2014 IL App (4th) 120460-U

NO. 4-12-0460

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 22, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. THE DEPARTMENT OF LABOR, Plaintiff-Appellee, v. KETTERMAN COMMUNICATIONS, INC., Defendant-Appellant.	))))))))	Appeal from Circuit Court of Champaign County No. 11MR625 Honorable Charles McRae Leonhard, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court lifted the stay on proceedings and affirmed, concluding the court did not err in dismissing defendant's petition for declaratory judgment and injunctive relief.

¶ 2 In December 2011, defendant, Ketterman Communications, Inc. (Ketterman), filed a petition for declaratory judgment and injunctive relief against plaintiff, the Department of Labor (Department), seeking to prohibit the Department from investigating Ketterman for a violation of the Employee Classification Act (Act) (820 ILCS 185/1 to 999 (West 2010)). Ketterman's petition alleged the Act was unconstitutional both facially and as applied to Ketterman because the company did not engage in construction as defined by the Act. In February 2012, the Department filed a combined motion to dismiss Ketterman's petition pursuant to section 2-619.1 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-619.1 (West 2012)). Following an April 2012 hearing, the court granted the Department's motion to dismiss

under the section 2-615 portion of the motion, finding Ketterman's petition failed, on its face, to state a cause of action.

¶ 3 Ketterman appeals, asserting the trial court erred in dismissing its petition for declaratory judgment and injunctive relief. Specifically, Ketterman argues it stated a claim for relief because (1) the Department's enforcement of the Act violated Ketterman's right to due process, and (2) the Act is unconstitutional both facially and as applied.

¶ 4 For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Illinois Employee Classification Act

¶ 7 Ketterman initially brought its claim and this appeal attacking the constitutionality of the 2008 version of the Act (2008 Act) (Pub. Act 95-26 (eff. Jan 1, 2008) (adding 820 ILCS 185/1 to 999)). However, during the pendency of this appeal, the General Assembly substantially amended provisions of the Act at issue in this case (2014 Act) (Pub. Act 98-106, § 5 (eff. Jan. 1, 2014) (amending 820 ILCS 185/25)). Due to the importance of both the 2008 Act and the 2014 Act to this analysis, we summarize those relevant provisions here.

¶ 8 1. *The 2008 Act*

¶ 9 In 2008, the General Assembly created the Act for the purpose of "address[ing] the practice of misclassifying employees as independent contractors." 820 ILCS 185/3 (West 2010). The Act requires proper classification of employees performing construction services and, to that end, offers an expansive definition of work that falls under the category of "construction." 820 ILCS 185/5 (West 2010).

¶ 10 Where the Department has a reasonable belief that an employer has misclassified one or more employees under the Act, it possesses the authority "to conduct investigations in

connection with the administration and enforcement of this Act." 820 ILCS 185/25(a) (West 2010). Accordingly, "any investigator with the Department shall be authorized to visit and inspect, at all reasonable times, any places covered by this Act and shall be authorized to inspect, at all reasonable times, documents related to the determination of whether an individual is an employee" covered under the Act. 820 ILCS 185/25(a) (West 2010). Moreover, "[t]he Director of Labor or his or her representative may compel, by subpoena, the attendance and testimony of witnesses and the production of books, payrolls, records, papers, and other evidence in any investigation and may administer oaths to witnesses." 820 ILCS 185/25(a) (West 2010).

¶ 11 Under the 2008 Act, if an investigation revealed a violation of the Act, the Department possessed the authority to: "(i) issue and cause to be served on any party an order to cease and desist from further violation of the Act, (ii) take affirmative or other action as deemed reasonable to eliminate the effect of the violation, (iii) collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to the individual, and (iv) assess any civil penalty allowed by this Act." 820 ILCS 185/25(b) (West 2010).

¶ 12 2. *The 2014 Act*

¶ 13 In January 2014, during the pendency of this appeal, the amended 2014 Act became effective. Pub. Act 98-106, § 5 (eff. Jan. 1, 2014) (amending 820 ILCS 185/25). Relevant to this matter, the 2014 Act amended the enforcement proceedings contained in section 25 of the Act. First, the 2014 Act added language to section 25(a), which now requires, "[w]ithin 120 days of the filing of a complaint, the Department shall notify the employer in writing of the filing of a complaint and provide the employer the location and approximate date of the project or projects, affected contractors, and the nature of the allegations being investigated." 820 ILCS 185/25(a) (West Supp. 2013). Additionally, the 2014 Act added subsection (c), which provides,

> "[i]f, upon investigation, the Department finds cause to believe that Section 20 or Section 55 of this Act has been violated, the Department shall notify the employer, in writing, of its finding and any proposed relief due and penalties assessed and that the matter will be referred to an Administrative Law Judge to schedule a formal hearing in accordance with the Illinois Administrative Procedure Act." 820 ILCS 185/25(c) (West Supp. 2013).

