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STATE OF MINNESOTA
TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA)
COMMUNITY

JEANNE A. KRIEGER
CLERK OF COURT

Jeanette Van Zeeland, an individual,
and Terrance Van Zeeland, an individual,

Court File No. 505-02

Plaintiffs,

vs.

MEMORANDUM OPINION

Little Six, Inc., d/b/a Mystic Lake Casino,
And Does 1 through 10, inclusive,

Defendants.

Defendant Little Six, Inc. brought a motion to dismiss this action pursuant to Shakopee Mdewakanton Sioux (Dakota) Community ("SMS(D)C" or "the Community") Rule of Civil Procedure 12(b). For the reasons explained below, this lawsuit is dismissed in its entirety for lack of subject matter jurisdiction on grounds of Indian tribal sovereign immunity.

I. FACTS

Plaintiffs' alleged facts may be summarized as follows. Plaintiffs Jeanette and Terrance Van Zeeland are husband and wife who live in Wisconsin. Complaint ¶ 3. On January 24, 2000, Plaintiffs attended a show presented by Curtis and Michael Production at Mystic Lake Casino. Complaint ¶ 6. During the course of the show, an entertainer named Doug Stark "negligently struck and injured plaintiff Jeanette Van Zeeland, and caused her to suffer great pain and permanent injury" and caused Mr. Van Zeeland to suffer loss of companionship and other related losses as a result. Complaint ¶ 6.

Plaintiffs submitted a claim against Mystic Lake Casino's insurance, which "declined coverage on grounds that Curtis and Michael Production were solely responsible for the stage production and liable for all injuries caused therefrom." Complaint ¶ 7. Plaintiffs further claim that an "obligation" existed between Curtis and Michael Production and Mystic Lake Casino in which the former was required to carry liability insurance for injuries occurring in connection with its shows. Complaint ¶¶ 5, 10. Plaintiffs claim that Mystic Lake Casino did not enforce the requirement, however, and allowed the January 24, 2000 show to proceed without evidence of liability insurance coverage. Complaint ¶ 10. Plaintiffs allege that Defendant concealed this fact from Plaintiffs. Complaint ¶ 11.

In 2001, Plaintiffs sued Curtis & Michael Production and other defendants in United States District Court, District of Minnesota, Case No. 01-1107, "naming Mystic Lake Casino a non-defendant third party." Complaint ¶ 8. Defendants in that case failed to respond, and the District Court entered default judgments against certain defendants. Plaintiffs allege that the District Court "ordered Mystic Lake Casino to provide the insurance information," Complaint ¶ 9, but the court docket shows that the District Court dismissed the suit with respect to Little Six, Inc. for failure to state a claim. Van Zeeland et al. v. DiCasta et al., No. 01-CV-1107 (Order dismissing Amended Complaint with respect to Little Six, Inc., D. Minn., October 29, 2002).

Plaintiffs assert that, on October 29, 2002, Defendant's attorney advised Plaintiffs' attorney for the first time that Mystic Lake Casino's management had allowed Curtis and Michael Production to perform the stage show without liability insurance coverage. Complaint ¶ 9. Plaintiffs do not allege that Defendant was in any way responsible for Jeanette Van Zeeland's injuries on January 24, 2000. Instead, Plaintiffs' lawsuit against Defendant is based on their

assertion that Defendant's failure to enforce the liability insurance coverage requirement resulted in Plaintiffs' inability to collect damages from the alleged tortfeasors. Complaint ¶ 12.

II. ANALYSIS

Rule 12(b) of the SMS(D)C Rules of Civil Procedure provides that certain defenses may be made by motion, including lack of jurisdiction over the subject matter. Defendants have brought a motion to dismiss for lack of subject matter jurisdiction on grounds of Indian tribal sovereign immunity.

Plaintiffs concede that the Community is "a sovereign Indian tribe" and bring this action pursuant to the Community's Tort Claims Ordinance. Complaint ¶ 1. The Tort Claims Ordinance waives the Community's sovereign immunity from suit under certain conditions.

Section 4, Subsection (A) of the Ordinance provides:

The Community hereby expressly waives its sovereign immunity from suit for the limited purpose of permitting claims made against the Community pursuant to this Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided in Section 5 herein, provided the damages are payable from the proceeds of an insurance policy. The Community will pay, from the proceeds of an insurance policy, compensation for injury to or loss of property, or for personal injury or death, caused by an act or omission of an employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant.

