

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MERIT MANAGEMENT GROUP, a Nevada)	
limited partnership,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:08-cv-825
)	Hon. Elaine E. Bucklo
PONCA TRIBE OF INDIANS OF OKLAHOMA,)	
a federally recognized Indian tribe, d/b/a Blue)	
Star Gaming and Casino,)	
)	
Defendant.)	

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO VACATE
JUDGMENT PURSUANT TO FRCP 60(b)(4)**

NOW COMES the Plaintiff, Merit Management Group, a Nevada limited partnership, by and through its attorneys, GARY A. GRASSO and GRASSO BASS, P.C., for its Response in Opposition to Defendant's Motion to Vacate Judgment Pursuant to FRCP 60(b)(4), and in support thereof states:

Introduction

Defendant does not contest the enforceability of the Promissory Note that is the subject of this litigation. Defendant entered into a Bridge Loan Agreement with Plaintiff, and borrowed the principal amount of \$122,500 from Plaintiff. After repeated attempts to resolve this matter outside litigation, Plaintiff was forced to file an action to collect the amounts due under the Bridge Loan Agreement. Notwithstanding the fact that Defendant was not only properly served in this case, but also that it was given notice of this Court's entry of default and default judgment entered against it, Defendant utterly ignored this matter until two years later when supplemental enforcement proceedings were initiated by Plaintiff to collect on the judgment.

Defendant's sole argument (that could possibly warrant vacating this Court's judgment) that forms the basis of its Motion is that this Court lacked jurisdiction over Defendant. This argument lacks legal merit. This Court had jurisdiction over the subject matter and parties to this action. Defendant fails to cite any authority that warrants vacating this Court's default judgment. Accordingly, Defendant's Motion to Vacate should properly be denied.

Nature and Procedure of the Case

Merit is a gaming management company based in a Chicago suburb. It provided a \$122,500 bridge loan to the Ponca Tribe of Indians of Oklahoma at 8%. The Tribe and Merit executed a Bridge Note dated January 7, 2005 which referenced an Exclusivity Agreement between them dated January 4, 2004, copies of which are attached hereto and made a part hereof as Exhibit "A". The Note provides, *inter alia*, that it may be enforced against the Tribe's Existing Gaming Enterprise as well as the New Gaming Enterprise if the Tribe did not enter into a management agreement ("Definitive Documents") with Merit. (The Tribe did not enter in Definitive Documents with Merit).

Upon information and belief the Tribe continues to operate at least one casino known as Blue Star Gaming and Casino that recently received a name change and is now known as Two Rivers.

The Tribe never repaid any of the money it borrowed or the interest it owed. Merit made demands for payment including a June 11, 2007 letter to the tribal chairman and council members, a copy of which is attached hereto and made a part hereof as Exhibit "B". The Tribe ignored Merit.

In February 2008, Merit filed suit against the Tribe in this district for non-payment of the Note. Merit asked the Tribe to waive service; it never responded. Merit retained an Oklahoma process server and effected service on the Tribe on June 30, 2008.

The Tribe never appeared or answered the complaint.

Merit filed a motion to default the Tribe and gave it notice. The Tribe never appeared or responded. On August 1, 2008, this Court defaulted the Tribe and set the case for prove-up.

Merit gave the Tribe notice of the default and the prove-up date. Merit also notified the Tribe when the court changed the time of the prove-up hearing.

The Tribe neither appeared nor answered.

On September 5, 2008, this Court entered judgment on the default in the amount of \$158,896.10 plus legal fees and costs of \$7,690.93. The Court entered judgment against the Ponca Tribe of Indians of Oklahoma, a federally recognizes tribe, d/b/a Blue Star Gaming and Casino.

Merit sent the judgment order to the Tribe. It never responded.

On February 2, 2010, Merit began this enforcement action and filed a certified copy of the judgment with supporting documents as required by rule.

Merit, through local counsel, notified the Tribe of the filing and Merit's intent to enforce the judgment. The Tribe did not respond to Merit or take any action in this Court until now.

Merit respectfully submits that it would not be fair to Merit or the federal court system's integrity to grant this Motion because of the Tribe's abuse of the system and disregard for its fundamental obligations of contract and law.

The Tribe Owes the Money and Interest to Merit

The Tribe does not dispute that it owes the money and interest to Merit. Nothing in its Motion suggests otherwise and the record contains the Note along with unrefuted allegations from Merit of the contract, demand, and non-payment over many years.

The Tribe wishes to delay the enforcement of this claim on grounds of jurisdiction and venue – not on the validity of Merit’s claim under the Note. Respectfully, the time within which to make such objections has passed. Moreover, the Tribe incorrectly argues that this Court lacked jurisdiction and that venue was improper. This argument is contrary to the governing contractual documents as well as the established law relating to jurisdiction over native tribes.

