

ROSEBUD SIOUX TRIBAL COURT)
ROSEBUD INDIAN RESERVATION) SS
ROSEBUD, SOUTH DAKOTA)

IN CIVIL COURT

William R. Kindle,
Rosebud Sioux Tribe,
Plaintiff/Petitioner

VS

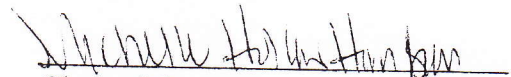
BBC Entertainment, Inc.,
Defendant/Respondent

DOCKET# CIV 01-230
NOTICE OF ENTRY
OF ORDER

TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 5th. day of September, 2003, the Honorable BJ Jones presiding, the Court entered a **ORDER DENYING PARTIAL SUMMARY JUDGMENT**. A certified copy of said judgment of **ORDER** is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 8th. day of SEPTEMBER, 2003.


Clerk of Courts

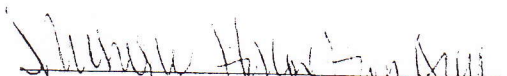
CERTIFICATE OF SERVICE

I, Michelle Hollow Horn Bear, Clerk of Courts of Rosebud Sioux Tribal Court, hereby certify that I served a true and correct copy of the Notice of Entry of Judgment upon the Defendant and Plaintiff as follows:

Dana Hanna - P.O. Box 500 Rosebud, SD 57570

Robert Reutter - 13629 CO HWY 117 Dalton, MN 56324-4549

Dated this 8th. day of September, 2003.


Clerk Of Courts

STATE OF SOUTH DAKOTA
ROSEBUD SIOUX TRIBAL COURT
ROSEBUD RESERVATION

I HEREBY CERTIFY THAT I HAVE CAREFULLY EXAMINED THE WITHIN DOCUMENT AND COMPARED THE SAME WITH THE ORIGINAL NOW ON FILE AND OF RECORD IN THIS OFFICE AND THAT IT IS A TRUE AND CORRECT COPY OF THE SAME AND THAT THE ABOVE IS A CORRECT COPY OF THE FILING HEREON. DATED THIS _____ DAY OF _____ 2003

CLERK
ROSEBUD SIOUX TRIBAL COURT

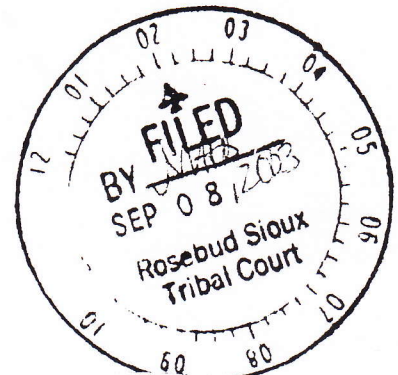


EXHIBIT 23

ROSEBUD SIOUX TRIBAL COURT
ROSEBUD SIOUX INDIAN RESERVATION
ROSEBUD, SOUTH DAKOTA

IN TRIBAL COURT

William R. Kindle,
Rosebud Sioux Tribe,
PLAINTIFFS,

CIV. 01-230

vs.

ORDER DENYING PARTIAL
SUMMARY JUDGMENT

BBC Entertainment, Inc.,
DEFENDANT.

The Defendant moved this Court for partial summary judgment on Count III of the Plaintiffs' complaint alleging that the Defendant breached its gaming management contract with the Plaintiffs by, inter alia, disbursing casino revenue to itself early in violation of the management agreement between the parties. Oral argument was held on the motion on the 18th day of July 2003 at 1:00 p.m. by telephone conference with the Defendant appearing through counsel, Robert Reutter, and the Plaintiffs appearing through counsel, Judith Shapiro (argued), and Attorney General, Dana Hanna. The Court took the matter under advisement and based upon the Court's review of the file issues this memorandum opinion.

The present case arises out of a management agreement between the Rosebud Sioux Tribe and BBC Entertainment, Inc., the latter to provide gaming management for the Rosebud Sioux Tribal Casino. BBC Entertainment ("BBC") on February 11, 1993, entered into the contract ("Management Agreement") with the Rosebud Sioux Tribe (the "Tribe") for providing operations management of the Tribe's casino, pursuant to the terms of a Tribal-State compact with the State of South Dakota and in accordance with the Indian Gaming Regulatory Act. (25 U.S.C. §§ 2701, et seq.) ("IGRA"). The

Management Agreement was duly approved on June 14, 1994, by the Chairman of the National Indian Gaming Commission (the "NIGC"), pursuant to 25 U.S.C. § 2711 and the Commission's regulations set forth at 25 C.F.R. Part 533. The sixty-month term of the Management Agreement began when the Rosebud Casino commenced operations on August 15th, 1994, and concluded at midnight on August 14th, 1999.

