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October 2, 2013

Via Lawyer's Service

Hon. Barry P. Sarkisian, J.S.C.
Superior Court of New Jersey
Law Division-Hudson County
Brennan Courthouse, 2nd Floor
583 Newark Avenue
Jersey City, New Jersey 07306

Re: Lynne Mitchnick vs. William Lee Childs
Docket No. HUD-L-4742-12

Dear Judge Sarkisian:

My firm represents the plaintiff, Lynne Mitchnick (hereinafter "Plaintiff") in the above-entitled action. Please accept this letter brief in lieu of a more formal brief in support of the Plaintiff's motion for partial summary judgment pursuant to R. 4:46, seeking summary judgment as to liability on the Plaintiff's claim for breach of contract alleged in the First Count of her complaint, as well as summary judgment as to the affirmative defenses of waiver and illegality raised by the defendant, William Lee Childs Jr. (hereinafter "Defendant"), in his answer. For all of the reasons set forth herein, Plaintiff's motion should be granted in its entirety.

Statement of Facts and Procedural History

The relevant facts and procedural history underlying the instant motion, as drawn from the Plaintiff's Statement of Material Facts Not in Dispute submitted herewith in support of the present motion (hereinafter "Pla. Stat."), are as follows: Defendant is a professional poker player. Plaintiff and Defendant entered into a signed contract on or about September 13, 2008 (hereinafter the "Backing Agreement"). Defendant had a full opportunity to review the Backing Agreement prior to signing it and Defendant drafted portions of the Backing Agreement that he later signed.

Under the terms of the Backing Agreement, the Plaintiff agreed to provide financing to Defendant to participate in professional poker tournaments, in exchange for Defendant's agreement to share his winnings with Plaintiff and to perform certain specified obligations relating both to the disbursement of earnings and to providing information to the Plaintiff so as to allow her to ascertain the status of her investment, the disbursement of earnings, and plan appropriately for upcoming financing (hereinafter the "Backing Agreement"). Specifically, the section of the Backing Agreement entitled "Player Responsibilities" obligated the Defendant to, among other things: (a) provide the Plaintiff with a schedule of live tournaments that he planned to play in six (6) months in advance; (b) deposit Plaintiff's share of winnings into the appropriate account or deliver the cash value of same to the Plaintiff within ten (10) days of Defendant winning same; (c) provide Plaintiff with the appropriate tax forms no later than January 31 of each calendar year.

The Defendant has admitted that he failed to perform each of these material, enumerated provisions of the Backing Agreement. After exhibiting admirable patience towards the Defendant, and repeatedly trying to work with him to improve his performance under the

Backing Agreement, the Defendant's continued inability or unwillingness to perform under the terms of the Backing Agreement eventually forced the Plaintiff to terminate the Backing Agreement by issuing the required written notice to the Defendant on July 30, 2012, said termination being made effective as of August 29, 2012. Defendant has alleged but failed to identify any evidence that Plaintiff breached any of her obligations under the terms of the Backing Agreement.

Plaintiff filed the complaint commencing the above-entitled action on or about October 2, 2012. The time for discovery in this case ended on September 26, 2013. No trial date has been scheduled in the above-entitled action.

Legal Argument

A. Standards governing motions for summary judgment pursuant to R. 4:46.

A motion for summary judgment should be granted when it appears from the papers submitted that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law". Pressler, CURRENT N.J. COURT RULES, R. 4:46-2(c) (GANN). The standard for determining whether the requisite genuine issue of material fact exists was defined by the New Jersey Supreme Court as:

[W]hether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995).

The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 536; see also Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189

N.J. 436, 445-446 (2007). If the Court finds no substantial genuine issues of material fact after reviewing the record in the light most favorable to the non-moving party, summary judgment should be granted. Turner v. Wong, 363 N.J.Super. 186, 199 (App. Div. 2003), citing Brill, 142 N.J. at 539-540; see also Laidlow v. Hariton Machinery Co., Inc., 170 N.J. 602, 607 (2002). Accordingly, a grant of summary judgment for a defendant is warranted where a party “fails to make a showing sufficient to establish the existence of an element essential to [his or her] case, and on which [he or she] will bear the burden of proof at trial.” Ramer v. New Jersey Transit Bus Operations, Inc., 335 N.J. Super. 304, 316 (App. Div. 2000).

