

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 07/08/2015

TIME: 02:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: E. Brown

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **34-2014-00161427-CU-MC-GDS** CASE INIT.DATE: 04/04/2014

CASE TITLE: **Whitehouse vs. Sacramento Casino Royale LLC**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Summary Judgment and/or Adjudication - Civil Law and Motion - MSA/MSJ/SLAPP

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion for Summary Judgment) taken under submission on 6/25/2015

TENTATIVE RULING

Plaintiffs Nicole Whitehouse, Johnnie Matranga, John Fierro, and Cherlyn Ortiz' (collectively, "Plaintiffs") motion for summary judgment is DENIED.

Plaintiffs' and Defendants' requests for judicial notice regarding legislative history are DENIED.

The Court received defendant Sacramento Casino Royale, LLC's ("Casino Royale") letter explaining its late filings of its amended opposition and the amended declaration of Stella Ma. While the Court appreciates having complete and accurate information, the few changes to the opposition and Ms. Ma's declaration do not affect the Court's resolution of this motion.

Casino Royale was a licensed gambling establishment that operated the Casino Royale card room inside the Red Lion Hotel located at 500 Leisure Lane in Sacramento, California. Casino Royale offered blackjack, baccarat, and pai gow in the card room. Defendant Pacific Gaming Services, LLC ("Pacific Gaming") has provided third-party propositional player services to Casino Royale, acting as a player-dealer during a card game. Both Casino Royale and Pacific Gaming submitted separate oppositions, but Pacific Gaming joined in Casino Royale's opposition. Therefore, Casino Royale and Pacific Gaming shall be collectively referred to as "Defendants."

Plaintiffs allege a single cause of action against Defendants for violating the Red Light Abatement Act (the "RLAA"). (California Penal Code §§ 11255 *et seq.*) The RLAA, at Penal Code § 11225(a), provides: "(a) (1) Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, ... and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, ... are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance."

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Calendar No.

Plaintiffs move for summary judgment against Defendants on the basis that Defendants violated the RLAA by operating "banked games" and seek to permanently enjoin Defendants from maintaining the public nuisance on the Red Lion hotel property. Plaintiffs also seek a civil penalty of up to \$25,000 against each Defendant.

A plaintiff moving for summary judgment must present prima facie evidence of each element of a cause of action entitling it to summary judgment. If plaintiff succeeds, the burden shifts to defendant, who must set forth specific facts showing a triable issue of material fact exists as to that cause of action. (C.C.P. section 437c(p)(l).)

To establish a violation of the RLAA, Plaintiffs must establish the existence of illegal gambling. Even assuming Plaintiffs met this burden, Defendants have presented sufficient evidence that a triable issue of material fact exists as to whether an injunction should issue.

The Undisputed Facts Support the Existence of Illegal Gambling

Plaintiffs contend Defendants violated the RLAA by operating "banked games" in violation of Penal Code sections 330 and 330.11. That is, operating card games where the player-dealer position remains with the house and does not rotate to other players. Thus, a "banking" game includes a game that does not provide for systematic and continuous rotation of the player-dealer position.

Under Penal Code section 330, "Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, ... any banking or percentage game played with cards ... is guilty of a misdemeanor"

Penal Code section 330.11 defines what is not considered a "banking game" or "banked game" and provides: "Banking game" or "banked game" does not include a controlled game *if the published rules of the game feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants during the play of the game*, ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, and preclude the house, another entity, a player, or an observer from maintaining or operating as a bank during the course of the game. For purposes of this section it is not the intent of the Legislature to mandate acceptance of the deal by every player if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. The house shall not occupy the player-dealer position. See, also B&P Code 19805(c)

The parties disagree as to the interpretation of Penal Code section 330.11. Plaintiffs contend the language of section 330.11 requires that the player-dealer position continuously and systematically rotate amongst participants during the game, not just that the position be *offered* to each player. Plaintiffs rely on *Oliver v. County of L.A.*, which held that because the rules of the game *permitted* one player to act as a player-dealer for repeated hands if other players decline the position, then the game is an illegal banking game. (66 Cal. App. 4th 1397, 1408-1409 (1998).) Defendants contend that *Oliver* has been abrogated by section 330.11, which only requires that the player-dealer position be systematically and continuously *offered*. Defendants also claim that the rules, rather than actual game practice, should govern because that is what the Bureau of Gaming uses as the basis for its licensing decisions.

