13CA1049 Green-Visiontek v Goodman 09-25-2014

COLORADO COURT OF APPEALS

DATE FILED: September 25, 2014
CASE NUMBER: 2011CV2231
DATE FILED: September 25, 2014

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Court of Appeals No. 13CA1049
City and County of Denver District Court No. 11CV2231
Honorable Edward D. Bronfin, Judge

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Green-Visiontek, LLC,

Plaintiff-Appellant,

and

Thomas Waldron, Sr., Thomas Waldron, Jr., and Thomas W. Luecke,

Third-Party Defendants-Appellants,

v.

Gregory Goodman and Kimberly Gaetano, a/k/a Kimberly Basehart-Gaetano,

Defendants-Appellees.

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JUDGMENT REVERSED IN PART, VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE NAVARRO
Webb and Furman, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**
Announced September 25, 2014

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Law Office of Kenneth Morris, Kenneth R. Morris, Boulder, Colorado, for Plaintiff-Appellant and Third-Party Defendants-Appellants

Plaintiff Green-Visiontek, LLC, as well as third-party defendants Thomas Waldron, Sr., Thomas Waldron, Jr., and Thomas Luecke, appeal the trial court's judgment. Their primary contention is that the trial court erred in declining to enforce an agreement for the purchase of an interest in a medical marijuana business on the ground that the contract was illegal and, thus, contrary to public policy. Because we conclude that the contract was not illegal, we reverse and remand for further proceedings.

## I. Background

### A. The Transactions

In October 2010, Waldron[1] entered into a written purchase-agreement (PSA) to buy a one-half interest in a Colorado medical marijuana business owned and operated by Kimberly Gaetano and her company, 420 Wellness Dispensary, LLC (420W). Gaetano and 420W were represented by Gregory Goodman, an attorney.[2] Shortly

[1] Because most of the ensuing discussion concerns Thomas Waldron, Sr., we will refer to him simply as "Waldron." We will refer to his son, Thomas Waldron, Jr., as "Waldron, Jr."

[2] The trial court found that Goodman had failed to advise Waldron that Goodman was representing only the interests of Gaetano and 420W, and not those of Waldron. Indeed, the court found that

after executing the PSA, Waldron caused a portion of the purchase price to be transmitted to Goodman's law firm trust account.

At the time of the PSA, Waldron was a resident of Florida. He had a criminal history. In 1993, he was convicted of federal charges related to his making false statements to a bank, and he had been incarcerated in federal prison. Waldron also owed more than $1,000,000 as a result of civil judgments against him. In addition, he owed back taxes to the federal government in excess of $58,000,000.

In November 2010, Goodman distributed an amended PSA that did not name Waldron as the purchaser but instead identified the purchaser as AgraTek International, Inc. (AgraTek Florida), a Florida corporation formed by Waldron and Waldron, Jr. The revised PSA also lowered the total purchase price from $1,500,000 to $1,250,000. Waldron and Gaetano signed the amended PSA on December 11, 2010. Waldron caused the balance of the purchase price to be transferred into Goodman's trust account.

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Goodman presented fabricated email messages in order to disguise the fact that he had failed to advise Waldron appropriately.

Later in December 2010, Gaetano and Goodman used a portion of the money in Goodman's trust account (representing the purchase price under the amended PSA) to buy a warehouse, ostensibly for future 420W operations. The warehouse was purchased in the name of Pro-Tek, Inc., a company incorporated by Gaetano with Goodman's assistance. Although Waldron was aware of the warehouse purchase, he did not know that the source of the money to buy the warehouse was the money in Goodman's trust account. Waldron was also unaware the warehouse was titled in the name of Pro-Tek rather than 420W.[3]

Around the same time, Goodman, with Gaetano's permission, used over $15,000 of the funds of his trust account to pay his legal fees. Waldron was not aware of this payment either.

