NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0398

AMELIA SUPERETTE, INC., d/b/a PETE'S

VS.

JMM

RELIABLE AMUSEMENT COMPANY, INC.

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JUDGMENT RENDERED: DECEMBER 28, 2006

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ON APPEAL FROM THE
SIXTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 112,031, DIVISION E
PARISH OF ST. MARY, STATE OF LOUISIANA

HONORABLE KEITH COMEAUX, JUDGE

****

KIM P. STANSBURY
MORGAN CITY, LA

COUNSEL FOR PLAINTIFF/APPELLEE
AMELIA SUPERETTE, INC. d/b/a PETE'S

GUY E. WALL
NEW ORLEANS, LA

COUNSEL FOR DEFENDANT/APPELLANT
RELIABLE AMUSEMENT COMPANY, INC.

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

Carter, J concurs in the results
Whipple, J. concurs.

MCDONALD, J.

In March 1998, Reliable Amusement Company, Inc. (Reliable), a licensed video poker operator from West Baton Rouge Parish, entered into an agreement with Thadeus Marcell, Jr. (Marcell) for the placement and operation of video draw poker devices. The devices were to be located in Pete's Lounge, which was owned by Amelia Superette, Inc., and operated by Marcell. The net revenue generated by the operation of the video poker devices was to be split 50% to Reliable and 50% to Pete's. An amendment to the agreement provided that Reliable would loan Pete's $10,000.00 evidenced by a promissory note, and that the promissory note would be marked paid on the date video poker devices located in Pete's were enrolled by the Louisiana State Police. The term of the agreement was for sixty months from the commencement of lawful operation of the video poker devices, which was September 23, 1998. Reliable had an option to renew the agreement for an additional sixty-month period by paying an additional sum of $10,000.00.

In the summer of 2000, Marcell asked Reliable to change the agreement and to give Pete's 60% rather than 50% of the net revenue. This proposition was originally resisted by Reliable, but in July 2000, Reliable agreed and immediately began giving Pete's 60% of the revenue. The initial term of the lease expired September 2003. In November 2003, Marcell, having consulted an attorney, directed that a letter be sent to Reliable advising that the sixty months period expired on September 22, 2003; that Reliable did not pay the $10,000.00 to renew the option prior to September 22, 2003, and therefore it had terminated; that Marcell did not intend to renew the terminated agreement, but wanted to purchase his own machines and was willing to buy Reliable's video poker machines at fair market value.

The letter also advised that Pete's would allow Reliable to continue operation of the video poker devices on a month to month basis with revenues divided 60% to Pete's and 40% to Reliable until Pete's purchased its own machines and obtained the necessary licenses, at which time Reliable would be required to remove its video poker devices from Pete's.

In February 2004, Pete's filed a petition for declaratory judgment seeking a judicial declaration that the agreement had terminated September 22, 2003; that defendant be ordered to remove any and all video poker and/or coin operated devices; and that defendant pay reasonable attorney fees. Reliable answered alleging that the agreement was extended for an additional sixty-month term commencing September 22, 2003, in return for an increased share of the revenues, and also filed a reconventional demand seeking refund of the consideration paid for the renewal of the agreement (in the event the court determined that the agreement had terminated), for all sums paid to Pete's in excess of the percentage specified in the agreement, and for reasonable attorney fees.

A bench trial was held in June 2005, at the conclusion of which judgment was rendered in favor of the plaintiffs, Marcell and Pete's, ordering the subject agreement cancelled as of September 23, 2003; dismissing the reconventional demand; decreeing that the 60%/40% revenue sharing agreement was valid and in effect from July 2000 to June 17, 2005; ordering all costs of the proceedings to be paid by the defendant, Reliable; and reserving the right to seek attorney fees. Reliable appeals this judgment alleging two assignments of error.

