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LYNNE MITCHNICK,	:	SUPERIOR COURT OF
	:	NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	HUDSON COUNTY
	:	
-against-	:	Docket No. HUD-L-4742-12
	:	
WILLIAM LEE CHILDS,	:	Civil Action
	:	
Defendant.	:	
	:	
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**DEFENDANT WILLIAM LEE CHILDS, JR.'S BRIEF IN REPLY TO THE
OPPOSITION FILED BY PLAINTIFF TO DEFENDANT'S MOTION FOR
RECONSIDERATION**

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William Lee Childs, Jr.*

I. This Motion is Timely

In the Certification of David Zeitlin, Esq. dated January 24, 2014, submitted in support of the instant motion, the controlling rule was mistakenly cited as *R. 4:49-2* of the New Jersey Rules of Court. However *R. 1:7-4(b)* states that “motions for reconsideration of interlocutory orders shall be determined pursuant to *R. 4:42-2*.” The Court’s December 4, 2013 Order granting partial summary judgment was clearly interlocutory in nature; accordingly, this motion should be scrutinized under *R. 4:42-2*, not *R. 4:49-2*, which applies solely to final orders.

R. 4:42-2 contains no time restriction whatsoever. “It is well established that the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at *any time* prior to the entry of final judgment.” *Lombardi v. Masso*, 207 N.J. 517, 534 (2011). This motion is thus not time barred.

II. The Court has Broad Discretion to Entertain This Motion

As established above, *R. 4:42-2* is the correct provision under which to examine the instant motion; thus, the limitations imposed by *R. 4:49-2* with respect to the review of final orders are inapplicable. *R. 4:42-2* broadly states only that reconsideration of an interlocutory order “is in the sound discretion of the court in the interest of justice.” *Id.* “Indeed, [a] significant aspect of the interlocutory nature of an order is its amenability to the trial court’s control until entry of final judgment without interposition of considerations appropriate to finality.” *Lombardi, supra* at 534-35, quoting Pressler & Vernier, *Current N.J. Court Rules*, comment 3 on *R. 4:42-2* (2011). The Court may

therefore hear and adjudicate Defendant's argument if it believes that the "goal of substantial justice" is served. *Lombardi* at 536.

In the same vein, *R. 4-49-2*'s restriction on the introduction of new evidence does not apply here. *Id.* at 536-37. Defendant's introduction of the "Amended Backing Agreement" along with this motion (Exhibit C to David Zeitlin, Esq.'s January 24, 2014 Certification ("Zeitlin Cert.)) is therefore permissible and may serve as a valid reason for the Court to re-examine its ruling on illegality.

III. Actual Execution of a New Document is not Required to Effectuate a Contractual Modification

Plaintiff's assertion that the parties' failure to affix their signatures to any documents other than the original 2008 Backing Agreement means the Backing Agreement was not modified is incorrect. It is axiomatic that where the signatorial requirements of the New Jersey Statute of Frauds or another statute are absent, contracts can nevertheless be created and/or modified without signatures. *See, e.g., Leodori v. Cigna Corp.*, 175 N.J. 293, 814 A.2d 1098, 1106 (2003), *cert. denied*, 540 U.S. 938 (2003).

Here, as previously stated, the relevant inquiry is not whether the parties signed a second document, but whether there was mutual assent by the parties to modify the Backing Agreement. *County of Morris v. Fauver*, 153 N.J. 80, 100-01 (1998). Defendant posits that the parties agreed to amend the Backing Agreement to include online poker and cites the "Amended Backing Agreement" (Zeitlin Cert. Ex. C)—a document that plainly states that "live and online tournaments will be treated as a single backing relationship"—as proof. During discovery, Plaintiff sought to establish that the

“Amended Backing Agreement” was a valid modification of the Backing Agreement. See Plaintiff’s Answers to Defendant’s Interrogatories (Exhibit B to Defendant’s Summary Judgment Cross Motion/Opposition papers) at p. 16, Childs Deposition Transcript (attached to the November 7, 2013 Certification of David Zeitlin, Esq.) at pp. 30-31, 36-38. Despite this, Plaintiff now opts to rely solely upon the original Backing Agreement in pursuit of this cause of action.

