheme that evidences a legislative intent to place exclusive authority with the Gaming Board over the conditions under which the video gaming industry shall be conducted.

¶ 44

CONCLUSION

¶ 45 For the foregoing reasons, we vacate the circuit court's preliminary injunction, dismiss this appeal, and remand to the circuit court with directions to dismiss the complaint due to a lack of subject matter jurisdiction.

¶ 46 Preliminary injunction vacated and appeal dismissed; cause remanded with directions.