The Court agrees with Plaintiffs' interpretation. In construing statutory language, if there is no ambiguity in the language, the plain meaning of the statute governs. (*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1103 (2007).) The language of section 330.11 is clear. It states that a game is not banked if the rules state that the player-dealer position *must be* continuously and systematically rotated. The statute also clearly states that every player does not have to accept the position, provided the maintenance of or operation of a bank is made impossible by other means. The statute does not state

that the player-dealer position only has to be *offered* to other players. Rather, it specifically states that even if a player does not accept the position, banking must be made impossible by other means. Thus, even if a game's rules only require that an offer be made, the rules must provide some other mechanism to prohibit banking. Essentially, actual rotation must take place or the game is an illegal banking game.

Plaintiffs' evidence of Defendants' operation of illegal "banked games" includes: (1) an admission from Casino Royale in its responses to Plaintiffs' First Set of Requests for Admissions that Pacific Gaming occupied the player-dealer position during all but two of the many hands that Plaintiffs' investigators (MIG) observed or participated in (UMFs 19); (2) PMQ testimony that Defendants believe they were only required to offer the player-dealer position to other players at the table, but not that the position ever had to change hands (UMFs 22, 24, 26, 27); (3) PMQ testimony that Casino Royale allowed Pacific Gaming to occupy the player-dealer position if no other players accepted the offer and that the game was not stopped (UMFs 29-32); and (4) testimony that Pacific Gaming regularly banks Casino Royale's card games (UMFs 33-35, 39-43). Defendants do not dispute any of this evidence. In fact, Defendants state in their opposition that they do "not dispute Plaintiffs' evidence that the player-dealer position at Casino Royale rotated only minimally." (Casino Royale Opp. at 4, n. 3; Casino Royale Sep. State. 31, 32.) Accordingly, Plaintiffs have met their burden to establish the existence of a public nuisance due to Defendants' operation of illegal banked games at the Red Lion hotel. However, this is only one part of Plaintiffs' burden.

Disputed Material Facts Exist as to Whether an Injunction Should Issue

Upon the finding of a nuisance, the RLAA provides the Court discretion to award at least two remedies: (1) the Court may enter an injunction ordering Defendants to refrain from any further conduct causing the nuisance (see Cal. Penal Code §§ 11227(a)); and (2) the Court may assess a civil penalty of up to \$25,000 against each Defendant. (Cal. Penal Code § 11230(b).) Plaintiffs request that this Court do both.

"Whenever the existence of a nuisance is shown in an action ... the court or judge shall allow a temporary restraining order or injunction to abate and prevent the continuance or *recurrence* of the nuisance." (Cal. Pen. Code § 11227.) "[A] injunction is ordered against past acts only if there is evidence that they will probably recur." (*Hannah v. Pogue*, 23 Cal. 2d 849, 858 (Cal. 1944).) "[W]here there is no showing that such action is being continued or repeated, or that defendant is threatening or intending to repeat the injury, the injunction should be denied." (*Thome v. Honcut Dredging Co.*, 43 Cal. App. 2d 737 (Cal. App. 1941).)

It is undisputed that gambling activities at Casino Royale *ended* on or about November 3, 2014. (UMFs 12, 14.) Plaintiffs' only evidence that Defendants will continue to operate illegal gambling at the Red Lion hotel includes Ms. Stella Ma's testimony that she is "very interested" in purchasing the card room because of its location in a hotel. (UMF 6.) Ms. Ma also testified that *if* she purchased the casino she planned to operate under the same name, utilize the same employees, and provide the same games. (UMFs 7-9.)

Defendants, however, have submitted evidence creating a triable issue of fact as to whether the nuisance will probably recur. First, Defendants submitted Ms. Ma's deposition testimony that she may no longer be interested in purchasing the casino because it has been moved out of the Red Lion hotel. (Stella Ma Depo. 54:12-21, 54:23-55:9, 57:4-58:1.) Indeed, Ms. Ma testified "The truth is, if it was still inside the hotel, I would very much want to buy it. Now it's out of the hotel. I can't really decide." Ms. Ma also indicated that at a meeting with Defendants they talked about her "not wanting to buy the casino anymore." (Stella Ma Depo. 57:4-58:1.) Defendants also provided a declaration from Ms. Ma stating that she is "no longer interested in purchasing or operating Casino Royale, and never will be." (Ma Decl. ¶ 4.) This directly disputes Plaintiffs' evidence.