¶ 14 B. Procedural History

¶ 15 On February 5, 2010, the Department sent a letter to Ketterman, a company that specializes in satellite-dish installation, requesting records pursuant to section 25 of the Act (820 ILCS 185/25 (West 2010)). The letter alleged Ketterman violated the Act "by misclassifying one or more individuals performing Dish Network satellite installation and services on your behalf in connection with new commercial/residential construction." Citing its authority under the Act, the Department requested Ketterman provide, within 15 days, all records with regard to "the individual(s) performing services, including but not limited to (1) their names, addresses, phone numbers and social security numbers; (2) any/all written agreements or contracts [Ketterman has] with them; (3) any/all records of days/hours worked; (4) any/all payroll or payment records; and (5) any federal and state documents related to the individuals performing services."

¶ 16 On February 16, 2010, Ketterman contacted the Department to assert (1) satellite-dish installation was not covered by the Act, and (2) the letter from the Department failed to identify the specific projects for which Ketterman needed to supply records. On July 14, 2010, the Department responded, stating (1) satellite-dish installation fell under the definition of "construction," and (2) the broad scope of records requested was necessary to the Department's

investigation. Ketterman failed to supply the requested records. On October 4, 2010, the Department sent a second request for records. This request limited the time frame to encompass records from 2009 through 2010; otherwise, the second request was identical to the first. Again, Ketterman declined to supply the requested records.

¶ 17 On January 31, 2011, the Department issued a subpoena *duces tecum* demanding any and all records pertaining to Ketterman's satellite-dish installations from January 2008 through "present." In March 2011, the Department modified the subpoena via e-mail, demanding only those documents regarding employees who engaged in satellite-dish installation for Ketterman in 2009. Ketterman failed to comply with the subpoena.

¶ 18 On July 19, 2011, the Department filed a verified complaint for adjudication of civil contempt, requesting sanctions for Ketterman's failure to comply with the subpoena. Ketterman, in turn, filed a December 2011 joint answer and petition for declaratory judgment and injunctive relief. Ketterman's petition requested declaratory judgment and injunctive relief, asserting satellite-dish installation does not constitute "construction" as defined by the Act; therefore, the Act was inapplicable to Ketterman. Moreover, Ketterman contended the Department violated Ketterman's right to due process because (1) absent from the Act was language requiring the Department to disclose the nature of the investigation; (2) the Department failed to provide specific information regarding the investigation; (3) the Act contained no provisions granting Ketterman the opportunity to be heard; and (4) the Act authorized the Department to investigate and adjudicate without a hearing. Additionally, Ketterman complained the Act was "impermissibly vague in that there is no means by which [Ketterman] can know in advance whether it has complied with the Act because Ketterman is not in a position to access much of the information required under the Act." Finally, Ketterman alleged the

Department had no jurisdiction over Ketterman because those who contracted with Ketterman were not covered by the Act. In its request for injunctive relief, Ketterman claimed immediate and irreparable harm if forced to comply with the subpoena, citing the reasons enumerated above to explain a reasonable likelihood of success on the merits.

¶ 19 In February 2012, the Department filed a motion to dismiss Ketterman's petition for declaratory judgment and injunctive relief pursuant to section 2-619.1 of the Civil Code (735 ILCS 5/2-619.1 (West 2012)). Under the section 2-615 portion of the motion to dismiss, the Department asserted (1) Ketterman failed to plead sufficient facts to bring forth a claim; (2) the Act was constitutional; (3) the Act complied with the Administrative Procedure Act (5 ILCS 100/1-1 to 90 (West 2012)); (4) the Act was not unconstitutionally vague; and (5) Ketterman failed to demonstrate it was entitled to injunctive relief. Under the section 2-619 portion of its motion to dismiss, the Department argued the trial court lacked subject-matter jurisdiction over Ketterman's claim.

