

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ILLINOIS STATE BAR ASSOCIATION,

Plaintiff,

v.

ILLINOIS DEPARTMENT OF
FINANCIAL AND PROFESSIONAL
REGULATION; BRYAN A.
SCHNEIDER, in his official capacity as
Secretary of the Illinois Department of
Financial and Professional Regulation;
and KREG T. ALLISON, in his official
capacity as Director of the Division of
Real Estate of the Illinois Department of
Financial and Professional Regulation,

Defendants.

Case No. 2017 CH 09418

Calendar 2
Courtroom 2601

Judge Raymond W. Mitchell

ORDER

This case is before the Court on Defendants Illinois Department of Financial and Professional Regulation, Bryan A. Schneider, and Kreg T. Allison's motion to dismiss and Plaintiff Illinois State Bar Association's motion for summary judgment. The motions present the following legal question: Does an attorney representing a client in a property tax proceeding violate the Appraisal Act and function as an unlicensed appraiser when he or she includes an analysis of comparable property valuations in a legal brief? This Court concludes that the answer to this question is "No" in light of Supreme Court precedent, the attorney's professional role in a property tax proceeding, and the text of the Appraisal Act.

I.

According to the facts alleged in the complaint, Plaintiff Illinois State Bar Association is a voluntary association of approximately 30,000 members, mostly lawyers, dedicated to promoting the interests of the legal profession. Approximately 400 ISBA members focus their practices on state and local taxation, including handling property tax matters. Defendant Illinois Department of Financial & Professional Regulation is an Illinois administrative agency with the statutory authority to regulate a number of professions, including real estate appraisers. Defendant Bryan A. Schneider is the Secretary of IDFPR and Defendant Kreg T. Allison is the Director of IDFPR's Division of Real Estate.

On April 3, 2017, IDFPR's Real Estate Division filed a complaint against ISBA member and Illinois licensed lawyer G. Terence Nader. The complaint was filed on the grounds that Nader had engaged in the unlicensed appraisal of real estate. It alleged that when filing a brief during a real estate tax assessment appeal to the Property Tax Appeals Board, Nader completed an appraisal by comparing the value of property at issue to other similar properties. Section 1910.65(c) of the Appeals Board Regulation states:

Proof of the market value of the subject property may consist of the following:

- 1) an appraisal of the subject property as of the assessment date at issue;
- 2) a recent sale of the subject property;
- 3) documentation evidencing cost of construction . . . ; or
- 4) documentation of not fewer than three recent sales of suggested comparable properties together with documentation of the similarity, proximity, and lack of distinguishing characteristics of the sales comparables to the subject property.

86 Ill. Admin. Code § 1910.65(c). Nader provided information regarding seven properties and argued that the property at issue should receive a lower assessed valuation based on the comparisons.

On April 20, 2017, IDFPR's Real Estate Division filed a complaint against ISBA member and Illinois licensed lawyer David Robert Bass alleging that Bass had engaged in an unlicensed appraisal when filing a brief during a real estate assessment proceeding that used an income approach valuation to estimate a property value. Rule 9 of the DuPage Board of Review requires the party seeking a modification of their income-producing property to submit "three concurrent years of operating statements, current leases and rent rolls." Rule 10 states that the party "[b]e prepared to discuss the fair cash value of the property as of January 1, of the assessment year in question." In both cases, the information contained within the briefs did not claim to be established by an appraiser nor did the briefs claim to contain an appraisal. Neither attorney claimed to be a licensed appraiser.

The IDFPR charged both attorneys with violating section 5-5 of the Appraisal Act, which states in part:

- (a) It is unlawful for a person to (i) act [or] offer services . . . as a State certified general real estate appraiser, State certified residential real estate appraiser, or associate real estate trainee appraiser, (ii) develop a real estate appraisal, [or] (iii) practice as

a real estate appraiser . . . without a license issued under this Act.

225 ILCS 458/5-5. "Appraiser" is defined as "a person who performs real estate or real property appraisals." 225 ILCS 458/1-10. "Appraisal" is defined as "(noun) the act or process of developing an opinion of value; an opinion of value (adjective) of or pertaining to appraising and related functions, such as appraisal practice or appraisal services." *Id.*

ISBA filed the instant case to enjoin IDFP from prosecuting Illinois lawyers for such activities completed in connection with real estate tax assessment proceedings. Specifically, ISBA seeks declaratory judgment (Count I), injunctive relief (Count II), and a writ of prohibition against IDFP (Count III). Defendants move for dismissal pursuant to 735 ILCS 5/2-619.1 and ISBA seeks summary judgment.

II.

