DOCKET NO. CV 05 4007243S : SUPERIOR COURT

THERESA SOKAITIS : JUDICIAL DISTRICT OF NEW BRITAIN

VS. : at NEW BRITAIN

ROSE BAKAYSA : MAY 11, 2010

MEMORANDUM OF DECISION

"Sisters, sisters, there were never such devoted sisters. . . Caring, sharing, everything little thing that we are wearing. . ."[1]

Two once close octogenarian sisters are embroiled in a family feud over a $500,000 Powerball lottery ticket. The plaintiff, Theresa Sokaitis (Terry), brought this action for breach of contract, seeking to recover money damages from her sister, the defendant, Rose Bakaysa (Rose), alleging that Rose had breached an agreement between the parties to share equally in any winnings from, inter alia, lottery tickets. This action was brought by civil complaint and summons on August 19, 2005. On August 17, 2006, Rose filed a motion for summary judgment, alleging that there was no genuine issue of material fact and that the agreement was unenforceable under General Statutes §52-553,[2] thereby entitling Rose to

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[1]Lyrics from the song, Sisters, Irving Berlin (1954).

[2] General Statutes §52-553 provides in relevant part: "All wagers, and all contracts and securities of which the whole or any part of the consideration is money or other valuable thing won, laid or bet, at any game, horse race, sport or pastime, and all contracts to repay any money knowingly lent at the time and place of such game, race, sport or pastime, to any person so gaming, betting or wagering, or to repay any money lent to any person who at such time and place, so pays, bets or wagers, shall be void . . ."

judgment as a matter of law. On September 14, 2006, the court granted Rose's motion for summary judgment and rendered judgment in her favor.

Terry filed an appeal. The Appellate Court reversed the trial court's ruling on the motion for summary judgment, and concluded that §52-553 is not applicable to the parties' agreement because the agreement was not a wagering contract within the terms of the statute. *Sokaitis v. Bakaysa*, 105 Conn. App. 663, 664-66, 938 A.2d 1278 (2008). The Supreme Court later affirmed the Appellate Court's ruling. *Sokaitis v. Bakaysa*, 293 Conn. 17, 975 A.2d 51(2009). The matter was returned to Superior Court, and the matter was tried to the court on March 23, 2010. The parties filed proposed findings of fact and post trial memoranda on April 15, 2010.

This case has been characterized as one involving two sisters, both well into their eighties, "fighting" over a $500,000 lottery Powerball ticket. In reality what spurred the argument was far less than a half of a million dollars, but boils down to a loan of $250 from Rose to Terry.

The sisters grew up in a family of ten brothers and sisters in New Britain. Terry and Rose were close growing up. Both sisters married, but Rose had no children of her own while Terry had six children, one of whom suffers from disabilities. After Rose's husband died in 1981, the two became closer, and when "the casino" opened in the late 1980's, they went two or three times a week.[3] Terry played "the cards," while Rose played the slots, and they would share what they won on an informal basis.

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[3]The parties are referring to Foxwoods Casino.

In January, 1995, Terry "hit" the big jackpot playing Carribean poker for $165,000. Upon receiving the check which had the taxes withheld, Terry gave it to Rose to hold for her over the weekend. The two sisters then together took the check to the bank, cashed it, and deposited it on Monday. Terry shared her winnings with Rose.[4]

In April, 1995, Terry decided that it would be a "good idea" to have a contract spelling out exactly the agreement she and Rose had about sharing their winnings. Perhaps this was to ensure that since Terry shared her big jackpot with Rose, if Rose won, she would be obligated to share in the winnings with Terry. Having made arrangements with an accountant, the two sisters went to his office, Terry told him the terms, he printed it, they both signed it, and had it notarized. It read:

> THIS IS A LETTER OF AGREEMENT BETWEEN ROSE BAKAYSA
> AND THERESA SOKAITIS
> THIS LETTER IS DATED ON 4/12/95
> THIS LETTER STATES THAT WE ARE PARTNERS IN ANY WINNING WE SHALL RECEIVE, TO BE SHARED EQUALLY. (SUCH AS SLOT MACHINES, CARDS, AT FOXWOODS CASINO, AND LOTTEREY (sic) TICKETS, ETC.). (Plaintiff's Exh. 1)

Terry and Rose continued their ventures to Foxwoods Casino, bought lottery tickets, and shared their winnings. Terry testified that "[the agreement] was supposed to last for the rest of our lives."

