STATE OF MICHIGAN

IN THE COURT OF APPEALS

BATES ASSOCIATES, LLC, a
Michigan limited liability company,

Plaintiff/Appellee,

vs.

132 ASSOCIATES, LLC, a Michigan
limited liability company, SAULT STE.
MARIE TRIBE OF CHIPPEWA INDIANS,

Defendants/Appellants.

Docket No. 288826

Wayne County Circuit Court
Case No. 08-113819-CK
Hon. John H. Gillis, Jr.

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APPELLANT'S REPLY BRIEF

Oral Argument Requested

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INTRODUCTION

Appellee, Bates Associates, LLC ("Bates"), in its effort to escape the pool of general creditors of Greektown Casino, LLC ("Greektown"), has endeavored to characterize, with no supporting record evidence, a fairly traditional commercial relationship into some sort of tortious and/or fraudulent transaction. Stripped to its essence, this dispute concerns the purchase of a parking garage by a Michigan limited liability company, 132 Associates, LLC ("132 Associates"), for the purpose of providing additional parking at Greektown until such time Greektown consolidated all of its parking needs and requirements into a single structure.

The purchase of the garage by 132 Associates could not be consummated without 132 Associates obtaining a loan for the purchase price. And, the loan to 132 Associates could not be completed in the absence of a loan guaranty by an entity that Bank One of Michigan felt was sufficiently solvent to stand behind 132 Associates' promise to repay. Thus, the Tribe, as an entity, had a limited role in the transactions that led up to this lawsuit – to guaranty a loan from Bank One of Michigan to 132 Associates.

As explained in its opening brief, the Tribe has adopted an ordinance, Tribal Code Chapter 44, governing the manner in which the Tribe may waive its sovereign immunity from suit. That ordinance, which has been codified and published, sets out a deliberate and precise process for waiving the Tribe's immunity. This ordinance was implemented in accordance with a long line of decisions from the Supreme Court and numerous lower federal courts that waivers of tribal sovereign immunity must be express and unequivocal and may not be implied. See *Appellant's Brief at p 16.* In this case, that ordinance was carefully followed and the Tribe waived its immunity solely in favor of Bank One of Michigan, and then only for the purpose of

guarantying the repayment of the $6 plus million that 132 Associates borrowed from the Bank to purchase Bates' garage. The Tribe's resolution is clear, express and unambiguous, but, unfortunately, does not benefit Bates. The waiver runs only in favor of Bank One and to no other person or entity.

The underlying litigation arose because of poorly drawn language contained in three other documents, two of which are signed (but not by a duly authorized tribal official), and one that is not. To an uninformed reader, the language in these documents may appear to be a waiver of tribal sovereign immunity. However, they are not valid or lawful for the principal reason that there is no tribal resolution, in accordance with the requirements of tribal law and federal law, to support the purported waiver.[1] In addition, those signing two of the three documents were not authorized to bind the Tribe. One person was in charge of real estate development for the Tribe, while the other was the Tribe's chief financial officer. Although those individuals could have been delegated authority by the Tribe's Board of Directors, neither a resolution authorizing and delegating such authority, nor existing tribal law authorizing them to bind the Tribe, exists.

ARGUMENT

A. BATES' ALLEGATIONS OF ILL INTENT AND DECEIT BY THE TRIBE ARE IMMATERIAL TO THE DETERMINATION OF WHETHER THE TRIBE EFFECTIVELY WAIVED ITS SOVEREIGN IMMUNITY

The issue before the Court - whether the Tribe waived its immunity according to tribal and federal law – is entirely legal in nature. Thus, the facts associated with how and why the

[1] The Tribe's ordinance governing waivers merely embodies the principles articulated in the many cases cited in our opening brief. That is, waivers must be express and explicit, and may not be implied. They may be limited in that they can be tied to particular transactions. See *Sault Ste. Marie Tribe of Chippewa Indians, Tribal Code, Ch. 44, Waiver of Tribal Immunities and Jurisdiction in Commercial Transactions*, available at www.saulttribe.net.

language found its way into the agreements at issue is irrelevant in determining the legal issue at hand. Whether mistakes were made in drafting and executing the written documents is immaterial to their interpretation. Furthermore, any ill intent or deceit on the Tribe's part, as alleged *ad nauseum* by Bates, is neither material nor helpful. The Tribe maintains that there was never any intent to trick or deceive Bates' principals. Even if the Tribe had been deceitful, however, neither its intent, inadvertence, or ineptitude govern the waiver of sovereign immunity.

