

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

FILED

JUN 28 2010

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

EASTERN SHAWNEE TRIBE OF
OKLAHOMA,

Plaintiff,

VS.

No. CIV-10-459-W

STATE OF OKLAHOMA,

Defendant.

ORDER

This matter comes before the Court on the Motion for Summary Judgment, as supplemented, filed pursuant to Rule 56, F.R.Civ.P., by plaintiff Eastern Shawnee Tribe of Oklahoma ("Tribe"). Defendant State of Oklahoma ("State") has responded.

Summary judgment as requested by the Tribe "should be rendered if . . . [the record] show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(2), F.R.Civ.P. An issue of fact is genuine if the issue could be decided in favor of either party, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), and a fact is material if it might reasonably affect the outcome of the case. E.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

The Tribe commenced this action against the State on May 4, 2010, seeking review, confirmation and enforcement of an Arbitration Award, including declaratory relief granted therein, dated April 5, 2010, In the Matter of the Joint Referral to Binding Arbitration by the Eastern Shawnee Tribe of Oklahoma and the State of Oklahoma of Dispute Under Tribal Gaming Compact. The Tribe has also sought enforcement of an agreement between its

representatives and representatives of the State. Based upon the record, the Court makes its determination with regard to the Tribe's entitlement to the relief it has requested.

The Indian Gaming Regulatory Act ("Act"), 25 U.S.C. § 2701 et seq., provides that a compact may be negotiated between tribal governments and states to govern the conduct of "Class III gaming" on Indian lands. E.g., id. § 2701(d). The Act further provides that "[C]lass III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into . . . by the Indian tribe that is in effect." Id. § 2710(d)(2)(C).

Oklahoma State Question 712, approved by State voters on November 2, 2004, proposed a model gaming compact as an offer to federally-recognized tribes in the State of Oklahoma to engage in "Class III gaming" on tribal lands within these tribes' Indian country under the terms and conditions of the proposed compact. E.g., 3A O.S. § 280; id. § 281 (codification of State Question 712, Model Tribal Gaming Compact).

On November 8, 2004, the Tribe accepted the State's offer and entered into the Eastern Shawnee Tribe of Oklahoma and State of Oklahoma Gaming Compact ("Compact"), which became effective February 9, 2005. Pursuant to this Compact, the Tribe has conducted and continues to conduct "Class III gaming" on tribal lands within its Indian County in conformity with the Compact's terms and conditions.

Part 6 of the Compact addresses and outlines the procedures for prize claim disputes brought by patrons of facilities covered by the Compact, see Part 6(B), as well as the procedures for tort claims for personal injury or property damage arising out of incidents that occur at facilities covered by the Compact. See Part 6(A). It also provides that the Tribe "consents to suit . . . in a court of competent jurisdiction with respect to a tort

claim or prize claim if all the requirements of . . . Part [6] have been met" Part 6(C), and Part 9 of the Compact expressly provides that the "Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdictions."

Part 12 of the Compact, entitled "Dispute Resolution," reads in part that

[i]n the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Company, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, the following procedures may be invoked"

E.g., 3A O.S. § 281, Part 12. The Compact requires the "party asserting noncompliance or seeking an interpretation of th[e] Compact [to] first . . . serve written notice on the other party[.]" Part 12(1), and directs "[r]epresentatives of the [T]ribe and [S]tate . . . [to] meet within thirty (30) days of receipt of [such] notice in an effort to resolve the dispute[.]" Id.

Part 12 also permits "either party . . . [to] refer a dispute arising under th[e] Compact to arbitration . . . , subject to enforcement or pursuant to review as provided by paragraph 3¹ of . . . Part [12] by a federal district court." Part 12(2). Part 12(2) of the Tribe's Compact restricts "[t]he remedies available through arbitration . . . to enforcement of the provisions of th[e] Compact," id., and reflects "[t]he parties[]" consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other," id., as well as the parties' waiver of "immunity with respect thereto." Id.

