TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN TRIBAL COURT OF APPEALS

Brandon & Shirley Mathiason, Plaintiff-Appellants, vs. Gate City Bank, Defendant-Appellee.	)	No. TMAC 04-2002 **OPINION AND ORDER**

Before: Chief Justice HUMA AHSAN and Justices MATTHEW L.M. FLETCHER and MONIQUE VONDALL.

Appearances: Richard G. Frederick, Sr., for the Plaintiff-Appellants; and Mandy Maxon, Vogel Law Firm, for the Defendant-Appellee.

By Justice FLETCHER for a unanimous Court.

OPINION

Procedural History

An exposition of the procedural history of this matter is necessary to a full understanding of this Opinion and Order.

Plaintiff-Appellants Brandon and Shirley Mathiason brought this action on January 20, 2004 in a pleading styled, "Petition for Lawful Lien." Plaintiff-Appellants alleged that they had entered into loan agreements with Defendant-Appellee Gate City Bank for the purchase of three vehicles: (1) a 1992 Fork pickup; (2) a Yamaha four-wheel all-terrain vehicle; and (3) a 1993 Chevrolet Blazer. Plaintiff-Appellants further

alleged that the bank had threatened to begin repossession of the vehicles in spite of plaintiffs' assertion that they were not in default on the loans.

Defendant-Appellee Gate City Bank answered in a pleading dated February 27, 2004 and asserted a counterclaim against the Mathiasons. Moreover, the bank asserted numerous grounds for a motion to dismiss Plaintiff-Appellants' petition on procedural and jurisdictional bases, including the argument that the petition did not state a claim for which relief could be granted.

On April 22, 2004, Tribal Court Judge MaDonna Marcellais held a show cause hearing at which all parties appeared. Judge Marcellais sought to force the Mathiasons to show cause as to why the bank should not be allowed to immediately repossess the three vehicles in question. At the hearing, Plaintiff-Appellants asserted, apparently without actually providing testimony or entering evidence into the record, that "a portion of the foregoing defaults is attributable to the cost of insurance force-placed by Gate City on the [vehicles]." *Mathiason v. Gate City Bank*, No. 04-2002, Order for Judgment at 2, ¶ 3 (April 30, 2004). Neither Plaintiff-Appellants nor Defendant-Appellee presented witnesses or entered evidence into the record at that hearing. At the conclusion of the hearing, the parties agreed to make "good faith efforts" to determine the actual amount due. *Id.* at 2-3, ¶ 4. The tribal court gave the plaintiffs until June 21, 2004 to cure the "aforesaid defaults." *Id.* at 3. This order apparently represented the intent of the parties to reach settlement and gave a deadline for reaching settlement.

No such "cure" or settlement was forthcoming and on June 22, 2004, counsel for Gate City Bank wrote a letter to the Tribal Court informing the court of the plaintiffs' failure to "cure" the "defaults." *See* Letter from Michael T. Andrews, Vogel Law Firm, to

Jacqueline V. Brien, Clerk of Court (June 22, 2004). Gate City's counsel included a proposed order for judgment that Judge Marcellais promptly executed. *See Mathiason v. Gate City Bank*, No. 04-2002, Judgment (August 11, 2004).

Plaintiff-Appellants filed a notice of appeal on September 3, 2004, a notice that their counsel apparently did not serve on the defendant until September 27, 2004. Defendant-Appellee responded to the notice of appeal with a request that the appeal be "summarily denied." *See* Response to Notice of Appeal and Request for Stay of Judgment at 1 (October 1, 2004).

On October 26, 2004, this Court set a briefing schedule and a date for oral arguments and denied Defendant-Appellee's motion to dismiss the appeal for failure to properly serve the bank.

Counsel for plaintiffs failed to file a brief and the bank filed a motion to dismiss for failure to file a brief in a pleading dated November 29, 2004. Defendant-Appellee also filed a short brief re-summarizing the bank's position.

On January 7, 2004, this Court held a hearing with all parties present.

Discussion

I. Motion to Dismiss Appeal for Plaintiff-Appellant's Procedural Flaws

Defendant-Appellee has filed a motion with this Court seeking dismissal of the Plaintiffs' appeal for failure to file an appellate brief and for failure to comply with the proof of service rule. Defendant-Appellee's motion to dismiss the appeal is denied.

