TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Leonard Prescott, Plaintiff, vs. Little Six, Inc., Past and Present Members of Its Board of Directors, Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise, and Shakopee Community Defendants.	)	Court File No.: 554-05

Memorandum Decision and Order

In this litigation, the Plaintiff Leonard Prescott seeks reimbursement from the Defendants for legal fees that he incurred in connection with his defense of earlier litigation that the Defendant, Little Six, Inc. ("LSI"), commenced against Mr. Prescott in October, 1994. The Defendants have moved to dismiss on a variety of grounds. In the view of the Court, their motion must be granted: Mr. Prescott's complaint against LSI is barred by the doctrine of claim preclusion, and as to the other Defendants it is barred by the doctrine of sovereign immunity.

History of the Litigation

The litigation for which Mr. Prescott is seeking his attorneys' fees was commenced by LSI in 1994. It continued for nearly six years. In the litigation, LSI

sought money damages from Mr. Prescott for certain actions that he took, or was alleged to have taken, during his tenure as Chairman of LSI's Board of Directors. The litigation ended in 2000, when the Shakopee Mdewakanton Sioux (Dakota) Community Court of Appeals concluded that Mr. Prescott was protected by the doctrine of qualified immunity with respect to most of LSI's claims, and that as to the remainder he was entitled to summary judgment. Little Six, Inc., et a. v. Prescott and Johnson, 1 Shak. A.C. 157 (2000) ("Prescott and Johnson"),

At the end of its opinion in Prescott and Johnson, the Court of Appeals stated –

> The parties to this litigation are to bear their own costs and fees. Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994) (parties normally bear own costs and fees); Legal Services of Northern California v. Arnett, 114 F.3d 135, 141 (9th Cir. 1997)(even where statute provides attorney fees for prevailing party, prevailing defendant only awarded attorney fees if claim is frivolous, unreasonable, or groundless).
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> Little Six, Inc., et a. v. Prescott and Johnson, 1 Shak. A.C. 157, 172 (2000).

Both before and after the Court of Appeals' decision in Prescott and Johnson, other litigation between LSI and Mr. Prescott also was taking place. Specifically, in 1999, the Court of Appeals decided In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, 1 Shak A.C. 146 (1999) ("Gaming Commission Appeal"), upholding the Shakopee Mdewakanton Sioux (Dakota) Gaming Commission's revocation, in 1994, of Mr. Prescott' Temporary Employment Authorization. Following that Court of Appeals decision, LSI again sued Mr. Prescott in this Court, this time seeking reimbursement for monies that LSI had paid to the Douglas Kelley Law Firm ("the Kelley Firm"), for work that the Kelley Firm had done on Mr. Prescott's behalf in 1994, during his ultimately unsuccessful defense, before the Gaming Commission, of his

Prescott's Temporary Employment Authorization, Little Six, Inc. v. Prescott, Court File No. 436-00 (filed Feb. 10. 2000) ("First Attorneys Fee Litigation")

In the First Attorneys Fee Litigation, Mr. Prescott moved to dismiss on the ground that he was protected by qualified immunity – the same ground that had operated to protect him from certain aspects of the LSI's claims in Prescott and Johnson. This Court denied his motion, (*see*, Little Six, Inc. v. Prescott, 4 Shak. T.C. 73 (2000), and Mr. Prescott filed an Answer, in which he made the following claim for his legal fees:

> As to the allegations contained in Paragraphs 34, 35, 36, 37, and 38 of Plaintiff's Complaint, Count II, Unjust Enrichment, Prescott denies each and every allegation, except for those previously admitted, and he affirmatively alleges that even if he were liable to LSI for reimbursement of funds as alleged by LSI, that he has personally incurred legal fees relating to the civil lawsuit initiated by Plaintiff in 1994 – a lawsuit based on the same nucleus of facts occurring in the same time period and in which Prescott was ultimately found to be the prevailing party – thus entitling him to indemnification by LSI, and consequently, a set-off in legal fees.
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> Little Six, Inc. v. Prescott, Court File No. 436-00 (Answer of Leonard Prescott, at ¶21, filed August 21, 2000) (Emphasis supplied).