Section 9 of the Ordinance sets forth a Statute of Limitations requiring that all claims brought against the Community under the Ordinance shall be brought within two years of the date of the act or omission giving rise to the claim, "or on the date a reasonable person under similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community."

To the extent any of the conditions in the Tort Claims Ordinance are not met, the Community's sovereign immunity is preserved, and a Court would, therefore, lack subject matter jurisdiction to adjudicate civil claims against the Community.

The facts that Plaintiffs allege give rise to a cause of action fall into three separate theories of liability. First, Plaintiffs claim, or appear to claim, that the Community is secondarily liable for damages caused by the tortfeasors. Second, Plaintiffs claim that they are third-party beneficiaries to a contract between the Community and the tortfeasors, and that they may bring an action for breach of that contract against the Community. Third, Plaintiffs claim they may sue the Community for negligence on the theory that the Community's failure to enforce a liability insurance coverage requirement caused Plaintiffs' inability to collect damages from the tortfeasors. Each of these theories of liability fails to state a cause of action covered by the Community's Tort Claims Ordinance, as described below. Failing to meet these requirements, the Community's sovereign immunity is thus preserved, and Plaintiffs' Complaint must be dismissed for lack of subject matter jurisdiction.

A. Secondary liability theory

Plaintiffs' secondary liability claim against Defendant fails for two reasons. First, the Complaint does not contain any allegations supporting this theory. According to the Restatement (Second) of Torts,

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Rest.2d Torts § 319 (1965). Plaintiffs, therefore, must have alleged in their Complaint that the Community knew or should have known that the tortfeasor was likely to cause bodily harm to others if not controlled, that the Community failed to control the tortfeasor, and further that such failure resulted in the tortfeasor's injuries to Plaintiff Jeanette Van Zeeland and her husband.

Plaintiffs' Complaint contains no such allegations, but rather frames its cause of action around Defendant's alleged concealment of its failure to enforce an obligation to require evidence of liability insurance coverage.

Second, even if Plaintiff's Complaint could be construed to contain allegations to support a theory of secondary liability, Section 9 of the Community's Tort Claims Ordinance contains a two-year statute of limitations for claims arising from the Community's actions or omissions under the Ordinance. Plaintiffs' claims against the Community for injuries caused at the show on January 24, 2000, if any, expired on January 24, 2002. Plaintiffs did not bring this action until October 2002. Plaintiffs' secondary liability claim against the Community is thus barred by the Statute of Limitations in Section 9 of the Tort Claims Ordinance and, therefore, is not covered by the limited waiver of immunity in the Ordinance.

B. Third-party beneficiary contract theory

To the extent Plaintiffs would attempt to bring their claim on the theory that they are third-party beneficiaries to an alleged contract between the Community and the tortfeasors, such a claim would not be covered by the waiver of immunity in the Tort Claims Ordinance. The Ordinance applies only to tort claims, namely, for "compensation for injury to or loss of property, or for personal injury or death." Tort Claims Ordinance § 4(A). The Ordinance does not extend its waiver of immunity to contract claims against the Community. The Court, therefore, lacks subject matter jurisdiction over this claim.

C. Negligence theory

Plaintiffs cannot sustain their claim that Defendant's failure to enforce a liability insurance coverage requirement against the alleged tortfeasor caused Plaintiffs' inability to collect damages from the tortfeasor. This alleged cause of action fails to satisfy the essential

element of causation between Defendant's act or omission and the alleged injury to Plaintiffs. Simply put, there is no set of facts Plaintiffs could prove which would establish that the Community's failure to require liability insurance coverage for Curtis and Michael Production caused Plaintiffs to suffer a compensable loss.

Under elementary principles of liability for negligence, Plaintiff must establish a prima facie case "by alleging facts sufficient to demonstrate (1) that Defendant owed him a duty, (2) that Defendant breached that duty, (3) that Defendant's breach was the proximate cause of plaintiff's injuries, and (4) that Plaintiff suffered actual injury." Famularo v. Little Six, Inc., No. 350-99 (SMS(D)C Tr. Ct. October 20, 2001), at 3 (citing Kostelnik v. Little Six, Inc., No. 019-97 (SMS(D)C Ct. App. March 17, 1998), at 5). Reflecting this standard, the Community's Tort Claims Ordinance permits claims for damages only to the extent they are *caused* by an act or omission of an employee of the Community. Tort Claims Ordinance § 4(A).