At the outset, this Court acknowledges that the strict compliance with the Turtle Mountain Tribal Code and the Turtle Mountain Rules of Court may serve to

fundamentally restrict access to the courts of the Turtle Mountain Band of Chippewa Indians. Tribal courts are not courts where the strict formality of Anglo-American jurisprudence is necessarily encouraged. To the contrary, as Professor Christine Zuni wrote, "Native and non-native societies operate from two different world views." Christine Zuni, *Strengthening What Remains, in* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 114, 118 (2004). As such, this Court will endeavor "to infuse the tribal [court] system with our own concepts of justice which more closely reflect our societal beliefs." Zuni, *supra* at 119. Based on this policy, this Court strongly supports a policy of providing access to the courts. And, in many instances, Indian litigants do not have the resources to retain lawyers experienced in complex litigation experience and legal aid societies that could provide free legal advice to indigent litigants are usually lacking in Indian Country. As such, this Court finds that in the case where Indian litigants cannot afford an experienced lawyer and must proceed pro forma or by retaining a non-law trained legal advocate, we may construe the rules of procedure broadly to ensure that litigants have access to the courts absent a strong showing of bad faith.

However, this Court also acknowledges that a too-lax enforcement of the court rules threatens to waste the court system's limited resources. Complex litigation prosecuted by pro se litigants and non-lawyer advocates may burden tribal judges, who must "sift through issues" and make sense of them. *See Smith v. Belcourt School District* #7, No. 02-10155 at 2 (Turtle Mountain App., November 30, 2004). Moreover, opposing parties require an equal and fair chance to respond.

With these principles in mind, we turn to the two areas in which Plaintiff-Appellants have failed to comply with the rules of this Court and whether their non-compliance compels this Court to dismiss their appeal.

A. Tribal Court Rule 2.4(b) – Failure to File a Brief

This Court's rule on the failure of an appellant to file a brief states, "Failure to file a brief by the moving party *may* be deemed an admission, that in the opinion of party or counsel, the motion is without merit. ..." TURTLE MOUNTAIN RULES OF COURT 2.4(b) (emphasis added). The rule allows this Court the discretion to determine whether an appeal should be dismissed. The relevant provision in the rule is couched in terms of the ethical responsibility of the counsel for the appellant to bring forth only meritorious claims and contentions. *Cf.* RULES OF PROFESSIONAL CONDUCT FOR THE "PRACTICE OF LAW" BEFORE THE TURTLE MOUNTAIN TRIBAL COURT 3.1 ("An advocate shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous...."). In accordance with this rule, motions to dismiss an appeal for failure to file an appellate brief will be granted if the Court determines that the appeal is, in actuality, without merit.

However, since this standard is relatively easy to meet, this determination of merit does not necessarily end our inquiry. Other factors may counsel this Court to dismiss an otherwise meritorious appeal. As such, this Court will take into consideration the prejudice to the opposing party, whether the appellant acted in bad faith, whether the appellant should be punished for the actions of counsel, the need for hearing the case on the merits, and other compelling factors brought to its attention. Previously, this Court dismissed an appeal where the appellant waited four years to prosecute the appeal. *See*

LaRoque v. Allard at 4 (Turtle Mountain Band App., September 11, 1990). Courts in other jurisdictions, such as North Dakota, have chosen not to dismiss an appeal for failure to file a brief where the appellant made a sufficient showing that she made a reasonable effort to prosecute the appeal. *E.g.*, *Gerhardt v. Fleck*, 251 N.W.2d 764, 766-67 (N.D. 1977) (noting cases where case not dismissed for failure to file a brief).

First, we note that in our judgment the Plaintiff-Appellants' Notice of Appeal and Request for Stay of Judgment meets the minimal burden of showing a degree of merit to the appeal. This Court, in one relevant example, has granted permission to appeal where the appellant alleged "insufficiency of evidence to justify the verdict." *Vann v. Turtle Mountain Tribe* at 2 (Turtle Mountain Band App., May 8, 1989) (*citing* TURTLE MOUNTAIN TRIBAL CODE 2.1306(g)). It is apparent from the Notice of Appeal that the Plaintiff-Appellants did allege a Tribal Court error that could result in reversal—that Plaintiff-Appellants had no opportunity to respond to the allegations made by the Defendant-Appellee. *See* Notice of Appeal and Request for Stay of Judgment at 1 (September 3, 2004). And, during oral argument, the Plaintiff-Appellees' notice states that the lower court did not hold a proper hearing to take evidence and testimony, an allegation sufficient to meet the requirement that the appeal contain a degree of merit.

