Sun Prairie (2002)

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Court of Appeal, Third District, California.

LOBO GAMING, INC., Plaintiff and Appellant,
v.
PIT RIVER TRIBE OF CALIFORNIA et al.,
Defendants and Respondents.

No. C037661.
(Super.Ct.No. 140106).

May 7, 2002.

Contractor brought action against Indian tribe for breach of lease agreement, pursuant to which tribe borrowed funds to construct two casinos and leased gaming machines and furnishings. The Superior Court, Shasta County, No. 140106, granted tribe's motion to quash service. Contractor appealed. The Court of Appeal, Raye, J., held that agreement's purported waiver of sovereign immunity was invalid.

Affirmed.

[1] Indians ⚿32(4.1)

209k32(4.1)

Court of Appeal, as a state court, had authority to interpret tribal constitution.

[2] Indians ⚿27(1)
209k27(1)

Provision of gaming equipment lease between contractor and Indian tribe that purported to waive tribe's sovereign immunity was invalid, and thus contractor's breach of contract action against tribe was barred; tribal council entered into the agreement that contained the purported waiver, but tribal constitution expressly reserved the power to waive sovereign immunity to the tribal membership.

[3] Indians ⚿27(1)
209k27(1)

Equitable estoppel was not available as a remedy to contractor whose action against Indian tribe for breach of gaming equipment lease was barred by sovereign immunity, as that doctrine involved a question of jurisdiction and not equity.

RAYE, J.

***1** Indian tribes enjoy sovereign immunity "from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." (*Kiowa Tribe v. Manufacturing Tech.* (1998) 523 U.S. 751, 760 [140 L.Ed.2d 981, 988] (*Kiowa*).) In this appeal challenging the contours and implications of sovereign immunity, plaintiff Lobo Gaming, Inc. contends the Pit River Tribe of California (Tribe) contractually waived its immunity. We disagree. The Constitution of the Pit River Tribe (Tribal Constitution) and state and federal precedent support the Tribe's notion that the Pit River Tribal Council (Tribal Council) did not have the authority to waive immunity without the consent of the tribal membership and such authority is not implicit in the Tribal Council's power to contract. We, therefore, affirm the order granting the Tribe's motion to quash the service of summons.

FACTS

Pursuant to an equipment lease agreement executed in March 1996, the Tribal Council borrowed funds from Lobo Gaming to construct two casinos on its reservation in Shasta County and to lease gaming machines and furnishings. The Tribe is governed by the Tribal Constitution. Article VII, section 1 confers on the Tribal Council the power to "negotiate, consult and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations." (Tribal Constitution, Art. VII, § 1.)

The Tribal Constitution expressly reserves to the Tribe the power to waive sovereign immunity. Article VII, section 3, entitled "Reserved Powers," states in pertinent part: "To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority

of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose."

Nevertheless, the equipment lease purports to waive the Tribe's sovereign immunity. It states that the Tribe will "[a]llow Lessor, for the sole purpose of enforcement of its rights in this agreement, to bring action in a court of competent jurisdiction if Lessor deems it necessary to secure its interest. Lessor's remedies will be limited to recovery of its equipment and repayment of the loan referred to above. Tribe agrees to abide by the decision of such court in this matter. Any judgment shall be satisfied only from casino profits and not from any other Tribal assets whatsoever." The Tribal Council approved the agreement, but the tribal membership did not. It is undisputed that the registered voters of the Tribe never voted on, and never approved, the agreement, nor did they vote on or approve any proposal for the Tribe to waive its sovereign immunity.

Disagreements developed between the parties over the terms of their agreement. On May 8, 2000, Lobo Gaming sued in Shasta County Superior Court. The Tribe, which had previously filed a federal action challenging the validity of the agreement under section 81 of title 25 of the United States Code, removed the case to federal district court. The district court subsequently granted summary judgment in favor of Lobo Gaming on the Tribe's federal action and remanded the present case to Shasta County Superior Court without addressing the issues raised therein. On remand, the Tribe moved to quash service of summons on grounds of sovereign immunity. The trial court granted the motion and this appeal followed.

DISCUSSION

***2** No one disputes that the Tribe enjoys sovereign immunity. We need not, therefore, reiterate the basic principles of sovereign immunity, other than to emphasize there are far-reaching implications of the doctrine for those who choose to do business with Indian tribes. (*Kiowa, supra,* 523 U.S. at p. 754- 755; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [56 L.Ed.2d 106, 115]; *Puyallup Tribe v. Washington Game Department* (1977) 433 U.S. 165, 172- 173 [53 L.Ed.2d 667, 674] (*Puyallup*); *Oklahoma Tax Com. v. Potawatomi Tribe* (1991) 498 U.S. 505, 509-510 [112 L.Ed.2d 1112, 1119-1120] (*Oklahoma Tax Com.*).) In bringing the motion to quash service, the Tribe contends the trial court lacks subject matter jurisdiction because of the Tribe's sovereign immunity. Lobo Gaming insists the Tribe contractually waived its immunity. To relinquish its immunity, a tribe's waiver must be " 'clear.' " (*C & L Enterprises v. Citizen Band* (2001) 532 U.S. 411, 418 [149 L.Ed.2d 623, 631] (*C & L Enterprises*).)

[1] Both sides seem to agree that to be "clear," a relinquishment must be express. But while the Tribe claims the Tribal Council has no "express" constitutional authority to waive immunity, Lobo Gaming insists the authority to waive immunity is part of its "express" power to contract. The authority to contract, Lobo Gaming argues, is a nullity without the authority to provide enforceable remedies. In the battle over what is express and what is implied, we must construe the language of the Tribal Constitution and resist the seductive temptation to consider either the equities or the expectations of the parties. We reject any implication by the Tribe that we, as a state court, cannot interpret a tribal Constitution. (See, e.g., *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council* (1985) 170 Cal.App.3d 489, 216 Cal.Rptr. 59 (*Hydrothermal*).)

The Tribe provides a plethora of cases involving the application of sovereign immunity to contractual disputes. We find two cases particularly compelling because of the factual similarities. In *World Touch Gaming v. Massena Management, LLC* (N.D.N.Y.2000) 117 F.Supp.2d 271 (*World Touch Gaming*), the tribe delegated authority to operate its casino to a management company pursuant to a management agreement. The agreement gave the management company the authority to "construct, manage, administer, operate, maintain and improve the gaming facilities ... [and] such other activities as are reasonably related thereto." (*Id.* at p. 273, fn. 2.) The senior vice president of the management company signed the lease and sales agreements as the managing agent of the casino. The sales agreement provided: "Notwithstanding the aforementioned Tribal Sovereignty the Tribe agrees to submit to the jurisdiction of the state and federal courts for the sole and limited purpose of enforcement of the obligations under this contract ...." (*Id.* at p. 273.)

World Touch Gaming, like Lobo Gaming, asserted that the explicit language in the agreement waived the tribe's sovereign immunity insofar as the breach of contract claim was concerned. The court disagreed. "[A]ccording to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express. The

Tribal Council did not authorize [the senior vice president] to waive sovereign immunity, nor did the Tribal Council expressly waive the Tribe's sovereign immunity. [Citation.] Thus, the Tribe's sovereign immunity was not waived, and it is immune from suit." (*World Touch Gaming, supra,* 117 F.Supp.2d at p. 275 .) The court rejected World Touch's contention that the provision in the management agreement giving exclusive control over the day-to-day operations of the casino was an authorization to waive the tribe's sovereign immunity.

***3** *Danka Funding Co. v. Sky City Casino* (1999) 329 N.J.Super. 357, 747 A.2d 837 (*Danka Funding*) also involves a casino on an Indian reservation. Danka Funding entered into two lease agreements with the Pueblo of Acoma, a federally recognized Indian tribe. The lease form contained a so-called "forum selection clause," whereby the tribe consented to the jurisdiction of "any local, state or federal court" and the application of the law of the state in which the lease processing center is located. (*Id.* at p. 840.) The comptroller of the casino signed the agreements on behalf of the tribe. The tribe, as here, contended that the comptroller did not have authority under tribal law to waive immunity. (*Id.* at p. 841.)

In *Danka Funding, supra,* 329 N.J.Super. 357, 747 A.2d 837, the tribe's laws protected its sovereign immunity to the maximum extent possible and explicitly stated what procedures had to be followed in order to waive immunity. (*Id.* at pp. 841-842.) Unlike the Tribal Council here, the Acoma Pueblo Tribal Council "has the power to waive the sovereign immunity of the Pueblo of ACOMA or by resolution, to authorize the Governor or his designate to waive the sovereign immunity of the Pueblo of ACOMA as limited in the resolution." (*Ibid.*) But the comptroller, not the council, purportedly waived the tribe's immunity by executing the lease form containing the forum selection clause. Such a waiver, according to the appellate court, was ineffective.

The court concluded: "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. *Ute Distribution Corp. v. Ute Indian Tribe,* 149 *F.*3d 1260, 1267 (10th Cir.1998). 'In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.' *Ute Distribution Corp.* ., 149 *F.*3d at 1267." (*Danka Funding, supra,* 747 A.2d at p. 841.)

Hence, in both *World Touch Gaming* and *Danka Funding,* the business enterprises were unable to pursue their breach of contract claims against the tribes. The courts did not have subject matter jurisdiction because those who purported to waive the tribes' immunity were without authority under the Constitutions and laws of the tribes. In each case, the court warned the sophisticated defendants of the implications of their carelessness. In *World Touch Gaming,* the court concluded: "Moreover, as a sophisticated distributor of gaming equipment that frequently deals with Indian gaming enterprises, World Touch should have been careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements. [Fn. omitted.] World Touch is not a novice in matters relating to Indian gaming enterprises and Indian sovereign immunity, and cannot now rely upon naivete to expand the reading of the Management Agreement to encompass authority to waive sovereign immunity." (*World Touch Gaming, supra,* 117 F.Supp.2d at pp. 275-276.)

***4** In *Danka Funding,* the court echoed the same admonishment: "Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws, describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions." (*Danka Funding, supra,* 747 A.2d at p. 842.)

A steady stream of Supreme Court cases on the sanctity of an Indian tribe's sovereign immunity, supplemented by cases such as these in which sovereign immunity is not waived when the means and procedures contravene the tribes' own laws, supports the Tribe's assertion that it had not legally waived its immunity. Lobo Gaming's plea for equitable relief is unavailing. It, too, is a gaming company, presumably sophisticated, and charged with the knowledge that the Tribe possesses sovereign immunity.

But Lobo Gaming insists that a more recent Supreme Court case, *C & L Enterprises, supra,* 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623, provides a more favorable standard for the resolution of business disputes with Indian tribes. While *C & L Enterprises*

certainly upheld the validity of a tribe's agreement to arbitrate, and hence bodes well for alternative dispute resolution mechanisms if properly authorized and executed, it has no bearing on a case such as this, where the purported waiver contravened the Tribe's Constitution. There was no contention that the form contract, which was proposed by the tribe itself, was not authorized, nor was there any suggestion or hint that whoever approved and executed the agreement did so improperly. Quite simply, the dispositive question raised in this case, whether the power to contract includes the power to waive immunity, was not at issue in *C & L Enterprises,* and the holding, therefore, bears no relevance to the case at hand. [FN1]

> FN1. Similarly, *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 115 Cal.Rptr.2d 455 (*Smith*), cited at oral argument by counsel for Lobo Gaming as a case expanding the holding of *C & L Enterprises,* is also inapposite. In *Smith,* the court held sovereign immunity was waived by execution of a contract containing an arbitration clause that expressly provided for judicial enforcement. The contract had been approved by the Hopland tribal council. However, the Hopland tribal council, unlike the Tribal Council here, had authority to waive the tribe's sovereign immunity. The case does not support the broad proposition asserted by Lobo Gaming that the power to contract includes the power to waive sovereign immunity.

The Tribe relies on applicable California case law as well. In *Hydrothermal, supra,* 170 Cal.App.3d 489, 216 Cal.Rptr. 59, the Court of Appeal reversed the confirmation of an arbitration award against the Fort Bidwell Indian Community Council because the tribe had not waived its sovereign immunity. The chairperson of the tribal council, who was also the chief executive officer, purportedly waived immunity by accepting the jurisdiction of an arbitrator. As in *World Touch Gaming* and *Danka Funding,* the court found the waiver had not been authorized by tribal law. Ignoring the equities involved, the court concluded the state lacked subject matter jurisdiction.

Lobo Gaming contends that these cases do not apply. According to Lobo Gaming, in *World Touch Gaming, Danka Funding,* and *Hydrothermal,* a mere official of each tribe attempted to waive immunity, but in each case that official had no authority to execute a waiver on behalf of the tribe. In this case, Lobo Gaming argues, the Tribal Council, not an official, executed a contract, an act it was expressly empowered to perform under tribal law. Since the Tribal Council has the constitutional authority to enter contracts and to manage the economic affairs of the Tribe, unlike the officials in these cases, it had the authority to agree to enforceable remedies contained within the contract. We disagree.

***5** The significance of *World Touch Gaming, Danka Funding,* and *Hydrothermal* was not who waived tribal immunity, but whether the waiver was authorized by tribal law. In each case, the court found the waiver had not been executed by those with the constitutional power to act on behalf of the tribe. The same is true here. The language used to reserve the power to waive sovereign immunity to the tribal membership is clear and unequivocal. The Tribal Council was not constitutionally authorized to waive immunity. Hence, *World Touch Gaming, Danka Funding,* and *Hydrothermal* are precisely on point. A waiver, no matter how clearly and unequivocally expressed, is ineffective if it transgresses tribal law.

Lobo Gaming resorts to hyperbole, insisting that a failure to find the power to waive immunity implicit in the power to contract will dampen, if not destroy, business opportunities on Indian reservations. No one, according to Lobo Gaming, will contract with a tribe without enforceable remedies. With such dire consequences looming, Lobo Gaming maintains that the only reasonable interpretation of the Tribal Constitution is to conclude that the power to contract means the power to waive sovereign immunity. And that power resides with the Tribal Council.

We, of course, are not the chamber of commerce. Our role is not to supplant the Tribe's assessment of its business risks and opportunities with our own. Our role is more humble and straightforward. We must construe the express language of the Tribal Constitution with the aid of state and federal law protecting the sovereignty of federally recognized Indian tribes.

Nor are we persuaded that the Tribal Council's inability to waive immunity renders its power to contract a nullity. In *Oklahoma Tax Com., supra,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112, the Supreme Court held that the tribe's sovereign immunity precluded the State of Oklahoma from collecting cigarette sales tax from tribal members who purchased their cigarettes in a tribal store on land held in trust by the federal government for the tribe. The court rejected the state's argument, similar to the argument advanced by Lobo Gaming, that they had the right to collect from nonmembers without any remedy. Rather, the

court stated, Oklahoma had a variety of alternative remedies, and if those failed, it could pursue appropriate legislation from Congress. (*Id.* at p. 514.)

