



NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

THE QUEENS, LLC; CHEROKEE)
QUEEN, LLC; and LARRY)
STECKLINE,)

FEB 25 2019

JOHN D. HADDEN
CLERK

Plaintiffs/Appellees,)

vs.)

Case No. 117,122

THE SENECA-CAYUGA NATION,)
formerly known as the Seneca-)
Cayuga Tribe of Oklahoma; WILLIAM)
L. FISHER; JERRY CROW; SARAH)
SUE CHANNING; SALLIE)
WHITE; LISA SPANO; GENEVA)
FLETCHER; and CALVIN CASSIDY,)

Defendants/Appellants.)

APPEAL FROM THE DISTRICT COURT OF
DELAWARE COUNTY, OKLAHOMA

HONORABLE ROBERT G. HANEY, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

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The Seneca-Cayuga
Nation

OPINION BY DEBORAH B. BARNES, PRESIDING JUDGE:

In this action to foreclose real property and for replevin, Defendant/Appellant The Seneca-Cayuga Nation (SCN or the Tribe) appeals from an order of the district court granting summary judgment to Plaintiffs/Appellees The Queens, LLC and Cherokee Queen, LLC (collectively, the Queens).¹ SCN asserts summary judgment for the Queens was inappropriately granted because the Tribe did not waive its tribal sovereign immunity. We reverse the district court's judgment and remand the case to the court with instructions to enter an order dismissing the case without prejudice.

¹ For purposes of this Opinion, we will refer to the Queens in the singular. The Queens filed a post-appeal Notice of Entry of Judgment *Nunc Pro Tunc* notifying this Court that on August 29, 2018, the district court entered a Judgment *Nunc Pro Tunc* Correcting and Substituting Judgment of February 14, 2018, the judgment granting summary judgment to the Queens and from which SCN now appeals. As noted by the Queens, the district court's *nunc pro tunc* order corrected the legal description of the real property that was the subject of the judgment, but did not otherwise change the February 14, 2018 judgment.

We note, the Second Amended Petition was filed by the Queens and an individual against SCN, a federally-recognized Indian tribe (now nation), and several individuals. The district court's February 14, 2018 judgment granted partial summary judgment to the Queens as against SCN only. The court certified that order as a final judgment pursuant to 12 O.S. 2011 § 994(A) stating, "[T]here is no just reason for delay of entry of said final judgment on Plaintiffs' First, Third, and Fourth causes of action[.] SCN appealed to the Oklahoma Supreme Court, Case No. 116,851. The Supreme Court, *sua sponte*, dismissed the appeal as premature. The Court's order specifically stated, however, "This dismissal does not prejudice [SCN's] right to bring an appeal in accordance with the Oklahoma Supreme Court Rules after the filing of a final order." The Supreme Court, therefore, did not determine the subject matter jurisdiction issue asserted in the current appeal.

On May 22, 2018, the district court filed an order of Dismissal in which it dismissed without prejudice (1) the individual plaintiff's claims against all defendants, (2) the Plaintiffs' "Second, Fifth, and Sixth Causes of Action against all defendants," and (3) the Queens' "First, Third, and Fourth Causes of Action against the individually named defendants[.]" The order stated, "This dismissal does not disturb the" February 14, 2018 judgment in favor of the Queens and against SCN, now a final order.

BACKGROUND

On March 8, 2012, the Queens and SCN entered into a Memorandum of Agreement (MOA or Agreement)² pursuant to which the Queens conveyed to SCN certain real property, personal property, and ongoing businesses. SCN agreed to a purchase price the amount of which was secured under the MOA by the real property,³ the personal property and the right to operate the ongoing businesses.

Section 13 of the MOA, titled "Dispute Resolution," contains several subsections. Section 13.01 provides, in part, as follows:

Tribe's Limited Waiver of Sovereign Immunity and Consent to Suit. The Tribe hereby agrees to, and hereby does, make a limited waiver of its sovereign immunity for the limited purpose of allowing the terms of this Agreement or any agreements referenced herein to be enforced by all Parties or other Party approved third-parties to the Agreement or agreements referenced herein by judicial enforcement in any court of competent jurisdiction in equity or law, pursuant to the following order of priority: (i) in applicable federal courts in the State of Oklahoma with all rights of appeal therein, and (ii) in the event that a federal court in the State of Oklahoma determines that it does not have jurisdiction, first, in the courts of the State of Oklahoma, with all rights of appeal therein; and (iii) only if the Oklahoma courts determine that they do not have jurisdiction, any other court of competent jurisdiction; provided, however,

² Second Amended Petition, MOA, Exhibit 1.