A. Defendants' Motion to Dismiss

Combined motions to dismiss under 735 ILCS 5/2-615 and 735 ILCS 5/2-619 are permitted pursuant to 735 ILCS 5/2-619.1 of the Illinois Code of Civil Procedure. A motion to dismiss pursuant to 735 ILCS 5/2-619 admits the legal sufficiency of the complaint, but raises defects, defenses, or some other affirmative matter that defeats the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (1st Dist. 2008). Section 2-619 permits the dismissal of an action where "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). "Other affirmative matter" is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained or inferred from the complaint. *Bucci v. Rustin*, 227 Ill. App. 3d 779, 782 (1st Dist. 1992). The movant bears the burden of proving the affirmative defense. *Luise, Inc. v. Village of Skokie*, 335 Ill. App. 3d 672, 685 (1st Dist. 2008).

An aggrieved party is generally required to exhaust available administrative remedies before resorting to the courts. *Poindexter v. State, ex rel. Ill. Dep't of Human Servs.*, 229 Ill. 2d 194, 207 (2008). However, an aggrieved party may seek judicial review without exhausting administrative remedies where a statute is attacked as unconstitutional on its face, where the agency cannot provide an adequate remedy or where it is patently futile to seek relief before the agency, where no issues of fact are presented or agency expertise is not involved, where irreparable harm will result from further pursuit of administrative remedies, or

where the agency's jurisdiction is attacked because it is not authorized by statute. *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 308-09 (1989).

A motion to dismiss pursuant to 735 ILCS 5/2-615 challenges the legal sufficiency of a complaint based upon defects apparent on its face. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). The critical inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). The complaint need only set forth the ultimate facts to be proved—not the evidentiary facts tending to prove such ultimate facts. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004).

Defendants contend that the instant case must be dismissed because the ISBA members subject to IDFPR's administrative proceedings have not exhausted their administrative remedies, thus their claims—and the ISBA's—are not ripe. However, when a claimant challenges an administrative agency's jurisdiction, they create a question of law for the court, not the agency. *County of Knox ex rel. Masterson v. Highlands*, 188 Ill. 2d 546, 555 (1999). ISBA contends IDFPR lacked the jurisdiction to prosecute the ISBA members because the members were engaged in the practice of law, not an appraisal. "Only the supreme court has the authority to 'regulate and define the practice of law.'" *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 820 (1st Dist 2009), citing *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 349 (1937). Persons authorized by their client to act professionally in legal formalities, negotiations, or proceedings are engaged in the practice of law. *Goodman*, 366 Ill. at 351. Because ISBA asserts that IDFPR lacks jurisdiction over the conduct at issue, ISBA's claims are ripe for adjudication.

Defendants also assert that the complaint should be dismissed pursuant to section 2-615, because the IDFPR has jurisdiction to prosecute the attorneys and the Illinois Supreme Court's exclusive power is not infringed upon. A declaratory judgment action has three requirements: (1) a plaintiff with a legal tangible interest; (2) a defendant with an opposing interest; and (3) an actual controversy between the parties concerning those interests. *Bearinger v. Page*, 204 Ill. 2d 363, 372 (2003). The ISBA has a tangible legal interest in preventing the prosecution of their members, defendants have an opposing interest, and the current and future risk of prosecutions present an actual controversy. Count I, for declaratory relief, stands.

Defendants seek dismissal of the claim for injunctive relief (Count II), arguing that there is an adequate remedy at law and no irreparable harm because ISBA members can proceed through Defendants' administrative process, which is subject to review pursuant to the Administrative Review Act. *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 549 (1977); *Baughner v. Walker*, 47 Ill. App. 3d 573, 577 (4th Dist. 1977) (finding an adequate remedy at law in

administrative proceedings that were reviewable under the Administrative Review Act). A party seeking a permanent injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that the party will suffer irreparable harm if the injunction is not granted; and (3) that there is no adequate remedy at law. *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 772 (1st Dist. 2009). Where a proposed remedy would come from an agency that has no jurisdiction to engage in such review, a plaintiff has no adequate remedy as a matter of law. *Office of Lake County State's Att'y v. Illinois Human Rights Comm'n*, 200 Ill. App. 3d 151, 156 (1990). ISBA has alleged that IDFPF lacks jurisdiction, thus it has demonstrated the lack of an adequate remedy at law. The threat of prosecution of ISBA members constitutes an irreparable harm. See *Harper v. Missouri Pac. R.R.*, 264 Ill. App. 3d 238, 251-52 (5th Dist. 1994) (finding the threat of ethical charges sufficient to limit the practice of law by attorneys and constituting an irreparable harm).

Defendants seek dismissal of the claim for a writ of prohibition (Count III) on the grounds that ISBA has an adequate remedy available through the administrative review process. For the reasons stated above, administrative review is an inadequate remedy at law. *Office of Lake County State Att'y*, 200 Ill. App. at 157.

B. Plaintiff's Motion for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005; *Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 127-28 (2005). The purpose of summary judgment is not to try a question fact, but simply to determine whether one exists. *Jackson v. TLC Assoc., Inc.*, 185 Ill. 2d 418, 423 (1998). A trial court is required to construe the record against the moving party and may only grant summary judgment if the record shows that the movant's right to relief is clear and free from doubt. *Id.* If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Assoc. Underwriters of Am. Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1016-17 (1st Dist. 2005).

