IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MCZ DEVELOPMENT CORP., SHEFFIELD DEVELOPMENT PARTNERS, LLC, GOLDEN CANYON PARTNERS, LLC, and FLORENCE DEVELOPMENT PARTNERS, LLC, Plaintiffs, v. DICKINSON WRIGHT, PLLC and DENNIS J. WHITTLESEY, Defendants.	No.: 13-cv-6395 The Honorable Sharon Johnson Coleman

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOW COME the Plaintiffs, MCZ Development Corp., Sheffield Development Partners, LLC, Golden Canyon Partners, LLC and Florence Development Partners, LLC, by and through their attorneys, Asperger Associates LLC, and for their Response in Opposition to Defendants' Motion to Dismiss, state as follows:

LEGAL STANDARDS

A Rule 12(b)(6) motion to dismiss may only be granted "if the allegations in the complaint, and all reasonable inferences drawn therefrom, cannot support any cause of action…." *Bercoon, Weiner, Glick & Brook v. Manufacturers Hanover Trust Co.*, 818 F. Supp. 1152, 1155 (N.D. Ill. 1993). In considering the motion, all well-pleaded facts must be accepted as true, and all inferences must be drawn in the plaintiff's favor. *Adams v. City of Chicago*, 865 F. Supp. 445, 446 (N.D. Ill. 1994). The motion is not based on the merits of the case, but rather,

the sufficiency of the complaint. *Pelfresne v. Village of Rosemont*, 952 F. Supp. 589, 592 (N.D. Ill. 1997).

Federal courts require "notice pleading," so a complaint is to be construed liberally. *Pope v. Inland Property Mgmt., Inc.*, 878 F. Supp. 1114, 1116 (N.D. Ill. 1995). In defending against a motion to dismiss, the plaintiff is free to allege any facts he pleases, consistent with the complaint, in order to show that a state of facts exists which, if proved, would entitle him to judgment. *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992). "Dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.*

In a legal malpractice case, the plaintiff must plead and prove the following elements: 1) the defendant owed a duty of care arising from an attorney-client relationship; 2) a breach of that duty; 3) proximate cause; and 4) damages. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 225-26, 856 N.E.2d 389, 394 (2006). In transaction-based legal malpractice actions, proving a "case-within-a-case" is not required where damages can otherwise be established. *Union Planters Bank, N.A. v. Thompson Coburn LLP*, 402 Ill.App.3d 317, 344, 935 N.E.2d 998, 1022 (5th Dist. 2010).

In this case, Defendants' Motion to Dismiss should be denied because the allegations in Plaintiffs' Complaint sufficiently set forth a viable cause of action for legal malpractice.

ARGUMENT

A. Plaintiffs Have Stated a Claim Based on the NIGC Letter

Plaintiffs' Complaint includes the following allegations, which must be taken as true:

- [Defendants] engaged [Plaintiffs] regarding the development of an Indian casino gaming project in Oklahoma (the "Project"). (Compl. ¶¶ 15-16)

- Defendants agreed to and did provide professional legal advice and services to Plaintiffs which included, but were not limited to, assessing the legal and regulatory requirements for pursuing gaming at the site, advising on the legal and regulatory requirements, drafting legal documents, meeting with regulators, pursuing legal and regulatory approval of the Project and advising Plaintiffs with respect to the development of the gaming site. (*Id.* ¶ 18)

- Defendants knew Plaintiffs were relying on the opinions and advice of Defendants to decide whether and when to make monetary investments and expenditures to begin developing the site for the purposes of casino gaming. (*Id.* ¶ 19)

- Defendants knew that Plaintiffs would be expending significant amounts of money in reliance on Defendants' advice. (*Id.* ¶ 20)

- On May 4, 2011, Plaintiffs inquired of Defendants the nature of any issues which might preclude the proposed gaming project from successfully moving forward. Defendants responded by assuring Plaintiffs that negative rulings by the relevant federal agencies would not prevent the proposed casino from opening and operating. (*Id.* ¶ 22)

- On or about August 17, 2011…Defendants advised Plaintiffs that [Plaintiff] had the right to conduct Class II and Class III gaming at the Project without the requirement of any further governmental approvals or permits. (*Id.* ¶ 23)

- On September 22, 2011, Defendants issued a written opinion letter to Plaintiffs which stated that Defendants "have formed the opinion that the August 17, 2011 gaming licensure concluded the applicable regulatory process and Class II and Class III gaming may now be conducted" at the casino. (*Id.* ¶ 24)