³ One of the tracts of the real property was subsequently conveyed in trust to the United States; the other tract, referenced as "Exhibit B-2 Property," is owned by SCN in fee. The district court's judgment ordering foreclosure of the real property and fixtures and improvements only concerned the Exhibit B-2 Property.

that liability of the Tribe under any judgment shall always be “**Limited Recourse**,” as defined herein[.]⁴

Section 13.04, “Limitation of Actions,” provides:

The Tribe’s waiver of immunity from suit is specifically limited to the following actions and judicial remedies:

13.04(a) **Damages**. The enforcement of an award of money and/or damages; provided that the award of any court must be Limited Recourse, and no court shall have authority or jurisdiction to order execution against any assets or revenues of the Tribe except the “**Collateral**” as defined herein. In no instance shall any enforcement of any kind whatsoever be allowed by [the Queens] against any assets of the Tribe other than the limited assets of the Tribe specified in this subsection. The “**Collateral**” shall consist of the personal property covered by the Security Interest (and all accounts, revenues, incomes, rents, general intangibles, chattel paper, documents and instruments associated therewith), [the ongoing businesses and a certain FERC/GRDA permit and easement].⁵

The Queens brought suit against SCN for, among other things, foreclosure and replevin and judgment for payments due under the MOA alleging SCN was in default having made no further payments under the MOA since September 2014.⁶ In its Answer to the Queens’ Second Amended Petition, SCN admitted it made payments for the first two and a half years and had made no payment since

⁴ MOA, Exhibit 1, p. 13.

⁵ MOA, Exhibit 1, p. 14.

⁶ The Queens apparently filed a petition and amended petition, but these pleadings are not part of the record on appeal. The appellate record contains the Queens’ Second Amended Petition, filed September 6, 2017.

September 2014,⁷ but denied other allegations made by the Queens and raised various Affirmative Defenses including the district court's lack of subject matter jurisdiction because of SCN's tribal sovereign immunity.

As previously noted herein, the Queens moved for partial summary judgment and SCN filed its objection. The parties submitted briefs in support of their respective positions including arguments concerning the Tribe's sovereign immunity and waiver. The district court granted judgment to the Queens, and upon that order becoming a final order, SCN appealed.

STANDARD OF REVIEW

"The standard of review for questions concerning the jurisdictional power of the trial court to act is de novo." *Dilliner v. Seneca-Cayuga Tribe of Okla.*, 2011 OK 61, ¶ 12, 258 P.3d 516 (citation omitted); *Seneca Telephone Co. v. Miami Tribe of Okla.*, 2011 OK 15, ¶ 3, 253 P.3d 53.⁸

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 immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Absent an effective waiver or consent, a

⁷ Tab 3, ¶¶ 21 and 22.

⁸ While "[t]he proper method to raise a question of jurisdiction is by a motion to dismiss," *Seneca Telephone Co.*, ¶ 3, as SCN did, the issue of jurisdiction was also raised in response to the Queens' motion for partial summary judgment.

state court may not exercise jurisdiction over a recognized Indian tribe. *Pullayup Tribe, Inc. v. Department of Game of the State of Washington*, 433 U.S. 165, 172, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977).

Dilliner, ¶ 12.

ANALYSIS

The issue of the trial court's subject matter jurisdiction on the ground that SCN had not waived its tribal sovereign immunity was presented to the court early in the proceedings through SCN's motion to dismiss.⁹ The issue was again raised in SCN's Answer to the Queens' Second Amended Petition,¹⁰ and in SCN's objection to the Queens' motion for partial summary judgment.¹¹ Although in various orders of the trial court the court does not specifically address SCN's limited waiver of sovereign immunity set out in the MOA, the court impliedly found SCN had waived its immunity with respect to the particular transaction herein because the trial court's minute granting the Queens' motion for partial summary judgment,¹² the court's subsequent order granting the Queens' motion for partial summary judgment on its "First, Third and Fourth causes of action" in the

⁹ The motion to dismiss Plaintiffs' Amended Petition was filed January 22, 2016; the court's minute order denying the motion, after a hearing on the motion, was filed April 6, 2016. Supplemental R. at Tabs 2 & 4.

¹⁰ R. at Tab 3, p. 6 (¶ 1, Affirmative Defenses).

¹¹ R. at Tab 5, pp. 6-7 and n.1.

¹² R. at Tab 6 (January 9, 2018).

Second Amended Petition,¹³ and its final Judgment granting judgment and foreclosure on those causes of action,¹⁴ limited the Queens' recovery to the collateral involved in the transaction at issue as set forth in the MOA.

None of these orders or the judgment, however, directly addressed SCN's limited waiver of sovereign immunity as to the forum in which litigation regarding the subject transaction could be heard.¹⁵ Nevertheless, the trial court impliedly found it had subject matter jurisdiction to entertain and render judgment in this case. It is this determination with which we disagree.