Second, we find that Defendant-Appellee has not shown that the Plaintiff-Appellants' failure to file an appellate brief has caused them prejudice sufficient to justify dismissing the appeal. Even given the policy of this Court to promote greater access to the courts, this emphasis has limits. This Court is aware of the acute problems created in this case by the failure of the Plaintiff-Appellants to file an initial brief. Neither the Court nor the Defendant-Appellee had adequate notice of the specifics of what the Plaintiff-

Appellants would argue on appeal. The Court had no choice but to use much of Plaintiffs' oral argument time on determining the Plaintiff-Appellants' position on appeal.

Moreover, this Court in *Smith*, No. 02-10155, *supra*, has recently instructed appellants to strictly adhere to some critical court rules, particularly Section 2.1306. This provision provides, "Any party aggrieved by any final judgment or other final order of the Tribal Court, *shall*, within thirty (30) days after the such judgment or order was rendered, file with the Clerk of the Court of Appeals, a request in writing asking for permission to take an appeal from such judgment or order...." TURTLE MOUNTAIN TRIBAL CODE § 2.1306 (emphasis added). Unlike Rule 2.4(b), section 2.1306 contains language that makes compliance with this rule mandatory. It reads, "The importance of filing a request for permission to appeal, commonly referred to a "Notice of Appeal," is manifest. This Court noted:

> [One] purpose of requiring permission to take an appeal is to ensure that timelines are followed and that all parties are given procedural due process, i.e., adequate notice and opportunity to be heard. Rule 2.1306 requires the Clerk of the Court of Appeals to give notice to all parties of the pending appeal ..., giving both parties adequate and timely notice.

Smith, No. 02-10155 at 2. This Court dismissed the appeal in *Smith* due to the appellant's failure to seek permission to appeal. However, *Smith* is distinguishable from this matter.

The purpose of requiring more strict compliance with the rule requiring a notice of appeal goes more to the question of fairness to opposing parties than does the rule giving this Court discretion to decide that the failure to file an appellate brief is an admission that the appeal is meritless. For example, in *Smith*, the appellant failed to seek

permission to appeal, denying the Clerk of the Court of Appeals to serve notice on the appellee. *See id.* at 1-2. In this case, by contrast, Plaintiff-Appellant did file a notice of appeal, eventually resulting in actual notice to Defendant-Appellee.

Applying the Rule 2.4(b) factors, we conclude that the appeal should not be dismissed on this ground. First, the appeal does meet the minimum standard of merit. Second, Defendant-Appellee offers no showing of prejudice or any other factors resulting from the Plaintiff-Appellants' failure to file a brief. Defendant-Appellee's counsel was able to respond to the notice of appeal in two separate pleadings and performed well during oral argument. Reviewing the record, this Court finds no evidence of bad faith on the part of the Plaintiff-Appellants or significant prejudice to the Defendant-Appellee. Defendant-Appellee's motion to dismiss is denied. Finally, we conclude that strict compliance with Rule 2.4(b) is not necessary to efficiently adjudicate this matter.

B. Tribal Court Rule 2.3 – Proof of Service

Whether this appeal should be dismissed for Plaintiff-Appellants' violation of Rule 2.3 is a much closer question. This Court, nevertheless, will allow the appeal to proceed.

Rule 2.3 provides, "Proof of service must be securely attached to the original papers when they are presented to the clerk for filing." Unlike Rule 2.4(b), this rule is mandatory—appellants *must* attach proof of service to papers when they are filed. It is clear from the record that Plaintiff-Appellants' counsel did not file proof of service with the Clerk of the Court of Appeals. Given the mandatory language in Rule 2.3, this would seem to end the inquiry. However, such a result does not comport with justice.