Where the moving party has demonstrated a prima facie right to summary judgment, the party opposing the motion bears a substantial evidentiary burden in opposing that motion. The opposing party is “required to show by competent evidential material that a genuine issue of material fact existed.” Ziembra v. Riverview Medical Center, 275 N.J.Super. 293, 301, 645 A.2d 1276, 1281 (App. Div. 1994). The opposing party must actually come forward with competent, admissible, and credible affirmative evidence: “[b]are conclusions in the pleadings without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.” Brae Asset Fund, L.P. v. Newman, 327 N.J.Super. 129, 134, 742 A.2d 986, 988 (App. Div. 1999). Moreover, “bare conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment.” Brae Asset Fund, L.P. v. Newman, 327 N.J.Super. at 134; see also Hoffman v. Asseenontv.com Inc., 404 N.J.Super. 415, 426, 962 A.2d 532, 538 (App. Div. 2009). When considering the opposing party’s response to the motion for summary judgment, the Court is advised not “to turn a blind eye to the weight of the evidence; the “opponent must do more than simply show that there is some metaphysical

doubt as to the material facts.” O’Loughlin v. National Community Bank. 338 N.J. Super. 592, 607, 770 A.2d 1185, 1194 (App. Div. 2001).

B. Plaintiff is entitled to an award of partial summary judgment on liability as to the breach of contract claim alleged in the First Count of the Plaintiff’s complaint as the Defendant has admitted to he committed multiple material breaches of the September 13, 2008 Backing Agreement.

In the First Count of her Complaint, the Plaintiff alleges a claim for breach of contract against the Defendant for his failure to perform under the terms of the Backing Agreement. In order to establish a claim for breach of contract under New Jersey law, a claimant must prove the following elements of the *prima facie* case: “that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result.” Murphy v. Implicito, 392 N.J. Super. 245, 265, 920 A.2d 678, 689 (App. Div. 2007). See also Coyle v. Englander’s, 199 N.J. Super. 212, 223, 488 A.2d 1083, 1088 (App. Div. 1985). A breach of contract is deemed material when it goes to one or more of the “essential obligations under the contract”. See Ingrassia Const. Co., Inc. v. Vernon Twp. Bd. of Educ., 345 N.J. Super. 130, 136-37, 784 A.2d 73, 77-78 (App. Div. 2001), citing Medivox Prod., Inc. v. Hoffmann-LaRoche, Inc., 107 N.J. Super. 47, 58-59, 256 A.2d 803 (Law Div. 1969).

It is undisputed that the parties entered into the Backing Agreement voluntarily, and that the Defendant played a role in drafting the agreement. (Pla. Stat. at ¶ 3). Moreover, the Defendant has admitted in his sworn deposition testimony that he failed to (a) provide the Plaintiff with a schedule of live tournaments that he planned to play in six (6) months in advance; (b) deposit Plaintiff’s share of winnings into the appropriate account or deliver the cash value of same to the Plaintiff within ten (10) days of Defendant winning same; (c) provide Plaintiff with the appropriate tax forms no later than January 31 of each calendar year. (Pla. Stat. at ¶¶ 5-6). Finally, the Defendant’s breaches are clearly material, because they go directly to the

heart of the Backing Agreement. The timely repayment of monies and keeping the Plaintiff informed about the Defendant's performance and plans under the Backing Agreement, represent the essence of the agreement between the parties.

The Plaintiff has candidly admitted that she was aware of the Defendant's breaches for a long time, but she has explained that she did so out of a belief that the business relationship could be salvaged and because she was dealing with personal issues during this period of time. (Pla. Stat. at ¶ 7). The Plaintiff never agreed to waive her rights under the Backing Agreement, nor release the Defendant from his obligations under the Backing Agreement, nor has the Defendant come forward with any proof of same. Thus, as a matter of law, the Plaintiff has demonstrated that there are no genuine issues of material fact as the existence of a valid contract and the Defendant's breach of this contract. The Plaintiff is therefore entitled to an award of summary judgment as to liability under the First Count of the complaint, leaving the issue of the Plaintiff's damages to be determined at a subsequent hearing.

C. Plaintiff is entitled to an award of summary judgment as to the Defendant's affirmative defense of waiver as alleged in the 2nd and 9th affirmative defenses.

"Waiver" under New Jersey law has been defined by the New Jersey Supreme Court as "voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177, 836 A.2d 794, 798 (2003), citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152, 141 A.2d 782, 786 (1958).; see also County of Morris v. Fauver, 153 N.J. 80, 104-05, 707 A.2d 958, 970 (1998). The alleged waiver must be proven to have been intentional and fully involuntary: "Waiver must be voluntary and there must be a clear act showing the intent to waive the right. Furthermore, waiver "presupposes a full knowledge of the right and an intentional surrender[.]" County of Morris v. Fauver, 153 N.J. at 104-05, citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152, 141 A.2d 782, 786 (1958). In other words, the "party

waiving a known right must do so clearly, unequivocally, and decisively.” Knorr v. Smeal, 178 N.J. at 177, citing Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J.Super. 376, 380, 463 A.2d 960, 962 (App.Div.1983).

