

CASE NO: A142560

**IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA**

FIRST APPELLATE DISTRICT

ROBERT FINDLETON, dba Terre Construction,
also dba On-Site Equipment,

Plaintiff/Appellant,

vs.

COYOTE VALLEY BAND OF POMO INDIANS,
also known as the Shodakai Casino, and Does 1-50,

Defendants/Respondents

Appeal of the Judgment of the
Superior Court of California,
County of Mendocino
Superior Court Case No. SCUK CVG 12-59929
Honorable Jeanine Nadell, Judge

**APPELLANT'S SUPPLEMENTAL REPLY BRIEF
(Pursuant to this Court's 4/14/16 Memorandum)**

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I
INTRODUCTION

Pursuant to this Court's 4/14/16 Memorandum, Plaintiff/Appellant Robert Findleton, doing business as Terre Construction, also doing business as On-Site Equipment, ("Findleton") hereby submits this Supplemental Brief.¹

In this case, the Coyote Valley Band of Pomo Indians (the "Band"), through its duly authorized Tribal Council, adopted Resolution No. CV-08-20-08-03 which contains the following waiver:

"The Tribe hereby consents to a Limited Waiver of Sovereign Immunity of the Tribe, which is limited to 1) provide for arbitration of disputes; 2) avoid dispute resolution in state courts; 3) limit recourse solely to casino assets; and shall not allow recourse to assets owned by individual members of the Tribe."

The Resolution could not be a more explicit waiver of immunity.

As to the arbitration/judicial enforcement provisions of the AIA Standard Form of Agreement and Rental Contract, the Band advances nearly the same contentions as were presented to this court in Smith v. Hopland Band of Pomo Indians (2002) 95 Cal. App. 4th 1. During the pendency of the appeal in that case, the United States Supreme Court held that contractual arbitration clauses are express waivers of tribal

¹ Findleton assumes that the reference to "Resolution No. CV-02-08-03" in the Court's Memorandum refers to "Resolution No. CV-08-20-08-03," adopted on 8/27/08.

immunity. See: C&L Enterprises Inc. v. Patawatomí Indian Tribe of OK (2001) 532 U.S. 411, 414; 121 S.Ct. 1589. This case is even more compelling on its facts since the Band in this case has executed two agreements/contracts containing binding arbitration provisions and adopted Resolution CV-08-20-08-03, which explicitly waived immunity from suit as to disputes related to the construction of the tribal casino and related infrastructure. As in Smith, *supra*, when a tribe contractually waives its immunity from suit, and the arbitration agreement is signed within the State of California, California courts have jurisdiction over the Band to enforce the arbitration provisions pursuant to CCP 1293.

II ARGUMENT

A. BY ENTERING INTO THE CONSTRUCTION AGREEMENT AND THE ON-SITE RENTAL CONTRACT, WHICH EACH CONTAINED BINDING ARBITRATION PROVISIONS, THE BAND WAIVED ITS SOVEREIGN IMMUNITY.

1. On 10/4/07 Findleton and the Band entered into a written STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR FOR CONSTRUCTION PROJECTS OF LIMITED SCOPE (AIA Document A 107-1997). CT 115 (paragraph 2) CT 119, et seq. The purpose of the Agreement was the construction of certain roads, underground utilities and other matters on Band's land. Section

9.10.2 of the Agreement provides that any claims, disputes and other matters arising out of the Agreement shall be subject to mediation as a condition precedent to arbitration to be conducted pursuant to the Construction Industry Mediation Rules of the American Arbitration Association ("AAA"). CT 122. Section 9.10.3 of the Agreement provides that arbitration shall proceed in accordance with the Construction Industry Arbitration Rules of the AAA. CT 122. Section 9.10.5 provides arbitration proceedings shall occur in Mendocino County. CT 122. Section 9.10.7 provides that any award rendered by the arbitrator shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. CT 122.

Section 9.10.8 contained the following provision:

"No item or provision in this Agreement shall be construed as a waiver of sovereign immunity of [the Band]. The parties specifically agree that the sovereign immunity of [the Band] shall not be waived for disputes or other matters related to the Agreement." CT 123

2. On 11/7/07, On-Site Equipment and the Band entered into a MASTER RENTAL CONTRACT. CT 127, et seq. The purpose of

the Contract was for the supply of equipment/machinery to the Band's lands. Section 22(D) of the Contract provides that any claims, disputes or other matter arising out of the contract or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the AAA, that demand for arbitration shall be filed with the other party to the Contract and with the AAA, that demand for arbitration shall be made within a reasonable time after the claim or dispute has arisen, that the Agreement to arbitrate shall be specifically enforceable in any court having jurisdiction thereof, and that the award rendered shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. CT 128-129.

Section 22 also contained language similar to that in the Agreement that the sovereign immunity of the Band "shall not be waived for disputes or other matters related to this Agreement." CT 129.

Tribal Power to Waive Sovereign Immunity

“As a matter of federal law, an Indian tribe is subject to suit only where congress has authorized the suit or the tribe has waived its

sovereign immunity.” See: Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc. (1998) 523 U.S. 751, 140 *L. Ed. 2d* 981; California Parking Services, Inc. v. Soba Band (2011) 197 Cal. App. 4th 814, 817-818.

