COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

James Van Nguyen,

Appellant,

vs. File No. Ct. App. 044-77

Amanda Gustafson,

Respondent.

Memorandum and Order

Summary

In the marriage dissolution proceeding which gives rise to this appeal, the Appellant, James Van Nguyen ("Nguyen") contends that the Courts of the Shakopee Mdewakanton Sioux Community lack personal jurisdiction over him, and also lack subject-matter over his marriage.

The Community's Trial Court has rejected Nguyen's jurisdictional contentions, has denied his motion to dismiss, and has established a schedule for pretrial proceedings and for trial. Nguyen seeks interlocutory review by this Court of the Trial Court's jurisdictional decision. Rule 31(a) of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community Tribal Court ("the Civil Rules") provides that a Trial Court order can be appealed only if, under federal law, such an order would be appealable had it been issued by a federal court. And under federal law, the decision of a United States District Court denying a motion to dismiss on either personal or subject-matter jurisdictional grounds is not appealable until the District Court has finally resolved all the issues that are pending between the parties in the litigation.

We therefore conclude that at this time the Trial Court's denial of Nguyen's motion to dismiss is not now properly appealable to this Court.

Background

Gustafson is a member of the Shakopee Mdewakanton Sioux Community ("the Community"), Nguyen is not a member of any Indian tribe. The parties have been married for approximately three and

one-half years, and they are the parents of one child, who is a member of the Community. Both before and during their marriage they have been involved in several proceedings in the Community's courts[1]. Gustafson filed a Petition, seeking to dissolve the marriage, and seeking orders both with respect to the child and with respect to certain real and personal property, on July 10, 2017. Nguyen moved to dismiss; and after receiving briefing and hearing oral argument, Judge Henry M. Buffalo, Jr. denied that motion on November 10, 2017, explaining his decision in a forty-five-page written memorandum.

On December 4, 2017, Nguyen filed a Notice of Appeal with this Court, asking us to review Judge Buffalo's decision, and on December 8, 2017 Nguyen asked Judge Buffalo to stay the effect the decision, and to certify for immediate appeal the jurisdictional questions resolved therein. On December 11, 2017, Judge Buffalo denied those requests; and also on December 11, 2017, we directed the parties to brief the single question of whether Nguyen's appeal could properly be heard by us before the Trial Court has finally resolved all the claims presented to it by the parties.

Having now considered the arguments raised in the parties' briefs, we conclude that an interlocutory appeal of Judge Buffalo's November 10, 2017 decision cannot properly be heard by this Court.

Discussion

Rule 31(a) of our Rules of Civil Procedure provides;

> Appealable Orders. 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. Actions that are heard by a three-judge panel of the Tribal Court under Rule 25 shall be deemed to have been the subject of a consolidated trial and appeal, and decision of the Tribal Court in those matters shall not be the subject of further appeal.

As a general rule, federal courts of appeal "have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291. "Ordinarily, a district court order is not final until it has resolved all claims as to all parties." *See Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015). That is, "a final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs*, 134 S.Ct. 773, 779 (2014) (internal quotation marks omitted). Here, Judge Buffalo's order is not "final" because it only

[1] The November 10, 2017 decision of the Trial Court discusses in detail the past and pending judicial proceedings in the Community's courts and in other courts.

adjudicates the jurisdiction of the Tribal Court as it pertains to the Petition while leaving merits of the Petition unresolved.

Nguyen argues, however that his appeal should nonetheless be heard under the "collateral order doctrine", which creates a narrow exception to the generally applicable requirement of finality[2]. In federal jurisprudence, the collateral order doctrine identifies a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To qualify for collateral order review, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *See Will v. Hallock*, 546 U.S. 345, 349 (2006) (alterations in original) (internal quotation marks omitted). The collateral order doctrine is a "narrow exception" to the final-judgment rule, *Pena-Calleja v. Ring*, 720 F.3d 988, 989 (8th Cir. 2013), and the Supreme Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule . . . that a party is entitled to bring a single appeal, to be deferred until final judgment has been entered." *See Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 869 (1994) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982)); *see also Will*, 546 U.S. at 350, 126 S.Ct. 952 (explaining that, "although the Court has been asked many times to expand the small class of collaterally appealable orders, we have instead kept it narrow and selective in its membership" (internal quotation marks omitted)).

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[2] Nguyen's Notice of Basis for Appeal and Request for Stay of Proceeding filed December 8, 2017 states that his appeal is "an appeal of a Collateral Order pursuant to 28 U.S.C. § 1292 and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)." Notice at 1. But Nguyen is incorrect insofar as his statement indicates that the collateral order doctrine, when satisfied, gives rise to jurisdiction under Section 1292, which lists the specific types of interlocutory orders that are appealable notwithstanding the finality of judgment, in addition to setting forth the process for taking appeals of orders involving controlling questions of law so certified by the district court. The Supreme Court case upon which Nguyen relies—*Cohen v. Beneficial Industrial Loan Corp.*—makes clear that when the elements of the collateral order doctrine are met, the result is a final appealable judgment under 28 U.S.C. § 1291. *Cohen*, 337 U.S. at 546.