- Defendants knew that the NIGC was also going to assess the adequacy of tribal jurisdiction over the casino gaming site. Defendants repeatedly assured Plaintiffs that the necessary jurisdiction existed, and that even a negative decision on jurisdiction would not prevent Plaintiffs from opening and operating a casino. (*Id.* ¶ 28)

- Relying on repeated representations and reassurances from Defendants, Plaintiffs continued to expend significant funds and undertake significant loan obligations to develop and construct the casino gaming facility. (*Id.* ¶ 29)

- On May 25, 2012, the NIGC issued an opinion letter and memorandum concluding that the requisite tribal jurisdiction over the gaming site does not exist. (*Id.* ¶ 33)

Plaintiffs' Complaint also alleges Defendants were negligent in : 1) advising Plaintiffs that Class II and III gaming could be conducted; 2) advising Plaintiffs that the requisite tribal jurisdiction existed; 3) advising Plaintiffs that a negative decision on jurisdiction would not prevent Plaintiffs from opening and operating a casino; 4) failing to advise Plaintiffs to delay expenditures until challenges to tribal jurisdiction were resolved; and 5) failing to adequately advise Plaintiffs of the potential risks of moving forward with the development and construction of the casino. (Compl. ¶¶ 39(b)(c)(e)(g)(i)). Plaintiffs allege that Defendants' negligence caused them to sustain money damages exceeding $75,000.[1] (*Id.* ¶ 40).

Defendants argue that this cause of action died with the dismissal of the Oklahoma injunction action. This ignores the impact of the adverse NIGC letter, which in effect prohibits the operation of a casino. Contrary to Defendants' assertion, the above allegations set forth facts supporting Plaintiffs' claim that Defendants breached their duty with respect to the NIGC's determination on jurisdiction. (*See* Def. Memo. at 10).

In fact, Defendants make many points supporting the conclusion that Plaintiffs pleaded a proper claim including the May 25, 2012, NIGC letter stating that "the requisite tribal jurisdiction over the gaming site does not exist." (Def. Memo. at 4). The letter notes that the Department of Interior Solicitor's Office concurs and, that if gaming is commenced, the chairperson would issue a notice of violation and temporary closure order pursuant to 25 U.S.C. § 2713. *Oklahoma v. Hobia*, 775 F.3d 1204, 1208 (10th Cir. 2014); *see* Exh. 1 – May 25, 2012, NIGC Letter & Memo., available at *www.nigc.gov/Reading_Room/Indian_Lands_Opinions*.[2]

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[1] Defendants' suggestion that Plaintiffs have not satisfied the amount in controversy requirement is disingenuous. (*See* Def. Mot. at 10 fn. 3). Defendants were Plaintiffs' attorneys throughout the time the site was being developed, prior to the temporary injunction. Defendants surely know that Plaintiffs' asserted damages considerably exceed the $75,000 threshold.

[2] A court may judicially notice and consider documents contained in the public record and reports of administrative bodies without converting a motion to dismiss into a motion for summary judgment. *Menominee Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 455 (7th Cir. 1998).

The chairperson subsequently denied a request for reconsideration. *Hobia*, 775 F.3d at 1208. Defendants concede that the NIGC chairperson has the authority to issue a temporary closure order. (Def. Memo. at 12). Defendants also acknowledge the 10th Circuit Court's determination that the letter "effectively prohibits the Tribe from conducting Class III gaming activities at the Property." (*Id.* at 13 fn. 4, *citing Hobia*, 775 F.3d at 1214 n. 5).

Whether the NIGC chairperson's letter was "unprompted," issued "more than nine months after the license properly issued," or "after the district court's erroneous entry of the preliminary injunction" is not relevant to the current motion to dismiss. (*See* Def. Mot. at 12). The fact remains that the NIGC nevertheless issued the letter and that the letter prohibits the operation of a casino on the site. Defendants' assertions that "[t]he IGRA does not require the NIGC to make a land status determination," and that "any land determination by the NIGC…is purely discretionary," are likewise irrelevant. (*See Id.* at 11). Defendants told Plaintiffs that the necessary jurisdiction existed, and that a negative decision on jurisdiction would not prevent the operation of a casino for gaming. (Compl. ¶ 28). Relying on these conclusions, Plaintiffs spent large sums on development and construction. (*Id.* ¶ 40). Defendants were wrong. The NIGC chairperson determined jurisdiction does not exist, effectively prohibiting Plaintiffs from commencing Class III gaming. Plaintiffs have therefore been damaged to the extent that they spent money in seeking to develop a casino in reliance on Defendants' incorrect advice.