At the heart of the Tribe's complaint is the allegation that BBC violated its financial and fiduciary obligations under the NIGC-approved Management Agreement. Count III of the Tribe's complaint, in particular, alleges that BBC, near the end of the management term but while the Tribe's casino and the tribal casino accounts were still in its control, impermissibly disbursed to itself \$272,220.15 of casino funds in violation of the following terms of the Management Agreement:

- a. Section 6.5(c), which provides that the Tribe's share and Manager's share be paid "simultaneously each month from Project Funds."
- b. Section 11.1(g), which states that, upon termination of the management term, "all Manager's Fees and Tribes [sic] share remaining to be paid under this agreement to be paid without preference or priority as between Tribe and Manager."

The Tribe supports its allegations concerning such payments with affidavits from a professional accountant and the President of the Rosebud Sioux Tribe. BBC does not, in fact, dispute that it made unilateral distribution of casino revenues to itself. Nor does BBC deny the Tribe's further allegation that BBC's unilateral distribution of revenue explicitly violates the Management Agreement. However, BBC moves for partial summary judgment on Count III of the complaint on the grounds that the Tribe fails to

state a claim upon which relief could be granted, pursuant to Rules 12(b) and 12(g) of Title IV of the Rosebud Sioux Tribal Code. In so moving, BBC contends that even though it did make such payments in violation of the Management Agreement terms, such a violation was merely "technical" and did not result in compensable damages to the Plaintiffs. BBC contends that the relationship between the Tribe and itself had soured to the point that it needed to remove its share of revenues from the joint account prior to termination of the agreement or risk losing them.

DISCUSSION

BBC has moved for partial summary judgment, pursuant to Rule 12(b) of Title IV of the Rosebud Sioux Tribal Code, on Count III of the Tribe's complaint on the ground that the plaintiff fails to state a claim upon which relief can be granted. The standard, however, for the moving party to obtain summary judgment at this stage is set high both by tribal and by federal case law. Furthermore, BBC's contention that no harm resulted to the Tribe as a result of BBC's acknowledged "technical violation" does not meet the standard for summary judgment under tribal and federal case law.

First, in ruling on similar motions under similar rules of procedure, tribal courts, such as the Mashantucket Pequot Tribal Court, have found that the decisions of federal courts "are a useful source of guidance" Mamiye v. Mashantucket Pequot Gaming Enterprise, No. 2 Mash. 141, 142 (06/23/1997). Thus, in Fletcher v. Mashantucket Pequot Tribe, et al., 2 Mash. 135 (1997), the Mashantucket Pequot Tribal Court further held the applicable standard of review for a motion to dismiss for failure to state a claim under M.R.C.P. 12(b)(6) required it "to accept the material facts alleged in the complaint as true." (citing Easton v. Sundram, 947 F.2d 1011, 1014-1015 (2nd Cir. 1991), cert. denied,

504 U.S. 911 (1992), Cooper v. Pate, 378 U.S. 546 (1964)). See also Delorge v. Mashantucket Pequot Gaming Enterprise, et al., No. 3 Mash. 1 (1997) (07/23/1997) (holding similarly and citing Fletcher).

Similarly, the Rosebud Sioux Tribal Code directs this court to apply relevant federal standards in ruling on motions for summary judgment. In so doing, it will construe such pleadings in the light most favorable to the non-moving party. Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir.1995). Furthermore, Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Although, the nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir.1995). Furthermore, "the mere existence of some alleged factual dispute between the parties is not sufficient by itself to deny summary judgment Instead, 'the dispute must be outcome determinative under prevailing law.'" Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir.1992) (citation omitted). However, any ambiguities concerning the sufficiency of the claims must be resolved in favor of the non-moving party. Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir.1996). Thus, if the plaintiff's claims are supportable

under law and supported by reasonable, on-point evidence, although that evidence might be contested, the Tribal Court will deny a motion for summary judgment.

In the present case, the only material fact in dispute is the amount of damages. On one hand, BBC does not dispute the Tribe's showing, both in the Management Report of the casino's auditor and the affidavit of accountant Paul Thorstenson, that twice in August of 1999 BBC made payments to itself from casino funds, and that BBC did not simultaneously disburse payment to the Tribe. Furthermore, the Tribe was not, in fact, paid until some time in September. Thus, that BBC explicitly violated specified terms in the Management Agreement is not contested. However, BBC contends that such violations were merely "technical," and resulted in minimal damages. The Tribe, on the other hand, contends that BBC's violations did indeed result in damages.

