IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

Little Six, Inc., a corporation chartered pursuant to the laws of the Shakopee Mdewakanton Sioux (Dakota) Community, Plaintiff, v. Leonard Prescott individually, and as current and former officer and/or director of Little Six, Inc., Defendant,	)	Case No. 436-00

MEMORANDUM OPINION AND ORDER

FACTUAL BACKGROUND

The underlying factual background of this dispute is discussed at length in the Court's August 8, 2000 Order and Opinion. Basically, in his Motion to Dismiss, Defendant Leonard Prescott (Prescott) argued that Little Six, Inc.'s (LSI's) Complaint should be dismissed under the doctrine of res judicata, or in the alternative, because he is shielded by official immunity. This Court denied Prescott's motion in an order dated August 8, 2000, and Prescott is now attempting to appeal this admittedly non-final order.

On August 24, 2000, Prescott filed a pleading labelled as a notice of appeal, which was addressed to the trial court. The one sentence text of the pleading, states that Prescott "moves" the court to "certify for appeal" the August 8, 2000 order. The Court, in its scheduling order dated August 25, 2000, noted that it would treat the pleading as a non-dispositive motion, and not as a properly filed notice of appeal. Briefing was invited from the parties on whether this Court should certify Prescott's appeal, and a hearing was held on September 20, 2000. I conclude that under this Court's appellate decisions and precedent, Prescott's appeal of this Court's non-final August 8, 2000 order should be certified.

DISCUSSION

As an initial matter, LSI argues that Prescott's attempt to appeal the August 8, 2000 order should not be entertained because it is untimely. LSI argues that by attempting to appeal the Court's August 8, 2000 decision, Prescott is actually asking for a modification of the August 8, 2000 judgment. Since under the Federal Rules of Civil Procedure motions to modify a judgment must be filed within ten days of judgment, LSI contends Prescott's motion is untimely. See FRCP 59(e).

This court, however, is not necessiarily bound by all the procedural requirements of a federal court. In fact, the SMS(D)C Court of Appeals has specifically declined to incorporate the 10 day limit for motions to certify interlocutory appeals under 28 U.S.C. § 1292 in a case strikingly similar to this. See LSI v. Smith, No. 010-97 (SMS(D)C Ct. App. May 28, 1998). LSI is essentially asking this Court to apply a different ten day limit to motions to certify an appeal – the ten day limit under FRCP 59. Since the Court of Appeals declined to impose a ten day limit on interlocutory appeals in Smith, this Court declines to impose such a limit in this case.

Instead, this Court will adhere to the 30 day time limit as recently announced by the Court of Appeals. The Court of Appeals has interpreted Ordinance 02-13-88-01, Section VII to give parties 30 days to file a notice of appeal, and the Court of Appeals "will not enforce the Ordinance as a limitation on the Court for certification of the matter for appeal." In re: Trust Under Little Six, Inc. Retirement Plans, No. 024-00 (SMS(D)C Ct. App. Sept. 13, 2000) at 3. Since Ordinance 02-13-88-01 Section VII specifically addresses motions to certify appeals, this case falls easily under the 30 day limit of that section. Prescott's motion

to certify this matter for appeal was timely filed on August 24, 2000 under this Court's rules and precedent.

Turning to the merits, it is true an order denying a motion to dismiss is not usually considered an appealable final order. LSI v. Smith, No. 010-97 (SMS(D)C Ct. App. May 28, 1998) at 3. Nonetheless, the SMS(D)C Court of Appeals has indicated that there are at least two contexts in which a non-final order may be appealled. First, if an order satisfies the collateral order doctrine, it may be appealled. LSI v. Prescott, Nos. 017-97, 018-97 (SMS(D)C Ct. App. Sept. 9, 1997). Second, where an appeal may lie from a federal district court, an appeal may also lie from this Court. LSI v. Smith, No. 010-91 (SMS(D)C Ct. App. May 28, 1998); SMS(D)C Rule of Civil Procedure 31.

The collateral order doctrine allows for an immediate appeal of orders which (1) conclusively determine a disputed question, (2) are separate from the merits of the action, and (3) which would be effectively unreviewable on appeal from a final judgment. LSI v. Prescott, Nos. 017-97, 018-97 (SMS(D)C Ct. App. September 9, 1997) at 2. The SMS(D)C Court of Appeals has held that "[o]rders rejecting defenses of absolute or qualified immunity are immediately appealable because immunity is not simply a defense from liability, but entitles its possessor to complete protection against suit. . . . The protection is effectively lost if, based on the lower court's error, the matter goes to trial." Id.

