IN THE TRIAL COURT OF
THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., a corporation chartered pursuant to the laws of the Shakopee Mdewakanton Sioux (Dakota) Community, Plaintiff, v. Leonard Prescott, individually, and as current and former officer and/or director of Little Six, Inc., Defendant,	)	Case No. 436-00

MEMORANDUM OPINION AND ORDER

INTRODUCTION

In his Motion to Dismiss, Defendant Leonard Prescott argues that Little Six, Inc.'s (LSI's) Complaint should be dismissed under the doctrine of res judicata, or in the alternative, because he is shielded by official immunity. Mr. Prescott also requests that he be reimbursed for his attorney's fees and expenses for this litigation, on the basis of Article 14 of the LSI's Articles of Incorporation. For the reasons set forth below, I have concluded that his motion must be denied.

FACTUAL BACKGROUND

A decision on this motion requires an examination of several previous cases between these same parties, and therefore, for clarity, the complaint in this action shall be referred to as the "2000 Complaint". In considering a motion to dismiss, this Court assumes all the facts alleged in the complaint as true and views the allegations in the light most favorable to the plaintiff. Welch et al. v. SMS(D)C, No. 059-95 (SMS(D)C Tr. Ct. Feb. 7, 1996), *affirmed*, Welch et al. v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996).

LSI is a corporation chartered by the Shakopee Mdewakanton Sioux (Dakota) Community under the provisions of the Community's Corporate Ordinance, No. 2-27-91-004. 2000 Complaint at ¶¶ 5-8. Under its Charter, LSI is wholly owned by the members of the Community and is charged with operating several of the Community's business interests. Id.

Between 1991 and 1994, Mr. Prescott served LSI and the SMS(D)C Community in a variety of capacities. He was the Chairman of the Community and President of LSI, and he later become Chairman of the Board of Directors of LSI. 2000 Complaint at ¶3. In his capacity as an officer of LSI, Mr. Prescott was required to obtain and maintain a gaming license under Community law. 2000 Complaint at ¶¶11-12.

In 1994, the SMS(D)C Gaming Commission ("the Gaming Commission") began an investigation into certain activities and actions undertaken, or allegedly undertaken, by Mr. Prescott while serving as an officer of LSI. In May 1994, the Gaming Commission suspended Mr. Prescott's gaming license and scheduled a hearing on whether or not his license should be revoked. 2000 Complaint at ¶¶13-16. On May 9, 1994, the LSI Board of Directors voted to indemnify Mr. Prescott for his legal fees in connection with those Gaming Commission proceedings. 2000 Complaint at ¶¶17-20. In the 2000 Complaint, LSI alleges that at that time Mr. Prescott agreed to reimburse LSI for the legal fee indemnification if the Gaming Commission, "or any other court, tribunal, or organization with appropriate authority, made a determination that [Mr. Prescott] was liable for negligence, fraud or misconduct." 2000 Complaint at ¶20.

In July 1994, the Gaming Commission decided to revoke Mr. Prescott's gaming license, concluding that some of his actions amounted to sanctionable misconduct. 2000

Complaint at ¶15. In September 1994, the LSI Board attempted to rescind its authorization to pay Mr. Prescott's legal fees, and directed its attorneys to demand that he pay the money back. 2000 Complaint at ¶26 and Exhibit A.

Mr. Prescott appealed the Gaming Commission's decision to this Court; and multiple motions, remands, and further appeals followed. Ultimately, in 1999, the SMS(D)C Court of Appeals concluded that the Gaming Commission's decision to revoke Mr. Prescott's license for misconduct was not unreasonable, and the Gaming Commission was affirmed. In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, No. 015-97 (SMS(D)C Ct. App. July 30, 1999).

In December of 1999, after the final Court of Appeals decision, LSI made a demand to be reimbursed for the legal fees for which it had indemnified Mr. Prescott. 2000 Complaint at ¶¶29-30 and Exhibit B. The 2000 Complaint alleges that the amounts demanded by LSI have not be reimbursed. Id. And although Mr. Prescott has yet to file an answer in this matter, it is the Court's understanding that at this point he does not claim to have repaid all the amounts LSI alleges he owes.

For the purposes of deciding this motion, it is important to note before the 2000 Complaint was filed, there were (and are) a number of cases in the SMS(D)C Court involving Mr. Prescott and LSI. First, there was the Gaming Commission appeal mentioned above. In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, No. 015-97 (SMS(D)C Ct. App. July 30, 1999). Second, there is an ongoing case involving the rights of each party under various employee compensation plans. See, e.g., In re Trust under Little Six Inc. Retirement Plans, No. 055-95 (SMS(D)C Tr. Ct. Jan. 19, 1999). And third, around the same time the Gaming Commission began its initial investigation in 1994, LSI and the SMS(D)C Community filed a complaint against Mr. Prescott seeking money damages for various other alleged instances of misconduct. LSI, et al v. Prescott and Johnson, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). This last case is the one most relevant to Mr. Prescott's motion to dismiss, and the complaint in that case shall be referred to here as the "1994 Complaint".