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[4] Terry gave Rose one-half of the winnings, less $15,000, which she withheld in two undated checks, one for $8,000 and one for $7,000. She told Rose that she would tell her when she could cash them. They remain uncashed.

In 2004, Rose experienced health problems which required surgery. After she left the hospital, she went to a rehabilitation facility for several weeks, and Terry visited her every day. It was while Rose was at the facility that Terry asked her to borrow some money. Terry thought it was $100, but Rose insisted it was $250. Rose lent her the money, something Rose had repeatedly done over the years.

When Rose left the facility, she still required assistance, so she went to stay with Terry for approximately three weeks to continue her recovery. In addition to the money Terry had borrowed from Rose while Rose was at the rehabilitation facility, Terry also owed her approximately $650 from a previous loan. The two sisters decided that Rose would stay with Terry, and instead of paying Terry for food, etc., Rose would forgive the $650 debt, and they would "call it even." Rose stayed with Terry, but testified that after Terry made her breakfast, Terry left her alone for the rest of the day to recuperate on her own.

When Rose returned to her own home several weeks later, she called Terry and told Terry that she and their brother, Joe, were coming over to get the $250 that she had lent to Terry. Terry insisted it was not $250, but only $100. Terry told Rose, "Don't come, because I don't have it," and explained she would pay her the money when she did have it. It is this conversation that both parties recall differently, and it is this conversation that would determine their personal and legal relationship from then on. Terry said that the conversation was not the heated argument that Rose recalls. Rose said

that the conversation became a shouting match, and testified that Terry was "hollering on the phone, 'I don't want to be your partner anymore,' " and that she (Rose) said "okay." Although Rose stated at trial that their brother, Joe, was present during this telephone conversation, and Joe himself testified that he witnessed the exchange, the court does not believe Joe was present.[5] What the court finds did happen is that Rose, upset over the heated discussion, called Joe and said, "Terry doesn't want to be my partner anymore," and Joe said, "I'll be partners with you."

After that conversation between Terry and Rose, and before Rose and Joe won the Powerball in June 2005, Terry eventually sent Rose a check for $250, but there was a significant change in their relationship. The parties did not speak or have any contact with each other, and there were no more trips together to the casino. They did not buy any lottery tickets together, nor did they share in any winnings. Terry testified that she continued to gamble by purchasing scratch lottery tickets, but not as often because she "finds it better to give it to St. Jude's Children Hospital."

Rose continued to purchase lottery tickets by entering into an arrangement with her brother, Joe. Every two weeks they would purchase lottery tickets, alternating every two weeks as to who would pay the money for the tickets. The numbers were always the same, and to this day, Rose and Joe still play the same numbers. On June 15, 2005, Joe purchased their usual set of tickets at a gas station in Plainville, Connecticut, for the June

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[5] Joe had testified at his deposition that he was not present, but that Rose had called him. His testimony changed at different times. His motives are questionable.

18th drawing. When he realized that they had won the Powerball for $500,000, he called Rose immediately, and told her, "we won some serious money – try a half a million!" He followed the procedure set forth by the lottery commission, signing the back of the ticket with his name, address, and social security number, and added Rose's name, social security number, and telephone number. Rose and Joe were each issued a check for approximately $175,000, on June 20, 2005. Terry later learned that Rose had won the powerball from her daughter, Eileen, who is Rose's godchild. Rose had always been very generous to Eileen, and when she won the lottery, she gave Eileen a $10,000 gift.

After the shouting match phone call, the next communication between Terry and Rose was from the state marshal who served the summons and complaint in this action on Rose, claiming the breach of contract, and seeking her share of the winnings. What came between these sisters was money.[6]

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[6] A bittersweet letter introduced at trial from Terry to Rose contains the following thoughts: "I hope you get this letter because I have plenty to say – the most important thing is I am so sick over what is happening with you and I going to court. None of this would have happened if you were not so greedy. . . All I know we should both be ashamed of our self (sic). We are sisters and goong (sic) to court is not right – All I know I am entitled to my share of the money and you know it. . . I remember when I was pregnant. We went to Raphels and you bought me my dress. It was navy blue and it had pink flowers on it . . . You and I use (sic) to go to the casino all the time and to Old Saybrook and look at all the houses and get hot dogs out there at the resterants (sic). . . Well Ro Ro, I don't know what is going to happen – but I want you to know I will always love vou. – But if you wanted to hurt me you did. . . My kids are so good to me and they do send me any money I need. They can't do enough for me so I guess I am rich with a lot of love and that is some thing you can't buy. I hope you feel good and have good health – I have sugar and I have a desease (sic) that is incurable. It is called neurapathy (sic). I can't walk at all. It is really painful – but Ma always said other people have worse problems so I just ask God to let me be able to handle it all. Take care of yourself. Mom would be sick over all of this – it

Terry is suing Rose for what she claims is a breach of contract. She contends that they had a valid written agreement, and that Rose breached the agreement when she failed to share her lottery winnings with Terry in June 2005. "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Pelletier v. Galske*, 105 Conn. App. 77, 81, 936 A.2d 689 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1100 (2008). A contract must be definite and certain as to its terms and requirements. *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 51, 873 A.2d 929 (2005).

