UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-61048-Dimitrouleas-Rosenbaum

HOLLYWOOD MOBILE ESTATES LIMITED,
a Michigan Limited Partnership,

Plaintiff,

v.

SEMINOLE TRIBE OF FLORIDA and UNITED STATES DEPARTMENT OF THE INTERIOR, DIRK KEMPTHORNE, in his official capacity as SECRETARY OF THE INTERIOR,

Defendants.
_____/

MOTION OF DEFENDANT, SEMINOLE TRIBE OF FLORIDA, TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MEMORANDUM OF SUPPORTING POINTS AND AUTHORITY

DONALD A. ORLOVSKY
Florida Bar Number: 223816
dao4law@aol.com
KAMEN & ORLOVSKY, P.A.
1601 Belvedere Road, Ste. 402-S
West Palm Beach, FL 33406
Phone: (561) 687-8500
Fax: (561) 687-7892
Counsel for Seminole Tribe of Florida

Defendant, Seminole Tribe of Florida ("Tribe"), a federally recognized Indian tribe, by and through its attorneys, hereby files this motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted against the Tribe pursuant to Rules 12(b)(1) and (6), Fed.R.Civ.P., based upon the Tribe's immunity from suit under the doctrine of tribal sovereign immunity. To the extent necessary to place issues in proper context, the Tribe hereby adopts by reference its memorandum in opposition to plaintiff's emergency motion for preliminary injunction and all exhibits thereto. In support of this motion, the Tribe also relies upon all affidavits submitted in support of its memorandum in opposition to the motion for preliminary injunction, including those of Max B. Osceola, Jr., former Acting Superintendent of the Bureau of Indian Affairs (BIA) and an elected member of the Tribal Council for approximately 23 years; Fred Hopkins, Director of Real Estate Services for the Tribe and William R. Latchford, the Chief of the Seminole Police Department. The substantial matters of law and fact to be argued are set forth below:

Introduction

This is a lease dispute between the Tribe and Hollywood Mobile Estates Limited (Lessee), arising under Business Lease No. 48 (Lease) for a parcel of tribal trust land in reservation status consisting of approximately 105 acres which is located on the Tribe's Hollywood Reservation and was, until July 15, 2008, utilized by Lessee as a mobile home park. As a result of uncured defaults about which of Lessee was notified and given an opportunity to cure in a letter dated June 17, 2008, from Mitchell Cypress, Chairman of the Tribal Council, the Tribe re-entered and re-took the leased premises upon the refusal of Lessee to cure the defaults set forth therein. Lessee filed suit seeking an injunction to prevent the Tribe from re-entering

and re-taking the premises so that the Tribe could be ordered to arbitration under Article 5.G of the Lease.

Article 5.G of the Lease does not pertain to defaults under the Lease but rather pertains only to agreements affirmatively required to be reached by the parties under the Lease. Article 18, regarding defaults, expressly allows the Tribe and the Secretary of the Interior (Secretary) to exercise the self help remedy of re-taking and re-entering the premises and removing all persons, conditioned not upon arbitration, but upon notice and an opportunity to cure. By virtue of a Self Determination Contract between the United States and the Tribe that originated in the late 1980s, the Secretary delegated to the Tribe, all federal functions with the exception of termination of the Lease for the United States.[1]

Lessee claims that the Tribe is not entitled to assert tribal sovereign immunity as a basis for challenging subject matter jurisdiction under C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001) as allegedly standing for the proposition that an arbitration clause (whether applicable or not), or the mere reference to arbitration in a Lease, constitutes a complete waiver of tribal sovereign immunity. As set forth herein, this is simply not the case, particularly since the arbitration provision contained in Article 5.G does not pertain to defaults under the Lease and the Tribe has not agreed to arbitrate all disputes under any set of arbitration rules or to have an arbitral award reduced to judgment under any law.

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1 The Tribe does not agree with this lone exception and asserts that the Tribe maintains the right to terminate the Lease on behalf of itself even if approval of the Secretary is ultimately required to terminate on behalf of the United States. Under the scope of work provision under the Self Determination Contract attached to the memorandum of the federal defendant, the Tribe's Director of Real Estate Services is specifically authorized to act upon cases of non-compliance with the Lease. This would appear to give the Tribe the right to terminate subject to ratification by the Secretary. In any event, the Tribe has the right to re-enter and re-take the leased premises and remove all persons without terminating the Lease.

