

FILED

JUL 19 2004

TRIBAL COURT
OF THE

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY
JEANNE A. KRIEGER
CLERK OF COURT

COUNTY OF SCOTT

STATE OF MINNESOTA

Little Six, Inc., a corporation chartered
Pursuant to the laws of the Shakopee
Mdewakanton Sioux (Dakota) Community,

Court File No. 436-00

Plaintiff,

vs.

Leonard Prescott, individually, and as
current and former officer and/or director
of Little Six, Inc.

Defendant.

MEMORANDUM OPINION AND ORDER

On February 17, 2004, in a Memorandum Opinion and Order, the Court granted in part and denied in part the Plaintiff's motion for summary judgment, concluding *inter alia* that a trial was required on one issue presented by the Plaintiff's Complaint:

The single issue that will be decided at trial will be the extent of the charges from the Kelly law firm that were directly connected to the proceedings and litigation surrounding "Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024" and any subsequent appeals.

That trial is scheduled to take place on August 23, and 24, 2004; and, following a scheduling conference on May 26, 2004, the Court entered a Scheduling Order to govern the proceedings up to the trial. In part, the Scheduling Order established a procedure to govern the possibility that the Plaintiff might seek to depose Steven Wolter, Esq.. The procedure specified by the Order was:

By June 25, 2004, any motion with respect to the taking of a deposition of Steven Wolter, Esq. will be filed. Any such motion and its supporting materials will be served on Mr. Wolter as well as upon all parties, and Mr. Wolter shall have the right to file a response. All responses to such a motion shall be filed by July 7, 2004; and any reply to those responses shall be filed by July 12, 2004.

The Plaintiff did, in fact, file a motion to depose Mr. Wolter. The motion was dated June 25, 2004; but, through an oversight, the motion and its supporting materials were sent to the Court and to the parties by regular mail, and therefore were not filed or served until June 28, 2004. Upon receipt and filing of the motion papers, the Court Administrator advised Mr. Wolter and counsel for the Defendant that responsive materials could be filed by July 9; and the Court declined to extend the deadline for the filing of the Plaintiff's reply. Both the Defendant and Mr. Wolter filed responsive materials, objecting to Mr. Wolter's deposition, on July 9, and the Plaintiff filed a reply on July 12.

In support of its motion, the Plaintiff attached a copy of the transcript of the deposition of Mr. Wolter's law partner, Douglas Kelley, taken under the sanction of this Court's Order of April 7, 2003. The Plaintiff argued that, in many instances during that deposition Mr. Kelley was unable to recall specific information that would illuminate the proper allocation of the Kelley firm's billings, between the Defendant and the Plaintiff, and that Mr. Wolter might be able to illuminate those uncertain areas since Mr. Wolter participated in a substantial portion of the work in question. In response, both the Defendant and Mr. Wolter assert that there is nothing in the transcript of Mr. Kelley's deposition suggesting that Mr. Wolter's memory would be better than Mr. Kelley's. In addition, the Defendant asserts that the Plaintiff's motion should be denied as a sanction because its motion was not timely filed, and Mr. Wolter asserts that if the motion is granted then the Plaintiff should compensate him for his testimony – citing cases where courts have required that testifying attorneys, called as “occurrence” witnesses, must be compensated

as, effectively, expert witnesses. The Plaintiff replies that the compressed time within which it was required to file its reply brief was sanction enough for its the untimely filing; that Mr. Wolter may have information relevant to the issues about which Mr. Kelley was unclear; and that equitable consideration should flow from the fact that, in the Plaintiff's view, the Kelley firm did not adequately segregate its billings between the Plaintiff and the Defendant, and therefore could be regarded as having in part created the problem that is before the Court.


The Court has reviewed the transcript of Mr. Kelley's deposition, and has concluded that it does not support any great hope that Mr. Wolter will have a better memory or a more detailed memory than Mr. Kelley. On the other hand, barring settlement of this dispute, at trial the Court and the parties will be obliged to wrestle with, and parse, the Kelley firm's billings, and any additional information that Mr. Wolter may possess may well be of value in that process. Therefore, the Court will grant the Plaintiff's motion. And since the Kelley firm received considerable remuneration for its work for the Plaintiff and the Defendant, and inasmuch as the lack of segregation in the Kelley firm's billings arguably has made the dispute between the parties more difficult to resolve, the Court would have denied Mr. Wolter's request for compensation – but for the fact of the untimely filing of the Plaintiff's motion. In view of that untimeliness, however, the Court is of the view that some sanction, beyond the compressed time in which the Plaintiff was obliged to file its reply, is appropriate; and the Court has concluded that the sanction should be the payment, to both Mr. Wolter and to the Defendant's counsel, of their standard hourly fees for the time taken in Mr. Wolter's deposition, but not for any time required to prepare for the deposition.

ORDER

For the foregoing reasons, and based on all the files and pleadings herein, it is herewith ORDERED:

1. That the Plaintiff's motion to depose Steven Wolter, Esq., is granted; and
2. That the Plaintiff shall pay to Steven Wolter, and to counsel for the Defendant, their hourly fees for the time consumed by Mr. Wolter's deposition.

Dated: July 13, 2004


Judge John E. Jacobson