State of Minnesota
Ramsey County

District Court
Second Judicial District
Court File Number: **62-CV-11-3952**
Case Type: Civil Other/Misc.

Notice of Entry of Judgment

In Re: Reed Aronow vs MN Department of Pollution Control, Mark Dayton, State of Minnesota

Pursuant to: The Order of Judge John H. Guthmann dated January 30, 2012.

You are notified that judgment was entered on January 31, 2012.

Dated: January 31, 2012

cc :Jilian Elizabeth Clearman;
Robert Britt Roche

Lynae K. E. Olson
Court Administrator
By: Linda Draske
Deputy Court Administrator
Ramsey County District Court
15 West Kellogg Boulevard Room 600
St Paul MN 55102

62-CV-11-3952

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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.
File No.: 62-CV-11-3952
Judge: John H. Guthmann

Reed Aronow,

Plaintiff,

v.

State of Minnesota, Minnesota Department of Pollution Control and Mark Dayton,

Defendants.

ORDER

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on November 2, 2011, at the Ramsey County Courthouse, St. Paul, Minnesota. At issue was defendants' Rule 12.02(e) motion to dismiss. Jilian E. Clearman, Esq., appeared on behalf of the plaintiff. Robert R. Roche, Esq., appeared on behalf of defendants. The matter was taken under advisement following the hearing.

Based upon all of the files, records, submissions and arguments of counsel herein, the Court issues the following:

ORDER

1. Defendants' Motion to dismiss plaintiff's Complaint pursuant to Minn. R. Civ. P. 12.02(e) is **GRANTED**.

2. The following Memorandum is made part of this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 30, 2012

JUDGMENT

The foregoing shall constitute the judgment of the court.

Entered: 1/31/12 LYNAE K.E. OLSON
Court Administrator
By Linda Thaske
Deputy Clerk

BY THE COURT:

John H. Guthmann
Judge of District Court

MEMORANDUM

I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiff commenced the instant lawsuit claiming that defendants have failed to take action that will adequately protect Minnesota's atmosphere. The claims are brought under the Public Trust Doctrine and the Minnesota Environmental Rights Act ("MERA"). The Complaint seeks a declaration "that the atmosphere is protected by the Public Trust Doctrine", a declaration that defendants "violated and are in violation of MERA", and an order compelling defendants "to take the necessary steps to reduce the State's carbon dioxide output by at least 6% per year, from 2013 to 2050, in order to help stabilize and eventually reduce the amount of carbon dioxide in the atmosphere." Finally, the Complaint seeks an award of costs, disbursements and attorney's fees. In response to the lawsuit, defendants filed a motion to dismiss pursuant to Rule 12.02(e) of the Minnesota Rules of Civil Procedure.

II. STANDARD OF REVIEW

Under Rule 12.02(e) of the Minnesota Rules of Procedure, a defendant may file a motion to dismiss in lieu of a formal answer to test the legal sufficiency of a complaint. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). As such, only documents embraced by the pleadings may be considered. *In re Hennepin County Recycling Bond*

Litigation, 540 N.W.2d 494, 497 (Minn. 1995). Dismissal of a complaint is warranted when "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963); *see Martens v. Minnesota Mining & Manufacturing Co.*, 616 N.W.2d 732, 748 (Minn. 2000) (if the Complaint fails to state a claim upon which relief may be granted, a dismissal with prejudice is appropriate).

III. DISCUSSION

A. Governor Mark Dayton is not a Proper Party to this Action

Alleging a violation of their common law and statutory obligations, plaintiff challenges the sufficiency of defendants' actions to protect the atmosphere. Plaintiff's claims against Governor Dayton are based upon his assertion that Governor Dayton failed to uphold MERA. Yet, MERA simply provides private citizens with a civil remedy to seek court-ordered protection of the environment. Plaintiff makes no allegation that Governor Dayton interfered with or failed to permit civil actions under MERA.

Plaintiff also argues that Governor Dayton has an independent obligation under either the common law Public Trust Doctrine, MERA, or both to take action protecting the atmosphere. (Compl. ¶ 13.) In essence, plaintiff argues that the Executive Branch, through the Governor and the agencies he manages, has an obligation to act in furtherance of MERA's broad purposes regardless of funding or authorizing legislation.

