

STATE OF MICHIGAN
THIRTIETH JUDICIAL CIRCUIT COURT
INGHAM COUNTY

JLLJ DEVELOPMENT LLC, and
LANSING FUTURE DEVELOPMENT II, LLC,

Plaintiffs,

v

File No. 21-189-CB
Hon. Joyce Draganchuk

KEWADIN CASINOS GAMING AUTHORITY,

Defendant.

MOTION TO DISMISS

BEFORE THE JOYCE DRAGANCHUK, CIRCUIT COURT JUDGE

Lansing, Michigan - Wednesday, June 23, 2021

APPEARANCES:

For the Plaintiffs:

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1 assets that can be used. There's no assets that can be used.
2 We all know how this is done, which is you go and you find an
3 investor who's willing to put up the money. And if they
4 -- if you can get an investor who's willing to put up the
5 money, then you can give them a share of the profits down the
6 road to compensate them for that risk.

7 And that's what they did here. They took a huge
8 risk. Getting a casino built in down state Michigan, as they
9 said in their complaint, their own complaint, is a hard thing
10 to do. There was a lot -- were a lot of hurdles to get
11 through. And that's why they had the big payday if it
12 worked. And now they want the big payday even though it
13 hasn't worked. And they don't get that because they agreed
14 that they would only get compensated from those profits.

15 So the waiver of sovereign immunity we believe is
16 clear and unambiguous. If, as Mr. Broder says, it's
17 ambiguous, it still has to be interpreted in favor of the
18 Tribe because of the substantial case law that says that
19 waivers of sovereign immunity have to be waived -- or have to
20 be construed in front of the Tribe -- in favor of the Tribe.

21 The one last point I want to make is just Tribes
22 all the time waive sovereign immunity. The fact that -- the
23 case law is when the Tribes believe they haven't is not
24 indicative of the path that ties to regularly based sovereign
25 immunity. There's regular suits where it's not an issue.

1 It's only in this type of a case where somebody's trying to
2 come back in and get something that they did not negotiate
3 for, a broad waiver of sovereign immunity to get at all the
4 Tribe's assets that there's an issue.

5 The Plaintiffs here, we would note, are basically
6 nonrecourse entities also. And that's one of the things that
7 is frustrating is that they're complaining that the Tribe and
8 their entity is nonrecourse loan. But what we've got here
9 are people who created these one -- one purpose corporations,
10 put in whatever assets they wanted to put into those
11 corporations, but we can't bring a claim against their
12 corporations because the corporations are these single entity
13 -- or single transaction entities. They know how to do the
14 nonrecourse for their benefit. And now they're complaining
15 the Tribe is doing it for its benefit, and that they agreed
16 to it and they shouldn't have now, they say, because they
17 want the big payday.

18 So we are very frustrated with the language that
19 they're using in trying to denigrate the Tribe and denigrate
20 the attorneys for a case where they knew what they agreed to
21 and they need to live with it. So we would ask that the
22 court dismiss this case.

23 THE COURT: All right, thank you. Well, as I
24 indicated at the beginning, this is the Defendant's Motion to
25 Dismiss. It is, in actuality, a Motion for Summary

1 Disposition. According to the motion, it's brought under
2 (C) (4), subject matter jurisdiction. But that -- I could not
3 find any briefing on that, so I'm not considering it under
4 (C) (4).

5 It was also brought under (C) (10), according to the
6 motion. But it wasn't briefed, again, as a (C) (10) motion,
7 and it wasn't properly supported as a (C) (10) motion, so I'm
8 not considering it a (C) (10) motion.

9 What it is is a (C) (7) motion, which is how it was
10 briefed, and that is that the -- the assertion of sovereign
11 immunity with respect to the Tribe. So proceeding on those
12 grounds I think it would be wise to start with some guiding
13 principles in this area.

