IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

HIALEAH RACING ASSOCIATION, LLC.,

CASE NO.: 04-02337 CA 31

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Defendant.
_____/

ORDER ON PLAINTIFF HIALEAH RACING ASSOCIATION, LLC'S MOTION FOR PARTIAL SUMMARY FINAL JUDGMENT

THIS CAUSE came before the Court on Plaintiff Hialeah Racing Association, LLC's Motion for Partial Summary Final Judgment. The Court, having reviewed the motion, the response in opposition, having considered the arguments presented at a hearing on September 10, 2013, and being otherwise fully advised in the premises, hereby finds as follows:

1. The Plaintiff, Hialeah Racing Association, LLC (Hialeah) requests a partial summary judgment in its favor, seeking to have the Court declare that its thoroughbred racing permit, which was previously revoked, has escheated to

the State and is available to be reissued.[1] The position of the State of Florida, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the Division), however, is that upon revocation, the permit ceased to exist, and is not available for re-issue. This legal question is one of first impression.

2. A number of sections of Chapter 550, which deals with Pari-mutuel wagering, are relevant to the issue of whether the previously revoked permit has escheated to the State and is available to be reissued, including sections 550.09515(3), 550.4251, and 550.054(9)(b).

3. Section 550.09515(3), Florida Statutes provides:

> (a) The permit of a thoroughbred horse permitholder who does not pay tax on handle for live thoroughbred horse performances for a full schedule of live races during any 2 consecutive state fiscal years shall be void and shall escheat to and become the property of the state unless such failure to operate and pay tax on handle was the direct result of fire, strike, war, or other disaster or event beyond the ability of the permitholder to control. Financial hardship to the permitholder shall not, in and of itself, constitute just cause for failure to operate and pay tax on handle.
>
> (b) In order to maximize the tax revenues to the state, the division shall reissue an escheated thoroughbred horse permit to a qualified applicant pursuant to the provisions of this chapter as for the issuance of an initial permit. However, the provisions of this chapter relating to referendum requirements for a pari-mutuel permit shall not apply to the reissuance of an escheated thoroughbred horse permit. As specified in the application and upon approval by the division of an application for the permit,

[1] In its motion for partial summary judgment, Hialeah included a section arguing that the permit must be reissued to Hialeah. However, in a letter to the Court dated September 13, 2012 (which was sent as a follow up to the hearing on the motion), it stated that "Through the Motion for Partial Summary Judgment, Hialeah is only seeking to have this Court declare that the Permit has escheated and is available to be reissued. Hialeah is not asking the Court to also direct the Division to issue the Permit to Hialeah."

> the new permitholder shall be authorized to operate a thoroughbred horse facility anywhere in the same county in which the escheated permit was authorized to be operated, notwithstanding the provisions of s. 550.054(2) relating to mileage limitations.

4. Section 550.5251, Florida Statutes provides, in part, that:

> as a condition precedent to the validity of its license and its right to retain its permit, each permitholder must operate the full number of days authorized on each of the dates set forth in its license.

5. Section 550.054(9)(b), Florida Statutes provides, in part, that:

> The division may revoke or suspend any permit or license issued under this chapter upon the willful violation by the permitholder or licensee of any provision of this chapter or of any rule adopted under this chapter.

6. According to the Division, it revoked Hialeah's permit pursuant to section 550.5251 because Hialeah failed to conduct all of the races that it advised it would run during the 2001-2002 and the 2002-2003 racing seasons. However, although section 550.5251 requires a permitholder to operate the full number of days authorized on its license as a condition precedent to its right to retain its permit, it does not explicitly set forth a revocation procedure, or explain what happens to a revoked permit.

7. Hialeah suggests, therefore, that section 550.5251 must be read in pari materia with section 550.09515(3)(a). According to Hialeah, section 550.09515(3)(a) deals with revocation based on both failure to operate and failure to pay tax. Indeed, although the first part of the first sentence of section 550.09515(3)(a) states that the permit of a permitholder who does not pay tax during any two consecutive years is void and escheats to the State, the second part of the sentence creates an exception for when "such *failure to operate* and pay tax on handle was the direct result of . . . disaster or event beyond the ability of the permitholder to control." (Emphasis added) ("Tax on handle" is the tax that a permitholder must pay on the bets

that it collects during a race.) The second sentence of section 550.09515(3)(a) also refers to "failure to operate and pay tax" rather than just failure to pay tax. Hialeah's position is not unreasonable.

