

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

-----	X	
In re:)	
)	
GREEKTOWN HOLDINGS, LLC, <i>et al.</i> ,)	Case No. 08-53104
)	Chapter 11
Debtors.)	Jointly Administered
)	
		Honorable Walter Shapero
-----	X	
BUCHWALD CAPITAL ADVISORS LLC, solely in)	
its capacity as Litigation Trustee to the)	
GREEKTOWN LITIGATION TRUST,)	Adv. Pro. No. 10-05712
)	
Plaintiff,)	Honorable Walter Shapero
)	
v.)	
)	
DIMITRIOS ("JIM") PAPAS, VIOLA PAPAS, TED)	
GATZAROS, MARIA GATZAROS, BARDEN)	
DEVELOPMENT, INC., LAC VIEUX DESERT)	
BAND OF LAKE SUPERIOR INDIANS, SAULT)	
STE. MARIE TRIBE OF CHIPPEWA INDIANS,)	
KEWADIN CASINOS GAMING AUTHORITY, and)	
BARDEN NEVADA GAMING, LLC,)	
)	
Defendants.)	
)	
)	
-----	X	

BRIEF IN SUPPORT OF MOTION TO DISMISS OF
DEFENDANTS SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND
KEWADIN CASINOS GAMING AUTHORITY
ON GROUNDS OF SOVEREIGN IMMUNITY (NO WAIVER)

I. INTRODUCTION

The Litigation Trust, as the plaintiff, bears the burden of establishing subject matter jurisdiction of the court over its claim. Whittle v. United States, 7 F.3d 1259, 1262 (6th Cir.

1993). If the Tribe Defendants enjoy sovereign immunity, this case must be dismissed for lack of jurisdiction. Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F.3d 917, 920 (6th Cir. 2009). The sole remaining issue before the Court concerning the Tribe Defendants' immunity from suit, under the doctrine of tribal sovereign immunity, is whether the Tribe Defendants waived their immunity in favor of the Litigation Trust. They did not.

Indian tribes can waive their immunity from suit and, indeed, the Tribe Defendants have done so on a number of occasions. However, when the Tribe Defendants have waived their immunity from suit, they have done so in strict compliance with the Tribe's Constitution and its Tribal Code. The Tribal Code provides that a waiver of sovereign immunity by the Tribe can only be accomplished by a resolution of the Board of Directors of the Tribe, which resolution cannot be general, but must be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, and the court having jurisdiction and applicable law.

The Tribe Defendants did not adopt a resolution waiving their sovereign immunity for the claims asserted by the Litigation Trust. Accordingly, under controlling Sixth Circuit law, the Tribe Defendants have not waived, nor could they waive, their immunity from suit in this case. To the extent that the Litigation Trust claims that the Tribe Defendants waived their immunity from suit by participating in the bankruptcy proceedings or by other conduct of Tribe members (including officers of the Tribe), such conduct—even if proven to be true—would not result in a waiver of the Tribe Defendants' sovereign immunity under controlling Supreme Court and Sixth Circuit precedent.

II. WAIVER OF TRIBAL SOVEREIGN IMMUNITY MUST BE CLEAR AND CANNOT BE IMPLIED

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or by congressional abrogation. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991). The District Court has concluded that Congress has not abrogated the Tribe Defendants' sovereign immunity in this case. Thus, the sole issue remaining before the Court is whether the Tribe Defendants waived their sovereign immunity. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978), quoting United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); see, also, C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594, 149 L.Ed. 623 (2001) (a tribe's waiver of sovereign immunity must be "clear."). The Tribe Defendants did not waive their immunity from suit, expressly, unequivocally, or even implicitly.

A. The Tribe Defendants Can Only Waive Their Sovereign Immunity Pursuant to a Resolution Adopted by the Board of the Tribe or the Management Board of the Authority

The Sixth Circuit has held that an Indian tribe "may choose to expressly waive its tribal-sovereign immunity either in its charter or by agreement." Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F.3d 917, 921 (6th Cir. 2009). Thus, the Litigation Trust is required to show that the Tribe Defendants waived their sovereign immunity pursuant to and in accordance with their governing documents or by agreement. There is no dispute in this case that the Tribe Defendants did not do so.

The governing documents of the Tribe include its Constitution and Bylaws and its Tribal Code. The Authority is a governmental instrumentality of the Tribe, established pursuant to the Gaming Authority Charter ("Charter"). The Authority's Charter is set forth in Chapter 94 of the Tribal Code.