¶ 20 In April 2012, the trial court heard arguments with regard to the Department's motion to dismiss Ketterman's petition for injunctive and declaratory relief. Later that month, the court issued a written order granting the Department's motion to dismiss under the section 2-615 portion of the motion. The court found Ketterman's petition failed to demonstrate (1) it was entitled to the relief requested, (2) it had been deprived of due process during the Department's investigatory phase, and (3) the Act was unconstitutional on its face or as applied. Further, the court noted any issues with regard to the validity of the Department's subpoena must be pursued under the provisions provided by the Act. In its supporting memorandum, the court concluded the issue of whether Ketterman engaged in "construction," thus placing it under the auspices of the Act, was an issue not ripe for adjudication; rather, Ketterman needed to raise the

issue with the Department during administrative proceedings. The court wrote, "a court order forbidding the Department to conduct its investigation in the first instance is simply not a remedy available to Ketterman" where the Act granted the Department the authority to investigate. Accordingly, the court granted the Department's motion to dismiss pursuant to section 2-615 of the Civil Code. Ketterman filed a timely notice of appeal.

¶ 21 In April 2013, this court granted the parties' motion to stay the appeal pending an Illinois Supreme Court decision in *Bartlow v. Costigan*, 2014 IL 115152, 13 N.E.3d 1216. In the meantime, the General Assembly enacted the 2014 Act, which amended the 2008 Act. We subsequently provided the parties with an opportunity to file supplemental briefs incorporating *Bartlow* and the 2014 Act. Now that briefing is complete, we order the stay lifted on these proceedings.

¶ 22 II. ANALYSIS

¶ 23 On appeal, Ketterman asserts the trial court erred in dismissing its petition for declaratory judgment and injunctive relief. Specifically, Ketterman argues it stated a claim for relief because (1) the Department's enforcement of the Act violated Ketterman's right to due process, and (2) the Act is unconstitutional both facially and as applied.

¶ 24 The trial court dismissed Ketterman's petition pursuant to section 2-615 of the Civil Code (735 ILCS 5/2-615 (West 2010)). A motion to dismiss under section 2-615 "tests the legal sufficiency of the complaint based on defects apparent on its face." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. In other words, a section 2-615 motion to dismiss "presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a

cause of action upon which relief may be granted." *Id.* We review the court's dismissal *de novo*. *Id.* Additionally, we review *de novo* the constitutional issues raised by Ketterman. *World Painting Co. v. Costigan*, 2012 IL App (4th) 110869, ¶ 12, 967 N.E.2d 485.

¶ 25 The question before this court is whether the trial court erred in dismissing Ketterman's petition for declaratory relief and a preliminary injunction. "A preliminary injunction is an 'extraordinary' remedy that 'should be granted only in situations of extreme emergency or where serious harm would result if the preliminary injunction was not issued.' " *Id.* ¶ 11, 967 N.E.2d 485 (quoting *Clinton Landfill, Inc. v. Mahomet Valley Water Authority*, 406 Ill. App. 3d 374, 378, 943 N.E.2d 725, 729 (2010)). A preliminary injunction is appropriate where "(1) a clearly ascertained right requires protection, (2) irreparable injury will result in the absence of an injunction, (3) no adequate remedy at law is available, and (4) the moving party is likely to succeed on the merits of the case." *Id.*

¶ 26 We now turn to whether Ketterman's motion for declaratory relief and preliminary injunction stated a cause of action sufficient to overcome the Department's motion to dismiss.

¶ 27 A. Due-Process Challenge

¶ 28 Ketterman first asserts the trial court erred by granting the Department's motion to dismiss because Ketterman stated a sufficient cause of action challenging the Act on due-process grounds pursuant to the United States and Illinois Constitutions. See U.S. Const., amend. XIV, Ill. Const. 1970, art. I, § 2. In *World Painting Co.*, this court examined the due-process rights of an employer during the investigatory stage of proceedings under the Act. *World Painting Co.*, 2012 IL App (4th) 110869, ¶ 15, 967 N.E.2d 485. In that case, filed under the 2008 Act, the Department and the plaintiff had agreed the Department could investigate potential violations but could not make any adjudicatory findings regarding the plaintiff's liability. *Id.* ¶ 24, 967 N.E.2d

485. This court noted, generally speaking, "the constitutional guarantee of due process, along with its requirements of notice and an opportunity to be heard, is not even implicated by an executive action that cannot result in an administrative adjudication of rights." *Id*. ¶ 15, 967 N.E.2d 485. Ultimately, this court concluded the Act did not violate the plaintiff's right to due process during the investigatory phase because the Department lacked the authority to adjudicate the plaintiff's liability. *Id*. ¶ 24, 967 N.E.2d 485.

