

**IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE  
IN AND FORE NEW CASTLE COUNTY**

KIRKWOOD FITNESS AND	)	
RACQUETBALL CLUBS, INC.	)	
Plaintiff,	)	
	)	
v.	)	C.A. N11C-02-073-JRJ
	)	
TIMOTHY P. MULLANEY, SR.,	)	
DIRECTOR OF THE FRAUD DIVISION	)	
STATE OF DELAWARE DEPARTMENT	)	
OF JUSTICE and	)	
	)	
IAN R. MCCONNEL,	)	
DIRECTOR OF CONSUMER	)	
PROTECTION DIVISION STATE OF	)	
DELAWARE DEPARTMENT OF	)	
JUSTICE	)	
Defendants.	)	

Date Submitted: May 1, 2011  
Date Decided: June 29, 2011

Upon Defendants' Motion to Dismiss - **GRANTED**

**OPINION**

Michael C. Hochman, Esq., Melvyn I. Monzack, Esq., Monzack Mersky McLaughlin and Browder, P.A., 1201 N. Orange Street, Suite 400, Wilmington, DE 19801, Attorney for the Plaintiff.

Sherry V. Hoffman, Esq., Deputy Attorney General, State of Delaware Department of Justice, 820 N. French Street, 5<sup>th</sup> Floor, Wilmington, DE 19801, Attorney for the Defendants.

**Jurden, J.**

## INTRODUCTION

Before the Court is Timothy P. Mullaney, Sr.<sup>1</sup> and Ian R. McConnel's<sup>2</sup> (Collectively "Defendants") Motion to Dismiss. Defendants argue they are entitled to judgment as a matter of law because under the circumstances presented in this case the Court does not have jurisdiction to order a declaratory judgment. For the reasons that follow, the Court finds that Defendants are entitled to judgment as a matter of law and therefore **GRANTS** the Motion.

## FACTS AND PROCEDURAL HISTORY

Kirkwood Fitness and Racquetball Clubs, Inc. (hereinafter, "Kirkwood Fitness") has been operating fitness clubs in Delaware and Pennsylvania for forty years.<sup>3</sup> On June 30, 2010, Kirkwood Fitness closed its club located on Kirkwood Highway, Wilmington Delaware. After the Kirkwood Highway Club closed, some of the Club members filed complaints with the Division of Consumer Protection alleging that Kirkwood Fitness did not offer "alternative facilities within 15 miles of the [closed] location,"<sup>4</sup> in violation of 6 *Del. C.* § 4201 *et seq.* ("The Delaware Health Spa Regulation").<sup>5</sup> The Club members argued that because Kirkwood fitness did not offer a comparable facility within 15 miles of the closed club, they were entitled to a pro-rated refund of their membership dues.

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<sup>1</sup> See Complaint at ¶ 6 (Trans. ID. 35798714); Mr. Mullaney is the Director of the Fraud Division for Delaware's Department of Justice.

<sup>2</sup> See Complaint at ¶ 7; Mr. McConnel is the Director of the Consumer Protection Division for Delaware's Department of Justice.

<sup>3</sup> Complaint at ¶ 1.

<sup>4</sup> Complaint at ¶ 47.

<sup>5</sup> Specifically 6 *Del. C.* § 4204 (d), which states:

Any buyer having a claim against a health spa may apply to the Director for payment of such claim from the Guaranty Fund, if the claim arises from a failure of the health spa to:

- (1) Comply with its contract obligations;
- (2) Comply with any provision of this chapter; or
- (3) Remain open for the duration of its contracts or provide alternative facilities within 15 miles of the location designated in the health spa contract, if the health spa goes out of business or relocates.

On September 13, 2010, The Division of Consumer Protection notified Kirkwood Fitness that an administrative hearing would be held to decide the claims made under the Health Spa Regulation.<sup>6</sup> Kirkwood Fitness agreed to appear at the Hearing, which was scheduled for October 6, 2010.<sup>7</sup> Pursuant to 6 *Del. C.* § 4204, the Director of the Division of Consumer Protection, Ian R. McConnel (“McConnel”), presided over the Hearing to determine whether claimants were entitled payment under the Health Spa Regulation.<sup>8</sup> At the Hearing, Kirkwood Fitness argued, *inter alia*, that the mileage calculation under 6 *Del. C.* § 4204 should be interpreted as a fifteen mile *radius* and not a fifteen mile *driving distance*. McConnel decided that the statute should be interpreted as a fifteen mile driving distance and found that Kirkwood Fitness did not have a comparable facility located within fifteen miles driving distance of the closed Kirkwood Highway location. Thus, McConnel ordered payments be made from the Health Spa Guaranty Fund, which Kirkwood Fitness would be required to repay in order to remain licensed.<sup>9</sup>

In response to McConnel’s ruling, Kirkwood Fitness filed an action titled “Complaint for Declaratory Judgment, Injunction and Other Equitable Relief.”<sup>10</sup> Kirkwood Fitness asked this Court to declare that 6 *Del. C.* § 4204 (d) shall be interpreted

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<sup>6</sup> Complaint at ¶ 89.

