

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT, IN AND FOR MARION
COUNTY, FLORIDA

Case No.: 15-2648-CA- G

LET'S OF OCALA II, LLC
d/b/a The Palms II, LLC,

Plaintiffs,

vs.

BRAD KING, in his capacity as State Attorney
For the Fifth Judicial Circuit of Florida, and
CHRISTOPHER BLAIR, in his capacity of
Sheriff of Marion County, Florida,

Defendants.

DAVID RELLSPERMAN
CLERK CIRCUIT COURT
MARION COUNTY, FL.

2016 JUL 13 PM 12:03

FILED
CIVIL DIVISION

**ORDER GRANTING FINAL SUMMARY JUDGMENT IN FAVOR OF
DEFENDANTS BRAD KING, IN HIS CAPACITY AS STATE ATTORNEY
AND THE SHERIFF OF MARION COUNTY**

This cause came to be heard on all parties filing competing motions for summary judgment. The court held a hearing on the matter on June 21, 2016. Prior to the hearing on the motions for summary judgment, the court held an evidentiary hearing on the Plaintiff's amended motion for temporary injunction filed on December 16, 2015.

The Plaintiff in this cause alleges that it was operating a business, Let's of Ocala d/b/a The Palms II, wherein customers could pay for the use of computer games. After paying money, customers would receive a code to enter in the computer to begin the game.

On December 1, 2015, two detectives from the Marion County Sheriff's Office went to Plaintiff's business and played the games. After playing the games, the detectives presented their findings to the State Attorney's Office. The State Attorney's Office notified Plaintiff via letter that it had determined Let's of Ocala was violating Florida Statutes § 849.08 and § 849.16. The letter further warned Plaintiff that the business and its employees would be subject to arrest and seizure of their property if they continued to operate. Plaintiff closed its business and filed a Petition for Declaratory Judgment under Chapter 86 Florida Statutes and Injunctive Relief before this court in order to determine its rights which were placed in question by the receipt of the letter.

STANDARD OF REVIEW

When a party moves for summary judgment, the trial court's function is to determine whether the moving party proved the nonexistence of a genuine issue of material fact. *Le v. Lighthouse Associates, Inc.*, 57 So.3d 283, 285 (Fla. 4th DCA 2011). "If the record reflects even the possibility of a material issue of fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party." *Florida Atlantic University Bd. Of Trustees v. Lindsey*, 50 So.3d 1205, 1206 (Fla. 4th DCA 2010) (quoting *Bender v. CareGivers of Am., Inc.*, 42 So.3d 893, 894 (Fla. 4th DCA 2010)). Summary judgment is proper only where the facts are "so crystallized that nothing remains but questions

of law.” *Tolan v. Coviello*, 50 So.3d 73, 74 (Fla. 4th DCA 2010) (quoting *Cohen v. Cooper*, 20 So.3d 453, 455 (Fla. 4th DCA 2009)).

The court in this case finds that the facts are not in dispute and only questions of law remain.

FACTS

The Plaintiff, Let’s of Ocala, and both Defendants, Brad King in his capacity as State Attorney for the Fifth Judicial Circuit of Florida and Emery Gainey in his capacity as Sheriff of Marion County, have all presented the same facts but do not agree as to how Florida Statutes § 849.08, § 849.16, and the Family Amusement Games Act § 546.10 apply to the facts.

The record evidence shows that Let’s of Ocala provides computer games where persons pay money to receive a code to place in a computer. After entering the code, the game begins when the player clicks start. In the primary game, cascading tiles fall. In a secondary game, a “loot wheel” spins. The player does not control the amount of the potential point prize. After the games determine the amount the player can potentially win, duck symbols appear, which proceed across the screen horizontally at different speeds. Different ducks are worth different percentages, which are applied to the potential points assigned by the cascading tiles and spinning wheel. Therefore, the amount of points the player wins depends on the cascading tiles, the spinning wheel, and which duck the player was able to click on, if

any. See Affidavits attached to the Defendant's Motion for Summary Judgment; See also Transcript of February 16, 2016 Hearing filed on April 8, 2016.

Plaintiff argues that the game is not a game of chance; rather, it is a game of skill because if players can't hit a duck they win nothing. Players earn points only if they hit a duck. Defendants argue that the game is a game of chance because the spinning wheel and/or cascading tiles, which control the potential amount of the prize prior to the duck shooting game, are controlled by a source other than the player.

