IN THE COURT OF THE
LOWER SIOUX COMMUNITY IN MINNESOTA

LOWER SIOUX INDIAN RESERVATION	STATE OF MINNESOTA
Thielen Leasing, Inc., Plaintiff, vs. Jackpot Junction (Lower Sioux Indian Community), Defendant.	Court File No. CIV-052

MEMORANDUM OPINION AND ORDER

I.
Introduction and Summary

This case is before the Court on a Motion for Summary Judgment brought by Defendant, Jackpot Junction, a wholly owned enterprise of the Lower Sioux Community (the "Community"), operated on the Community's Reservation near Morton, Minnesota. The Defendant asserts the matter is ripe for summary judgment, for there are no genuine issues of material fact, and the Defendant, as the moving party, is entitled to judgment as a matter of law. The Plaintiff contends that ambiguity in the contract document precludes deciding this case as a matter of law, for where an ambiguity exists with respect to the meaning of a term of a contract, such ambiguity precludes summary judgment. Here, an ambiguity regarding the meaning of terms material to the intent of the parties exists, and the matter is,

therefore, not ripe for summary judgment. However, nothing precludes Defendant from bringing or renewing the motion for summary judgment at a later stage of these proceedings, should such action be warranted.

II.
Summary of Procedural History

This case is a contract claim brought by Plaintiff, Thielen Leasing, Inc. ("Plaintiff"), against Defendant, Jackpot Junction Casino ("Defendant"). Defendant filed a Motion for Summary Judgment on August 18, 1995. Plaintiff responded on September 14, 1995 with its Memorandum in Opposition. On September 26, 1995, Defendant filed its Reply Memorandum in Support of its Motion for Summary Judgment. A hearing on Defendant's motion was held on October 6, 1995, at which both parties presented oral argument.

III.
Statement of the Facts

Plaintiff entered into a one-page Vehicle Lease Agreement (the "Contract") with Defendant on December 9, 1991. The Contract concerned transportation of casino customers to and from the casino from the Wilmar area. The Contract contains, and the dispute focuses on, the following provision:

> LESSOR hereby leases the vehicle or vehicles listed below for a period of 218 days for the agreed price listed below *based on a minimum number of trips*:
>
> A. Under 72 per week: 90 c per mile or $ 85.50 per trip whichever is greater.
>
> B. 73 to 100 trips per week: 80 c per mile or $76.00 trip whichever is greater.

C. 101 to _____ trips per week: 66 c per mile or $ 62.70 trip which is greater.

Contract (emphasis supplied).

The issue in this case is whether or not the Contract required Defendant to pay Plaintiff for a minimum number of trips each week, regardless of whether those trips were actually provided by Plaintiff to Defendant. Both parties ground their arguments in the language of the Contract quoted above. Plaintiff argues that this language, i.e. "based on a minimum number of trips", guaranteed to it payment for 72 trips each week, even though the actual number of trips made may have been less than 72. Defendant contends that the above-quoted Contract language merely indicates the existence of a volume-discount rate structure, as expressed in paragraphs A through C, above. Defendant further relies on the word "under" in paragraph A to support its construction of the terms of the Contract, arguing that the presence of this word must mean that the parties contemplated that payment for less than 72 trips per week was possible under the Contract terms.

IV.
Jurisdiction

The Court has jurisdiction over the subject matter of this dispute as a sovereign exercise of the adjudicatory authority of the Community, and pursuant to Title I, Chapter II of the Judicial Code of the Community, wherein the Community established this Court for the purposes of hearing disputes arising on lands subject to the governmental powers of the Community. As an exercise of its inherent sovereign authority, the Community has adjudicatory jurisdiction over causes of

action arising within the territory subject to its governmental powers. The territory subject to its governmental powers includes all lands within the exterior boundaries of the Reservation, together with all lands held in trust for the Community by the United States. The locus of this contract dispute is the Reservation, and therefore, this Court has jurisdiction over this matter.

