

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

CIVIL ACTION: 2018CP3100047

Kevin Cox, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery,

Defendant.

ORDER GRANTING DEFENDANT SOUTH CAROLINA EDUCATION LOTTERY COMMISSION'S MOTION TO DISMISS

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SC Court of Appeals

This matter comes before the Court on Defendant South Carolina Education Lottery Commission's ("SCEL" or "the Commission") Motion to Dismiss, which was heard before the undersigned on July 30, 2018. After carefully reviewing the pleadings, motions, memoranda, and applicable case law, this Court GRANTS SCEL's Motion to Dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges he purchased five Mega Millions® lottery tickets on March 25, 2016, and upon reviewing the tickets that evening, discovered four of them bore duplicate numbers. On February 20, 2018, Plaintiff filed this lawsuit alleging causes of action against SCEL for unjust enrichment, breach of contract and/or breach of implied contract, promissory estoppel, and violations of the Unfair Trade Practices Act. The Complaint does not allege Plaintiff alerted the retailer or the Commission of the alleged duplication prior to the Mega Millions® drawing, nor does it allege that Plaintiff exhausted his administrative remedies prior to filing this suit against SCEL. The SCEL moved to dismiss the suit, arguing in part that Plaintiff (and the putative class members) had failed to exhaust their administrative remedies prior to filing suit.

Plaintiff filed an Amended Complaint on June 7, 2018, adding a defendant (namely, Intralot, Inc., the contractor providing equipment and operation of some of SCEL's lottery games) and a new

cause of action for Negligence and/or Gross Negligence against that defendant.¹ This Court heard arguments on the Defendants' Motions to Dismiss on July 30, 2018.

ANALYSIS

SCEL argues the suit should be dismissed because Plaintiff has not alleged he has exhausted his administrative remedies. The Court agrees. Under the regulations promulgated by the SCEL, a person aggrieved by an action or decision of the Commission must first file a formal written complaint with the Commission's Executive Director. *See* SCEL Complaint Procedure ¶ A; *see also* S.C. Code of Regs. § 44-70(F). If the player is dissatisfied with the Executive Director's final, written decision, he must seek a hearing before the Board. *See* SCEL Complaint Procedure ¶¶ L-M; *see also* S.C. Code of Regs. § 44-70(F). If the player finds the Board's final, written decision unpalatable, his appeal must be taken to the ALC. *See* S.C. Code Ann. § 59-150-300(A). Only *after* the ALC rules may the matter be taken to the Circuit Court. *Id.* § 59-150-300(D). Mr. Cox did not complete this process.

The Court recognizes the general rule that administrative remedies must be exhausted absent circumstances supporting an exception to the general rule. *Hyde v. South Carolina Dept. of Mental Health*, 314 S.C. 207, 209, 442 S.E.2d 582, 583 (1994); *see also* S.C. Code Ann. § 1-23-380 ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1."). Plaintiff argues the Education Lottery statute permits, but does not mandate, an exclusive administrative remedy. While Plaintiff is correct that the statute uses permissive rather than mandatory language, the Supreme Court has previously required exhaustion where there is an adequate administrative remedy, and where the statute did not expressly require it. *Hyde*, 314 S.C. at

¹ Plaintiff also filed an Amended Complaint on June 18, 2018, which appears to be identical to the one filed on June 7, 2018, and whose signature block bears the date of June 7, 2018.

209, 442 S.E.2d at 583 (“We find the trial judge abused his discretion in finding as a matter of law that Hyde did not have to exhaust administrative remedies simply because the Whistleblower Statute does not expressly require it.”). Exhaustion is required here.

Further, Mr. Cox’s failure to exhaust his administrative remedies is not excused by the “futility” exception to the exhaustion requirement. South Carolina recognizes exceptions to the exhaustion of administrative remedies requirement. This exception exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act. *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (2010): “Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a ‘hard and fast position that makes an adverse ruling a certainty.’” *Id.* at 54, 697 S.E.2d at 611. The burden of proving futility is on the party seeking to avoid exhausting his administrative remedies. *See Stanton v. Town of Pawley’s Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1993) (“Stanton must show that as a matter of law, he was not required to exhaust administrative remedies”) (emphasis added); *S.C. Self Storage Ass’n v. City of Forest Acres*, No. 2007-CP-40-00316, 2010 WL 9499364, at *8 (S.C. Ct. Comm. Pl., Hon. J. Michelle Childs, April 13, 2010) (“The Court finds Plaintiffs cannot claim that an exhaustion of administrative remedies would have been in vain or futile because Plaintiffs have not met their burden of demonstrating that the procedures set forth in the challenged Ordinances would definitely result in an adverse ruling.”) (emphasis added). Even if Plaintiff had alleged that the SCEL would reach an adverse result in an administrative review, his complaint does not allege or show the exhaustion of the *entire* administrative process would be futile. This is because the efficacy or futility of a multi-level administrative process must be viewed *as a whole*. Not until a complainant has either completed each level of the review process or has proven that *each level*—including intra-agency appeal *and* an appeal to the Administrative Law Court—would be futile has he exhausted his administrative remedies or excused his failure to do so. *See Steele v. Benjamin*, 362 S.C. 66, 606 S.E.2d 499 (Ct.

