

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MERIT MANAGEMENT GROUP, a Nevada
limited partnership,

Case No. 1:08-cv-825
Honorable Elaine E. Bucklo

Plaintiff,

v.

PONCA TRIBE OF INDIANS OF
OKLAHOMA, a federally recognized Indian
tribe, d/b/a Blue Star Gaming and Casino,

Defendant.

**BRIEF IN SUPPORT OF DEFENDANT'S
MOTION TO VACATE JUDGMENT
PURSUANT TO FED.R.CIV.P. 60(b)(4)**

I. INTRODUCTION

Defendant, Ponca Tribe of Indians of Oklahoma (the "Tribe"), hereby moves, pursuant to Fed. R. Civ. P. 60 (herein "Rule 60"), for an order vacating this Court's default judgment entered against the Tribe on September 5, 2008 (the "Default Judgment"), because the judgment is void for lack of jurisdiction. The Tribe is not a citizen subject to diversity jurisdiction. Moreover, the Tribe possesses sovereign immunity which has only been waived with respect to courts sitting in Oklahoma, and thus the judgment entered in Illinois is void as a matter of law.

II. BACKGROUND

This dispute arises from a series of transactions that were entered into by the Tribe and Merit Management Group, a Nevada limited partnership engaged in the development of gaming properties ("Gaming Company") in contemplation of developing and financing a gaming facility on trust lands of the Tribe (the "Project"). Specifically, the Tribe signed and delivered a Bridge Note dated January 7, 2005, in the original principal amount of \$122,500 payable to the Gaming Company (the "Bridge Note"), and the parties signed an Exclusivity and Dispute Resolution

Agreement (the "Agreement") (**Ex. A**) whereby the parties agreed that any claim directly or indirectly related to the Project (including claims under the Bridge Note) would be governed by the Agreement's terms including dispute resolution procedures. The Agreement's relevant dispute resolution provision included a limited waiver of sovereign immunity with respect only to "the adjudication or enforcement of Claims in any federal or state court of competent jurisdiction sitting in the State of Oklahoma." *Id.* § 5(a) (emphasis added).

On February 7, 2008, the Gaming Company filed suit against the Tribe in this Court alleging that the Tribe breached the terms of the Bridge Note. The Gaming Company based jurisdiction upon 28 U.S.C. § 1332, commonly referred to as diversity jurisdiction. The Gaming Company's complaint alleged that "the controversy concerns citizens of different states, or, in the alternative, a claim against the sovereign nation by virtue of Defendant's status as a federally recognized Indian tribe." Compl. ¶ 1 [Dkt. #1]. The Gaming Company further alleged that "venue is proper in this district because (1) a substantial part of the events or omissions giving rise to the claim occurred in this district and (2) Defendant is a sovereign nation by virtue of Defendant's status as a federally recognized Indian tribe such that venue is proper in any district." *Id.* ¶ 2.

This Court entered a default judgment against the Tribe on September 5, 2008. On October 5, 2010, the Gaming Company filed an action in the United States District Court for the Western District of Oklahoma to enforce the Default Judgment. On December 20, 2010, after application by the Gaming Company, the United States District Court for the Western District of Oklahoma issued a writ to enforce the Default Judgment.

The Tribe now moves for this Court to set aside the Default Judgment because it is void under Rule 60(b)(4). The Gaming Company's jurisdictional allegations set forth in the complaint

are untrue as a matter of fact and law and were insufficient to confer subject matter jurisdiction upon this Court. The Tribe is a federally recognized Indian tribe. *Aff. Douglas A. Rhodd ¶ 2, Ex. B.* The case law clearly establishes that federally recognized Indian tribes are not citizens of any state and therefore no subject to diversity jurisdiction. Further, the Tribe possesses sovereign immunity, a fact that the Agreement signed by the parties explicitly acknowledges. *Ex. A at 1 ¶ F.* In fact, the signed Agreement itself states that "the Tribe is a federally recognized Indian Tribe and that the Tribe and its instrumentality possess sovereign immunity from unconsented suit and other legal proceedings." *Id.* § 5(a).

