2016 IL App (1st) 140817-U

SIXTH DIVISION
March 18, 2016

No. 1-14-0817

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

INDEPENDENT VOTERS OF ILLINOIS INDEPENDENT ORGANIZATION and AVIVA PATT,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	13 CH 04219
DAN WIDAWSKY, Comptroller of the City of Chicago; CHICAGO LOOP PARKING, LLC; and LMG2, LLC,	)	Honorable Rodolfo Garcia,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

Held: The circuit court did not err by dismissing the plaintiffs' complaint on the grounds that they lacked both direct and derivative taxpayer standing to challenge section 1.1 of the

concession agreement as violative of section 6(a) of article VII of the Illinois Constitution (Ill. Const.1970, art. VII, § 6(a)).

¶ 1 The controversy underlying this taxpayers' appeal centers around a municipal contract regarding the operation of four City-owned underground parking garages in Grant Park and Millennium Park (Parking System). The municipal contract is in the form of a concession and lease agreement entered into in November 2006 between defendants the City of Chicago (City) and Chicago Loop Parking LLC, now known as LMG2, LLC (CLP). The concession agreement was approved by the Chicago City Council through ordinance. Under the terms of the concession agreement, CLP paid the City an upfront payment of $563 million and assumed the responsibility and expense of operating the Parking System in exchange for, among other things, the right to collect parking fees paid at these garages for the 99-year lease term. See *City of Chicago v. Chicago Loop Parking LLC*, 2014 IL App (1st) 133020, ¶ 2.

¶ 2 In February 2013, plaintiffs, Aviva Patt, a Chicago taxpayer, and the Independent Voters of Illinois Independent Precinct Organization, an association representing the interests of Chicago taxpayers, filed a declaratory and injunctive action against CLP and the city comptroller. Plaintiffs argued that four provisions contained in section 1.1 of the concession agreement (Competing Parking Action; Competing Parking Area; Compensation Event; and Concession Compensation) combined to constrain the City in the exercise of its regulatory and police powers embodied in section 6(a) of article VII of the Illinois Constitution (Ill. Const.1970, art. VII, § 6(a))[1].

[1] The City of Chicago is a home rule municipality. The powers of home rule municipalities, those municipalities with a population greater than 25,000, are derived from article VII, section 6(a), of the Illinois Constitution of 1970 (Ill. Const.1970, art. VII, 6(a)). Section 6(a) provides in relevant part:

¶ 3 Taken together, these four provisions hold that if the City takes certain "Competing Parking Actions" within a "Competing Parking Area" that diminish the value of the revenue stream of the Parking System, then those actions will be considered a "Compensation Event" that requires the City to pay CLP "Concession Compensation" sufficient to maintain the benefit of the bargain the parties' reached when they entered into the concession agreement. Plaintiffs maintained that section 1.1 of the concession agreement unlawfully constrained the City in the exercise of its home-rule authority and police powers because it required the City to compensate CLP for financial losses attributed to competition arising from the City's exercise of its regulatory and police powers in granting new public parking garage licenses to competing entities within a defined area of the Chicago Loop (*City of Chicago v. Chicago Loop Parking LLC*, 2014 IL App (1st) 133020, ¶ 9).

¶ 4 In their action, plaintiffs sought a declaration that the concession agreement was illegal, unconstitutional, and void as against public policy on the alleged ground that pursuant to the agreement, the City had contracted away its nondelegable police powers to a private entity to direct and regulate the location, use, and construction of public garages. Plaintiffs sought to enjoin the city comptroller from making any expenditures of public funds under the agreement. Plaintiffs also requested attorneys' fees and costs pursuant to section 5(c)(2) of the Illinois Civil Rights Act of 2003 (740 ILCS 23/5(c)(2) (West 2010)).

¶ 5 The circuit court dismissed the plaintiffs' action with prejudice pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)) on the ground

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"Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. 1970, art. VII, § 6(a).

that the plaintiffs lacked standing to challenge the concession agreement. We agree and therefore affirm.

¶ 6 ANALYSIS

¶ 7 "A complaint may be involuntarily dismissed for lack of standing pursuant to section 2-619(a)(9) of the Code." *Lyons v. Ryan*, 201 Ill. 2d 529, 534 (2002). An order dismissing a complaint for lack of standing presents a question of law subject to *de novo* review. *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 493 (2005).