“C & L Enterprises Inc. v. Potowatomi Indian Tribe of OK (2001) 532, U.S. 411, 121 S. Ct. 1589 resolved the split of authority that had emerged in the state and federal courts on the question whether, by agreeing to an arbitration clause, and to enforcement of an arbitral award, 'in any court having jurisdiction thereof,' a tribe has waived its immunity from suit. The court concluded that agreement to such contract language constitutes an explicit waiver of tribal sovereign immunity.” Smith, *supra*, 6; C & L Enterprises, *supra*, at 421; S. Ct. at 1595-1596.

The court in C & L Enterprises, *supra*, focused on two key contractual provisions in the American Institute of Architects Form of Agreements; the arbitration clause and choice of law provision. *Id.*, 532 U.S. 411; Smith, *supra*, 6.²

² /Cases after C & L Enterprises have held the choice of law provision was “collateral to the court’s holding.” See: Ogala Sioux Tribe v. C. W. Enterprises, Inc. (2008) 542 F.3d 224, 232. “The Supreme Court noted the choice of law provision made it ‘plain enough’ that the [tribe] had waived immunity to suit in Oklahoma.” Ogala Sioux Tribe, *supra*, 232. “Fairly read, however, it is clear the C & L Enterprises decision does not depend on this provision.” See: Ogala Sioux Tribe, *supra*, 232. The C & L Enterprises decision was premised on the arbitration agreements alone. See: Ogala Sioux Tribe, *supra*, 233. In deciding the question of whether a tribe has waived its immunity the Supreme Court favorably cited multiple state court cases premised on the arbitration clause alone. Section 18.1.2 of the Abbreviated Form of Agreement in this case states the contract shall be governed by tribal law and that if the particular issue is not covered by such

The Supreme Court rejected the contention that the contract language constituted only a waiver by implication because the contract did not use the words “sovereign immunity” or expressly state the defense of sovereign immunity was waived (an implied waiver is ineffective because an established standard of federal law that a waiver must be “clear”). See: Smith, supra, 7 and 9 (explicit waiver does not require use of the magic words “waiver” or “sovereign immunity”).

"Contractual waivers of sovereign immunity are enforceable where they were executed by persons authorized to do so and where the necessary formalities were adequately observed." See: Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel (2011) 201 Cal.App.4th 190, 213 (Citing C & L Enterprises, supra, U. S. 411, 422-423)

The arbitration clause language of the Agreement and Rental Agreement between Findleton and the Band is similar to the language in C & L Enterprises, supra, and Smith, supra. The agreements to arbitrate and the enforcement of the award “in any court having jurisdiction thereof, ” standing alone, is an express waiver of

law, federal law shall govern. There is no evidence tribal law covers this dispute. The federal Arbitration Act does not create an independent basis for federal subject matter jurisdiction. See: Southland Corp v. Keating (1984) 465 U.S. 1, 16, 104, S. Ct. 852, 861 (N.9); Durant, Nichols, Houston, Hodgson & Corte-Costa P.C. v. Dupont (2009) 565 F3 56, 53. **Thus, a petition must be brought in state court unless the petition is predicated on action that arises under federal law.** See: Vaden v. Discover Bank (2009) 556 U.S. 49, 52-57 [129 S.Ct. 1262, 1267-70, 173 L. Ed.2d 206] Since there is no independent basis for federal court jurisdiction, Findleton's Petition is proper in state court.

sovereign immunity. See: Smith v. Hopland Band of Pomo Indians (2002) 95 Cal. App. 4th 1, 6. The basis for subject matter jurisdiction over the Tribe is that the Agreement and Contract were made in California and arbitration was to occur in Mendocino County. CT 122 (paragraph 9.10.5), 127. Parties are deemed to consent to personal jurisdiction of California courts in proceedings to enforce arbitration award and judgment when the arbitration provision is executed in this state. See: California Practice Guide, Alternative Dispute Resolution (TRG), ch. 5, Section 5:297; CCP 1293 (“The making of an agreement in this state providing for arbitration to be had within this state shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this state...”); Smith, *supra*, 10-11. Once a waiver of immunity is established, state court jurisdiction depends on whether state law provides jurisdiction over a given subject matter. California has done so in adopting CCP 1293. California courts have subject matter (and personal) jurisdiction over the Band for the purpose of compelling mediation and arbitration with Findleton as a result of the arbitration provisions of the Agreement and Contract.

The Band apparently contends that the arbitration provisions of the Agreement and Contract are made unclear or equivocal because of

the provisions stating the Band is not waiving its sovereign immunity. However, the language of the arbitration/judicial enforcement provisions, standing alone, is a clear waiver under Smith, supra, 7 and C & L Enterprises, supra, 418-419. As in Smith, supra, the Band's lack of understanding of the effect of the arbitration/judicial enforcement provisions does not make them ambiguous or invalid. *Id.*, 5. The Band's subjective belief that agreeing to the arbitration provisions did not waive sovereign immunity does not make the arbitration provisions unclear or unenforceable. Smith, supra, 8. See also Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel (2011) 201 Cal.App.4th 190, 209 ("with regard to the contractual type of waiver, the courts will look for the expressed intent of the parties, under an objective standard").

