UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NORTH DAKOTA

Shingobee Builders, Inc., **Case No. 1:18-cv-00057-DLH-CSM**

Plaintiff,

v.

North Segment Alliance,

Defendant.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT NORTH SEGMENT ALLIANCE'S MOTION TO DISMISS

INTRODUCTION

Plaintiff Shingobee Builders, Inc. ("Shingobee") respectfully submits this Memorandum of Law in Opposition to the Motion to Dismiss filed by Defendant North Segment Alliance ("North Segment") on April 16, 2018.

The Court should deny North Segment's Motion to Dismiss Shingobee's Complaint. This Court has subject matter jurisdiction over the dispute and North Segment waived sovereign immunity in this case. There is complete diversity between Shingobee – a citizen of Minnesota – and North Segment – a tribal corporation with a principal place of business in North Dakota – that gives this Court jurisdiction over this case. Additionally, there is an explicit waiver of sovereign immunity in the parties' contract that allows this case to proceed in this court. For these reasons, the Court should deny North Segment's motion to dismiss.

FACTUAL BACKGROUND

A. Project Background

This dispute arose over the construction of an apartment complex on the Fort Berthold Indian Reservation. On or about July 31, 2015, Shingobee entered into a guaranteed maximum price ("GMP") contract with North Segment Community Development Corporation ("NSCDC") for the construction of what was originally planned to be a 30-unit apartment complex known as the Red Hawk Estates Project in New Town, North Dakota (the "Project"). *See* Complaint (Doc. ID #1) at ¶¶ 8–9). As set forth in the Contract, Shingobee agreed to perform work as a construction manager and general contractor for the Project. *Id.* at ¶ 9.

During construction of the Project, Shingobee and NSCDC executed Amendment No. 2 to the Contract in which 36 additional units were added to the Project. *Id.* at ¶ 13. However, due to a scrivener's error, Amendment No. 2 only accounted for the cost to construct 30 additional units. *Id.* at ¶ 14. The parties also executed a number of other amendments to the Contract that increased the scope of work and GMP. *Id.* at ¶ 15. Pursuant to the Contract, NSCDC agreed to pay Shingobee a construction manager fee of 10% for any increases in the scope of work. *Id.* at ¶ 16. However, Shingobee was not paid the full amount due under the Contract. *Id.* at ¶ 17.

B. The Parties

The identity of the parties is a key issue underlying this dispute. Shingobee is a general contractor with a principal place of business in Minnesota. *Id.* at ¶¶ 1–2. North Segment is a tribal corporation organized to conduct business on behalf of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. *See* Affidavit of Damon K. Williams ("Williams Aff."), Ex. A (Doc. ID #10-1).

North Segment, not NSCDC, is the defendant in this action because NSCDC ceased to be an entity during the construction of the Project. *See* Complaint (Doc. ID #1) at ¶ 10. Through a resolution dated March 9, 2017, the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation adopted a resolution in which North Segment assumed all assets and liabilities of NSCDC. *See* Williams Aff., Ex. F (Doc. ID #10-6).

C. The Contract

The Contract contains two provisions that are dispositive for the purposes of this motion. First, Elgin Crows Breast executed the Contract as "Pres. NSCDC." *See* Williams Aff., Ex. C (Doc. ID #10-3). As set forth in the bylaws of NSCDC, the president was the designated signatory for all contracts entered into by NSCDC. *See id.*, Ex. E (Doc. ID #10-5), at § 4.4(a)(iv). Therefore, the Contract was authorized by NSCDC's governing documents. *See id.*

Second, the Contract also contains a dispute resolution clause that waives sovereign immunity. *See id.*, Ex. C (Doc. ID #10-3) at § 9.1. The provision states:

> The Parties will use best efforts to resolve disputes prior to resorting to formal dispute resolution. ***The Tribe hereby waives, and agrees not to assert as a defense, any immunity from suit based upon or related to Tribe's status as a federally recognized Indian Tribe***, except as provided for in, and as strictly limited by, this Section. For any matter related to this Agreement, ***Tribe hereby expressly consents only to the jurisdiction of, and consents to be sued only in, any federal court located in the State of North Dakota***. Said court shall not have the authority to award punitive damages to either Party. This limited waiver is granted only to Shingobee Builders, Inc., and its agents, successors and assigns who have been approved by prior written consent of the Owner.