In January 2011, Goodman advised Waldron that Gaetano was declaring the amended PSA null and void, ostensibly because Waldron had failed to disclose his full criminal history and the tax

[3] As the trial court found: "In 2011, Ms. Gaetano transferred the Warehouse to Star-Tek [yet another company incorporated by her and Goodman] by quitclaim deed, which then transferred the Warehouse to Ms. Gaetano's mother by quitclaim deed, who then transferred the Warehouse back to Star-Tek by quitclaim deed. No money was transferred with any of these quitclaim deeds."

judgment against him. The remaining funds in Goodman's trust account (approximately $360,000) were transferred to Waldron or Waldron, Jr.

In February 2011, all of the stock and assets of AgraTek Florida were sold to T.W. Luecke & Associates (TWL), a new Colorado company whose sole member was Thomas Luecke. AgraTek Florida and TWL filed a statement of merger with both the Colorado and Florida secretaries of state. TWL later changed its name to Green-Visiontek, LLC (GVT), and gained additional shareholders. The majority shareholder of GVT is a Colorado resident who is a long-time friend of Waldron and who has no knowledge of GVT's assets or operations.

GVT sued 420W, Gaetano, and Goodman. GVT brought several claims relating to the termination of the amended PSA, including claims for breach of contract, fraud, conversion, breach of fiduciary duty, civil conspiracy, fraudulent conveyance (as to the warehouse), and professional negligence (as to Goodman's representation). Gaetano and 420W asserted counterclaims and third-party claims against GVT, the Waldrons, and Luecke,

including claims for breach of contract, breach of the implied covenant of good faith and fair dealing, civil conspiracy, and tortious interference. Waldron then brought counterclaims against Gaetano and 420W for breach of contract, promissory estoppel, unjust enrichment (relating to services Waldron allegedly performed for 420W), and breach of a joint venture agreement.

B. The Trial Court's Ruling

After a three-day bench trial, the trial court issued a thorough written order. The court observed that Colorado law prohibits certain people from holding a license for a medical marijuana business. In particular, the court noted that such a license may not be issued to or held by a person: whose criminal history indicates that he or she is not of good moral character; who has failed to pay any taxes or judgments due to a government agency; or who has not been a Colorado resident for two years prior to the date of the license application. The court determined that the parties were aware of these limitations on licensees when the PSA and amended PSA were executed.

The trial court found that, before the execution of the original PSA in October 2010, Gaetano and Goodman knew that Waldron was not a Colorado resident and that he had a felony conviction. The court also found that, although Gaetano and Goodman did not learn about Waldron's $58,000,000 tax judgment and lien until sometime after January 12, 2011, they were aware of "some IRS issues" involving Waldron by October 2010, but they chose not to pursue this information. Further, the court decided that AgraTek Florida and GVT were "sham" corporations organized by Waldron "to attempt to circumvent Colorado law regarding ownership of a [medical marijuana] business" and that both Gaetano and Goodman "understood that AgraTek Florida was a sham corporation."

The trial court concluded that, because the original PSA and the amended PSA were designed to accomplish Waldron's partial ownership of a medical marijuana business, they "were illegal contracts and void as a matter of law." The court thus refused to enforce the contracts.

The trial court decided to "leave the parties where they are," with two exceptions. Noting that Gaetano had used money from Goodman's trust account to buy the warehouse, and noting that Waldron had caused this money to be paid into the trust account, the court invoked equitable principles to enter judgment in favor of Waldron against Gaetano in the amount of $774,092.40 plus interest. Similarly, noting that Goodman had disbursed money to himself from the trust account without Waldron's knowledge, the court entered judgment in favor of Waldron and against Goodman in the amount of $15,263 plus interest. Otherwise, the trial court declined to award relief to any party because, in the court's view, all claims arose out of the illegal contract and all parties knew it was illegal.

After calculating prejudgment interest, the trial court entered final judgment in favor of Waldron and against Gaetano in the amount of $893,189.80, and final judgment in favor of Waldron against Goodman in the amount of $17,611.28.

## II. Neither the PSA Nor the Amended PSA Were Illegal Contracts

GVT, Waldron, Waldron, Jr., and Luecke (collectively, Appellants) challenge the trial court's determination that the PSA and amended PSA constituted illegal contracts.[4] We agree with Appellants that the court erred because the statutory prohibitions on which it relied did not yet apply to the parties at the time these contracts were executed.

### A. Standard of Review

Whether a contract is enforceable is a question of law that we review de novo. *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 525-26 (Colo. App. 2011). Additionally, "[s]tatutory construction is a question of law subject to de novo review." *People v. Dinkel*, 2013 COA 19, ¶ 6.

### B. Illegal Contracts Generally

A contract that violates a statute is contrary to public policy. *See, e.g., Ridgeview Classical Schs. v. Poudre Sch. Dist. R-1*, 214

[4] Goodman filed a cross-appeal but then did nothing to prosecute it. The cross-appeal was therefore dismissed. Additionally, 420W was dismissed as an appellee because it did not retain counsel to represent it in this court. Neither of the remaining appellees, Gaetano and Goodman, filed an answer brief.

P.3d 476, 482-83 (Colo. App. 2008). Courts will not enforce contracts that are contrary to public policy. *Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, 1267 (Colo. App. 2004); *see Potter v. Swinehart*, 117 Colo. 23, 27, 184 P.2d 149, 151 (1947) ("Where the contract or transaction in question is illegal, fraudulent, or immoral, and there is mutual misconduct of the parties with respect thereto, neither law nor equity will aid either to enforce, revoke, or rescind."). In other words, the doctrine of illegality of contracts prevents a party to an illegal bargain from recovering damages for breach thereof. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103, 1111 (Colo. App. 1992), *aff'd sub nom. La Plata Med. Ctr. Assocs., Ltd. v. United Bank*, 857 P.2d 410 (Colo. 1993).

Hence, at least as to the parties thereto, "[c]ontracts in violation of statutory prohibitions are void." *Amedeus Corp. v. McAllister*, 232 P.3d 107, 109 (Colo. App. 2009). We recognize, however, that "[t]he power of courts to declare a contract void for being in violation of public policy 'is a very delicate and undefined power'" and "should be exercised 'only in cases free from doubt.'"

*Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 29 (quoting *Chicago, B. & Q.R. Co. v. Provolt*, 42 Colo. 103, 112, 93 P. 1126, 1128 (1908)).

Courts generally look to the law in effect at the time the contract was executed to determine whether the contract is valid or unlawful. *See Coffman v. State Farm Mut. Auto. Ins. Co.*, 884 P.2d 275, 279-81 (Colo. 1994) (recognizing that validity of a household exclusion clause in an insurance policy depends on the law in effect on the date the policy was purchased); *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859, 864 (Colo. App. 2001) (rejecting the claim that a contract was illegal as contrary to statute where the statutory provision at issue became effective *after* the contract was executed); *see also Nat'l Dairymen Ass'n v. Dean Milk Co.*, 183 F.2d 349, 354 (7th Cir. 1950) (holding that the validity of a contract is determined as of the date of the acceptance of the offer); *Branch v. Mobil Oil Corp.*, 772 F. Supp. 570, 571 (W.D. Okla. 1991) ("Whether a contract is unlawful or contravenes public policy is usually determined as of the time of its making and is not affected by subsequent changes of circumstances, whether of fact or law.");

*Stephan & Sons, Inc. v. Municipality of Anchorage*, 629 P.2d 71, 78 n.19 (Alaska 1981) ("[T]he general rule that it is the law in force at the time (a contractual transaction) is consummated and made effectual that must be looked to as determining its validity and effect" (internal quotation marks omitted)); Restatement (Second) of Contracts § 179 cmt. d (1981) ("Whether a promise is unenforceable on grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law."); 17A Am. Jur. 2d *Contracts* § 234 (2010) ("[T]he law in force at the time a contractual transaction is consummated and made effectual determines the contract's validity and effect.").

With these principles in mind, we turn to the law applicable to the PSA and amended PSA.

