2019 IL App (1st) 180312-U

SIXTH DIVISION
March 22, 2019

No. 1-18-0312

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES ANDERSON and LARRY DAKOF, on behalf of themselves individually and all others similarly situated, Plaintiffs-Appellants, v. NAPERVILLE ROTARY CHARITIES INC., an Illinois not-for-profit corporation, and TRIDENT INTERACTIVE LLC, an Illinois limited liability company, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 CH 7050 Honorable David B. Atkins, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiffs' second amended complaint was properly dismissed where defendants were not winners under the Loss Recovery Act; affirmed.

¶ 2 Plaintiffs, James Anderson and Larry Dakof, filed a complaint against defendants, Naperville Rotary Charities, Inc. (Rotary), and Trident Interactive, LLC (Trident), which in part

sought recovery under section 28-8 of the Criminal Code of 2012 (Illinois Loss Recovery Act or Loss Recovery Act) (720 ILCS 5/28-8 (West 2014)).[1] The circuit court granted defendants' motion to dismiss the Loss Recovery Act claims under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). On appeal, plaintiffs contend that dismissal was improper where the complaint sufficiently alleged that defendants were winners under the Loss Recovery Act. We affirm.

¶ 3 Plaintiffs' Loss Recovery Act claims were part of their 10-count second amended verified class action complaint. Although all claims were dismissed below, here, plaintiffs only challenge the dismissal of the Loss Recovery Act claims as alleged in the second amended complaint. That complaint stated as follows. From 2011 to 2016, Rotary, an Illinois not-for-profit corporation, illegally operated the House of Dreams Charity Raffle. Trident operated the raffle for Rotary, including providing marketing and advertising services. Raffle tickets cost $100 each and Rotary promoted the raffle as benefitting a local charity. In May 2015, plaintiff Larry Dakof, an Oak Park resident, bought a ticket for the 2015 raffle. In May 2016, plaintiff James Anderson, an Oak Lawn resident, bought a ticket for the 2016 raffle. Many tickets were sold for the raffle and winners were drawn by lot. A number of lesser prizes were raffled off before the raffle culminated in a drawing for the grand prize, which consisted of three options: (1) up to $1,000,000 towards the actual construction costs of a dream home, (2) an annuity of up to $1,000,000 payable in 20 equal installments, or (3) a one-time lump sum cash payment equal to 70% of the grand prize amount awarded. The other prizes included cars, electronic devices, and

[1]Section 28-8 of the Criminal Code does not have a short title. Another Illinois state decision, *Dew-Becker v. Wu*, 2018 IL App (1st) 171675, refers to the section as the Illinois Loss Recovery Act. Using this title is also consistent with federal decisions that have examined the statute and referred to it as the Illinois Loss Recovery Act or Loss Recovery Act. See, *e.g.*, *Sonnenberg v. Amaya Group Holdings, Ltd.*, 810 F.3d 509 (7th Cir. 2016); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016); *Fahrner v. Tiltware LLC*, No. 13-0227-DRH, 2015 WL 1379347 (S.D. Ill. Mar. 24, 2015); *Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587 (N.D. Ill. Oct. 9, 2013).

luxury vacations. Plaintiff Dakof's ticket was not selected for a prize during the grand prize drawing for the 2015 raffle. The plaintiff class members were Illinois residents who bought tickets for a raffle from 2011 to 2016, but did not win any of the prizes.

¶ 4 Plaintiffs further alleged that past raffle results showed that Rotary had built up its own assets while giving the identified charities less than $52,000 per year. Further, from 2011 through 2014, no million-dollar prize was awarded, and on information and belief, Rotary's activity in 2015 was similar to its activity in previous years. Also, raffle expenses "consumed significant ticket proceeds." As an example, according to an Internal Revenue Service (IRS) form, in 2013, there were gross ticket sales of $2,008,700, cash prizes to prizewinners of $738,931, and expenses of $1,128,926. The form also indicates net proceeds for charitable use of $140,843, and a gift of $52,000 to Support Our Troops. Plaintiffs also provided figures from IRS forms for the years 2011, 2012, 2014, and 2015.

¶ 5 Plaintiffs asserted that under the Loss Recovery Act, the winners of the raffle were subject to suit by the participants who lost funds, or any other person, for the return of three times the losses incurred. According to plaintiffs, Rotary and Trident were winners—Rotary organized the raffle to promote its own fundraising agenda and retained the raffle proceeds to cover the event's operating costs and build up its own assets, and Trident charged Rotary for coordinating the raffle's advertising and marketing and received proceeds from the raffle in exchange for its services. Citing paragraph (b) of the Loss Recovery Act (720 ILCS 5/28-8(b) (West 2014)), plaintiffs contended they could seek recovery of gambling losses for the 2011, 2012, 2013, 2014, and 2015 raffles because over six months had elapsed since the losses from those raffles, and "any person may initiate a civil action" to recoup those losses, regardless of whether the person participated in the raffles. Further, raffle participants lost money by gambling

within the meaning of the statute in that they bought tickets for the illegal raffle from Rotary in 2011, 2012, 2013, 2014, and 2015 in amounts exceeding $50 and did not win anything in exchange for the money they paid. Plaintiffs sought damages awards against Rotary and Trident of triple the amount of all funds paid to them for the 2011, 2012, 2013, 2014, and 2015 raffle tickets.

¶ 6 Rotary moved to dismiss plaintiffs' Loss Recovery Act claims under section 2-615 of the Code.[2] Rotary contended that it was not a winner under the Loss Recovery Act because it risked nothing in connection with the raffles and merely provided a forum for participants to buy tickets and participate in the raffles. In response, plaintiffs asserted in part that entities that arrange illegal gambling transactions may be liable as winners. Plaintiffs further stated that Rotary profited greatly from the losses of those who entered the raffle.

¶ 7 On January 13, 2017, the circuit court issued a written order that dismissed the Loss Recovery Act claims. The court stated that the applicable statute did not define "winner," but "in the context of gambling the most obvious definition thereof is a participant in the wager who like the loser has gambled but who has been on the better side of luck." Further, the relevant cases indicated that a party was liable under the Loss Recovery Act when it participated in the wager by undertaking some risk of its own and won. The court added that the "house" is not liable where it merely oversees the gambling and does not have a stake in who wins or loses. By extension, Rotary was not a winner because its gross proceeds were determined solely by the number of tickets sold and had nothing to do with who won or lost. Also, Trident was not a winner because its earnings appeared to be completely independent of the winners of the raffles, and plaintiffs did not allege that Trident itself ever entered or won the raffles. Overall, six counts

[2]Rotary's motion to dismiss was initially filed as to plaintiffs' first amended complaint, but was later adopted as a motion to dismiss plaintiffs' second amended complaint. Trident was added as a defendant in the second amended complaint.

of the complaint—including the Loss Recovery Act claims—were dismissed with prejudice and the remaining four counts were dismissed without prejudice.

¶ 8 Subsequently, plaintiffs filed a motion to reconsider the dismissal of their second amended complaint, contending that Rotary was the central and knowing participant in the illegal gambling transactions of each raffle. According to plaintiffs, Rotary made the bets and kept the winning bets of all losers. In response, Rotary asserted that plaintiffs conflated those that risk their own money and win with those that merely facilitate others' participation in a wager.

¶ 9 The circuit court denied the motion to reconsider on May 12, 2017. In a written order, the court stated that middlemen entities are winners under the Loss Recovery Act when they participate in the gamble and risk something of their own, "as they did in every case cited by the Plaintiffs."

¶ 10 Plaintiffs also filed a third amended complaint, which included amended allegations for counts not involved in this appeal. Pursuant to a motion to dismiss, the circuit court dismissed plaintiffs' remaining claims on January 12, 2018. The court's order stated that it was "a final and appealable order disposing of all remaining claims in this matter."

¶ 11 On appeal, plaintiffs contend that their complaint sufficiently alleged that Rotary and Trident were winners under the Loss Recovery Act. Plaintiffs argue that per their complaint, Rotary was a direct bettor with each purchaser and kept the proceeds of each transaction for its own use and disbursement. Further, Trident, acting as Rotary's agent, helped operate each raffle and received a share of the proceeds in exchange for its assistance.

¶ 12 "A section 2-615 motion to dismiss tests the legal sufficiency of a complaint." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Motions under section 2-615 raise the issue of whether the facts alleged in the complaint, taken as true, set forth a good and

sufficient cause of action. *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 723 (2007). We accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005). Dismissal is proper if the pleadings and attachments, when construed in the light most favorable to the plaintiffs, clearly show that the plaintiffs cannot prove any set of facts that would entitle them to relief. *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 9. We review the circuit court's section 2-615 dismissal *de novo*. *Id*.

¶ 13 The Loss Recovery Act states:

> "Gambling losses recoverable.
>
> (a) Any person who by gambling shall lose to any other person, any sum of money or thing of value, amounting to the sum of $50 or more and shall pay or deliver the same or any part therof, may sue for and recover the money or other thing of value, so lost and paid or delivered, in a civil action against the winner thereof, with costs, in the circuit court. ***
>
> (b) If within 6 months, such person who under the terms of Subsection 28-8(a) is entitled to initiate action to recover his losses does not in fact pursue his remedy, any person may initiate a civil action against the winner. The court or the jury, as the case may be, shall determine the amount of the loss. After such determination, the court shall enter a judgment of triple the amount so determined. *** " 720 ILCS 5/28-8 (West 2014).

