

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM CROSS, JR.,

Plaintiff

V
KEWADIN CASINOS GAMING
AUTHORITY, a political subdivision of
the SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS, a/k/a
SAULT STE. MARIE TRIBAL
GAMING AUTHORITY,

Defendant.

C.A. No. 2:19CV11326-AJT-SDD

HON. ARTHUR J. TARNOW

MAG. JUDGE STEPHANIE
DAWKINS DAVIS

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**DEFENDANT KEWADIN CASINOS GAMING AUTHORITY'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure
and LR 7.1 of the Local Rules of the United States District Court for the Eastern
District of Michigan, Defendant Kewadin Casinos Gaming Authority (the

“Authority”), a governmental instrumentality of the Sault Ste. Marie Tribe of Chippewa Indians (the “Tribe”), through its undersigned counsel, moves to dismiss Plaintiff’s Complaint with prejudice in the above-captioned matter, for the following reasons:

1. On April 9, 2019, Plaintiff William Cross Jr. (“Plaintiff”) filed a complaint against the defendant Authority in the Third Circuit Court of Wayne County, Michigan; and, without waiving sovereign immunity for itself or for the Tribe, the Authority timely removed that Complaint to this Court, based on federal question jurisdiction, within 30 days of its service, along with discovery, on April 15, 2019. The Complaint and its Exhibit A are submitted as Exhibit A with the Memorandum of Law in support of this Motion to Dismiss.

2. The Complaint seeks damages and injunctive relief in the form of a declaratory judgment against the Authority, a governmental instrumentality of the Tribe formed for the purpose of overseeing gaming activities, as permitted under the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.* (“IGRA”). The Tribe is a federally recognized Indian tribe as defined under IGRA § 2703(5) and, along with its instrumentalities, possesses powers of self-governance.

3. The Complaint demands payment from the Authority’s revenues under a purported contract with the Authority (see Ex. A to Pl. Compl, Doc 1, Ex. A), never fully executed, as a “finder’s fee” for finding, through unspecified

services, unidentified “Finance Parties” allegedly interested in providing “Investment Funds” to the Authority. The Complaint fails to allege that Plaintiff ever sent any notices (as required under the purported contract with the Authority) of any demands or claims for payment or of any notice to the Authority of any unidentified “Finance Party” supplying investment funds to the Authority solely because of his efforts.

4. Congress enacted IGRA in order **a)** to “provide a statutory basis for the operation of [Indian] gaming” as a means to “promot[e] tribal economic development, self-sufficiency, and strong tribal governments,” 25 U.S.C. § 2702(1), and **b)** to “shield [Indian tribes] from organized crime and other corrupting influences, to ensure that [Indian tribes are] the primary beneficiary of . . . gaming operation[s], and to assure that gaming is conducted fairly and honestly by both the operator and the players” (25 U.S.C. § 2702(2)). Plaintiff’s purported contract is a gaming-related contract: it provides that Plaintiff, retained as a consultant and an independent contractor, is to provide professional advice relating to financing and capitalization of projects by the Authority, including participation in a consortium with other owned casinos (See Section 3 of Ex. A to Pl. Compl., Doc. 1, Ex. A, Pg ID 21).

5. Under the Gaming Authority Charter of the Tribe, the Authority is not empowered to waive the sovereign immunity of the Tribe (Chapter 94, Gaming

Authority Charter (“Charter”), submitted with the Memorandum of Law as Exhibit B, Charter, § 94.111(1)).

6. No purported waiver of sovereign immunity of the Authority is effective unless it is made by express resolution to waive sovereign immunity by the Management Board of the Authority, and unless it conforms to tribal code requirements (Ex. B, Charter § 94.111(2)). In like manner, no purported waiver of jurisdiction is effective unless it is made by express resolution to waive jurisdiction by the Management Board of the Authority, and unless it conforms to Tribal Code requirements. (Chapter 44, Waiver of Tribal Immunities Ordinance (“Tribal Immunities Ordinance”), submitted with the Memorandum of Law as Exhibit D, § 44.109). Even if a Board resolution supplies such a waiver of sovereign immunity or jurisdiction, the waiver does not become a vested contractual right unless it is attached to the subject contract. (Ex. D, § 44.110).

7. In light of the sizeable fee sought for the first time by Plaintiff in his lawsuit, and in light of the professional services to be provided under Plaintiff’s purported contract (i.e., professional advice relating to financing and capitalization of projects by the Authority, including participation in a consortium with other owned casinos (See Section 3 of Ex. A to Pl. Compl., Ex. A), the validity of Plaintiff’s purported gaming-related contract turns on federal law, e.g., IGRA.

8. The Tribe and its instrumentalities are only subject to suit only where Congress or the Tribe (or its instrumentality as authorized by and in conformity with tribal law and certain federally approved ordinances, see Exhibits B, C, D, and E submitted with the Memorandum of Law in support of this Motion) expressly, clearly and unequivocally waives sovereign immunity. Failing such a clear and conforming waiver of sovereign immunity, lawsuits against the Tribe or its governmental instrumentalities are barred.

