

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

KIM E. AYVAZIAN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947
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NEW CASTLE COUNTY COURTHOUSE
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John F. Brady, Esquire
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Re: *Walsh v. William T. Spooner Post 17, Inc. and American Legion Home, Inc.*, C.A. No. 7263-MA

Dear Counsel:

I have reviewed the briefs in support of and against Plaintiff's Exceptions to my Draft Report. I am not persuaded by Plaintiff's argument that I should have considered House Bill No. 1 (12 *Del. C.* § 4819A) under Chancery Court Rules 11(b)(2) and 12(b)(6) and denied Defendants' motion to dismiss. The fact that on January 30, 2013, the law allowed the use of video lottery machines by charitable gaming organizations -- including veterans' organizations such as Defendants' -- upon approval by the Director of the State Lottery, is irrelevant to Plaintiff's request for specific enforcement of an illegal gambling obligation in the amount of \$24,480.00 that arose on November 10, 2009. Similarly, I am not persuaded by Plaintiff's argument that I should have applied the doctrine of unclean hands to enforce Defendants' gambling

obligation because it is no longer illegal or against the public interest to allow gambling in Defendants' establishment. The activity in which the parties engaged was against the public interest at the time in question.

In his reply brief, Plaintiff raises for the first time the argument that the parties did not knowingly enter into an illegal contract because they did not receive actual notice of the legal status of the machines until October 2012. “The failure to raise a legal issue in an opening brief generally constitutes a waiver of the ability to raise that issue in connection with a matter under submission to the court.” *Zutra v. Jansing*, 2013 WL 1092817, at *6 (Del. Ch. Mar. 18, 2013) (quoting *Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010)). Accordingly, because Plaintiff did not attempt to raise this defense until his reply brief in support of his exceptions,¹ I find that Plaintiff has waived this defense for the purposes of the pending motion to dismiss.

For the foregoing reasons, I am adopting my Draft Report as my Final Report, as modified herein. The parties are referred to Chancery Court Rule 144 for the process of taking exception to a Master's Final Report.

Sincerely,

/s/ Kim E. Ayvazian

Kim E. Ayvazian
Master in Chancery

¹ In his response to the motion to dismiss, Plaintiff simply argued that the alleged illegal nature of the slot machine was not relevant because no money was being sought. Answer to Motion at ¶ 8, Docket Item No. 9.