STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH K. LUMSDEN BAHWETING PUBLIC SCHOOL ACADEMY,

Plaintiff-Appellant,

v

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS,

Defendant-Appellee.

UNPUBLISHED
October 26, 2004

No. 252293
Chippewa Circuit Court
LC No. 03-007002-CK

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant and an order denying plaintiff's motion for a temporary restraining order/permanent injunction. The circuit court ruled that it lacked jurisdiction and that defendant was protected by sovereign immunity. Plaintiff is a Michigan charter school located on land owned by defendant and leased to plaintiff. The case arose from a dispute over an amendment to the lease covering the school building and the disposal of certain school property, specifically a classroom modular unit. We affirm.

In 1996, defendant allegedly gifted a modular classroom unit to plaintiff, who refurbished it and used it for school purposes until 2002. In December 2000, the parties entered into a lease agreement for the tribal property on which the school was located. This lease provided that "the laws of the Sault Ste. Marie Tribe of Chippewa Indians" would govern. In March 2001, the parties amended the lease to extend the term and provide for the prepayment of rent. During negotiations for the amendment, plaintiff proposed that defendant waive sovereign immunity and agree to resolve any disputes over the lease in Michigan courts. Plaintiff allegedly executed the amendment in the belief that it included those provisions. The amendment provides:

> This Agreement shall be interpreted in accordance with the laws of the State of Michigan. Lessor and Lessee agree to resolve any and all claims arising from this Agreement, subject to the limitations contained below, in Sault Ste. Marie Tribal Court. Lessor and Lessee each hereby consent to the personal jurisdiction of the Sault Ste. Marie Chippewa Tribal Court. Lessor, through resolution number 2001-44, has issued a limited waiver of sovereign immunity

> regarding claims arising under this Agreement, subject to those restrictions enumerated in said resolution, which is attached and fully incorporated herein.

Section 3.1 of Resolution 2001-44 provides in pertinent part:

> The Tribe hereby expressly waives its sovereign immunity from suit should an action be commenced by the School Board on the Agreement subject to the following. This waiver:
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> * * *
>
> 3. shall extend only to a suit to enforce the obligations under Article Two, Section 3(b) of the Agreement[;][1]
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> * * *
>
> 5. shall be enforceable only in the Sault Ste. Marie Chippewa Tribal Court;
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> 6. the Agreement shall be construed in accordance with and governed by the internal law of the State of Michigan . . . .

The language of these two documents precluded any suit in the circuit court. Defendant essentially waived its sovereign immunity only to the extent of suits filed in tribal court and then only on a limited issue.

Throughout 2002 and 2003, defendant submitted account statements to plaintiff concerning the prepaid rent. Plaintiff alleged that these statements included additional charges representing funds defendant misappropriated. By early 2003, the classroom unit had fallen into unsafe disrepair, and defendant allegedly pronounced the unit worthless after an inspection. Plaintiff arranged to have the unit disposed of, whereupon a tribe member complained to the tribe that plaintiff's administrator, Nancie Hatch, had disposed of tribal property without permission. Thereafter, the tribal police department began a criminal investigation of Hatch.

On September 9, 2003, plaintiff filed a complaint seeking to enjoin defendant from further investigating Hatch, to quiet title to the classroom unit, to obtain an accounting of the prepaid rent monies, and to reform the lease to conform to the parties' alleged agreement. The circuit court concluded that it did not have jurisdiction because defendant was protected by sovereign immunity. The court also held that because Hatch was not a party to the suit, and because the investigation was a tribal investigation of a tribe member over a tribal matter, the circuit court did not have jurisdiction to enjoin the investigation.

"This Court reviews a summary disposition determination de novo as a question of law." *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130; 574 NW2d 706 (1997). MCR

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[1] This is the prepaid rent provision.

2.116(C)(7) tests, in part, whether a claim is barred on the basis of immunity and requires consideration of all documentary evidence filed or submitted by the parties. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

