

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

ANGELS IN DISTRESS, a Florida non-profit corporation,

Plaintiff,

vs.

CASE NO. 06-CA-605

STATE OF FLORIDA,
FLORIDA FISH AND WILDLIFE
CONSEV A nON COMMISSION,

Defendant,

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MOTION TO DISMISS

COMES NOW the Defendant, Florida Fish and Wildlife Conservation Commission ("COMMISSION"), by and through the undersigned attorney, and pursuant to Rule 1.420, Florida Rules of Civil Procedure files this Motion to Dismiss, and in support thereof states:

1. Angels In Distress (hereinafter referred to as "AID") brought two counts against the Florida Fish and Wildlife Conservation Commission (hereinafter referred to as "FWC"), seeking declaratory judgment and injunctive relief.

2. AID is AID does not have standing to challenge FWC rules or policies pertaining to gopher tortoises, has plead no special injury or interest pertaining to gopher tortoises, and has failed to state any cause of action for which relief may be granted. The complaint in this matter should be dismissed with prejudice.

STATEMENTS OF LAW

3. Pursuant to Article IV, Section 9, Fla. Const., FWC has sole responsibility for the

regulation of wildlife in this state. FWC, which has a special competence in such regulation, is thereby responsible for all discretionary or planning decisions related to wildlife, and must weigh the competing demands and needs of the citizenry in its regulation.

4. Chapter 828, Florida Statutes provides for investigation of offenses thereunder only by law enforcement or, pursuant to section 828.03, F.S., by corporations duly approved by the mayor of the city wherein the corporation is located and may require other approvals depending on the geographic investigative area. Chapter 828, Florida Statutes does not provide any private right of civil prosecution.

5. Gopher tortoises are wildlife within the meaning of Article IV, Section 9, Fla. Const. The Legislature has passed no statute relating to gopher tortoises, and FWC's regulation thereof necessarily is derived from the Florida Constitution, not statutory authority. Section 120.54(1)(b)4, Florida Statutes, states that Chapter 120, Florida Statutes is applicable to "the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature." Therefore, FWC's regulation of gopher tortoises is not subject to challenge

6. Pursuant to Article II, Section 3, FWC exercises the executive and regulatory power of under Chapter 120, Florida Statutes. the State of Florida as regards gopher tortoises. That section further provides that "the legislature may enact laws in aid of the commission, not inconsistent with this section " The Legislature has declined to enact any laws relating to gopher tortoises or to species of special concerns. Hence, Chapter 327, Florida Statutes is inapplicable to FWC's regulation of gopher tortoises.

**AS TO DECLARATORY JUDGMENT
Standard**

7. To be entitled to declaratory relief, a party must show he is in doubt as to some right or status and that he is entitled to have such doubt removed. § 86.021, Fla. Stat. (2000); Kelner v. Woody, 399 So. 2d 35 (Fla. 3d DCA 1981)'at 37. The standard for testing the sufficiency of a declaratory judgment complaint is found in May v. Holley, 59 So. 2d 636 (Fla. 1952):

"Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is bona fide, actual, present practical need for declaration; that the declaration should deal with present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of complaining party is dependent on fact or law applicable to facts; that there is some person or persons who have, or reasonably may have actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity." at 639

8. Pursuant to section 86.101, Florida Statutes, the purpose of the declaratory judgment act "is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations "

9. As stated by the Florida Supreme Court in Readv v. Safeway Rock Company, 157 Fla. 27 (Fla. 1947):

"Viewed in its proper perspective, the declaratory judgments act is nothing more

than a legislative attempt to extend procedural remedies to comprehend relief in cases where technical or social advances have tended to obscure or place in doubt ones rights, immunities, status or privileges. It should be construed with this objective in view but it should not be permitted to foster frivolous or useless litigation to answer abstract questions to satisfy idle curiosity, go on a fishing expedition or to give judgments that serve no useful purpose." at p. 30.

