STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Opternative, Inc.,

Plaintiff,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation,

Defendants.

and

South Carolina Optometric Physicians Association,

Defendant-Intervenor.

C/A No.: 2016-CP-40-06276

ORDER

THIS MATTER came before this Court on October 4, 2017, on cross-Motions for Summary Judgment by Plaintiff Opternative, Inc. ("Plaintiff" or "Opternative") and Defendants South Carolina Board of Medical Examiners (the "Board") and the South Carolina Department of Labor, Licensing & Regulation ("LLR") (collectively the "Defendants"). Defendant-Intervenor South Carolina Optometric Physicians Association ("SCOPA") was also present and participated in oral argument.

In this action, Plaintiff has brought a declaratory judgment action to challenge the constitutionality of South Carolina's Eye Care Consumer Protection Law ("ECCPL"), S.C. Code Ann. § 40-24-10 *et seq.*, arguing that the ECCPL is protectionist legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Plaintiff's Complaint, ¶¶ 87-97).

For the reasons set forth below, I hereby GRANT the Defendants' Motion for Summary Judgment only as to the issue of standing and DENY the Plaintiffs' Motion for Summary Judgment. The case is, therefore, dismissed with prejudice.

PLAINTIFF'S LAWSUIT

Plaintiff is a private foreign corporation that has developed an online technology designed to conduct eye examinations and produce prescriptions for corrective lens. (Plaintiff's Complaint, ¶¶ 1, 5). In bringing this declaratory judgment action, Plaintiff argues that the ECCPL is protectionist legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Plaintiff's Complaint, ¶¶ 87-97). Regarding both grounds, Plaintiff alleged that "[u]nless Defendants are enjoined from enforcing the ECCPL, Opternative will suffer continuing and irreparable harm." (Plaintiff's Complaint, ¶¶ 91, 97). In its Complaint, Opternative describes the injury to the Plaintiff in the following manner:

"80. As a direct result of the passage of the ECCPL, the use of Opternative's Technology has been effectively prohibited in South Carolina.

81. Prior to the adoption of the ECCPL, Opternative could (and did) allow a South Carolina-licensed ophthalmologist to write corrective-lens prescriptions for South Carolina residents.

82. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are legally prohibited from working with Opternative to provide corrective-lens prescriptions for South Carolina residents.

83. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are no longer willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents.

84. As a direct result of the passage of the ECCPL, Opternative has ceased business operations in South Carolina.

85. But for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents.

86. But for the ECCPL, state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents."

THE ECCPL

The ECCPL has two parts. The first part establishes the definitions of terms that it uses, and the second establishes the substance of the act.

Importantly, the first part of the act defines "provider" as "an individual licensed by the South Carolina Board of Examiners in Optometry or the South Carolina Board of Medical Examiners." S.C. Code Ann. § 40-24-10(7). The second part of the ECCPL provides as follows:

> **SECTION 40-24-20.** Valid prescription required to dispense spectacles or contact lenses; penalties.
>
> (A) A person in this State may not dispense spectacles or contact lenses to a patient without a valid prescription from a provider.
>
> (B) To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. The prescription must take into consideration medical findings made and refractive error discovered during the eye examination. If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.
>
> (C) A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk.

THE BOARD AND LLR

The Board is the professional licensing board in South Carolina that regulates physician practice and conduct. S.C. Code Ann. § 40-47-5 *et seq*. The Board does not regulate Opternative, as it is not a physician licensed in the State of South Carolina. S.C. Code Ann. § 40-1-70; S.C. Code Ann. § 40-47-10(I).

The LLR administers the Board. S.C. Code Ann. § 40-1-40(B). Like the Board, LLR does not regulate Opternative, as it is not licensed by a Board that LLR administers. Rather, LLR merely "is responsible for all administrative, fiscal, investigative, inspectional, clerical, secretarial, and license renewal operation and activities" of the Board, and in fact does make such support available to the Board. S.C. Code Ann. § 40-1-50(A).

DECISION

I. THE LAWSUIT MUST BE DISMISSED BECAUSE PLAINTIFF DOES NOT HAVE PROPER STANDING.

Where a private party seeks to have a statue declared unconstitutional, it must first demonstrate that it has standing. *ATC v. Charleston Cty.*, 380 S.C. 191, 195–96, 669 S.E.2d 337, 339 (2008). Standing is defined as "a personal stake in the subject matter of a lawsuit." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (citing *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999)).

A private person or entity does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999). Such imminent prejudice must be of a personal nature to the party laying claim to standing, and not merely of general interest common to all members of the public. *Id.* (citing *Citizens for Lee County, Inc. v. Lee County,* 308 S.C. 23, 416 S.E.2d 641 (1992)).

