

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.

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

INTRODUCTION

The only issue this Court need address for purposes of this Motion is whether it had jurisdiction over this matter when it entered a default judgment. Plaintiff has not and cannot provide any basis for jurisdiction in this Court because the law does not support Plaintiff's position. Plaintiff routinely muddles the issues and misstates the effect of the contractual language in an effort to hide the issue of jurisdiction. While the Tribe does not agree with Plaintiff's arguments on the merits, those arguments are simply not relevant to this motion and have no bearing on the jurisdictional argument. Similarly, the timeliness of the motion and Plaintiff's venue analysis are irrelevant. The simple fact is that this Court did not have jurisdiction to enter a judgment against the Tribe. Consequently, this Court must vacate the judgment entered against the Tribe.

LAW AND ARGUMENT

A. A Judgment May Be Attacked for Lack of Jurisdiction at Any Time.

Plaintiff asserts that the judgment in this dispute must stand because it would be "unfair" to vacate the judgment. This logic demonstrates a complete failure by Plaintiff to understand the nature of the jurisdictional argument. It is axiomatic that a court cannot act outside of its jurisdictional power, and accordingly judgments ("fair" or not) entered absent jurisdiction are void. *See Robinson Eng'g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 453 (7th Cir. 2000). As a side note on the issue of fairness, Plaintiff sued the Tribe in its home state as a matter of its own convenience and misrepresented to this Court that it had diversity jurisdiction knowing federal law is clear that Tribes are not "persons" for diversity purposes. This countervails any argument it may now make regarding fundamental fairness. A void judgment remains 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).

The relevant issues in this motion pertain to this Court's power to act, not fairness to Plaintiff or the time elapsed since the judgment was entered. No amount of unfairness or elapsed time will confer jurisdictional power to this Court. This argument is irrelevant and should be disregarded.

B. The Merits of the Dispute Are Irrelevant.

Plaintiff's arguments that the Tribe owes it money or that it entered into certain contracts with Plaintiff are irrelevant. The Tribe, for purposes of this Motion, does not contest that it entered into an agreement with Plaintiff. The sole issue, however, is what power this Court had to enter a judgment against the Tribe on the basis of the agreements. The Tribe need not contest

the merits of Plaintiff's claims or assert its defenses on the merits because those issues have no place in the arguments made for vacating the judgment due to the absence of jurisdiction.

C. Subject Matter Jurisdiction Does Not Exist in the Northern District.

Indian Tribes are immune from suit and court processes in both state and federal courts unless Congress has expressly authorized the suit or the Tribe has waived its immunity. *Kiowa Tribe v. Mfg. Technologies Inc.*, 523 U.S. 751, 754 (1998). In other words, there is no basis for jurisdiction over the Tribe as a party to this dispute unless it waives its immunity with respect to this Court.

Plaintiff argues that the Tribe has somehow conferred jurisdiction to this Court, opining that the Tribe did not accurately quote the relevant provisions of the Exclusivity and Dispute Resolution Agreement (the "Agreement") and that the Agreement does not confine jurisdiction solely to courts in Oklahoma. Respectfully, the Agreement could not be any more clear to the contrary. Plaintiff adds emphasis to Section 5(a)'s statement by the Tribe that it "hereby irrevocably consents to the jurisdiction and venue of all Non-Tribal and Tribal Courts." Exclusivity & Dispute Resolution Agreement § 5, Ex. A to Def.'s Mot. Vacate J. [Dkt. #___]. However, this is not a general waiver. The terms "Non-Tribal" and "Tribal" court are explicitly defined and limited in Section 5(a) where the Tribe specifically waives its immunity except as to:

[A]ny 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"). . . . and

[A]ny court or other forum of the Tribe of competent jurisdiction (each, a "Tribal Court")

Id. (emphasis added). The plain language of the Agreement simply does not support Plaintiff's argument that the Tribe executed a general waiver of its sovereign immunity. The waiver is limited to the courts defined in the Agreement. This Court does not fall within the definition of a

Tribal Court or *Non-Tribal Court* as defined in the agreement and therefore has no jurisdiction in this matter.

D. Plaintiff's Analysis of Forum Selection Clauses Is Irrelevant and Does Not Apply to Entities that Have Sovereign Immunity.

Plaintiff mischaracterizes the Tribe's argument as one of improper venue. No such argument was made. The Tribe has argued that the judgment should be vacated because this Court did not have jurisdiction to enter the judgment. Venue is only an issue when and if it has been established that the Court has jurisdiction in the first place.

Even if Plaintiff's venue argument were considered, the analysis is entirely inapplicable to the Tribe. Plaintiff cites to *Keaty v. Freeport Indonesia Inc.*, 503 F.2d 955 (5th Cir. 1974), for the proposition that an agreement between parties consenting to jurisdiction in one state does not render other forums unavailable. Indeed, the contract at issue in *Keaty* stated that the parties would "submit to the jurisdiction of the courts of New York," and the court held that this provision was "not a situation where the contract, on its face, clearly limits actions thereunder to the courts of a specified locale." *Keaty*, 503 F.2d at 956–57. Accordingly, the court concluded that venue was proper in Louisiana based on the citizenship and business operations of the respective parties. *Id.*

These statements of law, while accurate, are entirely inapplicable to the Tribe. The Tribe is not a citizen, and it is not a business. The Tribe therefore is still not subject to federal diversity jurisdiction absent a clear waiver from the Tribe. In short, the Tribe's status as a sovereign nation inherently limits actions against it to tribal courts of competent jurisdiction and to those forums in which the Tribe clearly consents to jurisdiction.

Plaintiff's conclusion that the relevant section of the Agreement operates as a permissive forum selection clause requires the finding that there is another permissive venue. There is no

such venue. Again, the language in the Agreement specifically defines *Non-Tribal Courts* as courts sitting in the state of Oklahoma. Accordingly, the only proper non-tribal forum for this suit is a court sitting in Oklahoma.

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: March 24, 2011 By: /s/ James D. Benak
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