The Parties

Lessee is a Michigan limited partnership, which is the successor-in-interest, by assignment, to the rights, duties and obligations of the Lessee under Business Lease No. 48, dated March 11, 1969, between the Tribe and Joseph L. Antonucci, as Lessee. Plaintiff acquired the Lease by assignment dated March 20, 1986, with a scheduled expiration date, after modification, of March 10, 2024. Until July 15, 2008, Lessee occupied the premises as a mobile home park, with the exception of approximately ten (10) acres of valuable undeveloped frontage land located on the west side of State Road 7, South of Stirling Road on the Tribe's Hollywood Reservation.

The Seminole Tribe is a federally recognized Indian tribe that presently consists of approximately 3,300 members and occupies tribal trust and reservation lands in Broward, Hendry, Glades, Collier, Hillsborough and St. Lucie Counties in the State of Florida. These tribal trust lands are legally titled in the name of the United States of America in perpetual trust for the benefit of the Seminole Tribe of Florida. The tribal trust land in issue is a parcel of 105 acres, more or less, located on the Hollywood Reservation of the Seminole Tribe which is utilized as a mobile home park and has been operated by the Tribe since July 15, 2008.

The United States of America is the legal title holder to all tribal trust land, including the Tribe's Hollywood Reservation, which it owns for the perpetual benefit of the Tribe. Pursuant to a Self Determination Contract between the Secretary of the Interior (Secretary) and the Tribe under Public Law 93-638, (a copy of which is attached to the memorandum of the federal defendant), the Secretary has delegated the rights, duties and obligations of the United States to the Tribe with regard to Real Estate Services, including those real estate services pertaining to the leased premises other than termination for the federal government. Under the Self

Determination Contract, the scope of work gives the Tribe's Director of Real Estate Services to act upon cases of non-compliance with the Lease. This clearly appears to grant to the Tribe the right to terminate subject to ratification by the Secretary.

Relief South by Hollywood Mobile Estates

Lessee filed a complaint seeking injunctive relief in an effort to prevent the Seminole Tribe of Florida from exercising its self help remedies under the default provision contained in Article 18 of the Lease for uncured defaults about which Lessee was given written notice on June 17, 2008 together with an opportunity to cure. (Exhibit "D" to Complaint). On July 3, 2008, Lessee denied that defaults exist and, by implication, refused to cure, and demanded arbitration. (Exhibit "E" to Complaint) Lessee seeks an injunction to prevent the Tribe from re-entering and re-taking the premises under Article 18 of the Lease; however, the Tribe re-entered and took possession of the leased premises on July 15, 2008, prior to the Lessee's service of its motion for preliminary injunction, and the Tribe now operates the mobile home park.

The Tribe contends that this Court lacks subject matter jurisdiction to determine plaintiff's claim or any other claim arising under or out of the default provisions under the Lease based upon its entitlement to tribal sovereign immunity from suit. The Tribe also rejects Lessee's assertion that claims relating to default are subject to arbitration under Article 5.G or that this arbitration provision – which does not apply to Article 18 – operates to waive tribal sovereign immunity under a lease pre-dating the C&L Enterprises case by approximately 32 years.

Summary of the Basic Facts

On June 17, 2008, Mitchell Cypress, as Chairman of the Tribal Council, provided written notice to Lessee that it was in default under the terms and conditions of the Lease and that if the

defaults were not cured pursuant to Article 18 of the Lease, the Tribe would exercise its self help rights under Article 18, including, without limitation, the exercise of its self help right to re-enter and re-take the leased premises and remove all persons. (Complaint at Exhibit "D") The Tribe did so on July 15, 2008 after Hollywood Mobile Estates denied that any default existed and demanded arbitration under Article 5.G which does not pertain to defaults. (Complaint at Exhibit "E")

Under the Lease, the premises were to be developed, used and operated pursuant to a general plan of development prepared by the Lessee and approved by the Tribe and the Secretary. The general plan of development was provided for a mobile home park together with commercial facilities, community services and amenities for residents of the park.

Under Article 5 of the Lease, as later modified, the rent to be paid by the Lessee to the Seminole Tribe was 15% of the gross rental income resulting from the operation of a mobile home park or $150,000.00, whichever is greater. The Lessee was also obligated to pay to the Tribe and each year thereafter, a sum equal to fifteen percent (15%) of the gross profit on the sale of leasehold improvements.