Plaintiff first argues that the evidence shows that defendant waived sovereign immunity during negotiations over the lease amendment. However, the only evidence of defendant's alleged waiver was a fax from plaintiff's counsel to defendant's counsel containing plaintiff's *proposed* changes to the amendment, which included a waiver of immunity with jurisdiction in Michigan courts and a choice-of-law provision in favor of Michigan law. In contrast, defendant attached two faxes from defendant's counsel to plaintiff's counsel rejecting those proposals. Defendant also noted that two members of plaintiff's school board were also members of the Tribal Board of Directors, the entity that approved the limited waiver. Therefore, defendant argues, the school board was aware of the limitation on the waiver when the school board executed the amendment. Finally, defendant pointed out that section 44.105 of the Tribal Code unambiguously requires a Tribal Board resolution to waive sovereign immunity.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v Martinez*, 436 US 49, 58; 98 S Ct 1670; 56 L Ed 2d 106 (1978). "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 US 751, 754; 118 S Ct 1700; 140 L Ed 2d 981 (1998). Accordingly, in the absence of a waiver or congressional abrogation, defendant is immune from suit. *Huron Potawatomi, supra* at 131. Suits against Indian tribes are barred by sovereign immunity unless there exists a clear and unequivocally expressed waiver of immunity. *Oklahoma Tax Comm v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991); *Santa Clara, supra* at 58-59; *Huron Potawatomi, supra* at 130-131. If a tribe does waive sovereign immunity, the waiver is strictly construed and applied in accordance with any conditions or limitations on the waiver. *Missouri River Services, Inc v Omaha Tribe of Nebraska*, 267 F3d 848, 852-853 (CA 8, 2001). Importantly, the United States Supreme Court in *Kiowa, supra* at 760, stated:

> 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. [Emphasis added.]

Here, the amended lease provides a limited waiver for certain suits heard in tribal court. The documentary evidence presented by the parties fails to show an unequivocal and express waiver beyond the boundaries of the limited waiver. Indeed, plaintiff's allegations are unsupported by its documentary evidence and are contradicted by defendant's evidence. Moreover, the tribal code does not permit a waiver of sovereign immunity except by board resolution. Therefore, the limited waiver in the amendment and incorporated resolution is the only existing waiver, there is no basis to reform the contract, and the parties are required to abide by the terms of the contract and limited waiver.

Plaintiff argues that defendant fraudulently induced plaintiff to sign the lease amendment by untruthfully stating that the tribe had agreed to the changes proposed by plaintiff and incorporated them into the amendment. "Fraud in the inducement occurs where a party

materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). We find no actionable fraud because of a lack of reasonable reliance and a failure to present sufficient documentary evidence to give rise to a genuine issue of material fact regarding whether fraud was committed. The amendment and incorporated resolution are clear and unambiguous to any reader, and the language would certainly be observable to anyone preparing to execute the amendment. Presuming plaintiff could prove that defendant committed fraud, the remedy would be rescission of the fraudulently obtained contract. *Id*. at 640 (renders the contract voidable). If the amendment were rescinded, plaintiff would then be left with the original lease. Because the original lease contains no waiver of sovereign immunity, summary disposition would be proper under these circumstances as well.

Plaintiff also argues that, because plaintiff is a Michigan charter school and therefore a political subdivision of the state, it cannot be subject to the jurisdiction of defendant's tribal court. The question of whether a tribe has civil subject-matter jurisdiction over nonmembers was discussed in *El Paso Natural Gas Co v Neztsosie*, 526 US 473, 483-484; 119 S Ct 1430; 143 L Ed 2d 635 (1999), wherein the United States Supreme Court stated:

> *National Farmers Union Ins Co v Crow Tribe*, 471 US 845; 105 S Ct 2447; 85 L Ed 2d 818 (1985), was a suit involving the federal-question jurisdiction of a United States District Court under 28 USC 1331, brought to determine "whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians[.] We held, initially, that federal courts have authority to determine, as a matter "arising under" federal law, see 28 USC 1331, whether a tribal court has exceeded the limits of its jurisdiction. After concluding that federal courts have subject-matter jurisdiction to entertain such a case, we announced that, prudentially, a federal court should stay its hand "until after the Tribal Court has had a full opportunity to determine its own jurisdiction." [Citation omitted.]

The fact that a party's claims are not premised on federal law does not alter this result. *Ninigret Dev Corp v Narragansett Indian Wetuomuck Housing Auth*, 207 F3d 21, 27-28 (CA 1, 2000). On the basis of the language in *El Paso*, we initially question whether a state court has jurisdiction to entertain the issue of whether a tribal court would have subject-matter jurisdiction. Further, the tribal court here has not yet had the opportunity to determine its own jurisdiction in the setting of a lawsuit. Moreover, in *Montana v United States*, 450 US 544, 565-566; 101 S Ct 1245; 67 L Ed 2d 493 (1981), the Supreme Court ruled:

> Though *Oliphant* [*v Suquamish Indian Tribe*, 435 US 191; 98 S Ct 1011; 55 L Ed 2d 209 (1978)] only determined inherent tribal authority in criminal matters, the principals on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial

> dealing, contracts, leases, or other arrangements.[2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.]