In determining the locus of a contract dispute, courts generally look to: 1) the place of contracting; 2) the place where the contract was negotiated; 3) the place of performance; 4) the location of the subject matter of the contract; and 5) the place of the residence of the parties. Restatement (Second) Conflict of Laws § 188(2). In this case, there is no evidence before the Court in the pleadings, the briefs filed in this motion, or in the arguments of counsel, regarding the place of contracting or the place where the contract was negotiated. The place of performance, however, is the Reservation, for the Plaintiff could only perform under the contract by delivering persons to the gaming operation of the Defendant on the Reservation. The location of the subject matter of the contract is both on and off the Reservation, for the subject matter involves the busing of persons to and from the Reservation from locations off the Reservation. The Defendant is resident of the Reservation, and Plaintiff is resident of the state of Minnesota. Based upon the foregoing factors, the Court holds that the locus of the contract dispute is the Reservation, and that original and exclusive subject matter jurisdiction lies with this Court.

Although this Court has subject matter jurisdiction pursuant to the above, this Court may still be precluded from exercising subject matter jurisdiction if

Defendant is protected by the Community's sovereign immunity from suit. Though the question was not raised by the pleadings or suggested by counsel, this Court must address this issue *sua sponte*, in order to ensure that the Court does not exceed its authority, Cover v. Schwartz, 133 F.2d 541 (2d Cir. 1942), *cert. denied*, 319 U.S. 748 (1943), *reh'g denied*, 319 U.S. 785 (1943), for it is hornbook law that a court may not hear a case if it lacks subject matter jurisdiction. Cambridge Hospital Assoc., Inc. v. Sullivan, 1991 WL 533754, at *4 (D.Minn. 1991); United Food & Comm'l Workers Union, Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994).

Indian tribes are "domestic dependent nations," which exercise inherent sovereignty. Cherokee Nation v. Georgia, 8 L.Ed. 25 (1831). The sovereignty of Indian tribes is not delegated by the federal government, United States v. Wheeler, 435 U.S. 313, 328 (1978), created by the United States Constitution, or granted by any federal act, for the powers of Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished." Id. at 322, *citing* F. Cohen, Handbook of Federal Indian Law, 122 (1945). Indian tribes function as "distinct, independent political communities, retaining their original natural rights," Worcester v. Georgia, 31 U.S. (6 Pet) 515, 559 (1832); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978), exercising powers of self-government over their territories and the persons within those territories. United States v. Mazurie, 419 U.S. 544 (1975). As sovereigns, Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo, 436 U.S.

at 58. As a federally recognized Indian tribe, then, the Community possesses tribal sovereign immunity from suit.

Tribes can confer their sovereign immunity on tribal entities. Tribal sovereign immunity shields the tribe's agencies, instrumentalities and enterprises from suit absent an express and unequivocal waiver of that immunity. Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668, 670-71 (8th Cir. 1986). This principle applies to tribally-chartered housing authorities, Weeks; tribally-owned businesses, *see* Donovan v. Navajo Forest Products Industries, 692 F.2d 709, 701 (10th Cir. 1982); and tribal corporations organized under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 477, Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517, 521 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); Rosebud Sioux Tribe v. A & P Steel, 874 F.2d 550, 552 (8th Cir. 1989) (holding that sovereign immunity of a tribal corporation was waived by a sue and be sued clause in the tribe's corporate charter). Here, the Court may not hear this case if the Defendant is entitled to sovereign immunity from suit and that immunity has not been waived. Puyallup Tribe, Inc. v. Washington Dept. of Game, 436 U.S. 165, 172 (1977) ("If a Native American community's sovereign immunity stays intact, a court lacks power to hear or decide the litigation.")

The IRA provided two means by which tribes may organize. Pursuant to the IRA, tribes may organize for governmental purposes, 25 U.S.C. § 476 ("Section 16"), or for business or commercial purposes, 25 U.S.C. § 477 ("Section 17"). Section 16 and Section 17 entities are distinct organizations. Ramey Constr. v. Apache Tribe,

673 F.2d 315, 320 (10th Cir. 1982). Section 16 allows tribes to organize for governmental purposes while retaining their sovereign immunity from suit. S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community, 674 P.2d 1376 (Ariz. App. 1984). On the other hand, Section 17 allows tribes to incorporate for business and commercial purposes. Section 17 entities have the authority to waive sovereign immunity as provided in a sue and be sued clause.