Where the Lessee develops a portion of the leased premises and operates a business or businesses thereon, other than as a mobile home park, Lessee is required to pay a percentage of gross receipts, which is required to be established by mutual agreement. (Lease, Article 5.B). Where the parties cannot mutually agree to the rental, the percentage rent is to then "… be established by arbitration between the parties as hereinafter provided." [*See, Lease, Articles 5.B and 5.G*] Where the Lessee receives income derived from subleasing, permitting, contracting or from another authorized use of the leased premises, other than as a mobile home park, the percentage rental rate is to be calculated from a percentage of gross receipts to be established by

mutual agreement. Once again, in the event that the Lessor and Lessee cannot mutually agree upon the percentage rental rate, "… then the parties shall utilize those arbitration procedures as outlined in Article 5(G)." [*See, Lease, Article 5.C*].

Article 5.G of the Lease contains a provision applicable solely to those circumstances where the parties are unable to reach an agreement where the Lease requires the parties to mutually reach an agreement such as those referenced in the Lease at Articles 5.B and 5.C. In circumstances such as that, where the parties cannot reach a mutual agreement as required by the Lease, Article 5.G provides for the following:

> Whenever during the term of this lease the Lessee, the Lessor, and the Secretary are unable to reach an agreement as required by this lease, and it becomes necessary to submit a matter to arbitration for settlement, an Arbitration Board shall be established. Said Arbitration Board shall consist of three (3) persons, one member to be selected by the Lessee, one member to be selected by the Lessor, and the third to be selected by the other two members. If the two members selected by the Lessee and Lessor are unable to agree upon a third member within twenty (20) days after the Lessee and Lessor selections have been made, the senior judge of the Federal District Court for the District wherein the leased premises are located shall select the third member. The cost of such arbitration shall be shared equally by the Lessee and the Lessor. It is further understood and agreed that the Secretary may be expected to accept any reasonable decisions reached by said Arbitration Board but [the Secretary] cannot be legally bound by any such decision which might be contrary to, or in conflict with, the best interest of the Indians or the United States Government. (emphasis added)

By its clear language, the arbitration provision in Article 5.G is not intended to apply to defaults under the Lease. This is clear from the language of Article 18 which addresses defaults under the Lease. Article 18 provides the Lessor and Secretary with an immediate right to resort to self-help or litigation, conditioned only upon notice and an opportunity to cure, whereas the arbitration provision in Article 5.G applies only to situations where the parties are unable to reach an agreement as required by the Lease; it does not apply to material defaults. Moreover,

the arbitration provision, by its terms, cannot be applied so as to bind the Secretary to any decision which is not in the best interest of the Seminole Tribe and the United States.

The purpose of Article 5.G is clear when read in the context of examples of agreements that the parties are affirmatively required to reach under the Lease that trigger Article 5.G. Two of them are discussed above regarding Articles 5.B and 5.C. A non-exclusive list of additional examples are found in the Lease as follows:

(a.) Under Article 14.C, the Lessor and Secretary are not permitted to unreasonably withhold approval of any sublease, assignment or transfer or any other matter requiring approval and agreement pursuant to the provisions of Article 14. Arbitration would be presumably applicable under Article 5.G if the parties cannot reach a mutual agreement.

(b.) Under Article 15, the leased property may not be encumbered without the written approval and agreement of the Lessor and Secretary which approval shall not be unreasonably withheld. If the Lessor and Secretary are alleged to be unreasonably withholding their agreement to an encumbrance, the provisions of Article 5.G would apply.

(c.) In Article 16.E, any disagreements relating to the distribution of insurance proceeds or other agreements required to be reached pertaining to insurance must be resolved by arbitration. Article 16.E. expressly states that "[a]ny disagreements arising hereunder shall be resolved by those arbitration procedures hereinbefore described." (emphasis added).

(d.) Article 17 pertains to eminent domain. Where the parties cannot agree upon the apportionment of an eminent domain award as between Lessor, Lessee and a Sub-lessee, Article 17 provides that any disagreement shall be resolved "… by those arbitration procedures hereinbefore described." (emphasis added).

