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Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001074-MR

ELMER DOWNS; AND ELMER DOWNS,
as Representative of Putative Class

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. McKAY CHAUVIN, JUDGE
ACTION NO. 03-CI-009867

KENTUCKY LOTTERY CORPORATION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

COMBS, JUDGE: Elmer Downs appeals from the orders of the Jefferson Circuit Court that granted summary judgment to the Kentucky Lottery Corporation (KLC). He also appeals from the trial court's orders that denied his motions to certify a class. After our review, we affirm.

Downs's case concerns the Extra Cash game. Extra Cash was an add-on to the Pick 3 and Pick 4 games, which are still available. The winning numbers for Pick 3 and Pick 4 are selected in nightly televised drawings. Extra Cash, however, was similar to a scratch-off game. The numbers were printed on a ticket at the time of purchase. The ticket was valid for Pick 3 or Pick 4 -- regardless of whether the Extra Cash numbers were winners. The Extra Cash game was available from January 2003 until June 2004. KLC discontinued it due to slow sales.

KLC promoted the Extra Cash game heavily through advertising prior to its commencement and during the first several months that it ran. The advertising included radio and television spots, newspaper ads, direct mailings with coupons, and several types of items that retailers could display in their stores. Some of the advertisements depicted a sample Pick 3 ticket with an Extra Cash prize of \$500. Other ads and a How-to-Play brochure stated that the Extra Cash numbers were randomly generated. In June 2003, the How-to-Play brochure was revised to explain that winning Extra Cash tickets were randomly selected. KLC discontinued advertising the game.

Downs spent approximately \$300 on Extra Cash tickets. Because he felt that he did not win as many times as he should have, he stopped playing. After learning that another lottery player was suing KLC, Downs, *pro se*, filed an action on November 10, 2003, alleging that KLC intentionally misled consumers by claiming that the Extra Cash numbers were randomly generated. Downs

contended that KLC had violated the Consumer Protection Act and had engaged in fraudulent misrepresentation, resulting in unjust enrichment.

Downs later obtained counsel and filed his first amended complaint in January 2006, alleging that KLC: violated the Kentucky Consumer Protection Act (KCPA); engaged in fraudulent misrepresentation and negligent misrepresentation; committed breach of contract; and obtained unjust enrichment. The complaint also sought to have the lawsuit certified as a class action. The court denied the motion for class certification on November 22, 2006. On June 6, 2007, Downs filed a motion to reconsider. The court granted the motion to reconsider on October 17, 2008, but denied the motion for class certification. Downs filed another motion to reconsider on October 29, 2008, which the court denied on January 15, 2009. On April 23, 2009, KLC filed a motion for summary judgment. Downs filed a cross-motion for summary judgment on March 22, 2010. On May 23, 2011, the court granted KLC's motion for summary judgment and denied Downs's cross-motion for summary judgment.

Downs now appeals the court's orders that denied class certification as well as the order of May 23, 2011, which dealt with the summary judgment motions.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is deemed to be a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of

material fact exists, and he “should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy.” *Id.* The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). The non-moving party must present “at least some affirmative evidence showing the existence of a genuine issue of material fact[.]” *Id.* On appeal, our standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006).

Claims under the Kentucky Consumer Protection Act

Kentucky Revised Statute[s] (KRS) 367.170(1) provides that “[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce” are unlawful. A person may bring an action under this statute if he:

purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170[.]

KRS 367.220(1).

Downs argues that the lottery is engaged in trade and commerce as contemplated by KRS 367.170(1). However, the trial court held that the threshold requirement of the purchase of goods and services contained in KRS 367.220(1) had not been met and that, therefore, Downs is not entitled to bring a claim under KCPA.

KRS Chapter 367 does not provide a definition of *goods*. The trial court relied on a portion of the definition of KRS 355.2-105 which provides that *goods* are “all things which are movable.” Downs urges us to apply a portion of the definition of *goods* from BLACK’S LAW DICTIONARY (9th ed. 2009): “[t]hings that have value, whether tangible or not[.]” We believe that it is helpful to examine the BLACK’S LAW definition in its entirety.

goods. 1. Tangible or movable personal property other than money; esp., articles of trade or items of merchandise <goods and services>. • The sale of goods is governed by Article 2 of the UCC. 2. Things that have

value, whether tangible or not <the importance of social goods varies from society to society>.

