JUDICIAL COURT

of the

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Culver Security Systems, Inc.,
a Minnesota corporation,

Plaintiff,

v.

Little Six, Inc., a corporation,
and Kraus-Anderson Construction
Company, a Minnesota corporation,

Defendants.

Court File 026-92

MEMORANDUM

I.

INTRODUCTION AND SUMMARY

This case is before the Court on a motion to dismiss brought by the Defendant, Little Six, Inc. (LSI). LSI asserts that it has not waived its sovereign immunity in any dealings with the Plaintiff, Culver Security Systems (Culver) and, therefore, is not subject to suit. The Court agrees with LSI and, therefore, LSI's motion to dismiss with prejudice has been granted.

Further, the Court finds that it does not have subject matter jurisdiction to hear the remaining contract dispute between Culver and Kraus-Anderson (KA). Therefore, the Plaintiff's remaining claims against the KA have been dismissed without prejudice.

II.

STATEMENT OF FACTS

This case arises out of two contracts between the Defendants and the Plaintiff. The first was an oral contract between Culver and LSI (a corporate arm of the Shakopee Mdewakanton Sioux Community (the Community), a federally recognized Indian tribe), occurring in approximately January 1991, whereby Culver agreed to provide various security services to LSI at its bingo hall and casino. The second was a written contract between LSI and KA concerning construction services at the Community's bingo hall and casino. The LSI/KA written contract provided that Culver would be a preferred subcontractor for security systems. Preferred subcontractor status means that the subcontractor so designated would not have to participate in the bidding process. LSI and KA were the only parties to the written contract. That contract contains a clause which waives LSI's sovereign immunity and subjects it to suit with regard to contractual disputes arising between LSI and KA.

In conjunction with the casino development, LSI Chief Executive Officer, Leonard Prescott, signed a real estate note with the Prior Lake State Bank. That note contains a waiver of immunity clause which subjects LSI to suit thereon.

On or about January 8, 1992 Culver was terminated from the bingo hall and casino projects based on claims that their work was preformed in a defective and inadequate fashion. KA finished the projects with a new subcontractor.

The Plaintiff originally brought this breach of contract action in State District Court in Scott County in May 1992, and then voluntarily dismissed the case in September 1992. The Plaintiff then brought this claim in Tribal Court against LSI, and later amended its complaint

to add KA as a party defendant. LSI now moves for dismissal of Culver's claims against it based on a claim of sovereign immunity.

III.

DISCUSSION

1. Sovereign Immunity

In order for Culver to maintain an action against LSI, it must demonstrate that LSI expressly and unequivocally waived its sovereign immunity. The Court finds that Culver has failed to demonstrate such a waiver.

The nature and importance of the sovereign immunity doctrine as applied to Indian tribes was aptly explained by the United States Court of Appeals for the Eighth Circuit in the 1985 case of American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985) in which the Court stated that

> The principle that Indian nations possess sovereign immunity has long been part of our jurisprudence [citations omitted]. Indian tribes enjoy immunity because they are sovereigns predating the Constitution [citations omitted] and because immunity is thought necessary to promote the federal policies of tribal self determination, economic development, and cultural development [citations omitted].
>
> Ibid. at 1378.

This doctrine is uncomplicated. As Chief Justice William Rehnquist recently noted "Suits against Indian tribes are thus barred by sovereign immunity absent clear waiver by the tribe or congressional abrogation." Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 509. This Court has adopted this view and, accordingly, the Community, its elected officials, and employees acting in their official capacity, all possess sovereign immunity and, absent an express waiver of that immunity, are not subject to suit. Barrientez v. The Shakopee Mdewakanton, Sioux Community, No. 007-88, Ct of the Shakopee Mdewakanton Sioux

Community (June 17, 1991), citing, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), **See also,** Duluth Lumber & Plywood v. Delta Development Inc., 281 N.W.2d 377, 383-384 (Minn. 1979). This Court in the Barrientez case further held that an agency or corporate arm of the Tribal government may possess the same immunity from suit that is enjoyed by the government itself, and that an express waiver of immunity is also required before such and arm or agency will be subject to suit. Barrientez, at p.46, **See also,** Shakopee Mdewakanton Sioux Community Corporate Ordinance 2-27-91-004, Section 4.11. This Court has also held that the Community and its agencies and arms have the same immunity from suit in Tribal Court as they do in State or Federal Courts. Hove v. Stade, No. 001-88, Ct. of the Shakopee Mdewakanton Sioux Community (July 15, 1988). The Court finds that LSI as a corporate arm of the tribal government enjoys the same sovereign immunity as does the Community and, accordingly, must expressly waive its immunity before it will be subject to suit.