The only allegation of causation set forth in Plaintiffs' Complaint is this statement: "But for the actions and omissions of defendant Mystic Lake Casino as stated above, Curtis and Michael Productions would have been insured against the liability judgments in U.S. District Court and Plaintiffs would have been compensated for their injuries." Plaintiffs' audacious assertion is fundamentally illogical. Trying to assess the actual consequences of Defendant's enforcement of the liability insurance requirement amounts to a purely speculative inquiry. "But for" Defendant's failure to enforce the requirement, the tortfeasor might have carried liability insurance, but that is impossible to demonstrate as a matter of historical fact or even of probability. Furthermore, even if the tortfeasor had carried insurance, Plaintiffs would not necessarily have collected damages. They still would have had to establish the validity of their claim. The fact that Plaintiffs have obtained a default judgment for damages against the

tortfeasor(s) does not inform the necessary inquiry as to whether a claim existed in the first place. From the purely speculative standpoint taken by Plaintiffs, if the tortfeasor(s) had been required to carry insurance, they might simply have declined to perform on the date the injuries occurred. They might have carried insurance, and had the accident still occurred, then they might have simply tendered the claim to their insurer for defense. In that case, Plaintiffs might have settled with the insurer, they might have gone to trial, they might have won, or they might have lost their suit altogether. But Plaintiffs can neither show causation nor quantify their damages to any credible degree of probability. Such a speculative inquiry is entirely improper for the purpose of determining whether Plaintiffs have established a prima facie case for negligence by merely alleging that failure to enforce an insurance coverage requirement actually *caused* Plaintiffs' inability to collect damages from the tortfeasor(s). *See, e.g., Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (holding that nonmoving party "cannot preserve his right to a trial on the merits merely by referring to unverified and conclusionary allegations in his pleading or by postulating evidence which might be developed at trial"). *See also Faimon v. Winona State Univ.*, 540 N.W.2d 879, 884 (Minn. Ct. App. 1995) (affirming principle that plaintiffs may not recover damages that are too speculative, and the determination of whether damages are too speculative or remote "should usually be left to the judgment of the trial court") (quoting *Jackson v. Reiling*, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (1977)).

Plaintiffs have failed to state a cause of action for negligence, and their failure to set forth facts sufficient to establish the element of causation bars their claim under the Tort Claims Ordinance. Plaintiffs' proposed Amended Complaint does not cure the defect in the original Complaint because it merely alleges that the tortfeasors have no assets to satisfy a judgment. It does not, and cannot, establish by mere speculation that the Community's act or omission caused

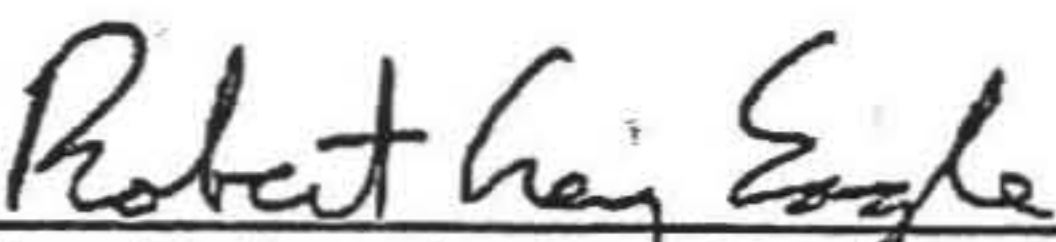
the tortfeasors to have no assets or otherwise to be judgment-proof. This claim is not covered by the Community's waiver of sovereign immunity, and therefore, it must be dismissed for lack of subject matter jurisdiction.

III. CONCLUSION

In consideration of the foregoing, Plaintiffs' Motion to Amend the Complaint is DENIED, Defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED, and Plaintiff's Complaint is hereby dismissed with prejudice.

IT IS SO ORDERED.

Date: 2/12, 2003



Hon. Robert A. Grey Eagle