(e.) Article 20 pertains to future assessments, taxes and fees. It provides that where the parties cannot agree on a levy or where such tax and fees exceed, in amount, similar taxes and/or fees imposed by the City of Hollywood in Broward County, Florida, such "… levies as may be contested by the Lessee or Sub-Lessee shall be subject to arbitration as otherwise provided in this lease agreement." (emphasis added).

The Default Provisions of the Lease – Article 18

Not unexpectedly, the provisions of Article 18, which pertain to defaults under the Lease, do not require the parties to reach an affirmative mutual agreement like those in paragraphs 5.B, 5.C, 14.C, 15, 16.E, 17, and 20. In fact, Article 18 makes no reference at all to arbitration and does not contemplate arbitration. Article 18 provides a direct right for the Tribe and the Secretary, in the event of a default, after notice and an opportunity to cure, to enforce, by suit or otherwise, Lessee's compliance with any provision of the Lease **or**, alternatively to re-enter the premises, remove all persons and either re-let the premises or re-take the premises. The pertinent provisions of Article 18 of the Lease, are as follows:

> 18. DEFAULT
>
> … Should Lessee default in any payment of monies or fail to post bond, as required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Secretary to encumbrancer and Lessee, during which thirty (30) day period encumbrancer and Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant of the lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Secretary to encumbrancer and Lessee, during which sixty (60) day period encumbrancer and Lessee shall have the privilege of curing such breach, then Lessor and the Secretary may either:
> A. Collect, by suit or otherwise, all monies as they become due hereunder, or enforce, …, Lessee's compliance with any other provision of the lease, or
> B. Re-enter the premises and remove all persons and property there from, excluding the property belonging to authorized sub-lessees, and either:
> (1) Re-let the premises without terminating this lease, as the agent and for the account of Lessee, but without prejudice to the right to terminate the lease

> thereafter, and without invalidating any right of Lessor and the Secretary or any obligation of Lessee hereunder. …
> (2) Terminate this lease at any time and even though Lessor and the Secretary have exercised rights as outlined in (1) above. Exercise of this remedy shall exclude recourse to any other remedy.
> * * *
> No waiver of a breach of any of the covenants of this lease shall be construed to be a waiver of any succeeding breach of the same or any other covenant.

Sovereign Rights of Federally Recognized Indian Tribes

Chief Justice Marshall stated in Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832), that Indian tribes are:

> ...distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

Section 16 of the *Indian Reorganization Act of 1934*, as amended, 25 U.S.C. § 476 established the right of an Indian tribe to organize for its common welfare by adopting a constitution and bylaws in accordance with the provisions of the Act. By adoption of its constitution, the Seminole Tribe became a formally recognized Indian tribe under Act. As such, this federal recognition vested in the tribal government certain powers, in addition to the Tribe's pre-existing sovereign powers. One of the long-standing powers that the Seminole Tribe has always had and retained is its right, as a sovereign tribal government, to immunity from suit for itself in all state and federal courts, except in the most limited circumstances. A copy of the Amended Constitution and Bylaws of the Tribe are attached to the Affidavit of Max B. Osceola, Jr. as Exhibit "A".

As an aspect of its sovereignty, the Tribe is immune in any civil action in any state or federal court without a clear, express and unmistakable waiver by the Tribal Council or a like abrogation of immunity by act of Congress. Neither exist in this case. A waiver or abrogation

of immunity cannot arise by inference or implication and must be clear, express and unmistakable. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001). Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government. *See*, Namekagon Development Company v. Bois Forte Reservation Housing Authority, 517 F. 2d 508, 510 (8th Cir. 1975); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982); Tamiami Partners, Ltd. et al. v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999).

The vitality of the doctrine of tribal sovereign immunity is so securely rooted in American law that it has been held that federal and state courts lack subject matter jurisdiction to consider actions against Indian tribes, even when the actions are for alleged intentional violations of rights secured by the Constitution and laws of the United States and the Indian Civil Rights Act (ICRA) and Tribal Constitutions. *See*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978) (claims for violations of the ICRA, beyond *habeas corpus*, barred by tribal sovereign immunity); Talton v. Mayes, 163 U.S. 376 (1896) (alleged violation of Fifth Amendment rights barred by tribal sovereign immunity); Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989); *aff'g* in part, Evans v. Little Bird, 656 F. Supp. 872 (D. Mont. 1987) (same); United Nuclear Corp. v. Clark, 584 F. Supp. 107 (D.D.C. 1984); Bruette v. Knope, 554 F. Supp. 301 (E.D. Wisc. 1983) (claims arising under Fourth, Fifth, Ninth and Fourteenth Amendments together with three federal civil rights statutes based upon police chase and alleged use of excessive force, barred by tribal sovereign immunity). In each of these cases, actions against tribes and their employees and agents arising under the United States Constitution, federal civil rights statutes and the ICRA have been held to be barred on tribal sovereign immunity grounds. *See also*, 28 U.S.C. § 1360