¹Part 12(3) provides:

Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of . . . Part [12]. The decision of the court shall be subject to appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.

On January 20, 2009, the Oklahoma Supreme Court² asserted state court civil-adjudicatory jurisdiction over a tort lawsuit brought by Loyman Cossey against Cherokee Nation Enterprises, L.L.C., formerly known as Cherokee Nation Enterprises, Inc., and Cherokee Nation Enterprises, Inc., for injuries he had sustained while a customer at the Cherokee Casino in Roland, Oklahoma. Cossey v. Cherokee Nation Enterprises, LLC, 212 P.3d 447 (Okla. 2009). At the time Cossey filed his lawsuit in the District Court for Rogers County, Oklahoma, a compact existed between Cherokee Nation of Oklahoma and the State that was virtually identical to the Compact that is the subject of this action.

The state district court denied the defendants' Motion to Dismiss, and the Oklahoma Supreme Court granted the defendants' petition for certiorari "to determine whether the District Court of Rogers County, Oklahoma, [was] . . . a 'court of competent jurisdiction' as that term [was] . . . used in the 'Tribal Gaming Compact Between the Cherokee Nation and the State of Oklahoma'" Id. at 449-50. The state supreme court, after finding *inter alia* that "[t]he Tribe's sovereign interests . . . [were] not implicated so as to require tribal court jurisdiction . . . ," id. at 460, affirmed the state district court and held that "[t]he Oklahoma district court [was] . . . a 'court of competent jurisdiction' to hear Cossey's tort claim." Id.

In response thereto, Choctaw Nation of Oklahoma on February 4, 2009, provided a Notice of Dispute to the State in the form prescribed by the Choctaw Nation of Oklahoma

²Oklahoma Supreme Court Justice Joseph M. Watt wrote the published opinion, in which Justice James R. Winchester concurred. Vice Chief Justice Steven W. Taylor likewise concurred, but wrote separately. Justice Marian P. Opala joined in Justice Taylor's concurrence.

Justice Tom Colbert concurred specially in a separate written opinion; Justice Yvonne Kauger, joined by Chief Justice James E. Edmondson, concurred in part and dissented in part, and Justices Rudolph Hargrave and John F. Reif, writing separately, dissented.

and State of Oklahoma Gaming Compact, a compact that is also virtually identical to the Compact involved in the case-at-bar, over the proper interpretation of that compact, and such Notice of Dispute triggered the dispute-resolution proceedings outlined in the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact.

On that same date, Choctaw Nation of Oklahoma moved to stay two matters then pending in the Oklahoma Supreme Court until completion of the dispute-resolution proceedings between Choctaw Nation of Oklahoma and the State, which had been triggered by the Notice of Dispute. In those two cases, Dye v. Choctaw Casino of Pocola, Case No. 104,737,³ and Griffith v. Choctaw Casino of Pocola, Case No. 104,887,⁴ the plaintiffs had appealed the dismissal of their state court tort actions against Choctaw Nation of Oklahoma.⁵ By Order dated March 3, 2009, the Oklahoma Supreme Court denied the Motions to Stay and refused to abate the proceedings.

On March 6, 2009, Chickasaw Nation provided a Notice of Dispute to the State in the form prescribed by the Chickasaw Nation and State of Oklahoma Gaming Compact over the proper interpretation of that compact, which, again, is almost identical to the

³In Dye v. Choctaw Casino of Pocola, Case No. 104,737, Danny Dye was struck by a casino shuttle cart driven by a casino employee. He and his wife sued the Choctaw Casino of Pocola, Oklahoma, and Choctaw Nation of Oklahoma in the District Court for LeFlore County, Oklahoma, and claimed that the defendants' negligence had caused their injuries.

⁴In Griffith v. Choctaw Casino of Pocola, Case No. 104,887, the plaintiff stepped into a flowerbed and fell. She sued the Choctaw Casino of Pocola, Oklahoma, and Choctaw Nation of Oklahoma in the District Court for LeFlore County, Oklahoma, and claimed that the defendants' negligence had directly caused her injuries.