Bates' brief demonstrates that it sees this case very differently. For example, Bates asserts that "[t]he Tribe treats sovereign immunity as an ultimate 'get out of jail card' for contracts that no longer suit its fancy." *Appellees' Brief on Appeal*, p 27. Bates asserts that the issue here is a matter of "fundamental decency," *Appellees' Brief on Appeal*, p 1, and that the Tribe "tricked . . . [Bates] by not passing a resolution waiving sovereign immunity." Bates even accuses the Tribe of deception regarding the initiation of Greektown's bankruptcy proceedings. See *id.* at p 8. Of course, whenever the bankruptcy proceedings were initiated, Bates would be affected if its claimed debt was unpaid at the time. But, more importantly, all of these accusations about the Tribe's intent, or lack thereof, are wholly immaterial to the issue before the Court, see *supra*.

Bates' approach to the garage transactions and this litigation is not surprising, especially when one reviews the outstanding precedents in this area of the law. Faced with the venerable, impenetrable barriers and judicial protection of tribes in the context of sovereign immunity, Bates falls back on arguments that might assist Bates if the alleged debtor were a corporation organized under State law. Thus, Bates contends it was tricked by an Indian tribe playing "gotcha," and/or that the Tribe was bound under the principle of apparent authority. These

principles, however, have no application in the context of tribal sovereign immunity. Bates would rather blame anyone but itself and even contends the Tribe owed it an obligation to protect Bates' interests and do all things necessary to waive the Tribe's immunity in Bates favor.

B. APPELLEE'S INTRODUCTION AND COUNTER STATEMENT OF FACTS IS MISLEADING AND INACCURATE.

Bates' Introduction and Counter Statement of Facts should be carefully read in order to avoid being misled. Most importantly, Bates subtly attempts to conflate the three parties involved in the garage transaction into one entity – the Tribe.

The organizational structure of Greektown is that of a limited liability company under Michigan law. The Tribe is the majority owner of Greektown, and the owner of the single member LLC, 132 Associates, which is also organized under Michigan law. Thus, although ownership interest is in the Tribe, Greektown and 132 Associates are separate and distinct legal entities under Michigan law, which do not enjoy sovereign immunity. The Tribe is not a creature of State law. Rather, it is a governmental entity, recognized by the United States as an Indian tribe qualified to organize under federal law, in this case the Indian Reorganization Act of 1934, 25 USC § 476. As a governmental entity, much like the State of Michigan or the United States, it enjoys sovereign immunity from suit.

Despite the clear and separate distinction of Greektown and 132 Associates from the Tribe, Bates blurs the lines between the entities. For example, Bates states that "the Tribe agreed to make significant repairs and upgrades to the garage, and the Tribe also agreed to sell the garage back to Bates in 2007. . ." *Appellee's Br.* p 2. The Tribe agreed to no such thing. 132 Associates, LLC, purchased the garage for over $6 million and agreed to sell it back to Bates for

$1.00 seven years later. The Tribe's limited role in this transaction was to act as a guarantor on the loan in the amount of the purchase price from Bank One to 132 Associates. Similarly, Bates states that "the Tribe even refused to deliver title to the Garage to Bates." *Id.* at 6. The Tribe never agreed to deliver title to the garage to Bates. 132 Associates agreed to, and in fact, did so. The transfer of the garage back to Bates for $1.00 is not an issue in this appeal, but it is part of Bates effort to paint the Tribe as a bad actor for asserting its sovereign immunity.

The Tribe urges the Court not be misled or confused by the hyperbole and mischaracterization of the transactions involving Bates, and the Tribe's limited role in the transaction. The nature of the dispute before the Court has nothing whatsoever to do with any parties' motives, business acumen, or bad faith. The legal issue to be resolved is whether, under the circumstances presented here, the Tribe waived its sovereign immunity in favor of Bates.

C. BATES' RELIANCE ON *SMITH v HOPLAND BAND OF POMO INDIANS* IS MISPLACED.

Bates argues that the Tribe is wrong regarding whether a duly adopted resolution waiving the Tribe's immunity, in accordance with Tribal Code Chapter 44, is required to actually effect a valid waiver of tribal sovereign immunity.[2] It relies solely on *Smith v Hopland Band of Pomo Indians,* 95 Cal App 4th 1, 115 Cal Rptr 2d 455 (Cal App 2002) to support its argument. However, the facts of that case are materially different from the facts presented here.