(c) regarding the binding effect of tribal ordinances and tribal customs upon courts relative to other types of non-tribal laws.

Moreover, since an Indian tribe's sovereign immunity is coextensive with that of the United States, a party may not maintain a claim against an Indian tribe or any of its subordinate governmental units or agents absent a firm showing of an effective waiver which is unequivocally and unmistakably expressed. Ramey Construction Company, Inc., v. Apache Tribe of Mescalero Reservation, 673 F. 2d 315, 319-320 (10th Cir. 1982). If a waiver of immunity exists -- by act of Tribe or Congress -- the waiver or abrogation of immunity must be limited in scope and must be clear, express and unmistakable. United States v. Dion, 476 U.S. 734, 738-739 (1986). See also, Tribal Sovereign Immunity Ordinance of Seminole Tribe of Florida C-01-95, (Exhibit "B" to Affidavit of Max B. Osceola, Jr.)

It is further well settled as a matter of law that the doctrine of tribal sovereign immunity applies to federally recognized Indian tribes, whether or not they are engaged in governmental or commercial activity and irrespective of whether the activity in question occurs on or off of reservation land. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 US 751 (1998); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991); Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001) (Tribe's agreement to abide by specific federal laws in grant applications and assurances to federal government seeking federal funds do not constitute a waiver or abrogation of tribal sovereign immunity thereunder).

Tribal Ordinance C-01-95 was duly enacted by the Seminole Tribe on March 16, 1995 and unconditionally approved by the United States Department of the Interior on April 16, 1995. A copy of the Tribal Sovereign Immunity Ordinance is attached to the Affidavit of Max B.

Osceola, Jr. as Exhibit "B." This ordinance restates, as matter of binding law, that tribal sovereign immunity from suit by third parties is applicable not only to the Tribe and its subordinate governmental units, but also to tribal officials, employees and authorized tribal agents regarding suits brought against the Tribe. It reads, in pertinent part, as follows:

> NOW THEREFORE BE IT ORDAINED: that the Seminole Tribe of Florida, its subordinate economic and governmental units as well as its tribal officials, employees and authorized agents are immune from suit brought by any third-party in any state or federal court absent the clear, express and unequivocal consent of the Seminole Tribe of Florida or the clear, express and unequivocal consent of the United States Congress. This immunity shall apply whether the Tribe or any subordinate economic or governmental unit is engaged in private enterprise or governmental function; and
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> BE IT FURTHER ORDAINED: that all tribal officials, employees or other authorized agents shall likewise be immune from suit brought by any third party in any state or federal court where such tribal official, employee or other authorized agent is either acting on behalf of the Seminole Tribe of Florida in the course of their agency or where the acts of such tribal official, employee or other agent, though mistaken, negligent or otherwise improper are within that degree of authority which the Seminole Tribe of Florida is capable of bestowing upon the agent as a matter of federal, constitutional or tribal law; …

In this case, the Tribal Council did not waive sovereign immunity regarding the Lease or any claim of the Lessee alleged to arise thereunder. (Affidavit of Max B. Osceola, Jr.)

Lessee's claims against the Tribe must be dismissed since Lessee cannot, under any circumstances, demonstrate a clear, express and unmistakable tribal waiver of sovereign immunity or a tribal acceptance and consent to federal or state jurisdiction over claims against it arising under the default provisions in Article 18 of the Lease through the deliberative act of its Tribal Council, sitting in legal session, *or* the clear and unmistakable abrogation of immunity on the part of Congress with respect to those claims which Lessee has asserted or could assert against the Tribe in connection with a default under the Lease. Neither exist in this case.