Once the Chief Justice of this Court issued a notice reminding Turtle Mountain Band Tribal Court practitioners to prove the Tribal Court with correct proof of service, *see* Letter from Chief Justice Huma Ahsan at 1 (September 23, 2004), counsel for Plaintiff-Appellants immediately cured his error by serving the Defendant-Appellee. Given the fact that counsel for Plaintiff-Appellants is not a lawyer and given that this Court emphasizes a policy of open access to the courts, we find that counsel's late proof of service is adequate under *these specific and limited circumstances.*

And, as noted above, the Defendant-Appellee has suffered no significant prejudice. This Court acknowledges that it appears that neither Plaintiff-Appellants nor the Clerk of the Court of Appeals served notice on Defendant-Appellee of the notice of appeal until more than 30 days after the lower court issued its judgment. But because Defendant-Appellee did receive notice in time to adequately prepare a response, *see* Response to Notice of Appeal and Request for Stay of Judgment (October 1, 2004), that Defendant-Appellee's due process rights were not implicated. Conversely, in *Smith*, the appellant filed a brief first, depriving the Court of the opportunity to determine if on the face of the request for permission the appeal was meritless. *See Smith*, No. 02-10155 at 2 ("One purpose of requiring permission to take an appeal is to prevent the judicial system from squandering its time on frivolous appeals."). Moreover, the appellee's "first notice that ... the Tribal Court opinion was being appealed was when he was served with a copy of Appellant's brief...." *Smith*, No. 02-10155 at 2. Defendant-Appellee has not suffered the same disadvantage.

As such, this Court declines to dismiss the appeal for Plaintiff-Appellants' failure to comply with Rule 2.3.

II. Due Process of Law – Failure to Provide a Hearing

This Court holds that the Tribal Court failed to provide due process of law to the Plaintiff-Appellants and reluctantly finds no other choice but to vacate the Tribal Court's orders of judgment issued April 30, 2004 and August 11, 2004.

Failure of the Tribal Court to take evidence and hear testimony from both sides is a violation of the due process rights of the Plaintiff-Appellants. This Court learned during oral argument on this matter that the Tribal Court did not hold a hearing in which either side presented witnesses or entered evidence into the record. The basic tenants of due process of law are notice and an opportunity to be heard. *See Smith v. Belcourt School District #7*, No. 02-10155 at 2 (Turtle Mountain Band App., November 30, 2004); *Synowski v. Confederated Tribes of Grand Ronde*, 31 Indian L. Rptr. 6117, 6118 (Grand Ronde App. 2003); *Hoopa Valley Indian Housing Authority v. Gerstner*, 22 Indian L. Rptr. 6002, 6005 (Hoopa Valley Tribe App. 1993). This due process maxim is put into practice when the Tribal Court convenes to allow each side to present their position and put forth arguments and evidence in support. *See McCloud v. Turtle Mountain Band of Chippewa Indians* at 9 (Turtle Mountain Band App., October 16, 1989) (The Tribal Court's "function is to hear disputes and render a decision, and to allow all parties [to] present their arguments in a manner following procedures and to allow due process to all parties."). During a trial or a show cause hearing such as the one held by the lower court, due process requires the trial court to allow each side to present evidence and testimony and to allow each side to cross-examine the other's witnesses. *See Blevins v. Desjarlais* at 6 (Turtle Mountain Band App., June 28, 1990) (noting right to testify and present

witnesses); *Turtle Mountain Band of Chippewa Indians v. Pariesien*, 1 Tribal Court Rptr. A95, A98-A99 (Turtle Mountain Band App., March 6, 1979) (noting right to cross-examine accuser). In a case, as here, where the record on appeal is "void as to the rationale used by the Court..., we find ... a clear abuse of discretion by the trial court." *Laducer v. Laducer* at 5 (Turtle Mountain Band App., September 11, 1990).

Also, failure of the Tribal Court to provide written findings of fact and conclusions of law is cause for vacating the judgment below. As this Court wrote over a decade ago, "The burden of making sure that the findings are clear and specific are not on this Court but on the trial court and counsel below." *Laducer* at 5 (quotation omitted). Absent written findings of fact, this Court has no adequate record for reviewing the Tribal Court's judgment. *See Security State Bank v. Parisien* at 6 (Turtle Mountain Band App., September 11, 1990) ("[W]ithout findings of fact [and] conclusions of law..., the primary issues brought to this Court on appeal are impossible to address.").