LSI argues that despite the above language from the Court of Appeals, Prescott's immunity claims in this case do not fit within the collateral order doctrine because an appeal from the August 8, 2000 order would not involve abstract questions of law that can be easily resolved on appeal. Instead, LSI contends that there is a disputed issue of fact outstanding -- whether Prescott was acting within the scope of this duty or not -- which disqualifies this case from the collateral order doctrine.

LSI misreads this Court's August 8, 2000 order. In that opinion the Court concluded that whether Prescott was acting within his duty or not was not relevant to the Court's conclusion on immunity. If he was acting outside the scope of his duty he was not shielded by qualified immunity. See, e.g., Little Six, Inc., et al v. Prescott and Johnson, Nos. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). If he was acting within the scope of his duty, and the allegations made by LSI are taken as true (as they must be

when considering an immunity claim), Prescott should have known that keeping money he promised to repay violated the rights of LSI. Either way, the Trial Court determined that within the scope of his duty or not, Prescott would not be entitled to a defense of immunity. This legal conclusion does not rest on any disputed issue of fact. The Court's August 8, 2000 order as it pertains to the immunity defenses is immediately appealable under the collateral order doctrine.

The collateral order doctrine, however, does not seem to apply to Prescott's res judicata claims because there is no indication that those issues would be effectively unreviewable from an appeal of a final order. LSI v. Prescott, Nos. 017-97, 018-97 (SMS(D)C Ct. App. September 9, 1997) at 2.

Instead, Prescott argues that these issues are appealable under Rule 31 and the substantive provisions of 28 U.S.C. § 1292. 28 U.S.C. § 1292 allows a U.S. court of appeals, in its discretion, to entertain an appeal if the district court certifies that the order in question involves controlling questions of law, to which there are substantial differences of opinion, and where an immediate appeal would materially advance the termination of the litigation.[1]

In LSI v. Smith, No. 010-97 (SMS(D)C Ct. App. May 27, 1998), the SMS(D)C Court of Appeals incorporated the substantive standards of § 1292(b) and allowed an appeal from a denial of a motion to dismiss on mootness grounds. The Court of Appeals reasoned that an appeal should lie because the mootness issue was one of first impression

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[1] The full text of 28 U.S.C. § 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeal which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

which, if reversed, would materially advance the termination of the litigation. The Court of Appeals, in its discretion, decided to hear the appeal, and reversed.

Similarly, here the res judicata issues raised by Prescott's motion to dismiss are issues of first impression which have not been addressed by the Court of Appeals in any earlier cases. In addition, if the Court of Appeals were to reverse this Court's August 8, 2000 order on the res judicata issues it would clearly advance the termination of this litigation.

While under its rules and precedent the Court of Appeals clearly has discretion to not entertain this appeal, both the Smith and earlier Prescott case indicate that these issues should be certified for appeal by this Court.

Given the confusion of the parties concering the appealability of non-final orders in this case, as well as the Smith case and the earlier Prescott case, I would like to outline the proper procedure for the parties filing appeals. If a party wishes to appeal a decision from a final order, he or she has 30 days from the entry of judgment within which to file a notice of appeal with this Court. In re: Trust Under Little Six, Inc. Retirement Plans, No. 024-00 (SMS(D)C Ct. App. Sept. 13, 2000). That notice of appeal will be transmitted by the Clerk to the Court of Appeals, and a scheduling order shall issue. If a party wishes to appeal a non-final order, he or she should file a motion to certify with this court within 30 days after the entry of judgment. Id.; Ordinance 02-13-88-01, Sec. VII. If this Court denies the motion to certify, the matter is at an end and the case proceeds to trial.[2] If this Court certifies the order for appeal, the motion to certify is converted into a notice of appeal. The Court of Appeals then has 90 day to decide whether it will exercise its discretion to accept jurisidiction over the matter, and the parties are not to submit additional briefing to the Court of Appeals until so ordered. [CITE to provision that requires court to act within 90 days]

ORDER

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[2]The reason the matter is effectively at an end at this point is because the denial of a motion to certify itself would not be considered a final order. Therefore, if a party wanted to appeal a Trial Court decision to deny a motion to certify, that party would have to file another motion to certify, which in all likelihood would be denied.

For the foregoing reasons, the Motion to Certify filed by Defendant is GRANTED. The Motion to Certify will be forwarded to the Court of Appeals as a notice of appeal, and that Court will have 90 days to decide whether to accept jurisdiction over the appeal.

Dated: December 28, 2000

Judge John E. Jacobson