Reliable asserts that the trial court's judgment should be reversed because its findings were influenced by legal error and are unreasonable. Reliable posits two bases for legal error. First, it cites a statement by the trial court that "if Reliable wanted to modify the terms of the agreement, certainly writings would have been proper in order to modify the ten thousand dollar payment at the end of the agreement." Reliable argues that there is no legal requirement for the modification of the contract at issue here to have been in writing, and the trial court's finding was influenced by its erroneous interpretation of the law. We agree that it was not necessary for the contract modification to have been in writing to be valid. However, our review of the record does not support a finding that the trial court erroneously believed it was essential that the modification be written, or that this purported erroneous belief formed the basis for the trial court's decision.

Secondly, Reliable argues that the trial court committed legal error in failing to allow the admission of evidence supporting its position that Marcell had a financial motive to deny his prior agreement to extend the term without payment of the $10,000.00 when Reliable agreed to increase Pete's share of the revenue by 10%. The trial court refused to consider evidence relating to the financial problems of Pete's II, another establishment operated by Marcell. The importance of the evidence would be as corroborating circumstances to support Reliable's position that the requirement that it pay Marcell $10,000.00 to renew the contract in September 2003 was eliminated in July 2000, when it agreed to increase Pete's share of the revenues. Our review of the trial transcript reveals testimony that would support Reliable's position, as well as sufficient evidence of corroborating circumstances that arguably supported its position, and counsel did make the argument. The trial court, however, was not persuaded.

Ultimately, the findings of the trial court were based on its decision as to whose testimony it believed. Marcell and his mother and uncle testified that Marcell expected Reliable to pay the $10,000.00 in September 2003 if it intended to renew the contract. The owners of Reliable and one of its employees testified that Marcell agreed to forego the $10,000.00 payment in return for a larger share of the profits. Obviously, all of the testimony could be considered biased. The issue was very clear and not susceptible of any ambiguity or misunderstanding; either Marcell agreed to relieve Reliable of the necessity of making the $10,000.00 payment in September 2003 in return for the increased revenues in July 2000 or he didn't. The trial court chose to believe Marcell's version of events, which was that Reliable agreed to increase the revenues in July 2000, without extracting any further agreement from him. Our review of the trial court's decision, therefore, must be under the manifestly erroneous/clearly wrong standard.

The court of appeal should not set aside the factual findings of a trial court absent manifest error or unless it is clearly wrong. *Arceneaux v.Domingue*, 365 So.2d 1330 (La. 1978). Although appellate courts should accord deference to the factfinder, they nonetheless have a constitutional duty to review facts. *Ambrose v. New Orleans Police Dep't Ambulance Service,* 93-3099 (La. 7/5/94), 639 So.2d 216, 221. The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was reasonable. *Bonnette v. Conoco, Inc.,* 2001-2767 (La. 1/28/03), 837 So.2d 1219, 1227. If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* Our review of the record in this case reveals a reasonable basis for the trial court's decision. We are, therefore, prohibited from reversing the judgment appealed insofar as it is based on factual findings.

Reliable also argues that the trial court's finding that Reliable did not obtain any advantage for itself in agreeing to modify the contract makes it a unilateral gratuitous contract, which must be in authentic form. Again, we find Reliable's statement of law to be correct, but not applicable to or dispositive of the issue here. We do not find Reliable's decision to increase Pete's share of the revenue to be one without cause sufficient to support an obligation. Clearly, Reliable agreed to a 60%/40% share of the revenues with other establishments. Also, Marcell and Craig Tullos were friends in July 2000 and Marcell was well established in a community where Reliable was attempting to establish other business relationships. Therefore, we find that the modification of the agreement was a legally binding bilateral contract, and do not find that Louisiana law requires that it be in authentic form to be valid. After reviewing the entire record, we do not find any legal error that requires the decision of the trial court to be reversed.

The judgment of the trial court appealed is affirmed and this opinion is issued in accordance with Uniform Rules - Courts of Appeal, Rule 2-16.2 A (6) and (8). Costs are assessed to appellant, Reliable Amusement Company, Inc.

AFFIRMED.