In *Smith,* the dispute involved an architect's standard form contract containing an arbitration clause. The Supreme Court, in *C & L Enterprises v Potawatomi Indian Tribe,* 532 US 411 (2001), had recently construed this type of arbitration clause as a sufficient explicit waiver of

[2] Bates characterization of the Tribal Code as an "internal law," serves no apparent purpose other than to disparage. The Tribe shall refrain from referring to Michigan laws as "internal."

tribal sovereign immunity. Thus, there was no issue regarding whether the waiver language was sufficiently explicit to meet the high Court's standards required to effectuate a waiver. Rather, the issue there was whether the tribe had in fact approved the contract for architectural services. The California tribe argued that it had not, because its ordinance governing such waivers, which was similar to the Sault Tribe's ordinance, had not been followed. But the facts also showed that the California tribe had specifically authorized its Chairman to sign the contract and that the Tribal Council had specifically approved the contract containing the arbitration language. The California appeals court said "the terms of the sovereign immunity ordinance may have been satisfied because . . . the tribal Council did pass a resolution approving the contract." 115 Cal Rptr 2d at 461. That is not the case here.

It is important to consider carefully the Sault Tribe's Board of Directors' resolution governing this transaction.[3] Resolution No. 2000-148 was carefully crafted to comply with Chapter 44 of the Tribal Code. See *Appellant's Brief, Exh. 1.* Pursuant to the Resolution, the Tribe's Board of Directors expressly authorized its Chairman to acquire 132 Associates by assignment, and to sign the Guaranty Agreement in favor of Bank One. *Id.* at § 2.1. With respect to waiver of sovereign immunity and consent to jurisdiction, the Board of Directors waived the Tribe's immunity "*solely* to the Bank One of Michigan," and "only to a suit to enforce the obligations of the Tribe under the Guaranty Agreement." *Id.* at §§ 3.1(ii) and (iii)(emphasis added).

In *Smith,* the California Court of Appeals said:

> [I]t is clear that the purpose of the Tribal sovereign immunity ordinance is to ensure that *no waiver of sovereign immunity is*

[3] The Sault Tribe's governing body is called its Board of Directors, pursuant to its Constitution and Bylaws. Most tribes refer to their governing body as the Tribal Council.

> *made by a single Tribal officer*, and that instead such waivers be made only by formal action of its governing body, the Tribal Council. *That purpose is served here because, the Tribal Council, with full knowledge of its terms, approved the contract by resolution.*

Smith v Hopland Band of Pomo Indians, 115 Cal Rptr at 462 (emphasis added). The record is clear here that, unlike in *Smith*, the Sault Tribe's Board of Directors did not see, let alone approve, the subsequent agreements relating to the option in favor of Bates to reacquire the garage, the agreement of sale in the event Bates exercised the option, and the settlement agreement entered into 7 plus years later. Resolution 2000-148 did not authorize the Chairman to sign, nor did the Chairman sign, any of these agreements.[4] The Chairman of the Sault Tribe was only authorized to acquire by assignment the single member LLC, 132 Associates, and then to sign a Guaranty Agreement guarantying the loan from Bank One in order for 132 Associates to acquire the garage. Not only was there no waiver in favor of any other person or entity, there was clearly no approval of any contract other than the Guaranty Agreement in favor of Bank One.

Bates' reliance on the language in the Settlement Agreement that Michigan law shall govern its interpretation seems particularly unavailing. First, Michigan law does not govern waivers of tribal sovereign immunity. That subject is governed by federal law. Second, to the extent Michigan courts get involved with this subject, they have steadfastly applied and accepted the doctrine that Indian tribes are immune from suit and that waivers of immunity must be explicit and construed according to the strict language of the waiver. *See Sungold Gaming USA, Inc. v. United Nation of Chippewa, Ottawa & Pottawatomi Indians, Inc.*, attached to appellants'

[4] The Resolution even recites that 132 Associates "does not and will not have legal authority to assert the sovereign immunity from suit of the Tribe. . . ." Resolution 200-148, § 5.1. 132 Associates is not the Tribe. It is a separate entity organized under State law.

opening brief at tab 2, p. 3 ("we similarly conclude that the instant choice of law provision did not reflect defendants' intent to waive their sovereign immunity."). *Joseph K Lumsden Bahweting Public School Academy v Sault Ste Marie Tribe of Chippewa Indians,* another unpublished opinion of the Michigan Court of Appeals, also attached to appellants' opening brief at tab 2, deals with the same Tribe which is party to these proceedings and with the Tribe's ordinance governing waivers, Chapter 44 of the Sault Tribe's Tribal Code. There, the Court refused to expand the Tribe's waiver beyond the limited waiver contained in the Tribe's resolution ("Here, the amended lease provides a limited waiver for certain suits in tribal court. The documentary evidence presented by the parties fails to show an unequivocal and express waiver beyond the boundaries of the limited waiver [found in the Tribe's resolution adopted pursuant to Chapter 44 of the Tribal Code]"). *Id.* at tab 2, p. 3. Thus, Bates assertion that "the relevant authority stands in direct contrast to the Tribe's contention that its clear waiver is negated by its alleged failure to pass a resolution," is flatly contradicted by the facts and holding in *Bahweting Public School Academy,* where the Michigan Court of Appeals reached the exact opposite conclusion.

