[Cite as *Clark v. Ohio Lottery Comm.*, 2024-Ohio-6120.]

IN THE COURT OF CLAIMS OF OHIO

CATHARINE CLARK Plaintiff v. OHIO LOTTERY COMMISSION Defendant	Case No. 2023-00447JD Judge Lisa L. Sadler Magistrate Gary Peterson DECISION

{¶1} On October 11, 2024, Defendant filed a Motion for Summary Judgment pursuant to Civ.R. 56(C). On October 14, 2024, Plaintiff filed a Response in Opposition to Defendant's Motion for Summary Judgment. Defendant did not file a reply in support of its Motion for Summary Judgment. Defendant's Motion for Summary Judgment is now before the Court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4(D). For the following reasons, Defendant's Motion for Summary Judgment is GRANTED.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C):

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is

> made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St. 3d 280, 292 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶3} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Facts

{¶4} Defendant submitted an affidavit from its employee, Executive Producer of Cash Explosion for the Ohio Lottery Commission Barry Riley, with its Motion for Summary Judgment. However, upon review, Plaintiff did not submit any Civ.R. 56 evidence with her Response. The relevant pleadings and evidence submitted,[1] viewed in a light most favorable to Plaintiff, shows the following:

[1] Defendant's Motion for Summary Judgment is related to Plaintiff's "Second Amended Complaint, filed on August 15, 2023." (Defendant's Motion, p. 1). The Court previously determined that Plaintiff's July 27, 2023 Amended Complaint was the operative pleading, but because the July 27, 2023 and August 15, 2023 versions of Plaintiff's Amended Complaint are identical other than the corresponding certificate of service, the Court finds it harmless error that Defendant's Motion for Summary Judgment refers to the "Second Amended Complaint, filed on August 15, 2023." (See August 15, 2023 Order of the Magistrate ("The court will use plaintiff's original filing date of July 27, 2023, for purposes of the record; Because the August 15, 2023 amended complaint is a duplicate of the July 27, 2023 amended complaint, the July 27, 2023 amended complaint will be the operative pleading.")).

{¶5} On or before February 12, 2023, Plaintiff purchased a Cash Explosion instant lottery ticket. (Amended Complaint, ¶ 12). Defendant's "Cash Explosion Instant Tickets cost $2 each." (Barry Riley Affidavit, ¶ 8; *see also* Amended Complaint, attachments). Plaintiff states that she "did not win an instant prize, but did win an entry into the Cash Explosion Game Show." (Amended Complaint, ¶ 12).

{¶6} The Cash Explosion Game Show was impacted by the COVID pandemic, which resulted in "a backlog of contestants that significantly extended the time between drawing selections and winner announcements." (Riley Dep., ¶ 4). To ease its backlog, Defendant, through its Executive Director of the Ohio Lottery Commission, "issued new Contestant Selection Procedures on January 10, 2023 for conducting the Cash Explosion drawing." (Riley Dep., ¶ 4; Riley Dep. Exhibit A). The new Contestant Selection Procedures required that "from January 20, 2023-March 10, 2023, 'the first four (4) valid selections will be contestants for the game show. The next 20 (20) valid selections will receive a Cash Explosion prize pack. And the next two (2) valid selections will be alternates.'" (Riley Dep., ¶ 5, Riley Dep. Exhibit A, § 3.4). However, the new Contestant Selection Procedures "noted that beginning March 17, 2023, 'the first eight (8) valid selections will be contestants for the Game Show,'" and "[t]he next four (4) valid selections will be alternates." (Riley Dep., ¶ 5, Riley Dep. Exhibit A, § 3.4). Drawings are considered complete once valid selections are made for each available slot. (*See* Riley Dep. Exhibit A, § 3.4).

{¶7} On February 12, 2023, Plaintiff "took the ticket to a lottery location and they provided the claim ticket to send in the winning entry to be submitted to the Ohio Lottery Commission to become a contestant on the Cash Explosion Game Show." (Amended Complaint, ¶ 12; Riley Dep., ¶ 7). Plaintiff proceeded to submit her ticket into the drawing that occurred on February 25, 2023, to become a contestant, but was ultimately not selected as one of the four contestants, 20 prize pack winners, or two alternates. (Amended Complaint, ¶ 12; Riley Dep., ¶ 7).

Law and Analysis

{¶8} Plaintiff alleges that "[t]he advertised representations of the game were false and unfair and/or deceptive. [Defendant] knowingly failed to properly facilitate the game

and update the information provided to consumers as protected under consumer protections." (Amended Complaint, ¶ 12). Plaintiff alleges that 8 contestants should have been selected rather than 4 contestants. (Amended Complaint, ¶ 12). Plaintiff specifically claims "Breach of Contract, Emotional Distress." (Amended Complaint, ¶ 12). Plaintiff states that "damages are undetermined because the situation cannot be recreated," but labels her damages as "Loss of Winnings on Game Show" estimated at one million dollars. (Amended Complaint, ¶ 12-13).