The governing body of the Tribe is its Board of Directors. (Constitution, Article IV, Section 1; attached as Exhibit A to the Affidavit of Candace Blocher). Pursuant to Chapter 44 of the Tribal Code (Waiver of Tribal Immunities and Jurisdiction in Commercial Transactions), the Tribe Board is granted the power to waive the Tribe's sovereign immunity. (Chapter 44 of the Tribal Code, attached as Exhibit B to the Blocher Affidavit). Section 44.104 of the Tribal Code provides in pertinent part that the sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or tribal court, is expressly reaffirmed unless such immunity is waived in accordance with Section 44.105 or 44.108 of the Tribal Code. Similarly, under Chapter 94 of the Tribal Code, which sets forth the Authority's Charter, the Management Board of the Authority may, by duly adopted resolution, waive the Authority's sovereign immunity (but not the Tribe's sovereign immunity). (Section 94.111 of the Tribal Code, attached as Exhibit B to the Blocher Affidavit).

Section 44.015 of the Tribal Code provides in pertinent part that the sovereign immunity of the Tribe may be waived (a) by resolution of the Board of Directors of the Tribe expressly waiving the sovereign immunity of the Tribe and consenting to suit provided that such waiver is not general and is specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction, and applicable law; or (b) by a Tribal entity exercising authority expressly delegated to

such entity in its charter or specifically by resolution of the Board of Directors of the Tribe, provided that such waiver shall be made in strict conformity with the provisions of the charter or resolution governing such delegation.

Section 44.108 provides in pertinent part that the Tribe and the Authority waive their sovereign immunity for any claim “sounding in contract” where the claim arises from an express, written contract signed by all parties to the contract involving the performance of a proprietary function of the Tribe, and the claim is brought by a party to the contract or a party expressly made a third-party beneficiary under the terms of the contract. Section 44.108 further provides in pertinent part that the Tribe is not subject to suit under that Chapter of the Tribal Code for (a) any claim sounding in tort (as that term is defined in Tribal Code 85.103(3)) and (b) any claim founded upon a provision of a statute of the United States or any State.

There is no assertion by the Litigation Trust in this case that the Tribe Defendants entered into an agreement or contract by which the Tribe Defendants agreed to waive their sovereign immunity as to the claims asserted against them by the Litigation Trust. Thus, Section 44.108 of the Tribal Code does not apply, as the claims brought by the Litigation Trust against the Tribe Defendants are not contract claims brought by a party to a contract with the Tribe or the Gaming Authority. Even if such an agreement existed, a waiver pursuant to Section 44.108 would not apply because the claims asserted by the Litigation Trustee are based on a statute of the United States and a statute of a State and thus are not subject to a waiver of immunity under Section 44.108 of the Tribal Code. (Complaint, Doc 2442, filed 5/28/10, ¶ 1, Page 2 of 37) (“This proceeding is brought pursuant to sections

544 and 550 of title 11 of the United States Code (the “Bankruptcy Code”) and Michigan’s Uniform Fraudulent Transfer Act.”).

Thus, the only way the Tribe Defendants could possibly be subject to suit would be if they expressly waived their sovereign immunity pursuant to a duly adopted resolution by the Tribe Board or, in the case of the Authority, by a duly adopted resolution by the Management Board of the Authority. No such resolution was adopted by either the Tribe Board or the Management Board of the Authority. (Affidavit of Joanne Carr, Doc. 75-2, 9/13/10, at ¶¶ 3-6; Supplemental Affidavit of Joanne Carr, at ¶¶ 4-7). As a result, the Tribe Defendants have not waived their immunity from suit in this case.

B. Decisions of the Supreme Court and the Circuit Courts Uniformly Support the Tribe Defendants’ Claim of Sovereign Immunity

Decisions from the Supreme Court, the Sixth Circuit, and other circuit courts, on the issue of tribal waivers of sovereign immunity, all lead to the inescapable conclusion that the Tribe Defendants have not waived their immunity from suit.

C & L Enterprises involved a construction contract entered into between an Indian tribe and a construction company. The tribe proposed the contract to the construction company and the proposed contract contained a provision that required that all disputes arising under the contract be resolved in arbitration governed by the rules of the American Arbitration Association, with a choice of law provision providing that the contract would be governed by the law of the place where the project was located. When a dispute arose, the construction company proceeded to arbitration and the tribe claimed sovereign immunity. The Supreme Court concluded that the tribe had clearly, by express terms, waived its sovereign immunity by tendering a contract by which it agreed to certain dispute resolution procedures. C & L Enterprises, 121 S.Ct. at 1595. Significantly, the C & L

Enterprises court did not discuss or consider any of the tribe's governing laws or documents (such as a tribal code or constitution) in reaching its decision. The court noted why in a footnote: "The Tribe alternatively urges affirmance on the grounds that the contract is void under 25 U.S.C. § 81 and that the members of the Tribe who executed the contract lacked the authority to do so on the Tribe's behalf. These issues were not aired in the Oklahoma courts and are not within the scope of the questions on which we granted review. We therefore decline to address them." C & L Enterprises, 121 S.Ct at 1597, fn. 6.

Memphis Biofuels involved a contract between Memphis Biofuels and the Chickasaw tribe which contained a "waiver provision" by which both parties waived all immunities. Memphis Biofuels, 585 F.3d at 922. Unlike C & L Enterprises, Memphis Biofuels did involve the issue of whether a tribe official is authorized to waive a tribe's sovereign immunity. In Memphis Biofuels, the Chickasaw tribe's charter required board approval by written resolution of any waiver of tribal immunities. No such resolution was adopted by the tribe. Despite the waiver provision in the contract between the parties, the Sixth Circuit concluded that there was no waiver of tribal immunity because "board approval was not obtained and [the tribe's] charter controls." Id. The same reasoning applies in this case, even with more force, because not only is there no Board resolutions waiving tribal immunity, there is no contract by which the Tribe Defendants purportedly waived their sovereign immunity.

The plaintiff in Memphis Biofuels also argued that the Chickasaw tribe waived its sovereign immunity based on equitable doctrines. The Sixth Circuit rejected the equitable waiver argument, concluding that "[the tribe's] charter controls, and, without board approval, the waiver in the agreement is insufficient." Id. In reaching this decision, the

court noted: “Courts have held that unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity.” Id. The cases relied upon by the Sixth Circuit in Memphis Biofuels are informative on the issue of whether a tribe can, by the conduct of its tribal officials, waive tribal immunity.

Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001) involved a claim by Sanderlin, a former employee of the tribe, that the tribe discriminated against him in violation of the federal Rehabilitation Act. Sanderlin argued that the tribe implicitly waived its sovereign immunity when its officers accepted federal funds on the tribe’s behalf and agreed as a condition of their receipt to comply with the Rehabilitation Act. The Eleventh Circuit rejected this argument, noting that “waivers of tribal sovereign immunity cannot be implied on the basis of a tribe’s actions, but must be unequivocally expressed.” Sanderlin, 243 F.3d at 1286 (quoting State of Florida v. Seminole Tribe, 181 F.3d 1237, 1243 (11th Cir. 1999)). In particular, the court concluded that a Seminole Tribe ordinance prescribed when and how the tribe could waive sovereign immunity (i.e., pursuant to a resolution duly enacted by the Tribal Council) and, since Sanderlin was unable to point to any duly-enacted tribal resolution purporting to effect a waiver “in these circumstances,” there was no waiver of the tribe’s sovereign immunity. Sanderlin, 243 F.3d at 1287.

Native American Distributing v. Seneca-Cayuga Tobacco Company, 546 F.3d 1288 (10th Cir. 2008) involved a contract between Native American Distributing (“NAD”) and the Seneca-Cayuga Tobacco Company (“SCTC”), an enterprise of the Seneca-Cayuga Tobacco Company (“the tribe”). When NAD and SCTC entered into the contract, an officer of NAD (who was also a member of the tribe) asked tribe officials if it was necessary to secure a tribal waiver of sovereign immunity and was told by those officials such a waiver was not

necessary because SCTC was subject to a “sue and be sued” clause in a corporate charter. In fact, SCTC was not subject to the “sue and be sued” clause. NAD argued that SCTC should be equitably estopped from claiming sovereign immunity because its managers told NAD that SCTC was subject to the sue and be sued clause in the corporate charter. The district court and the Tenth Circuit rejected this argument, concluding that tribal officers possess no power through their actions to waive tribal immunity. Native American Distributing, 546 F.3d at 1295.

World Touch Gaming, Inc. v. Massena Management, LLC, 117 F.Supp.2d 271 (N.D.N.Y. 2009) involved a contract between World Touch and a casino owned and operated by an Indian tribe. The tribe entered into a management contract with Massena Management (“Massena”) to manage the casino. Massena, on behalf of the casino, entered into two contracts with World Touch relating to the purchase and lease of gaming equipment. The two contracts contained language purporting to waive the sovereign immunity of the tribe and the casino. When a dispute arose under the contracts, World Touch filed suit against Massena, the tribe, and the casino.

The tribe’s civil judicial code provided that tribal sovereign immunity could only be waived by the tribe’s council, in a clear and explicit writing. Despite the fact that the contracts, signed by an officer of Massena (the casino’s management company) contained clear language waiving the tribe’s and the casino’s sovereign immunity, the court concluded that the tribe’s immunity was not waived, because the tribe’s council did not authorize Massena to waive sovereign immunity nor did the tribe council waive its sovereign immunity. World Touch, 117 F.Supp.2d at 275. The court held: “However, regardless of any apparent or implicit, or even express authority of the Management

Company [Massena] to bind the Casino and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe's sovereign immunity." World Touch, 117 F.2d at 276. The court further concluded that "any argument that subsequent acts, or acquiescence in carrying out the contract entered into with apparent authority, estop the Tribe from claiming sovereign immunity, must fail." Id.

Finally, Danka Funding Company, LLC v. Sky City Casino, 329 N.J. Super. 357, 747 A.2d 837 (1999) involved a casino owned and operated by an Indian tribe. The casino's comptroller entered into two leases with Danka for eight copying machines. A dispute arose under the leases and Danka claimed that the tribe had waived its sovereign immunity based on the lease agreements with the casino, which contained a forum selection clause by which the parties consented to personal jurisdiction in the state where the lease processing center was located. The court was thus presented with the question of whether the forum selection clause in the casino's lease agreements waived the tribe's sovereign immunity. The court concluded that it did not.

The court started with the proposition that the "requirement that the waiver be 'clear' and 'unequivocally expressed' is not something that may be flexibly applied or even disregarded based on the parties or the specific facts involved." Danka Funding, 747 A. 2d at 841. The court then noted that the "tribe, through its laws, describes how one may obtain a legally enforceable waiver" of its sovereign immunity, but Danka failed to take advantage of those provisions. Danka Funding, 747 A.2d at 842. The court concluded: "By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, [Danka] failed to satisfy the conditions necessary for an unequivocal waiver

identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S. Ct. 1670.” Danka Funding, 747 A.2d at 843.

C. **The Tribe Defendants’ Involvement In The Bankruptcy Proceedings Is Not A Waiver of their Sovereign Immunity In This Adversary Proceeding**

In this Adversary Proceeding, the Litigation Trust seeks to recover millions of dollars in alleged fraudulent transfers from the Tribe Defendants. The Litigation Trust claims that the Tribe Defendants waved their tribal immunity as a result of their actions and conduct in the underlying bankruptcy proceedings. The Complaint asserts that the Tribe and the Gaming Authority “waived any defense of sovereign immunity,” based on the allegation that the Tribe Defendants’ participated in the Debtors’ bankruptcy proceedings by filing several proofs of claims (against Greektown Casino, Kewadin Greektown Casino, and Greektown Holdings), by filing several notices of appearance and requests for service of process, and by “filing numerous plan objections (Docket Nos. 1654, 1655 and 1990), and joining in the objection and reservation of rights filed by the Papases with respect to the Committee’s and Deutsche Bank Trust Company Americas’ request for authorization to bring this action (Docket No. 2236).” (Complaint, Doc 2442, filed 5/28/10, at ¶¶ 7, 8, 30 and 31).

The Complaint does not assert that the Tribe Defendants unequivocally expressed their alleged waiver of sovereign immunity. Rather, any alleged waiver must be deemed to have occurred by implication. As discussed above, waiver of tribal immunity by implication is impermissible. The Litigation Trust’s contention that the Tribe Defendants waived their immunity from suit by participating in the underlying bankruptcy is without merit for the following additional reasons.