In addition, Defendants have submitted evidence that shortly after November 3, 2014, Casino Royale laid-off virtually all of its employees, removed all of its gaming tables, furniture, and electronic equipment. (Casino Royale's Addtl. UMFs 15-16; Kouretas Decl. ¶ 9.) Defendants also provided evidence that ownership of the Red Lion hotel has changed and the former Casino Royale gaming area has been furnished as a lobby space with a cocktail area. (Casino Royale's Addtl. UMF 11; Joyce Kouretas Decl. ¶¶ 3-6.) Plaintiffs have disputed this evidence and claim it does not sufficiently demonstrate that Defendants have no intention of reopening Casino Royale.

Defendants have submitted substantial evidence demonstrating triable issues of material fact with respect to whether Plaintiffs are entitled to the permanent injunction they seek. Specifically, there is disputed evidence as to whether Casino Royale will or will not continue to operate at the Red Lion hotel. Accordingly, there are triable issues of material fact as to whether the nuisance is continuing or will probably recur entitling Plaintiffs to the permanent injunction they seek.

Given the denial of this motion, no civil penalties are awarded at this time.

The Court declines to consider California Gaming Association's *Amicus Curiae* in support of Defendant's opposition to Plaintiff's motion for summary judgment and all documents related thereto.

Defendants' counsel shall prepare for this Court's signature an order pursuant to CCP § 437c(g) and CRC Rule 3.1312.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 6/25/2015, the Court now rules as follows:

SUBMITTED MATTER RULING

The Tentative Ruling is vacated, and the Court now rules as follows:

Plaintiffs Nicole Whitehouse, Johnnie Matranga, John Fierro, and Cherlyn Ortiz' (collectively, "Plaintiffs") motion for summary judgment is DENIED.

Plaintiffs' and Defendants' requests for judicial notice regarding legislative history are DENIED.

The Court received defendant Sacramento Casino Royale, LLC's ("Casino Royale") letter explaining its late filings of its amended opposition and the amended declaration of Stella Ma. While the Court appreciates having complete and accurate information, the few changes to the opposition and Ms. Ma's declaration do not affect the Court's resolution of this motion.

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player-dealer during a card game. Both Casino Royale and Pacific Gaming submitted separate oppositions, but Pacific Gaming joined in Casino Royale's opposition. Therefore, Casino Royale and Pacific Gaming shall be collectively referred to as "Defendants."

Plaintiffs allege a single cause of action against Defendants for violating the Red Light Abatement Act (the "RLAA"). (California Penal Code §§ 11225 *et seq.*) The RLAA, at Penal Code § 11225(a), provides: "(a) (1) Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, ... and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, ... are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance."

Plaintiffs move for summary judgment against Defendants on the basis that Defendants violated the RLAA by operating "banked games" and seek to permanently enjoin Defendants from reopening the public nuisance on the Red Lion hotel property. Plaintiffs also seek a civil penalty of up to \$25,000 against each Defendant.

A plaintiff moving for summary judgment must present prima facie evidence of each element of a cause of action entitling it to summary judgment. If plaintiff succeeds, the burden shifts to defendant, who must set forth specific facts showing a triable issue of material fact exists as to that cause of action. (C.C.P. section 437c(p)(l).)

To establish a violation of the RLAA, Plaintiffs must establish the existence of a nuisance - in this case, illegal gambling. Even assuming Plaintiffs met this burden, they must then present evidence supporting the permanent injunction they seek. Again, even assuming Plaintiffs met this burden, Defendants have presented sufficient evidence that a triable issue of material fact exists as to whether an injunction should issue. Further, Plaintiffs have presented insufficient evidence as to the civil penalties they seek, which are assessed based on the severity and duration of the nuisance.

Upon the finding of a nuisance, the RLAA provides: (1) the Court shall enter an injunction to abate and prevent the continuance or recurrence of the nuisance (see Cal. Penal Code §§ 11227(a)); and (2) the Court may assess a civil penalty of up to \$25,000 against each Defendant. (Cal. Penal Code § 11230(b).) Plaintiffs request that this Court do both.