¶ 29 Although such an agreement was not reached between the parties in this case, the 2014 Act provides those same protections. The 2014 Act authorizes the Department to investigate any alleged violations of the Act, including inspecting businesses, issuing subpoenas for documentation, and compelling testimony from witnesses. 820 ILCS 185/25(a) (West Supp. 2013). However, under the 2014 Act, the Department lacks the authority to adjudicate an employer's liability; rather, an administrative law judge must make that determination. 820 ILCS 185/25(c) (West Supp. 2013). The Department concedes the 2014 Act would apply to any prospective adjudication against Ketterman if the investigation revealed Ketterman violated the Act. See *Bartlow*, 2014 IL 115152, ¶ 31, 13 N.E.3d 1216. Thus, the Department cannot enforce any provisions against Ketterman until after the administrative law judge issues a ruling in favor of the Department. 820 ILCS 185/25(c) (West Supp. 2013). As the Department could only investigate—not adjudicate—Ketterman, we conclude no process was due during the investigatory stage.

¶ 30 Moreover, Ketterman's challenge to the Department's subpoena would be more appropriately raised in a motion to quash the subpoena, a course of action Ketterman agrees it could still pursue. By doing so, Ketterman could present its challenges as to the breadth of the subpoena and allow the trial court to determine whether the subpoena complies with the Act.

¶ 31 Accordingly, Ketterman's petition for declaratory relief and a preliminary injunction failed to state a cause of action on this issue because Ketterman did not demonstrate it had a clearly ascertained right to due process requiring protection during the investigatory stage of proceedings.

¶ 32 B. Challenge to the Act's Constitutionality

¶ 33 Ketterman next contends the trial court erred in finding the petition for declaratory relief and a preliminary injunction failed to state a cause of action because the Act is unconstitutional, both on its face and as applied. However, before reaching an analysis of the Act's constitutionality, we first must determine whether Ketterman's challenge at this stage in the proceedings violates the separation-of-powers doctrine. Ill. Const. 1970, art. II, § 1.

¶ 34 In issuing its thorough, well-written order dismissing Ketterman's petition, the trial court stated,

> "[T]he Department presently has reason to believe that Ketterman *is* subject to the terms of the Act and is conducting *an investigation of a reported violation.* This central dispute—whether Ketterman engaged in "construction" as defined in the Act—is presently beyond the scrutiny of a court in the context of Ketterman's prayers for injunctive and declaratory relief." (Emphases in original.)

The court further determined it was not "within the province of the court to grant preemptive declaratory relief to the effect that Ketterman was not or is not engaged in 'construction' under the Act" because doing so "would impede or pretermit the exercise of lawful authority properly delegated to the Department and would cause the court to cross boundaries of judicial authority

clearly established by the Illinois Constitution." We agree and thank the trial court for its illuminating written order in this matter.

¶ 35 The Illinois Constitution provides, "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. These powers are not specifically defined, but the purpose of the separation-of-powers provision "is to ensure that the whole power of two or more branches of government shall not reside in the same hands." *People v. Hammond*, 2011 IL 110044, ¶ 51, 959 N.E.2d 29. The legislative branch possesses the inherent power to investigate. See *Murphy v. Collins*, 20 Ill. App. 3d 181, 201, 312 N.E.2d 772, 787 (1974); Ill. Const. 1970, art. IV, § 7. When enacting a statute, the legislature "may delegate to others the power to implement the statute which it could itself execute but cannot advantageously or understandingly effect itself." *Alexander v. Director, Department of Agriculture*, 111 Ill. App. 3d 927, 932, 444 N.E.2d 811, 815 (1983).

¶ 36 Here, the legislature delegated to the Department its inherent investigatory power to implement the statute. 820 ILCS 185/25 (West 2010). Ketterman now argues we should enjoin that investigatory power by finding the statute unconstitutional both on its face and as applied. In furthering this argument, Ketterman does not argue the legislative delegation of power was unconstitutional or invalid. Therefore, we decline to encroach upon the Department's lawful exercise of its legislatively authorized power to investigate and issue subpoenas. However, that is not to say Ketterman cannot challenge the constitutionality of the Act at a more appropriate stage of these proceedings.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we lift the stay on the appellate court proceedings and affirm the trial court's judgment.

¶ 39 Affirmed.