SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
FRANCIS B. SCHULTZ
JUDGE

WILLIAM J. BRENNAN COURTHOUSE
583 Newark Avenue
Jersey City, New Jersey 07306

December 4, 2013

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

Dear Counsel:

Please allow this letter to serve as the findings of the court.

The plaintiff moved for partial summary judgment as to liability only on her complaint alleging defendant's breach of contract as well as for summary judgment seeking to dismiss the defendant's affirmative defenses of waiver and illegality.

The defendant cross-moved for summary judgment seeking to dismiss the plaintiff's complaint as based on an illegal contract, that in any event the defendant did not breach the contract, that the defenses of waiver, estoppel, laches and unclean hands apply and that the liquidated damage clause is an unenforceable penalty.

The contract upon which the litigation is based is what the parties refer to as a "Backing Agreement" that was signed by both parties on September 13, 2008. This Backing Agreement is essentially a contract in which one party (backer) agrees to provide funding for another party (player) who will use the money to play in poker tournaments. The agreement sets forth the specific rights and obligations of each party.

The parties disagree as to the choice of law that this court should make in determining the issues. The plaintiff, a resident of New Jersey, argues that New Jersey law should apply and

notes that New Jersey law allows such agreements as enforceable when they pertain to legal casino gambling, relying on Gottlob v. Lopez, 205 N.J. Super. 417 (App. Div. 1985), N.J.S.A. 2A:40-1, N.J.S.A. 2A:40-3 and N.J.S.A. 5:12-101. Alternatively the plaintiff would ask the court to apply the similar law of Nevada citing Sigel v. McEvoy, 101 Nev. 623 (1985).

The defendant, a resident of Virginia, urges that the law of Virginia should apply noting that Virginia will not enforce such agreements even if based on legal gambling citing Goghill v. Boardwalk Regency Corp., 240 Va. 230, 232 (1990) as well as Va. Code Ann. § 11-14.

New Jersey applies a "most significant relationship" standard, State Farm Mut. Auto Ins. Co. v. Estate of Simmons, 84 N.J. 28, 34 (1980) and uses the guidelines found in the Restatement (Second) of Conflict of Laws § 188 (1971).

This court will first discuss the "contact to be taken into account" factors before moving on to the section six analysis in the Restatement.

The place of contract cannot easily be identified. The parties met in Las Vegas and apparently signed the contract electronically. The plaintiff's physical location at the time she affixed her signature electronically is perhaps at issue but the court will assume it was in New Jersey. The defendant's physical presence at the moment of fixing his signature electronically may also be disputed, but the court will assume it was in Virginia. This factor is equally balanced.

The place of negotiation is difficult to ascertain since this was also conducted electronically, although it should be noted that the original draft was crafted by the plaintiff. This factor is equally balanced.

The place of performance *can* be established to a certain degree. Although it is clear that the plaintiff *did* provide backing for "on line" poker playing by defendant the "Backing Agreement" by its clear terms did *not* apply to "on line" tournaments. The "scope" of the agreement was limited to "live tournaments" with certain exceptions that did *not* include "on line" tournaments. Although mentioned, "on line" tournaments were specifically excluded from the agreement. There is no reason for a judge to alter the clear and unambiguous provisions of a contract to which the parties specifically agreed.

Since live casino gambling is impossible in Virginia, the place of performance was either in the casinos of Atlantic City, Nevada or those other jurisdictions that allow it. Since no weight can be attributed to Virginia, and significant weight can be attributed to New Jersey and Nevada (which similar to New Jersey allows for the enforcement of legal gambling loans) this place of performance factor weighs in favor of New Jersey or similar Nevada law.

The "subject matter" of the contract would have to be defined before its "location" can be determined. The defendant urges that the skill of the defendant is the subject matter of the contract and since the defendant lives in Virginia, that State's law should apply. The court observes, however, that this instrument is entitled "Player (Lee Childs)/Backer (Lynne Mitchnick) Agreement" and thus equal weight should be given to the significance of the

"Backer", who presumably along with her money resides in New Jersey. This factor is equally balanced.

The final factor (domicile, residence, etc.) is also in equipoise.

Moving on to the Section six factors, the needs of the interstate and international systems (a) cannot be addressed here as they do not appear relevant.

The relevant policies of the forum (b) and of other interested states and the relative interests of those states in the determination of the particular issue (c) will be discussed jointly. As to the forum, New Jersey's policy is to enforce loans based on legal casino gambling Gottlob v. Lopez, 205 N.J. Super. 417 supra and Virginia's policy is the opposite, Goghill v. Boardwalk Regency Corp., 240 Va. 230 supra. Counsel for the defendant argues that Virginia law is so opposed to gambling debts that Virginia would oppose any states' enforcement of a gambling obligation on one of its citizens even if the gambling took place outside of Virginia's borders. This is a fanciful argument. After all, how would New Jersey feel about one of its citizens entering into an arm's length agreement with a Virginian for lawful activities in New Jersey only to have the Virginian say "Ha Ha, I am from Virginia" when the Virginian defaults on his signed obligations. If however, the Garden State resident defaulted one would assume the Virginian would be only too happy to champion New Jersey law. The policies of both states being recognized, this factor is equally balanced.