Id. (emphasis added). Therefore, there is an express waiver of sovereign immunity and a consent to jurisdiction of this Court.

D. Procedural Posture

Shingobee commenced the present action against North Segment on March 21, 2018. *See* Complaint (Doc. ID #1). On April 16, 2018, North Segment filed a motion to dismiss pursuant to

Federal Rule of Civil Procedure 12(b)(1), arguing Shingobee's Complaint should be dismissed for lack of subject matter jurisdiction and due to sovereign immunity. *See* Memorandum in Support of Motion to Dismiss (Doc. ID #9). Shingobee now responds to North Segment's motion to dismiss.

ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) provides that a complaint may be dismissed for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). A plaintiff only has to establish jurisdiction by a preponderance of the evidence to survive a motion to dismiss. *See Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir. 1990). Courts considering a motion to dismiss for lack of jurisdiction may consider evidence outside the pleadings without converting the motion to one for summary judgment. *See Smith ex rel Fitzsimmons v. U.S.*, 496 F. Supp. 3d 1035, 1038 (D.N.D. 2007). Dismissal is only proper where the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

B. This Court Has Subject Matter Jurisdiction Over this Action.

North Segment appears to rely on an argument that it is an extension of the Tribe, rather than a separate corporation, to support a conclusion that this Court does not have subject matter jurisdiction over this dispute. This is an incorrect interpretation of the law.

A federal court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 where the amount in controversy exceeds $75,000 and the dispute is between citizens of different states. *See* 28 U.S.C. § 1332(a). There is no dispute the amount in controversy in this matter exceeds $75,000

and that Shingobee is a citizen of Minnesota. Therefore, the core of the dispute is with respect to North Segment's citizenship.

North Segment correctly states that "an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction." *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974). However, this case does not involve a dispute between a private citizen and an Indian tribe or tribal authority. This case instead involves a dispute between a private citizen and a tribal corporation, which is an entity of the state in which it has its primary place of business.

North Segment attempts to classify itself as a tribal authority, when in actuality it is a tribal corporation. The cases cited by North Segment are distinguishable from the present case because they involve tribal authorities and agencies rather than separate tribal corporations. *See Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir. 2007) (finding no subject matter jurisdiction when the dispute involved a tribal education board and tribal school that were "considered part of the Indian tribe"); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) (finding no jurisdiction when the dispute involved a housing authority that was merely "a tribal agency rather than a separate corporate entity created by the tribe"); *U.S. ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273, 1276–77 (8th Cir. 1987) (finding no jurisdiction in a dispute involving a tribal housing authority which was "an agency" of the tribe).

North Segment similarly cannot rely on *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000) in support of its argument that there is a lack of diversity in this case. In *Hagen*, the defendant college argued that it was a tribal agency because "it is chartered, funded, and controlled by the Tribe to provide education to tribal members on Indian land." *Id.* at

1043. Because the college provided educational benefits to the tribe, the court found the corporation served "as an arm of the tribe and not as a mere business." *Id.* Therefore, *Hagen* follows the case law cited above on jurisdiction for tribal agencies and is not controlling over the present case.

The decisions of several courts instead support the conclusion that this Court has jurisdiction to hear this matter. When reviewing the citizenship of a tribal corporation, the Seventh Circuit held that "a corporation chartered under Native American tribal law should be treated as a citizen of a state pursuant to § 1332(c)." *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 693 (7th Cir. 2011). The Seventh Circuit also expressly distinguished *Auto-Owners Insurance Co.*, stating, "We understand the Eighth Circuit's decision to apply only to *unincorporated* tribal agencies." *Id.* The Ninth and Tenth Circuits have similarly concluded that "a corporation organized under tribal law should be analyzed for diversity jurisdiction purposes as if it were a state or federal corporation." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 723 (9th Cir. 2008); *see also Gaines v. Ski Apache*, 8 F.3d 726 (10th Cir. 1993) (finding tribal corporate entities "may be considered a citizen of the state of its principal place of business for diversity jurisdiction purposes").