The Community is organized pursuant to Section 16, and has a corporate charter issued pursuant to Section 17. McCarthy v. Jackpot Junction, 490 N.W.2d 158 (Minn. Ct. App. 1992). Because some courts have held that a waiver of sovereign immunity may be found in a "sue and be sued" clause contained in the charter of a corporation organized pursuant to the IRA, Dacotah Properties - Richfield, Inc. v. Prairie Island Indian Community, 520 N.W. 2d 167 (Minn. App. 1994)(holding that the Prairie Island Indian Community operated its business enterprises pursuant to a Section 17 corporate charter, and that the sue and be sued clause of the corporate charter was an express waiver of the Community's sovereign immunity from suit), this Court must first address whether the Defendant is operated pursuant to the Community's Section 16 or Section 17 powers, and, if organized pursuant to Section 17, whether the sue and be sued clause, without more, constitutes an express waiver of the Community's sovereign immunity from suit to permit this Court to exercise subject matter jurisdiction over this case.

Although a tribe may be organized under Section 16 and Section 17, commercial activities are not necessarily undertaken only pursuant to Section 17. S.

Unique Ltd., 674 P.2d 1376. The economic powers of a Section 16 entity may be as broad or broader than the powers of a Section 17 entity. Dacotah Properties - Richfield, Inc., 520 N.W.2d 169, *citing* Timber as a Capital Asset of the Blackfeet Tribe, Op. No. M-36545 (Dept. Interior Dec. 16, 1958). Moreover, there is a rebuttable presumption that all corporate or business activities are that of a Section 16 entity. S. Unique Ltd., 674 P.2d 1376. Plaintiff here has presented no evidence rebutting the presumption that Jackpot Junction is operated pursuant to Section 16 governmental authority. Further, this Court has, on one previous occasion, held that Defendant is "operated as an arm of the tribal government, and that it possesses sovereign immunity from suit." Lamote v. Jackpot Junction, Court File No. CIV-053, at 4, (Lower Sioux Court, 1994), *appeal pending*. In conformance with the laws of this sovereign Indian Community, this Court holds that the Community operates Jackpot Junction pursuant to its Section 16 governmental powers, and, therefore, the Court need not address the issue of whether a Section 17 corporate charter containing a "sue and be sued" clause operates as an express waiver of sovereign immunity from suit.[1]

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[1] While some courts have held that the sue and be sued clause in a corporate charter operates as an express waiver of sovereign immunity, Rosebud Sioux Tribe, 874 F.2d at 552, this Court rejects the reasoning of those courts, for logic dictates that even in Section 17 posture there must be an explicit, affirmative waiver. More sound is the court's reasoning in In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc., where the court held that sovereign immunity of the St. Regis Mohawk Tribe extended to the St. Regis Mohawk Education and Community Fund, a non-profit, state-chartered, corporation, and that because "preserving tribal resources and tribal autonomy are matters of vital importance," a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed" even where there is a sue and be sued clause at issue. 658 N.E.2d 989, 993 (N.Y. 1995).

As an enterprise of the Community operated pursuant to that authority granted in Section 16 of the Indian Reorganization Act, the Act of June 18, 1934, 25 U.S.C. § 476, Defendant retains the Community's inherent sovereign immunity from suit, and, absent an express and unequivocal waiver of that sovereign immunity, is protected from this suit, for absent "consent, the attempted exercise of judicial power is void. . . ." United States v. United States Fidelity & Guarantee Co., 309 U.S. at 514.

"[T]he standard the Supreme Court has established for a waiver of tribal [sovereign immunity] is extremely difficult to satisfy." Smith v. Babbitt, 875 F. Supp. 1353, 1361, n.4 (D. Minn.), *appeal docketed*, No. 95-3392 (8th Cir. Sept. 26, 1995). Federal courts have "steadfastly applied the express waiver requirement irrespective of the nature of the lawsuit." American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985) (internal citations omitted). This Court must do so also.