There is no dispute that there was a valid fully executed contract between Terry and Rose, which provided for the equal sharing of lottery winnings. However, Rose claims that she has a defense to the action for breach of contract because they ended the contract. Specifically, she states in her amended answer dated June 2, 2006, "[a]ny agreement reached by the parties as alleged has been rescinded."[7]

Rescission is the unmaking of a contract, which "places the parties, as nearly as possible, in the same situation as existed just prior to the execution of the contract." (Internal quotation marks omitted.) *Winchester v. McCue*, 91 Conn. App. 721, 732, 882 A.2d 143 (2005). "[T]he effect of a rescission is to extinguish the contract and to

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would never happen if you at least shared some of the money with me. Do you think I would have done that to you? Never. . . See you in court." Terry

7 Rose also raised the special defense that the contract was void pursuant to General Statutes §52-553, which bars actions on wagering contracts. The Supreme Court determined that this contract was not a wagering contract.

annihilate it so effectively that in contemplation of law it has never had any existence, even for the purpose of being broken. Accordingly, it has been said that a lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of the contract. An election to rescind a contract waives the right to sue upon it. After rescission for a breach, there is no right to sue on the contract for damages for such breach." Id. 732-33, citing 17 Am.Jur.2d 1002-3, Contracts §516 (1964). "The parties to this contract could as validly agree to rescind it as they could agree to make it originally." *Yale Co-operative Corporation v. Rogin*, 133 Conn. 563, 567, 53 A.2d 383 (1947).

"[T]he well-established rule [is] that rescission or abandonment of contract, like entry into a contractual relationship, depends upon the intent of the parties and that the relevant intent is to be inferred from the attendant circumstances and conduct of the parties." *Smith & Smith Building Corp. v. DeLuca*, 36 Conn. App. 839, 843, 654 A.2d 368 (1995) (rescission of an agreement was effective because of the exchange of mutual promises, no other consideration was required; upon rescission of the agreement the obligation to arbitrate any dispute arising under the contract was discharged); see also *Herman S. Newman & Partners, P.C. v. CFC Construction Ltd. Partnership*, 236 Conn. 750, 762, 674 A.2d 1313 (1996). "An agreement to rescind a prior contract requires expressions of assent by both parties, usually in the form of an offer by one and an acceptance by the other but may occur through the conduct of the parties including the

mutual abandonment of their agreement.[8] Absent evidence to the contrary, the legal effect of rescission is the discharge of all rights and duties on the part of both parties with respect to the contract that has been rescinded." 13 A. Corbin, Contracts (Rev. Ed. 2003) §67.8.

The fact that the original contract was in writing does not require a subsequent agreement to rescind the contract also to be in writing. First, while General Statutes §52-550a (5) requires "any agreement that is not to be performed within one year from the making thereof" to be in writing, this agreement does not fall within the purview of this statute. "Where the time for performance is definitely fixed at more than one year, the contract is, of course, within the statute of frauds. . . If no time is definitely fixed but full performance may occur within one year through the happening of a contingency upon which the contract depends, it is not within the statute . . . Contracts of uncertain duration are simply excluded [from the Statute of Frauds]; the provision covers only those contracts whose performance cannot possibly be completed within a year." (Citations omitted.) *C. R. Klewin, Inc. v. Flagship Properties, Inc.*, 220 Conn. 569, 578-79, 600

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[8] See *Young v. Young*, 78 Conn.App. 394, 400-01, 827 A.2d 722 (2003), where the court found that the parties' conduct indicated that they had abandoned all claims to an escrow agreement, simply because neither party acted as though the agreement was in effect. Although the court cited as authority *Smith & Smith Building Corp. v. DeLuca,* supra, an escrow agreement can be "mutually abandoned by the parties to it. The abandonment need not be marked with a formality equal to that used in establishing an escrow; any conduct inconsistent with the escrow is sufficient for the court to conclude it was abandoned, and thus, even if parties did not expressly agree to waive the escrow conditions or to abandon the agreement, a court may consider whether the facts sustain such an implication." (Citing 28 Am. Jur. 2d, Escrow § 8 (1992).