Moreover, the Tribal Court's orders first presumed judgment against the Plaintiff-Appellants and then slanted the final disposition against the Plaintiff-Appellants. Without making findings of fact or conclusions of law and without taking testimony and evidence from either side, the Tribal Court ordered the Plaintiff-Appellants to cure its default – a default that had never been proven to exist. At no time did the Defendant-Appellee prove that such a default existed at the April 22, 2004 hearing; nor could it, as the court did not take testimony or evidence. The Tribal Court compounded its error by placing the onus on the Plaintiff-Appellants to cure the "default." By the order's very terms, the Defendant-Appellee could easily have stonewalled the Plaintiff-Appellants attempts to "cure" the "default," a possibility the Plaintiff-Appellants raised in both their Notice of

Appeal and during oral argument and which the Defendant-Appellee denies. Regardless, the Tribal Court inadvertently set up the Plaintiff-Appellants to fail by first presuming their liability. The mistake is understandable – at the show cause hearing, it appeared that the parties had agreed to reach a settlement and dispose of the matter and the Tribal Court rightfully imposed a deadline on those negotiations in accordance with its discretion. However, after the parties failed to reach settlement, counsel for the Defendant-Appellee imposed a proposed judgment before the Court. What the Court should have done at the second hearing was take evidence as a trier of fact. Instead, the Court executed the proposed judgment against the Plaintiff-Appellant. The judgment must not stand.

As such, for all the above reasons, the orders of judgment are invalid.

III. Defendant's Motions to Dismiss Plaintiff's Petition

Upon review of the record after oral argument, this Court discovered that the Defendant-Appellee made a motion to dismiss the Plaintiff-Appellants' petition in its Answer and Counterclaim for failure to state a claim. This Court reviews these arguments on its own motion and hereby dismisses Plaintiff-Appellants' Petition for Lawful Lien for the following reasons. However, Defendant-Appellee's counterclaim remains extant.

The pleading that originated this matter is styled, "Petition for Lawful Lien." The pleading makes factual allegations and then seeks relief as follows: (1) "That a lawful lien be placed on all ... vehicles, pending a show cause hearing in Tribal Court;" and (2) "That a hearing be scheduled as soon as possible."

Plaintiff-Appellants' request that "a lawful lien be placed on all ... vehicles ..." is not relief that the Tribal Court has authority to grant. *See generally* TURTLE MOUNTAIN

TRIBAL CODE §§ 4.0301 *et seq.* ("Replevin"). Defendant-Appellee correctly argued in that pleading that "no 'lien' can arise in favor of Plaintiff-Appellants by virtue of their making contractually-required payments to Defendant, or their failure to make such payments, or by virtue of their mere possession of the subject collateral." Answer and Counterclaim at 3 (February 27, 2004). If Plaintiff-Appellants wanted to correctly initiate an action, they could have filed an action seeking a declaratory judgment and a request for an injunction or other equitable relief against Defendant-Appellee. Other actions might have been possible as well.

Nevertheless, Defendant-Appellee correctly brought this action to the jurisdiction of the Turtle Mountain Band Tribal Court in its counterclaim against Plaintiff-Appellants, *see Winer v. Penny*, 674 N.W.2d 9 (N.D. 2004), and that is where this matter will be resolved.

ORDER

For reasons stated in the opinion above, this matter is REMANDED to the Tribal Court for proceedings consistent with this Opinion and Order. The Tribal Court's April 30, 2004 and August 11, 2004 orders of judgment are hereby VACATED. As such, this Court orders the following:

1. The Plaintiff-Appellants to this matter must file an Answer to the Defendant-Appellee's counterclaim within thirty (30) days of service of this Opinion and Order; and
2. Upon the filing of an Answer by the Plaintiff-Appellants, the Tribal Court must schedule and hold a trial on the merits of Defendant's counterclaim in which both

sides are allowed to present witnesses and enter evidence into the record, after which the Tribal Court must make written findings of fact and conclusions of law.

Matthew L.M. Fletcher,
Appellate Justice

2/1/05
Date

We join this opinion.

Huma Ahsan,
Chief Appellate Justice

2/1/05
Date

Monique Vondall,
Appellate Justice

2/1/05
Date