Filed 8/30/12 Strickland v. Bicycle Casino CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ELI STRICKLAND et al., Plaintiffs and Appellants, v. THE BICYCLE CASINO, INC., Defendant and Respondent.	B233575 (Los Angeles County Super. Ct. No. VC057998)

APPEAL from a judgment of the Superior Court of Los Angeles County. Yvonne T. Sanchez, Judge. Affirmed.

A|D|Y Law Group, A. David Youssefyeh and Liza Youssefyeh for Plaintiffs and Appellants.

Baker, Keener & Nahra, Phillip A. Baker, James D. Hepworth, Daniel P. Leonard, and Derrick S. Lowe for Defendant and Respondent.

Plaintiffs Eli Strickland and Edwin Pairavi entered a no-limit poker tournament organized by defendant, The Bicycle Casino. The poker tournament was originally scheduled to have three "start" days to qualify for the final day of play, when the top 10 percent of qualifiers would split the $200,000 guaranteed payout. In the middle of the tournament, after plaintiffs had already qualified for the final day of the competition, defendant declared an extra start day, thus qualifying more people for the final day. This put more money into the overall pot, but it also resulted in a lower payout for each entrant who ended up in the top 10 percent. Plaintiffs filed a complaint against defendant, alleging breach of contract, fraud and unfair business practices. Defendant generally demurred to all causes of action, reasoning that plaintiffs' claims arose out of a gambling contract and transaction, therefore preventing judicial resolution of the dispute as a matter of public policy. The trial court sustained the demurrer without leave to amend. Since the Gambling Control Act[1] defines poker as a "controlled game," and defines any controlled game as "gambling," we agree that public policy prevents judicial resolution of this dispute. (See Bus. & Prof. Code, § 19805, subds. (g), (*l*); Pen. Code, § 337j, subd. (e)(1).) We therefore affirm the judgment dismissing the complaint.

FACTS AND PROCEDURAL BACKGROUND

The facts pleaded in the complaint are as follows: In November 2010, defendant advertised a no-limit poker tournament with a $500 entry fee and a $200,000 guaranteed payout. The tournament would have three qualification rounds—from Thursday, November 18, 2010, to Saturday, November 20, 2010—when entrants and any losers from the previous days could pay the entry fee and enter the tournament. The final day of the tournament was advertised to be Sunday, November 21, 2010, when the top seven percent of the players from each qualification day would advance and the winner would be determined. The top 10 percent of players who qualified for the final day of play would share in the $200,000 prize money.

---

[1] Business and Professions Code section 19800 et seq.

Plaintiffs entered the tournament on Thursday, November 18, 2010, the first start day, and finished in the top seven percent, thus qualifying for the final day of the tournament. On Saturday, November 21, 2010, in the middle of the tournament, defendant declared Sunday would be another start day, and moved the final day of the tournament to Monday, November 22, 2010. On Monday, plaintiffs finished the tournament in the top seven percent after the field of players on the final day increased from 14 to 22.

Plaintiffs sued defendant, alleging breach of contract, fraud and unfair business practices for adding another start day to the tournament, decreasing the amount of each payout slot and theoretically decreasing each participant's chance to win. Defendant demurred to the complaint, contending that plaintiffs' gambling-related claims were barred as a matter of public policy under *Kelly v. First Astri Corp.* (1999) 72 Cal.App.4th 462 (*Kelly*). In opposition, plaintiffs argued that the poker tournament was not gambling within the meaning of *Kelly*, because poker is not a game of chance, but a game of skill. Defendant's reply admitted that poker involves skill, but nonetheless argued it is dominated by chance, citing poker expert Lou Krieger and Card Player Magazine. Plaintiffs filed a request for judicial notice with their surreply (which contended that defendants misquoted Lou Krieger), asking the court to take judicial notice of the published opinion in *Bell Gardens Bicycle Club v. Department of Justice* (1995) 36 Cal.App.4th 717 (where defendant took the position that jackpot poker was not an illegal lottery because it is a game of skill instead of a game of chance); a whitepaper titled Games of Skill and Games of Chance: Poker as a Game of Skill; Card Player Magazine archives; excerpts from Lou Krieger's website (theorizing that poker is a game of skill); and excerpts from defendant's website advertising the tournament.