Subject Matter Jurisdiction Existed in the Northern District

The Tribe argues that it provided a “limited” waiver of sovereign immunity in connection with its execution of the governing documents relating to this claim. Respectfully, the Tribe incorrectly terms its waiver as “limited”. Federal courts have held that a waiver of sovereign immunity must be explicit and unequivocal. In the instant case, the Tribe waived *any* applicable sovereign immunity in the executed Exclusivity Agreement. The relevant provisions therein are:

Section 5(a) (emphasis added): “**...with respect to all Claims, the Tribe hereby irrevocably waives its sovereign immunity and the sovereign immunity of all other Tribal Parties, and all defenses based thereon, to permit as provided in this Section: (i) the adjudication or enforcement of Claims in any federal or state court of competent jurisdiction sitting in the State of Oklahoma** and all courts to which appeals therefrom may be taken (each, a “Non-Tribal Court”), (ii) the arbitration of Claims as provided in Section 5(e), and (iii) judicial proceedings before any Non-Tribal Court or before any court or other forum of the Tribe of competent jurisdiction (each, a “Tribal Court”) to determine the arbitrability of any Claim, compel arbitration of such Claim pursuant to this Section 5, or to enforce, modify or vacate any arbitration award arising from such arbitration. **The tribe hereby irrevocably consents to the jurisdiction and venue of all Non-Tribal Courts and Tribal Courts.**”

Section 5(c): “The Tribe hereby expressly and irrevocably waives the application of the doctrines of tribal remedies, abstention, or comity and all other rights of any Tribal Party that might otherwise require that a Claim be heard in a Tribal Court.”

Section 5(f): “The Tribe and all present or future Tribal Courts shall give full faith and credit to any award, order or decree rendered in any arbitration or by any Non-Tribal Court in accordance with this Section...”

Contrary to Defendant's selective citation of the relevant provisions of the Agreement, the Exclusivity Agreement *does not confine* jurisdiction solely to Courts within Oklahoma. Even if it did, it could be argued that since we are dealing with an Indian Tribe that does not technically “reside” within any particular state, the jurisdiction of any federal district court over an Indian Tribe that waives its sovereign immunity is the same.

In other words, just as two parties cannot contractually confer jurisdiction to a federal court, there is no case that holds that an Indian Tribe can contractually limit the jurisdiction of all federal courts (in favor of one particular federal district) once sovereign immunity has been waived. If it could, there would at least be the minimum requirement that the contractual provision contain a *mandatory* forum selection provision rather than a permissive one.

The adjudication and enforcement of a contract and debt in excess of \$75,000 are well within the subject matter jurisdiction of the federal court. Merit is a citizen of Illinois. The Tribe is a quasi-sovereign nation. Thus, the Northern District of Illinois had subject matter jurisdiction of this case.

Finally, by apparently arguing that Merit should have filed its case in Oklahoma federal court, the Tribe implicitly concedes that federal courts have subject matter jurisdiction of this case.

Venue was Proper or Waived

As noted, the Tribe appears to seek reversal of this Court's judgment by arguing the venue should have been in Oklahoma. Such an argument lacks merit because improper venue cannot be the basis for this Court vacating its judgment. The judgment should be vacated only

where it can be shown that the Court lacked jurisdiction over the parties and subject matter. For example, in *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955 (5th Cir. 1974), an employment agreement contained the following contractual choice of forum provision: "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York." *Id.* At 956. The Court held that the provision at issue was "not a situation where the contract, on its face, clearly limits actions thereunder to the courts of a specified locale." *Id.* At 957. As such, the Court determined that venue was also proper in Louisiana.

Various federal circuits have held that mandatory forum selection clauses, by their terms, expressly limit the forum(s) to the one(s) listed in the contract. In other words, a mandatory forum selection clause has express language limiting the action to the courts of a specific locale which is clear, unequivocal and mandatory. On the other hand, a permissive forum selection clause authorizes jurisdiction or venue in a selected forum, but does not prohibit litigation elsewhere. *Bentley v. Mutual Benefits Corp.*, 237 F. Supp. 2D 699, 702 (S.D. MS 2002).

Just because a forum selection clause designates alternative federal courts for litigating disputes does not, by itself, override 28 USCS § 1391(a)(2) or render forum court's statutory venue improper. *Southeastern Consulting Group v. Maximus, Inc.*, 387 F Supp 2d 681 (S.D. MS 2005).

In an action by a bank to enforce a note and guaranties, a limited liability company and a guarantor consented to venue under 28 USCS § 1391(a) and (c) because they waited six weeks to challenge venue and in fact accepted the court's appointment of a receiver; thus, they waived any objection to venue because of their conduct. *First Bank Bus. Capital, Inc. v Agriprocessors, Inc.* 602 F Supp 2d 1076 (N.D. IA 2009).