The Defendant has alleged an affirmative defense of waiver in in the 2nd and 9th affirmative defenses in his answer, but has failed to come forward with sufficient proof of same. Plaintiff’s interrogatory number 17 expressly asked the Defendant to set forth the factual basis for each of his affirmative defenses. The Defendant’s answer to Plaintiff’s interrogatory number 17 fails to identify any proof that the Plaintiff engaged in a knowing and intentional waiver of her rights to terminate the Backing Agreement as required by the Knorr and Fauver decisions. The sole “fact” offered by the Defendant in support of his claim of waiver was that the Plaintiff “consented to receipt of late documents”. (See Pla. Stat. at ¶ 9). There is no showing of any evidence that the Plaintiff intended her efforts to continue to work with the Defendant was to serve as a waiver of her rights under the Backing Agreement, much less to the standard of “clearly, unequivocally, and decisively.” Knorr v. Smeal, 178 N.J. at 177. In the absence of any additional explanation or supporting evidence, the Defendant’s conclusory allegation and similarly conclusory statement in his answers to interrogatories, without supporting evidence, is insufficient as a matter of law.

Moreover, to the extent that the Defendant now tries to come forward with additional alleged evidence, such efforts should be rejected as a matter of law. It is black-letter law in New Jersey that a party who fails to identify and/or produce requested evidence in response to interrogatories served by another party should be barred from introducing that evidence at trial. See Skibinski v. Smith, 206 N.J.Super. 349, 353, 502 A.2d 1154, 1156 (App. Div. 1985); Automatic Merchandising Council of New Jersey v. Edison Tp., 204 N.J.Super. 395, 401-402,

499 A.2d 224, 227 (App. Div. 1985), rev'd in part on other grounds 102 N.J. 125 (1986); Branch v. Emery Transp. Co. 53 N.J.Super. 367, 374, 147 A.2d 556, 560 (App. Div. 1959); D'Agostino v. Schaffer 45 N.J.Super. 395, 402, 133 A.2d 45, 49 (App. Div. 1957).

In the absence of additional proofs, the Plaintiff's demonstration of good will in trying to work with the Defendant in the face of his chronic breaches of the contract is not a waiver as a matter of law. The Defendant has thus failed to sustain his burden of proof as to his affirmative defense of waiver in the 2nd and 9th affirmative defenses in his answer, and accordingly Plaintiff should be awarded summary judgment to this affirmative defense as a matter of law.

D. Plaintiff is entitled to an award of summary judgment as to the Defendant's affirmative defense of illegality as alleged in the 1st and 13th affirmative defenses.

The Defendant has raised affirmative defenses premised upon the argument that New Jersey and/or Federal law prohibits providing financial backing for professional poker players. A review of the applicable law in this area demonstrates that this argument is clearly without merit, and thus the Defendant's affirmative defense of illegality of the Backing Agreement should be dismissed with prejudice as a matter of law.

As a preliminary matter, it must be noted that the Backing Agreement by its very terms limits itself to financial backing for live tournaments only, played in lawfully operated casinos, and expressly excludes on-line tournaments. (See Pla. Stat. at ¶ 2). The parties had discussed a separate agreement for on-line poker tournaments, such as in Atlantic City, New Jersey and Las Vegas, Nevada, but the Defendant never executed such an agreement.

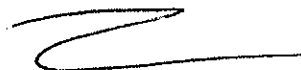
It is black-letter law in the State of New Jersey that loans made for casino gambling are legal and enforceable, even if the loan is made by a non-licensed person. See Gottlob v. Lopez, 205 N.J. Super. 417, 420, 501 A.2d 176, 178 (App. Div. 1985), citing N.J.S.A. 2A:40-1, N.J.S.A. 2A:40-3, and N.J.S.A. 5:12-101. It is similarly well-settled under Nevada law that a loan made

by a financial backer to a poker player is legal and enforceable under Nevada law. See Sigel v. McEvoy, 101 Nev. 623, 626, 707 P.2d 1145, 1147 (1985). Finally, there is no Federal statute or case law prohibiting an agreement to provide financial backing for tournament poker. To the contrary, Federal courts have expressly held that the act of advancing credit for lawful gambling activities is not a violation of Federal law. See In re MasterCard Int'l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 482 (E.D. La. 2001) aff'd sub nom. In re MasterCard Int'l Inc., 313 F.3d 257 (5th Cir. 2002). The Defendant has not identified any contrary authority during the pendency of this case, and has thus failed to create any genuine issue of fact as to the legality and enforceability of the Backing Agreement. Accordingly, the Plaintiff should be awarded summary judgment to this affirmative defense as a matter of law.

Conclusion

For all of the reasons set forth herein, and in the other papers submitted in support of the present motion, Plaintiff Lynne Mitchnick respectfully request that this Court grant the pending motion in its entirety, award Plaintiff partial summary judgment pursuant to R. 4:46 on the terms requested herein, and enter the proposed form of Order submitted herewith.

Respectfully Submitted,
STEVEN ROBERT LEHR, P.C.



Eric J. Szoke, Esq.
For the Firm

EJS
Enc/s

cc: Melvin R. Solomon, Esq. (via Lawyer's Service w/enc)
Lynne Mitchnick