⁵The state district judge in both Griffith and Dye "concluded that tribal courts and federal courts ha[d] jurisdiction over Indian tribes but state courts [did] . . . not and dismissed the action[s]." Griffith v. Choctaw Casino of Pocola, 230 P.3d 488, 490 (Okla. 2009)(per curiam); e.g., Dye v. Choctaw Casino of Pocola, 230 P.3d 507, 509 (Okla. 2009)(per curiam).

instant Compact, and such Notice of Dispute triggered the dispute-resolution proceedings outlined in the Chickasaw Nation and State of Oklahoma Gaming Compact.

On June 11, 2009, the Oklahoma Supreme Court denied the Petition for Rehearing filed by the Cherokee Nation of Oklahoma in Cossey and issued its mandate, directing the state district court to proceed on the merits of Cossey's tort action.

On June 30, 2009, the Oklahoma Supreme Court issued five opinions⁶ in Griffith v. Choctaw Casino of Pocola, 230 P.3d 488 (Okla. 2009)(per curiam), and three opinions⁷ in Dye v. Choctaw Casino of Pocola, 230 P.3d 507 (Okla. 2009)(per curiam). The state supreme court held in both cases "that Oklahoma district courts are 'courts of competent jurisdiction' as that phrase is used in Oklahoma's statutory model tribal gaming compact and therefore the state courts may exercise jurisdiction over . . . tort claims against the Choctaw Nation and its casino in Pocola, Oklahoma." 230 P.2d at 491; e.g., id. at 509. The state supreme court further wrote that "[n]othing in [its] . . . opinion[s] should be taken as a holding that a tribal court is not a 'court of competent jurisdiction' or should be taken as eliminating the tribal court as a forum available to a tort claimant if the claimant chooses to file suit in tribal court." Id. at 498; e.g., id. at 510 (holding that case does not change, diminish or expand jurisdiction of tribal courts or take away right of tort claimant to select forum—federal, state or tribal—in which to file tort action).

⁶Vice Chief Justice Taylor, by separate writing, Justice Opala, by separate writing, and Justices Watt, Winchester and Colbert concurred. Justice Kauger, by separate writing, concurred in part and dissented in part. Justice Hargrave dissented, and Justice Reif, by separate writing in which Chief Justice Edmondson joined, likewise dissented.

⁷Vice Chief Justice Taylor and Justices Opala, Watt, Winchester and Colbert concurred. Justice Kauger in a separate writing concurred in part and dissented in part. Justice Hargrave dissented, and Justice Reif, by separate writing, in which Chief Justice Edmondson joined, likewise dissented.

On July 20, 2009, the Chickasaw Nation and the Choctaw Nation of Oklahoma (collectively "Nations") and the State entered into a Joint Referral to Binding Arbitration Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact and agreed to

submit to binding arbitral interpretation in light of controlling extrinsic law the issue of whether, under the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact, jurisdiction over all Compact based tort claim and/or prize claim lawsuits lies exclusively in Choctaw Nation or Chickasaw Nation forums.

On August 25, 2009, an Arbitration Award was issued, and the arbitrator found therein that "Part 9 of the . . . Nations' Class III gaming Compacts preserves, adopts, and incorporates by reference into those Compacts the controlling law establishing the limits of the Indian-country civil-adjudicatory jurisdiction of both tribal courts and Oklahoma's state courts," and "[b]ecause Part 9 . . . leaves Oklahoma courts' civil-adjudicatory jurisdiction precisely where it was before the Compacts (i.e., absent), no Oklahoma state court is a 'court of competent jurisdiction' within the meaning of Part 6(C) of th[e] [Nations'] Compacts." In the Matter of the Joint Referral to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the State of Oklahoma of Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact.