BLACK'S LAW DICTIONARY 701 (7th ed. 1999).

Lottery tickets are sold. If they are indeed “goods,” their sale is controlled by the Uniform Commercial Code (UCC). The Kentucky version of the UCC defines *goods* in the statute upon which the trial court relied – KRS 355.2-105, which provides as follows:

(1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (KRS 355.2-107).

KRS 355.2-105.

As the trial court pointed out, a lottery ticket represents a chance to win an unknown amount of money. *See Commonwealth v. Allen*, 404 S.W.2d 464 (Ky. 1966). A chance to win money is intangible and cannot physically be moved at the time that it is purchased. The definition of *goods* does not include intangible property. We also find it is persuasive that the Michigan Court of Appeals has held that lottery tickets do not come within the purview of the UCC. *Ramirez v. Bureau of State Lottery*, 463 N.W.2d 245 (Mich. Ct. App. 1990).

Alternatively, Downs contends that the trial court erred in not holding that the lottery is a service. In support of this argument, he analogizes the lottery to

insurance. Insurance policies are ongoing contractual relationships which create obligations for both parties. The insured must maintain payments in exchange for coverage of the loss for which he has sought protection. However, the purchase of a lottery ticket does not create any ongoing contractual relationship between KLC and the player. It is merely a game of chance resulting in a temporary and ephemeral association between the KLC and the purchaser of a ticket.

We also note that lottery tickets have been specifically defined as “gambling contrivances.” *Gilley v. Commonwealth*, 229 S.W.2d 60, 62 (Ky. 1950). The predecessor to our Supreme Court recognized their uniqueness more than eighty years ago as follows: “[g]aming, betting, and lotteries are separate and distinct things in law and fact, and have been recognized consistently as calling for different treatment[.]” *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W.2d 987, 994 (1931).

The Court of Appeals of Texas has held that actions based on purchase of lottery tickets cannot be brought under the Texas counterpart of Kentucky’s KCPA. *Kinnard v. Circle K Stores Inc.*, 966 S.W.2d 613, 617-18 (Tex. Ct. App. 1998). In *Kinnard*, the Texas court held that the right to participate in the lottery is intangible and is neither a good nor a service. *Id.* We have searched but have not discovered any authority that is contradictory. Based on the long-existing precedent in this state and our review of the treatment of this issue in other jurisdictions, we are persuaded that actions arising from transactions regarding the

lottery do not fall within the purview of the KCPA. They simply do not state a cause of action under the KCPA.

Fraudulent and Negligent Misrepresentation Claims

Downs claims that KLC committed fraudulent and negligent misrepresentation when it claimed that the Extra Cash numbers were randomly generated.

In order to succeed at the threshold, a claim of *fraudulent* misrepresentation must satisfy six elements:

- (1) that the declarant made a material representation to the plaintiff;
- (2) that this representation was false;
- (3) that the declarant knew the representation was false or made it recklessly;
- (4) that the declarant induced the plaintiff to act upon the misrepresentation;
- (5) that the plaintiff relied upon the misrepresentation;
- and (6) that the misrepresentation caused injury to the plaintiff.

Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544, 549 (Ky. 2009). A claim of *negligent* misrepresentation “requires proof by clear and convincing evidence of a material representation that a defendant knew, or should have known, to be false.”

Aesthetics in Jewelry, Inc. v. Brown, ex rel. coexecutors, 339 S.W.3d 489, 495 (Ky. App. 2011) (citing *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 581 (Ky. 2004)).

While the proof for the two claims is different, both nonetheless require that the alleged misrepresentation must have been false. In this case, it was not false.

In this case, Downs failed to establish a false representation.

In a sworn deposition, KLC's manager of research and planning explained how the numbers were selected. For every scratch-off game, KLC determines how much prize money is available and how many tickets will win. The information is entered into grids, which do not all necessarily include all possible prizes. When all the tickets in a grid have been purchased, the game starts a new and different grid.

When a person purchased an Extra Cash ticket, he would have first selected his numbers for the Pick 3 or Pick 4 ticket that he was also purchasing. The computer system would generate a seed number for that purchase – the Extra Cash ticket. The seed number would have been between 1 and approximately 1.1 billion. The seed number then would be divided by the number of tickets remaining in the grid. An algorithm (generated from the remainder of the division calculation) would determine if the ticket was a winning ticket. A winning ticket would print with at least one number that matched the chosen Pick 3 or Pick 4 numbers. Otherwise, a ticket with no matches would be printed.