The remedies plaintiff seeks in his Complaint require passage of new laws and

standards by the Legislature. In addition, the remedies sought by plaintiff require a legislative appropriation. The Governor "is not vested with any legislative power, and no such power can be conferred upon him by the Legislature. As Governor, he can enforce the laws, but cannot change or suspend them." *State ex. Rel. Lichtscheidl v. Moeller*, 189 Minn. 412, 420, 249 N.W. 330, 333 (Minn. 1933); *see* Minn. Const. art. III, § 3. In other words, the Governor executes the law but he cannot create law or spend money that was not appropriated by the Legislature.

The Complaint also alleges that Governor Dayton failed to "effectively implement and enforce the laws under his jurisdiction." (Compl. ¶ 13.) However, with the exception of MERA and Minnesota Statutes section 216H.02, the Complaint does not describe or cite a statute that the Governor failed to implement or enforce. In the case of MERA and section 216H.02, the Complaint does not state, in even the vaguest terms, how the Governor failed to implement or enforce these statutes. Moreover, plaintiff failed to cite a statute that authorizes the Governor or any state agency to require the reduction of greenhouse gases at all much less at the rate sought by the Complaint. It is well established that Governor Dayton is not a proper party to an action in which he cannot "implement any of the relief that petitioners request." *See, e.g., Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008). Because Governor Dayton has no legal authority to implement the policies sought by plaintiff, he is not a proper party to the lawsuit.[1] The claims against Governor Dayton must therefore be dismissed.

[1] The same principle holds true for the Minnesota Pollution Control Agency.

B. Common Law Public Trust Doctrine

Minnesota Courts have recognized the Public Trust Doctrine only as it applies to navigable waters. "Navigability and nonnavigability [sic] mark the distinction between public and private waters. The state, in its sovereign capacity, as trustee for the people, holds all *navigable* waters and the lands under them for public use." *Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942) (emphasis added). The *Nelson* court ultimately held that a private citizen's riparian rights are subordinate to the State's needs as it manages the navigable waters that are held in the public trust. *See also Pratt v. State, Dep't of Natural Resources*, 309 N.W.2d 767, 771 (Minn. 1981). In *Larson v. Sando*, 508 N.W.2d 782 (Minn. Ct. App. 1993), *rev denied* (Jan. 21, 1994), the court declined to extend the public trust doctrine beyond "the state's management of waterways," partly because the cases cited by the parties applied only to waterways. *Id.* at 787 (declining to extend the doctrine to land). Similarly, this Court cannot locate, nor did counsel for either party supply, a Minnesota case supporting broadening the Public Trust Doctrine to include the atmosphere. This Court has no authority to recognize an entirely new common law cause of action through plaintiff's proposed extension of the Public Trust Doctrine.

C. CLAIMS UNDER MERA

As discussed above, Minnesota does not recognize a common law action by citizens to require governmental protection of the atmosphere under the Public Trust Doctrine. However, through MERA, the Minnesota Legislature has enacted legislation enabling citizen lawsuits against the state, its agencies and its subdivisions aimed at

protecting, among other things, Minnesota's atmospheric resources. Minn. Stat. §§ 116B.01-.13 (2010).

When enacting MERA, the Legislature defined the purpose of the statute:

> The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment or destruction.

Minn. Stat. § 116B.01 (2010). The statute goes on to establish two separate private causes of action. First, under section 116B.03, "any person residing within the state" may "maintain a civil action . . . in the name of the state of Minnesota against any person, for the protection of the air . . . whether publically or privately owned, from pollution, impairment, or destruction." *Id.* § 116B.03, subd. 1.

The second private cause of action created by MERA is found in section 116B.10. It permits:

> any natural person residing in the state . . . [to] maintain a civil action . . . for declaratory or equitable relief against the state or any agency or instrumentality thereof where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license stipulation agreement or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed."

Id. § 116B.10, subd. 1.[2] To the extent plaintiff's Complaint arguably asserts a claim under both MERA causes of action, the Court will address the viability of each.

1. Minn. Stat. § 116B.03.

To be actionable under section 116B.03, the defendant must engage in "pollution, impairment or destruction" as defined by the statute. *Id.* § 116B.02, subd. 5 ("conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license stipulation agreement or permit of the state or any instrumentality, agency, or political subdivision thereof"). This conduct must be committed by a "person." MERA defines the term "person" to include "any state, municipal or other governmental or political subdivision or other public agency or instrumentality . . . ." *Id.* § 116B.02, subd. 2. It is of note that the definition does not include the State of Minnesota as an entity. *Id.*

Plaintiff's Complaint contains a section entitled "Jurisdiction and Venue", which lists only section 116B.10, subd. 1 as the basis for the Court's jurisdiction. (Compl. ¶ 15.) However, under a generous theory of notice pleading, plaintiff's Complaint arguably asserts a claim under Minn. Stat. § 116B.03. "The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) (citing *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963)). "Consequently,

[2] Defendants argue that the State of Minnesota may never be a proper party to a lawsuit. (Defendants' Memorandum in Support of Motion to Dismiss, at 3-4.) However, in the case of MERA actions under section 116B.10, the statute expressly authorizes "a civil action . . . against the state." Minn. Stat. 116B.10, subd. 1 (2010).

Minnesota does not require pleadings to allege facts in support of every element of a cause of action." *Id.*

Here, plaintiff's Complaint cited cases that were filed as section 116B.03 claims. (Compl. ¶ 53.) In addition, plaintiff's "Jurisdiction and Venue" section does not mention the Public Trust Doctrine cause of action as a basis for the court's jurisdiction. Thus, plaintiff did not use the "Jurisdiction and Venue" section of the Complaint as an exclusive list of claims subject to the court's jurisdiction. Nevertheless, the Court is convinced that plaintiff did not intend to include a section 116B.03 claim in the Complaint. More important, even if the Complaint is deemed to include a section 116B.03 claim, the Court finds that the claim cannot survive Rule 12.02(e) scrutiny.

First, Minn. Stat. 116B.03 contains very specific notice requirements:

> Within seven days after commencing such action, the plaintiff shall cause a copy of the summons and complaint to be served upon the attorney general and the pollution control agency. Within 21 days after commencing such action, the plaintiff *shall* cause written notice thereof to be published in a legal newspaper in the county in which suit is commenced, specifying the names of the parties, the designation of the court in which the suit was commenced, the date of filing, the act or acts complained of, and the declaratory or equitable relief requested. The court may order such additional notice to interested persons as it may deem just and equitable.

Minn. Stat. §116B.03, subd. 2 (emphasis added). There is no evidence before the Court that plaintiff met the published notice requirement. Even if plaintiff intended to bring a section 116B.03 claim, his failure to publish a notice of claim within 21 days deprives this Court of jurisdiction over the claim. *County of Dakota (C.P. 46-06) v. City of Lakeville*, 559 N.W.2d 716, 722 (Minn. Ct. App. 1997) (because the parties failed to

comply with the statutory notice requirement, they did not properly commence their action, which prevented the district court from taking jurisdiction over the matter.) Plaintiff's failure to satisfy the notice requirement evinces his intent not to include a section 116B.03 claim in the Complaint. If plaintiff intended to include the claim, the failure to give notice is fatal. Either way, if the Complaint is deemed to include a section 116B.03 claim, it must be dismissed.

Second, section 116B.03 requires the action to be "in the name of the State of Minnesota." Minn. Stat. § 116B.03, subd. 1. Here, plaintiff sued solely in his name. Plaintiff's failure to sue in the name of the State as required by section 116B.03 demonstrates plaintiff's intent not to include such a claim in the Complaint.

Finally, plaintiff does not allege the basic prerequisite of a section 116B.03 claim. Instead, plaintiff's Complaint seeks to impose upon the State of Minnesota environmental requirements that heretofore do not exist in any statute, rule, regulation, or other form. Yet, to be actionable under section 116B.03, the plaintiff's claim must allege conduct by a defendant that constitutes "pollution, impairment or destruction" as defined by the statute. Because the Complaint does not allege anything falling within the definition of "pollution, impairment or destruction," any section 116B.03 claim must be dismissed to the extent the Court deems such a claim to have been included in the Complaint.