C. The Colorado Medical Marijuana Code

"Our task in construing a statute is to ascertain and give effect to the intent of the General Assembly." *Dinkel*, ¶ 6. "In determining statutory intent, a reviewing court begins its analysis with the plain language of the statute." *Id.* at ¶ 7. "If the statute is clear and

unambiguous on its face, the court does not engage in further statutory analysis." *Id.*

In 2010, the General Assembly enacted the Colorado Medical Marijuana Code (the Code). *See* Ch. 355, sec. 1, §§ 12-43.3-101 to -1001, 2010 Colo. Sess. Laws 1648-77.[5] Among other requirements, the Code provided that a medical marijuana business "may not operate until it has been licensed by the local licensing authority and the state licensing authority pursuant to this article [Article 43.3 of Title 12]." Ch. 355, sec. 1, § 12-43.3-310(2), 2010 Colo. Sess. Laws 1663. The Code also set forth restrictions on who could obtain or hold such a license. For example, section 12-43.3-310(1)(a) of the Code stated, in relevant part:

> A license provided by this article shall not be issued to or held by:
> . . .
>
> (II) A person whose criminal history indicates that he or she is not of good moral character;
> . . .

[5] We cite to the Code in effect in 2010 because relevant sections have been amended since then and the contracts at issue here were consummated before those amendments.

> (VII) A person licensed pursuant to this article who, during a period of licensure, or who, at the time of the application, has failed to: . . .
>
> (C) Pay any judgments due to a government agency; . . . [or]
>
> (F) Remedy an outstanding delinquency for taxes owed [or] an outstanding delinquency for judgments owed to a government agency . . .
>
> (XIII) A person who has not been a resident of Colorado for at least two years prior to the date of the person's application; except that for a person who submits an application for licensure pursuant to this article by December 15, 2010, this requirement shall not apply to that person if the person was a resident of the state of Colorado on December 15, 2009.

Ch. 355, sec. 1, § 12-43.3-307(1)(a), 2010 Colo. Sess. Laws 1660-61.

The above provisions, however, did not immediately apply to all persons upon the effective date of the Code, July 1, 2010. Instead, the General Assembly permitted a person operating an "established, locally approved" medical marijuana business on July 1, 2010, to continue to operate that business without a license until July 1, 2011, when licensure became mandatory for all businesses. Section 12-43.3-103 of the Code, entitled "Applicability," provided:

> (1)(a) On July 1, 2010, a person who is operating an established, locally approved business for the purpose of cultivation, manufacture, or sale of medical marijuana or medical marijuana-infused products . . . may continue to operate that business in accordance with any applicable state or local laws. "Established", as used in this paragraph (a), shall mean owning or leasing a space with a storefront and remitting sales taxes in a timely manner on retail sales of the business as required pursuant to 39-26-105, C.R.S., as well as any applicable local sales taxes.
>
> . . .
>
> [2](c) On and after July 1, 2011, all businesses for the purpose of cultivation, manufacture, or sale of medical marijuana or medical marijuana-infused products, as defined in this article, shall be subject to the terms and conditions of this article and any rules promulgated pursuant to this article.

Ch. 355, sec. 1, § 12-43.3-103, 2010 Colo. Sess. Laws 1649-50.

In contrast to the licensure requirement, the Code required established medical marijuana businesses to comply with certain other obligations *before* July 1, 2011, in order to continue operating. For instance, the Code stated that "[t]o continue operating a business or operation . . . , the owner shall, on or before August 1, 2010, complete forms as provided by the department of

revenue and shall pay a fee." Ch. 355, sec. 1, § 12-43.3-103(1)(b), 2010 Colo. Sess. Laws 1649. The Code explained that "[p]ayment of the fee and completion of the form shall not create a local or state license or a present or future entitlement to receive a license." *Id.*

In summary, the General Assembly made it unlawful for any person to sell medical marijuana "except as allowed pursuant to" the Code. Ch. 355, sec. 1, § 12-43.3-901(2), 2010 Colo. Sess. Laws 1675. The Code allowed established medical marijuana businesses to continue to operate without a license until July 1, 2011.

D. Neither the PSA nor the Amended PSA violated the Code

The record confirms that 420W was an established medical marijuana business as of July 1, 2010. Hence, the owners of 420W did not need a license under the Code in order to continue operating the business until July 1, 2011. As a consequence, the owners' ability to obtain a license did not control whether the business could operate. In other words, the Code's limitations on who could obtain or hold a license (e.g., the requirement of Colorado residency) did not affect whether 420W could continue to operate — at least not until July 1, 2011.