The Tribe, in the Agreement, agreed to a limited waiver of sovereign immunity thereby conferring jurisdiction over claims related to the Agreement only to courts in Oklahoma. *Id.* However, the Gaming Company's claim was brought in this Court sitting in the state of Illinois, not Oklahoma, and the Tribe has never consented to the jurisdiction and venue of this Court or waived its sovereign immunity in that regard.

Because the Tribe is not a citizen subject to diversity jurisdiction and because the Tribe has sovereign immunity and has not consented to the jurisdiction of this Court, the Default Judgment is void as a matter of law and must be set aside.

III. LAW AND ARGUMENT

A. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT THE DEFAULT JUDGMENT BE SET ASIDE.

A movant may attack a judgment under Fed. R. Civ. P. 60(b)(4) for lack of jurisdiction at any time because a judgment rendered without jurisdiction is void. *Robinson Eng'g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 453 (7th Cir. 2000). "A judgment is void for the purposes of Rule 60(b)(4) if the court that rendered it lacked jurisdiction over the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *United States v.*

Indoor Cultivation Equip. from High Tech Indoor Garden Supply, 55 F.3d 1311, 1316 (7th Cir. 1995). If a court lacks jurisdiction, the underlying judgment is void regardless of the amount of time that passes between entry of the judgment and the motion to vacate or set aside the judgment. *See Rodd v. Region Const. Co.*, 783 F.2d 89, 91 (7th Cir. 1986).

Defects in subject matter jurisdiction cannot be waived by the parties. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235 (2006) (citing *U.S. v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002)); *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175 (7th Cir. 1994). Likewise, the parties cannot confer subject matter jurisdiction upon the federal courts by agreement. *Shapo v. Engle*, 463 F.3d 641, 645 (7th Cir. 2006). In addition, Defects in subject matter jurisdiction cannot be waived by the parties. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235 (2006) (citing *U.S. v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002)); *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175 (7th Cir. 1994). Likewise, the parties cannot confer subject matter jurisdiction upon the federal courts by agreement. *Shapo v. Engle*, 463 F.3d 641, 645 (7th Cir. 2006) (citing *Hays v. Bryan cave LLP*, 446 F.3d 712, 714 (7th Cir. 2006); *Wolf v. Cash 4 Titles*, 351 F.3d 1348, 1357 (11th Cir. 2003); *Presidential Gardens Assoc. v. U.S. ex rel Sec. of Housing & Urban Dev.*, 175 F.3d 132, 140 (2nd Cir 1999)); *Chicago Tupographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991) (“federal jurisdiction cannot be created by contract”).

1. The Tribe Is Not Subject to Diversity Jurisdiction.

A district court has jurisdiction under 28 U.S.C. § 1332¹ over matters in which the amount in controversy exceeds \$75,000 and which are between citizens of different states,

¹ The Gaming Company's complaint erroneously alleges that diversity of citizenship between the parties exists pursuant to 28 U.S.C. § 1132(a); however, this is simply a mistake in the complaint, and the Gaming Company is referring to 28 U.S.C. § 1332(a).

between citizens of one state and citizens of a foreign state, or in which a foreign state as a plaintiff sues a citizen of a state. Thus, diversity jurisdiction would only be proper in this case if the Tribe were found to itself be a foreign state or to be a citizen of the state in which it resides.

It is well established that an Indian tribe is not a foreign state for jurisdictional purposes. *United States v. Funmaker*, 10 F.3d 1327, 1332 (7th Cir. 1993)(citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17–18 (1831)). Accordingly, diversity jurisdiction only will apply if the Tribe were found to be a citizen of the state in which it resides.