Immediately thereafter, Choctaw Nation of Oklahoma filed a Motion to Honor the Arbitration Award with the Oklahoma Supreme Court in Dye and Griffith. And, on September 2, 2009, the state court directed the plaintiffs in Dye and Griffith to respond not

only to the Petitions for Rehearing filed by the Choctaw Nation of Oklahoma on July 20, 2009, but also to the Motions to Honor the Arbitration Award filed by the Choctaw Nation of Oklahoma. On April 12, 2010, the Oklahoma Supreme Court denied both the Petitions for Rehearing and the Motions to Honor the Arbitration Award.⁸

Prior to those proceedings, David Crocker, on August 21, 2009, brought a tort action against the Tribe and Border Town Casino & Bingo in the District Court for Ottawa County, Oklahoma.⁹ Crocker v. Border Town Casino & Bingo, No. CJ-09-485. On January 8, 2010, the state district court denied the Tribe's request for dismissal, but agreed to certify the matter for interlocutory appeal to the Oklahoma Supreme Court.

In light of the state court's actions in Crocker, the Tribe delivered a Notice of Dispute to the State in the form prescribed by the parties' Compact over the proper interpretation of its terms and conditions, and such Notice of Dispute triggered the dispute-resolution proceedings outlined in the Eastern Shawnee Tribe of Oklahoma and State of Oklahoma Gaming Compact.

As required by the Compact, representatives of the parties met in an attempt to resolve the jurisdictional disputes arising under the Compact. That meeting resulted in an agreement that was memorialized in "Resolution of Dispute Arising Under the State-Tribal Gaming Compact Between the State of Oklahoma and the Eastern Shawnee of Tribe of Oklahoma ('Resolution of Dispute')." In the Resolution of Dispute, which was executed by

⁸Chief Justice Edmondson, Vice Chief Justice Taylor and Justices Opala, Watt, Winchester and Colbert concurred. Justices Hargrave, Kauger and Reif dissented.

⁹The Tribe and Border Town Bingo & Casino, among others, had also been sued by another tort claimant, Donna Harrington, in the District Court for Ottawa County, Oklahoma. Harrington v. Eastern Shawnee Tribe of Oklahoma, No. CJ-08-313. That suit was commenced on June 5, 2008, and was settled on May 18, 2009.

Glenna Wallace, Chief of the Eastern Shawnee Tribe of Oklahoma, on January 27, 2010, and by Brad Henry, Governor of the State of Oklahoma, on February 8, 2010, the parties agreed that "[a]n Oklahoma state court is not a 'court of competent jurisdiction' within the meaning of that term in Part 6(C) of the Compact" and further agreed that "[t]he Tribe has not consented to the exercise by the State of jurisdiction over claims arising under Part 6 of the Compact, and the State lacks such jurisdiction."

The Tribe also invoked the alternate dispute-resolution method provided in the Compact: arbitration. On March 1, 2010, the Tribe and the State entered into a Joint Referral to Binding Arbitration Disputes Under and/or Arising From the Eastern Shawnee Tribe of Oklahoma and State of Oklahoma Gaming Compact and agreed to

submit to binding arbitral interpretation in light of controlling extrinsic law the issue of whether, under the Eastern Shawnee Tribe of Oklahoma and State of Oklahoma Gaming Compact, jurisdiction over all compact-based tort claim and/or prize claim lawsuits lies exclusively in Eastern Shawnee Tribe of Oklahoma forums.

During the arbitration proceedings, the Tribe "proffer[ed] three independent grounds for holding that Oklahoma courts may not involuntarily assert jurisdiction over claims arising under Part 6 of the Compact," only two of which are pertinent to the case-at-bar. The first ground was based upon the Resolution of Dispute entered into by the parties' representatives pursuant to Part 12(1); the third ground was based on Parts 12(2) and 12(3) of the Compact and controlling federal and state law.

The arbitrator declined to rule on the first ground, and instead relied on the third ground advanced by the Tribe. In so doing, the arbitrator, interpreting the parties' Compact and applying federal and state law, found that "no Oklahoma state court [was] . . . a 'court of competent jurisdiction' within the meaning of Part 6(C) of the Compact."