A.2d 772 (1991). It follows that the Statute of Frauds, and all doctrines flowing from it, are not controlling on this agreement. Thus, the Statute of Frauds does not apply to this contract, since the contract was not one that could not be performed within one year. The agreement did not specify any term limit, so it was not required by the Statute of Frauds to be in writing. The rescission is in and of itself a new contract.[9] There is nothing in the agreement to rescind which required it to be in writing. The rescission was effective immediately, and it did not alter or vary the terms of the earlier agreement – it ended it.

Second, an agreement for the rescission of this contract also does not fall within the Statute of Frauds. "If the subsequent agreement is purely one of rescission, without any other substitution for or variation of an earlier contract, it is hardly ever within the [Statute of Frauds]." 4A Corbin, Contracts (Rev. Ed.) §13.2. "Notwithstanding the Statute of Frauds, all unperformed duties under an enforceable contract may be discharged by an oral agreement of rescission." 2 Restatement (Second) of Contracts, §148 (1979).

Consequently, the paramount issue in finding the rescission valid is proving that it was within the intent of the parties to abandon or rescind the contract. "Whether the parties have manifested an intention to modify or abandon their agreement is ordinarily a question of fact." *Rowe v. Cormier*, 189 Conn. 371, 372-73, 456 A.2d 277 (1983).

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9 *Burkle v. Superflow Mfg. Co.*, 137 Conn. 488, 497, 78 A.2d 698 (1951) ("The rescission of a contract is itself a new contract. It is the substitution of a new agreement for the old.")

"The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties." (Internal quotation marks omitted.) *Cavoli v. DeSimone*, 88 Conn.App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005).

"It is well established that in cases tried before courts, trial judges are the sole arbiters of the credibility of witnesses and it is they who determine the weight to be given specific testimony. . . [I]t is the quintessential function of the fact finder to reject or accept certain evidence. . ." (Citations omitted; internal quotation marks omitted.) *In re Antonio M.*, 56 Conn. App. 534, 540, 744 A.2d 915 (2000). "The sifting and weighing of evidence is peculiarly the functions of the trier [of fact]." *Smith v. Smith*, 183 Conn. 121, 123, 438 A.2d 842 (1981).

The crucial issue is what occurred in that conversation in June, 2004, when Rose called Terry to tell her she wanted repayment of her $250. The evidence was clear that over the years Rose had helped Terry financially, and at that point, Rose had had enough. She wanted Terry to keep her agreement to repay the money Rose lent to her while she was at the rehabilitation facility. When Terry started to say that she did not have the money to pay her back, it is quite believable that the conversation became heated, and Terry said, as Rose testified, "I don't want to be your partner anymore," at which point Rose agreed, saying, "okay." This is backed up by Rose then telling their brother, "Terry doesn't want to be my partner anymore," to which he replied, "I'll be your partner."

The behavioral changes that occurred support Rose's position that this was a heated argument that, as her counsel argued, "clearly fractured a sibling bond and terminated the partnership." Neither party bought lottery tickets together, went to the casino together, or gambled from that day onward. Their next conversation was when Rose called Terry after being served with the lawsuit. During that conversation, Terry told Rose, that she "deserved a share of the money," and Rose told her she was not going to get anything. Rose was partners with her brother. Terry said, "I am your partner and I have a contract," but Rose said, "I tore mine up," and Terry said, "I didn't." But what Terry failed to remember is that she was the one who had initially said, "I don't want to be your partner anymore." That action constituted an offer which Rose accepted, effectuating the rescission.

Terry testified, "I love my sister. There was no reason to not be partners," but her conduct and Rose's conduct belie this testimony. The fact that the parties did not have any contact for over a year supports the defendant's assertions about the tenor of the conversation, and that the contract was rescinded during that conversation. The facts support her contention that during that conversation, Terry told Rose "I don't want to be your partner anymore," and Rose said, "Okay." Thus, the court finds the parties agreed to rescind their contract.

There is something in this tragedy that touches most people. While the court may be able to resolve the legal dispute, it is powerless to repair the discord and strife that now overshadows the once harmonious sisterly relationship.

For the foregoing reasons, the court finds all issues for the defendant, and enters judgment for the defendant, Rose Bakaysa.

Swienton, J.