CONCLUSION

Bates' entire argument, other than asserting that cases directly on point are mere *dicta*, such as *Sanderlin v Seminole Tribe of Florida*, 243 F3d 1282 (CA 11, 2001), and *Joseph K Lumsden Bahweting Public School Academy v Sault Ste Marie Tribe of Chippewa Indians*, or its contentions about apparent authority, which fly in the face of well settled Federal law, relies on a faulty analytical approach to addressing this dispute. Bates would have the Court look at the language in three agreements which purport to waive the Tribe's immunity from suit in

connection with its claim for compensation under the third agreement, the Confidential Settlement Agreement, entered into in January, 2008. However, looking at the language of purported waiver in those agreements will lead the Court in the wrong direction.

The proper analysis is to look to the organic document required for a lawful and effective waiver of immunity in accordance with tribal and federal law.[5] That document is Tribal Resolution No. 2000-148. Any and all waivers must emanate from that document. Similarly, any limitations in the Tribe's waiver contained in that document cannot be overcome by language in later contracts, no matter how forthright or direct they might appear. The bottom line is that the language in the subsequent agreements is not in compliance with tribal or federal law regarding how waivers are to be effectuated. Furthermore, there is no basis in the record to conclude that the Tribe was either aware of the language in the contractual documents or ratified them in any manner or that the Tribe had in any way authorized the Chairman or any other tribal employee to sign those documents on behalf of the Tribe. What that means is that Bates has its remedy against 132 Associates and Greektown, but not the Tribe.

The Tribe is neither proud nor smug about the way these dealings unfolded. But, there

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[5] The Tribe's ordinances and laws are publicly available, and similar to the laws of the State of Michigan, the Federal Government, and other states. For example, Michigan's Court of Claims Act, MCL § 600.6401 *et seq.*, stands as the State's controlling legislative expression of waiver of the State's sovereign immunity from suit against it and its agencies, and over their submission to jurisdiction of a court. *Greenfield Const Co, Inc v Michigan Dep't of State Highways*, 402 Mich 172, 195; 261 NW2d 718 (1978). The Tribe's analogue is Chapter 44 of the Tribal Code. Both of these legislative enactments set forth procedures for obtaining a proper waiver of immunity, and the procedure for pursuing an action in court when a breach is perceived. In both cases, MCL § 600.1401 *et seq.*, and Chapter 44 of the Tribal Code, when the proper processes are not adhered to with rigid exactness, the courts will uniformly hold that an action will not be permitted to proceed. See *Manion v State*, 303 Mich 1, 19; 5 NW2d 527 (1942) (Any relinquishment of state's sovereign immunity must be strictly interpreted); see also, 22 Mich Civ Jur § 50, Waiver of Immunity.

are no allegations regarding fraud, and the Tribe certainly had no design to trick or deceive. Bates points out that the Supreme Court has recently disparaged the doctrine of tribal sovereign immunity, which is evident in *Kiowa Tribe of Oklahoma v Mfg Techs, Inc,* 523 US 751 (1998). Nonetheless, the doctrine continues to be the law, and is scrupulously followed, notwithstanding its criticism. As the Tribe has repeatedly reiterated, the issue here is legal in nature. The standard applied to effectuate a waiver is unambiguous. Every case presents slightly different facts, of course, but the results are almost always the same. No matter how much Bates complains, and no matter how much it attempts to demonstrate that the cases upholding tribal sovereign immunity somehow do not apply to its particular situations, the courts have continued to apply and stand behind the doctrine. That should be the result here, as well.

For these reasons, the Tribe respectfully requests the Court reverse the Circuit Court's conclusion that there has been a lawful waiver of the Tribe's immunity from suit in connection with Bates' claims against the Tribe under the Confidential Settlement Agreement. The Tribe has not waived its sovereign immunity, except in favor of Bank One and then only in connection with the Guaranty Agreement required for 132 Associates to obtain the loan necessary to purchase the garage. There is and has never been a valid waiver of the Tribe's sovereign immunity in favor of Bates.

Dated: July 17, 2009

Respectfully submitted,

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