The Tribe suggests that Lobo Gaming also has alternative remedies, even if they are not as desirable as litigation. The Tribe suggests that the general membership's retained power to waive sovereign immunity does not preclude the Tribal Council from contractually agreeing to other remedies that do not involve an immunity waiver, such as authorizing prospective injunctive relief against tribal officials, escrowing tribal collateral, nonbinding arbitration, or mediation. Again, we need not assess the relative value of the remedies. The question posed is whether the inability to sue in the absence of a waiver of immunity by the tribal membership renders our interpretation of the Tribal Constitution absurd or unreasonable. We conclude it does not. While the possibility of other remedies, like the court alluded to in *Oklahoma Tax Com., supra,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112, does mean the power to contract is not a nullity without the power to sue, we are more persuaded by the clarity of the express language used in the Tribal Constitution to reserve the power to waive immunity to the tribal membership. Given the strong tradition in state and federal law to honor a tribe's prescription of how immunity must be waived, we find that the Tribal Constitution's clear reservation of the power to waive trumps any collateral restriction on the power to contract. [FN2]

> FN2. The parties exchange factual allegations on the merits of the underlying dispute. These allegations are irrelevant to the legal issue presented.

***6** Undeterred by the formidable law against it, Lobo Gaming turns our attention to a single word, convinced that a sole adjective is the key to harmonizing the Tribal Constitution, rendering the waiver effective, and conferring jurisdiction on the courts of California. The adjective is "unconsented"; the context is the Tribe's reservation of the right to waive sovereign immunity to "unconsented suit."

Lobo Gaming argues that the phrase "unconsented suit" in article VII, section 3 of the Tribal Constitution recognizes that the power of the Tribal Council to enter into contracts pursuant to article VII, section 1 includes the authority to provide for enforceable remedies in the event of a breach of contract. In other words, "unconsented suit" is a lawsuit not consented to by the Tribal Council by contract pursuant to its power under article VII, section 1. Lobo Gaming insists that we must construe each and every term used in the Tribal Constitution, and by interpreting "unconsented" to mean those suits in which the Tribal Council has not contractually agreed to waive immunity, section 1 and section 3 can be harmonized.

The Tribe's response is twofold. First, "unconsented" routinely modifies "suit" to underscore the self-evident notion that immunity is only pertinent where the sovereign does not consent to being sued. Second, and more importantly according to the Tribe, reliance on this lone adjective does not overcome the absence of any express language in the Tribal Constitution vesting the Tribal Council with the power to waive immunity. In order for "unconsented suit" to mean "unless the Tribal Council contractually agreed to be sued," there would have to be language somewhere in the Tribal Constitution vesting the Tribal Council with the power to waive the Tribe's sovereign immunity. We agree with the Tribe.

[2] The Tribal Constitution expressly reserves the power to waive immunity to the tribal membership. Although the Tribal Constitution confers a long list of powers on the Tribal Council, nowhere does it give the Tribal Council the authority to waive sovereign immunity. To suggest, as Lobo Gaming does, that the power to waive sovereign immunity is "a part of" the power to contract is to conjure a power out of thin air.

And hence, Lobo Gaming's argument comes full circle. Waivers of sovereign immunity cannot be implied, nor can the power to waive immunity. We cannot accept Lobo Gaming's far-fetched notion that under the guise of harmonizing every term the express reservation of the power to waive immunity to the tribal membership gives way to an implied power to waive immunity to the Tribal Council.

[3] Finally, and briefly, we reject Lobo Gaming's contention that if all contractual remedies fail, it is entitled to an equitable estoppel. Sovereign immunity is a question of jurisdiction, not equity. (*Puyallup, supra,* 433 U.S. at pp. 172-173.) "[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of a given situation ." (*Chemehuevi Ind. Tribe v. Cal. St. Bd. of Equal.* (9th Cir.1985) 757 F.2d 1047, 1052-1053, fn. 6, revd. in part on other grounds (1985) 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9.) Thus, tribal immunity may not be defeated even where its assertion may "unfairly deprive contracting parties of the benefit of their bargains." (*Amer. Indian Agr. Credit v. Stand.*

Rock Sioux Tribe (8th Cir.1985) 780 F.2d 1374, 1379.)

DISPOSITION

*7 The order is affirmed.

We concur: DAVIS, Acting P.J., and MORRISON, J.

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