In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the United States Supreme Court reiterated that "to relinquish its immunity, a tribe's waiver must be 'clear.'" *Id.* at 418 (citing *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). In *C & L Enterprises*, the United States Supreme Court held the Citizen Band Potawatomi Tribe, which had entered a contract with plaintiff contractor that contained an arbitration clause, had waived its immunity to suit in Oklahoma state court:

¹³ R. at Tab 8.

¹⁴ R. at Tab 9.

¹⁵ Presumably the court did not address this limitation on SCN's waiver of immunity because the court previously denied SCN's motion to dismiss on this issue in a minute order even though SCN reasserted the issue in response to the motion for partial summary judgment.

The question presented is whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with [plaintiff] relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards “in any court having jurisdiction thereof.” We hold that, by the clear import of the arbitration clause, *the Tribe is amenable to a state-court suit to enforce an arbitral award* in favor of [plaintiff] contractor[.]

Id. at 414 (emphasis added).¹⁶ The Court concluded:

In sum, the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures. The regime to which the Tribe subscribed includes entry of judgment upon an arbitration award in accordance with the Oklahoma Uniform Arbitration Act. That Act concerns arbitration in Oklahoma *and correspondingly designates as enforcement forums “court[s] of competent jurisdiction of [Oklahoma].” Ibid.* [Plaintiff] selected for its enforcement suit just such a forum.

C & L Enterprises, 532 U.S. at 420 (emphasis added). As noted by the Supreme Court of New Mexico in *Doe v. Santa Clara Pueblo*, 154 P.3d 644 (N.M. 2007),

Taken in context, *C & L Enterprises* suggests that when a sovereign tribe waives its immunity from suit, it may also choose the forum in which the resulting litigation will occur, including state court, whether or not it has express congressional authority to do so. In the context of similar business agreements, other courts appear to agree. *See Bradley v. Crow Tribe of Indians*, 315 Mont. 75, 67 P.3d 306, 308, 311-12 (2003) (holding

¹⁶ Thus, the *C & L Enterprises* Court reasoned that while “the requisite clarity” is required to waive immunity, *id.* at 418, waiver of immunity, “to be deemed explicit,” does not require the words “sovereign immunity” be expressly stated, *id.* at 420 (citation omitted).

that tribe had waived its sovereign immunity and could be sued in state court by agreeing to state law and to state court jurisdiction in a standard construction contract provision on choice of law and venue); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 404, 406 (Colo. Ct. App. 2004) (holding the tribe had waived its immunity and state court had jurisdiction based on a legally enforceable contract in which tribe consented to state court jurisdiction).

154 P.3d at 651 (footnote omitted). See *Garcia Akwesasne Housing Auth.*, 268 F.3d 76, 86 (2d Cir. 2001) (“courts consistently have applied two complementary principles to waivers [of immunity]: (1) a sovereign’s waiver must be unambiguous, and (2) a sovereign’s interest ‘encompasses not merely *whether* it may be sued, but *where* it may be sued” (citations omitted)). See also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984), *superseded by statute on other grounds* (discussing Eleventh Amendment immunity). The Oklahoma Supreme Court has also explained that in contract matters, among others, state courts are barred from exercising jurisdiction over Indian tribes absent their consent or Congressional approval. *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810, *overruled on other grounds* in *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 50, 315 P.3d 359.¹⁷

¹⁷ Although the issue in *Bittle* concerned a tort action in which the Supreme Court rejected tribal immunity from suit by a nonmember alleging violation of Oklahoma liquor laws, the Court discussed *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), in which

Therefore, even assuming without deciding that SCN waived its sovereign immunity to allow suit against it, the question remains whether SCN has “expressly and unequivocally waived” its sovereign immunity to allow Oklahoma courts to enforce the parties’ Agreement.¹⁸ As the Queens concedes, pursuant to the terms of the MOA, “either Party shall have the right to take action in the applicable courts *in the order outlined in Section 13.01*” of the MOA.¹⁹ As quoted above, § 13.01 provides, in part:

The Tribe hereby agrees to, and hereby does, make a limited waiver of its sovereign immunity for the limited purpose of allowing the terms of this Agreement . . . to be

the tribe executed a promissory note to buy stock in a commercial enterprise. The note contained a clause that it did not subject or limit the sovereign rights of the tribe. When the tribe defaulted on the note, Manufacturing Technologies sued in state court. *Manufacturing Technologies* determined that 1) tribal immunity is a matter of federal law and is not subject to diminution by the states; 2) 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 immunity*; and 3) Congress has not dispensed with or limited the rule of tribal immunity from suit. *Manufacturing Technologies* ruled: “Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.” 523 U.S. at 760[.]