¶ 8 "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). The doctrine "requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome." *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996). Standing requires some injury in fact to a legally recognizable interest. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988).

¶ 9 "A plaintiff's status as a taxpayer may provide a basis for his or her standing." *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (2011). "Taxpayer standing is a narrow doctrine permitting a taxpayer the ability to challenge the misappropriation of public funds." *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 29. Taxpayers possess an equitable right to bring suit to protect their interest in public funds. *Feen v. Ray*, 109 Ill. 2d 339, 344 (1985). However, "a simple allegation of taxpayer status is insufficient to assert a taxpayer suit." *Village of Leland v. Leland Community School District No. 1*, 183 Ill. App. 3d 876, 879 (1989). The taxpayer must also tie allegations of illegal appropriations and expenditures to some financial injury as a result of the misappropriation. *Id.* "The key to taxpayer standing is the plaintiff's

liability to replenish public revenues depleted by an alleged unlawful government action." *Barber*, 406 Ill. App. 3d at 1102.

¶ 10 In the instant case, plaintiffs presented two theories of standing based on their status as taxpayers: (1) direct taxpayer standing; and (2) derivative taxpayer standing. Based upon our review of the relevant case law, we believe the circuit court correctly determined that the plaintiffs lacked both direct and derivative taxpayer standing to challenge section 1.1 of the concession agreement as violative of section 6(a) of article VII of the Illinois Constitution (Ill. Const.1970, art. VII, § 6(a)).

¶ 11 Direct taxpayer standing confers standing to taxpayers who sue in their individual capacities and as representatives of similarly situated taxpayers. See, *e.g.*, *Scachitti*, 215 Ill. 2d at 493 ("A 'taxpayer action' is brought by private persons in their capacity as taxpayers, 'on behalf of themselves and as representatives of a class of taxpayers similarly situated within a taxing district or area"). Taxpayers have standing to enjoin the alleged illegal expenditure of public funds, where without such an injunction, they could be liable to replenish the public treasury for the deficiency caused by such misappropriation. *Barber*, 406 Ill. App. 3d at 1102.

¶ 12 According to plaintiffs, section 1.1 of the concession agreement violates section 6(a) of article VII of the Illinois Constitution of 1970 because this section of the concession agreement unlawfully constrains or chills the City in the exercise of its police powers concerning the regulation of public parking garages by requiring the City to compensate CLP if the City grants new licenses to competing entities within the Competing Parking Area which diminish the value of the revenue stream of the Parking System. We find plaintiffs lacked direct standing as taxpayers to challenge section 1.1 of the concession agreement because even if they succeeded on the merits, they would still not be entitled to the requested relief of an injunction.

¶ 13 The plaintiffs' claim for declaratory judgment sought an order declaring that the concession agreement was unconstitutional and void as against public policy on the ground that pursuant to section 1.1 of the agreement, the City had contracted away its nondelegable police powers to a private entity, CLP, to direct and regulate the location, use, and construction of public parking garages. Plaintiffs sought to enjoin the city comptroller from making any expenditures of public funds under the agreement.

¶ 14 However, if, as plaintiffs have alleged, section 1.1 of the concession agreement actually constrains and chills the City from exercising its police powers in issuing licenses for new public parking garages within the Competing Parking Area, then the City would not be required to compensate CLP under the terms of the agreement; and because the City would not be required to compensate CLP, then there would be no expenditures to enjoin and thus no basis for an injunction.

¶ 15 Under section 1.1 of the concession agreement, the City is only required to compensate CLP if the City builds competing public parking garages or issues licenses for new public parking garages within the Competing Parking Area that diminish the value of the revenue stream of the Parking System. Contrary to plaintiffs' complaint, payment of such compensation would actually constitute evidence demonstrating that the City was not in fact chilled from exercising its police or regulatory powers concerning public parking garages.