The Tribe cites *Hunt Construction Group, Inc. v. Oneida Indian Nation*, a New York state law case, for the proposition that tribal sovereignty confers not just whether it may be sued, but also “*where*” it may be sued. 2008 N.Y. Slip Op 6029, 53 A.D.3d 1048, 862 N.Y.S.2d 423 (N.Y. 4th App. 2008). While the legal proposition is technically correct, the *Hunt* case is factually inapposite to the case at bar. In *Hunt*, the contract at issue stated that the “[defendant] hereby consents to submit to personal jurisdiction of those courts of the State of New York and of the United States with competent subject matter jurisdiction *located in the City of Syracuse, New York and the parties agree that all actions related to this Agreement shall be brought or defended in such courts.*” *Id.* at 2. In contrast, the forum selection clause contained in the Agreement that is the subject of this litigation is permissive. It does not contractually limit or confine jurisdiction *only* to courts sitting in Oklahoma. Rather, the contract clearly states, “**The tribe hereby irrevocably consents to the jurisdiction and venue of all Non-Tribal Courts and Tribal Courts.**”

To suggest that this Court lacked jurisdiction based upon the Agreement is patently untrue. The Defendant improperly proffers an untimely objection to venue as a jurisdictional issue. The Court had jurisdiction and properly entered judgment. As such, the Tribe has no right to seek reversal of this Court's default judgment.

Although it does not do so in its Motion to this Court, the Tribe has previously cited *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, to the Oklahoma district Court seeking a stay order on a Writ of Execution in this case for the proposition that “a State's [e.g., California] constitutional interest in immunity encompasses not merely *whether* it may be sued, but where it may be sued.” But, “where” in *Atascadero* only meant jurisdiction in federal court – not a specific federal court venue as the Tribe wishes this Court to infer. The issue in *Atascadero* was

whether Article III of the California Constitution affirmatively subjected the state to suit in federal court (as opposed to a particular federal venue). The U.S. Supreme Court explained that it is not enough for a state to waive the immunity guaranteed by the Eleventh Amendment. The Court reasoned that a state must specify its “...intention to subject itself to suit in *federal court*.” Therefore, applying the principles articulated in this case, it can be readily established that the Tribe intended to subject itself to the jurisdiction of the federal courts.

Likewise, in *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), the Court, citing the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602-1611, quoted section 1605(a) of the FSIA, which states that “A foreign state shall not be immune from the jurisdiction of courts of the United States or or the States in any case – (1) in which the foreign state has waived its immunity either explicitly or by implication...” *Id.* at 1022. “At the very least it is clear that a sovereign party has waived immunity where a contract *specifically* states that the laws of a jurisdiction within the United States are to govern the transaction.” *Id.* In essence, these cases establish only one thing: that the Tribe fully waived its sovereign immunity in this case, and subjected itself to the jurisdiction of the federal courts, not, as it argues, only the federal courts sitting in Oklahoma.

Accordingly, the Motion of the Tribe should properly be denied.

The Tribe Has Means to Pay Its Obligation to Merit

The Tribe owns and operates the Two Rivers Casino, White Eagle Drive, Ponca City, Oklahoma which is the same location that it owned and operated the Blue Star Gaming and Casino. Apparently, there has been a marketing name change of the casino. Nonetheless, the Tribe appears to control a thriving casino business from which it is more than capable of paying off the judgment. According to www.casinocity.com/us/ok/poncacity/poncatri Two Rivers is a

Native American casino in Ponca City, OK open seven days a week containing 20,000 square feet of gaming space with 250 gaming machines, 300 bingo seats, one restaurant and concession stands.

In addition, the Tribe received approximately \$10 million recently from a lawsuit settlement against the Continental Carbon Company. See www.lannan.org/lf/ic/legal-rights/ponca-tribe-oklahoma.

**The Affidavit of Chairman Rhodd Should be Stricken or Given No Weight;
It is Parole Evidence, Self-Serving and Lacks Foundation**

Chairman Rhodd, respectfully to his position, apparently was not the Chairman of the Tribe at the time nor does he indicate any personal knowledge of the events that led to terms and conditions of the Bridge Note or the Exclusivity Agreement. As such, his statements lack foundation and are merely self-serving that should be stricken or given no weight.

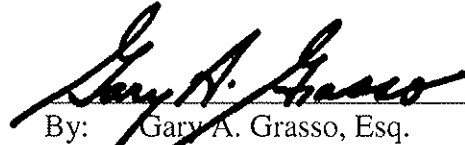
Furthermore, the documents at issue on the waiver issue are not ambiguous and their plain meaning cannot be attacked or explained by parole evidence.

The applicable law does not allow the Tribe to waive sovereign immunity to create venue in only one federal district court. The Tribe clearly and unambiguously waived sovereign immunity and permitted suit on this debt in federal court. The Northern District of Illinois federal court had subject matter jurisdiction. The Tribe ignored its legal obligations and suffered the consequences of a default judgment and prove-up.

Conclusion

For the reasons stated, the Court is asked to deny the Motion to Vacate, and for such other and further relief as this Court deems just and equitable.

Respectfully Submitted,
MERIT MANAGEMENT GROUP


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CERTIFICATE OF ECF FILING

I hereby certify that on March 10th, 2011, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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