

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION: 2018CP4300138

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Plaintiffs,

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

vs.

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SC Court of Appeals

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery, and Intralot, Inc.

Defendants.

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. This Court issued an Order on the Motion on January 4, 2019. SCEL subsequently filed a Motion to Alter or Amend. After carefully reviewing the Motion to Alter or Amend, the pleadings, other motions, memoranda, and applicable case law, this Court GRANTS SCEL's Rule 59 Motion to Alter or Amend.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that they are purchasers of "Holiday Add-A-Play" lottery tickets sold by various retailers on Christmas Day of 2017. Plaintiffs allege the game was shut down on the evening of December 25, 2017 after a two-hour system-wide event in which nearly every player appeared to receive a "winning" ticket. Plaintiffs further allege that the lottery players who attempted to cash in their apparently winning tickets received slips stating, "Transaction not allowed." Plaintiffs subsequently filed this lawsuit alleging causes of action against SCEL for

unjust enrichment, breach of contract, breach of implied contract, promissory estoppel, and violations of the Unfair Trade Practices Act.

SCEL moved to dismiss the suit, arguing in part that Plaintiffs had failed to exhaust their administrative remedies prior to filing suit. Plaintiffs' counsel subsequently wrote the Commission on behalf of Plaintiffs to initiate an administrative grievance or review regarding the Add-A-Play incident. A few days later, the Commission's Board received and adopted a report and findings prepared by a forensic consulting firm—Gaming Laboratories International—that SCEL had engaged to investigate the Add-A-Play incident. The report concluded that the tickets issued during the incident were issued or produced in error. As a result, the Commission determined it could not pay those tickets and informed each Plaintiff in writing of that decision. The Commission further advised Plaintiffs they could elect (i) to receive a refund for the ticket price, or (ii) to appeal the Board's decision to the Administrative Law Court as provided by law, or (iii) to submit any evidence not considered by the forensic consulting firm to the Commission for additional review.

ANALYSIS

SCEL argues the suit should be dismissed because Plaintiffs have not alleged they have exhausted their administrative remedies. The Court agrees. Under the regulations promulgated by the SCEL, the Executive Director of the Commission may deny awarding a prize to a claimant if the ticket is "printed or produced in error." S.C. Code of Regs. § 44-70(E). The Executive Director's decisions and judgments with respect to the determination of a winning ticket or any dispute arising from the payment or awarding of prizes are final, subject to an appeal to the Commission. S.C. Code of Regs. § 44-70(F).

Section 59-150-300 of the South Carolina Education Lottery Act sets forth the procedure for review of a decision by the SCEL Board of Commissioners. Section (A) states, a "lottery game ticket holder aggrieved by an action of the board may appeal that decision to the Administrative Law Judge

Division.” The ALJ Division may reverse the decision of the board only if the appellant proves the decision is “in violation of constitutional or statutory provisions, is in excess of the statutory authority of the board, is made upon unlawful procedure, is affected by an error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 59-150-300(B).

The Court recognizes that the general rule is 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). Plaintiffs argue that the Education Lottery statute permits, but does not mandate, an exclusive administrative remedy. While Plaintiffs are 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. *Id.* (“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.”).

Plaintiffs further argue in the alternative that they fall within the “futility” exception to the exhaustion requirement. South Carolina recognizes exceptions to the exhaustion of administrative remedies requirement. A recognized 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).

When Plaintiffs initially filed this suit, SCEL had not yet made a ruling as to whether it would honor the tickets. On May 30, 2018, however, SCEL issued a press release indicating the SCEL Board of Commissioners “voted to reimburse the purchase price paid by each Holiday Cash Add-A-Play ticketholder bought on December 25, 2017 on or after 5:51 p.m. because these tickets were produced or issued in error.” The fact that the Commission declined to pay the prizes, however, does not 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, if available, an appeal to the Administrative Law Court—would be futile had 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).¹

Furthermore, the statutory requirement that aggrieved ticket holders exhaust the entirety of the administrative review process applies equally to individual claimants and putative classes of claimants.² The relevant statutes contain no class exception to the exhaustion requirement. *See* S.C. Code Ann. § 59-150-300; *see also 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).

In sum, 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

¹ 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).

² No South Carolina case law supports the idea that a plaintiff may avoid a statutory exhaustion requirement by simply alleging a putative class action. Other courts have held exhaustion was required before a class of plaintiffs could bring an action for damages. *See e.g. Lopez v. Civil Serv. Comm’n*, 232 Cal. App.3d 307, 312 (Cal. Ct. App.—1st Div., 1991) (“The mere bringing of a class action is not ipso facto an exception to the exhaustion requirement. . . . *Morton v. Superior Court*, 9 Cal. App.3d 977 dispels any notion that class actions are *per se* exempt from the exhaustion requirement.”); *Bautista v. City of Yolo*, No. C039340, 2003 WL 22969353, at *4 (Cal. Ct. App.—3d Dist. 2003) (affirming dismissal of suit and noting that “*Rose* is of no help to plaintiffs” because “*Rose* arose in the context of a writ challenge to a PERS ruling, not a complaint for damages”).

the Administrative Law Court. Plaintiffs have not presented any argument or information to suggest that the Administrative Law Court cannot or will not analyze the matter impartially and fairly. Plaintiffs have not completed the steps within the administrative process, nor have they supported their burden to prove the entirety of the administrative review process would be futile.

CONCLUSION

Plaintiffs have neither exhausted their administrative remedies nor excused their 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 Commission. This Court **GRANTS** SCEL's Motion to Alter or Amend the prior Order and **GRANTS** SCEL's Motion to Dismiss.

IT IS SO ORDERED.

Hon. Kristi F. Curtis, Circuit Court Judge

February ____, 2019
Sumter, South Carolina



Sumter Common Pleas

Case Caption: Shardae Davis , plaintiff, et al VS South Carolina Education Lottery
Commission , defendant, et al
Case Number: 2018CP4300138
Type: Order/Dismissal

So Ordered

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