B. Plaintiffs' Damages Are Not Speculative

In a legal malpractice case, if an attorney's advice falls below the applicable standard of care, "any damages which proximately flow from the client's acceptance of that advice are recoverable…." *Metrick v. Chatz,* 266 Ill.App.3d 649, 655, 639 N.E.2d 198, 202 (1st Dist. 1994). Here, Defendants advised Plaintiffs that the necessary jurisdiction existed, and that a negative

decision on jurisdiction would not prevent Plaintiffs from opening and operating a casino. (Compl. ¶ 28). Relying on this advice, Plaintiffs incurred significant expense in attempting to develop and construct the casino. (*Id.* ¶ 29). Defendants' advice was incorrect, and Plaintiffs are effectively prohibited from moving forward with the casino. Plaintiffs have adequately pled that they should have been informed of the potential legal and regulatory impediments to gaming that existed before they invested in the development of a casino. (*Id.* ¶¶ 22, 23 & 39). Defendants' failure to clearly advise Plaintiffs fell below the standard of care, causing Plaintiffs to suffer real damages. (*Id.* ¶¶ 39-40).

The six points raised on pages 13 and 14 of Defendants' brief ignore business reality. The NIGC has unequivocally stated in its letters and memorandum—at least twice—that if Plaintiffs open a casino and begin gaming, the NIGC will exercise its authority to close the casino. Defendants argue that the NIGC letter does not represent a final governmental action and that Plaintiffs are required to invest additional millions of dollars to construct and furnish the casino, hire hundreds of employees, commence gaming, and ultimately get shut down by NIGC or other governmental agencies, just to confirm they have been damaged. (Def. Memo. at 13-14). Not only would opening a casino in the face of the chairperson's promise to close the casino be fiscal insanity, Defendants would later likely argue that following such course runs afoul of the doctrine of avoidable consequences.

Defendants' reliance on *Lucey v. Law Offices of Pretzel & Stouffer Chtd.*, 301 Ill.App.3d 349, 703 N.E.2d 473 (1st Dist. 1998), is misplaced. In *Lucey*, the plaintiff was sued by his former employer after acting on the allegedly negligent advice of his attorneys. *Id.* at 351-52, 703 N.E.2d at 475-76. The plaintiff filed a legal malpractice case against his attorneys while the former employer's lawsuit was pending and unresolved. *Id.* at 352-53, 703 N.E.2d at 476. The

primary issue in *Lucey* was whether the plaintiff's malpractice claim had accrued in light of the fact that no adverse ruling had yet been made against him in the underlying litigation. *Id.* at 358, 703 N.E.2d at 480. The *Lucey* court held that the plaintiff's malpractice case was premature, as without a judgment against him in the underlying case, he was yet to sustain damages as a result of the defendants' negligence. *Id.*

The *Lucey* case is an illustration of Illinois' "prematurity doctrine," whereby a plaintiff first must lose an underlying case before his legal malpractice claim accrues. *See Alper v. Altheimer & Gray*, 65 F.Supp.2d 778, 784 (N.D. Ill. 1999). The instant lawsuit is distinguishable, as there is no underlying case necessary to determine whether Plaintiffs have been damaged.[3] Plaintiffs have already been damaged. They spent millions of dollars in attempting to develop a casino in reliance on Defendants' assurance that the necessary jurisdiction existed, and further assurance that a negative decision on jurisdiction would not prevent Plaintiffs from operating a casino. They continue to incur substantial interest and carry costs on outstanding debt and equity. They should not be compelled to spend millions more to prove damages.

Because Plaintiffs have already suffered damages due to their reliance on Defendants' negligent advice, Defendants' Motion to Dismiss should be denied.

C. <u>A Supreme Court Reversal Will Impose Additional Liability on Defendants.</u>

1. Defendants' claim of judgmental immunity is without merit.

The Tenth Circuit Court of Appeals reversed the Oklahoma court's decision, and the preliminary injunction was dismissed. However, the State of Oklahoma has filed a petition for certiorari with the Supreme Court of the United States seeking review of that decision.