The Court further finds that LSI has not expressly waived its immunity from suit relative to its transactions with Culver. The Court narrowly construes questions of waiver of sovereign immunity. As noted by the Court in Barrientez, "an express waiver of immunity is required before a tribal entity which otherwise is cloaked with immunity will be deemed to have shed that cloak." Id. at p.46. The Court's position in this regard is consistent with the Community's Corporate Charter which provides that "...such corporation...must explicitly consent to be sued in a contract or other commercial document which specifies the terms and conditions of such consent". LSI's Articles of Incorporation contain the identical language at Article 3.2. Accordingly, the Court will not find LSI to have waived its immunity by implication or inference. Rather, LSI must be found to have expressly and unequivocally waived its immunity before it will be subject to suit. See, Ramey Construction v. Apache Tribe of Mescalero

Reservation, 673 F.2d 315, 319 (10th Cir. 1982), citing, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Culver claims LSI waived its sovereign immunity in a number of ways including: 1) an oral agreement and unspoken understanding between Culver and LSI; 2) a written waiver included in LSI's contract with Kraus-Anderson; and 3) written waiver included in the note provided to the Prior Lake State Bank. The Court is not persuaded that any of these actions constitutes an express waiver of LSI's immunity with regard to its transactions with Culver.

First, a waiver of LSI's immunity by way of an oral agreement is in direct conflict with the above cited law and this Court's consistent position that a waiver of immunity must be express and unequivocal. The cases cited by Culver conflict with its position in that they involve instances where a Tribe expressly waived its immunity by a written document. This Court has held that a written waiver of immunity may be sufficient to overcome a defense of sovereign immunity. See, Barrientez v. The Shakopee Mdewakanton, Sioux Community, No. 007-88, Court of the Shakopee Mdewakanton Sioux Community (June 17, 1991). However, Culver's argument is based on an oral agreement, and by definition, excludes such a written waiver. Culver, in its argument to the Court, conceded that they did not have an explicit waiver from LSI. At the hearing held before this Court on September 13, 1993, the Plaintiff specifically admitted its lack of an explicit waiver in the following exchange:

> Judge Buffalo: Did you have anything that explicitly stated that LSI was waiving its immunity relative to whatever oral agreement it had with Culver?
>
> Mr. Buxton: No, Sir, Your Honor. We do believe that the construction agreement, the general contract between Kraus-Anderson and LSI, does apply to that . . .
>
> Transcript of Proceedings at p. 17, 11, 9-16.

Culver later in that same proceeding acknowledge the importance of a written waiver when its attorney stated

> And, unfortunately, there was never a writing evidencing the contract between Little Six and Culver Security or the things not covered in the subcontract.
>
> Ibid. at p. 25, 11, 1-6.

Based on the authority discussed above, these admissions are fatal to Culver's position because absent proof of a written waiver, the case law cited by Culver in support of its contention are simply not applicable.

Culver contends, and this Court does not dispute, that oral contracts may be binding on the parties thereto. However, this proposition does not lead, as urged by Culver, to the conclusion that a binding oral agreement, if one existed between LSI and Culver, is a proper legal substitute for a written waiver of LSI's sovereign immunity. LSI's Articles of Incorporation, the Community's charter and case law on the issue require an unequivocal written waiver of immunity. No such waiver exists here. Therefore the fact that an oral contract may be binding on the parties is not germane to the question of whether LSI expressly waived its immunity from suit. The Court finds that the alleged oral agreement between Culver and LSI is insufficient to demonstrate an express waiver of LSI's immunity from suit.

Culver next contends that LSI's written contract with KA provides a written waiver of LSI's immunity relative to Culver. Culver never has contended that it participated in the contract between LSI and KA. Rather, Culver contends that its contract with KA incorporates the LSI/KA contract by reference and, therefore, LSI's waiver of immunity was included in the KA/Culver contract. Culver's argument urges a waiver of LSI's immunity by implication. For the reasons noted above, the Court does not recognize a waiver of immunity by implication and, accordingly, this argument fails.

Further, it is Hornbook law that two contracting parties may not limit or in any way affect the rights of a third party not participating in the contract. Neither will a person not a party to the contract be bound by its terms, Johnson v. Coleman, 288 S.W.2d 348 (KY 1956); Burdeu v. Elling State Bank, 76 Mont. 24, 245 P 958 (1926); New York Tel. Co. v. Teichner, 69 Misc.2d 135, 329 N.Y.S.2d 689 (1972), nor may a person not a party to a contract attempt to enforce the terms thereof. Williams v. Eggleston, 170 U.S. 340, 42 L.Ed. 1047, 18 S.Ct. 617 (1898); Corp. of Washington v. Young, 23 U.S. 406, 6 L.Ed. 352; Eastern States Electrical Contractors, Inc. v. William L. Crow Constr. Co., 544 N.Y.S.2d 600 (A.D. 1 Dept. 1989). Culver's position that an incorporation of the LSI/KA contract constitutes a waiver of LSI's immunity is antithetical to this contract tenet, and is, therefore, not supported by law. LSI did not participate in the KA/Culver contract and absent its participation the parties had no authority to limit or in any way affect LSI's rights and immunities. The Community's Corporate Charter and Articles of Incorporation specifically state that the corporation must consent to be sued in a contract or commercial document. These documents leave no question but that the corporation must participate in any contract which purports to waive its immunity. Therefore, any incorporation of the LSI/KA contract as it relates to a waiver of LSI's immunity is void.