Downs testified in his deposition that he does not trust computers to generate random numbers. Downs believes that only numbers that come out of the lottery's nightly drawing machines are random. However, the game was advertised as one that could be won *instantly*, necessitating that the computer be a component of the process to select the random numbers. Downs's personal skepticism about the ability of the computer to generate random numbers does not render the process tainted or false.

Downs also contends that the depiction of a sample Pick 3 ticket with a \$500 winning number was fraudulently and negligently misleading. His argument is based on the fact that the two Pick 3 grids which included a \$500 winning number or prize were ultimately never used. However, he does not offer any proof that it was impossible that the grids could have been used if the game had continued. At the time that the advertising materials were created, grids of Pick 3 prizes that included \$500 did exist. Therefore, there is no genuine issue of fact concerning the \$500 Pick 3 prize.

Breach of Contract

Downs argues that the trial erred when it granted summary judgment to KLC concerning his claim for breach of contract. He repeats his argument that the Rules and Regulations stated that the Extra Cash numbers would be randomly generated -- but that in fact, they were not.

We agree with Downs that our Supreme Court has construed the relationship between KLC and a lottery winner as being contractual in nature. *Kentucky Lottery Corp. v. Casey*, 862 S.W.2d 888 (Ky. 1993). Additionally, other jurisdictions have recognized that lottery tickets are contracts between state lotteries and their players as applied to winning entitlements. *Haynes v. Dept. of the Lottery*, 630 So.2d 1177 (Fla. Dist. Ct. App., 1994); *Parsons v. South Dakota Lottery Commission*, 504 N.W.2d 593 (S.D. 1993); *Thao v. Control Data Corp.*, 790 P.2d 1239 (Wash. Ct. App. 1990); *Driscoll v. State of New Jersey, Department*

of Treasury, Division of the Lottery, 627 A.2d 1167 (N.J. Super. 1993); *Valente v. Rhode Island Lottery Commission*, 544 A.2d 589 (R.I. 1988).

The elements of a contract are: offer and acceptance, full and complete terms, and consideration. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). The purchase of a lottery ticket is the acceptance of an offer. *Driscoll v. State*, 627 A.2d at 1171. The terms of the contract are the rules and regulations of the lottery. *Id.*

Downs agreed to the terms of the contract when he purchased the ticket. The Rules and Regulations and how-to-play brochure for Extra Cash stated that the numbers were randomly generated. We have already examined the process of the game and determined that the numbers were indeed randomly generated. The terms were complete. Therefore, there is no genuine issue of fact, and the court did not err when it granted summary judgment to KLC on the breach of contract claim.

Unjust Enrichment

Downs claims that KLC was unjustly enriched when it ran the Extra Cash game. There are three elements that a party must meet in order to prevail on a claim of an unjust enrichment:

- (1) benefit conferred upon defendant at plaintiff's expense;
- (2) a resulting appreciation of benefit by defendant; and
- (3) inequitable retention of benefit without payment for its value.

Jones v. Sparks, 297 S.W.3d 73, 78 (Ky. App. 2009).

Downs's brief offers no support for this argument. He merely complains that the order of the trial court was condescending in tone toward lottery players. We are not persuaded that KLC was unjustly enriched. The record shows that KLC awarded approximately 64% of the revenue generated by Extra Cash as prizes. Downs personally felt that he did not win as often as he should have; however, he does not offer any proof that KLC was unjustly enriched. By the very nature of a lottery, lottery players often receive nothing monetary in return for their purchases of tickets. The record includes transcripts of several KLC advertisements reminding its players that, "it's only a game." We are unable to conclude that the trial court had any basis to find that KLC was unjustly enriched.

Class Certification

Downs's final contention is that the trial court should have granted his motion for class certification. However, because we are affirming the summary judgment in favor of KLC on all issues, we conclude that the issue of class certification is moot. If the action has not survived for one individual, it surely would have no viability for an entire class. Therefore, we decline to address this issue.

We affirm the Jefferson Circuit Court.

ALL CONCUR.

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