ISBA contends that it is entitled to summary judgment because an attorney's submission within a brief of a comparison of property values or income approach valuation constitutes a legal argument that does not meet the Appraisal Act's definition of appraisal. Defendants contend that it is irrelevant that lawyers do not hold themselves out as appraisers or call their work appraisals—by comparing the values of properties or using the income approach valuation model, the attorneys have created an opinion of value.

Does an attorney's reference to comparable valuations in a property tax proceeding constitute an appraisal? The answer to this question is made easier by the Illinois Supreme Court's decision in *In re Yamaguchi*, 118 Ill. 2d 417, 426 (1987). There, the Supreme Court concluded that the activity of representing a client in a property tax proceeding constituted the practice of law. *Id.* The Court characterized the valuation analysis at the core of those proceedings as "legal analysis of the facts which . . . justified a tax reevaluation." *Id.* Indeed, the Court's holding is consistent with longstanding precedent that recognizes whenever an attorney is engaged by a client to represent them during a legal proceeding, the attorney is engaged in the practice of law. *Goodman*, 366 Ill. at 351.

The *Yamaguchi* holding finds further support in a real world recognition of what attorneys actually do in property tax proceedings. Lawyers argue. Appraisers opine. A lawyer's argument is *not* evidence. See IPI 1.01 [14]. Argument is *not* an opinion. Instead, the attorney offers "legal analysis of the facts" in order to advocate for their client. This difference is recognized by the Illinois Rules of Evidence, which permit opinion testimony to be considered as evidence, but exclude a lawyer's arguments. Ill. Rs. Evid., Rules 701, 702; *People v. Henderson*, 142 Ill. 2d 258, 425 (1990).

The distinct roles of attorney and appraiser are mirrored in their respective professional standards. The appraisal standards define an appraiser as someone "who is expected to perform valuation services competently and in a manner that is independent, impartial, and objective." Appraisal Standards Board, Appraisal Foundation, 2014-15 Uniform Standards of Professional Appraisal Practice p. U-1 (2014). In stark contrast, a lawyer is obligated to act as an advocate for a client and pursue that client's interests zealously. Ill. R. Prof. Conduct, Preamble. The distinct professional obligations of a lawyer and an appraiser suggest that when a lawyer produces a legal argument, it is not an opinion of value that meets an appraisal's definition. Rather, it is an attorney's argument or "legal analysis of the facts."

Against this backdrop, there is nothing in the text and structure of the Appraisal Act that suggests that the General Assembly intended its prohibition on unlicensed appraisers to extend to what is the traditional practice of law in the property tax context. Indeed, the Supreme Court has recognized that in light of its own extensive regulation of the legal profession, it expects that if the legislature intends a statute to apply to the legal profession, the legislature "would have stated that intention with specificity." *Cripe v. Leiter*, 184 Ill. 2d 185, 197 (1998). In short, an attorney's reference to comparable valuations in a property tax proceeding constitutes the practice of law, which is regulated exclusively by the Illinois Supreme Court. This activity falls outside of the Appraisal Act and is plainly beyond the reach of the IDFPR.

III.

Therefore, it is hereby ORDERED:

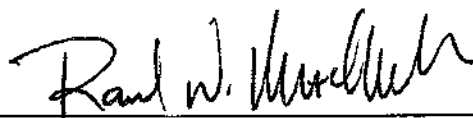
- (1) Defendants' motion to dismiss is DENIED.
- (2) Plaintiff's motion for summary judgment is GRANTED.
- (3) Judgment is entered on Plaintiff's Complaint in favor of Plaintiff Illinois State Bar Association and against Defendants Illinois Department of Financial and Professional Regulation, Bryan A. Schneider, and Kreg T. Allison.
- (4) The Court finds that the comparison of properties or an income approach valuation presented by a licensed Illinois attorney on behalf of a client in real estate tax assessment proceedings does not entail the development or submission of an appraisal or constitute the unlicensed practice of real estate appraisal in violation of Section 5-5(a) of the Appraisal Act, 225, ILCS 458/5-5(a). (Count I).
- (5) The Court hereby enjoins Defendants, their officials, agents, and employees, and all persons acting in concert with them, from instituting or maintaining an action against a licensed Illinois attorney for engaging in the submission of a comparison of properties or income approach valuation by a property tax attorney in a real estate tax assessment proceeding. (Count II).
- (6) The Court issues a writ of prohibition against Defendants preventing them from initiating, maintaining, or threatening a prosecution of an attorney licensed to practice in the State of Illinois for engaging in the submission of a comparison of properties or income approach valuation by a property tax attorney in a real estate tax assessment proceeding. (Count III).
- (7) This is a final order that disposes of the case in its entirety.

Judge Raymond W. Mitchell

JUN 20 2018

Circuit Court - 1992

ENTERED,



Judge Raymond W. Mitchell, No. 1992