The court has taken these facts and compared them to the applicable law and finds that there is an element of chance in the game. The statutes that apply to this case are Florida Statute § 546.10, § 849.08 and § 849.16. Florida Statute § 849.08 prohibits gambling in the State of Florida. Florida Statute § 849.08 provides "Whoever plays or engages in any game at cards, keno, roulette, faro or **other game of chance**, at any place, **by any device whatever**, for money or other thing of value, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083." (Emphasis Added). The court finds that the record shows that there is an element of chance built into the game that qualifies as an "other game of chance" "by whatever device, for money or other thing of value".

Defendants argue that the game designed and operated by the Plaintiff qualifies as a slot machine or device as defined in Florida Statute § 849.16.

The court has highlighted the portions of the statute that the court finds the record shows that the Plaintiff's game is a slot machine or device.

Florida Statute 849.16 Slot machines or Devices

(1) As used in this chapter, the term "slot machine or device" means any machine or device or system or network of devices that is adapted for use in such a way that, upon activation, which may be achieved by, but is not limited to, the insertion of any piece of money, coin, account number, code, or other object or information, such device or system is directly or indirectly caused to operate or may be operated and if the user,

(a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or

(b) Secure additional chances or rights to use such machine, apparatus, or device, even though the device or system may be available for free play or, in addition to any element of chance or unpredictable outcome of such operation, may also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value. The term "slot machine or device" includes, but is not limited to, devices regulated as slot machines pursuant to chapter 551.

(2) This chapter may not be construed, interpreted, or applied to the possession of a reverse vending machine. As used in this section, the term "reverse vending machine" means a machine into which empty beverage containers are deposited for recycling and which provides a payment of money, merchandise, vouchers, or other incentives. At a frequency less than upon the deposit of each beverage container, a reverse vending machine may pay out a random incentive bonus greater than that guaranteed payment in the form of money, merchandise, vouchers, or other incentives. The deposit of any empty beverage container into a reverse vending machine does not constitute consideration, and a reverse vending machine may not be deemed a slot machine as defined in this section.

(3) There is a rebuttable presumption that a device, system, or network is a prohibited slot machine or device if it is used to display images of games of chance and is part of a scheme involving any payment or donation of money or its equivalent and awarding anything of value.

The court finds that the spinning wheel and/or cascading tiles at the beginning of the game sets out the amount a player may win. Therefore, this is an element of chance controlled not by the player but by another source, in that the spinning wheel and/or cascading tiles determine how much a player can potentially win which is unpredictable by the user.

Subsection (1) of Florida Statute § 849.16 states: "that, whether by application of skill or by reason of **any** element of chance or any other outcome unpredictable by the user..." (Emphasis Added). Again, the court finds that the cascading tiles and/or spinning wheel at the beginning of the game qualifies as an element of chance that the statute prohibits. See Florida Statute § 849.16 (1)(b), "in addition to any element of chance or unpredictable outcome." (Emphasis Added). The court finds that the prize awarded is determined by some source other than the player.

There is a rebuttable presumption that the game is a slot machine and the Plaintiff has not provided evidence in the record to overcome the rebuttable presumption.

Plaintiff argues that its game is exempt under Florida Statute § 546.10 as an amusement game. The court has considered the statute and finds that the record does not support the Plaintiff's argument. The court has highlighted the sections of the statute that show that the Plaintiff's game is not an amusement game.

Florida Statute 546.10 Amusement games or machines:

(1) This section may be cited as the "Family Amusement Games Act."

(2) The Legislature finds that regulation of the operation of skill-based amusement games or machines at specified locations to ensure compliance with the requirements of law is appropriate to prevent expansion of casino-style gambling. Therefore, the Legislature finds that there is a compelling state interest in clarifying the operation and use of amusement games or machines to ensure that provisions regulating these devices are not subject to abuse or interpreted in any manner as creating an exception to the state's general prohibitions against gambling.

(3) As used in this section, the term:

(a) "Amusement game or machine" means a game or machine operated only for the bona fide entertainment of the general public which a person activates by inserting or using currency or a coin, card, coupon, slug, token, or similar device, and, by the application of skill, **with no material element of chance inherent in the game or machine, the person playing or operating the game or machine controls the outcome of the game. The term does not include:**

1. Any game or machine that uses mechanical slot reels, video depictions of slot machine reels or symbols, or video simulations or video representations of any other casino game, including, but not limited to, any banked or banking card game, poker, bingo, pull-tab, lotto, roulette, or craps.