Federal precedent across the Circuits dictates that a denial of a motion for lack of personal jurisdiction is not a decision that falls within the collateral order doctrine. This is because such a denial does not prevent the aggrieved party from vindicating rights by appealing that decision after final judgment on the merits. *See, e.g., Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988) ("Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order."); *see also Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1024-26 (9th Cir. 2010) (stating that a "denial of a motion to dismiss for lack of personal jurisdiction is neither a final decision nor appealable under the collateral order doctrine"); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1297 (11th Cir. 2000) ("The denial of a motion to dismiss for lack of personal jurisdiction is not, in itself, immediately appealable under the 'collateral order doctrine' . . . .").

Similarly, while the denial of a motion to dismiss for lack of subject matter jurisdiction predicated on a claim of immunity is immediately appealable, *see Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985), "the denial of a motion to dismiss for lack of subject-matter jurisdiction on other grounds is generally not subject to interlocutory review," *Intel Corp. v. Commonwealth Sci. & Indus. Research Organisation*, 455 F.3d 1364, 1369 (Fed. Cir. 2006) (citing *Catlin v. United States,* 324 U.S. 229, 236 (1945) ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable.")); *see Gov't of the Virgin Islands v. Hodge*, 359 F.3d 312, 321 (3d Cir. 2004) ("'[N]on-immunity based motions to dismiss for want of subject matter jurisdiction are not ordinarily entitled to interlocutory review.'" (quoting *Merritt v. Shuttle, Inc.,* 187 F.3d 263, 268 (2d Cir. 1999)). Here, Nguyen's challenge to the Tribal Court's subject-matter jurisdiction is not an immunity-based challenge, but instead is predicated on his assertion that the Court lacks subject matter jurisdiction pursuant to *Montana v. United States*, 540 U.S. 544 (1981), the Indian Child Welfare Act, and Public Law 280. As a result, federal case law dictates that Nguyen's challenge is a "non-immunity based motion [ ] to dismiss for want of subject matter jurisdiction" that is not immediately reviewable. *See Hodge*, 359 F.3d at 321.

Without reference to the foregoing case law, Nguyen argues that he has satisfied the three elements of the collateral order doctrine. As to the third element, Nguyen cites two federal cases for the proposition that his motion to dismiss "would otherwise be effectively unreviewable (the

asserted rights for jurisdiction of the Tribal Court dissolution proceeding would be destroyed)" if Judge Buffalo's Order is not immediately appealable. Notice at 1. But neither case supports his argument. In the first, the Supreme Court held "that States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Thus, *Puerto Rico Aqueduct* is consistent with the aforementioned line of federal authority holding that denials of claims of immunity are immediately appealable. After all, the Court's "ultimate justification" for its holding in *Puerto Rico Aqueduct* was "the importance of ensuring that the States' dignitary interests can be fully vindicated" through application of immunity—an interest noticeably absent in the matter before the Tribal Court. *See id.* at 146.

United States v. Archer-Daniels-Midland Co., 785 F.2d 206, 210 (8th Cir. 1986), is also unpersuasive. In *Archer-Daniels-Midland Co.*, the court held that the district court order denying defendants' motion contending that the government violated the rule protecting the secrecy of grand jury proceedings was an immediately appealable collateral order in part because it was "effectively unreviewable on appeal from a final judgment." *Id.* The Court reasoned that "[a]ny harm to [defendants'] interests which are sought to be protected by keeping grand jury proceedings secret cannot be undone by a later reversal of the district court order." *Id.* Further, the Court distinguished its decision from the Supreme Court's conclusion in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377 (1981), that denial of a motion to disqualify an opposing party's counsel may not be appealed under the collateral order doctrine because such an order can be effectively reviewed on appeal from a final judgment. The Court concluded that unlike in *Firestone*, the inability to immediately appeal the order would result in losing "the legal and practical value" of the rights defendants have asserted to the secrecy of the grand jury proceedings. *Archer-Daniels-Midland Co.*, 785 F.2d at 210.

Unlike in the situation in *Archer-Daniels-Midland*, Nguyen's inability to immediately appeal Judge Buffalo's order does not result in loss of "the legal and practical value" of the rights he has asserted. While Nguyen argues that he would be prejudiced by being forced to litigate the merits of a case over which the Tribal Court does not have jurisdiction, he nonetheless retains the ability to challenge the Court's jurisdiction on appeal after resolution of the merits. If that challenge is successful, Nguyen may also access the relief he now seeks:

dismissal of the Petition. Therefore, this is not a situation like in *Archer-Daniels-Midland* where inability to immediately appeal extinguishes the rights being advanced.

Finally, Nguyen cites us to a decision of the Minnesota Court of Appeals, *McGowan v. Our Saviour's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995), in which interlocutory appeal was permitted from the denial of a motion to dismiss on personal jurisdiction grounds. But, whatever the force of the *McGowan* decision has for Minnesota state courts under Minnesota law, it does not reflect the federal precedents that are incorporated in, and govern, our Civil Rules.

Because Nguyen's challenges to the Trial Court's subject matter and personal jurisdiction are reviewable after adjudication of the merits of Gustafson's Petition, federal precedent makes it clear that it is inappropriate for us to permit interlocutory review of those challenges under the collateral order doctrine.

IT THEREFORE IS ORDERED that the instant appeal is dismissed, without prejudice, as procedurally premature under Rule 31(a) of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community Tribal Court

Dated: Jan. 30, 2018

Chief Judge John E. Jacobson

Judge Terry Mason Moore

Judge Jill E. Tompkins