¶ 14 At issue is the meaning of the term "winner" in the Loss Recovery Act. Plaintiffs assert that the circuit court interposed the notion of undertaking risk into the definition of "winner" without referring to the term's plain meaning. Relying on the dictionary definition, plaintiffs state that a winner is "one that wins," such as "a victor especially in games and sports." Plaintiffs

also state that "win" is defined as "to get possession of by effort or fortune." Plaintiffs further contend that even under the circuit court's definition, Rotary and Trident were winners. Rotary annually lost a percentage of the wagers it collected to a grand prize winner, and so it undertook a loss with respect to each bet. Moreover, Rotary kept each loser's losses and shared those funds with Trident. Plaintiffs also maintain that even if Rotary was only a middleman or "house," Rotary and Trident would still qualify as winners based on well-settled Illinois law.

¶ 15 Our primary goal when interpreting a statute is "to ascertain and give effect to the true intent and meaning of the legislature." *Whelan v. County Officers' Electoral Board of Du Page County*, 256 Ill. App. 3d 555, 558 (1994). While we look first to statutory language (*id.*), statutory interpretation "cannot always be reduced to the mechanical application of the dictionary definitions of the individual words and phrases involved" (internal quotation marks omitted) (*Grady v. Illinois Department of Healthcare & Family Services*, 2016 IL App (1st) 152402, ¶ 10). In construing a statute, we should examine not only the statutory language, but also its context and purpose. *Whelan*, 256 Ill. App. 3d at 558.

¶ 16 The parties disagree over whether we should apply a liberal or strict construction to the Loss Recovery Act. The answer depends on whether the Loss Recovery Act is a remedial or penal statute. Generally, remedial statutes, which remedy wrongs against a person, are liberally construed. *Cook County v. Thomas Recreational Vehicle*, 68 Ill. App. 3d 582, 584 (1979). Meanwhile, penal statutes, which impose punishment for an offense committed against the state (*Salzman v. Boeing*, 304 Ill. App. 405, 412 (1940)), are strictly construed, "to the end that penalties shall not be inflicted except in cases clearly intended to be included in such statutes" (*Kruse v. Kennett*, 181 Ill. 199, 204-05 (1899)). Gambling statutes that authorize suit by the loser are considered remedial, while provisions that authorize suit by any person are considered penal.

Salzman, 304 Ill. App. at 412; see also *Kruse*, 181 Ill. at 204 (provision in prior version of Loss Recovery Act allowing anyone to sue within six months was penal).

¶ 17 Plaintiffs' complaint indicates that they seek recovery under the penal provision of the Loss Recovery Act, and so we apply a strict construction. Plaintiffs stated in their brief that plaintiff Anderson timely pursued a claim in his own right for the 2016 raffle, but the complaint seeks relief under the provision that allows "any person" to initiate a civil action against the winner. See 720 ILCS 5/28-8(b) (West 2014)). Plaintiffs requested damages awards of triple the amount of all funds paid to Rotary and Trident for the 2011, 2012, 2013, 2014, and 2015 raffles, which is only available under the penal, "any person" provision. Still, penal provisions "are to be fairly construed according to the legislative intent as expressed in the enactment," and we do not apply a strict construction "with such unreasonable strictness as to defeat the true intent and meaning of the enactment." *Zellers v. White*, 208 Ill. 518, 526 (1904). We thus recognize that the Loss Recovery Act "was intended to deter illegal gambling by using its recovery provisions as a powerful enforcement mechanism." *Vinson v. Casino Queen, Inc.*, 123 F.3d 655, 657 (7th Cir. 1997).

¶ 18 Turning to the definition of "winner," based on our review of the applicable case law, we find that a winner under the Loss Recovery Act must put its own money at risk. Plaintiffs rely on nineteenth and early twentieth century Illinois Supreme Court cases to argue that a party can be a winner just for arranging a bet, but these cases actually indicate otherwise. In *Pearce v. Foote*, 113 Ill. 228, 232-33 (1885), the Illinois Supreme Court considered whether a brokerage firm was a winner under a predecessor to the Loss Recovery Act after the firm entered into a contract for the sale of grain futures, which was considered illegal gambling at the time. The contract provided that if there was a loss, the client would pay the brokerage firm, and if there was a gain,