<sup>7</sup> Complaint at ¶ 91; Kirkwood appeared “with the understanding that it is with full reservation of rights and that participating in the process does not waive [its] position that the procedure contemplated by the Attorney General’s Office is not applicable to Complaints/Claims seeking payment from the Health Spa Regulation.

<sup>8</sup> See 6 *Del. C.* § 4204 (g): “The Director shall issue an order requiring payment from the Guaranty Fund of any sum found to be payable upon such application.”

<sup>9</sup> See 6 *Del. C.* § 4204 (h): “If the Director pays any amount as a result of a claim against a health spa pursuant to an order under subsection (g) of this section, the health spa's registration shall be suspended and it shall not be eligible to register until it has repaid such amount in full, plus interest at a rate to be determined by the Director.”

<sup>10</sup> See Complaint.

as having a fifteen mile radius requirement and not a fifteen mile driving distance requirement. In response, Defendants filed the instant Motion to Dismiss.<sup>11</sup>

### **PARTIES' CONTENTIONS**

Defendants argue that a Declaratory judgment, pursuant to 10 *Del. C.* § 6501 *et seq.*, is not available to Kirkwood Fitness because: (1) “[t]he adverse interests that are a predicate to a declaratory judgment action are between Kirkwood and its members and not the State enforcement authority;”<sup>12</sup> (2) pursuant to 10 *Del. C.* § 6511, claimants, who have not been joined in this action, are necessary parties, and thus, the claim should be dismissed; and (3) “a judicial officer is not a proper party in an action for declaratory judgment.”<sup>13</sup>

Kirkwood Fitness contends that the Court has jurisdiction to hear this matter, and that the claimants are not necessary parties because the State is adequately representing their interests.

### **DISCUSSION**

An “actual controversy” must exist with regard to an action before the Court can issue a Declaratory Judgment.<sup>14</sup> The following must be present in order for an “actual controversy” to exist:

(1) It must be a controversy involving the rights or other legal relations of the party seeking delaratory (sic) relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.<sup>15</sup>

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<sup>11</sup> Motion to Dismiss (Trans. ID. 36150112).

<sup>12</sup> *Id.* at ¶ 9.

<sup>13</sup> *Id.* at ¶ 16.

<sup>14</sup> *Rollins Intern., Inc. v. International Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973).

<sup>15</sup> *Id.*

In the case *sub judice*, the third prong – whether the controversy is between parties whose interest are real and adverse – is absent.

“Suit against a judicial officer to challenge his rulings, and correct his perceived error, is not a circumstance for which declaratory judgment is available under Delaware law.”<sup>16</sup> 10 *Del. C.* 6511 is clear, “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim *any interest which would be affected by the declaration*, . . .”<sup>17</sup> McConnel, as Director of Consumer Protection, acted in quasi-judicial capacity when he ordered payments be made to Kirkwood Fitness’s members from the Health Spa Guaranty Fund.<sup>18</sup> “[A] judicial officer has no cognizable interest in seeking to have his rulings or legal interpretations sustained.”<sup>19</sup> Because the Defendants in this case have no “interest which would be affected by the declaration,”<sup>20</sup> there is no “actual controversy,” and thus, a declaratory judgment would be inappropriate.<sup>21</sup>

In the alternative, the Declaratory Judgment Act is clear, “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”<sup>22</sup> If the Court were to grant the relief requested by Kirkwood Fitness, not only would the rights of Kirkwood Fitness and its members be

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<sup>16</sup> *Wilmington Trust Co. v. Barron*, 470 A.2d 257, 262 (Del. 1983).

<sup>17</sup> Emphasis added.

<sup>18</sup> See 6 *Del. C.* § 4204 (g).

<sup>19</sup> *Wilmington Trust Co.*, 470 A.2d at 262.

<sup>20</sup> *Id.* (“Unless real and adverse interests are present, there is no basis for invoking declaratory relief against one who has no role in contesting a claim.”).

<sup>21</sup> If, as Kirkwood Fitness has argued, a hearing pursuant to 29 *Del. C.* § 2523 is applicable to claims made under the Health Spa Regulation, Kirkwood Fitness should re-file a *Writ of Mandamus*, requesting the Court to order the Division of Consumer Protection to abide by the procedures set forth in 29 *Del. C.* § 2523.

<sup>22</sup> 6 *Del. C.* § 6511.

affected, but so would the rights of all other health spas and spa members located within Delaware.

**CONCLUSION**

For the aforementioned reasons, Defendants' Motion to Dismiss is **GRANTED**.  
**IT IS SO ORDERED.**

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Jan R. Jurden, Judge