Thereafter, Mr. Prescott pursued an interlocutory appeal of the denial of his motion to dismiss, *see*, Prescott v. Little Six, Inc., 1 Shak A.C. 190 (2001). The appeal was unsuccessful, and following remand and extensive discovery, LSI moved for summary judgment. Responding to that motion, Mr. Prescott made the following argument:

> LSI's 2994 civil lawsuit against Prescott alleged, among other things, that Prescott was liable for misconduct, fraud and/or negligence in the performance of his duties to LSI. The 1994 civil lawsuit against Prescott was ultimately unsuccessful as to each and every allegation and claim. Even though no final judgment of misconduct, fraud or negligence was entered, LSI has not yet indemnified or reimbursed Prescott for the fees and costs he incurred to successfully defend against the claims.

> Article 14 of the Articles of Incorporation, the same Article under which LSI is not claiming entitlement to reimbursement, requires LSI to indemnify Prescott for the fees and costs incurred by him as a result of being made a party to the 1994 civil suit. Because Prescott was successful against the claims of LSI in the 1994 civil lawsuit – he was not found liable of negligence, misconduct or fraud in the performance of his duty to LSI – Prescott is entitled to reimbursement.
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> If this Court awards LSI summary judgment in accordance with its motion, the Court should order that any such award of repayment be reduced by the amount LSI owes to Prescott as indemnification for his successful defense of the 1994 civil lawsuit. While Prescott has made no formal demand under Article 14 for payment of the indemnification amounts owed by LSI, there is no requirement in the Article that such a request be made. LSI is obligated to make the payment and as yet has not made the payment. Equity, fairness and justice require that any amount awarded to LSI in the matter at bar be reduced by the amount incurred by Prescott in his defense of the 1994 civil action.
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> Little Six, Inc. v. Prescott, Court File No. 436-00 (Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, at 25-26, filed November 7, 2003) (Emphasis supplied).

This Court granted LSI's summary judgment motion in part, and denied it in part. The Court held that as a matter of law Mr. Prescott was liable to reimburse LSI for the amounts that LSI had paid to the Kelley Firm, but also held that there were material facts at issue with respect to whether some of the monies that had been paid to the Kelley Firm were paid for work done for LSI, as opposed to work done for Mr. Prescott. Little Six, Inc. v. Prescott, Court File No. 436-00 (Memorandum Opinion and Order, filed February 17, 2004). The Court's decision did not discuss Mr. Prescott's setoff claim. Instead, it concluded with these words:

> So, inasmuch as there is a disputed issue of material fact, we are obliged to go to trial on that issue, at a time to be determined. The single issue that will be decided at trial will be the extent of the charges from the Kelly [sic] 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.

For the foregoing reasons, it is herewith **ORDERED:**

1. That the Plaintiff's motion for summary judgment on the issue of the Defendant's liability to reimburse the Plaintiff LSI for the legal fees and expenses paid by LSI in connection with the proceedings and litigation surrounding Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024 is **GRANTED**; and

2. That the Plaintiff's motion for summary judgment on the amount of the fees and expenses to be reimbursed by the Defendant is **DENIED.**

Ibid, at 8.

Mr. Prescott did not appeal the award of partial summary judgment against him, either at the time of the award or thereafter.

Trial on the issues associated with the Kelley Firm's bills took place on August 23, and 24, 2004. During the trial, no evidence was offered or received by either party concerning Mr. Prescott's setoff claim. Following extensive post-trial briefing, on May 11, 2005 the Court rendered its decision, stating its view of the issues that were before it as follows:

> Today, I decide the amount that Mr. Prescott should reimburse LSI pursuant to his agreement. I also decide the plaintiff's claims for interest and for reasonable attorneys fees and expenses incurred in these proceedings.
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> Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott, Court File No. 436-00 (Memorandum Opinion and Order filed May 11, 2005 at 5)[1].

The Court concluded that, in fact, all of the work done by the Kelley Firm during the period at issue was done for Mr. Prescott. The Court awarded LSI the sum of $516,871.46 plus interest and reasonable attorneys fees and expenses; and thereafter, on October 26, 2005, the Court rendered a Memorandum Opinion and Order holding that

[1] In 2005, the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise, as successor to the rights and liabilities of LSI, had been substituted, without objection, as the Plaintiff in First Attorneys Fee Litigation.