Further, even when a tribe has expressly and unequivocally waived its sovereign immunity from suit, such a waiver must be interpreted restrictively against the party bringing the claim. *See generally* United States Fidelity & Guaranty Co., 309 U.S. 506; Santa Clara Pueblo, 436 U.S. 49. The waiver language must be narrowly construed, and it is only unequivocal expressions which will be given effect. Id.; *see also*, United States v. Nordic Village, 503 U.S. ____, 112 S. Ct. ____, 117 L. Ed.2d 181, 187 (1992). These same principles apply to tribal entities. Accordingly, even with the grant of jurisdiction to this Court discussed above, this

Court must find an express and unequivocal waiver of sovereign immunity in order to exercise subject matter jurisdiction over this action.

This Court is not prohibited by the Community's sovereign immunity from suit from exercising the subject matter jurisdiction it possesses over this matter, however, for the Community expressly and unequivocally waived Jackpot Junction's immunity in "actions to enforce contracts between the Community, its businesses, its officers, employees and agents and any person or entity" in the Court of the Lower Sioux Indian Community. Resolution 39-93. The present matter is an action to enforce a contract between a Community business, Jackpot Junction, and a person or entity. Thus, Jackpot Junction's sovereign immunity from suit has been expressly and unequivocally waived in this matter. Pursuant to Community law, then, this Court may exercise its subject matter jurisdiction in this action.

V.
Summary Judgment Standard

For Defendant to prevail on its summary judgment motion, it must appear to the Court "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 30, LSCRCP. This court, therefore, must determine whether there is any material factual issue remaining which is sufficient to take the case to trial. The moving party bears the initial burden of demonstrating conclusively that no genuine issue of material fact exists, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), and that the movant is entitled to judgment as a matter of law. 60 Ivy Street Corp v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987). When considering a motion for summary judgment, the court must

view the facts and all inferences in the light most favorable to the non-moving party. Id. Conversely, all reasonable inferences must be drawn against the movants. Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th Cir. 1983). Once the moving party has made a prima facie case, the nonmovant must come forward with specific facts demonstrating there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Therefore, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . " Foutch v. Joy Mfg. Co., 67 F.3d 299 (6th Cir. 1995). The nonmoving party's evidence must be such "that a reasonable jury could return a verdict for the nonmoving party," Vitkus v. Beatrice Co., 11 F.3d 1535, 1539 (10th Cir. 1993), and such evidence must be not merely colorable but significantly probative. Id. A successful summary judgment defense requires more than mere argument or re-allegation of the pleadings. IRT, Inc. v. TCBY Systems, Inc. 52 F.3d 734 (8th Cir. 1995).

Defendant's position is that the construction of the Contract language is a matter of law, that the relevant language is clear and unambiguous, and that where there is no ambiguous contract language, the court may not consider extrinsic evidence. Plaintiff does not argue these principles of contract construction, and maintains that the contract language, on its face, is insufficient to determine the intent of the parties.

The Court agrees that the Contract, on its face, does not evidence the parties' intent, even when the document is interpreted as a whole, *see* Tanner v. Waseca-

Owatonna Broadcast, Inc., 549 F Supp. 411 (D. Minn. 1982), the words are assigned their ordinary meaning, *see* NLRB v. Superior Forwarding, Inc. 762 F.2d 695, 697 (8th Cir. 1985), and all terms are given effect, *see* Medtronic, Inc. v. Catalyst Research Corp., 518 F. Supp. 946, 950 (D. Minn.), *aff'd*, 664 F.2d 660 (8th Cir. 1981), because there is more than one reasonable interpretation of the Contract. Where there is more than one reasonable interpretation of a contract, the contract is ambiguous, Universal Towing Co. v. United Barge Co., 579 F.2d 1098, 1101 (8th Cir. 1981). However, contrary to Defendant's assertion, ambiguity in a contract *is not necessarily* a question of law for the court, Otten v. Stonewall Ins. Co., 511 F.2d 143, 147 (8th Cir. 1975), it may also be a question of fact which requires consideration of extrinsic evidence to resolve.[2] City of Virginia v. Northland Office Properties, 465 N.W.2d 424 (Minn. Ct. App. 1991); Swanson v. American Hardware Mut. Ins. Co., 359 N.W.2d 705 (Minn. Ct. App. 1984. Other courts have said that "[T]he construction and effect of a contract are questions of law for the court, but where there is ambiguity and construction depends on extrinsic evidence and a writing, there is a question of fact for the jury," Turner v. Alpha Phi Sorority House, 267 N.W.2d 63, 66 (Minn. 1979), and that contract actions may present mixed questions of law and fact. *See* William Schwarzer, et al., *The Analysis and*