8. However, the Division's view of the revocation of the permit, and of the applicable statutes, is different. It interprets section 550.09515(3)(a) as dealing only with a failure to pay taxes, and section 550.5251 as dealing only with a failure to run all of the scheduled races. The Division states that "These are clearly distinct provisions and concern different subject matter. Clearly the legislature intended different results for different violations."

9. The Division argues that there is a logical reason behind this distinction. It argues that when a permitholder simply fails to pay the taxes that it owes, rather than fails to run its scheduled races, "it has shown through experience it can generate the money to pay the taxes but has chosen not to do so." Thus, in such a circumstance, section 550.09515(3)(a) applies, including its provision that the permit escheats to the state and becomes available for reissue, so that another entity can obtain the permit, run races, and pay taxes. However, when the permitholder fails to run its scheduled races, it has proven an inability to compete, and has shown that the community could not accommodate all of those who wished to run a horse-racing establishment, which means that taxes cannot be generated, so there is no reason to reissue the permit to another entity, and section 550.5251 applies, which does not call for the escheatment and reissue of the permit.

10. Under the Division's analysis, to the extent that section 550.5251 would not operate to revoke a permit in and of itself, section 550.054(9)(b), could do so (for the willful violation of a provision of chapter 550). This analysis explains why section 550.09515(3)(a) calls for escheatment and reissue while section 550.5251 and section 550.054(9)(b) do not, and supports that the permit in the instant case did not escheat to the State for reissue, but instead, vanished from existence upon revocation.

11. The Division's analysis also answers Hialeah's argument that it would be unconstitutional to interpret sections section 550.09515(3)(a) and section 550.5251 differently in regard to escheatment and reissue, based on the

argument that doing so would allow the Division the unbridled discretion of choosing between two statutes when an entity fails to run its scheduled races, resulting in a failure to pay taxes, and therefore, choosing whether a permit evaporates or continues to exist and is available for reissue: Under the position that the Division is setting forth, it would only proceed under section 550.09515(3)(a) when an entity ran its scheduled races but failed to pay its taxes.

12. The Division's analysis of the applicable statutes is not unreasonable. Although it does not account for the inclusion of the "failure to operate" language in the latter portion of section 550.09515(3)(a), neither does Hialeah's analysis account for the lack of the "failure to operate" language in the first portion of that subsection. Although neither party's interpretation of the statutes at issue seems unreasonable, the Division's interpretation is entitled to greater weight.

13. As very recently stated by the Third District, in regard to the Division of Pari-Mutuel Wagering, "because the Division is the state agency that is responsible for regulating pari-mutuel wagering in Florida, . . . the Division's interpretation of statutes relating to pari-mutuel wagering 'is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with the legislative intent of the statute,' . . . or it 'conflicts with the plain and ordinary meaning of the statute.'" *Summer Jai Alai Partners v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering*, 3D13-395, 2013 WL 5539339 (Fla. 3d DCA Oct. 9, 2013) (quoting *Donato v. Am. Tel. & Tel. Co.*, 767 So. 2d 1146 (Fla. 2000) and *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002)).

14. In the instant case, the Department's interpretation of the statutes at issue is not clearly erroneous, contrary to legislative intent, or in conflict with the plain and ordinary meaning of those statues. As such, it is entitled to deference, and this Court cannot find that Hialeah's previously revoked permit escheated to the State so that it is available for reissue.

Therefore, for the reasons stated herein, it is hereby **ORDERED** and **ADJUDGED** that:

1. "Plaintiff Hialeah Racing Association, LLC's Motion for Partial Summary Final Judgment" is **DENIED**.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 10/31/13.

ABBY CYNAMON
CIRCUIT COURT JUDGE

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.