To make the required showing, the challenging party must satisfy the following three-part test:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

ATC, 380 S.C. at 195-96, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted)); *see also Youngblood v. S.C. Dept. of Social Services*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

A. Injury in Fact.

First, Opternative must show that it has suffered an "injury in fact," which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical." From its Complaint, Opternative appears to argue that its "injury in fact" is its loss of business and belief that the ECCPL prevents South Carolina-licensed ophthalmologists from being "willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents," and that if the ECCPL were struck down, they presumably would be willing to use Opternative's technology to write corrective-lens prescriptions. (Plaintiff's Complaint, ¶¶ 83, 86). The ECCPL does not appear to forbid a South Carolina-licensed ophthalmologist from using Opternative's technology to assist in his or her work. Opternative alleges that it hast lost business in South Carolina and has been forced to shut down business. (Plaintiff's Complaint, ¶¶ 80). Opternative's allegations make it clear that the law directly affects their business model, but it is unclear that the Defendants are perpetuating the injury. (Plaintiff's Complaint, ¶¶ 80-86)

Although Plaintiffs present the argument that the ECCPL directly affects its business, Plaintiffs are not regulated under the act by the Defendants. *See Joytime Distrib. and Amusement Co., Inc. v. State*, 338 S.C. 634, 640 528 S.E.2d 647, 650 (1999) (holding the Plaintiffs had standing to sue the State alleging the unconstitutionality of a law that directly affected Plaintiff's business and required the Plaintiffs to pay a license surcharge fee under the law). Professionals under the authority of the Board are not forbidden by the ECCPL – and not by any action of the Board or LLR – from using Opternative's technology. Indeed, a South Carolina-licensed ophthalmologist may still use Opternative's technology to assist him or her in making a determination to write a prescription for spectacles or contact lenses. He or she simply cannot solely base the prescription on the refractive eye error of the human eye or be generated by a kiosk. Opternative has certainly presented evidence that the ECCPL will deter state-licensed ophthalmologists and optometrists from using its technology *within Opternative's current business model*.

In sum, Opternative has failed to show that it has suffered an "injury in fact," and instead has only raised theories of injury that are "conjectural" or "hypothetical."

B. <u>Causal Connection</u>.

Second, Opternative has not shown that there is a causal connection between the injury and the conduct complained of. The injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *ATC,* 380 S.C. at 195-96, 669 S.E.2d at 339.

In the instant case, the causal connection does not exist because the injury alleged by Opternative – that South Carolina-licensed ophthalmologists are no longer "willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents" – actually

requires an act from a third party not before the court. Namely, as set forth above, Opternative alleges that South Carolina-licensed ophthalmologists are no longer willing to use its on-line exam because, under the ECCPL, its on-line exam cannot be the sole basis to write a prescription for spectacles or contact lenses.

South Carolina-licensed ophthalmologists can presumably make their own decisions about whether and how to use – or not use – Opternative's on-line technology to assist them in their provision of lawful corrective-lens prescriptions to their patients. In any event, that decision rests with South Carolina-licensed ophthalmologists, and not with the Board or with LLR.

C. Redress by a Favorable Decision.

Even if Plaintiff could show an "injury-in-fact" and a "causal connection," Plaintiff must also allege adequately that the particularized injury would be redressed by a favorable decision in this case. *Sea Pines Ass'n*, 345 S.C. at 602, 550 S.E.2d at 292. In its Complaint, Plaintiff appears to address this element by alleging that "[b]ut for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents" and that "state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents." (Plaintiff's Complaint, ¶¶ 85-86).

In this regard, Plaintiff's claims appear similar to those of the plaintiffs in *Sea Pines Ass'n*, who raised a constitutional challenge to the decision of the South Carolina Department of Natural Resources ("SCDNR") to issue permits to lethally eliminate a substantial number of white-tailed deer on Hilton Head Island. The court found that the plaintiffs lacked standing in part because their alternative plan to hunting permits – use of non-lethal means to reduce the deer population – would lead to the same result, namely, the reduction of the deer population at Sea Pines. 345 S.C.

at 603, 550 S.E.2d at 292. For that reason, the plaintiffs failed to demonstrate standing because the proposed alternative would result in the same "injury."

In this case, Plaintiff's showing of redress is complicated by the fact that "state-licensed ophthalmologists" can already work with Opternative to provide corrective-lens prescriptions for South Carolina residents. The true "injury" of which Opternative complains is that it wants "state-licensed ophthalmologists" to use Opternative's technology *within its current business model.* This is insufficient to demonstrate standing for a constitutional challenge.

* * *

To show standing, Plaintiff must satisfy each of the three elements referenced above. Plaintiff has failed to demonstrate that it can satisfy any of them. For this reason, Plaintiff's lawsuit must be dismissed.

CONCLUSION

As set forth above, Plaintiff has failed to demonstrate that it has standing to bring this claim. The Court declines to address any equal protection and due process arguments in light of its conclusion that Plaintiffs fail to demonstrate standing.

For these reasons, the motion of the Board and LLR is GRANTED as to the issue of standing, the motion of Opternative is DENIED, and this action is dismissed with prejudice, with each side to bear its own costs and fees.

AND IT IS SO ORDERED.

The Honorable DeAndrea Gist Benjamin
Presiding Judge
Fifth Judicial Circuit

1-25, 2018
Columbia, South Carolina.