[3] Not all legal malpractice actions conform to the "case-within-a-case" model of litigation. *See Alper* at 785. In *Alper*, the plaintiff was damaged when one of his businesses was mistakenly sold due to his attorney's negligence in drafting a contract. *Id.*

Oklahoma v. Hobia, 2015 WL 1236456 (U.S. March 23, 2015) (No. 14-1177). Defendants' characterization that the petition is "irrelevant," is remarkable. (*See* Def. Memo at 7). Reinstatement of the trial court's decision would add further support to the damages Plaintiffs seek, based on a theory of liability separate from and in addition to the negligent advice Defendants provided with respect to the NIGC decision.

Defendants suggest that even if the Tenth Circuit's decision is reversed, this case would have to be dismissed as a matter of law because Defendants' errors were protected by the principle of "judgmental immunity," arguing that the law was "unsettled." (Def. Memo. at 7, *citing Nelson v. Quarles & Brady LLP,* 997 N.E.2d 872, 882-83, 2013 IL App (1st) 123122 ¶ 35). However, dismissal based on this principle would be an exception to the overriding rule that "'the question of whether a lawyer has exercised a reasonable degree of care and skill in representing and advising his client has always been one of fact.'" *Nelson*, 2013 IL App (1st) 123122 ¶ 30, 997 N.E.2d at 880 (*quoting Brown v. Gitlin*, 19 Ill.App.3d 1018, 1020, 313 N.E.2d 180 (1974)).

Defendants' characterization of their conduct as a matter of judgment does not end the inquiry. *See Gelsomino v. Gorov*, 149 Ill.App.3d 809, 814, 502 N.E.2d 264, 267 (1st Dist. 1986). The question as to whether Defendants exercised a reasonable degree of care and skill in representing Plaintiffs is a question which "usually cannot be decided as a matter of law." *Id.* Defendants have presented no facts establishing the underlying law or legal principle they claim was unsettled which would give rise to judgmental immunity. Such a finding cannot be made at this stage of the litigation.

Defendants also argue that the advice they gave Plaintiffs was simply a judgment call which cannot be the basis of negligence. (Def. Memo. at 7). Yet the September 22, 2011,

opinion letter issued by the Defendants contained no such caveat. (Compl. ¶ 24). On the contrary, Defendants' opinion letter and verbal remarks gave clear and unequivocal assurances that: "Class II and Class III gaming may now be conducted;" negative rulings by federal agencies would not prevent the proposed casino from opening and operating; and a legal challenge in court would not result in an injunction. (Compl. ¶¶ 22 & 24). This advice was incorrect and led Plaintiffs to invest millions of dollars to develop the casino site. Defendants' argument must be rejected.

2. Even with the Tenth Circuit's reversal, Defendants' improper advice proximately caused damage to Plaintiffs.

Plaintiffs have also sufficiently pled damages as a proximate result of Defendants' improper advice pertaining to the State of Oklahoma's ability to seek and secure an injunction. Defendants knew Plaintiffs were looking for and relying on their advice as to whether and when to spend money to develop the casino site. (Compl. ¶ 19). Defendants did not warn Plaintiffs of the possibility of an injunction being entered; Defendants told Plaintiffs it would never happen. (*Id.* ¶ 22). Even after the State filed its lawsuit seeking an injunction, Defendants advised Plaintiffs to continue building because an injunction would never be entered. (*Id.* ¶ 36). Defendants were wrong. Between the time the injunction action was filed and the date of its dismissal on appeal several years later, Plaintiffs incurred substantial interest obligations tied to the debt they undertook and the equity investments made in the venture. The interest clock continues to run as the certiorari petition is pending.

Had Defendants advised Plaintiffs to suspend development until issues with the State were resolved, Plaintiffs would not have incurred the interest obligations that accrued during the nineteen months the injunction was in effect. The fact that the Oklahoma court ultimately

vacated the injunction and dismissed the State's case does not relieve Defendants of liability for the damages caused by their improper advice.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Honorable Court deny Defendants' Motion to Dismiss.

Dated: June 8, 2015

Respectfully submitted,

PLAINTIFFS

By: /s/ Bary L. Gassman

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CERTIFICATE OF SERVICE

As an attorney of record in this matter, I hereby certify that on June 8, 2015, I caused a copy of the foregoing to be filed with the Court's CM/ECF system, which provides service via electronic mail on the following counsel of record:

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