Similarly, the United States District Court for the District of South Dakota recently distinguished *Auto-Owners Insurance Co.* on the basis that *Auto-Owners* involved an unincorporated tribal board. *See J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board*, 842 F. Supp. 2d 1163, 1181 (D.S.D. 2012). The court cited, among other things, work from a well-known Indian Law scholar supporting the concept that tribal corporations are "citizen[s] of the state of its principal place of business for purposes of diversity jurisdiction." *Id.* at 1182 (quoting William C. Canby, *American Indian Law* 110, 249 (5th ed. 2009)).

In this case, North Segment admits in its opening memorandum that it is a tribal corporation. *See* Memorandum in Support of Motion to Dismiss (Doc. ID #9) at p. 3 ("On March 8, 2017, the Tribe created, pursuant to and under tribal law, NSA, a nonprofit tribal corporation . . . ."). North Segment's articles of incorporation similarly state that North Segment is a "tribal corporation." *See* Williams Aff., Ex. B (Doc. ID #10-2). The articles of incorporation also identify a "principal office of the Corporation" in New Town, North Dakota. *See id.*, art. IV. Thus, North Segment is a tribal corporation with a principal place of business in North Dakota. As such, North Segment is also a citizen of North Dakota for purposes of determining diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). This case therefore involves a dispute between citizens of different states, and this Court has jurisdiction over the matter. North Segment's motion to dismiss should be denied.

C. <u>North Segment Waived Sovereign Immunity and Expressly Consented to Be Sued in this Court.</u>

North Segment also argues that this case should be dismissed because there was no waiver of sovereign immunity. North Segment incorrectly interprets the law with respect to waiver of sovereign immunity and improperly argues the case should be dismissed for this reason.

Indian tribes may only be sued when authorized by Congress or where there is a waiver of sovereign immunity. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). There is no specific language necessary to waive immunity; the waiver must only be "clear." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); *see also Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir. 1995) (noting waiver of sovereign immunity must be explicit, but does not require "the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity").

By way of example, courts consistently find that arbitration provisions in contracts are express waivers of sovereign immunity. *Ogala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 231 (8th Cir. 2008) (noting "the arbitration agreement alone is enough to waive immunity"); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1416–17 (8th Cir. 1996). In fact, the First Circuit has called this type of forum-selection clause "nose-on-the face plain." *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000). A contractual clause expressly waiving sovereign immunity for a lawsuit in a specific court – as is present in this case – goes beyond a contractual arbitration provision and is therefore an express waiver of sovereign immunity.

North Segment relies on *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) to argue that the express waiver of sovereign immunity in the Contract is not effective in this case. However, *Memphis Biofuels* is limited to the facts of that case and is distinguishable from the present situation. *Memphis Biofuels* involved a contract dispute between a company and a federally chartered tribal corporation. *Id.* at 918. The parties extensively negotiated the contract prior to execution, and the tribal corporation's attorneys included comments in the draft notifying the company that board approval was necessary to waive sovereign immunity. *Id.* at 918–19. However, the board did not waive immunity when the parties signed the contract, and the court ultimately held that sovereign immunity was not waived by the tribal corporation. *Id.* at 919, 922.

Numerous courts have since distinguished the Sixth Circuit's decision in *Memphis Biofuels*. Under a similar factual scenario as *Memphis Biofuels*, the court in *Bates Associates, LLC v. 132 Associates, LLC*, 799 N.W.2d 177 (Mich. Ct. App. 2010) found a waiver of sovereign immunity. In *Bates Associates*, the parties executed a sale agreement that included a waiver of

sovereign immunity and a consent to jurisdiction in Michigan. *Id.* at 180. Relying in part on *Memphis Biofuels*, the tribe argued the contractual waiver of sovereign immunity was not effective because there was not a separate tribal resolution waiving sovereign immunity, as required by the tribal code. *Id.* at 182.