2. A game in which the player does not control the outcome of the game through skill or a game where the outcome is determined by factors not visible, known, or predictable to the player.

.....

(d) "Game play" means the process of events beginning with the activation of the amusement game or machine and ending when the results of play are determined without the insertion or the use of any additional currency, coin, card, coupon, slug, token, or similar device to continue play. A free replay is not a separate game played.

(e) "Material element of chance inherent in the game or machine" means that:

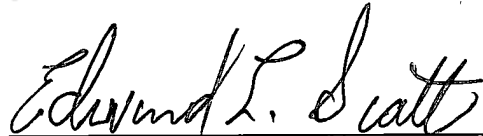
1. The possibility of the player succeeding at the game or accomplishing the player's task is determined by the number or ratio of prior wins or prior losses of players playing the game;
2. An award of value is not based solely on the player achieving the object of the game or on the player's score;
3. The number of the coupons or points awarded or the value of the prize awarded for successfully playing the game can be controlled by a source other than the player or players playing the game;
4. The ability of the player to succeed at the game is determined by a game feature or design that changes the effect of the player's actions and that is not discernible or known by the player;
5. The accomplishment of the player's task requires the exercise of a skill that no player could exercise;
6. A computer-based or mechanical random number generator or other factor that is not discernible, known, or predictable by the player determines the outcome or winner of the game; or
7. The game is designed or adapted with a control device to allow manipulation of the game by the operator in order to prevent a player from winning or to predetermine which player will win.

(Emphasis Added). The court finds, based on the record, that the cascading tiles and/or spinning reels at the beginning of the game that determine how much the player (who does not control this stage of the game) may win, shows the game has a material element of chance inherent in the game as defined in Florida Statute § 546.10(3)(e)(1)(2) and **(3)** above.

As to the Declaratory Judgment action, the court finds that the Plaintiff's game is a slot machine or device as defined in Florida Statute § 849.16 and that the exemptions under the Florida Amusement Game Act, Florida Statute § 546.10 do not apply, because of the game of chance in the value of the prize awarded. The Petition for Injunctive relief is **DENIED** as moot.

Based on the above, the Defendants, Brad King, as State Attorney for the Fifth Judicial Circuit of Florida and Emery Gainey, in his capacity as Sheriff of Marion County, Motions for Summary Judgment are GRANTED. The Plaintiff, Let's of Ocala II, LLC d/b/a The Palms II, Motion for Summary Judgment is DENIED.

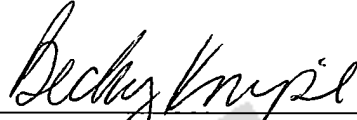
ORDERED this 12th day of July, 2016, in Ocala, Marion County, Florida.



EDWARD L. SCOTT
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail or e-mail to the following on this 12 day of July, 2016: Justin B. Kaplan, Esquire ikaplan@kymplaw.com and Michael S. Greenberg, Esquire, mgreenberg@kymplaw.com, Mark Simpson, Esquire msimpson@sao5.org and R. Gregg Jerald, Esquire@marionso.com.



Becky Knipe
Judicial Assistant

UNOFFICIAL
DOCUMENT



*BRAD KING, STATE ATTORNEY
Fifth Judicial Circuit of Florida
Serving Marion, Lake, Citrus, Sumter, Hernando Counties*

December 8, 2015

The Palms II
8499 SW Highway 200 Suite 141
Ocala, Florida 34481

Re: Lottery & Slot Machines

Sirs,

This office has been provided video surveillance and an investigative report from the Marion County Sheriff's Office regarding the video slot machines being operated in your business. After reviewing the video and the report it has been determined that the games in your establishment violate Florida law. Specifically your games qualify as a lottery under Section 849.09, Florida Statutes and a slot machine under Section 849.16, Florida Statutes. Specifically investigators have represented that employees of the business have stated that the "duck" game makes these games of skill, this argument is without merit. After receipt of this letter if it is determined that your games are still in operation you will be subject to arrest and forfeiture of the gaming system. If you have any questions regarding this letter I suggest you contact your attorney.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Simpson".

Mark D. Simpson
Assistant State Attorney
Public Interest Unit