At the April 8, 2011 hearing, the trial court sustained the demurrer without leave to amend and took judicial notice of only the published appellate opinion. The court found plaintiffs' attempt to compare the tournament to "'bowling leagues, golf tournaments, and fishing contests'" unpersuasive, and concluded that the tournament was gambling within the meaning of *Kelly*, and therefore plaintiffs' claims were barred by

"California's strong public policy against judicial resolution of civil disputes arising out of gambling contracts or transactions." This timely appeal followed.

DISCUSSION

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "'A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. . . . The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action.'" (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank*, *supra*, at p. 318.) "The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.]" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).)

The *Kelly* plaintiffs sued defendant casino managers for gambling losses arising from the use of marked cards (permitting players to cheat) during blackjack games where plaintiffs were acting as the "bank" by financially backing the dealer, receiving the dealer's winnings and answerable for the dealer's losses. (*Kelly*, *supra*, 72 Cal.App.4th at pp. 467-468.) The trial court granted summary judgment to defendant casino managers, and the court of appeal affirmed, concluding "California's strong, long-standing public policy regarding gambling is a broad policy against judicial resolution of civil claims arising out of lawful or unlawful gambling contracts or transactions, and in the absence of a statutory right to bring such claims, this policy applies both to actions for recovery of gambling losses and actions to enforce gambling debts." (*Id.* at p. 471.) *Kelly* relies on a long line of cases which conclude that because gambling is immoral, any gambling contract is unenforceable under Civil Code section 1667, subdivisions (2) and

(3) (defining as unlawful any contract "contrary to good morals"), irrespective of the legality of the game. (*Kelly*, at p. 483.) *Kelly* acknowledged that although attitudes about gambling have changed, and many forms of gaming have been legalized in this state, the public policy considerations barring judicial intervention in gambling disputes remain the same. (*Id*. at pp. 488-489.)

Plaintiffs contend that *Kelly* is inapplicable because the poker tournament was not "gambling," and that the question of whether the tournament is gambling is a factual question, not appropriately resolved by demurrer. Plaintiffs devote 12 pages of their opening brief to arguments that poker is a game of skill and not chance, and that the tournament style of play is more akin to a contest than gambling, because the players paid an entrance fee and played with chips provided by defendant which would determine the players' eligibility for a "prize." Plaintiffs' arguments are of no consequence, because, as discussed below, the Legislature has already decided that poker tournaments are gambling. Therefore, the determination of whether the complaint describes gambling activity within the meaning of *Kelly* is appropriately resolved by demurrer, without the need to resolve any disputed facts. (*Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 702.)

The Gambling Control Act was enacted in 1997, with the goal of providing "uniform, minimum standards of regulation of permissible gambling activities and the operation of lawful gambling establishments." (Bus. & Prof. Code, § 19803, subd. (a).) The act, borrowing from the Penal Code, defines poker as a "controlled game," and defines any controlled game as "gambling." (See Bus. & Prof. Code, § 19805, subds. (g) ["'Controlled game' means any controlled game, as defined by subdivision (e) of Section 337j of the Penal Code"], (*l*) ["'Gambling' means to deal, operate, carry on, conduct, maintain, or expose for play any controlled game."]; Pen. Code, § 337j, subd. (e)(1) ["'controlled game' means any poker . . . game . . . played for currency, check, credit, or any other thing of value"].) Bureau of Gambling Control regulations, adopted pursuant to the Gambling Control Act, define "'Gaming Activity'" as "any activity or event including, but not limited to, jackpots, bonuses, promotions, cashpots, *tournaments*, etc.,

that is appended to, or relies upon any controlled game." (Cal. Code Regs., tit. 11, § 2010, subd. (f), italics added; *id.*, tit. 11, § 2000.) Because the poker tournament at issue here was undisputedly legal, and is explicitly defined as gambling by statute, we need not address the parties' arguments as to whether the tournament fell within the definition of gambling in various sections of the Penal Code which prohibit lotteries or banked games. (Pen. Code, §§ 319, 330.)

