Court of Appeal Cause No. 69605-1-I

90084-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Sona Chu and Jim Chung0Sik Chu, Respondents

v.

Hyun H. Seo-Jeong & Myung Chul Seo, Petitioners

PETITION FOR REVIEW

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253-274-0201

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TABLE OF AUTHORITIES

A. Identity of Petitioners

Hyun H. Seo-Jeong and Myung Chul Seo ask the Court to accept review of the Court of Appeals decision termination review designated in Part B of this petition.

B. Court of Appeals Decision

Hyun H. Seo-Jeong and Myung Chul Seo ask this Court to review the decisions terminating review by the Court of Appeals. The appeal was denied by the Court of Appeals on January 21, 2014. The motion for reconsideration was denied February 19, 2014. A copy of the unpublished opinion is in the Appendix at page A-1. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-2.

C. Issues Presented for Review

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

II. May a document being sought to be admitted as evidence itself be used to prove lack of coercion and/or duress?

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

D. Statement of the Case

Procedural and Substantive Facts

Plaintiffs' motion for summary judgment was granted by the trial court on October 19, 2012. Appellant's appeal was denied by the Court of Appeals on January 21, 2014. Appellant's motion for reconsideration was denied by the Court of Appeals on February 19, 2014.

On January 18, 1995, defendants opened Café Arizona in Federal Way, Washington as a restaurant, lounge, and card room. On October 1, 2000, Café Arizona

received its license to conduct casino activities. This casino business constantly lost 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 at the time, introduced plaintiff 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. Chus filed suit in year 2007 to recover their investment and the parties subsequently signed the CR2A Agreement to settle 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)).

E. Argument Why Review Should Be Accepted

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

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[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.

[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;

> "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 confirmed the existence of this "confidential investment agreement in paragraph 3.9 of their Amended Complaint under 05-2-41074-4KNT.

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. Because of this, 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. There was no prior statement by a 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.

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.

[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 ... "

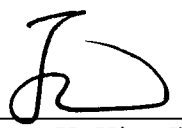
If the funds were in fact provided to Seos as a loan by Chus, why did the parties enter into a "Confidential Investment Agreement" instead of a promissory note or a similar document? Chus cannot answer this question because they were and still are fully aware of the facts and circumstances that led the 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 did therefore provide sufficient evidence of duress to survive the summary judgment, especially so when viewed in a light most favorable to them the nonmoving party.

F. 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 considering the statement in the CR2A Agreement itself as proof of lack of coercion.

RESPECTFULLY Submitted this 19th day of March, 2014



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SONA CHU and JIM CHUNG-SIK CHU, wife and husband, Respondents, v. HYUN H. SEO-JEONG and MYUNG CHUL SEO, Appellants.	)	No. 69605-0-I UNPUBLISHED OPINION FILED: January 21, 2014

VERELLEN, J. — Sona Chu and Jim Chung-Sik Chu (Chu) sued Hyun H. Seo-Jeong and Myung Chul Seo (Seo-Jeong) claiming breach of a settlement agreement. Because Seo-Jeong presented no genuine issue of material fact for trial, we affirm summary judgment in favor of Chu.

FACTS

In 1995, Seo-Jeong opened Café Arizona, a casino and restaurant in Federal Way. The business experienced financial difficulties and Seo-Jeong sought additional capital. In 2001, Chu lent $200,000 to Seo-Jeong.

In 2005, Chu sued Seo-Jeong for breach of contract due to Seo-Jeong's failure to repay the loan as agreed. On February 1, 2008, following mediation, the parties

entered into a settlement agreement pursuant to Civil Rule 2A (CR 2A).[1] The settlement agreement, signed by Jim Chung-Sik Chu and Myung Chul Seo, their respective attorneys and the mediator, provided, in relevant part:

> This agreement made and entered into this 1st day of February, 2008 between the parties named above to resolve issues between them arising out the action brought herein, including any cross-claims, counter-claims, set-offs or affirmative defenses. The agreement attached hereto constitutes a fair and full settlement of all issues brought herein. The parties stipulate pursuant to Civil Rule 2[A] this is a binding agreement between the parties. The parties agree they have met in settlement conference/mediation and have voluntarily, without coercion, and of their own free will entered into the agreement attached hereto and understand this agreement and settlement is fully enforceable by the court [sic] by either party.
>
> . . . .
>
> 8. All defendants shall have 24 months from 2/1/08 to sell license for casino.
>
> 9. Upon sale or opening of casino, all defendants will pay plaintiffs $200,000.00 (not a [percentage] of ownership or other consideration).
>
> 10. If the $200,000.00 is not paid by the end of the 24th month, then starting on the 25th month [payments] in the amount of $4,167.00/month will be paid by defendants to plaintiffs for 4 years (48 months) until the $200,000 is paid in full. No interest.
>
> 11. All aspects of all dealings between the parties will remain strictly confidential.
>
> 12. All documents shall reflect this deal was always a personal loan to Hyung Seo-Jeong, not a casino investment/loan.[2]

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[1] CR 2A provides that "[n]o agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same."

