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NO. 69605-0

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

HYUN SEO-JEONG, et al,

Appellants,

vs.

SONA & JIM CHU

Respondents

APPELLANT'S BRIEF

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ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

I. Is a CR2A Agreement that was executed under coercion or duress valid contract?

II. May a document being sought to be admitted as evidence itself be used to prove lack of coercion and/or duress and thus render it admissible under hearsay rules?

III. Did Appellants' evidence raise genuine issue of material facts, the existence of coercion or duress?

STATEMENT OF THE CASE

Procedural and Substantive Facts

On October 19, 2012, the trial court granted summary judgment in favor of Respondents Chu (hereinafter "Chus").

Café Arizona first opened for business in Federal Way, Washington on January 18, 1995 as a restaurant, lounge, and card room and on October 1, 2000, received its license to conduct casino activities. Casino business for Café Arizona was constantly losing money and the business was in need of additional capital. Sometime during early 2001, John Chong, the general manager of the casino at Café Arizona, introduced Jim Chu as a possible investor in the casino business. Jim Chu was interested in making the investment but did not want to disclose his source of funds and suggested that the investment be made confidential. On or about June 1, 2001, Jim Chu signed a confidential investment agreement under which he invested $200,000.00 to Café Arizona's casino business. The casino business continued to lose money and on September 30, 2003, the parties agreed to cease casino activities. Appellants Seo (hereinafter "Seos") kept the casino license active until 9/20/2011 when the the Seos decided not to renew the casino license. (CP, Sub 14, Exh. 1, p.2). Chus filed suit in early 2007 and the parties subsequently signed the CR2A Agreement as settlement of the suit.

Standard of Review

In reviewing an order of summary judgment, "this court engages in the same inquiry as the trial court." *Tollycraft Yachts Corp. v. McCoy*, 122 Wash.2d 426, 431, 858 P.2d 503 (1993) (citing RAP 9.12; *Harris v. Ski Park Farms, Inc.*, 120 Wash.2d 727, 737, 844 P.2d 1006 (1993)). A trial court may grant summary judgment only "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Dep't of Labor & Indus. v. Fankhauser*, 121 Wash.2d 304, 308, 849 P.2d 1209 (1993) (citing CR 56(c)). In reviewing a summary judgment, "all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo." *Coppernoll v. Reed*, 155 Wash.2d 290, 296, 119 P.3d 318 (2005) (citing *Berger v. Sonneland*, 144 Wash.2d 91, [102-03,] 26 P.3d 257 (2001)).

ARGUMENT

"Summary judgment is proper if the pleadings and evidence, viewed in a light most favorable to the nonmoving party show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Landberg v. Carlson*, 108 Wn. App. 749, 757, 33 P.3d 406 (2001); Washington Court Rule 56. All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. Summary judgment is proper when reasonable minds could reach but one conclusion regarding the material facts. *Cotton v. Kronenberg* 111 Wn. App. 258, 264, 44 P.3d 878 (2002).

In examining the facts most favorable to the nonmoving party, the evidence submitted to the trial court raised genuine issues as to material facts as to whether the CR2A Agreement is a valid contract. First, the court must look to the evidence. The evidence submitted by the Seos, that they were indeed under duress and therefore coerced into signing the Agreement, does raise genuine issues as to material facts. Chus argued that the CR2A agreement was properly executed and there is no material genuine issue of fact.

I. A CR2A AGREEMENT EXECUTED UNDER COERCION OR DURESS IS NOT A PROPERLY EXECUTED CONTRACT.

While the agreement may appear to meet CR2A requirements, it is overned by general principles of contract law. The issue then is not as to the terms of the CR2A Agreement but rather whether the Agreement was executed under duress or coercion. CR2A supplements but does not supplant the common law of contracts. Stottlemyre v. Reed, 35 Wn. App. 169, 171, 665 P.2d 1383, review denied, 100 Wn.2d 1015 (1983); In re Marriage of Ferree, 71 Wn. App. 35, 39, 856 P.2d 706 (1993). Coercion or duress here was in the form of a probable, not just possible, loss of the casino license. Washington Administrative Code (hereinafter "WAC") 230-03-055 requires the licensee to report "any information required on the application changes or becomes inaccurate in any way within ten days of the change" to Washington State Gaming Commission (hereinafter, "the Commission").[1] Seos held a casino license and were therefore required to report the $200,000.00 investment by Chus as they would have

[1] **WAC 230-03-055 Reporting changes to application.** You must notify us if any information required on the application changes or becomes inaccurate in any way within ten days of the change.

become a substantial interest holder under WAC 230-03-045.[2] WAC 230-23-085 provides,

> "We may deny, suspend, or revoke any application, license or permit, when the applicant, licensee, or anyone holding a substantial interest in the applicant's or licensee's business or organization:
> (7) Fails to provide us with any information required under commission rules within the time required, or, if the rule establishes no time limit, within thirty days after receiving a written request from us".

Both parties were aware of these rules but Chus obviously did not wish to proceed in such a fashion and have their investment reported to the Commission, accounting for the source of the funds used in the investment. Instead, they chose to enter into a "confidential investment agreement" in their attempt to hide this investment from the Commission. Chus alleged

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[2] **WAC 230-03-045 Defining substantial interest holder.** (1) "Substantial interest holder" means a person who has actual or potential influence over the management or operation of any organization, association, or other business entity.

(2) Evidence of substantial interest may include, but is not limited to:

(a) Directly or indirectly owning, operating, managing, or controlling an entity or any part of an entity; or

(b) Directly or indirectly profiting from an entity or assuming liability for debts or expenditures of the entity; or

(c) Being an officer or director or managing member of an entity; or

(d) Owning ten percent or more of any class of stock in a privately or closely held corporation; or

(e) Owning five percent or more of any class of stock in a publicly traded corporation; or

(f) Owning ten percent or more of the membership shares/units in a privately or closely held limited liability company; or

(g) Owning five percent or more of the membership shares/units in a publicly traded limited liability company;

to its existence in paragraph 3.9 of their Amended Complaint under 05-2-41074-4KNT (CP, Sub 14, Exh. 3).

The existence of an investment agreement without proper reporting of the investment to the Commission was a clear violation of WAC 230-03-055, subjecting the violator to sanctions under WAC 230-03-085. Seos, in their opinion at the time of the CR2A Agreement, had no choice but to agree to Chus' terms. In fact, they had made some payments to the Chus even prior to the filing of the suit in 2007. Seos did not want the existence of the confidential agreement made public, and certainly did not want the Commission to be notified. The CR2A agreement itself supports this argument that the parties were well aware of Seos' fear of losing their casino license. It states, "THIS DOCUMENT WILL NOT BE FILED WITH THE COURT." There is no reason other than an attempt to prevent the disclosure of the transaction between the parties not to file the CR2A Agreement with the trial court.

These facts fully support Seos' claim that the CR2A Agreement was executed under duress or coercion. It is therefore not a valid contract between the parties and should not be enforced as such.

II. A DOCUMENT THAT IS BEING SOUGHT TO BE ADMITTED CANNOT SERVE AS THE BASIS FOR ITS ADMISSIBILITY.

The CR2A Agreement specifically states that it was being entered into without coercion. The trial court accepted this statement at face value without any independent evidence that the CR2A Agreement was in fact entered into without coercion. Evidence Rule (E.R.) 801(c) states:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

In *State v. Ashurst*, 45 Wn.App. 48, 723 P.2d 1189 (1986), the court also defined as hearsay the statements that served no purpose other than to prove truth of matters asserted. Here, the statement that the CR2A Agreement was entered into without coercion served, for the summary judgment motion, no purpose other than to show that there was no coercion. As such, it is hearsay that should not have been admitted or considered. In addition, there was no prior statement by witness or admission by the Appellant of a lack of coercion or duress in entering into the Agreement and E.R. 801(d) does not apply here. Criminal Rule 4.2(d) is cognizant of this possibility and requires that the trial court first make a

determination as to the voluntariness of the plea.[3] This determination is made despite the fact that both the defendant and the defendant's attorney have already signed the plea form.

The CR2A Agreement in this case where there is a reasonable claim of coercion or duress cannot be admitted to prove that it was executed without any coercion or duress. It is hearsay and such hearsay should not have been admitted as evidence and should not have been considered by the trial court under these circumstances.

[3] CrR 4.02(d) states in part: "Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently ... "

III. APPELLANTS RAISED GENUINE ISSUE OF MATERIAL FACT(S)

To survive the summary judgment motion by Chus, Seos had to offer evidence of coercion or duress, material facts, at trial court. *Patterson v. Taylor,* 93 Wn. App. 579. Seos submitted evidence, direct and circumstantial, that the Seos were indeed under duress. They were under the threat of losing their casino license. At stake with the casino license was a substantial investment of funds and effort as evidenced by the fact that $200,000.00 of Chus' funds were infused to the business. This risk is both real and important to the casino business regardless of the classification of these funds as a loan or an investment.

If the funds were in fact provided to Seos as a loan by Chus, why did the parties enter into a "Confidential Investment Agreement" instead of a promissory note or a similar document? Chus cannot answer this question because they were and still are fully aware of the facts and circumstances that led the parties to enter into such an arrangement. It was an investment and the parties agreed that the investment should not become public knowledge and should not be reported to the Commission. An investment cannot and should not become a loan once the business falters, especially under the threat, implied or otherwise, of losing what a party considers to be of a great value.

These claims by Seos were not mere assertions or technicalities as in *Patterson*. In contrast, Chus offered no evidence otherwise in their motion and reply. Seos therefore did provide sufficient evidence of duress survive the summary judgment, especially so when viewed in a light most favorable to them the nonmoving party.

CONCLUSION

The trial court erred by granting summary judgment when there are genuine issues of material facts, issues that are not mere assertions. Seos proffered evidence rising at least to the level of raising genuine issue of a material fact, that the CR2A Agreement is not a valid contract as duress and/or coercion was at play during the negotiation that led to the signing of the Agreement. Yet, the trial court erred by admitting hearsay as evidence by considering the statement in the CR2A Agreement itself as proof that there was no coercion.

Seos therefore respectfully request the Court to vacate the summary judgment and remand the matter for trial.

DATED this 22nd day of February, 2013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on the 22nd day of February, 2013, I caused a copy of Appellant's Brief, to be served upon the following:

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