The Tribe has argued before this Court that it is entitled to certification and enforcement of the Arbitration Award. The State has not disputed any of the facts outlined by the Tribe in its Motion for Summary Judgment, as supplemented, and it has not asserted any affirmative defenses or arguments that would preclude certification and/or enforcement of the Arbitration Award. The State has instead stated in its response that if Part 12 of the Compact, which authorizes the submission of disputes over the terms and conditions of the Compact to arbitration, is valid, then the Arbitration Award should be deemed valid and confirmed. The Court agrees.

Based upon the record, the Court finds that there are no genuine issues of material fact that preclude summary judgment in the Tribe's favor and that Parts (2) and (3) of the dispute-resolution clauses of the parties' Compact are valid, thereby making arbitration the proper forum to interpret the phrase "court of competent jurisdiction" as used in the Compact. Accordingly, the Tribe is entitled to judgment as a matter of law to the extent that the Court hereby certifies and confirms the Arbitration Award dated April 5, 2010.¹⁰

Accordingly, the Court

(1) GRANTS the Tribe's Motion for Summary Judgment [Doc. 13] filed on May 12, 2010, and supplemented on May 17, 2010, see Doc. 14;


(2) in so doing, CERTIFIES and CONFIRMS the Arbitration Award dated April 5, 2010, In the Matter of the Joint Referral to Binding Arbitration by the Eastern Shawnee

¹⁰In light of the Court's findings as to Parts 12(2) and 12(3), the Court need not consider and has not considered the Tribe's second ground for relief—that the Resolution of Dispute provides an independent basis for resolving the instant controversy and requires the same result as that reached by the arbitrator.

Tribe of Oklahoma and the State of Oklahoma of Dispute Arising under Tribal Gaming Compact; and

(3) DIRECTS the parties to confer and submit within ten (10) days a judgment that conforms with Rule 58, F.R.Civ.P.

ENTERED this 28th day of June, 2010.


LEE R. WEST
UNITED STATES DISTRICT JUDGE

Pat George

From: okwd_ecf_notice@okwd.uscourts.gov

Sent: Monday, June 28, 2010 11:28 AM

To: okwdecf@okwd.uscourts.gov

Subject: Activity in Case 5:10-cv-00459-W Eastern Shawnee Tribe of Oklahoma v. Oklahoma State of Order on Motion for Summary Judgment

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

Western District of Oklahoma[LIVE]

Notice of Electronic Filing

The following transaction was entered on 6/28/2010 at 11:28 AM CDT and filed on 6/28/2010

Case Name: Eastern Shawnee Tribe of Oklahoma v. Oklahoma State of

Case Number: 5:10-cv-00459-W

Filer:

Document Number: 17

Docket Text:

ORDER Granting [13] the Tribe's Motion for Summary Judgment and in so doing, the Court Certifies and Confirms the Arbitration Award and Directs the parties to submit a judgment within 10 days. Signed by Honorable Lee R. West on 6/28/2010. (brs,)

5:10-cv-00459-W Notice has been electronically mailed to:

Harvey D Ellis, Jr ellish@crowedunlevy.com, ecf@crowedunlevy.com, norrise@crowedunlevy.com

D Michael McBride, III michael.mcbride@crowedunlevy.com, ecft@crowedunlevy.com, pat.george@crowedunlevy.com

Stephen L Cortes stephen.cortes@gov.ok.gov

Sarah Brune Edwards sarah.edwards@gov.ok.gov

Susan E Huntsman susan.huntsman@crowedunlevy.com, angie.kuske@crowedunlevy.com, ecf@crowedunlevy.com

6/28/2010

5:10-cv-00459-W Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1041971380 [Date=6/28/2010] [FileNumber=1762650-0
] [874bd2ef1e32c45defb0b27f8c78a523ed69c968ec1b38139faf73358a153a9a584
cec42d5361e6b45f079694c8ece039a86e8b010049624faf8ff8880ea412a]]