[2] Clerk's Papers at 18-21.

It is undisputed that Seo-Jeong defaulted on the payments required by the settlement agreement. On February 14, 2012, Chu sued Seo-Jeong for breach of contract under the settlement agreement.

Chu moved for summary judgment. In opposition to the motion, Seo-Jeong argued that the settlement agreement was unenforceable because it was the product of duress. Seo-Jeong claimed that Chu agreed to lend the $200,000 as part of a "confidential investment agreement" that the parties were not permitted to disclose to anyone.[3] Seo-Jeong knew that the failure to report Chu's loan to the Washington State Gambling Commission could result in the loss of their casino license.[4] As a result, Seo-Jeong asserted, they had "no choice but to agree" to the settlement agreement.[5]

The trial court determined that the settlement agreement was "a knowing, voluntary and intelligent final decision embodied and evidenced per CR 2A in writing by both parties and that each party had the benefit and representation of their individual legal counsel before entering into said final agreement."[6] The trial court also concluded that Seo-Jeong breached the agreement by failing to make the necessary payments.

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[3] Appellant's Br. at 7.

[4] WAC 230-06-107 requires the holder of a casino license to "report any change in ownership when the change would result in any person or organization becoming a substantial interest holder" to the Washington State Gambling Commission. A "substantial interest holder" is a person who has actual or potential influence over the management or operation of the gambling entity. WAC 230-03-045. Evidence of "substantial interest" may include indirect ownership of the entity or "[p]roviding ten percent or more of cash, goods, or services for the start up of operations or the continuing operation of the business during any calendar year or fiscal year." WAC 230-03-045(2)(a), (h). Failure to provide the Gambling Commission with the necessary information may result in the suspension or revocation of a casino license. WAC 230-03-085.

[5] Appellant's Br. at 8.

[6] Clerk's Papers at 66.

The trial court granted summary judgment in favor of Chu and entered a final judgment against Seo-Jeong. Seo-Jeong appeals.

DISCUSSION

On appeal, Seo-Jeong claims that the trial court erred in granting summary judgment in favor of Chu because a genuine issue of material fact existed as to whether the settlement agreement was invalid due to duress.

We review both a grant of summary judgment and an action to enforce a CR 2A settlement agreement de novo.[7] "When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the trial court proceeds as if considering a motion for summary judgment."[8] We consider all facts and reasonable inferences in the light most favorable to the nonmoving party, and affirm only if, from all the evidence, reasonable minds could reach but one conclusion.[9] The party moving to enforce a settlement agreement has the burden of proving there is no genuine dispute as to the material terms of the agreement.[10] If the moving party meets its burden, "the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact."[11]

"Settlement agreements are governed by general principles of contract law."[12] Duress is an affirmative defense in an action to enforce a contract.[13] The party raising

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[7] Lavigne v. Green, 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

[8] Brinkerhoff v. Campbell, 99 Wn. App. 692, 696, 994 P.2d 911 (2000).

[9] In re the Marriage of Ferree, 71 Wn. App. 35, 44, 856 P.2d 706 (1993).

[10] Brinkerhoff, 99 Wn. App. at 696-97.

[11] Patterson v. Taylor, 93 Wn. App. 579, 584, 969 P.2d 1106 (1999) (citing Ferree, 71 Wn. App. at 44).

[12] Lavigne, 106 Wn. App. at 20.

an affirmative defense has the burden of proving the elements of that defense at trial.[14] Therefore, to defeat Chu's motion for summary judgment, Seo-Jeong has the burden of demonstrating the existence of a genuine issue of material fact as to whether the settlement agreement was procured under duress.

To establish duress, a party must demonstrate that it was deprived of its free will by the wrongful or oppressive conduct of the other party.[15] The "mere fact that a contract is entered into under stress or pecuniary necessity is insufficient" to prove duress.[16] "[T]here must be proof of more than reluctance to accept or financial embarrassment."[17] Furthermore,

> "[i]t is the well-established general rule that it is not duress to institute or threaten to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights. It is never duress to threaten to do that which a party has a legal right to do, and the fact that a threat was made of a resort to legal proceedings to collect a claim which was at least valid in part constitutes neither duress nor fraud such as will avoid liability on a compromise agreement."[18]

Chu met their burden to establish that Seo-Jeong breached the settlement agreement. Seo-Jeong does not dispute their failure to make the payments required by the settlement agreement. Rather, Seo-Jeong reiterates their argument below that they executed the settlement agreement under duress because they feared they would

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[13] Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982).

[14] August v. U.S. Bancorp, 146 Wn. App. 328, 343, 190 P.3d 86 (2008).

[15] Retail Clerks, 96 Wn.2d at 944-45.

[16] Id. at 944.

[17] Id.

[18] Doernbecher v. Mutual Life Ins. Co. of New York, 16 Wn.2d 64, 73-74, 132 P.2d 751 (1943) (quoting 17 AM. JUR. 892).

otherwise lose their casino license for failing to report the sum of money they received to the Gambling Commission. This is insufficient to establish a genuine issue of material fact as to the alleged affirmative defense of duress. Seo-Jeong's acceptance of Chu's loan and the failure to report the loan to the Gambling Commission was of Seo-Jeong's own volition. Chu wanted to maintain the confidentiality of the source of the $200,000. Seo-Jeong offered no evidence that Chu knew that the loan could potentially jeopardize their casino license, nor that Chu attempted to use this knowledge to force Seo-Jeong to sign the settlement agreement. In addition, because Seo-Jeong failed to repay Chu, Chu was entitled to bring legal action to enforce the settlement agreement, and such action did not constitute duress. The trial court appropriately granted summary judgment.

Seo-Jeong also claims that the trial court erred in considering a copy of the settlement agreement on summary judgment. The settlement agreement contained the following language: "The parties agree they have met in settlement conference/mediation and have voluntarily, without coercion, and of their own free will entered into the agreement attached hereto."[19] Seo-Jeong argues that because this was used to prove the truth of the matter asserted, i.e., that Seo-Jeong did not enter into the settlement agreement under duress, it is inadmissible hearsay. But Seo-Jeong cites no authority that an admission contained in a recitation in a contract signed by a party to the pending dispute is somehow impacted by the hearsay rule. "If a party fails to object or bring a motion to strike deficiencies in affidavits or other documents in

[19] Clerk's Papers at 18.

support of a motion for summary judgment, the party waives any defects."[20] Because Seo-Jeong did not raise this issue below, we decline to review it.

Chu requests attorney fees and costs incurred in defending this appeal. However, Chu fails to cite authority warranting such an award. A request for attorney fees on appeal requires a party to include a separate section in his or her brief devoted to the request; this requirement is mandatory.[21] A "bald request for attorney fees on appeal" is insufficient; rather, argument and citation to authority are required under the rule to advise this court of the appropriate grounds for an award of attorney fees and costs.[22] As such, we deny Chu's request.

Affirmed.

WE CONCUR:

Spearman, A.C.J.

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[20] Bonneville v. Pierce County, 148 Wn. App. 500, 509, 202 P.3d 309 (2008).

[21] RAP 18.1(b); Phillips Bldg. Co. v. An, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996).

[22] Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992); Austin v. U.S. Bank of Wash., 73 Wn. App. 293, 313, 869 P.2d 404 (1994).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SONA CHU and JIM CHUNG-SIK CHU, wife and husband, Respondents, v. HYUN H. SEO-JEONG and MYUNG CHUL SEO, Appellants.	No. 69605-0-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Hyun Seo-Jeong has filed a motion for reconsideration of the court's opinion entered January 21, 2014. After consideration of the motion, the court has determined that it should be denied.

Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 19th day of February, 2014.

FOR THE PANEL:

THE COURT OF APPEALS OF THE STATE OF WASHINGTON – DIVISION I

SONA CHU and JIM CHUNG-SIK CHU, wife and husband, Respondents, vs. HYUN H. SEO-JEONG & MYUNG CHUL SEO, wife and husband, Appellants	**NO. 69605-I** **CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on the 19th day of March, 2014, I caused a copy of Petition for Review, to be served upon the following by United States Mail:

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Dated this 19th day of March, 2014

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