Here, plaintiff and defendant entered into a consensual relationship, i.e., the lease agreement or contract, and the relationship or contract concerned the lease of Indian fee lands that directly effects the tribe. We believe, without deciding, that a tribal court could exercise jurisdiction over matters not precluded by sovereign immunity under the circumstances presented. *Nevada v Hicks*, 533 US 353; 121 S Ct 2304; 150 L Ed 2d 398 (2001), upon which plaintiff relies, does not alter our conclusion. *Hicks* involved a tribal member's civil rights and tort action that was filed against state officials in their individual capacities arising from the execution of a search warrant on land within the reservation for evidence of an off-reservation poaching crime. The *Hicks* Court ruled that, as a general proposition, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, except to the extent necessary to protect tribal self-government or to control internal affairs. *Id.* at 359. The Supreme Court, citing *Montana, supra*, held that an exception to this general proposition exists where nonmembers enter consensual relationships with the tribe through contracts or leases; however, it was not applicable under the circumstances in *Hicks*. *Hicks, supra* at 359. Here, there was a consensual relationship, and a lease governing Indian property is involved. Although the *Hicks* Court ruled that the "other arrangements" language from *Montana* referred to private consensual relationships so as not to include state officials under the circumstances, the Court specified that "[w]hether contractual relations between State and tribe can expressly or impliedly confer tribal regulatory jurisdiction over nonmembers – and whether such conferral can be effective to confer adjudicative jurisdiction as well – are questions that may arise in another case, but are not at issue here." *Hicks*, *supra* at 372. The Court "merely assert[ed] that 'other arrangements' in the passage from *Montana* does not include state officers' obtaining of an (unnecessary) tribal warrant." *Id.* We also note that if the tribe in the case at bar was deprived of the ability to enter into a contract with a willing party whereby the parties agree to have disputes litigated in a tribal court, it would dampen tribal self-government and weaken control of internal affairs where Indian land or property is the underlying subject of the contract.

Moreover, assuming that the tribal court did not have subject-matter jurisdiction over the issues that escape sovereign immunity, it would not mean that the state circuit court could then ignore the principle of sovereign immunity in a suit filed in the court. Defendant waived its sovereign immunity only to the extent of suits filed in tribal court and then only on a limited issue. Forcing a state civil suit on defendant without its agreement to allow such a suit solely on the basis that the tribal court could not hear the action would run contrary to the requirement of a

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[2] In *Nevada v Hicks*, 533 US 353, 367; 121 S Ct 2304; 150 L Ed 2d 398 (2001), the Court discussed the relationship between the regulative or legislative authority of Indian tribes and their adjudicative authority, and it noted that tribal courts are not courts of general jurisdiction as compared to state courts and that "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction."

clear and unequivocal waiver. Predicated on the concept of sovereign immunity, the circuit court would still remain without authority to adjudicate the controversy.

Therefore, the lower court appropriately granted summary disposition to defendant on plaintiff's claim for an accounting of the prepaid rent. Plaintiff's remaining claims were not covered by the lease agreement at all and therefore lacked even a limited waiver of immunity. Therefore, those claims were also appropriately dismissed.

Plaintiff further argues that the trial court erred in denying its request for a restraining order or injunction against defendant's tribal police investigation of Hatch. We disagree. "This Court reviews for an abuse of discretion the trial court's decision to grant or deny a preliminary injunction. A trial court's findings of fact will be sustained unless they are clearly erroneous or we are convinced that we would have reached a different result." *Pharmaceutical Research & Manufacturers of America v Dep't of Community Health*, 254 Mich App 397, 402; 657 NW2d 162 (2002). "Whether a party has standing to bring an action involves a question of law that is reviewed de novo." *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004).

"A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). Although it is reasonable to assume that plaintiff would "engage in full and vigorous advocacy" on behalf of its administrator, the real party in interest is Hatch, who is not a named party in this case. Although plaintiff cites incidental benefits which would accrue to plaintiff school if an injunction is issued, Hatch is the party "who is vested with the right of action" on the claim for injunctive relief.

Additionally, even if plaintiff had standing to bring the suit, the circuit court lacks jurisdiction to enjoin an Indian tribal police department from investigating a tribe member at a facility located on tribal property for an alleged crime involving the improper disposal of tribal property. See *United States v Wheeler*, 435 US 313; 98 S Ct 1079; 55 L Ed 2d 303 (1978).[3] "The areas in which . . . implicit divestiture of sovereignty [in regard to prosecutions for tribal offenses] has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326. But Indian tribes have not been deprived of their

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[3] In reaffirming the doctrine of tribal sovereign immunity, *Wheeler* concluded:

> It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions. [*Wheeler*, *supra* at 322 (citations omitted).]

jurisdiction to charge, try, and punish tribal members for violations of tribal law. *Id.* at 324. Therefore, there remains the protection of sovereign immunity in the case before us today.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey