IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO.: 4D15-0235
LOWER TRIBUNAL CASE NO.: 14-00419 (14)

MMMG, LLC and MOBILE MIKE PROMOTIONS, INC.,

APPELLANTS,

v.

SEMINOLE TRIBE OF FLORIDA, INC. d/b/a TRIBE, INC.,

APPELLEE.

APPELLANTS' REPLY BRIEF

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ARGUMENT[1]

A. The Trial Court Erred By Not Properly Applying The Fourth District Court Of Appeal's Decision In *Mancher*.

Appellants assert that the Trial Court erred by not applying the *Mancher v. Seminole Tribe of Florida, Inc.*, 708 So. 2d 328 (Fla. 4th DCA 1998) standards to STOFI's Motion to Dismiss. Under this Court's decision in *Mancher*, the Trial Court should have denied STOFI's Motion to Dismiss because numerous factual issues existed concerning whether STOFI waived its purported right to sovereign immunity. In *Mancher*, this Court made it clear that a challenge to jurisdiction based on tribal sovereign immunity is "not amenable to resolution by motion to dismiss" when there are disputed factual questions. *Id.* at 328-29.

STOFI, in its Answer Brief, attempts to rebut Appellants' argument by stating that, since jurisdictional discovery was permitted and an evidentiary hearing was held, the Trial Court could simply ignore the standards ordinarily applied to a Rule 1.140(b)(6) motion to dismiss, and rule on the jurisdictional issues as the trier of fact. STOFI relies heavily on the Second DCA's decision in *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353 (Fla. 2d DCA 2005), and argues that the burden shifting analysis for determining factual issues raised by motion to dismiss for lack of personal jurisdiction set forth by the Florida Supreme Court in *Venetian Salami*

[1] To the extent any issue is not specifically addressed herein, Appellants rely on the arguments set forth in Appellants' Initial Brief.

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Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989) should be used to determine a motion challenging subject matter jurisdiction. **STOFI failed to advise this Court that the *McCor* court specifically acknowledged that the Fourth DCA did not agree with the Second District's conclusion that factual questions may be resolved on a motion to dismiss with accompanying affidavits.** See *McCor*, Id. at 357. Of equal importance, *McCor* involved the Tribe, not STOFI, which interpreted the Tribe's constitution and ordinances rather than STOFI's charter and resolutions.

STOFI's interpretation of Florida procedure ignores the purpose of a motion to dismiss. A motion to dismiss under Rule 1.140(b) tests whether the plaintiff has stated a cause of action, not whether the plaintiff will prevail at trial (in this case, whether a waiver of sovereign immunity occurred). Indeed, a motion to dismiss is not intended to determine issues of ultimate fact. *See Minor v. Brunetti*, 43 So. 3d 178, 179 (Fla. 3d DCA 2010). Thus, in ruling on a motion to dismiss, the court may not look beyond the four corners of the complaint in considering the legal sufficiency of the allegations. *See Swope Rodante, P.A. v. Harmon*, 85 So. 3d 508, 509 (Fla. 2d DCA 2012). "The facts alleged in the complaint must be accepted as true. All reasonable inferences must be drawn in favor of the pleader." *Gladstone v. Smith*, 729 So.2d 1002, 1003 (Fla. 4th DCA 1999) (citations omitted). Importantly, a motion to dismiss may not act as a substitute for summary

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judgment. "A motion to dismiss a complaint is not a motion for summary judgment in which the court may rely on facts adduced in depositions, affidavits, or other proofs." *Mancher*, 708 So. 2d at 327.

However, a trial court "may consider affidavits when determining a motion to dismiss under very limited circumstances." *Mancher*, 708 So. 2d at 328. As instructed by the Fourth DCA, "[a] motion to dismiss based on lack of subject matter jurisdiction may properly go beyond the four corners of the complaint **when it raises solely a question of law**." *Id.* (emphasis added). The Fourth DCA was well-aware of the *Venetian Salami* analysis, and even cited *Venetian Salami* as one of the few circumstances where the trial court is allowed to look beyond the four corners of the complaint. However, this Court did not adopt the *Venetian Salami* analysis for determining factual issues raised by motion to dismiss for lack of subject matter jurisdiction. Indeed, despite STOFI's argument to the contrary, in *Mancher* the Fourth DCA made it abundantly clear that disputed issues of fact, even in the context of a claim of sovereign immunity, should not be determined on a motion to dismiss.

Interestingly, the Trial Court properly applied *Mancher* when denying the Individual STOFI Defendants' Motion to Dismiss based upon lack of subject matter jurisdiction. In particular, the Trial Court denied the Individual STOFI Defendants' Motion to Dismiss as to Counts II, III and IV because there were

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disputed factual allegations on the issue of whether the Individual STOFI Defendants were acting within the scope of their duties at STOFI. *See* Order On Motion to Dismiss, ¶¶ 50-51, 55. The Trial Court cited to and relied on the Fourth DCA's holding in *Mancher*, and noted that the issue of whether the Individual STOFI Defendants were acting within the scope of their duties are "issues not amenable to resolution by motion to dismiss because there are disputed factual questions," *Id.* at ¶¶ 50 (*citing Mancher*, 708 So. 2d at 328-29). The Trial Court explained:

> On this issue, unlike the other issues in this case which are issues of subject matter jurisdiction where the court can go beyond the four corners of the complaint, the Court must stay within the factual allegations and four corners of the Amended Complaint. A review of the [ten] count Amended Complaint shows that it is unclear in some of the counts whether the STOFI defendants were 'acting within the course and scope of [their] employment.' In some of the counts the allegations raise an issue of fact and require a rebuttal not only as to whether they occurred but whether if they did occur, were they within the scope of the council duties and thus shielded by sovereign immunity.

Id. at ¶ 50 (*citing Mancher*, 708 So. 2d at 328 and *Lewis v. Edwards*, 815 So. 2d 656 (Fla. 4th DCA 2002)). Likewise, here, issues abound as to whether the parties in fact entered into a waiver provision.

According to the Fourth DCA, a challenge to jurisdiction based on tribal sovereign immunity, like this case, is "**not amenable to resolution by motion to dismiss** because there are disputed factual questions." *Id.* at 328-29. The Trial

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Court erred by not properly applying the standard set forth in *Mancher* to STOFI's Motion to Dismiss.

B. The Trial Court Erred in Applying Tribal Law to the Issue of Waiver, When the Parties Specifically Agreed that Florida Law Controlled.

The LOI, which was approved by the STOFI Board of Directors, and all versions of the MMMG Operating Agreement, all provide that the laws of Florida would govern the agreement. *See* R.106, p. 2. Thus, because the contract itself specifies that it is to be governed by Florida law, Florida law applies to determine the effectiveness of the contractual waiver of sovereign immunity, not tribal law. Nothing in the STOFI Corporate Charter purports to limit the manner in which STOFI may consent to a choice of law provision, and STOFI does not contend that the STOFI Board of Directors did not have the power to approve a contract containing such a provision. At least for purposes of interpreting and enforcing the MMMG Operating Agreement, it is indisputable that STOFI agreed to be governed by Florida law, not tribal law.

Under Florida law, "a '[w]aiver is the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right.'" *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999). Importantly, "[w]hether a waiver has occurred in any given situation ***is generally a question of fact.***" *Hill*, 745 So. 2d at 1138

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(emphasis added); *Dumor Avionics, Inc. v. Hangar One, Inc.*, 319 So.2d 95, 97 (Fla. 3d DCA 1975) ("The question of waiver usually is one of fact to be tried on the issues properly defined by the pleadings."); *see also Gulfstream Park Racing Ass'n, Inc. ex rel. TIG Specialty Ins. Solutions v. Kessinger*, 874 So. 2d 645, 647 (Fla. 4th DCA 2004) ("Waiver is a factual issue to be determined by the finder of fact, in this case, the jury. Yet, the issue was not submitted to the jury. Instead, the trial court assumed the role of seventh juror and made the factual finding. We hold that it erred in doing so and in granting the motion for directed verdict."); *Popular Bank of Florida v. R.C. Asesores Financieros, C.A.*, 797 So. 2d 614, 619 (Fla. 3d DCA 2001) ("Generally speaking, the issue of waiver is one for the fact finder. Based upon our careful review of the record evidence and the reasonable inferences therefrom, there was a genuine factual issue for the jury as to whether RCAF knowingly refrained from demanding the payment of the subject fees. Consequently, the trial court correctly denied Popular Bank's motion for directed verdict and judgment notwithstanding the verdict and correctly submitted this issue to the jury."); *Leonardo v. State Farm Fire and Cas. Co.*, 675 So. 2d 176, 178-79 (Fla. 4th DCA 1996) (citations omitted) ("[W]e believe that a disputed material issue of fact exists as to whether State Farm intended, through its continued billing and acceptance of premiums, to waive its rescission of Leonardo's policy. We recognize that other jurisdictions have found waiver as a matter of law in situations

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such as the instant case. Nevertheless, we conclude that this issue should be resolved, on a case-by-case basis, by the trier of fact.").

STOFI attempts to circumvent the Florida choice of law provision in the MMMG Operating Agreement by wrongly arguing that the waiver was ineffective because the waiver violated tribal law. STOFI argues that the waiver was not approved by STOFI's Board of Directors and because it was a general waiver not allowed under STOFI's Charter.

First, a Board Resolution is not required under STOFI's Charter to waive sovereign immunity. The Charter merely states that waiver occurs through express provision in a contract, which occurred here.

Equally important, the MMMG Operating Agreement specifies that it is to be governed by Florida law, not tribal rules. STOFI argues that Florida law applies federal law in determining whether sovereign immunity has been waived. Under both Florida and federal law, a waiver of sovereign immunity must simply be clearly and unequivocally expressed. "While a contractual waiver of sovereign immunity must be unequivocal, it need not contain 'magic words' stating that the [defendant] hereby waives its sovereign immunity." *Mastro v. Seminole Tribe of Florida*, 2013 WL 3350567, *6 (M.D.Fla. Jul. 2, 2013) (citation omitted); *see also Bates Associates, LLC v. 132 Associates, LLC*, 290 Mich.App. 52, 59 (Mich.App.2010) (citations omitted and emphasis added) ("The Tribe argues that

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the purported waivers of sovereign immunity and tribal-court jurisdiction in the settlement agreement are invalid because they were not supported by a resolution of the Tribe's board of directors as required under § 44.105 and § 44.109 of the Tribe's code. We note that the United States Supreme Court has not addressed this issue and has not required anything other than clear, unequivocal language for a valid waiver**.**"). Simply stated, STOFI's own internal corporate rules do not apply under Florida law to determine whether a waiver occurred and to what extent.

STOFI also ignores Florida law on the issue of apparent authority, and argues that apparent authority should not be applied in this case. Agency principles and the doctrine of apparent authority are applicable to the waiver analysis under Florida law. In Florida, "[a]n agency relationship can arise by written consent, oral consent, or by implication from the conduct of the parties. An agency by implication, or apparent agency, arises only when there has been (1) a representation by the principal that the actor is his or her agent, (2) reliance on that representation by a third party, and (3) a change in position by the third party in reliance on that representation." *Stalley v. Transitional Hospitals Corp. of Tampa, Inc.*, 44 So. 3d 627, 630 (Fla. 2d DCA 2010) (citations omitted). Moreover, a president of a corporation is vested with apparent authority to conduct corporate business, and that a party doing business with a corporation is permitted to rely on the president's apparent authority to bind the corporation. *See Cambridge Credit*

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Counseling Corp. v. 7100 Fairway, LLC, 993 So. 2d 86, 90 (Fla. 4th DCA 2008) (corporation's president had apparent authority to enter into guarantee of commercial lease as part of assignment to tenant).

Although there is no case law directly on point in Florida, other jurisdictions have applied agency principles to determine whether an agent with authority to contract on behalf of a tribe had apparent authority to waive sovereign immunity. *See Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo.Ct.App. 2004) (applying Colorado agency principles to hold that the chief financial officer of the Ute Mountain Ute Tribe had apparent authority to waive the tribe's sovereign immunity without approval from the tribal council) ("The words, actions, and other described conduct of the Tribe, reasonably interpreted, would and did cause Rush Creek to believe that the Tribe consented to have the contract and waiver signed on its behalf by the CFO. The CFO held himself out as the Tribe's agent and acted at least with apparent authority in assenting to the contract and the waiver therein. Rush Creek relied to its detriment upon the apparent authority of the CFO. Hence, we conclude as a matter of law that the CFO had apparent authority to sign the contract and waive the Tribe's sovereign immunity.");[2] *StoreVisions, Inc. v. Omaha Tribe of Nebraska*, 795 N.W.2d 271,

[2] The *Rush Creek* court found that just because Supreme Court precedent requires that waivers of sovereign immunity must be express, it does not follow that "the

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278–80 (Neb. 2011), *modified on denial of rehearing*, 281 Neb. 978, 802 N.W.2d 420, *cert. denied* —— U.S. ——, 132 S.Ct. 1016, 181 L.Ed.2d 736 (2012) (adopting the reasoning of *Rush Creek,* the Nebraska Supreme Court applied Nebraska agency law principles to conclude that the Omaha Tribe of Nebraska's chairman and vice-chairman had apparent authority to waive the tribe's sovereign immunity without a resolution from the tribal council).

Here, the Amended Complaint alleges, and the record evidence and testimony provides, that Sanchez held himself out as STOFI's agent and acted at least with apparent authority in assenting to the MMMG Operating Agreement and the waiver of sovereign immunity contained therein. Sanchez signed the MMMG Operating Agreement as STOFI's President after the STOFI Board of Directors approved the LOI giving Sanchez the authority to proceed with the MMMG business venture. The parties operated under the agreement for approximately 18 months, and STOFI even made payments to MMP's principal for his performance under the agreement. Sanchez and STOFI did not make any attempts to immediately disavow the agreement, even though President Sanchez was notified

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authority to sign waivers cannot be established by apparent authority." *Id.* at 407; *See also id.* at 406 ("The statement in the Tribal Chairman's affidavit that the CFO did not have authority from the Tribal Council to waive sovereign immunity goes only to disprove express authority; it is not relevant in determining the existence of apparent authority, nor does it negate or prohibit the existence of apparent authority.").

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by a member of the Tribe that the agreement contained a waiver of sovereign immunity. Arguably, the words, actions, and other conduct of Sanchez and STOFI, reasonably interpreted, could have caused MMP to believe that STOFI consented to have the agreement and waiver signed on its behalf by Sanchez. However, like the issue of waiver, this issue of apparent authority concerns issues of fact that are not appropriate on a motion to dismiss, and must be left to the jury. *See Taco Bell of Cal. v. Zappone*, 324 So. 2d 121, 123 (Fla. 2d DCA 1975) (citation omitted) ("This issue of apparent authority often presents a mixed question of law and fact, and is one which should be submitted to the jury under appropriate instructions."). It was error for the trial court to rule on this factual issue and dismiss the case.

Accordingly, because there are numerous disputed issues of fact regarding STOFI's waiver and the applicability of the doctrine of apparent authority, the Trial Court should have, in accordance with the Fourth DCA's decision in *Mancher*, denied STOFI's Motion to Dismiss.

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CONCLUSION

The Trial Court's Order on Motion to Dismiss should be reversed and the case remanded for further proceedings thereon.

Dated: September 30, 2015

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CERTIFICATE OF COMPLIANCE

I hereby certify that the typeface used in this brief is no smaller than 14 point Times New Roman in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email this 30th day of September 2015, to:

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