Culver also contends that LSI waived its immunity relative to a subcontractor based on its contract with the prime contractor is rebutted by LSI's Articles of Incorporation and case law on the issue. First, the Articles clearly provide for a reservation of waiver on a contract by contract basis. The argument that LSI waived its immunity in all subcontracts based on its waiver in the prime contract is in direct conflict with the clear language of the Articles. Second, Federal and State Court case law provides that absent privity of contract with a sovereign entity there can be no express waiver of immunity. **See** Erickson Aircrane Co. v. United States, 731

F.2d 810, 813 (Fed.Cir. 1984); Pan Arctic Corp. v. United States, 8 Cl. Ct. 546 (1985); APAC-Virginia v. Dept. of Hwys. & Transp., 388 S.E.2d 841 (Va.App. 1990). LSI correctly notes that as an entity possessing immunity co-extensive with that of the United States government it must be in privity of contract with Culver before a valid waiver of immunity will be found. Culver has not demonstrated that it was in privity of contract with LSI. Accordingly, it cannot demonstrate that LSI expressly waived its immunity.

Finally, Culver argues that a waiver clause found in a note executed by CEO Prescott with the Prior Lake State Bank constitutes a waiver of LSI's immunity with respect to Culver. The Court is uncertain as to the connection between the note and Culver's security services, but finds the argument too remote to be relevant. To find a waiver from such a transaction would require the highest degree of implication, and is outside the express waiver requirements found in LSI's Articles, and the law. See, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Barrientez v. The Shakopee Mdewakanton Sioux Community, No.007-88, Ct. of the Shakopee Mdewakanton Sioux Community (June 17, 1991); Feldman v. Little Six, Inc., Minn.Dist.Ct., Scott Co. Court File No. 93-06036 at p.6 (July 29, 1993).

Culver's reliance on McCarthy & Associates v. Jackpot Junction, 490 N.W.2d 156 (Minn.Ct.App. 1992) is misplaced. The Court in McCarthy found that the Lower Sioux corporate charter contained a general waiver of its sovereign immunity relative to its gaming operation and that the community did not reserve its submission to suit on a contract by contract basis. The Court misinterpreted the authority under which the Lower Sioux Community created its enterprises. The Enterprises were created under the authority of Section 16 of the Indian Reorganization Act of 1934. The Corporate Charter was created under Section 17 of the IRA and by its term applied only to activities carried out under the Charter. In the case at bar the

Community also elected to operate the enterprise under Section 16 and not under its Corporate Charter and, indeed, the language in LSI's Articles of Incorporation expressly state the waiver reservation that was lacking in the Lower Sioux Charter. Accordingly, the McCarthy case is inapposite to the case at bar.

2. Subject Matter Jurisdiction

At the time of the hearing on this matter the Court expressed doubt that it would continue to have subject matter jurisdiction over the case if LSI were dismissed. Now that LSI is, indeed, dismissed the question is magnified.

> The Community's General Council has granted this Court subject matter jurisdiction
>
> > to decide cases relating to the membership of the community, the rights of Community members, including the right to vote in Community elections and proceedings, the procedures employed by the General Council, the Business Council, the Committees of the Community or the officers of the Community . . . and . . . all controversies arising out of actual or alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C., Section 1301, et. seq.
>
> Community Ordinance 02-13-88-01.

By enacting Ordinance 03-27-90-003 the Council further granted this Court

> > [s]ubject matter jurisdiction over all cases, controversies and proceedings to the maximum extent permitted by law, including, but not limited to those involving the ownership possession, use or occupancy of Reservation lands.
>
> Id. Section 10(a).

With LSI dismissed from this action, the remaining dispute is no longer within this Court's prescribed jurisdiction. In short, the remaining dispute is an action on a contract involving two non-Indian parties. The contract was neither executed on Indian land, nor affects the rights or interests of the Community or its individual members. As such it is a dispute

outside the Courts jurisdiction and, therefore, the Court must dismiss the plaintiff's remaining claims without prejudice.

HMB

FILED

JUN 14 1994

CLS

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COUNTY OF SCOTT **STATE OF MINNESOTA**

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ORDER

The above entitled matter came on for hearing before the undersigned Judge of Tribal Court on the 13th day of September, 1993, at 2330 Sioux Trail Northwest in the city of Prior Lake, County of Scott, State of Minnesota, on the defendant, Little Six, Inc.'s, motion to dismiss.

Peter Lancaster, Esquire appeared on behalf of the defendant, Little Six Inc. Rex Buxton, Esquire appeared on behalf of the plaintiff, Culver Security Systems, Inc.

The Court being fully advised of the premises and based on the files, records and evidence herein, as well as the arguments of counsel,

IT IS HEREBY ORDERED,

1. That the Defendant, Little Six Inc.'s motion to dismiss with prejudice be, and hereby is, GRANTED;

2. That the Plaintiff's remaining claims against the defendant Kraus-Anderson be, and hereby are, DISMISSED, without prejudice;

3. That the attached memorandum of law is hereby incorporated by reference.

BY THE COURT:

Dated: 6/14/94

Henry M. Buffalo, Jr.