B. RESOLUTION NO. CV-08-20-08-03 CONTAINS A CLEAR, EXPRESS AND UNAMBIGUOUS WAIVER OF SOVEREIGN IMMUNITY BY THE BAND.

1. On 8/19/08, the Tribal chairman, John Feliz, Jr. was presented with a proposal and Third Amendment to Agreement for Findleton to continue work on the casino project with payments to be made in early 2009. CT 115 (paragraphs 5 and 6); CT 133-136. Paragraph 2 (d) of the proposal stated that the Band was "to issue a Tribal resolution

accepting the terms and conditions outlined in the proposal. **This resolution shall include the "limited waiver of sovereign immunity" wording which allows Terre Construction remedy within the U. S. Federal court system."** CT 134. The Third Amendment was executed by the Band's chairman on 8/19/08. CT 136. The Proposal was presented to the Tribal Council. CT 138. CT 654:8.

2. On 8/27/08, the Tribal Council adopted RESOLUTION NO. CV-08-20-08-03. CT 137-138. **The Resolution recites that the General Council of the Tribe had previously adopted General Council Resolution 08-01 which authorized the Tribal Council to waive the Tribe's sovereign immunity on a limited basis in contracts related to the development and financing of a new gaming and resort facility and related infrastructure and utility to support the new gaming facility and the Tribal community.** CT 138. The Resolution resolved that the Band accepts the terms and conditions outlined in Findleton's proposal and accepts the Third Amendment. CT 138. **The Resolution contained a waiver of sovereign immunity, limited to (1) provide for arbitration of disputes (2) avoid dispute resolution in state courts, (3) limit recourse solely to casino assets (4) shall not allow recourse to assets owned by individual members**

of the Tribe. CT 138. Thereafter, Findleton performed the scope of work described in the Third Amendment (and subsequent amendments) at the Band's property in Mendocino County. CT 116 (paragraph 8).³

This is a clear, and explicit, waiver of the Band's sovereign immunity and, assuming the General Council validly delegated its authority to waive the Band's sovereign immunity to the Tribal Council, it was made by those who had authority to do so on behalf of the Band.

Smith, *supra*, 9.

C. BY ADOPTING FINDLETON'S PROPOSALS AND EXECUTING THE THIRD AMENDMENT TO AGREEMENT, THE BAND WAIVED ITS IMMUNITY.

In order to apply pertinent legal principals, it may be necessary to determine the historical facts of a transaction. See: Yavapai-Apache Nation, *supra*, 207.

In this case, both the Agreement (CT 122) and the Rental Contract (CT 128-129) provided for the binding arbitration of disputes and entry of judgment in any court having jurisdiction thereof. As discussed, among the jurisdictional factors to be considered are: the choice of law provision and method of dispute resolution (Yavapai-Apache Nation, *supra* 195-196); the negotiation of the contract by an

³ / Nearly all of the work/payments which are the subject of this dispute arose under the Third Amendment. CT 23-25.

authorized representative (Warburton/Buttner v. Superior Court (2002), 103 Cal. App.4th 1170, 1189); approval of the contract by legislative resolution (Yavapai-Apache Nation, *supra*, 198 and 204); whether the waiver allows for binding arbitration and judicial enforcement in any court of competent jurisdiction; whether the tribal council, with full knowledge of its terms, approved the contract by resolution (Id. 208); and whether an amendment to the contract changed the dispute resolution and sovereign immunity provisions. (Id., 215-216). Each of these factors is satisfied in this case.

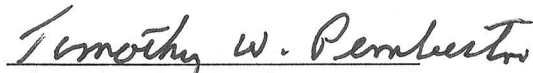
The contracts contained the (contradictory) statement that no provision in the contracts was to be construed as a waiver of sovereign immunity. CT 123, 129. The proposal accompanying the Third Amendment contained a condition precedent to the Third Amendment that the Band adopt a resolution including "limited waiver of sovereign immunity" wording. CT 134. The adoption of the proposal and the Third Amendment (and Resolution No. CV-08-20-08-03) by the Tribal Council had the effect of eliminating the contradictory provisions in the Agreement and Contract (even if they were effective caveats) thereby making these contractual waivers clear and unambiguous.

III

CONCLUSION

The arbitration/judicial enforcement provisions of the Agreement and Contract were duly authorized, valid contractual waivers of sovereign immunity. The adoption of Resolution CV-08-20-08-03 by the Tribal Council pursuant to the proposal accompanying the Third Amendment, was a duly authorized and valid, explicit legislative waiver of sovereign immunity.

Dated: April 27, 2016



Timothy W. Pemberton

IV

CRC RULE 8.204(C)(1) STATEMENT

Pursuant to California Rules of Court, Rule 8.204(c)(1), the foregoing brief contains 2,489 words (as counted by software).

Dated: Dated: April 27, 2016


Timothy W. Pemberton