2. Minn. Stat. § 116B.10

As noted above, MERA creates two private causes of action that allow citizens to sue for the protection of the environment under defined circumstances. Plaintiff

specifically pleads a claim under section 116B.10.[3] To determine whether the claim survives a Rule 12.02(e) challenge, the Court must determine if the Complaint alleges something that section 116B.10 declares actionable. The plain language of section 116B.10 does not permit a private cause of action by every citizen who is unhappy that the Legislature failed to go far enough to protect the environment. To be viable, plaintiff's "action [must] challenge . . . an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof." Minn. Stat. § 116B.10, subd. 1 (2010).

Plaintiff's Complaint does not refer to or challenge a single "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit." *Id.* In addition, plaintiff's Complaint does not allege that the state or any agency or instrumentality of the state has actually regulated carbon dioxide. To the contrary, the gravamen of plaintiff's Complaint is an assertion that this Court should step in and order the State of Minnesota, the Governor and the PCA to do what they have heretofore declined to do. What the plaintiff seeks goes far beyond the scope of the civil action authorized by section 116B.10.

Although the Complaint does not challenge an "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit", may the plaintiff use MERA to challenge a statute? Other than MERA, the only statute referred to in the

[3] Defendants argue that plaintiff lacks standing, the Court lacks subject matter and personal jurisdiction and that the issues before the Court are not justiciable. In the absence of Minn. Stat § 116B.10, these arguments would have merit. However, the language of section 116B.10 grants the plaintiff standing to bring his claim, grants the Court jurisdiction over the subject matter, and provides for recognition of justiciable issues if the Complaint properly alleges the factual predicates to a claim.

Complaint is Article 5 of the Next Generation Energy Act of 2007 ("NGEA"). Compl. ¶ 39; *see* Act of May 22, 2007, ch 136, art. 5, 2007 Minn. Laws (codified as Minn. Stat. §§ 216H.01-.13). It is evident from reading Article 5 of the NGEA that the statute sets goals, requires the filing of reports and proposed legislation by agencies with the Legislature, and establishes a construction and energy use moratorium.[4] The statute is largely aspirational. It does not create an "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit." Minn. Stat. § 116B.10, subd. 1 (2010). As such, if one assumes that legislation can be challenged through a section 116B.10 lawsuit, chapter 216H does not qualify as a statute subject to challenge.

The Court also holds that the Legislature did not intend to permit citizen lawsuits under section 116B.10 against the State of Minnesota due to legislative action or inaction. Section 116B.10 claims may only challenge something that was "promulgated or issued." *Id.* Legislatures do not "promulgate or issue" anything. Rather, they "enact." Moreover, the "environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit" subject to challenge must be one in "which the applicable statutory appeal period has elapsed." *Id.* There is no statutory appeal period for challenging

[4] Article 5 of the NGEA defines "statewide greenhouse gas emission" and establishes a greenhouse gas emissions reduction goal to "a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050." Minn. Stat. § 216H.02, subd. 1 (2010). The statute requires certain state agencies to submit a "climate change action plan" to the Legislature. *Id.* § 216H.02, subd. 2. The statute also requires the Pollution Control Agency to "establish a system for reporting and maintaining an inventory of greenhouse gas emissions", *id.* §§ 216H.021, subd. 1, enacts a moratorium on the construction of any "new large energy facility" or the importation of energy from any such facility, *id.* § 216H.03, requires a variety of reports to the Legislature on a periodic basis accompanied by proposed legislation, *id.* §§ 216H.07, and imposes certain reporting and disclosure requirements on the manufacturer and purchaser of a "high-GWP greenhouse gas." *Id.* §§ 216H.10-12. None of the goals, systems or plans is enforceable absent further legislation.

legislation. The "statutory appeal period" language clearly refers to the time limits that exist in the Administrative Procedure Act governing regulations that are promulgated or issued and, perhaps, the limitations periods found in local ordinances. *See, e.g.,* Minn. Stat. ch. 14 (2010) (setting forth the procedure and timeline under which rules become final). Thus, to the extent plaintiff claims that the NGEA is "inadequate to protect the air . . . from pollution, impairment, or destruction," such claims fall outside the intended scope of a section 116B.10 MERA lawsuit. The Legislature did not intend to authorize court recourse for injunctive remedies directing the Legislature to enact laws and appropriate money to realize outcomes that citizens could not achieve through the political process.

JHG