

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAREK MARKOWIAK,
Appellant,

vs.

LAS VEGAS SANDS, LLC, F/K/A LAS
VEGAS SANDS, INC., D/B/A THE
VENETIAN; AND HOWIE WEINER,
Respondents.

No. 51033

FILED

JUN 25 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a Gaming Control Board matter. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

In the summer of 2007, respondent Venetian Casino Resort held a baccarat tournament. According to the Venetian's rules, a person could qualify to enter the tournament either with a \$2,500 buy-in or by earning his place with six hours of rated play. Appellant Jarek Markowiak earned entrance to the tournament with six hours of rated play, during which he lost \$22,700. Markowiak began playing in the baccarat tournament but, on July 17, 2007, the Venetian barred him from further participation in the tournament. On July 24, 2007, Markowiak notified the Nevada Gaming Control Board of the Venetian's actions. The Board initiated an investigation and informed Markowiak in a written decision that the Venetian had acted appropriately. Markowiak did not file a petition with the Board for a reconsideration hearing on the matter.

Markowiak subsequently filed a complaint against the Venetian in district court on the basis of fraud and promissory estoppel to recover the \$22,700 he had lost while gaining entrance to the tournament,

as well as punitive damages, costs, and attorney fees. The Venetian moved to dismiss the complaint pursuant to NRCP 12(b)(1) for lack of subject matter jurisdiction, arguing that the matter constituted a patron dispute as defined by NRS 463.362 and, therefore, was under the Board's exclusive jurisdiction. The Venetian contended that the district court lacked subject matter jurisdiction over the dispute because Markowiak had failed to exhaust the administrative remedies available to him. Markowiak filed a jury demand, as well as an opposition to the motion to dismiss. The district court held a hearing on the matter and granted the Venetian's motion to dismiss, finding it lacked subject matter jurisdiction because Markowiak had failed to exhaust his administrative remedies.

On appeal, Markowiak argues that the district court erred in granting the Venetian's motion to dismiss because the Board does not have exclusive jurisdiction over this matter. Alternatively, Markowiak asserts that NRS 463.362 is unconstitutional because it denies him the right to a jury trial. For the reasons stated below, we disagree, and therefore, affirm the district court. As the parties are familiar with the facts of this case, we do not recount them except as necessary to our disposition.

DISCUSSION

Motion to dismiss for lack of subject matter jurisdiction

Markowiak argues that the district court erred when it granted the Venetian's motion to dismiss for lack of subject matter jurisdiction. Specifically, Markowiak contends that this matter does not constitute a patron dispute under the Board's exclusive jurisdiction because he did not place a wager. Rather, Markowiak asserts that he

entered into a valid contract with the Venetian, for which the \$22,700 he lost while gaining entrance to the tournament constituted consideration.

The Board had exclusive jurisdiction over the matter

The manner in which disputes between patrons and casinos are to be resolved is governed by NRS 463.362. The statute states, in pertinent part:

1. Whenever a patron and a licensee, or any person acting on behalf of or in conjunction with a licensee, have any dispute which cannot be resolved to the satisfaction of the patron and which involves:

(a) Alleged winnings, alleged losses or the award or distribution of cash, prizes, benefits, tickets or any other item or items in a game, tournament, contest, drawing, promotion or similar activity or event; or

(b) The manner in which a game, tournament, contest, drawing, promotion or similar activity or event is conducted,

the licensee is responsible for notifying the Board or patron in accordance with the provisions of subsection 2, regardless of whether the licensee is directly or indirectly involved in the dispute.

2. Whenever a dispute described in subsection 1 involves:

(a) At least \$500, the licensee shall immediately notify the Board

NRS 463.362.

Here, the Venetian barred Markowiak from further participation in its baccarat tournament. Pursuant to NRS 463.362(1)(b), the Board has jurisdiction over disputes between a patron and a casino concerning the manner in which the casino conducts a tournament.