In order for a tribal waiver to exist under the default provisions of the Lease, the Lessee must show that the Tribe knowingly agreed to be subject to the jurisdiction of this Court in a manner consistent with the constitutional mandates of the Amended Constitution of the Tribe, as a sovereign tribal government. As noted, the affairs of the Seminole Tribe are governed by an elected Tribal Council which consists of five tribal members, each of whom is elected from tribal membership and each of whom is vested with voting rights. The powers of the Tribal Council are defined in Article V of the Amended Tribal Constitution. Among those powers is the power of the Tribal Council to waive tribal sovereign immunity. *See, e.g.*, Article V, Sections 1, 3, 5 and 12. Virtually anything having to do with the rights of the Seminole Tribe and its land and assets are exclusively within the power of the Tribal Council. No waiver of sovereign immunity exists in the Amended Tribal Constitution and no waiver of immunity exists regarding claims associated with the Lease. At no time and under no circumstances has the Tribal Council of the Seminole Tribe enacted an ordinance or resolution accepting the jurisdiction of this Court or agreeing to defend or be subject to jurisdiction for claims arising under the default provisions under Article 18 of the Lease. (Affidavit of Max B. Osceola, Jr.)

Had Congress intended to abrogate tribal sovereign immunity relative to matters pertaining to the claims asserted in the complaint or claims otherwise arising under the Lease, it would have been required to say so in unequivocal terms.

In addressing the Seminole Tribe's entitlement to immunity from suit, the courts have even refused to distinguish whether the Tribe is engaged in a private enterprise or governmental function or whether the transactions or events in question occurred on or off of tribal trust land. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751 (1998); Maryland Casualty Company v. Citizens National Bank of West Hollywood, 361 F. 2d 517, 520-521 (5th

Cir. 1966). In Maryland Casualty Company, it was held that the Seminole Tribe's agent, a federally chartered tribal corporation, was immune from suit while engaged in a private commercial enterprise. *See also*, American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985).

Sovereign immunity is a right of the sovereign to be immune from claims. The doctrine goes to the power of the court and not to the subject matter of the dispute. As the Ninth Circuit said in State of California v. Quechan Tribe of Indians, 595 F. 2d 1153 (9th Cir. 1979), "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . . " Id. at 1155.

In describing the level of clarity necessary to determine whether a congressional abrogation exists, the Eleventh Circuit Court of Appeals made the following statement in Kimel v. State of Florida Board of Regents, 139 F.3d 1426, 1431 (11th Cir. 1998) *aff'd* 528 US 62 (2000) that is instructive on the issue of congressional abrogation here:

> For abrogation to be unmistakably clear, it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate. Although we make no definite rule about it, the need to construe one section with another, by its very nature, hints that no unmistakable or unequivocal declaration is present.

This analysis becomes particularly important in view of the Supreme Court's pronouncement that a waiver of tribal sovereign immunity -- whether by tribal act or congressional abrogation -- may not arise by implication. Santa Clara Pueblo v. Martinez, 436 U.S. at 58-59. Simply stated, Congress has not seen fit to enact any law providing any state or federal court with civil jurisdiction over Indian tribes for claims such as those arising from Article 18.

In a line of cases decided over a period of 175 years, the Supreme Court has recognized that Indian tribes retain their original natural rights, as sovereign governmental entities which

existed long before the genesis of the United States. Florida Paraplegic Assoc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1130 (11th Cir. 1999), *citing* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). The principle of tribal sovereign immunity from suit is a well established doctrine. United States v. U.S. Fidelity Guaranty Company, 309 U.S. 506, 512 (1940); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Oklahoma Tax Commission v. Citizen Band Potowatomi Indian Tribe, 498 U.S. 505, 509 (1991); Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998). As governmental sovereign entities that predate the United States, Indian tribes are immune from suit by third parties without their consent. Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489, 1498-1499 (D.C. Cir. 1997). Tribal sovereign immunity does not derive from an act of Congress, but rather is one of the inherent powers of limited sovereignty which has never been extinguished. Id. at 1498, *citing*, United States v. Wheeler, 435 U.S. 313, 322 (1978).

As noted in Kiowa and its numerous predecessors, including, Bank of Oklahoma v. Muscogee Creek Nation, 972 F.2d 1166, 1169 (10th Cir. 1992), the basic law of sovereign immunity for Indian Tribes is quite clear: suits against Indian Tribes are barred by sovereign immunity absent a clear and unmistakable waiver by the Tribe or congressional abrogation. *See*, State of Florida v. Seminole Tribe of Florida, 181 F.3d 1237, 1241 (11th Cir. 1999). As previously noted, a waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo, 436 U.S. at 58.