First, the Tribe alleges that BBC's delayed payment of casino revenue funds resulted in over \$1000 of lost interest revenue for the Tribe. Furthermore, the Tribe claims that the delay in payment resulted in substantial harm to members of the Tribe in the form of lack of funding of critical tribal government programs. In support of the first allegation, the Tribe submits the letter to Management of the Auditor, Joseph Eve & Company, and the sworn affidavit of a professional accountant, Paul Thorstenson. Here, there appears to be more than sufficient cause for the Court to deny BBC's motion for partial summary judgment. In the first place, the affidavits alone probably merit the denial of BBC's motion, Ludwig, 54 F.3d at 470. Furthermore, the damages alleged in the Tribe's second claim are difficult to quantify and "cannot be founded upon mere speculation and conjectural evidence." Wolverine Upholstery Co. v. Ammerman, 135 N.W.2d 572, 575 (Mich.Ct.App.1965). Yet, "[i]t is the uncertainty as to the fact of legal

damages that is fatal to recovery, ... not uncertainty as to the amount." Id. at 576; Home Ins. Co. v. Commercial and Indus. Sec. Servs., Inc., 225 N.W.2d 716, 719 (Mich.Ct.App.1975).

Additionally, if the Restatement (Second) of Contracts is followed, given the undisputed violation of a material term of the Management Agreement, some amount of recovery is almost certain. For, even if a violation "caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages."¹ Restatement (Second) of Contracts § 346 (2) (1981).

It might be contended that the violated terms were not, in fact, material. This, however, cannot be supported in light of IGRA, pursuant to which the Management Agreement was formed. In particular, Congress, in passing IGRA sought among other objectives, to insure that Indian tribes themselves, rather than outside investors or gaming industry consultants, should be the primary beneficiaries of the revenues of Indian gaming. Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 Wyo. L. Rev. 427, 427 (2001). The terms in the Management Agreement stipulating simultaneous payments of tribal casino revenue are clearly a response to Congress' efforts to shield Tribes from undue exploitation by such contracts; thus, they must be seen as material. Furthermore, Congress provided in IGRA for the modification of Management Agreements, which may not be amended without NIGC approval. 25 C.F.R. § 535.1.

¹ Additionally, "[t]here are instances in which loss is caused but recovery for that loss is precluded because it cannot be proved with reasonable certainty. [In such] instances the injured party will nevertheless get judgment for nominal damages, a small sum usually fixed by judicial practice in the jurisdiction in which the action is brought. Such a judgment may, in the discretion of the court, carry with it an award of court costs. Restatement (Second) of Contracts § 346 (2)(n.b.) (1981)

("Modifications that have not been approved by the Chairman in accordance with the requirements of this part are void." 25 C.F.R. § 535.1(f)). Congress appears to have taken such transgressions seriously, having provided for civil penalties of up to \$25,000 to be levied according to the judgment of the Chairman. 25 C.F.R. § 535.14(a). Thus, there is every indication that Congress intended that the terms of NIGC-approved Management Agreement be carefully groomed and strictly enforced. In light of this, the violations under present scrutiny are certainly material.

CONCLUSION

The motion for summary judgment is denied as to Count III. The Tribe has alleged significant damages as a result of BBC's violations and supported its claim with evidence sufficiently worthy of judicial notice. Furthermore, the difficulty of quantifying the measure of damages is no bar to pursuing the claim, as the Tribe may be awarded nominal damages in the absence of specific damages.

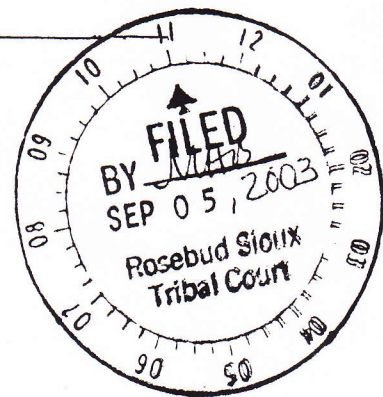
So ordered this 5th day of September 2003.

BY ORDER OF THE COURT:

ATTEST:

Muriel H. H. H. H.

[Signature]
Special Judge



STATE OF SOUTH DAKOTA
ROSEBUD SIOUX TRIBAL COURT
ROSEBUD RESERVATION

I HEREBY CERTIFY THAT I HAVE CAREFULLY EXAMINED THE WITHIN DOCUMENT AND COMPARED THE SAME WITH THE ORIGINAL NOW ON FILE AND OF RECORD IN THIS OFFICE AND THAT IT IS A TRUE AND CORRECT COPY OF THE SAME AND THAT THE ABOVE IS A CORRECT COPY OF THE FILING THEREON. DATED THIS 5 DAY OF SEP, 2003

[Signature]
CLERK

ROSEBUD SIOUX TRIBAL COURT