

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Cecil Ray Barth
Deanna Joan Barth,

Debtors.

Case No. 09-36006
Chapter 7

Michael S. Dietz, Trustee,

Plaintiff,

Adversary Proceeding No. 11-03233

vs.

Deanna Joan Barth and the Lower Sioux
Indian Community in the State of Minnesota,
Defendant.

In Re:

Morris Jerome Pendleton, Sr.
Constance Louise Pendleton,

Debtors.

Case No. 10-34267
Chapter 7

Paul W. Bucher, Trustee,

Plaintiff,

Adversary Proceeding No. 11-03234

vs.

Morris Jerome Pendleton, Sr. and the Lower
Sioux Indian Community in the State of Minnesota,
Defendant.

In Re:

Linda Rose Whitaker,

Debtor.

Case No. 10-38674
Chapter 7

Paul W. Bucher, Trustee,

Plaintiff,

Adversary Proceeding No. 11-03235

vs.

Linda Rose Whitaker and the Lower
Sioux Indian Community in the State of Minnesota,
Defendant.

PLAINTIFFS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. Debtors' Rights as Qualified Members of the Lower Sioux Indian Community are Vested.

Pursuant to Lower Sioux Indian Community ("Lower Sioux") law, each Qualified Member Defendant¹ is of the Lower Sioux. The Qualified Member Defendants are entitled to receive certain benefits pursuant to tribal law. Qualified Member Defendants have the same vested right to receive an equal amount of any net profits that are distributed by the Lower Sioux Community Council (hereinafter, "Allocation of Net Profits" or "Per Capita Payments"). Qualified Member Defendants' vested interest is the right to receive exactly what all other Qualified Members receive. The amount of the Allocation of Net Profit is uncertain (and could even be nothing), but Qualified Member Defendants' rights to equal treatment as to other Qualified Members is vested subject to changes in tribal or federal law.

The Lower Sioux Indian Community Enrollment and Membership Privilege Ordinance provides the criteria for status as a Qualified Member. (See the Affidavit of Denny Prescott dated December 12, 2012, filed by Defendants, "Prescott Aff, Ex. 3000001 - 14). The requirements to achieve the status of Qualified Member include, enrollment, attainment of eighteen years of age, and the member's name appearing on the list of Chartered Resident Members." (Prescott Aff., Ex. 3000006, Sec 4.3).

Qualified Members may lose their status as Qualified Members under very limited circumstances. First, if a Qualified Member ceases to maintain residency within the community for a period of two consecutive years, that member may lose their status. (Prescott Aff. Ex.

¹ As defined in Plaintiff's Memorandum in Support of Summary Judgment.

3000007, Sec. 5.1). In addition, if a Qualified Member is incarcerated or deemed a threat to the community, that member can lose their status. (Prescott Aff., Ex. 300007, Sec 5.7 and 5.8).

Plaintiff acknowledges that there is no guarantee that the Qualified Members will receive a Per Capita Payment. However, each Qualified Member is entitled to the same allocation, if any distribution is made. Qualified Member Defendants' vested rights to share equally in any Per Capita Payments became property of their respective bankruptcy estates when they voluntarily filed for relief pursuant to Chapter 7 Bankruptcy.

2. The "Right" to Per Capita Distribution of Net Profits is a Property Interest.

Lower Sioux law states that the Per Capita Payments are a personal benefit and a right. However, the value of the right is contingent upon the Lower Sioux's actual distribution of the net profits.

The first issue is to determine whether the right to receive the Allocation of Net Profits is an interest in property (tangible, intangible, contingent or otherwise). To do so we look at the Federal Bankruptcy Law. As identified by all parties, Bankruptcy Law is extremely broad in its description of property.

The existence of and Lower Sioux's authority to pay Per Capita Payments are rooted in federal law. The federal government recognizes per capita payments as the distribution of money or something of value. Specifically, the Code of Federal Regulations defines per capita payments as follows:

Per capita payment means the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity. This definition does not apply to payments which have been set aside by the tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing or other similar, specifically identified needs.

25 C.F.R. § 290.2. Likewise, the federal government expressly requires notification of the federal taxation of the Per Capita Payments, and thereby taxes these payments as income. 25 U.S.C. § 2710(b)(3)(D). The federal government's description and treatment of Defendants' Per Capita Payments fits squarely into the bankruptcy code's broad definition of property of the estate.

The federal government oversees the Lower Sioux pursuant to the Indian Gaming Regulatory Act. ("IGRA"). The IGRA controls what the Lower Sioux does with the profits from its gaming operation. 25 U.S.C. § 2710(b)(2)(B) and § 2710(d). The IGRA specifically restricts how the net profits may be paid to tribal members:

- (3)** Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—
- (A)** the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);
 - (B)** the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);
 - (C)** the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and
 - (D)** the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

25 U.S.C. § 2710(b)(3). The Ordinance satisfies these requirements with a procedure for distribution of the net profits upon a majority vote of the Community Council. The Community Council has routinely voted to allocate the net profits to Qualified Members. Presumably, the

Community Council will continue to do so, as long as its gaming establishment produces net profits.

Finally, we look to tribal law for guidance. Unfortunately, “property right” is not defined in the Lower Sioux Indian Community in Minnesota Gaming Revenue Allocation Ordinance (the “Ordinance”). The Ordinance specifically governs the, “allocation of available net profits.” (Prescott Aff, Ex. 2000001, Sec 100). The Ordinance defines “per capita payment” as “those payments made pursuant to the terms of this Ordinance to Qualified Members out of revenues generated from Community gaming businesses.” (Prescott Aff., Ex. 2000003, Sec. 302(A)).