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[2] Defendant is correct that the mere existence of a dispute over contract language does not necessarily signal the presence of ambiguity in the contract. Orkin Exterminating Co., Inc. v. FTC, 849 F.2d 1354, 1360 (11th Cir. 1988). Were it otherwise, a party could automatically avoid summary judgment simply by raising a dispute over a contract term. This would clearly be an unacceptable result, for summary judgment can be a useful and economical tool for disposing of conflicts before trial.

Decision of Summary Judgment Motions, 139 F.R.D. 441 (1991); *see also* Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990) (whether or not contract existed was mixed question of law and fact); Elxsi v. Kukje America Corp., 672 F. Supp. 1294, 1297 (N.D. Ca. 1987) (holding that where denial of contract liability is asserted, the court faces a mixed question of law and fact).

Where there is a mixed question of law and fact, an award of summary judgment is usually inappropriate. "Judges prefer to send this kind of question [mixed questions of law and fact] to the jury when they can, because they are difficult questions, and appellate courts have encouraged them to be sent to juries." Boy Scouts of America v. Graham, 76 F.3d 1045, 1050 (9th Cir. 1996); *see also* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976) (holding that materiality is a mixed question of law and fact, and suggesting that summary judgment is inappropriate where mixed questions of law and fact are at issue.); *accord* McDermott Int'l v. Wilander, 498 U.S. 337, 356 (1991) (holding that summary judgment on mixed questions of law and fact is appropriate only where both the facts and the law will reasonably support only one conclusion); Blanchard v. Peerless Ins. Co., 958 F.2d 483, (1st Cir. 1992) (applying Rhode Island law and holding that mixed questions of law and fact preclude an award of summary judgment unless no reasonable trier of fact could draw any other inference from the "totality of the circumstances" revealed by the undisputed evidence).

Mixed questions are typically inappropriate for resolution on summary judgment for several reasons. First, in most cases the record has not been

sufficiently developed to allow a fully informed decision on an outcome determinative issue. *See* Bertolucci v. San Carlos Elementary School District, 721 F. Supp. 1150, 1153 (N.D. Ca. 1989). Second, where resolution of an ultimate fact depends on the credibility or demeanor of witnesses (as it very well may in a contract action where the intent of the parties is at issue), a trial is often necessary and hence a grant of summary judgment unwise. Id. *See also* Graham v. City of Chicago, 828 F. Supp. 576, 583 (N.D. Ill. 1993). Thus, where ambiguity results in a mixed question of fact and law, and where the ambiguity is not susceptible of resolution from an examination of the extrinsic evidence offered at the summary judgment hearing, the matter is deserving of a trial.

When determining whether an ambiguity exists, this Court looks to the parties' intent at the time of contracting as evidenced by the face of the contract and the language used. The language is examined in the context of the whole agreement while giving effect to all terms. Medtronic, Inc., 518 F. Supp. at 950, *citing* Sun Oil Co. v. Vickers Refining Co., 414 F.2d 383, 387 (8th Cir. 1969). An ambiguity exists if the agreement is reasonably susceptible of more than one construction, Universal Towing Co., 579 F.2d at 1101; Litton Microwave Cooking Products, v. Leviton Mfg. Co., Inc., 15 F.3d 790, 796 (8th Cir. 1994), *reh'g denied*, 1994. A more detailed articulation of this basic principle holds a contract term ambiguous if it is "capable of more than one meaning when viewed by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally

understood in the particular trade or business." Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987) (applying New York law). The record shows that, when all facts and inferences are viewed in the light most favorable to the Plaintiff (as the non-moving party), a reasonable person could find convincing either Plaintiff's or Defendant's construction of the relevant contract language, and a review of the contract indicates that the intent of the parties is not clear from the language used in face of the contract.