{¶9} "The sale and purchase of lottery tickets is governed by the general principles of contract law." *Struna v. Ohio Lottery Comm.*, 2004-Ohio-5576, ¶ 9 (10th Dist.); *Peters v. Ohio Lottery Comm.*, 63 Ohio St.3d 296, 299 (1992). "Simply stated, the state of Ohio 'agrees' to pay the holder of a lottery ticket containing the winning numbers as chosen by the State Lottery Commission, the 'jackpot' amount . . . . It is this promise which induces the purchase of the lottery tickets." (Footnote omitted.) *Struna* at ¶ 9, quoting *Couchot v. State Lottery Comm.*, 1994 Ohio App. LEXIS 2844, *10 (10th Dist. June 30, 1994), reversed on other grounds, *Couchot v. State Lottery Comm.*, 74 Ohio St. 3d 417 (1996). Lottery players agree to be bound by the terms of the game when they purchase and redeem their tickets. *Struna*, ¶ 9, citing *Woodbridge Partners Group, Inc. v. Ohio Lottery Comm.*, 99 Ohio App.3d 269, 273 (10th Dist. 1994). The rules of lottery games are published in the Ohio Administrative Code, and plaintiff is conclusively presumed to have notice of those rules and regulations. *Keefe v. Ohio Lottery Comm.*, 2006-Ohio-3658, ¶ 10 (10th Dist.).

{¶10} The rules and terms for "Cash Explosion" are set forth in Adm.Code 3770:1-9-522, which provides, in pertinent part, that:

> (3) All holders of valid winning tickets, which reveal an "ENTRY" symbol three times shall become eligible for a chance to be selected in a scheduled drawing to appear as a contestant on the Cash Explosion Game Show by complying with the special claim, entry, receipt, validation and drawing requirements of the Ohio lottery commission's current Game Show Mail and Drawing Procedures, and with all other applicable requirements of the rules of the commission, the regulations of the director and the procedures established by the director.

{¶11} Defendant asserts that it is entitled to summary judgment because "[Plaintiff] cannot prevail on a claim of a breach of contract" because "[Plaintiff] cannot show a breach" and "[Plaintiff] cannot show that she was damaged as a result of [Defendant's] alleged breach." (Defendant's Motion, p. 4-6). Moreover, Defendant asserts that it is also entitled to summary judgment because "[Plaintiff] cannot sustain a claim for negligence arising from her relationship with [Defendant]." (Defendant's Motion, p. 7). Defendant submitted Civ.R. 56(C) evidence in the form of an Affidavit from its employee, Executive Producer of Cash Explosion for the Ohio Lottery Commission Barry Riley.

{¶12} "'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.'" *Kostelnik v. Helper*, 2002-Ohio-2985, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976). To establish a claim for breach of contract under Ohio law, a plaintiff "must prove: (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damages or loss resulting from the breach." *Claris, Ltd. v. Hotel Dev. Servs., LLC*, 2018-Ohio-2602, ¶ 28 (10th Dist.), citing *Lucarell v. Nationwide Mut. Ins. Co.*, 2018-Ohio-15, ¶ 41; *Jarupan v. Hanna*, 2007-Ohio-5081, ¶ 18, (10th Dist.). The party seeking to recover for a breach of contract bears the burden of proving each element of a breach-of-contract claim. *Claris, Ltd.* at ¶ 47. "Plaintiff must show his entitlement to damages" on a contract. *Eckel v. Bowling Green State Univ*., 2012-Ohio-3164, ¶ 59 (10th Dist.). "Damages for a breach of contract are those which are the natural or probable consequence of the breach of contract or damages resulting from the breach that were within the contemplation of both parties at the time of making the contract." *Id*. "When the facts presented in a case are undisputed, whether they constitute a performance or a breach of the contract, is a question of law for the court." *Luntz v. Stern*, 135 Ohio St. 225, 237, 20 N.E.2d 241 (1939).

{¶13} Upon review, the undisputed evidence establishes that Defendant properly performed its obligations under the contract, Plaintiff's valid winning ticket for "Entry" to the Cash Explosion Game Show, and as such, Defendant is not in breach and Plaintiff cannot prove she was damaged. Defendant's operation of Cash Explosion is controlled