the brokerage firm had to pay the client. *Id*. at 237-38. The brokerage firm was paid a commission, but the key factor in finding that the firm was a winner was that it participated in the wager and the client or brokerage firm would have to pay the other "on the happening of a certain event." *Id*. at 238-39. The brokerage firm's own money was at stake. *Pearce*'s approach was followed in subsequent Illinois decisions. See *Kruse*, 181 Ill. at 205-06 (following *Pearce)*; *Jamieson v. Wallace*, 167 Ill. 388, 391-92, 401 (1897) (where a broker purchased certain stock for a customer and the customer paid money to cover losses, the transaction was a gambling contract and the broker was a winner under the predecessor to the Loss Recovery Act). Further, Illinois decisions distinguish between a winner and an entity serving as the middleman or "house" for a gambling transaction. See *Zellers*, 208 Ill. at 523-24 (owner of gambling house could be sued to recover money lost at draw poker where the owners' employees were playing for the owner); *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 924-26 (2010) (distinguishing between a direct participant in gambling and a third-party facilitator); *Holmes v. Brickey*, 335 Ill. App. 390, 395-96 (1948) ("the winner and not the keeper of the house is liable to the loser"). Contrary to plaintiffs' position, a winner must participate in the bet by risking its own money. Arranging the gambling, without more, does not make an entity a winner.

¶ 19 Federal decisions that applied Illinois law come to the same conclusion—under the Loss Recovery Act, a winner must put its own money at risk, and merely arranging the gambling transaction does not suffice. As an aside, while federal decisions construing Illinois law are not binding, they are persuasive unless they run contrary to previously decided state cases. See *Falk v. Northern Trust Co.*, 327 Ill. App. 3d 101, 108 (2001). Further, we may follow the reasoning of unpublished federal decisions if we find it persuasive. *Morris v. Union Pacific R.R.*, 2015 IL App (5th) 140622, ¶ 51 n.1. We turn to two particularly persuasive federal decisions below.

¶ 20 In *Sonnenberg*, 810 F.3d at 510, the court found that hosts of Internet gambling websites were not winners under the Loss Recovery Act. The court defined a winner as "a person whom a player had played with and lost to." *Id*. at 510 (citing *Pearce*, 113 Ill. at 238). The court acknowledged that the sites "rake off some of the money in the pot," but stated that "charging a fee for engaging in gambling is not the same as winning a gamble." *Id*. at 511. Although the host took a share of the pot to defray the expense of maintaining the gambling site, the host did not have a stake in the outcomes of the games played on the site. *Id*.

¶ 21 In *Langone*, 2013 WL 5567587, at *7, the court concluded that FanDuel, the owner of a website that hosted fantasy sports games, was not a winner under the Loss Recovery Act. FanDuel collected entry fees from participants, who in turn competed against each other based on the performance of professional players in a given sport. *Id*. at *1. FanDuel took a commission of 10% of the entry fees and the remaining 90% of the entry fees constituted the prize money. *Id*. The court found that FanDuel "[risked] nothing when it [took] entry fees from participants in its fantasy sports games." *Id*. at *6. Further, the prize that FanDuel was obligated to pay "[was] predetermined according to the number of participants in a given league, and never [exceeded] the total entry fees." *Id.* Rather than placing wagers with participants where it could lose money based on the happening of a future event, FanDuel "merely [provided] a forum for the participants to engage each other in fantasy sports games." *Id.*

¶ 22 Applying the definition used in the Illinois and federal decisions above, Rotary and Trident were not alleged to be winners under the Loss Recovery Act. Attached to plaintiffs' complaint were the spring 2016 raffle rules, which stated that the total number of prizes "shall be dependent on the total number of valid entries received." The prizes may change depending on ticket sales, but Rotary and Trident would never owe more than they receive from ticket sales.

Thus, their own money is not at risk. Further, using ticket sales to cover operating costs and "build up its own assets" does not make Rotary a winner, and receiving money in exchange for its services does not make Trident a winner. See *Sonnenberg*, 810 F.3d at 511 (charging a fee to defray expenses did not make site a winner); *Langone*, 2013 WL 5567587, at *6 (taking a commission did not make FanDuel a winner). Rotary, with Trident's help, functions as a "house," with the raffle ticket serving as an entry fee for participants to compete against each other for a prize. And, being a "house" is insufficient to qualify an entity as a winner. See *Holmes*, 335 Ill. App. at 395-96 ("the winner and not the keeper of house is liable to the loser"). Rotary and Trident are akin to the sites in *Sonnenberg* and *Langone*, and not the brokers in *Pearce*, *Kruse*, and *Jamieson*.

¶ 23 Per plaintiffs' complaint, Rotary and Trident are not winners. Thus, plaintiffs' complaint does not state a cause of action under the Loss Recovery Act. As a result, we will not address the parties' arguments about whether Rotary and Trident violated the Raffles Act. See 230 ILCS 15/0.01 (West 2014); 720 ILCS 5/28-1(b)(8) (West 2014) (no liability for gambling if raffle conducted in accordance with Raffles Act).

¶ 24 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.