$185,810.05 in legal fees and costs had reasonably been incurred by the Plaintiff in the Gamin Commission Appeal Litigation. On October 27, 2005, Judgment in the full amounts awarded was entered.

Mr. Prescott appealed to the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community. His Notice of Appeal stated that he sought review of –

> ...the May 11, 2005 *Memorandum Opinion and Order* of Judge John E. Jacobson which found in favor of the Plaintiff as to issues of repayment of monies paid for legal fees and costs, payment of pre-judgment interest and payment of attorney fees and costs for prevailing in this Court and the *Memorandum Opinion and Order* of Judge John E. Jacobson issued on October 26, 2005 and the subsequent Judgment entered and filed on October 27, 2005.
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> Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise, f.k.a. Little Six, Inc. v. Prescott, Court File No. 436-00 (Defendant Prescott's Notice of Appeal, filed November 21, 2005).

He did not make any appellate arguments with respect to the setoff claim that he had made in his Answer, and that he had argued to the Court in the summary judgment proceedings.

Instead, on December 29, 2005, while the appeal was pending in First Attorney Fee Litigation, he filed the present case, seeking the approximately $177,000 in attorney's fees he asserts that he incurred in the Prescott and Johnson litigation. He bases his claim on a contract theory, and also on the language of LSI's Articles of Incorporation that were in effect in 1994, which required LSI to reimburse corporate officers in certain circumstances. He makes his claims against four groups of defendants: LSI, the past and present members of the Board of Directors of LSI ("the Directors"), the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise ("the Enterprise"), and the Shakopee (Dakota) Community ("the Community").

Discussion

1. Sovereign Immunity.

The Directors, the Gaming Enterprise, and the Community all have moved for dismissal based on their claim that Mr. Prescott's suit against them is barred by the doctrine of sovereign immunity. In the Court's view, they are correct. Sovereign immunity protects the Community and its enterprises, and any official or employee acting within the scope of their duties, from suit unless the Community has unequivocally and expressly waived that immunity. Culver Security Systems v. LSI, 1 Shak. T.C. 156 (June 14, 1004); Stopp v. LSI, 2 Shak. T.C. 50 (July 3, 1985).

In his complaint, and in his response to the Defendants' motion to dismiss, Mr. Prescott has not identified any unequivocal and express waiver of immunity by the Community, the Gaming Enterprise, or the Directors. Mr. Prescott argues that since the Community and the Directors were plaintiffs in Prescott and Johnson, they do not possess sovereign immunity in this case, where they are defendants. But Mr. Prescott has not provided the Court with any legal authority for this theory; and in the Court's view the fact that the Community and the Directors filed a complaint against Prescott over twelve years ago does not mean that they thereby forever waived their sovereign immunity for any future lawsuits initiated by Mr. Prescott.

Mr. Prescott also contends that since the membership of LSI is composed of Community members, and since LSI has waived its immunity, it should follow that the Community has waived its immunity as well. But the Community chose to establish LSI as a corporation separate from the Community itself, presumably to protect the Community against exposure to lawsuits related to the activities of LSI. To follow the

Mr. Prescott's reasoning here would be to essentially abolish the Community's ability to establish corporate entities separate from the Community itself. The Court has no legal basis to do such a thing.

In sum, since the Plaintiff has failed to identify any unequivocal and express wavier of immunity from the Community, the Gaming Enterprise, or the Directors, Mr. Prescott's claims against those parties must be dismissed.

LSI also claims that it is protected by sovereign immunity from Mr. Prescott's claim. LSI contends that the proper way to read Mr. Prescott's complaint is that he is bringing both a contract-based claim and a claim based on LSI's Articles of Incorporation. LSI concedes that a claim based on its Articles of Incorporation is not barred by sovereign immunity, because LSI executed a limited waived of its immunity in its Articles; but LSI contends it has not waived its immunity for any contract claim outside Articles. Mr. Prescott, on the other hand, resists having this Court read his complaint as LSI has urged.

I find it unnecessary to resolve these issues, because in my view LSI is correct when it argues that the issues in Mr. Prescott's complaint are barred by the doctrine of claim preclusion.