Section 302 of the Ordinance provides a detailed description of how the per capita payments are made. First, a majority of the Community Council must approve the payments. The payments must not exceed seventy-five percent (75%) of the profits. The Ordinance then describes a detailed procedure for providing “uniform monthly per capita payments” with a compulsory payment² of net reserves (assuming additional funds remain in excess of the uniform payments made). (Prescott Aff. Ex. 2000003-04). Uniform payments provide the Qualified Members a sense of certainty as to the amount of payments over time.

The final clause of Section 302 (“Section G”) is the Anti-alienation / Spendthrift Provision. Defendants allege Section G expresses the Lower Sioux’s legal rule on Per Capita Payments. The Lower Sioux relies entirely upon a recently added/amended section of its Gaming Revenue Allocation Ordinance to carve periodic payments out of Defendants’ bankruptcy estates.

² It is unclear if any of the Qualified Member Defendants were entitled to compulsory payments at the time of their respective bankruptcy filings.

The Anti-alienation/Spendthrift Provision is the sum of the tribal law that Defendants reply upon in their assertion that the Qualified Member Defendants' interest in Per Capita Payments are not a "property right." The clause is contradictory and ultimately unclear.

The first section of the clause discusses the nature of the interest:

The per capita payments made under this Ordinance are **a personal benefit** to the Community Members who qualify. The per capita payments are **periodic payments, not a property right**. The **right** to receive a per capita payment does not accrue or vest until the Community actually makes a payment to Community Members who qualify.

(Hoss Aff. Ex. F). (Prescott Aff. Ex 2000007-8, Sec. 302(G)).

The first sentence identifies the Per Capita Payments as "a personal benefit" to "Community Members³ who qualify." The second sentence defines the personal benefit as periodic payments, and specifically denounces the periodic payments as, "not a property right." The very next sentence describes the periodic payments as a "right"⁴ that does not vest until the payment is made. In reality, the right is vested, but the amount is not certain and the exchange not official until actually paid.

³ Curiously, the capitalized term, "Community Members" is not previously defined in the Ordinance. "Qualified Members is a defined term (see section 200), but is not used here. Likewise, the term Community is defined (see section 100), but not "Community Members." The term "Community Members" is also used in the third sentence of section 302(G), but in the fourth sentence, the drafter(s) refer to "Community members." It is unknown if this is a drafting error or has some unknown legal distinction.

⁴ But not a Property Right or Property interest? What else could the Lowe Sioux Carve out of the bankruptcy estate with a simple declaration? Currency? Tax Refunds? Gold? Jewelry? Hopefully, a simple declaration that other property interests are "not a property right" would not make it so, as to a bankruptcy estate.

The remaining portion of Section 302(G) is the actual alienation and spendthrift provisions.⁵ The clause provides a long list of things that the “Community members” cannot do with their “benefit, right or interest” (including Per Capita Payments). The list of restrictions includes, the sale, transfer, assignment or pledge thereof. The next sentence allows the Lower Sioux to set-off a variety of liabilities against the Per Capita Payments, including state and federal tax liens. Then, in the next sentence, the clause actually authorizes the assignment of the Per Capita Payments to a financial institution:

Nor shall this restriction prevent, or impair the validity of, **an assignment of per capita payments that is made by a Community Member to a financial institution,**

How is it possible to pledge the Per Capita Payments to a financial institution if they are not a property interest? What can a Qualified Member pledge if there is no property interest? It appears that the Lower Sioux attempts to describe the Per Capita Payments as non-property, yet specifically identifies the value of, and procedure for, assigning this non-property right as collateral to a financial institution. This contradiction alone proves that there is real value in a Qualified Member’s right to Per Capita Payments. The Pendleton Defendants actually pledged Mr. Pendleton’s right to Per Capita Payments to Dakota Finance Corporation. (Hoss Aff. Ex. C, Schedule D).

3. The Lower Sioux’s Declaration that Per Capita Payments are Property is not Determinative.

The federal government oversees the Lower Sioux pursuant to the Indian Gaming Regulatory Act. (“IGRA”). The IGRA controls what the Lower Sioux does with the profits from

⁵ Section 302(G) is simply a restriction on the transfer of the Qualified Members’ right to transfer their interest in the Per Capita Payments. Such restrictions are invalid as to the bankruptcy estate pursuant to 11 U.S.C. §541(c)(1).

its gaming operation. 25 U.S.C. § 2710(b)(2)(B) and § 2710(d). The IGRA specifically restricts how the net profits may be paid to tribal members:

CONCLUSION

The Defendants in this case voluntarily sought the relief and responsibility provided pursuant to a Chapter 7 bankruptcy. Defendants now ask this Court to rely upon the Lower Sioux's recent declaration that Per Capita Payments are "not a property right," to exclude from their bankruptcy estates, the regular, uniform, monthly Per Capita Payments that Defendants receive based upon their status as Qualified Members.

The inclusion of Defendants' Allocation of Net Profits in the bankruptcy estate is neither harsh nor unfair. Each Defendant received a discharge. Likewise, each Defendant exempted certain property, as defined by the Bankruptcy Code. Once the respective Defendants' debts are satisfied, they are entitled to keep or distribute any future Per Capita Payments (if any) as they see fit. This is the same procedure employed where a Debtor's estate consists of a stream of payments.

The Lower Sioux cannot simply declare a tangible or intangible thing, as "not a property right" and exclude it from the bankruptcy estate. The Lower Sioux is a sovereign nation with the power to create and enforce its own laws. However, that does not give the Lower Sioux the ability to carve any, or all, property out of the Federal Bankruptcy Code.

Dated: January 4, 2013

DUNLAP & SEEGER, P.A.

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