by Adm.Code 3770:1-9-522, which provides that eligibility to become a contestant on the game show requires a valid winning ticket holder abide by "all other applicable requirements of the rules of the commission, the regulations of the director and the procedures established by the director." The Director of Defendant "issued new Contestant Selection Procedures on January 10, 2023 for conducting the Cash Explosion drawing[,]" which were in place on February 12, 2023 when Plaintiff entered her valid winning ticket for Entry into the February 25, 2023 drawing for the Cash Explosion Game Show. (Riley Dep., ¶ 4, 7; Riley Dep. Exhibit A). The new Contestant Selection Procedures required that "from January 20, 2023-March 10, 2023, 'the first four (4) valid selections will be contestants for the game show. The next 20 (20) valid selections will receive a Cash Explosion prize pack. And the next two (2) valid selections will be alternates.'" (Riley Dep., ¶ 5, Riley Dep. Exhibit A, § 3.4). Accordingly, the uncontested evidence shows Defendant did not breach the contract and complied with Adm.Code 3770:1-9-522 and the Director's Contestant Selection Procedures on February 25, 2023, when it conducted a Cash Explosion Game Show drawing and Defendant's "first four selections from the drawing were contestants for the game show, the next 20 selections from that same drawing received a Cash Explosion prize pack, and the next 2 valid selections were deemed alternates." (Riley Dep., ¶ 7).

{¶14} Moreover, Plaintiff was not one of the twenty-six entrants selected during the February 25, 2023 drawing. (Riley Dep., ¶ 7). Even if Defendant would have selected 8 contestants, as Plaintiff alleges it should have, or 8 contestants and 4 alternates as was set to go into effect beginning March 17, 2023, Plaintiff would not have been selected because Defendant did, in fact, draw twenty-six entrants and Plaintiff was not selected. Accordingly, the uncontested evidence establishes that Plaintiff cannot show damages.

{¶15} Finally, the "economic loss" rule generally provides that there is no cause of action in negligence for claims arising under a contract. *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co*., 42 Ohio St.3d 40, 43-45 (1989). "The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." (Quotations omitted). *Id*. at 43. "When the promisee's injury consists merely of the loss of his bargain, no tort claim arises because the duty of the promisor to fulfill the term of

the bargain arises only from the contract." (Quotations omitted). *Id*. at 45. Accordingly, inasmuch as the parties had a contractual relationship and Plaintiff alleged purely economic losses, Plaintiff cannot prevail on a negligence claim.

{¶16} Upon review, the uncontested Civ.R. 56(C) evidence submitted by Defendant establishes that Defendant did not breach its contractual duties to Plaintiff because it properly complied with Adm.Code 3770:1-9-522 and the Director's Contestant Selection Procedures, Plaintiff cannot show contractual damages, and Plaintiff cannot sustain a negligence claim under the circumstances. Accordingly, Defendant has met its initial burden as the moving party seeking summary judgment pursuant to Civ.R. 56(C).

{¶17} Plaintiff's Response in Opposition simply "asks that the Court disregard and exclude any case law presented by the Defendant since they did not notify the Plaintiff or the public of significant material changes. None of the Defense's arguments for summary judgement have merit, the Plaintiff respectfully asks the Court to hear the claim at trial and deny Defense's motion to move for Summary Judgement." (Plaintiff's Response, p. 1).

{¶18} "When a motion for summary judgment is made and supported as provided in Civ.R. 56, the nonmoving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing that there is a genuine triable issue." *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996). However, upon review, Plaintiff has not submitted any admissible Civ.R. 56 evidence to prove her reciprocal burden that Defendant breached the contract, she suffered contractual damages, or she has a valid negligence claim. As such, Plaintiff's conclusory Response does not demonstrate the existence of a genuine issue of material fact meeting the reciprocal burden pursuant to Civ.R. 56(E) regarding Defendant's alleged breach of contract, Plaintiff's contractual damages, or Plaintiff's negligence claim. Accordingly, Defendant is entitled to judgment as a matter of law and granting of summary judgment in its favor.

Conclusion

{¶19} Defendant has met its initial burden, pursuant to Civ.R. 56(C), by showing that there are no genuine issues of material fact regarding Defendant's alleged breach of

contract, Plaintiff's contractual damages, or Plaintiff's negligence claim. However, Plaintiff has not met her reciprocal burden, pursuant to Civ.R. 56(E), setting forth specific facts showing that there is a genuine issue for trial. Even construing the evidence in a light most favorable to Plaintiff, she has failed to demonstrate the existence of a genuine issue of material fact related to Defendant's alleged breach of contract, Plaintiff's contractual damages, or Plaintiff's negligence claim.

{¶20} For these reasons, Defendant's Motion for Summary Judgment is GRANTED. Judgment is rendered in favor of Defendant.

LISA L. SADLER
Judge

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CATHARINE CLARK Plaintiff v. OHIO LOTTERY COMMISSION Defendant	Case No. 2023-00447JD Judge Lisa L. Sadler Magistrate Gary Peterson JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶21} For the reasons set forth in the Decision filed concurrently herewith, Defendant's Motion for Summary Judgment is GRANTED. Judgment is rendered in favor of Defendant. All previously scheduled events are VACATED. Court costs are assessed against Plaintiff. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

LISA L. SADLER
Judge

Filed November 22, 2024
Sent to S.C. Reporter 12/31/24