2. Claim Preclusion.

For a claim to be precluded, under this Court's precedents, previous litigation must have involved the same parties, must have been before a court of competent jurisdiction, must have stated the same cause of action as is stated in the present claim, and must have resulted in a judgment on the merits. Prescott v. Little Six, Inc., 1 Shak. A.C. 190, 192 (2001). LSI argues that the issue raised in the instant litigation – whether

Mr. Prescott is entitled to his attorneys' fees incurred in the Prescott and Johnson litigation – was decided both in Prescott and Johnson itself, and in First Attorneys Fee Litigation, and that both cases involved the same parties, and were litigated and decided in a court of competent jurisdiction.

There appears to be little ground for disputing either that Prescott and Johnson and First Attorneys Fee Litigation involved the same parties as the present case or that both cases were litigated and decided in a court of competent jurisdiction. In my view, the issue presented here also was raised in both earlier cases. In the Answer filed in Prescott and Johnson, Mr. Prescott requested his attorney's fees for litigating that case. See Little Six, Inc. v. Prescott and Johnson, Court file No. 048-00 (Separate Answer of Defendant Leonard Prescott, filed Nov. 14, 1994). And although Mr. Prescott ultimately prevailed in that litigation, largely on qualified immunity grounds, the Court of Appeals made it very clear that he was to bear his own attorney's fees. LSI v. Prescott and Johnson, 1 Shak. A.C. 157, 172 (2000).

Then again, in First Attorneys Fee Litigation, Mr. Prescott expressly advanced precisely the same theory of recovery that he espouses here: he claimed that he was due a setoff of any liability because he was owed his attorney's fees from Prescott and Johnson.

Mr. Prescott argues, however, that even if the issue in fact was raised before this Court earlier, still the issue was not properly litigated, nor properly considered by the Court. While if is not certain that the Plaintiff is correct on this point, even if he were his position still must fail. Under the doctrine of claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were

or could have been raised in that action." Rivet v. Regions Bank of Louisana, 522 U.S. 470, 476 (1998). The doctrine bars issues that could have been raised earlier, not only issues that were in fact raised and litigated to the satisfaction of the parties.

Clearly, Mr Prescott could have pressed his claim either in Prescott and Johnson or in First Attorneys Fee Litigation. In Prescott and Johnson, he could have asked the Court of Appeals to reconsider its decision concerning the parties' attorneys fees, based on the theory he has put forth here, but he choose not to.[2] Then, in First Attorneys Fee Litigation, after he raised his claim both in his Answer and in his response to the Plaintiff's Motion for Summary Judgment, and having had summary judgment awarded against him on all issues except issues relating to the nature of the Kelley Firm's bills, he again could have not to pressed his claim either before this Court on a motion to reconsider, or in his appeal to the Court of Appeals. He chose to do neither.

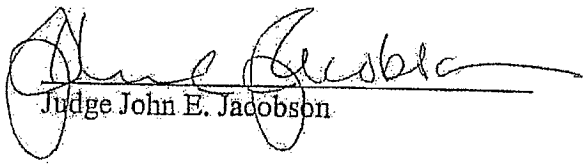
It is not enough for Mr. Prescott to claim that this Court should have reached out and expressly addressed his counterclaim in First Attorneys Fee Litigation. The fact is that the issue raised in Mr. Prescott's complaint in the present case was in fact was raised in earlier litigation between these same parties. In two earlier cases, courts of competent jurisdiction not only failed to grant his claim, but – in Prescott and Johnson – the Court of Appeals specifically mandated that each party was to bear their own costs for that litigation. Under these circumstances, in my view Mr. Prescott is precluded from raising the issue for a third time.

[2] Instead, Mr. Prescott asked the Court for a clarification of its decision, with a pledge to raise this issue in the future. See Plaintiff's Response to Defendant's Motion to Dismiss, Exhibit B, Court file 544-05 (Mar. 31, 2006). The Court of Appeals did not respond to this request for clarification, presumably because in its view the opinion was unambiguous, and presumably a request for clarification falls outside of the scope of this Court's rules.

Order

For the foregoing reasons, and based upon all the filings and pleadings herein, the Defendants' motion to dismiss this matter with prejudice is GRANTED.

August 30, 2006



Judge John E. Jacobson