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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2041-12T2

HEA SOOK HAN,

Plaintiff-Respondent,

v.

CINDY E. JANG,

Defendant-Appellant.

Submitted December 4, 2013 – Decided June 16, 2014

Before Judges Fuentes and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6208-11.

Rotolo, Rotolo, Yi & Karpf, attorneys for appellant (P. Cliff Rotolo, on the brief).

David Fronefield, attorney for respondent.

PER CURIAM

Defendant Cindy E. Jang appeals from the December 14, 2012 judgment in the amount of $26,000 entered following a jury verdict in favor of plaintiff Hea Sook Han. We reverse and remand for further proceedings.

We derive the following facts from the record. The parties are of Korean descent. They were involved in an "investment

club" or "savings club" they called a "Kye."[1] Yung Sook Khang and Nam Hee Kim formed the Kye. The Kye had twenty-six members split into two groups of thirteen. Plaintiff was in the group Khang led and defendant was in the group Kim led.

Each Kye member gave his or her respective leader $3000 a month to deposit into the Kye, and each month a member would receive a payout of $72,000. To record the transactions, Khang and Kim created a "Kye chart," which identified them as the Kye's leaders and listed the members. The Kye chart, written in Korean, also indicated how much money was deposited into the Kye, the month a payout would be made, and the member who would receive the payout. The trial judge barred admission of the Kye chart because it was not translated into English.

Plaintiff became a member of Khang's group in June 2008. Plaintiff made fourteen $3000 monthly payments, for a total of $42,000, and was to receive a $72,000 payout in November 2009.

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[1] Generally, a Kye is a rotating credit association where members "'pool their funds on a regular basis then rotate the pool around the group until all members have received it.'" Part III.A. of Lan Cao, Looking at Communities and Markets, 74 Notre Dame L. Rev. 841, 874-84 (1999) (quoting Ivan Light & Edna Bonacich, Immigrant Entrepreneurs: Koreans in Los Angeles 1965-1982, 244 (1988)). In Korea, the Kye dates back to farming villages in the sixteenth century. Historically, rotating credit associations have been crucial for the economic development of immigrant communities in the United States. Ibid.

Defendant became a member of Kim's group in October 2008. Defendant made two $3000 monthly payments and received a $72,000 payout in December 2008. She continued making her $3000 monthly payments thereafter until the Kye dissolved in August 2009.

The Kye dissolved because Khang's members did not make their monthly payments. In the event of dissolution, the Kye required reimbursement of the investments of members who received no payout. To this end, the Kye required members who received a payout to return to their group leader the amount of money they received above their total investment. Khang and Kim were responsible for collecting the money from their group members and reimbursing the group members who received no payout. Khang and her group members who received payouts did not return any money. Khang eventually left New Jersey without reimbursing plaintiff her $42,000 investment.

Kim testified that she instructed defendant, who had received a payout, to sign fourteen checks in the amount of $3000 each and leave the payee line blank so that Kim could reimburse her members who received no payout. Defendant was to give the checks to Khang, and Khang was to send the checks to Kim. Defendant did as Kim instructed; however, unbeknownst to her, Khang gave the checks to plaintiff. Kim testified that the

checks were for reimbursement of her group members and were wrongly given to plaintiff.

Plaintiff testified that in September 2009, she went to defendant's jewelry store, met with defendant and Khang, and asked for reimbursement of her $42,000 investment. Defendant gave her fourteen signed, dated, and posted-dated checks from defendant's personal account in the amount of $3000 each, but left the payee line blank and instructed plaintiff to write her name there.[2] Plaintiff claimed that "the leaders" agreed to give her the checks. There was no dispute that plaintiff received the checks in accordance with the Kye's reimbursement policy.

Plaintiff also testified that approximately two weeks after the meeting at defendant's jewelry store, her son went there and exchanged a check for $3000 in cash. Plaintiff later became "anxious" about the checks and went to defendant's store, where she received $13,000 worth of jewelry as security for the other checks.

Defendant testified that she gave plaintiff's son the $3000 because she believed he was a member of Kim's group, and gave plaintiff the jewelry because plaintiff agreed to return the remaining checks, which plaintiff failed to do. On Kim's

[2] The checks were dated and post-dated on the fifteenth day of every consecutive month, with the final check dated November 15, 2010.

instructions, defendant subsequently stopped payment on the checks.

Plaintiff filed a complaint against defendant, seeking damages in the amount of $39,000 for breach of contract. Defendant counterclaimed for $13,000.

Defendant requested that the judge give the jury Model Jury Charge (Civil), 4.10N.1.f, "Illegality" (1999),[3] arguing that the alleged contract was unenforceable because the Kye violated the law and public policy. The trial judge declined to give the charge, concluding the Kye's illegality was irrelevant because the parties had a contract separate and distinct from the Kye.

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[3] Model Jury Charge (Civil), 4.10N.1.f, "Illegality" provides as follows:

> If a contract breaks the law or violates public policy, then the plaintiff often cannot enforce it. That means the plaintiff cannot make the defendant do what the contract required, or pay money for not doing what the contract required.
>
> The defendant claims that the contract cannot be enforced because of facts that make it violate the law or public policy. The plaintiff denies this.
>
> It is my job to decide what would make this contract illegal or against public policy so that it could not be enforced.
>
> [(Footnote omitted).]

The judge also declined defendant's request to charge mutual mistake and estoppel.