In the 1994 Complaint, LSI alleged that Mr. Prescott and Mr. Johnson received over $500,000 in attorney's fees and expenses, which included money to defend themselves in proceedings before the Gaming Commission. 1994 Complaint ¶¶42-44.

The 1994 Complaint alleged that these fees were used for personal purposes. Id. In the Prayer for Relief, the 1994 Complaint requested that the amounts converted to person use be accounted for and returned. 1994 Complaint ¶¶110-111. The legal theories upon which LSI proceeded in the 1994 Complaint were breach of fiduciary duty, violations of the Indian Gaming Regulatory Act of 1988, civil conspiracy, conversion, and unjust enrichment. 1994 Complaint ¶¶64-91. Each of these counts in the 1994 Complaint included a reallegation of the legal fee indemnification issue as a basis for relief. Id. All of the counts in the 1994 Complaint ultimately were resolved either through Mr. Prescott's successful assertion of an official immunity defense, or on the merits, in Mr. Prescott's favor, in light of undisputed facts. LSI, et al v. Prescott and Johnson, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000).

DISCUSSION

A. CLAIM PRECLUSION/ISSUE PRECLUSION

The first issue raised by Mr. Prescott's motion to dismiss here is whether this action is barred by the doctrines of res judicata, by virtue of the resolution of the issues raised in the 1994 Complaint. Res judicata, which is the binding effect of a former adjudication, can take one of two forms: (1) claim preclusion, which bars relitigation of the same claim between two parties where a final judgment has been rendered on the merits in an earlier case by a court of competent jurisdiction, and (2) issue preclusion, which prevents the relitigation of a specific legal or factual issue decided between two related parties in an earlier case. See, e.g., W.A. Lang Co. v. Anderberg-Lund Printing, 109 F.3d 1343, 1346 (8th Cir. 1997).

1. Claim Preclusion

Claim preclusion bars a subsequent lawsuit when the first action was (1) between the same parties, (2) brought in a court of competent jurisdiction, (3) based on the same cause of action, and (4) resulted in a judgement on the merits. Lang, 109 F.3d at 1346. Mr. Prescott's Motion to Dismiss here is premised on the argument that this case is barred by the judgement in LSI v. Prescott and Johnson, 020-99, 021-99, 022-99

(SMS(D)C Ct. App. Feb. 1, 2000), which disposed of the 1994 Complaint.

There is little dispute that this case and the case commenced by the 1994 Complaint involve the same parties; and in the materials submitted to the Court there is little argument on the question of whether the 1994 case was litigated in a court of competent jurisdiction. The main contention between the parties is whether this suit and LSI v. Prescott and Johnson involve the same cause of action.

Most American courts evaluate whether two causes of action are the same if they stem from the same nucleus of operative facts:

> Whether the present action is the same cause of action as the prior action depends on whether it arises out of the same nucleus of operative facts as the prior claim. The legal theories of the two claims are relatively insignificant because a litigant cannot attempt to relitigate the same claim under a different legal theory of recovery. To determine whether the present claim and the prior claim constitute the same claim, we consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. . . .
>
> In the final analysis the test would seem to be whether the wrong for which redress is sought is the same in both actions. A "claim" should be determined not by the actions of a plaintiff vindicating its rights but by the conduct or alleged conduct of a defendant breaching those rights.

United States v. Gurley, 43 F.3d 1188, 1195-96 (8th Cir. 1994) (citations and quotations omitted).

The preclusive effect of an earlier suit extends to claims that could have been raised in the suit but were not. See, e.g., Myers v. Price, 463 N.W.2d 773, 776-77 (Minn.Ct.App.1990). For example, in Gurley, a business created a toxic dump that leaked into the surrounding water. The U.S. Environmental Protection Agency (EPA) cleaned up the spill, and brought a suit for clean up costs under the Clean Water Act (CWA), which it won. Later, after the site kept leaking, the EPA cleaned it up again and brought another suit for actual and future clean up costs under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Eighth Circuit held that the CERCLA suit was barred by the CWA action because the two suits were for the same cause of action. Gurley, 43 F.3d at 1196-97. The court noted that the CERCLA claim could have been brought at the same time as the CWA claim, but was

not. Id. The court concluded that the wrong to be redressed by each action was the creation of the dump, and therefore, each suit involved the same cause of action. Id.