Also, despite Plaintiff’s current claims to the contrary, the presence of a clause in the Backing Agreement limiting modifications to those made in writing does not render the “Amended Backing Agreement” (that is in writing) invalid. *See, e.g., Lewis v. Travelers Ins. Co.*, 51 N.J. 244, 253 (1968); *Home Owners Constr. Co. v. Borough of Glen Rock*, 34 N.J. 305, 316 (1961) (both holding that similar clauses do not prevent parties from modifying contracts orally or through their conduct).

IV. It is Impossible to Sever Legal and Illegal Contract Terms at This Juncture

The following facts are not in dispute: At all relevant times, Defendant played a combination of live and online poker as his main source of income. In 2008, Plaintiff and Defendant agreed that Plaintiff would commence financing Defendant’s live poker play only. Subsequently, in 2009, Plaintiff and Defendant agreed that Plaintiff would also finance Defendant’s online poker play. From that point forward, Plaintiff financed Defendant’s pro poker career in its entirety, covering both Defendant’s live and online poker play. While Plaintiff presently cites no authority governing her substantial investment in Defendant’s online play, the parties’ activity in that realm had to be governed by *something*. Defendant asserts that the Backing Agreement was modified to encompass online poker.

“If striking the illegal portion defeats the primary purpose of the contract. . . the entire contract [is] unenforceable.” *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 33 (1992). Severing illegal provisions from a contract “is only an option if striking the unenforceable portions of an agreement leaves behind a clear residue that is manifestly consistent with the central purpose of the contracting parties, and that is capable of enforcement.” *N.A.A.C.P. of Camden County East v Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 437 (App. Div. 2011).

The act of playing live poker may be easy to distinguish from the act of playing online poker, but the rights and obligations agreed to by the parties implicated online poker in ways that render it impossible for the Court to enforce a live-only poker staking agreement. Nearly every clause, even in the ostensibly “live only” Backing Agreement, also governed the parties’ relationship with respect to online poker. Consider that (a) segregating Defendant’s profits and losses from the two spheres may not be possible;¹ (b) the parties’ final makeup figure—which is the amount Plaintiff seeks as damages in the Complaint—reflects results resulting from both live and online poker together; (c) Defendant was supposedly obligated to provide “appropriate tax forms,” but Plaintiff did not distinguish live from online poker on her tax returns, making it apparent that tax forms from both sources were contemplated; and (d) the parties were permitted to, and apparently did, utilize their online poker accounts to transfer funds emanating for live poker to each other.

¹ This task is not as simple as separating live results from online results following the parties’ final profit split in November of 2010. That profit split (which would have been significantly larger had the parties maintained separate live and online accounting) must itself be deconstructed as it was performed after the proceeds were applied to a combined (live and online) makeup figure. In addition, it must be determined whether further profit splits would have occurred between November 2010 and the end of the parties’ relationship based on theoretically separate makeup figures.

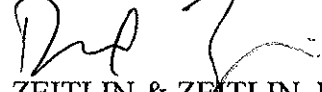
The 2008 Backing Agreement—which dates to a time preceding Plaintiff’s investment in Defendant’s online play—is a convenient document for Plaintiff to base her cause of action on. However, the ultimate purpose of Plaintiff’s investment—as indicated by the modified contract and the conduct of the parties—was to finance Defendant’s career in its entirety. Segregating online poker from this lawsuit fails to reflect the actual nature of the parties’ relationship.

V. Conclusion

For the foregoing reasons, Defendant William Lee Childs, Jr. respectfully requests that the Court grant his application for reconsideration and reverse that portion of its December 4, 2013 Order that granted Plaintiff’s motion for summary judgment on the defense of illegality.

Dated: Brooklyn, New York
February 24, 2014

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