COURT OF APPEALS
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION STATE OF MINNESOTA

Great Northern Insurance Company,

Appellant,

Court File No. Ct. App. 048-20

vs.

Michael Hamilton, in his capacity as Conservator for the Estate of Amanda Brewer-Ross.

Order Dismissing Appeal

On April 17, 2020, Great Northern Insurance Company appealed from a Tribal Court order denying its motion to dismiss based on "duplicity, and. . . . lack of personal and subject-matter jurisdiction." Because Great Northern's notice did not address the appealability of the order, we asked the parties to brief that threshold issue. We have considered the parties' arguments and now dismiss the appeal.

Analysis

"In any action before the Tribal Court where a three-Judge panel has not heard the matter, a party may appeal any decision of the assigned Judge that would be appealable if the decision had been made by a judge of a United States District Court."

SMSC R. Civ. P. 31(a). Appealability of federal district court orders is governed by 28 U.S.C. §§ 1291 and 1292.

Under Section 1291, appellate courts "have jurisdiction of appeals from all final decisions of the district courts." Generally, this requires "a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (quotation omitted).

Here, Great Northern recognizes that the Tribal Court order has not ended the litigation and that "the case has not been determined on its merits." App. Memo. at 2. Instead, Great Northern argues that the Tribal Court order falls within a "'narrow exception to the normal application of the final judgment rule'" for orders that determine collateral claims of right. *Id.* (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989)). This so-called "collateral order doctrine" applies to "orders which (1) conclusively determine disputed questions, (2) are separate from the merits of the action, and (3) . . . would be effectively unreviewable on appeal from a final judgment." *Little Six Inc. v. Prescott*, 1 Shak. A.C. 77, 78 (Sept. 9, 1997). Though the parties dispute the presence of all three conditions, we choose to dispose of the matter based on the first and third.

Turning to the first condition, Great Northern appears to argue that the Tribal Court order conclusively determines the question of its jurisdiction and "duplicity" of the action. App. Memo. at 3. We disagree.

The Tribal Court decided that Hamilton had made a *prima facie* case that subject-matter jurisdiction existed under Community law and the consensual-relationship exception under *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and that personal jurisdiction existed under Community law and the minimum-contacts test under In *re the Marriage of Nguyen and Gustafson*, ___ Shak. A.C. ___, No. Ct. App. 045-19, Slip Op. at 10-12 (Jan. 21, 2020), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Order at 2, 17, 22, 33-35, 47.[1] In order for the Tribal Court to reach its decision, it analyzed the following jurisdiction limits:

- The Tribal Court has "original jurisdiction over all civil causes of action arising on lands subject to the jurisdiction of the . . . Community." SMSC Resolution 11-14-95-003, § I.
- "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contract, leases, or other arrangements." *Montana*, 450 U.S. at 565-66; *see Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997) (applying *Montana* in the context of tribal-court jurisdiction).
- The Tribal Court has personal jurisdiction over "all persons whose actions involve or affect the . . . Community or its members, or where the person in question enters into consensual relationships with the Community or its

[1] The Tribal Court declined to address Hamilton's argument below that *Montana* does not apply because of the land status at issue of that *Montana*'s self-government exception applies. Order at 18, 24. We do not opine on those issues here.

members through commercial dealings, contract, leases, or other arrangements." SMSC Resolution 11-14-95-003, § II.

- The Tribal Court has personal jurisdiction over persons who "have certain minimum contacts with [the Community] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.*, 326 U.S. at 316 (quotation omitted).

As Hamilton intimates, these are fact-intensive inquiries. *See* Resp. Memo. at 4-5. And further proceedings may bring the Tribal Court to a different conclusion. A decision to deny a motion to dismiss does not preclude the Tribal Court from revisiting the question of its jurisdiction in a motion for summary judgment—a motion that will require a greater showing by Hamilton. *See Wilderness Society v. Griles*, 824 F.2d 4, 16 (D.C. Cir. 1987). Similarly, as the case proceeds, Great Northern can reassert its concerns regarding the status of the parallel federal-court action. Thus, the Tribal Court order is, by its nature, a tentative determination of the question of jurisdiction and "duplicity." *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Turning to the third condition, Great Northern argues that "[i]f the case proceeds to a conclusion on the merits, the jurisdiction issue *effectively* becomes unreviewable because the time, expense and efforts of the court and both parties will have already been incurred." App. Memo. at 3 (emphasis in original). We are unpersuaded by this argument. Great Northern does not contend that it will be unable to seek review of its arguments on appeal from a final judgment, nor is there "reason to suspect that [Great Northern] will be unable to obtain effective review." *Petroleos Mexicanos Refinancion v.*

M/T King A (EX-TBILISI), 377 F.3d 329, 334 (3d Cir. 2004). "Cases abound where a victorious plaintiff's judgment evaporates on appeal after final judgment when the court of appeals holds that the district court lacked . . . jurisdiction." *Id.* And although we agree that continued proceedings will result in increased time and expense for the parties and the Tribal Court, an "argument that the court's order may be burdensome in 'ways that are only imperfectly reparable by appellate reversal of a final . . . judgment . . . has never sufficed' to satisfy the third condition" of the collateral-order doctrine. *Nice v. L-3 Communications Vertex Aerospace LLC*, 885 F.3d 1308, 1312 (11th Cir. 2018) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009)). It will not suffice here.

Because the first and third conditions of the collateral-order doctrine are not met in this case, we hold that the Tribal Court order may not be treated as a final decision under Rule 31(a).

Finally, the Company notes that interlocutory decisions—such as the Tribal Court order—are immediately appealable under Section 1292(b) if "(1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation." App. Memo. at 3 (quoting *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994)) (internal quotations omitted). While the Company correctly recites the test set out by Section 1292(b) and *White*, it does not explain how the Tribal Court order satisfies that

test. Like other courts, "[w]hen a party includes no developed argumentation on a point, as is the case here, we treat the argument as waived." *Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Thus, we decline to consider this argument.

Order

For the foregoing reasons, the appeal is dismissed and the case is remanded to the Tribal Court for further proceedings.

Dated June 15, 2020 *Per Curiam*