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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-932

Filed: 1 August 2017

Bladen County, No. 16-CVS-204

CRAZIE OVERSTOCK PROMOTIONS, LLC, Plaintiff,

v.

JAMES McVICKER, in his personal and official capacity as Sheriff for Bladen County North Carolina; JEFFREY TYLER, in his personal and official capacity as a Captain in the Bladen County Sheriff's Department, Defendants.

Appeal by Defendants from order entered 13 June 2016 by Judge C. Winston Gilchrist in Bladen County Superior Court. Heard in the Court of Appeals 23 March 2017.

Morningstar Law Group, by William J. Brian, Jr. and Keith P. Anthony, for Plaintiff-Appellee.

Womble Carlyle Sandridge & Rice, LLP, by Christopher J. Geis, and Patrick G. Spaugh, for Defendants-Appellants.

DILLON, Judge.

James McVicker and Jeffrey Tyler (“Defendants”) appeal from the trial court’s order denying their motion to dismiss. After careful review, we affirm the trial court’s order.

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I. Background

The plaintiff, Crazy Overstock Promotions, LLC, (“Crazy Overstock”) is a retailer of various discount goods which are promoted through certain “retail establishments.” Defendants, however, believe that Crazy Overstock, in fact, operates illegal gambling video games at these establishments.

Crazy Overstock sells “gift certificates” at the licensed retail establishments, which may be used to purchase Crazy Overstock’s discount goods through its website. However, for each dollar a consumer spends on a gift certificate, the consumer gets an opportunity to play a series of video games for a chance to win money. Crazy Overstock states that it provides this opportunity to win money as a promotional rewards program (the “CO Rewards Program”) to encourage the sale of gift certificates.

Specifically, the CO Rewards Program allows customers to receive a certain number of “game points” for each dollar of gift certificates they purchase through kiosks located in the retail establishments. Game points may then be used to play “reward games” on machines in these establishments. The reward games require no skill, and their results are determined randomly. Customers who are successful at reward games receive “reward points” as a result. Reward points, in turn, may be used by the customer to play a “dexterity test,” which tests players’ hand-eye coordination and reflexes by requiring them “to stop a simulated stopwatch within

specified ranges.” Customers who are successful at the dexterity test then receive “dexterity points,” which may be redeemed for cash rewards.

Police with the Bladen County Sheriff’s Office obtained a search warrant and conducted a search of a “retail establishment” that offered the CO Rewards Program. In response, Crazie Overstock filed this suit against Defendants in their official capacities¹, seeking (1) a declaration that its CO Rewards Program is lawful and (2) an injunction prohibiting Defendants from taking enforcement action concerning the CO Rewards Program.

Defendants filed a motion to dismiss Crazie Overstock’s complaint pursuant to Rules 12(b)(1) and 12(b)(6). The trial court denied the motion, and Defendants appealed.

II. Analysis

This appeal is from an interlocutory order. Therefore, we do not reach the merits of Crazie Overstock’s claim regarding the legality of its CO Reward’s Program. Rather, we only address Defendants’ argument that the trial court erred in denying their motion to dismiss based on governmental immunity. *See Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff’d*, 344 N.C. 729, 477 S.E.2d 171 (1996) (recognizing that “orders denying dispositive motions grounded on the defense of

¹ Crazie Overstock also alleged claims against the defendants in their individual capacities; however, these claims have been dismissed and are not part of this appeal.

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governmental immunity are immediately appealable as affecting a substantial right”).

We conclude that, here, we are bound by our Supreme Court’s decision in *Sandhill Amusements, Inc. v. Miller*, 236 N.C. App. 340, 762 S.E.2d 666 (2014), *rev’d per curiam for the reasons stated in the dissenting opinion*, 368 N.C. 91, 773 S.E.2d 55 (2015) in resolving this appeal. In *Sandhill*, which involved facts very similar to the facts of this case, the Court affirmed a trial court’s denial of a sheriff’s motion to dismiss based on governmental immunity. *Sandhill*, 368 N.C. at 91, 773 S.E.2d at 55. In fact, we have recently followed the *Sandhill* holding in concluding that governmental immunity does not bar claims brought by Crazie Overstock, the plaintiff in this case, against other law enforcement officials in their enforcement attempts against so-called rewards programs. *See T and A Amusements, LLC v. McCrory*, ___ N.C. App. ___, ___ 796 S.E.2d 376, 381-82 (2017); *G.S.C. Holdings, LLC v. McCrory*, ___ N.C. App. ___, ___ 795 S.E.2d 832 (2017) (unpublished)².

It certainly can be argued that the CO Rewards Program is a form of illegal gambling: a consumer must spend money (on gift certificates) in order to play a game of chance from which the consumer can win “reward points,” and that these “reward points” are, in themselves, a thing of value as they can be used as an “entry fee” to

² The briefs in the present case were filed before the mandate issued in these 2017 opinions from our Court, and no party has moved to amend its brief or attempted to distinguish these 2017 opinions at oral argument.

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play a game of skill to win money.³ However, whether the CO Rewards Program, in fact, does constitute illegal gambling is not an issue before us in this interlocutory appeal.

III. Conclusion

Based on our Supreme Court's holding in *Sandhill*, adopting Judge (now Justice) Ervin's dissent and our Court's recent opinions following *Sandhill*, we conclude that the trial court did not err in denying Defendants' motion to dismiss based on governmental immunity.

AFFIRMED.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).

³ For example, ten people each contributing \$100 to play in a golf outing, with the winner getting the entire \$1,000, might be legal in North Carolina, as a game of skill. However, if two people wanting to participate in the golf outing each only had \$50, they would be engaging in illegal gambling if they agreed to flip a coin to see which one of them would get the other's \$50 for the chance to play in the golf outing.