First, even where a sovereign official is authorized to waive the sovereign's immunity by filing a proof of claim in a bankruptcy proceeding, the filing of a proof of claim does not waive the sovereign's immunity from suit. The seminal case involving a proof of claim filed by a sovereign is Gardner v. State of New Jersey, 329 U.S. 565, 67 S.Ct.467 (1947). In Gardner, New Jersey filed a proof of claim for unpaid taxes in Gardner's reorganization. Gardner objected to the claim and filed a petition for adjudication of New Jersey's tax claims in accordance with his objection. New Jersey claimed that the court could not entertain the petition because it would be a prohibited suit against the state. The Supreme Court disagreed, holding that the "procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim." Id., at 472. The court further held: "When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim." Id. (emphasis added).¹

Courts applying the Gardner rule have consistently held that, where the sovereign is authorized to file a proof of claim, such filing does not waive the sovereign's immunity from suit. For example, in In re White, 139 F.3d 1268 (9th Cir. 1998), a tribal entity participated in the bankruptcy of a tribe member, by filing a proof of claim, objecting to the confirmation plan, and by filing an adversary proceeding contesting the dischargeability of its claim. The court held that in doing so, the tribe had "waived its immunity respecting the adjudication of its claim to recover [tribe member's] debts," but doing so did not extend the tribe's waiver "beyond adjudication of the claim itself..." White, 139 F.3d at 1271, 1272);² In re

¹ The Gardner court also concluded that the claim filed by the state was authorized by state statute. Id., at 472.

² The White court noted that the issue of whether the tribe entity was authorized to waive its sovereign immunity was not raised below and that there was "nothing in the record...that suggests what tribal approvals are necessary, or

Seay, 244 B.R. 112, 118 (Bkrtcy.E.D. Tenn. 2000) (the filing of a proof of claim by a state waives its sovereign immunity as to matters connected with the claims allowance process but not as to an adversary proceeding against the state).

Second, and more importantly, the conduct of the Tribe Defendants relied upon by the Litigation Trust and described in the Complaint actually demonstrates that the Tribe Defendants sought to and did preserve all defenses available to them in this case, including the defense of tribal immunity. As the Court is aware, the Notices of Appearance filed by the Tribe Defendants' specifically state that the Notice is not a consent to jurisdiction of the Court over the Tribe Defendants and the Notices specifically reserved the Tribe Defendants' right to assert any and all defenses available to them. (See, e.g., Doc 751, filed 1/5/09 and Doc 1404, filed 8/17/09). As the Court is further aware, on November 3, 2009, the Court granted a motion in limine, which ordered that nothing in the plan confirmation process would impair or prejudice the right of the Tribe Defendants to assert any defenses, whether affirmative defenses or otherwise, with respect to "any potential avoidance claim or other claim filed against any of them." (Order Granting Motion in Limine, Doc 1830, filed 11/3/09). Finally, as the Court is aware, the plan confirmation order specifically provides that neither the Tribe nor the Gaming Authority "shall be deemed or construed to have waived, released or relinquished their right to defend and attack any [bond avoidance] claim on all possible procedural and/or substantive grounds." (Order Confirming Second Amended Joint Plans, Doc 2046, filed 1/22/10).

that indicates whether any approval in fact is required." Id. at 1271. Unlike the tribe in White, the Tribe Defendants have demonstrated that formal approval by the Tribe Board is required for any waiver of tribal immunity and, therefore, even if the Gardner rule is applied to Indian tribes, the Tribe Defendants' governing documents (Tribal Code and Charter) control and there can be no waiver of tribal immunity based on the filing of a proof of claim.

Thus, even if conduct on the part of Tribe officials could serve to waive the Tribe's sovereign immunity, the conduct at issue in this case in no way demonstrates a clear and unequivocal intent on the part of the Tribe Defendants to waive their immunity from suit by the Litigation Trustee. And, as discussed above, the law is clear that conduct by tribe officials **cannot** serve to waive a tribe's sovereign immunity.

III. CONCLUSION

Memphis Biofuels and the cases cited therein make clear that if a tribe has established specific procedures for waiving sovereign immunity, either through the tribe's constitution or charter or tribal code, then those procedures **must** be followed in order to find a clear and unambiguous waiver of tribal immunity. The Tribe Defendants governing documents provide that tribal sovereign immunity may only be waived by the Tribe Defendants pursuant to a duly authorized and approved resolution, adopted by the Tribe Board and the Authority Board, respectively. No such resolution exists by which the Tribe Defendants waived their sovereign immunity as to the claims asserted by the Litigation Trust. Accordingly, the Tribe Defendants are immune from suit and this case should be dismissed as against them.

Dated: September 4, 2015

Respectfully submitted,

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