When an ambiguity regarding the parties' intent exists, this Court may consider "the surrounding circumstances, the occasion and apparent object of the parties." Florida East Coast Railway Co. v. CSX Transp., Inc., 42 F.3d 1125, 1129 (7th Cir. 1994), *reh'g denied*, 1995, *quoting* Underwood v. Underwood, 64 So.2d 281, 288 (Fla. 1953). Thus, summary judgment is unwarranted, unless the "extrinsic evidence presented about the parties' intended meaning is so one-sided that no reasonable person could decide to the contrary." Allen v. Adage, Inc., 967 F.2d 695, 698 (1st Cir. 1992).

Here, the Plaintiff has offered the Affidavit of Richard Thielen to establish its interpretation of the contract language. This affidavit states that the parties "intended to provide a base or minimum number of trips for which Plaintiff was entitled to be paid . . ." (Thielen Aff. at 3). Whether or not such an affidavit would be sufficient at trial to prove the intent of the parties, it is extrinsic evidence which is not merely colorable, but significantly probative, and is sufficient under the above standard to withstand Defendant's Motion for Summary Judgment. The Thielen

Affidavit, considered together with Plaintiff's Complaint, and the record at oral argument, is a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex v. Catrett, 477 U.S. 317 (1986). Moreover, the Thielen Affidavit and the record as a whole compel the conclusion that the extrinsic evidence is not "so one-sided that no reasonable person could decide to the contrary." Allen v. Adage, 967 F.2d at 698.

The Defendant offers a course of performance to establish its version of the parties' intent at the time of contracting. Such evidence, however, is itself supportive of more than one interpretation of the contract language, *see discussion, infra.*, and, given that the Court must view the facts in the light most favorable to the non-moving part, without more, does not weigh heavily enough in the balance to dispense with Plaintiff's claims at this stage of the proceedings. Since both interpretations are supported by the face and language of the contract, this Court finds that an ambiguity exists in the contract, and that the contract, together with the extrinsic evidence presented to the Court, is insufficient to resolve the ambiguity.[3]

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[3]A note on Defendant's *contra proferentum* argument is in order. This rule requires contracts to be construed against their drafters if the interpretation advanced by the non-drafter is reasonable. Simeone v. First Bank Nat'l Assoc., 971 F.2d 103, 107 (8th Cir. 1992). This rule is only applied once an ambiguity is found and it is used a last resort. Thompson v. Amoco Oil Co., 903 F.2d 1118, 1121 (7th Cir. 1990). The rule generally does not apply where the agreement was extensively negotiated. Homac, Inc. v. DSA Financial Corp., 661. F. Supp. 776, 788 (E.D.Mich. 1987). Because the record indicates a dispute as to whether and to what extent this

(continued...)

Since an ambiguity exists, a question about a material fact (the meaning of the contract term) has arisen. Bell Lumber Co. v. Seaman, 161 N.W.2d 383 (Minn. 1917). Defendant relies on the rule in Celotex that summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. This Court finds the teaching of Celotex relevant to interpreting the Community's Summary Judgment standard. The meaning of "establish" within the Celotex requirement is, however, not to be construed as narrowly as Defendant would have it. The Celotex Court itself noted that the non-moving party, to avoid summary judgment, is not required to produce evidence that would be admissible at trial. 477 U.S. at 324. Nor must the non-moving party depose its own witnesses. Id. The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts . . . ." Joy Mfg. Co., 67 F.3d 299. The non-moving party must bring forth evidence beyond the mere pleadings to meet its burden, and the nonmoving party's evidence must be such "that a reasonable jury could return a verdict for the nonmoving party," Vitkus, 11 F.3d 1539, and such evidence must be not merely colorable but significantly probative. Id. This Plaintiff has done. Plaintiff has thus designated "specific facts showing that there is a genuine issue for trial."

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[3](...continued)
Contract was extensively negotiated (and as to whether or not Plaintiff's role was that of "drafter" or merely "typist"), it would not be appropriate to apply this rule to resolving this motion.

The Defendant argues that extrinsic evidence may be considered by the Court to resolve any ambiguity which might exist in the Contract, and that such evidence is supplied here by the course of performance between the parties, and that such evidence establishes the validity of the Defendant's position. Defendant's Memorandum in Support of Its Motion to Dismiss at 13. Defendant has provided the Court with invoices to the Defendant from the Plaintiff, and checks in payment of those invoices, which demonstrate that Plaintiff billed for fewer than the minimum number of trips Plaintiff alleges it was entitled to, and accepted payment for fewer than the minimum number identified. The Defendant urges the Court to accept this as an objective manifestation of the parties' intent regarding the ambiguous term of the Contract.