"Whenever the existence of a nuisance is shown in an action ... the court or judge shall allow a temporary restraining order or injunction to abate and prevent the continuance or *recurrence* of the nuisance." (Cal. Pen. Code § 11227.) "[A] injunction is ordered against past acts only if there is evidence that they will probably recur." (*Hannah v. Pogue*, 23 Cal. 2d 849, 858 (Cal. 1944).) "[W]here there is no showing that such action is being continued or repeated, or that defendant is threatening or intending to repeat the injury, the injunction should be denied." (*Thome v. Honcut Dredging Co.*, 43 Cal. App. 2d 737 (Cal. App. 1941).)

Further, because the "primary purpose of the [RLAA] is to 'reform' the property in question rather than to punish the property owner," the potential for any alleged "continuance or recurrence" must be linked to the underlying property location at issue. (*People v. ex rel. Van de Kamp v. Am. Art. Enterprises, Inc.* (1983) 33 Cal. 3d 328, 330.) An RLAA action "is not one for the abatement of [the prohibited acts] ... but one for the abatement of a public nuisance committed or maintained by the habitual practicing *in a building or in or on any premises* of [such] acts." (*Id.* at 334 (*emphasis added*)).

It is undisputed that gambling activities at Casino Royale *ended* on or about November 3, 2014, pursuant to a DOJ Emergency Order, issued for reasons unrelated to this current lawsuit. (Casino Royale Addt. UMFs 12, 14.) Plaintiffs' only evidence that Defendants will continue to operate illegal

gambling at the Red Lion hotel includes Ms. Stella Ma's testimony that she is "very interested" in purchasing the card room because of its location in a hotel. (UMF 6.) Ms. Ma also testified that *if* she purchased the casino she planned to operate under the same name, utilize the same employees, and provide the same games. (UMFs 7-9.)

Defendants, however, have submitted evidence creating a triable issue of fact as to whether the nuisance will probably recur. First, Defendants submitted Ms. Ma's deposition testimony that she may no longer be interested in purchasing the casino because it has been moved out of the Red Lion hotel. (Stella Ma Depo. 54:12-21, 54:23-55:9, 57:4-58:1.) Indeed, Ms. Ma testified "The truth is, if it was still inside the hotel, I would very much want to buy it. Now it's out of the hotel. I can't really decide." Ms. Ma also indicated that at a meeting with Defendants they talked about her "not wanting to buy the casino anymore." (Stella Ma Depo. 57:4-58:1.) Defendants also provided a declaration from Ms. Ma stating that she is "no longer interested in purchasing or operating Casino Royale, and never will be." (Ma Decl. ¶ 4.) This directly disputes Plaintiffs' evidence.

In addition, Defendants have submitted evidence that shortly after November 3, 2014, Casino Royale laid-off virtually all of its employees, removed all of its gaming tables, furniture, and electronic equipment. (Casino Royale's Addtl. UMFs 15-16; Kouretas Decl. ¶ 9.) Defendants also provided evidence that ownership of the Red Lion hotel has changed and the former Casino Royale gaming area has been furnished as a lobby space with a cocktail area. (Casino Royale's Addtl. UMF 11; Joyce Kouretas Decl. ¶¶ 3-6.) Plaintiffs have disputed this evidence and claim it does not sufficiently demonstrate that Defendants have no intention of reopening Casino Royale.

Defendants have submitted substantial evidence demonstrating triable issues of material fact with respect to whether Plaintiffs are entitled to the permanent injunction they seek. Specifically, there is disputed evidence as to whether a nuisance will recur at the Red Lion hotel. Accordingly, there are triable issues of material fact as to whether Plaintiffs are entitled to the permanent injunction they seek addressed to the property at the Red Lion hotel.

Given the denial of this motion, and that Plaintiffs have not met their burden to establish that civil penalties are warranted, no civil penalties are awarded at this time.

The Court declines to consider California Gaming Association's *Amicus Curiae* in support of Defendant's opposition to Plaintiff's motion for summary judgment and all documents related thereto.

Defendants' counsel shall prepare for this Court's signature an order pursuant to CCP § 437c(g) and CRC Rule 3.1312.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: July 8, 2015

E. Brown, Deputy Clerk _____ s/ E. Brown _____

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