14 First, in order to relinquish its immunity, of
15 course a Tribe's waiver has to be clear. A waiver can't be
16 implied. It has to be unequivocally expressed. But even
17 though it must be unequivocally expressed, it doesn't really
18 require the particular words, sovereign immunity, be used in
19 order to constitute an unequivocal express waiver of
20 sovereign immunity.

21 I also learned from looking at the cases that were
22 cited by both sides that the contract provisions themselves
23 may suffice to work as an express waiver of sovereign
24 immunity where -- in cases where those exact words are not
25 used. So what I'm alluding to is the *Bates Association* case,

1 the Michigan Court of Appeals case, talked about the U.S.
2 Supreme Court case, *C & L Enterprises*, where the sovereign
3 immunity was found to be waived. It didn't say the Tribe
4 expressly waives sovereign immunity, but it did -- the
5 contract said Oklahoma law would govern and that the Oklahoma
6 courts had jurisdiction. So the U.S. Supreme Court, as was
7 discussed in the *Bates* case by the Michigan Court of Appeals,
8 found that that was -- that satisfied an express waiver of
9 sovereign immunity.

10 I saw that again in a case that was unpublished.
11 This is a Michigan Court of Appeals case from 2015. And as
12 an unpublished case, of course it's of little -- it's not
13 binding, but it was still informative, along with the other
14 cases that are binding. And that is *Star Tickets versus*
15 *Chumash Casino Resort*, and it applied those same principles
16 that you don't have to actually say we waive sovereign
17 immunity, but the contract itself and the language of the
18 contract may operate as such a waiver.

19 So in that case the contract contained the language
20 that it was enforceable against any party and any court of
21 competent jurisdiction within Kent County. And it also said
22 the parties consented and submitted to the personal
23 jurisdiction of Michigan for purposes of enforcing the
24 agreement. And then, finally, it also said the agreement was
25 governed by the laws of Michigan. So again, those

1 contractual provisions operated as an express waiver of
2 sovereign immunity.

3 So with those principles in mind, I would conclude
4 that the Term-Key Agreements alone are far more expansive in
5 waiving sovereign immunity than just Section 6.3 alone
6 describes. And of course an entire contract always has to be
7 examined. You can't just pull out one section and ignore
8 everything else, so I examined the entire contract.

9 And Section 5.3.1.3 entitled *Election of Remedies*
10 provides as follows, and this is a little long but I think
11 it's important. So it provides, "Notwithstanding any term or
12 provision of any of the Transaction Documents to the
13 contrary, Developer may exercise any and all rights and
14 remedies existing or available to Developer under any of the
15 Transaction Documents, or under applicable law including,
16 without limitation, the rights and remedies of a secured
17 party with respect to the Operating Profits and Equipment
18 under the Tribe's UCC provisions.

19 In the event Developer shall elect to selectively
20 and successively enforce its rights under applicable law or
21 under any one or more of the Transaction Documents, such
22 action shall not be deemed a waiver or discharge of any other
23 right or remedy existing or available to Developer under any
24 applicable law or under the Transaction Documents; nor shall
25 such action discharge any lien, encumbrance, or other

1 security interest granted to Developer under the Transaction
2 Documents."

3 Going on, Section 5.3.3.2 *Cumulative Remedies*
4 provides, "The remedies provided for in this section 5.3
5 shall be cumulative to the extent permitted by applicable
6 law, and may be exercised partially, concurrently, or
7 separately. The exercise of one or more remedies shall not
8 be deemed to preclude the exercise of any other remedies."
9 That ends the quote from the agreement.

10 So except for the nonrecourse provision, which I
11 will speak to in a moment, Section 6.3 which expressly
12 mentions sovereign immunity, is actually quite consistent
13 with the very broad waiver in Section 5.3 that applies,
14 notwithstanding any term or provision of any of the
15 Transaction Documents to the contrary.

16 Section 6.3.1 provides, "That any dispute shall be
17 resolved first pursuant to applicable federal law; second,
18 pursuant to applicable state law; and third, pursuant to the
19 laws of the Tribe if neither federal nor state law applies."
20 Further, it says that, "The parties designate the U.S.
21 District Court for the Western District of Michigan as the
22 forum for any litigation."