We find the definitions in the Gambling Control Act apply here and will not engage in the definitional wrestling match proposed by plaintiffs over whether the poker tournament was a contest of wits and skill, not a game of chance. The cases which plaintiffs (and defendants) rely upon did not answer the question of whether a legal game was gambling, and pre-date the Gambling Control Act. (See, e.g., *Tibbetts v. Van De Kamp* (1990) 222 Cal.App.3d 389 [analyzing whether poker is proscribed by Pen. Code § 330]; *Hankins v. Ottinger* (1896) 115 Cal. 454 [contract to share purse of horse race was a competition for a premium, and not an immoral wager or bet]; *Brown v. Board of Police Commrs.* (1943) 58 Cal.App.2d 473 [analyzing whether a new game was a game of chance or skill, requiring a permit under a local ordinance]; *Western Telcon, Inc. v. California State Lottery* (1996) 13 Cal.4th 475 [finding Keno was not a lottery within the meaning of Pen. Code, § 319, but was a banking game under Pen. Code, § 330].)

Alternatively, plaintiffs contend that *Kelly* is inapplicable because this is not an action for "the collection of gambling debts and losses," but instead concerns a "business'[s] improper breach of contract and advertising fraud." The allegations in the complaint convince us otherwise. The complaint seeks damages based on the theory that plaintiffs would have won more money if defendant did not offer an additional qualification round, which increased the number of people competing for and sharing in the same guaranteed payout. Clearly, this is an action for gambling losses within the meaning of *Kelly*, as it seeks contract and fraud damages, as well as other remedies under the Business and Professions Code, based upon the diminution of winnings by the addition of an extra start day. *Kelly* held courts will not enforce gambling-related contracts, and denied the *Kelly* plaintiffs recovery on their fraud theory. (*Kelly*, *supra*, 72

Cal.App.4th at p. 469.) To the extent that plaintiffs here seek relief under the Business and Professions Code, we see no reason to treat this claim any differently, since it arises out of a gambling transaction and judicial resolution of such disputes is contrary to public policy under *Kelly*. (See, e.g., *Price v. Starbucks Corp*. (2011) 192 Cal.App.4th 1136, 1147 [where unfair business practices claim is derivative of other failed claims, it also fails].)

Plaintiffs also argue that the holding in *Kelly* should be "limited to protect the rights of consumers" (boldface and upper case omitted), because aggrieved customers of a licensed business would have no forum to litigate their gambling-related complaints. However, a comprehensive scheme of regulation, overseen by the Attorney General's Bureau of Gambling Control and the Gambling Commission, as well as municipalities, exists to regulate entities such as defendant. (Bus. & Prof. Code, §§ 19803, 19810, 19811.) After *Kelly* decided that gambling disputes may not be heard in court without a statutory right to bring such claims, the Legislature chose *not* to create a right to sue over gambling losses. Nevertheless, through the Gambling Control Act, the Legislature has given the Gambling Commission and the Bureau of Gambling Control broad authority to keep gambling clean.

Plaintiffs contend that they should be given an opportunity to amend the complaint, to state causes of action for false advertising, unjust enrichment, and improper contest advertising. (See, e.g., Bus. & Prof. Code, §§ 17500, 17539.1, 17539.3.) However, to the extent that each of these theories is premised on a gambling transaction, they are foreclosed by *Kelly*. "[P]laintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] . . . [¶] To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] . . . [¶] . . . Where the [plaintiff] offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]" (*Rakestraw, supra,* 81 Cal.App.4th at pp. 43-44.) Plaintiffs here have not

demonstrated how these causes of action would avoid *Kelly*, or whether they are otherwise legally supportable.

Lastly, plaintiffs contend that the trial court erroneously failed to take judicial notice of exhibits two through five of their Request for Judicial Notice, and ask us to take judicial notice of the same documents. The exhibits concern whether the poker tournament is a game of chance or skill, a matter we need not decide, so the exhibits are irrelevant. Therefore, we find no error, and do not take judicial notice of the exhibits. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6.) For this same reason, we also deny defendant's request to take judicial notice of content from its website advertising the poker tournament.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.