Mr. Prescott argues that the present lawsuit against him is to redress some of the same alleged wrongs as were the subject of the 1994 lawsuit, and therefore, the 2000 Complaint should be viewed as based on the same cause of action. He points out that both the 1994 and 2000 Complaint allege that he received over $500,000 in attorney's fees and expenses which included money to defend himself in proceedings before the Gaming Commission. 1994 Complaint at ¶¶42-44; 2000 Complaint at ¶¶21-23. In addition, both Complaints allege that these fees were used for personal uses, and both Complaints seek to have these sums returned to LSI. 1994 Complaint at ¶¶42-44, 110-111; 2000 Complaint at ¶¶28-30. So, Mr. Prescott argues the 2000 Complaint could be considered the same cause of action.

Mr. Prescott's argument is not without some force, but I conclude that in fact the causes of action in the two suits in fact simply cannot be considered the same, because LSI could not have brought its present breach of contract claim at the time it filed its 1994 Complaint. That is, LSI was wholly unable to allege a breach of contract claim in 1994, because such a claim could not exist until after LSI had demanded repayment from Mr. Prescott after the SMS(D)C Court of Appeals decision in July of 1999. According to the allegations in the 2000 Complaint, there are two conditions precedent to a breach of contract claim by LSI: (1) a finding of misconduct by an appropriate tribunal, and (2) a failure by Mr. Prescott to repay the money forwarded to him. These conditions do not appear to have existed until after LSI demanded repayment after the 1999 Court of Appeals decision, and after Mr. Prescott refused to honor the repayment request. 2000 Complaint ¶¶29-30. If LSI had alleged a breach of contract claim in 1994, it could not have pled in good faith that all the conditions precedent to its cause of action had occurred: the Gaming Commission's adjudication of misconduct against Mr. Prescott was still on appeal, and LSI had not made a demand for the money to which Mr. Prescott failed to respond.

Since I believe that this suit and the 1994 suit do not involve the same cause of action, it is not necessary for me to decide whether the issues raised by the 1994 Complaint were decided on the merits. I note that case law in other jurisdictions is

apparently split on this question, and I expressly do not make any conclusion as to which doctrine is more appropriate for this jurisdiction. Compare Lommen v. City of East Grand Forks, 97 F.3d 272, 275 (8th Cir. 1996) (official immunity decision is on the merits under Minnesota law), and Myers v. Price, 463 N.W.2d 773, 776-77 (Minn.Ct.App.1990); with Wade v. City of Pittsburgh, 765 F.2d 405 (3rd Cir.1985) (official immunity decision is not necessarily on the merits under Pennsylvania law).

2. Issue preclusion. Since claim preclusion does not bar this suit, I must consider whether this action should be barred by the doctrine of issue preclusion. Issue preclusion (or "collateral estoppel") applies to legal or factual issues "actually and necessarily determined," with such a determination becoming "conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Issue preclusion applies when--

> (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Michels v. Kozitza, 2000 WL 622272, at 4 (Minn. App. (May 16, 2000)) (quotations omitted), citing, Willems v. Commissioner of Pub. Safety, 333 N.W.2d 619, 621 (Minn.1983). Issue preclusion "operates only as to matters actually litigated, determined by, and essential to a previous judgment." Roseberg v. Steen, 363 N.W.2d 102, 105 (Minn.App.1985).

Here, I think the legal issues clearly are not identical. The 1994 Complaint did not include a breach of contract claim on the same facts as the 2000 Complaint. Nor did the party against which estoppel would operate (LSI) actually have a full and fair opportunity to be heard on the breach of contract issue in 1994. See e.g., Parker v. MVBA Harvestore Systems, 491 N.W.2d 904 (Minn. Ct. App. 1992) (party claiming estoppel bears burden of showing issues are precisely identical). Therefore, I conclude that issue preclusion also does not apply to bar this suit.

B. OFFICIAL IMMUNITY

Mr. Prescott also argues that even if claim and issue preclusion do not bar this

suit, he is nonetheless entitled to relief on the basis of qualified immunity. The SMS(D)C law on qualified immunity states:

> [a]n official performing a discretionary function within the scope of their duty will be shielded from liability for civil damages as long as their conduct does not violate a clearly established right of which a reasonable official would have known. See Harlow, 457 U.S. at 818. In other words, an official is entitled to qualified immunity only if in light of pre-existing law, the unlawfulness of his conduct would be apparent to a reasonable official. Anderson v. Creighton, 483 U.S. 635, 640 (1987).
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> The first task in this inquiry is to determine if the law was clearly established at the time the official acted. If it was not, the official could not be reasonably expected to anticipate subsequent legal developments and could not either actually or constructively "know" that his actions were illegal. Harlow, 457 U.S. at 818-19.