The Court rejects this position, for at oral argument, Defendant's counsel agreed that, if an ambiguity existed in the Contract, and if the course of performance were used to resolve the ambiguity, and if that extraneous evidence were susceptible to more than one interpretation, then the matter would not be ripe for summary judgment.

> **The Court:** You would agree then that in the event there is an ambiguity, and in the event that that ambiguity should involve reference to the statements that are attached as an exhibit to your papers filed with the Court, if another reasonable interpretation for that exists, then that would be a disputed matter of material fact, would it not?
>
> **Mr. Jacobson:** Yes.
>
> **The Court:** And this matter would not be right for summary judgment?

Mr. Jacobson: That's also true.

The Court: So if the Court finds that an ambiguity exists in this language, then the Court should not grant your motion for summary judgment?

Mr. Jacobson: That's probably correct, your Honor. I think that is likely correct.

The Court: So really, the single issue that confronts this Court is whether there is an ambiguity?

Mr. Jacobson: Yes.

Further, for the Court to accept Defendant's argument that the course of performance demonstrates the intent of the parties regarding the minimum number of trips required, the Court must reject the truth of the Thielen Affidavit. However, without additional evidence presented to the Court to refute the Thielen Affidavit, the Court is unable to conclude that the interpretation of the intent of the parties to the Contract, as presented in the Thielen Affidavit, is incorrect. The Thielen Affidavit simply alleges that the Plaintiff had rights to payment for a certain number of trips, a right which the Plaintiff chose to refrain from exercising. The waiver of the Plaintiff's alleged contract rights for any given week has no bearing on the duty of performance required of the Defendant for any other week. While the Court is reluctant to infer that the course of performance as provided resolves the ambiguity in the contract language, or to infer a blanket waiver of Plaintiff's alleged rights from the course of performance, it may well be that additional evidence will substantiate that Plaintiff's alleged rights did not exist in the first instance, or, that if such rights did exist, that a blanket waiver of such rights might be inferred from the parties'

course of performance. It is the need for such additional evidence which leads to the Court's reluctance to dismiss this matter without further developing the factual context from which the parties' intent might be ascertained, and which will, presumably, resolve any ambiguity in the contract language.

Finally, the Defendant argues that the case must be dismissed because the Plaintiff has failed to establish that the Defendant breached the Contract. The Court notes that, given the fact that this is the fundamental issue which will be decided at trial, it is premature to decide it on the evidence currently before the Court.

ORDER

Defendant's Motion for Summary Judgment is therefore DENIED. This ruling shall not prejudice either party from bringing or renewing a summary judgment motion after the close of discovery.

Dated: May 20, 1996

Steven F. Olson, Associate Judge

Lower Sioux Community in Minnesota Tribal Court

Kurt V. BlueDog, Chief Judge
Andrew M. Small, Associate Judge
Steven F. Olson, Associate Judge
Vanya Hogen-Kind, Clerk of Court

5001 W. 80th Street, Suite 500
Bloomington, Minnesota 55437
Telephone (612) 893-1813
Telefax (612) 893-0650

CLERK'S NOTICE

Date: May 20, 1996

To:

ATTORNEY FOR PLAINTIFF:
Ronald C. Anderson
Hulstrand Anderson Larson & Hanson
331 Professional Plaza
331 S.W. 3rd Street
P.O. Box 130
Wilmar, MN 56201

ATTORNEY FOR DEFENDANT:
Joseph F. Halloran
Jacobson, Buffalo, Schoessler & Magnuson
810 Lumber Exchange Building
Ten South Fifth Street
Minneapolis, MN 55402

Re: *Thielen Leasing, Inc. v. Jackpot Junction (Lower Sioux Indian Community), Case No. CIV-052*

A Memorandum Opinion and Order (copy enclosed) was issued in this case today.

Vanya Hogen-Kind
Vanya Hogen-Kind
Clerk of Court

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