In the instant matter, the Tribe argued that the ruling in *Manufacturing Technologies* bars the state court from exercising jurisdiction over it. *Manufacturing Technologies* does not apply here. This case does not involve a contract

Bittle, ¶¶ 29-30 (emphasis added).

¹⁸ *Dilliner*, ¶ 1.

¹⁹ (Emphasis added.)

enforced by all Parties . . . by judicial enforcement *in any court of competent jurisdiction in equity or law, pursuant to the following order of priority*: (i) in applicable federal courts in the State of Oklahoma with all rights of appeal therein, and (ii) *in the event that a federal court in the State of Oklahoma determines that it does not have jurisdiction*, first, in the courts of the State of Oklahoma, with all rights of appeal therein

(Emphasis added.) The limited waiver of immunity in the Agreement regarding an Oklahoma court’s enforcement of the Agreement is, thus, expressly conditioned on a federal court “determin[ing] that it does not have jurisdiction[.]” Neither the Queens, the trial court, nor this Court can decide for a federal court what its jurisdiction is or is not. More to the point, SCN only agreed to waive its sovereign immunity to allow an Oklahoma court to hear this matter if a federal court first determines it does not have jurisdiction. Thus, Oklahoma State courts do not have subject matter jurisdiction to presume or predict a determination of a federal court’s jurisdiction in this matter.²⁰ This precondition is the condition to which the

²⁰ The Queens argues it and Oklahoma courts should make this determination because, it argues, “the allegations in the Amended Petition conclusively show a lack of federal court jurisdiction” and it and its counsel would be subject to Rule 11 sanctions if it were to have filed a lawsuit in federal court. Supplemental R. at Tab 3, p. 16. It does not, however, discuss any authority that stands for the proposition that a tribe’s express waiver can be modified without its consent – in this case, by allowing an opposing party or an Oklahoma court to determine the non-existence of federal jurisdiction. Nor does it discuss why waiver of immunity can properly be implied – in this case, by inferring that SCN impliedly consented to Oklahoma State court jurisdiction if a party or an Oklahoma state court decided a federal court lacked jurisdiction. *See e.g., Sheffer*, 2013 OK 77, ¶ 45 (reiterating the Court’s rejection of an implied waiver of sovereign immunity and citing *Dilliner*).

Without making any determination with regard to the following, we note, for example, it is discussed in *Cohen’s Handbook of Federal Indian Law* that while the lower federal “courts

parties agreed and to which SCN expressly limited its waiver of immunity.²¹

Consequently, the trial court and this Court are without subject matter jurisdiction over this case unless and until an “applicable federal court[] in the State of Oklahoma with all rights of appeal therein” determines it is without jurisdiction over this matter.

CONCLUSION

In the Agreement the Queens and SCN executed, SCN expressly limited its waiver of sovereign immunity to a lawsuit in Oklahoma courts if a federal court first determined it did not have jurisdiction to enforce the parties’ Agreement. Because no such determination has yet been made by a federal court, we conclude the district court was without subject matter jurisdiction to decide any matter in this case; thus, the court erred as a matter of law in granting summary judgment to the Queens. Accordingly, we reverse the trial court’s judgment and remand the

have consistently ruled that tribes are not citizens of any state for diversity purposes and that their presence in a case therefore precludes the exercise of jurisdiction under section 1332,” the United States Supreme Court has not addressed the issue. *Cohen’s Handbook of Federal Indian Law* § 7.04[1][c], at p. 619 (Nell Jessup Newton ed., 2012). The MOA in this case expressly included “all rights of appeal” in the federal courts. Moreover, Cohen notes, while in 1831 the United States Supreme Court “held that tribes are not foreign states for purposes of the Supreme Court’s original jurisdiction in state-foreign state diversity cases under Article III of the United States Constitution,” the Court more recently “analogiz[ed] Indian tribes to foreign nations for eleventh amendment jurisdictional purposes.” *Cohen’s Handbook* § 7.04[1][c], at p. 619 n.64 (citations omitted). At least according to this source, it is not clear that a federal court along the chain of an appeal would necessarily find it lacks jurisdiction in such a context, or that it would find an argument for a change in the law to be frivolous.

²¹ As previously stated herein, although we conclude this precondition was not met, we make no determination about whether SCN waived its tribal sovereign immunity to allow suit against it.

case to the court with instructions to enter an order dismissing the case without prejudice.

REVERSED AND REMANDED WITH INSTRUCTIONS.

WISEMAN, V.C.J., and RAPP, J., concur.

February 25, 2019