Prescott and Johnson v. LSI, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000) (citations omitted). So, deciding Mr. Prescott's immunity argument involves resolving two issues: (1) whether Mr. Prescott was acting within the scope of his duty, and (2) if so, whether the law clearly established such that a reasonable officer would know his actions were illegal.

In considering a motion to dismiss, this Court assumes all the facts alleged in the complaint as true and views the allegations in the light most favorable to the plaintiff. Welch et al. v. SMS(D)C, No. 059-95 (SMS(D)C Tr. Ct. Feb. 7, 1996), *affirmed*, Welch et al. v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996).

Assuming the facts alleged in the 2000 Complaint are true, I conclude that it is at least debatable whether Mr. Prescott's actions were within the scope of his duty.

> [F]or the purposes of qualified immunity analysis, to determine if an official's action was within the scope of his or her duty, we will ask whether there is a reasonable connection between the alleged act and the type of duties that the official is normally responsible for. If there is a reasonable connection, we will proceed with the next step of the immunity analysis.

Prescott and Johnson v. LSI, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). The crux of the 2000 Complaint is that Mr. Prescott has failed to repay money that was forwarded to him for legal expenses incurred at the time he was an officer of LSI. See 2000 Complaint ¶¶28, 32, 35. And it is difficult to conceive that failing to

pay back money rightfully owed to LSI could have been part of Mr. Prescott's job description when he was an officer of LSI. So, analyzed this way, the actions alleged in the 2000 Complaint likely were outside of the scope of his duty.

But employing this mode of analysis would permit any plaintiff to avoid a qualified immunity defense merely by alleging an illegal action and claiming that it was outside of the officer's scope of duty. This approach is frowned upon under SMS(D)C case law. See LSI v. , No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000) at 7-8 (rejecting argument that allegation of breach of fiduciary duty is sufficient to show officer acted outside of scope of duty).

On the other hand, entering into indemnification agreements with an employer does not seem completely unrelated to Mr. Prescott's duties as an officer of LSI. The LSI Articles of Incorporation clearly contemplate that officers may need to be indemnified for lawsuits against them in their official capacity, and that the officer shall be liable to reimburse LSI if he or she is adjudged guilty of negligence, fraud, or misconduct. See LSI Articles of Incorporation, Article 14. LSI, in its brief on this issue, states that LSI was under no obligation to indemnify Mr. Prescott, and that the indemnification agreement was a wholly voluntary contractual arrangement. See LSI's Response to Defendant's Motion to Dismiss, at 29. However, a close reading of LSI's Articles of Incorporation leads me to conclude that LSI's brief is not correct on this point. Therefore, it seems at least plausible that entering into an indemnification agreement was within the scope of Mr. Prescott's duty, see LSI's Articles of Incorporation, Art. 14, and that the Court should proceed with the rest of the immunity inquiry.

But assuming, without deciding, that Mr. Prescott's actions were within the scope of his duty, still I conclude he is not entitled to qualified immunity here. Assuming the facts as alleged in the 2000 Complaint are true, Mr. Prescott entered into an agreement to repay certain sums if certain events happened, those events did in fact happen, and he has not paid the money back. 2000 Complaint ¶¶31-38. If that is the case, it seems to me to be likely that a reasonable official would know, should have known, that not paying back sums as promised would violate clearly established rights of the other contracting party. This is particularly true in Mr. Prescott's case, given the specificity

of the allegations against him, and given the explicit decision of the Court of Appeals to affirm the Gaming Commission's findings of misconduct after years of litigation. Therefore, under the standards for qualified immunity utilized by this Court, I conclude that Mr. Prescott's claim for such immunity here must fail on the merits, even if he was acting within the scope of his duty when he signed the agreement which is the subject of the 2000 Complaint.

C. ATTORNEY'S FEES

Mr. Prescott has also asked for indemnification for his attorney's fees and expenses for defending this action. He bases his request on Article 14 of the LSI Articles of Incorporation, which states that officers or former officers sued for official actions can be indemnified if they are not adjudged guilty of misconduct. Since I am denying Mr. Prescott's motion to dismiss, I will take his motion for attorney's fees under advisement pending the resolution of the case in chief. If Mr. Prescott ultimately is successful in this litigation, he may renew his motion for attorney's fees at that time.

ORDER

For the foregoing reasons, the Motion to Dismiss filed by Defendant is dismissed.

Dated: August 8, 2000

Judge John E. Jacobson