Without an express and unequivocal congressional waiver of tribal immunity, it is respectfully submitted that no Court or other tribunal is free to imply one. The overriding importance and stability of the doctrine of tribal sovereign immunity is also found in the well settled canon of construction that any ambiguities or doubtful expressions in statutes and

agreements regarding Indian tribes and their agents are to be **liberally construed and resolved in favor of tribes**. United States v. Nice, 241 U.S. 591, 599 (1916) (doubtful expressions are to be resolved in favor of the [Indians]); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144 (1980) (ambiguities in federal law have been construed generously in order to comport with . . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354 (1941); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 178 (1989); United States v. Truckee - Carson Irrigation District, 649 F.2d 1286, 1298 (9th Cr. 1981); Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976). The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 247 (1985). Because Congress' authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts have developed canons of construction that treaties and other federal action should, when possible, be read as protecting Indian rights and in a manner favorable to Indians. F. Cohen, *Handbook of Federal Indian Law* at 221 (1982 Ed.). Today, the courts continue upon this highly regarded but deferential path. *See*, Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1131 (11th Cir. 1999).

C&L Enterprises

Plaintiff contends that sovereign immunity is unavailable to the Tribe under the authority of C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001) as standing for the proposition that an arbitration clause (whether applicable or not), or a mere reference to arbitration for that matter, constitutes a complete waiver of tribal sovereign immunity. This is simply not the case, particularly since the arbitration provision contained in

Article 5.G, allows for arbitration only in those instances where the parties cannot affirmatively reach an agreement required to be reached under the Lease, such as those agreements referenced in Articles 5.B, 5.C, 14.C, 15, 16, 17 and 20. It does not pertain, in any respect, to the language contained in Article 18 regarding remedies for default which entitle the Tribe to immediately re-enter and re-take the premises and terminate the Lease, conditioned not upon arbitration, but upon notice and an opportunity to cure.

In C&L Enterprises, the Tribe proposed and entered into a standard form construction contract for the installation of a roof on a tribally owned commercial building located off of the reservation. Unlike the Lease before the Court in this case, the standard form construction contract in C&L Enterprises contains a clause requiring that "[a]ll…disputes…arising out of…the Contract…shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association…. The award rendered by the arbitrator…shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Id. at 415. Under the provisions set forth above, a unanimous Court, writing through Justice Ginsburg, held that the arbitration clause pertaining to the resolution of all disputes in the standard form construction contract or an off reservation project constituted a clear and unmistakable waiver of tribal sovereign immunity since: (a) the arbitration clause was intended to govern all disputes under the contract pursuant to the American Arbitration Association Construction Rules, and (b) the Tribe consented to having final judgment entered under Oklahoma law on the arbitral award. The Court held that this clearly meets the standard of a clear, express and unmistakable tribal waiver. The factual scenario in C&L Enterprises is a far cry from the facts in this case.

In the Lease that is subject of this civil action, the arbitration provision is extremely limited since the Secretary may not be legally bound by any arbitral award which may be contrary to or in conflict with the best interests of the Indians or the United States government. Moreover, there is no agreement by the Seminole Tribe to submit any dispute regarding default under Article 18 (or any other dispute) to binding arbitration with consent of the Tribal Council or to allow final judgment to be entered on any arbitral award against the Tribe under any body of law. A further distinction exists with respect to the location of the property. The demised premises in this case is located on tribal trust land in reservation status whereas the land in C&L Enterprises was not on tribal trust land.

In C&L Enterprises, the court observed that the arbitration clause, unlike the one in this case, required the resolution of all contract related disputes between the parties to be resolved by binding arbitration with the ensuing arbitral award to be reduced to final judgment in accordance with applicable law, under a choice of law provision. In the Lease now before the Court, there is no provision for governing arbitration rules or for the arbitral award to be reduced to a final judgment in accordance with any choice of law, nor is there any requirement that disputes pertaining to defaults under the Lease be submitted to arbitration for any purpose.