App. 2004) (affirming the trial court's dismissal of plaintiff's suit, holding that by failing to appeal the agency's decision to the ALC, the plaintiff failed to exhaust his administrative remedies); *S.C. Dept. of Health & Env. Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987) (reversing a trial judge who had "determined that he could pass upon the merits of Armstrong's entitlement to a permit without requiring Armstrong to *complete* the administrative process") (emphasis added); *Booker v. S.C. Dept. of Corrections*, No. 2011-CP-10-08774, 2013 WL 10533559 (S.C. Ct. of Comm. Pleas, Hon. R. Markley Dennis, Jr., March 1, 2013) (noting that if an aggrieved party is unsatisfied with the outcome of an internal agency grievance process, "the final administrative remedy available to him is a review by the South Carolina Administrative Law Court," and he "has not exhausted all administrative remedies unless and until he has completed Step 1, Step 2, and has received an administrative review and decision by the ALC."); *cf.* S.C. Code Ann. § 1-23-380 ("A party who has exhausted *all* administrative remedies available within the agency and who is aggrieved by a *final* decision in a contested case is entitled to judicial review . . .") (emphasis added).²

Furthermore, the statutory requirement that aggrieved ticket holders must exhaust the entire administrative review process applies equally to individual claimants and to putative classes of claimants. Stated differently, the fact that Mr. Cox has asserted this suit as a putative class action does

² Courts of other jurisdictions agree that a person aggrieved by an administrative action must either complete each step of the administrative process or must show that *each step* of the process would be futile. *See Johnpoll v. Thornburgh*, 898 F.2d 849, 850 (2d Cir. 1990) (noting that "animosity by *one* case unit manager is not sufficient to show futility of the *entire* administrative process") (emphasis added); *Metz v. Veterinary Examining Bd.*, 741 N.W.2d 244, 250-51 (Wis. Ct. App. 2007) ("The exhaustion doctrine is typically applied when a party seeks judicial intervention before completing *all* the steps in the administrative process. [] The general rule in this situation is that a party must complete *all* administrative proceedings before coming into court.") (citations omitted; emphasis added).

not excuse him (or the putative class members) from the requirement of exhaustion. The relevant statutes contain no class exception to the exhaustion requirement. *See* S.C. Code Ann. § 59-150-300; *id.* at §§ 59-150-60, -70(D), -90(A), -230(A), and -240(C). Where, as here, a “statute’s meaning is clear on its face, . . . this court has no right to impose another meaning.” *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 597–98, 654 S.E.2d 284, 289 (Ct. App. 2007).

The process by which a ticket holder may challenge the Commission’s actions or decisions is a multi-step administrative process including both intra-agency review *and* an appeal to the Administrative Law Court. Mr. Cox did not even allege that he has followed the procedures for administrative review and has not presented argument or information that doing so would result in an adverse ruling at all levels. There is nothing to suggest that the Administrative Law Court would not fairly and impartially analyze the case. Accordingly, Plaintiff has not exhausted his administrative remedies, nor has he met his burden to prove the *entirety* of the administrative review process would be futile.

CONCLUSION

Plaintiff has neither exhausted his administrative remedies nor excused his failure to do so. Accordingly, the Court concludes the lawsuit must be dismissed. Because dismissal of the suit is warranted for the foregoing reason, this Court need not rule on the other bases for dismissal asserted by the SCEL. This Court **GRANTS** SCEL’s Motion to Dismiss.

IT IS SO ORDERED.

Hon. Kristi F. Curtis, Circuit Court Judge

February ____, 2019
Sumter, South Carolina



Lee Common Pleas

Case Caption: Kevin Cox VS South Carolina Education Lottery Commission ,
defendant, et al
Case Number: 2018CP3100047
Type: Order/Dismissal

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762