Many courts have examined the citizenship status of an Indian tribe under Section 1332. The vast majority of these cases establish that an Indian tribe is not a citizen of any state for diversity jurisdiction purposes, and therefore that tribe cannot be sued in federal court based on diversity jurisdiction. *See, e.g., Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Veeder v. Omaha Tribe of Nebraska*, 864 F. Supp. 889, 898 (N.D. Iowa 1994). This statement of law is congruous with the judicial policy of deference to tribal sovereignty routinely articulated by the Supreme Court. Indeed, "if state court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

Although the Seventh Circuit has yet to speak on the citizenship status of Indian tribes with respect to Section 1332, this issue was recently examined by the United States District Court for the Western District of Wisconsin, which stated that "the majority of courts to consider the issue have concluded that a tribe is not a citizen of any state." *CTGW LLC v. GSBS PC*, 2010 WL 2739963, at *1 (W.D. Wis. 2002)(emphasis in original). The court stated that it agreed with "the majority of courts that have decided this issue and conclude that Indian tribes are not

citizens of any state for the purpose of diversity jurisdiction." *Id.*, at *2. The court further explained that its ruling is harmonious with the well-established rule that other domestic sovereigns, such as states, are not citizens of any state for purposes of diversity jurisdiction. *Id.* (citing *Indiana Port Comm'n v. Bethlehem Steel Corp.*, 702 F.2d 107, 109 (7th Cir. 1983)).

Quite simply, the Gaming Company's jurisdictional allegations contained in paragraph 1 of its complaint are unfounded and contravene the well-established law governing the status of Indian tribes. The Tribe is not a foreign nation, and it is not a citizen of any state. Consequently, the Tribe may not be sued in federal court on the basis of diversity jurisdiction.

2. The Tribe Has Not Waived Its Sovereign Immunity With Respect to the Gaming Company's Claim.

The Tribe is a federally recognized Indian tribe. **Ex. B ¶ 2.** In fact, the sovereign status of the Tribe is fully acknowledged by the parties in the Agreement. **Ex. A § 5(a).** Federally recognized Indian tribes retain attributes of sovereignty over both their members and their territories. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Thus, an Indian tribe is not subject to a suit, even for breach of contract claims, unless Congress has authorized the suit or the tribe has waived its immunity. *C & L Enter. Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411, 412 (2001). In order for a tribe to relinquish its immunity, a tribe's waiver must be clear. *Id.* There has been no waiver of sovereign immunity by the Tribe in this dispute with respect to any court in Illinois.

The Ponca Tribe entered into an Exclusivity and Dispute Resolution Agreement with Merit Management. **Ex. B ¶ 4.** The Gaming Company's claim is for non-payment pursuant to the terms of the Bridge Note signed by the parties. **Compl. ¶ 7.** The Bridge Note clearly states that "a claim for payment of this Note shall be treated as a Claim under the Exclusivity

Agreement." Bridge Note at 2, **Ex. C**. As previously mentioned, that Agreement provides that any claim shall be governed by its dispute resolution procedures, which provides:

[T]he 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

Ex. A § 5(a)(emphasis added). This dispute resolution provision plainly articulates the scope of the Tribe's waiver. Specifically, the Tribe only waived its sovereign immunity with respect to courts of competent jurisdiction in Oklahoma. "[A] sovereign's interest 'encompasses not merely *whether* it may be sued, but *where* it may be sued.'" *Hunt Constr. Group, Inc. v. Oneida Indian Nation*, 53 A.D.3d 1048, 1049; 862 N.Y.S. 2d 423, 424 (2008). Accordingly, the Tribe's waiver permitted it to be sued only in the state and federal courts of Oklahoma and only for the limited purposes encompassed by such waiver.

Because the Tribe has not waived its immunity with respect to courts outside of the state of Oklahoma, the Tribe's sovereign status devoids this Court of jurisdiction over the Tribe with respect to the Gaming Company's claims. Any other holding would impermissibly infringe upon the Tribe's sovereign immunity and would undermine not only the judicial policies preserving the sovereign status of tribes, but also the parties' freedom to contract by ignoring their express dispute resolution procedures agreed upon.

IV. CONCLUSION

Based on the foregoing, Defendant, the Ponca Tribe of Indians of Oklahoma, respectfully requests that this Court enter an order vacating the Default Judgment entered against it on September 5, 2008.

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Dated: February 17, 2011

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