The plain language of the Lease now before the Court does not contain any clear, express and unmistakable agreement on the part of the Tribe to waive immunity so that disputes arising under Article 18 of the Lease became subject to arbitration. The language of Article 18 does not lend itself to such an interpretation. Tribal records do not contain any ordinance or resolution containing a waiver of tribal sovereign immunity in connection with any claim arising under or relating to the Lease. (Affidavit of Max B. Osceola, Jr.). Moreover, any alleged waiver of tribal sovereign immunity (were one to exist) does not comply with the required procedures for

waiving sovereign immunity under the Tribal Sovereign Immunity Ordinance, C-01-95. [Id. at Exhibit "B".]

Thus, the substantial difference between this case and C&L Enterprises is that the Tribe did not consent to arbitrate any default or other claim arising under the default provisions under the Lease nor is there any language that purports to say that it did. Article 5.G does not apply to Article 18. It is also clear that the Tribe did not consent to the enforcement of any arbitral award in any court or other forum nor did the Tribe unmistakably waive its immunity from suit with regard to the availability of self help as a remedy for any uncured default under the Lease. The position taken by plaintiff asks this Court to disregard the facts, ignore the plain language of the Lease and construe C&L Enterprises as authority for the misguided proposition that any reference to arbitration (whether applicable or not and regardless of context) waives tribal sovereign immunity from suit. C&L Enterprises is distinguishable in every material respect from this case, and plaintiff's position on this issue is unfounded. Lessee has no right to expect arbitration regarding its uncured default or the Tribe's access to self help, particularly after Lessee denied that a default existed, refused, by implication, to cure and then demanded arbitration and filed suit.

Conclusion

Based upon the foregoing, plaintiff's claim must be dismissed for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity.

Respectfully submitted,

s/ Donald A. Orlovsky
Donald A. Orlovsky, Esq. (Fla. Bar No. 223816)
dao4law@aol.com
KAMEN & ORLOVSKY, P.A.
1601 Belvedere Road, Ste. 402-S
West Palm Beach, FL 33406
Telephone: (561) 687-8500
Facsimile: (561) 687-7892
Attorneys for Defendant, Seminole Tribe of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-61048-Dimitrouleas-Rosenbaum

HOLLYWOOD MOBILE ESTATES LIMITED,
a Michigan Limited Partnership,

Plaintiff,

v.

SEMINOLE TRIBE OF FLORIDA and UNITED STATES DEPARTMENT OF THE INTERIOR, DIRK KEMPTHORNE, in his official capacity as SECRETARY OF THE INTERIOR,

Defendants.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic filing.

/s/ Donald A. Orlovsky
_____
DONALD A. ORLOVSKY

SERVICE LIST
Hollywood Mobile Estates v. Seminole Tribe et al.
Case No. 08-CV-61048 – Dimitrouleas – Rosenbaum
United States District Court, Southern District of Florida

JOHN M. MULLIN
Email: jmm@trippscott.com
TRIPP SCOTT, P.A.
110 SE 6 Street, 15th Floor
Fort Lauderdale, Florida 33301
Tel. 954-525-7500
Fax 954-761-8475

BRUCE S. ROGOW
Email: guntherc@rogowlaw.com / brogow@rogowlaw.com
CYNTHIA E. GUNTHER
Email: guntherc@rogowlaw.com
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, Florida 33394
Tel. 954-767-8909
Fax 954-764-1530

MICHAEL P. HAMAWAY
Email: mhamaway@mbhlawyer.com
MOMBACH, BOYLE & HARDIN
Broward Financial Center
500 East Broward Blvd., Suite 1950
Fort Lauderdale, Florida 33394
Tel. 954-467-2200
Fax 954-467-2210

R. ALEXANDER ACOSTA
Email: alex.acosta@usdoj.gov
U.S. ATTORNEY
99 NE 4 Street
Miami, FL 33132
Tel. 305-961-9001
Fax 305-530-7679

MARILYNN KOONCE LINDSEY
Email: Marilynn.Lindsey@usdoj.gov
500 East Broward Blvd., Suite 700
Fort Lauderdale, FL 33194
Ph: 954-660-5770
Fax: 954-356-7180

VICKI MOTT / vicki.mott@sol.doi.gov
JOHN HARRINGTON / john.harrington@sol.doi.gov
Assistant Regional Solicitors
U.S. Department of the Interior
Office of the Regional Solicitor
75 Spring Street, S.W. Suite 304
Atlanta, GA
[Served by Email]