The protection of justifiable expectations (d) is a one sided matter here. Both parties were justified in expecting that the agreement to which they mutually assented would be recognized by a court of law, if necessary. This factor weighs heavily in favor of New Jersey. There is nothing in the record to indicate that at the time of execution either party felt otherwise.

The basic policies underlying this particular field of law (e) are also in equal balance. Virginia recognizes the dangers of gambling and all of the problems it brings to bear on the gambler, his dependents and others. New Jersey recognizes freedom of contract and the practical advantages of licensed and well regulated gambling.

Certainly, predictability and uniformity of result (f) weighs in favor of New Jersey law for reasons similar to the protection of justified expectations (d). Additionally, as an increasing number of states recognize the practical advantages of licensed well regulated casino gambling, this factor must weigh in favor of recognizing financial arrangements made in connection with such gambling.

As to the final factor (g) this court did find "ease" in determining the law to be applied since no factor could be found in favor of Virginia law. Applying New Jersey's well developed law of contract to the case should not be terribly difficult. The law of New Jersey will apply.

Summary Judgment motions are determined in accordance with R.4:46-2(c) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995). The plaintiff claims she is entitled to summary judgment on liability since the defendant failed to provide a schedule of tournaments six (6) months in advance, deposit plaintiff's share of winning within ten (10) days

and provide appropriate tax forms by January 31. These issues were thoroughly discussed at oral argument on November 22, 2013. With minor exception, the schedules were not available six (6) months ahead of time, it was not conceded by the defendant that the deposits were not timely made, and the term "appropriate tax forms" was not clearly defined or understood. Besides, plaintiff acknowledged there were no positive earnings to report on her income tax. Additionally, it is not clear that defendant's alleged failings here went to a "material" breach of the contract as opposed to a simply ministerial obligation, Chance v. McCann, 405 N.J. Super. 547, 565 (App. Div. 2009). The plaintiff's motion for summary judgment on liability is denied.

As to the plaintiff's motion for summary judgment on the affirmative defenses of waiver that application is also denied. It is clear that the plaintiff, on at least one occasion, told defendant she did not need the tax information and also modified the six (6) month scheduling requirements. Since it is the plaintiff's burden to meet the standard for summary judgment and has failed, the requested relief cannot be granted.

The plaintiff's motion for summary judgment as to the affirmative defense of illegality is granted. As indicated earlier, this agreement specifically excluded on line gambling, New Jersey law shall apply and the contract is enforceable. Alternatively, even if illegal on line gambling was part of this contract (which it is not) New Jersey law allows for the severance of the legal portion from a contract that contains unenforceable illegal provisions Maseef v. Cord, Inc., 90 N.J. Super. 135, 143 (App. Div. 1966). The financial records provided in discovery and to the court co-mingled the online financial data with the legal casino data. The plaintiff, however, claims that the data supporting these records is so specific she can easily extract the data for only the legal casino gambling. Since proving damages is the plaintiff's burden that issue should remain for trial but it appears that the legal portion is servable.

For reasons already made clear, the defendant's motion for summary judgment based on illegality is denied.

The defendant's motion for summary judgment based on not violating the terms of the agreement is also denied. Whether or not these were breaches by the defendant and whether or not they were "material" are issues still unsettled and not ripe for summary judgment.

As to waiver, a voluntary and "intentional relinquishment of a known right" W Jersey Title & Guarantee Co. v. Indemnity Trust Company, 27 N.J. 144, 152 (1958) it is not clear from the current record that the defendant can reach the summary judgment standard. While the plaintiff did waive her right to "appropriate tax forms" on one specific occasion and chose not to seek termination when she believed she was entitled to do so, these acts do not necessarily constitute waiver. The plaintiff testified that she elected not to formally commence termination because the "makeup" was over a $100,000.00 at that time and she felt (apparently correctly) that there was an upcoming tournament in which the defendant would make money and allow for the makeup to be reduced (which it was) thus, the doctrines of unclean hands, estoppel, laches and breach of the covenant of good faith cannot be applied with the certainty necessary to reach the summary judgment standards.

A liquidated damages clause is presumed valid, Wasserman's Inc. v. Township of Middletown, 137 N.J. 238, 252 (1994). The record, at the present, is not so clear that this court can determine whether or not "the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach" Westmont Country Club v. Kameny, 82 N.J. Super. 200, 206 (App. Div. 1964).

An order accompanies this letter opinion.

Francis B. Schultz, J.S.C.

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Enc.