The court distinguished *Memphis Biofuels* and found the tribe waived sovereign immunity. *Id.* at 183–84. The court found the signatory to the agreement had authority to enter into the agreement and the tribe never represented that the agreement was invalid. *Id.* The court stated, "By conceding that the waivers in the option agreement and sale agreement were valid . . . the Tribe waived any argument that they were invalid because they were not supported by a tribal resolution." *Id.* at 184.

Similarly, the court in *Smith v. Hopland Band of Pomo Indians*, 115 Cal. Rptr. 455 (Cal. Ct. App. 2002) found a waiver of sovereign immunity. *Hopland* involved a contract dispute between an architect and a tribe for the development of Indian land. *See id.* at 457. Included within the contract was a dispute resolution clause requiring the parties to submit disputes to arbitration. *Id.* A dispute arose and the architect sued the tribe in state court. *Id.* The tribe moved to dismiss pursuant to a tribal ordinance requiring the tribal council to pass a resolution in order to waive sovereign immunity. *Id.*

The court found the tribe waived its sovereign immunity by executing the contract with the arbitration provision. *Id.* at 461. The court found the tribe's representative and signatory to the contract had authority to bind the tribe, and the tribe approved the contract by resolution. *Id.* By doing so, the tribe "clearly and explicitly waived its sovereign immunity." *Id.* The court found it unnecessary for the tribe to pass a separate ordinance waiving sovereign immunity where the tribal council approved the contract that included the arbitration provision. *Id.* at 462.

This Court should reach the same conclusion as in *Bates* and *Hopland* and deny North Segment's motion to dismiss. There is a clear, explicit waiver of sovereign immunity in the Subcontract: "The Tribe hereby waives, and agrees not to assert as a defense, any immunity from suit based upon or related to Tribe's status as a federally recognized Indian Tribe, except as provided for in, and as strictly limited by, this Section." Williams Aff., Ex. C (Doc. ID #10-3) at § 9.1.

North Segment's reliance on a provision within its articles of incorporation does not change this analysis. North Segment is not arguing, and, in fact, cannot argue, that the Contract is invalid for any reason. There is no allegation that the board of directors failed to approve the Contract. The facts instead show Shingobee completed work pursuant to the Contract and was paid some amounts owed under to the Contract. The Contract was also executed by the individual designated in the Bylaws of the North Segment Community Development Corporation as the proper signatory. *See* Williams Aff., Ex. E (Doc. ID #10-5) at § 4.4(a)(iv) ("The president shall sign and execute all contracts in the name of the corporation . . . ."); *see also id.*, Ex. C (Doc. ID #10-3) (noting Elgin Crows Breast executed the Contract as "Pres. NSCDC"). Therefore, North Segment cannot show the Contract itself was invalid for any reason.

North Segment's argument that the Tribal Business Council did not approve the waiver of immunity is similarly flawed. As discussed more fully above, an additional vote on the waiver of immunity is not necessary when it is explicitly provided for in the Contract, which was approved by the necessary authorities. Additionally, a separate requirement for approval of the waiver of sovereign immunity is not included in NSCDC's bylaws, which were in effect at the time of contract execution. *See* Williams Aff., Ex E (Doc. ID #10-5).

Even if additional approval of a tribal board were required in this case, the Tribal Business Council passed a resolution authorizing "the 'North Segment Alliance', a tribal not-for-profit corporation, to assume all assets and liabilities of the North Segment Development Corporation effective the date of this Resolution." *See* Williams Aff., Ex. F (Doc. ID #10-6). By doing so, the Tribal Business Counsel expressly approved North Segment's assumption of all of NSCDC's liabilities, including the Contract that contains the express waiver of sovereign immunity. As discussed in *Bates* and *Hopland*, this resolution satisfies any additional tribal approval requirements, to the extent these exist. Therefore, North Segment waived sovereign immunity and consented to be sued in this forum. North Segment's motion to dismiss should be denied.

CONCLUSION

For the foregoing reasons, Plaintiff Shingobee Builders, Inc. respectfully requests that this Court deny Defendant North Segment Alliance's Motion to Dismiss.

Dated: May 7, 2018

By: */s/ Elise R. Radaj*

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