10. In sum, the declaratory judgment act is intended to provide individuals clarification as to their rights and responsibilities under the law. The declaratory judgment act is not intended to provide a potential plaintiff with an advisory opinion so such plaintiff may determine whether or not a cause of action would likely succeed prior to filing such cause of action.

As to Chapter 828, Florida Statutes

11. AID has asserted that n[a]n actual, justiciable controversy exists between Plaintiff and Defendant whether permits issued by Defendant are valid and enforceable under Chapter 828, Florida Statutes."

12. Chapter 828, Florida Statutes is, by definition, a criminal statute which creates no private civil cause of action.

13. As stated by the Florida Supreme Court in Murthy v. North Sinha Corp., 644 So. 2d 983 (Fla. 1994):

" ... we agree that legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one. See In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130, 1137 (Fla.

1990); Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1981) ("Legislative intent is

- the pole star by which we must be guided in interpreting the provisions of a law.

)." at pp. 985, 986.

14. AID does not assert that Chapter 828, Florida Statutes creates a private civil cause of action. Indeed, such an assertion would be difficult to make in light of the provisions of section 828.03, Florida Statutes. That section provides, subject to the restrictions recited in section 828.03(2), Florida Statutes, that a count)' may "appoint agents" to investigate violations. Therefore, while expressly approving the appointment of agents for investigation, the statute fails to provide any civil cause of action.

15. AID does not allege that it has met the restrictions recited in 828.03(2), Florida Statutes, and may not therefore even engage "in investigation of violations under the statute.

16. AID's request for declaratory judgment regarding "whether permits issued by Defendant are valid and enforceable under Chapter 828, Florida Statutes" does not advise AID as to any right or responsibility pursuant to Chapter 828, Florida Statutes, as it has none. AID is not in doubt of its rights, immunities, status or privileges, and its request for declaratory judgment is simply an attempt to secure an "answer to questions propounded from curiosity." ~ at 639. Such a declaration would "serve no useful purpose" (Ready at 30) as AID has no private cause of action available to it.

As to Chapter 120, Florida Statutes

17. AID has asserted that "[a]n actual, justiciable controversy exists between Plaintiff and Defendant whether permits issued by Defendant are valid and enforceable under Chapter 120, Florida Statutes."

1990); Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1981) ("Legislative intent is

- the pole star by which we must be guided in interpreting the provisions of a law." at pp. 985, 986.

14. AID does not assert that Chapter 828, Florida Statutes creates a private civil cause of action. Indeed, such an assertion would be difficult to make in light of the provisions of section 828.03, Florida Statutes. That section provides, subject to the restrictions recited in section 828.03(2), Florida Statutes, that a county may "appoint agents" to investigate violations. Therefore, while expressly approving the appointment of agents for investigation, the statute fails to provide any civil cause of action.

15. AID does not allege that it has met the restrictions recited in 828.03(2), Florida Statutes, and may not therefore even engage in investigation of violations under the statute.

16. AID's request for declaratory judgment regarding "whether permits issued by Defendant are valid and enforceable under Chapter 828, Florida Statutes" does not advise AID as to any right or responsibility pursuant to Chapter 828, Florida Statutes, as it has none. AID is not in doubt of its rights, immunities, status or privileges, and its request for declaratory judgment is simply an attempt to secure an "answer to questions propounded from curiosity." ~ at 639. Such a declaration would "serve no useful purpose" (Ready at 30) as AID has no private cause of action available to it.

As to Chapter 120, Florida Statutes

17. AID has asserted that " [a]n actual, justiciable controversy exists between Plaintiff and Defendant whether permits issued by Defendant are valid and enforceable under Chapter 120, Florida Statutes."

18. Pursuant to Article IV, Section 9, Fla. Const., FWC has sole responsibility for the regulation of wildlife in this state.

19. Gopher tortoises are, indisputably, wildlife within the meaning of Rule 68A-1.004(89), F.A.C.

20. Section 120.54(1)(b)4, Florida Statutes, states that Chapter 120, Florida Statutes is applicable to "the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature."

