First Fed. Banking Corp. v. Financial Insts. Comm'n, 13 ROP 213 (Tr. Div. 2005)

FIRST FEDERAL BANKING CORPORATION,
Plaintiff,

v.

FINANCIAL INSTITUTIONS COMMISSION,
Defendant.

CIVIL ACTION NO. 05-046

Supreme Court, Trial Division
Republic of Palau

Decided: October 26, 2005

LARRY W. MILLER, Associate Justice:

This matter is before the Court on (in chronological order) defendant's motion to compel, plaintiff's motion to strike defendant's affirmative defense, and defendant's motion for a continuance in responding to plaintiff's motion for summary judgment.[1] All of these motions are interrelated in that they all stem from defendant's affirmative defense that the relief sought by plaintiff in this action – the maintenance of plaintiff's corporate status pending the end of defendant's moratorium on accepting new banking license applications – should be denied because defendant would have denied plaintiff's application in any event.[2]

Plaintiff has objected to discovery sought by defendant relating to that defense (leading to the motion to compel) and has sought to have the defense stricken; defendant, in turn, has argued that it is entitled to a stay of summary judgment proceedings until its motion to compel has been granted and plaintiff has fully complied with its discovery demands. Because the Court is inclined to plaintiff's position on this matter, it will rule on the pending motions accordingly.

This case, as pled, presents a fairly narrow legal question – whether defendant had the authority to dissolve plaintiff's corporate status. Notably, plaintiff does not seek to compel defendant to rule on its application for a banking license; it merely seeks to remain in the running pending the lifting of the moratorium on new licenses.

Defendant is presumably prepared to set forth the basis for its claimed authority to dissolve plaintiff's corporate status. But it seeks to argue in the alternative that, even had it not dissolved plaintiff as a corporation and had acted on its application, it would have ⊥214 denied

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[1]Technically speaking, the Court has ruled on the last of these, but the effect of that ruling is contingent on the outcome of the motion to compel. See Order, October 3, 2005.

[2] Defendant denominates this defense as one of mootness, presumably in the sense that plaintiff's right to relief would be a "moot" point if the Court were to adopt defendant's arguments regarding the likely denial of its application. But the case is by no means moot in the usual sense of no longer presenting a live controversy. *See e.g., Mesubed v. Ninth Kelulul a Kiuluul*, 10 ROP 104, 105 (2003).

First Fed. Banking Corp. v. Financial Insts. Comm'n, 13 ROP 213 (Tr. Div. 2005) that application for a variety of reasons. [3] Besides complicating what would otherwise be a relatively narrow legal dispute (which, in itself, is probably not a good enough reason to strike a defense), the Court believes that this approach runs afoul of the "fundamental rule of administrative law that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency as disclosed by the record." 2 Am. Jur. 2d *Administrative Law* § 568 (2004) (footnotes omitted); *see also id.* § 485 ("The focal point for judicial review of an administrative action should be the administrative record already in existence, not some new record made initially in the reviewing court.").

This fundamental rule derives from two landmark administrative law cases decided by the United States Supreme Court in the 1940s. In *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 459 (1943), the court stated: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its actions are based." Although it recognized that a reviewing court is generally empowered to uphold a lower court's judgment on different grounds, it likened the role of courts vis-a-vis administrative agencies to their role vis-a-vis juries:

> [W]here the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

Id. (emphasis added). When the same case came before it a second time, the Supreme Court reiterated what it characterized as "a simple but fundamental rule of administrative law:"

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers ⊥215 to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

SEC v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575, 1577 (1947).

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[3] Defendant contends that it could justifiably have rejected the application -- or at least is entitled to discovery to establish that it could have done so -- because it was incomplete, because of pending and past criminal proceedings against plaintiff and some of its employees, and because plaintiff had unlawfully engaged in banking business before its license had been approved.

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As applied here, if defendant had turned down plaintiff's banking application on one ground, it would be inappropriate to uphold that denial on some other ground. *A fortiori*, if defendant has chosen not even to rule on plaintiff's application, it would be inappropriate to uphold its interim action (plaintiff's dissolution as a banking corporation) on the basis that it would have grounds for denying the application – a decision that it deliberately chose not to make.[4] To do so would call upon the Court to make its judgment "do service for an administrative judgment," and – as defendant's discovery requests make clear – to do so not on "the administrative record already in existence, [but] some new record made initially in th[is] court."

It may well be that defendant's counsel is right, and if the matter had proceeded to an administrative decision, plaintiff's application would have been denied. But that is a judgment for defendant to make (subject to plaintiff's right to review from that judgment) and not one for defendant's counsel or even this Court. The Court's ruling is therefore to take one step at a time.

Defendant's motion to compel is accordingly denied, plaintiff's motion to strike is granted,[5] and, pursuant to the order of October 3, 2005, defendant is ordered to respond to plaintiff's motion for summary judgment within the next thirty days.

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[4]The same is true of defendant's allegation that plaintiff's application was incomplete. There is a difference between defendant saying -- as it did -- that it will not accept plaintiff's application because of the current moratorium and saying that it will reject that application because it is incomplete. Conversely, of course, nothing that this Court could say in addressing this case -- including plaintiff's request that the application be declared "still pending" -- would preclude defendant from relying on any of these considerations in subsequent proceedings.

[5] Contrary to defendant's suggestion, ROP R. Civ. P. 12(f) explicitly authorizes the Court to "order stricken from any pleading any insufficient defense ...."