Markowiak undisputedly entered a tournament. He now disputes the Venetian's decision to bar him from further participation in the tournament. Therefore, pursuant to NRS 463.362(1)(b), this matter is within the Board's jurisdiction as it is a dispute over the manner in which the Venetian conducted the tournament.¹

To the extent that Markowiak argues that this matter is not within the Board's jurisdiction because it concerns an enforceable contract, his contention fails.² Regardless of how Markowiak frames his argument,

¹In so concluding, we note that Markowiak's argument that the Board does not have jurisdiction because he did not formally initiate a patron dispute is without merit. The Board's jurisdiction is not determined by whether the patron initiated the dispute, but rather by the parties and matters that the dispute involves. See NRS 463.362.

We further note that, to the extent Markowiak asserts that the original version of NRS 463.362 did not give the Board jurisdiction over tournaments, his assertion is without merit because, at the applicable time, NRS 463.362 had been amended to include tournaments.

Finally, Markowiak's assertion that the Board is only granted exclusive jurisdiction over gaming debts pursuant to NRS 463.361, and has "concurrent" jurisdiction over all other disputes, fails. NRS 463.361 governs the enforceability and resolution of gaming debts, but the statute does not suggest that gaming debt disputes are the only type of conflict within the Board's exclusive jurisdiction. Rather, NRS 463.362 clearly indicates that other types of gaming disputes, including the manner in which a tournament is conducted, are within the Board's exclusive jurisdiction.

²We also reject Markowiak's argument that, pursuant to Las Vegas Hacienda v. Gibson, 77 Nev. 25, 27-29, 359 P.2d 85, 86-87 (1961), his case is not within the Board's jurisdiction because it is a contest, and therefore, he entered into an enforceable contract. Las Vegas Hacienda is distinguishable because it involved a golfer and a golf course owner, 77
continued on next page . . .

it can most accurately be described as a dispute concerning how the Venetian conducted the tournament. See Erickson v. Desert Palace, Inc., 942 F.2d 694, 696 (9th Cir. 1991) (applying Nevada law and noting the federal district court's decision that the plaintiffs' claims, alleging fraud and cheating, were within the Board's jurisdiction because they could "most accurately be characterized as an attempt to recover a gaming debt not evidenced by a credit instrument . . . plaintiffs cannot maintain a civil action to recover a jackpot, but instead are limited to an administrative proceeding followed by judicial review."). Further, a tournament is "a series of contests," NRS 463.0196, meaning it is "a competition among patrons for a prize, whether or not: (1) [t]he prize is a specified amount of money; or (2) [c]onsideration is required to be paid by the patrons to participate in the competition." NRS 463.01463. Therefore, Markowiak's argument that by earning entrance he paid consideration does not remove the dispute from the Board's jurisdiction. Instead, it fits squarely within the definition of a matter to be decided by the Board.

The matter was not justiciable in the district court

When a party fails to exhaust his administrative remedies, the matter is not justiciable in the district court. City of Henderson v. Kilgore, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006) (noting that although this court in Rosequist v. Int'l Ass'n of Firefighters, 118 Nev. 444, 448, 49

. . . continued

Nev. at 27, 359 P.2d at 86, whereas this case involves the exact parties that the Board is meant to regulate disputes between—a patron and a casino.

P.3d 651, 653 (2002), overruled on other grounds by Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 573 n.22, 170 P.3d 989, 995 n.22 (2007), described the district court as lacking subject matter jurisdiction when a party had failed to exhaust administrative remedies, it was actually a matter of justiciability, not jurisdiction).

Here, Markowiak failed to exhaust his administrative remedies pursuant to NRS Chapter 463. Specifically, NRS 463.363 states that, within 20 days from receiving the Board's written decision, the aggrieved party can file a petition with the Board requesting a hearing for reconsideration of the matter. After receiving the Board's written decision, Markowiak never petitioned the Board for a reconsideration hearing on the matter. Instead, he filed a complaint with the district court. Therefore, Markowiak failed to exhaust his administrative remedies and the matter was not justiciable in the district court. See NRS 463.363(3) ("If no petition for reconsideration is filed . . . the decision shall be deemed final action and is not subject to reconsideration by the Board or to review by the [Nevada Gaming] Commission or any court.).

Accordingly, because the Board had jurisdiction over the matter and because it was not justiciable in the district court, the district court acted properly when it granted the Venetian's motion to dismiss.

NRS 463.362 is constitutional

Markowiak next contends that NRS 463.362 is unconstitutional because it denies patrons their right to a jury trial. This argument is without merit.