The jury found that plaintiff established an enforceable contract with defendant to pay $39,000, and defendant breached the contract. The jury awarded plaintiff $39,000. The jury also found that defendant established an enforceable contract for $13,000, and plaintiff breached the contract. The jury awarded defendant $13,000. The judge molded the verdict and entered judgment for plaintiff in the amount of $26,000.

On appeal, defendant does not challenge the jury's verdict that the parties had enforceable contracts. Rather, defendant contends that the contract was not separate and distinct from the Kye, and that although the Kye has not been deemed illegal, the facts demonstrated that the contract was unenforceable because the Kye was against public policy and violated the laws and rules promulgated under the Internal Revenue Code, 26 U.S.C.A. § 6050I, New Jersey's Uniform Securities Law, N.J.S.A. 49:3-47 to -76, and the State Tax Uniform Procedures Law, N.J.S.A. 54:48-1 to -7, and N.J.S.A. 17:16A-2. Defendant also contends the judge erred by failing to: consider factors rendering the contract unconscionable and therefore void; analyze grounds for rescission based on mutual mistake; instruct the jury on estoppel; and admit the Kye chart into evidence.

Our review of a trial judge's findings is a limited one. Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div.), certif. denied, 40 N.J. 221 (1963). We will defer to the trial judge's factual findings that are "supported by 'adequate, substantial and credible evidence.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (quoting Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 293 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002)). However, we accord no deference to the trial court's conclusions on issues of law and review those issues de novo. Ibid. (quoting Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013)). Applying these standards, we conclude that the record does not support the judge's finding that the alleged contract between the parties was separate and distinct from the Kye.

If an alleged illegal contract is collateral, rather than inherent, to the contract at issue, then the contract is enforceable. Loew's, Inc. v. Somerville Drive-in Theatre Corp., 54 N.J. Super. 224, 241 (App. Div. 1959). In Loew's, a film distributor sought fees pursuant to its license agreements with a theatre operator. Id. at 226-27. The theatre operator alleged that the licensing agreement scheme was illegal pursuant to the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1 to 7, and

therefore unenforceable. Ibid. The trial court held, and we affirmed, that

> contracts . . . which are collateral to and independent of the unlawful contract by which the [illegality] was created, and which are not in furtherance of its unlawful purpose, are valid and enforceable. It is generally agreed that the mere fact that the plaintiff is a member of an unlawful conspiracy or combination, created with the intent and purpose of restraining trade or establishing a monopoly, will not disable or prevent it in law from selling goods or services within or affected by the provisions of such trust or combination, and recovering their price or value, either at common law or under statutes making unlawful contracts in restraint of trade or commerce.
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> [Id. at 228.]

Similarly, outside the anti-trust context, our Supreme Court has held that

> A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal if proof of the bargain can be made without relying upon the illegal transaction. . . . How closely a bargain must be connected with an illegal purpose in order to make the bargain illegal is a question of degree. The line of proximity varies somewhat according to the gravity of the evil apprehended.
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> [Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n, 74 N.J. 113, 141 (1977) (citations and internal quotation marks omitted).]

In Manning, the plaintiff received a contract in exchange for its officer's role as a liaison for an illegal "kickback"

associated with an engineering project in the defendant's county. Id. at 117-19. The Court held that the subsequent contract was not sufficiently "collateral" or "remote" to the initial illegal contract because "the doctrine of collateralness must give way to the public policy of discouraging such illegal activities as those admitted by [the officer] and found below on adequate proofs to have led directly to the award of the instant contract to his firm." Id. at 141-42.

Here, plaintiff received the checks from defendant specifically in accordance with the Kye's reimbursement policy. Thus, the alleged contract was not collateral to or independent from the Kye. Accordingly, the judge should have determined whether, as a matter of law, the contract was unenforceable because the Kye violated the law or was against public policy, or whether it is inappropriate to apply Western law to this uniquely Asian economic model in which the parties voluntarily engaged.

We, therefore, reverse and remand for the court to determine these issues after affording the parties the opportunity to address them. If the court determines that the alleged contract was unenforceable, he shall vacate the judgment and enter a judgment dismissing the complaint and counterclaim

with prejudice. If the court determines otherwise, the judgment shall remain in full force and effect.

We have reviewed defendant's remaining contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we make the following brief comments.

We discern no reason to charge mutual mistake. There was no clear and convincing evidence of a past or present fact material to the contract and not to an opinion respecting future conditions as a result of present facts. Asbestos Fibres, Inc. v. Martin Labs., 12 N.J. 233, 240-41 (1953); Spangler v. Kartzmark, 121 N.J. Eq. 64, 71 (Ch. 1936).

We also discern no reason to charge estoppel. There was no evidence that defendant changed her position to her detriment by relying upon plaintiff's statement or conduct, and that: (1) plaintiff's statement or conduct amounted to a misrepresentation or a concealment of material facts; (2) plaintiff knew or should have known the true facts; (3) defendant did not know of the facts concealed or the misrepresentation at the time defendant acted upon the plaintiff's statement or conduct; (4) the statement or conduct was said (or done) by plaintiff with the intention that defendant rely on it; and (5) defendant actually

relied on plaintiff's conduct to defendant's detriment or harm and that such reliance was reasonable and justified. See Model Jury Charge (Civil), 4.10N.2.a "Estoppel" (1999).

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION