

SIGNED.

Dated: July 19, 2011



James M. Marlar

James M. Marlar, Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

<p>10 In re:</p> <p>11 BASHAS' INC.,</p> <p>12 BASHAS' LEASECO INC.,</p> <p>13 SPORTSMAN'S, LLC,</p> <p>14 _____ Debtors.</p> <p>15 This Filing Applies to</p> <p>16 <input checked="" type="checkbox"/> All Debtors</p> <p>17 <input type="checkbox"/> Specified Debtors</p> <p>18 DAVID A. DUNCAN,</p> <p>19 _____ Plaintiff,</p> <p>20 vs.</p> <p>21 BASHAS' INC.,</p> <p>22 _____ Defendant.</p>	<p>) Chapter 11</p> <p>) Nos. 2:09-bk-16050-JMM</p> <p>) 2:09-bk-16051-JMM</p> <p>) 2:09-bk-16052-JMM</p> <p>) (Jointly Administered)</p> <p>) Adversary No. 2:11-ap-00223-JMM</p> <p>) MEMORANDUM DECISION</p>
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On July 13, 2011, this court conducted a trial on the disputed claim (No. 1756) filed by David A. Duncan. The court took evidence submitted by both parties. Mr. Duncan testified on his own behalf. At the conclusion of the hearing, the court took the matter under advisement, so that it could consider the applicable law and review the exhibits in more depth.

Having done so, the court now rules.

1 **PROCEDURE**

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3 Previously, the court entered a partial ruling on the Duncan claim, entered January 28,
4 2011 (ECF No. 9). That decision determined that the Duncan claim, which asserted legal theories
5 under the Lanham Act, the Arizona Consumer Fraud Act, and the Arizona Criminal Code were not
6 viable, either due to the passage of applicable statutes of limitations, or for lack of criminal
7 jurisdiction.

8 However, the court determined that a claim for breach of contract was not time-barred,
9 and could be dealt with on the merits. The matter was thus narrowed for trial on that basis alone,
10 resulting in the presentation of evidence on July 13, 2011.

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12 **JURISDICTION**

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14 This is a core matter over which the court has jurisdiction. 28 U.S.C. § 157(b)(2)(B).

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16 **THE FACTS**

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18 The facts are essentially undisputed:

19 1. In 2003, Bashas' held a store-wide promotion, "Million Dollar Summer Collect
20 to Win Game." Rules governing the playing of the game were published. The game included a
21 game board and markers, the latter to be collected by a participating player upon the purchase of
22 participating products. The rules stated a requirement that, to collect the grand prize of one million
23 dollars, the participant's game board and all six required markers had to be submitted. This
24 requirement was clearly stated on the game board.

25 2. On or about September 30, 2003, Duncan submitted a game board to Bashas',
26 which only contained 5 of the required 6 markers. The Duncan game board lacked game marker
27 number 6. (Ex. F.)

1 3. On January 9, 2004, Creative Promotional Solutions, Inc., promotional agent
2 of Bashas', notified Duncan in writing that he had failed to have the sixth marker, which was
3 required in order to claim the million dollar prize. (Exs E, F and H.)

4 4. On October 9, 2009, a Proof of Claim was prepared and signed by Duncan and
5 was received by Epiq Bankruptcy Solutions, the Debtors' Noticing and Claims Agent. The claim
6 was for \$1,285,124.00 (Ex. A). This represented the principal of one million dollars, plus interest.

7 5. On November 30, 2010, Bashas' filed an objection to Duncan's Proof of Claim
8 based on the fact that Duncan was notified on September 30, 2003, in person by a Bashas' employee,
9 Dallas Bennewitz, Vice-President of Marketing, that his submission of the game board only
10 contained five of the required six markers and therefore, he was not a winner since the game board
11 was missing one of the required six markers.

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13 **LEGAL AND FACTUAL ISSUES TO BE DETERMINED BY THE COURT**

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15 1. Does David Duncan hold an allowed proof of claim pursuant to 11
16 U.S.C. §502?
17 2. Did Bashas' and Duncan have a written contract?
18 3. Did David Duncan comply with the rules and requirements of the
19 “Million Dollar Summer Collect to Win Game?”
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21 **DISCUSSION**

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23 **A. The Law**

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25 A gaming event, such as the one at issue here, is most analogous to a written contract.
26 Rules of the contest govern the issues of legal entitlement. See, e.g., Gray v. Montgomery, 23 Ariz.
27 461, 204 P. 1029 (1922); Kerr v. Time Inc. 188 F.3d 513 (9th Cir. 1999); Henry v. Chandler
28 Education Foundation, Inc. 2008 WL 5384289 (Ariz. App. 2008) (unpublished decision).

1 In Arizona, suit on a written contract carries a six-year statute of limitations.
2 ARS § 12-548. Here, the cause of action accrued on September 30, 2003 (Proof of Claim).

3 Before the six-year limitations period expired, Bashas' filed Chapter 11 on July 12,
4 2009. Upon that filing, the automatic stay of 11 U.S.C. § 362(a) prevented Mr. Duncan from
5 commencing suit on the claim. A kind of tolling period occurred thereafter. See 11 U.S.C. § 108(c).
6 Although Mr. Duncan could have sought stay relief to commence his action in state court, he instead
7 took advantage of the claim provisions of the Bankruptcy Code to file a timely proof of claim.
8 Thus, he has elected to have the merits of the controversy decided by this court.

9 The court finds and concludes that the applicable statute of limitations, for bringing
10 an action upon a written contract, had not expired when the bankruptcy case was filed. The
11 substantive issues of Mr. Duncan's proof of claim require a trial on the merits.

12 13 **B. Application of the Law to the Facts**

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15 Turning now to the merits of the claim, the evidence indicated that Mr. Duncan only
16 had five of the six markers required to claim the prize. Therefore, he is not legally entitled to claim
17 \$1,000,000 (plus interest) against the Debtors. He failed to produce the critical sixth marker.

18 Mr. Duncan's reasons as to why he feels he is entitled to the one million dollar prize,
19 under the established facts, are incomprehensible and unfocused, and therefore without merit. In
20 addition, the court has been unable to understand the relevance of many of Mr. Duncan's exhibits,
21 and thus, try as it might, the court cannot locate a consistent, logical thread to Mr. Duncan's
22 arguments and points. The court was given no helpful guidance as to how the large amount of
23 paperwork presented by him helps it overcome the Debtors' objection to Mr. Duncan's claim.
24 Although all of Mr. Duncan's exhibits were admitted into evidence, and the court has carefully
25 reviewed each one, the court cannot craft a prevailing argument in Mr. Duncan's favor.

26 Since Mr. Duncan has the legal burden of proof in this case, the court must find that
27 he has not carried his persuasive burden in a manner sufficient to legally prove his claim and
28 overcome the Debtors' objection to it.

1 CONCLUSION

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3 Although a type of contract exists between the parties, Mr. Duncan has not proven that
4 he satisfied all of the conditions thereof, which would have made him a one million dollar winner.

5 Based upon the evidence presented, the court concludes that claim of Mr. Duncan is
6 not supported by the facts and the applicable law. Therefore, the contract claim is not viable against
7 the Debtors and the Debtors' objection thereto shall be SUSTAINED. To that end , Claim No. 1756
8 shall be DISALLOWED. A separate judgment shall be entered.

9 Any appeal of the decision must be filed within 14 days after it is entered on the
10 docket. FED. R. BANKR. P. 8002.

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12 DATED AND SIGNED ABOVE.

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14 To be NOTICED by the Bankruptcy Notification
Center ("BNC") to:

15 Jannis Gallego and Michael McGrath, Attorneys for Plaintiffs

16 David A. Duncan, Claimant

17 Edward K. Bernatavicius, Office of U.S. Trustee
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