The PSA and amended PSA represented efforts by Waldron and AgraTek Florida, respectively, to acquire an ownership interest in 420W in late 2010 (i.e., at a time when 420W could operate without a license). Thus, regardless of whether Waldron or AgraTek Florida could have obtained or held a license for a medical marijuana business, their partial ownership of 420W would not have prevented the continued operation of the business at the time of the contracts.[6]

Accordingly, the object of the PSA and amended PSA — partial ownership of 420W by Waldron or AgraTek Florida — did not violate the Code provisions applicable to 420W at the time those agreements were executed. Even if this ownership transfer resulted in the inability to obtain a medical marijuana license for 420W, the business still could have continued to operate until at least July 1, 2011. And the owners of 420W would have had approximately six months to attempt to come into compliance with the limitations on

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[6] Furthermore, the Code's provisions restricting the transfer of ownership of a medical marijuana business (including the requirement of approval by licensing authorities) applied only to a "license holder," not to an established business operating without a license as permitted by the Code. *See* Ch. 355, sec. 1, § 12-43.3-309(2), 2010 Colo. Sess. Laws 1663.

licensees. We conclude, therefore, that neither the PSA nor the amended PSA were illegal contracts.

Because these contracts did not violate public policy, they were enforceable. We thus remand this matter to the trial court for further proceedings to resolve the parties' claims based on the contracts (including questions of breach, causation, and damages)[7] as well as the other claims brought by the parties.

## III. Remaining Contentions

Appellants contend that the trial court erred in finding that AgraTek Florida and GVT were "sham" corporations designed "to circumvent Colorado law regarding ownership of a [medical marijuana] business." On its face, the court's finding was tied to its determination that the contracts were illegal because they violated Colorado law. Because we have concluded that the contracts were not illegal, we vacate the trial court's determination that AgraTek

[7] To the extent Appellants request that we direct the trial court to find that 420W and Gaetano breached the agreements, we decline. Whether any party breached the agreement is a question of fact for the trial court. *See Lake Durango Water Co. v. Pub. Utils. Comm'n*, 67 P.3d 12, 21 (Colo. 2003). And, because Appellants' request for attorney fees and costs on appeal rests on the notion that 420W and Gaetano breached the agreements, we deny that request.

and GVT were sham entities, and we remand for possible further findings and reconsideration consistent with this opinion.

In reassessing whether these entities were sham corporations, the trial court may still consider whether they were formed for a valid business purpose or actually carried on business activity, as our conclusion that the contracts were not illegal leaves open the possibility that these entities were formed for the purpose of evading what was believed to be applicable licensure requirements. *See United States v. Creel*, 711 F.2d 575, 579 (5th Cir. 1983) ("A sham corporation may be one established for no valid purpose, such as a corporation formed solely for the purpose of escaping taxation, or defrauding creditors." (citations omitted)); *Mustang Tractor & Equip. Co. v. Cornett*, 747 S.W.2d 33, 35-36 (Tex. App. 1988) ("In order to prove 'corporate sham,' as a matter of law, Mustang must show conclusively that the corporation was organized and operated as a mere tool or business conduit of another corporation, used as a means of evading an existing legal obligation, employed to achieve or perpetrate a monopoly, used to circumvent a statute, or used to justify a wrong."). If the trial court

does not conclude that these entities were sham corporations but the court nonetheless believes that disregarding the corporate form may be appropriate, the court should consider the principles articulated in *In re Phillips*, 139 P.3d 639, 643-44 (Colo. 2006) (discussing traditional piercing of the corporate veil and the alter ego doctrine).

Appellants also challenge the trial court's equitable remedy and its finding that no party was a prevailing party for purposes of recovering costs. Because we have concluded that the contracts were enforceable and we have decided to remand for resolution of the parties' contract claims and related claims, we need not address these other contentions. Indeed, Appellants present them as alternative arguments to be addressed only if we conclude that the contracts were illegal.

## IV. Conclusion

The judgment is reversed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion.

JUDGE WEBB and JUDGE FURMAN concur.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**CHRIS RYAN**
**CLERK OF THE COURT**

**PAULINE BROCK**
**CHIEF DEPUTY CLERK**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(I), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 10, 2013

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