23 It seems to me that we have an illustration here by
24 what the Plaintiff did as to how this language applies. The
25 Plaintiff followed it and adhered to that language in this

1 case, giving federal law the first shot. The Plaintiff filed
2 suit in federal court. However, not a great surprise, the
3 federal court found that federal law did not apply because
4 there was no federal jurisdiction. There were only state law
5 claims and there was no doorway to federal court in the
6 action. So the case got dismissed, and then this suit
7 followed in an effort to apply state law.

8 That's exactly what Section 6.3.1 says that any
9 dispute is resolved first by applicable federal law, second
10 pursuant to applicable state law. What could that possibly
11 mean when if all you have are state law claims you're never
12 getting in the door, or much past the door, of federal court.

13 It obviously means that you take a shot at federal
14 court and if there's -- but if that doesn't work because
15 there's no applicable federal law, which there was not
16 according to the federal court, then you go to state law. If
17 you go to state law you have to go to state court. Because
18 if there's no doorway into federal court, then that's the
19 next option per the contract of the parties. So this suit
20 followed in an effort to apply state law.

21 Section 6.3.2 merely affirms that the waiver in
22 Section 6.3.1 applies. And then it goes on to affirm that it
23 is an express and explicit waiver of sovereign immunity with
24 respect to the Gaming Authority only. And that is the only
25 Defendant here, so not a problem with that language.

1 So with all of that said, the applicable language
2 in the notes is consistent with the Turn-Key Agreement. The
3 notes say, "The borrower hereby expressly grants to the
4 lender an irrevocable limited waiver of its sovereign
5 immunity from suit with respect to any dispute, claim, or
6 controversy between the lender and the borrower arising out
7 of or relating in any way to this note or any actions
8 contemplated to be taken in accordance herewith, collectively
9 a claim, in furtherance of the foregoing waiver. And with
10 respect to any claim the borrower hereby consents with
11 respect to any claim to be sued in, one, the U.S. District
12 Court for the Western District of Michigan, or two, any court
13 of general jurisdiction in the state of Michigan."

14 And that ends the quote. It doesn't end the whole
15 language in the contract, but it's the applicable language.
16 It goes on to say further, "Upon default, the lender shall
17 have all rights and remedies provided in this note, or in any
18 other agreements between borrower and lender and applicable
19 law." So I read that as the same broad and expansive express
20 waiver of sovereign immunity that's contained in the Turn-Key
21 Agreements.

22 The only thing that is remaining to be addressed is
23 the nonrecourse provision in the Turn-Key Agreements.
24 Section 6.3.3, *Procedural Requirements* is the title, provides
25 that the waiver of sovereign immunity is effective only if

1 every one of three conditions is met. And the third
2 requirement limits funds to satisfy any judgment Developer
3 secures to the operating profits and the equipment. So
4 that's the part where -- that limitation seems to fly in the
5 face of the language in the other Transaction Documents that
6 expressly and irrevocably waive sovereign immunity and grant
7 the Developer all of its rights and all of its remedies in
8 the event of default.

9 And that conflict has to be addressed. And I would
10 resolve it with any of these three approaches. The first is
11 that in the event -- and this is Section 5.1 of the Turn-Key
12 Agreement -- in the event of a default under the Turn-Key
13 Agreement that constitutes a default under all the
14 Transaction Documents.

15 And Section 5.3.1.3 of the Turn-Key Agreement
16 provides under *Election of Remedies*, "Notwithstanding any
17 term or provision of any of the Transaction Documents to the
18 contrary, Developer may exercise any and all rights and
19 remedies existing or available to Developer under any of the
20 Transaction Documents or under applicable law."

21 There is no comparable notwithstanding any other
22 term or provision language with respect to the nonrecourse
23 provision. So that's one way of looking at it. That alone
24 does not have to be dispositive because I think there's two
25 other ways of looking at it.