This court reviews constitutional issues, including one's right to a jury trial, de novo. Awada v. Shuffle Master, Inc., 123 Nev. 613, 618, 173 P.3d 707, 711 (2007). Nevada's Constitution provides that "[t]he right

of trial by Jury shall be secured to all and remain inviolate forever.” Nev. Const. art. 1, § 3. Recently, this court explained that the “framers’ use of the phrase ‘shall . . . remain inviolate forever,’ indicates their intent to perpetuate the jury trial right as they understood it in 1864, when they adopted Nevada’s Constitution.” Awada, 123 Nev. at 619, 173 P.3d at 711 (quoting Nev. Const. art. 1, § 3).

The Supreme Court of the United States has held that “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’” Atlas Roofing Co., v. Occupational Safety Comm’n, 430 U.S. 442, 455 (1977). A “public right[]” is one created by statute. Id. at 450. The Supreme Court has held that agency resolution is also proper for “a seemingly ‘private’ right that is . . . closely integrated into a public regulatory scheme.”³ Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54 (1989) (quoting Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 593-94 (1985)).

Markowiak’s argument that he was denied his right to a jury trial hinges on his contention that he has brought private, common law claims. We conclude that this argument is without merit. NRS Chapter

³We also note that this court has previously held that the Legislature may create statutes that effectively waive a party’s right to a jury trial. Harris Assocs. v. Clark County Sch. Dist., 119 Nev. 638, 644, 81 P.3d 532, 536 (2003) (noting that that by enacting NRS 338.150, “the Legislature [had] consented on behalf of the subdivisions of the state to waive the right to a jury trial in certain disputes”).

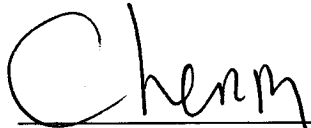
463 creates “public” rights. See Sports Form v. Leroy’s Horse & Sports, 108 Nev. 37, 40, 823 P.2d 901, 903 (1992) (noting that the Legislature did not intend for provisions of NRS Chapter 463 to be enforced through private civil actions); cf. Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 573, 170 P.3d 989, 995 (2007) (concluding that, given the Nevada Department of Insurance’s exclusive jurisdiction, no private right of action exists under NRS 690B.012). We previously determined that Markowiak’s claim falls within the ambit of NRS 463.362 because it is a dispute over the manner in which the Venetian conducted the baccarat tournament. Therefore, because NRS Chapter 463 is implicated, a public right is being disputed. As such, we conclude that NRS 463.362 does not violate the right to a jury trial because it is proper to relegate the determination of public rights to administrative agencies. See Atlas Roofing Co., 430 U.S. at 455. Moreover, as noted above, even if we were to view Markowiak’s claims as common law fraud and promissory estoppel claims, they are so closely linked to a public right—whether the Venetian correctly conducted the baccarat tournament—that it is proper to allow the Board jurisdiction. See Granfinanciera, 492 U.S. at 54.


We also reject Markowiak’s argument that the July 1, 2007, amendment to NRS 463.362 was unconstitutional because it brought into the purview of NRS Chapter 463 disputes that had previously not been within the Board’s jurisdiction. Prior to July 1, 2007, NRS 463.362 governed patron disputes concerning “winnings, alleged losses or the manner in which a game is conducted.” NRS 463.362 (2005); 2007 Nev. Stat., ch. 295, § 9, at 1112. Since July 1, 2007, the Board also has jurisdiction over tournaments and the manner in which tournaments are conducted. 2007 Nev. Stat., ch. 295, § 9, at 1112-13. As the Supreme


Court of the United States noted in Granfinanciera, Congress lacks the power to “strip parties contesting matters of private right of their constitutional right to a trial by jury.” 492 U.S. at 51-52. However, this situation is distinguishable. Baccarat is a “game” pursuant to NRS 463.0152. Therefore, this matter would have been within the Board’s jurisdiction even before the July 1, 2007, amendment. Accordingly, a private right never existed and Markowiak has no right to a jury trial in this instance.

Therefore, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jessie Elizabeth Walsh, District Judge
Larry J. Cohen, Settlement Judge
Nersesian & Sankiewicz
Cooper Levenson April Niedelman & Wagenheim, P.A.
Eighth District Court Clerk