¶ 16 In order for a taxpayer to have standing to challenge a municipal action, the taxpayer must have sustained, or be in imminent danger of sustaining, a concrete injury in fact as a result of the challenged action. *Tarkowski v. Scott*, 79 Ill. App. 3d 787, 790 (1979). Here, plaintiffs have not pled they are in actual or imminent danger of sustaining taxpayer liability to replenish the public treasury for any identified deficiencies allegedly caused by the enforcement of section

1.1 of the concession agreement. Our supreme court has determined that the "mere possibility" that taxpayers may someday be required to "make up a deficiency in public funds" caused by alleged illegal expenditures "is not sufficient" to support a taxpayer suit. *Dudick v. Baumann*, 349 Ill. 46, 50-51 (1932).

¶ 17 The only expenditure plaintiffs identify as possibly being imminent is a $58 million binding arbitration award the City was required to pay CLP as a result of the City engaging in a competing parking action by issuing a license to a developer who constructed a public parking garage known as the "Aqua garage" within the competing parking area. See *City of Chicago v. Chicago Loop Parking LLC*, 2014 IL App (1st) 133020, ¶ 20. However, this arbitration award does not qualify as an expenditure amounting to an injury sufficient to support plaintiffs' asserted home-rule challenge to section 1.1 of the concession agreement because the award was triggered by the City's exercise of its police and regulatory powers which refutes the plaintiffs' allegations and its basis for bringing suit that the concession agreement chilled the City from exercising these powers. This finding is supported by our decision in *Independent Voters of Illinois Independent Precinct Organization v. Ahmad*, 2014 IL App (1st) 123629, ¶ 81, where we determined that compensation payments made by the City to a private entity pursuant to a concession agreement similar to the one at issue in this case constituted evidence that the City was not chilled in exercising its police powers over the parking meter system.

¶ 18 Plaintiffs also lacked derivative taxpayer standing to challenge section 1.1 of the concession agreement as violative of section 6(a) of article VII of the Illinois Constitution of 1970. A taxpayer derivative action is an action brought by a taxpayer on behalf of a local governmental unit to enforce a cause of action belonging to that governmental unit. *Scachitti*, 215 Ill. 2d at 494. The basis of the derivative action is that the governmental unit has been

injured and has the primary right to proceed but has refused to bring the action. *Metropolitan Sanitary District of Greater Chicago v. Ingram Corporation*, 85 Ill. 2d 458, 468-69 (1981). The taxpayer subsequently brings the action because the governmental unit failed to exercise its own right to sue. See *Feen v. Ray*, 109 Ill. 2d 339, 346 ("It is a requirement of all taxpayer derivative suits that the governmental entity refused taxpayers' requests to enforce on its own the entity's cause of action"). " 'The claimed injury [in a taxpayer derivative action] is not personal to the taxpayers, but rather impacts the governmental entity on whose behalf the action is brought.' " *Scachitti*, 215 Ill. 2d at 494 (quoting *Lyons v. Ryan*, 201 Ill. 2d 529, 535 (2002)).

¶ 19 In this case, plaintiffs' complaint does not allege they are seeking, on behalf of the City, a refund of any amount paid by the City to CLP, or even that the City has ever paid any amount to CLP. Rather, the complaint alleges that the plaintiffs have taxpayer derivative standing to seek, on behalf of the City, an injunction prohibiting CLP from accepting any compensation that the concession agreement might require the City to pay to CLP in the future. However, our supreme court has determined that "[i]t is a fundamental principal of equity that to entitle one to permanent injunctive relief he must establish actual and substantial injury and not merely technical, inconsequential, or speculative damage." *Barco Manufacturing Co. v. Wright*, 10 Ill. 2d 157, 166 (1956). As we have discussed, plaintiffs do not assert a basis for granting injunctive relief. In sum, the plaintiffs' complaint does not contain allegations supporting their assertion of taxpayer derivative standing.

¶ 20 Based on the foregoing, we conclude the circuit court did not err by dismissing the plaintiffs' complaint on the grounds that they lacked both direct and derivative taxpayer standing to challenge section 1.1 of the concession agreement as violative of section 6(a) of article VII of the Illinois Constitution (Ill. Const.1970, art. VII, § 6(a)). "In light of our conclusion regarding

plaintiff[s'] lack of standing to maintain this action we need not consider the other contentions advanced by the parties." *Tarkowski*, 79 Ill. App. 3d at 790. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.