9. The purported contract itself contains on its face an express reservation of the sovereign immunity of the Tribe and the Authority. (See Ex. A to Pl. Compl., § 11, Doc 1, Ex. A, Pg ID 23). Thus, on its face the purported contract necessarily implicates the federal common-law of tribal sovereign immunity. As federal courts have recognized, Indian tribes have an interest in a national uniform body of federal law relating to sovereign immunity.

10. Despite the express reservation of sovereign immunity of the Authority and of the Tribe in the purported contract, and despite the absence of any clear and unequivocal manifestation of a waiver of sovereign immunity or jurisdiction through formal Board resolution adopted by the Board of the Authority in conformity with the requirements of the Tribal Code, Plaintiff alleges that Section 11 in the purported contract (relating to venue, governing law, and to jurisdiction) permits this lawsuit against the Authority for payment from its

revenues, waives sovereign immunity, and confines the Tribe to state court (Ex. A to Pl. Compl., § 11, Doc 1, Ex. A, Pg ID 23).

11. In light of the express reservation of sovereign immunity in the very Section upon which Plaintiff relies, and in light of the explicit final sentence in which that express reservation overrides any other provisions in Section 11 from which Plaintiff would imply a waiver of sovereign immunity or jurisdiction, contrary to the requirement under federal law that such waivers be clear and unequivocal (*Id.*), the Authority and the Tribe vigorously disagree that the purported contract creates a valid waiver of sovereign immunity or jurisdiction.

12. Because the validity of Plaintiff's purported contract turns on federal law, because the purported contract clearly and expressly reserves sovereign immunity for both the Authority (denominated the "Client" in the alleged agreement) and the Tribe, and because the purported contract does not contain a clear and unequivocal manifestation of a waiver (as required under federal law) of sovereign immunity or jurisdiction by formal Board resolution delineating the specifics required in and the findings necessary for such waivers as required under tribal ordinances, the purported contract is clearly insufficient to effect valid waivers, and the Authority moves to dismiss the Complaint with prejudice, pursuant to Rule 12(b)(1), for want of subject matter jurisdiction.

13. The Authority makes this 12(b)(1) Motion without waiving its or the

Tribe's sovereign immunity, for this Court may exercise sufficient federal question jurisdiction for the limited purpose of ascertaining its own jurisdiction. *United States v. Ruiz*, 532 U.S. 622, 628 (2002).

14. In addition, because Plaintiff's Complaint fails to articulate material factual allegations supporting a plausible claim for relief under the *Twombly/Iqbal* standard, the Authority moves to dismiss the Complaint with prejudice, pursuant to Rule 12(b)(6). For over a decade, Plaintiff did not submit any notices or demands or claims to the Authority, as the purported contract requires (Ex. A to Pl. Compl., § 13(e), Doc 1, Ex. A, Pg ID 25), **a)** identifying Finance Parties that provided investment funds for projects of the Authority solely because of his consulting services, **b)** delineating the amounts of any such investment funds, and **c)** seeking payment of his alleged finder's fees. Plaintiff's Complaint is also lacking in any such specifics. Plaintiff also fails to allege that he complied with the notice provisions in the purported contract and submits an incomplete contract (missing its Exhibit A identifying "Finance Parties), one which is devoid of a title or a date for Plaintiff's signature and therefore lacks an "Effective Date," and on which lacks Plaintiff's initials next to a reduced finder's fee. (See Ex. A to Pl. Compl., p. 6, Doc 1, Ex. A, Pg ID 29 and Pg ID 22 (next to § 4), respectively. The Authority makes its 12(b)(6) Motion without waiving its or the Tribe's sovereign immunity as a separate and independent ground for dismissal.

15. This motion is based upon the accompanying Memorandum of Law in support of the motion.

16. The undersigned certifies that, on May 7, 2019, the Authority's counsel sought the concurrence of opposing counsel in the relief requested by this Motion, and that such concurrence was not supplied.

WHEREFORE, for the reasons discussed more fully in the memorandum of law accompanying this Motion, Defendant Kewadin Casinos Gaming Authority, a governmental instrumentality of the Sault Ste. Marie Tribe of Chippewa Indians, respectfully requests that this Honorable Court grant this Motion and dismiss Plaintiff's Complaint with prejudice, pursuant to Fed. R. Civ. P. 12(b)(1) and/or (6), and award the Authority its reasonable attorneys' fees and costs incurred in bringing this Motion.

Dated: May 7, 2019 Respectfully submitted,

KEWADIN CASINOS GAMING AUTHORITY,
a governmental instrumentality of the SAULT STE.
MARIE TRIBE OF CHIPPEWA INDIANS, a/k/a
SAULT STE. MARIE TRIBAL GAMING AUTHORITY

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