21. As Chapter 120, Florida Statutes is not applicable to determine the validity of any rules of FWC concerning gopher tortoises, any declaration would "serve no useful purpose" (Ready at 30) and would simply be an "answer to questions propounded from curiosity." May at 639

As to Chapter 372, Florida Statutes

22. AID has asserted that "[a]n actual, justiciable controversy exists between Plaintiff and Defendant whether permits issued by Defendant are valid and enforceable under Chapter 372, Florida Statutes "

23. Pursuant to Article IV, Section 9, Fla. Const., FWC exercises the executive and regulatory power of the state with respect to wildlife in this state, including gopher tortoises. FWC has promulgated rules, including but not limited to Rules 68A-4.001 and 68A-27.005, Florida Administrative Code, to protect gopher tortoises. Gopher tortoises are, indisputably, wildlife within the meaning of Rule 68A-1.004(89), F.A.C.

25. As stated by the Florida Supreme Court in Florida Dept. of Revenue v. Howard, 916 So. 2d 640 (Fla. 2005), " ... we are obligated to accord legislative acts a presumption of

18. Pursuant to Article IV, Section 9, Fla. Const., FWC has sole responsibility for the regulation of wildlife in this state.

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21. As Chapter 120, Florida Statutes is not applicable to determine the validity of any rules of FWC concerning gopher tortoises, any declaration would "serve no useful purpose" (Ready at 30) and would simply be an "answer to questions propounded from curiosity." May at 639

As to Chapter 372, Florida Statutes

22. AID has asserted that "[a]n actual, justiciable controversy exists between Plaintiff and Defendant whether permits issued by Defendant are valid and enforceable under Chapter 372, Florida Statutes "

23. Pursuant to Article IV, Section 9, Fla. Const., FWC exercises the executive and regulatory power of the state with respect to wildlife in this state, including gopher tortoises. FWC has promulgated rules, including but not limited to Rules 68A-4.001 and 68A-27.005, Florida Administrative Code, to protect gopher tortoises. Gopher tortoises are, indisputably, wildlife within the meaning of Rule 68A-1.004(89), F.A.C.

25. As stated by the Florida Supreme Court in Florida Dept. of Revenue v. Howard, 916 So. 2d 640 (Fla. 2005), "we are obligated to accord legislative acts a presumption of

constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." at 642

26. There are no state statutes that pertain to or regulate gopher tortoises.

27. Therefore, FWC's rules and policies with respect to gopher tortoises are not in conflict with any state statute.

28. AID asserts that Chapter 372, Florida Statutes is applicable to FWC in its regulation of gopher tortoises. Such statute cannot, by law, relate to FWC's regulation of gopher tortoises unless the Legislature has violated Article II, Section 3 of the Florida Constitution.

29. As Chapter 372, Florida Statutes is not constitutionally applicable to activities concerning gopher tortoises, any declaration would "serve no useful purpose" (Ready at 30) and would simply be an "answer to questions propounded from curiosity." May at 639

As to Rule 68A-27.00S, Florida Administrative Code

30. AID has asserted that "[a]n actual, justiciable controversy exists between Plaintiff and Defendant whether permits issued by Defendant are valid and enforceable under ... [Rule] 68A-27.005(1)(a) [Florida Administrative Code]."

31. AID does not allege FWC has violated any portion of Rule 68A-27.005(1)(a), Florida Administrative Code, does not allege FWC failed to comply with the provisions of the Rule, does not allege the Rule is invalid or unconstitutional and does not allege FWC's actions are contrary to its duly adopted rule.

32. AID instead alleges that FWC has made an incorrect decision, and asks this Court to substitute its judgment for that of FWC.

33. AID is not in doubt as to the effect of the cited rule, it simply disagrees with FWC's decision under the rule.

34. As application of Rule 68A-27.005(1)(a), Florida Administrative Code is solely within the province of FWC under the Florida Constitution, any declaration would "serve no useful purpose" (Ready at 30) and would simply be an "answer to questions propounded from curiosity." May at 639

AS TO INJUNCTION
Sovereign Immunity and
Separation of Powers

35. Should this Court determine any of AID's requests are appropriate subjects for declarative or injunctive relief, the doctrines of sovereign immunity and separation of powers all compel dismissal of AID's complaint with prejudice.

As to Sovereign Immunity

36. Section 768.28(1), Fla. Stat. waives sovereign immunity, but only to the extent a private person would be liable i.e., if some duty of care was owed and alleged breached. In the instant case, no duty or any breach is alleged, so any tort allegations must fail. As to the requests for declaratory judgment, the Florida Supreme Court found in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985):

"Clearly, the legislature, commissions, boards, city councils, and executive officers, by their enactment of, or failure to enact, laws or regulations, or by their issuance of, or refusal to issue, licenses, permits, variances, or

directives, are acting pursuant to basic governmental functions performed by the legislative or executive branches of government. The judicial branch has no authority to interfere with the conduct of those functions unless they violate a constitutional or statutory provision. There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out these functions. These actions are inherent in the act of governing. " at 919, "
" citations omitted.

37. Under Trianon, FWC's regulatory function for the determination of entitlement to permits is immune from suit on the basis of sovereign immunity.

As to Separation of Powers

38. If FWC's activity of which AID complains were part of its statutory duties, the doctrines of primary jurisdiction and exhaustion of administrative remedies would counsel this Court to dismiss this matter, especially in light of AID's failure to seek relief from FWC. FWC's activity is, however, clearly under its constitutional duties, implicating the separation of powers doctrine.

39. AID makes no allegations that FWC's activities are unconstitutional, and does not ask this Court to rule upon the constitutionality of any rule or statute, nor upon the application of any rule or statute in any particular instance. AID has not asserted that FWC failed to take any action required under statute or rule. Instead, AID simply disagrees with the FWC's decisions as concern regulation of gopher tortoises.

40. As the Florida Supreme Court stated in Moffitt v. Willis, 459 So. 2d 1018 (Fla.

1984):

"It is the final product of the legislature that is subject to review by the court, not the internal procedures. As we stated in General Motors Acceptance Corp. v. State,] 52 Fla. 297, 303, 11 So. 2d 482, 485 (1945), the legislature has the power to enact measures, while the judiciary is restricted to the construction or interpretation thereof." at l 021.

41. Under its constitutional powers, FWC's rule has the effect of statute as regards gopher tortoise regulation .•

42. AID has not, as noted above, asked this Court to construe or interpret FWC's rules, nor has it asked this Court to rule on the constitutionality of its rules.

43. This Court is compelled to dismiss AID's complaint under the doctrine of separation of powers as "the preservation of the inherent powers of the three branches of government, free of encroachment or infringement by one upon the other, is essential to the effective operation of our constitutional system of government." In re Advisory Opinion to the Governor, 276 So. 2d 25, 30 (Fla. 1973).

CONCLUSION

44. AID lacks standing to request a declaratory judgment, and such judgment would "serve no useful purpose" (Ready at 30) and would simply be an "answer to questions propounded from curiosity." May at 639 Such requests should therefore be denied, and this complaint dismissed with prejudice.

45. AID has alleged no constitutional infirmity with FWC's policies and rules, has alleged no conflict with statute has alleged no cause of action against F\VC for which relief may

27.

be granted.

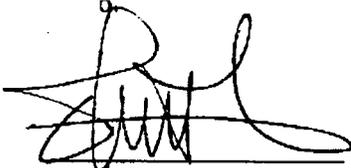
46. AID's request for injunction asks this Court to find FWC's internal procedures in it's regulation of gopher tortoises unwise, and enjoin FWC from exercising these internal procedures. AID has made no challenge to the constitutionality of FWC's regulation of gopher tortoises. This Court may not, under the separation of powers doctrine, review the internal procedures of FWC in its regulation of gopher tortoises. Accordingly, AID's request for injunction should be denied, and this complaint dismissed with prejudice.

Respectfully submitted this 3rd day ~

Elise Matthes 
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail to William L. Petros, Attorney for Plaintiff, 4090 Laguna Street, Second Floor, Coral Gables, Florida 33146, this 3rd day of April, 200


Elise Matthes