IN THE COURT OF APPEALS FOR THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six Inc. Board of Directors, et al., Appellants, v. L.B. Smith, et al., Appellees.	Ct. App. No. 010-97

MEMORANDUM OPINION AND ORDER

In October 1995, thirteen members of the Shakopee Mdewakanton Sioux (Dakota) Community sued the Little Six Board of Directors (LSI) to compel the production of certain documents and to remove members of the LSI Board of Directors. Between that time and this, ten of those persons have been dismissed from the case. Now in this appeal, we must decide if subsequent events have rendered any of the remaining Plaintiff/Appellees' claims moot, and if they have, what remedy is appropriate at this stage in the litigation.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 1994, the Appellees and ten other members of the

Community asked in writing to inspect certain LSI documents under the terms of Community's Corporation Ordinance, No. 2-27-91-004, *as amended by* Resolutions 11-05-92-001 and 7-27-94-001 (the Corporation Ordinance). LSI denied these requests, contending that the requests did not conform to the requirements of Section 68 of the Corporation Ordinance. Specifically, LSI claimed some of the information was held by the SMS(D)C Business Council rather than LSI, and that compliance with other requests would be unduly burdensome.

In October 1995, the thirteen original Plaintiff/Appellees sued LSI to compel the production of documents and to remove the members of the LSI Board of Directors. LSI filed a motion to dismiss, which was granted in part and denied in part on April 30, 1996. LSI then appealed the part of the order denying dismissal.

While on appeal, Appellee Feezor submitted a second document request to LSI, dated January 8, 1997. Notably absent from this request were any documents held by the Business Council. LSI believed that this request conformed with Section 68 of the Corporation Ordinance; and after signing a stipulation of confidentiality with the Appellees (dated May 27, 1997) to cover the proceedings in this Court, LSI turned over the documents identified in the second request.

On September 11, 1997, in response to a motion made to this Court, ten of the thirteen Appellees were dismissed for failing to

prosecute their claims.

LSI now argues that the entirety of this case is moot, and that the trial court opinion from which it appeals should be vacated. Specifically, LSI contends that its production of documents under the second request moots Appellees' claims regarding the first document request, and that the dismissal of ten of the thirteen Appellees renders the action for removal of Board members ineffective and moot.

II. DISCUSSION

As an initial matter, Appellees suggest this Court is without jurisdiction to hear this matter because an order denying a motion to dismiss is not ordinarily an appealable final order. This Court is permitted to hear appeals by SMS(D)C Rule of Civil Procedure 31, which states that " . . . a party may appeal any decision of the assigned (trial) Judge that would be appealable if the decision had been made by a judge of a United States District Court."

It is true that a denial of a motion to dismiss is not ordinarily considered an appealable final order; but there are numerous circumstances under which non-final decisions of federal district courts are appealed as interlocutory matters. Under 28 U.S.C. § 1292 (1994), interlocutory appeals are allowed for orders (1) that involve controlling questions of law as to which there is substantial difference of opinion, and (2) where an immediate

appeal may materially advance the termination of the litigation. Here, the issues relating to mootness involve issues of first impression, which, if resolved, will materially advance the termination of this litigation. We are satisfied that a federal court could and would chose to hear this appeal on an interlocutory basis, and therefore, the requirements of SMS(D)C Rule of Civil Procedure 31 have been satisfied.

Appellees protest, however, that even if this order is the type that meets the substantive requirements of 28 U.S.C. § 1292 (1994), still this Court should not consider the appeal because LSI has failed to conform with the procedural requirements imposed by that section. But the text of our Rule 31 does not purport to incorporate all of the procedural requirements imposed on parties attempting to appeal a decision by a federal district court judge. Instead, our Rule 31 merely incorporates the substantive requirements of finality, with all the interlocutory exceptions that are used by federal courts to determine when an appeal may lie. Rules of this Court make it clear when they are intended to incorporate all the procedural requirements of specific federal rules (see, e.g., SMS(D)C Rule Civil Procedure 18, 21, 28) and Rule 31 does not do so. LSI filed this appeal within the time frame established by our Rules, and the procedural requirements of 28 U.S.C. § 1292 (1994) do not apply.

Having determined this Court may properly exercise jurisdiction over this appeal, we next must determine if the

Appellees' claims are moot. Legal issues generally are moot if the controversy is no longer "live", the parties lack a cognizable interest in the outcome of the litigation, the court can no longer fashion effective relief, or the substantially same relief has been obtained through other means. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Alton v. Alton, 347 U.S. 610, 611 (1954); Blackwelder v. Safnauer, 866 F.2d 548, 551 (2d Cir. 1989). However, even if moot, an action still can be maintained if the issue is such that it is capable of repetition, yet evading review, or if public policy requires that the dispute be adjudicated. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 23-35 (1994); Davis, at 631.

In our view, Appellees' claims regarding their first document request clearly are mooted by LSI's response to their second document request. The second document request obtained relief that was essentially identical to the relief sought by the first request. For example, in the first document request, Appellees asked LSI to turn over records of per capita payments made to Community members. This information is kept by the SMS(D)C Business Council, not LSI. The second document request asked for records of the gaming proceeds set aside by LSI for Community purposes -- which are records that LSI does keep, and which contain the same type of information that the per capita payment request sought. LSI turned this information over to Appellees, enabling them to obtain the same relief they sought from their first

document request.

Nor does there appear to be any further relief which this Court could grant. Appellees have not identified any outstanding documents that LSI has refused to turn over in violation of the Corporation Ordinance. So, as far the document requests are concerned, there is no longer a live issue to adjudicate.

Appellees argue, however, that exceptions to the mootness doctrine apply here. Specifically, they claim there is a threat of repeated harm without review, and that public policy warrants resolution of this issue.

We disagree. While the validity of a document request under Section 68 of the Corporation Ordinance certainly is an issue that is capable of repetition, it will not evade review in the future unless, as here, the party seeking the documents submits a second request that LSI honors and that provides essentially the same relief as the first request; and public policy is best served by adjudicating legal issues in light of actual disputed facts. Appellees' request that we rule on the document claim, despite the fact that they have already obtained the relief they sought, essentially is a request for an advisory opinion, and this court refrains from issuing advisory opinions in all but the most extreme cases. In re Advisory Request from the Business Council -- Payment of Revenue Allocation to Thirty One Members, No. 037-94 (SMS(D)C Tr. Ct. Feb. 11, 1994).

Appellees' request to remove LSI officers also has been mooted

by subsequent events. On September 11, 1997, this Court dismissed ten of the original thirteen Plaintiff/Appellees for failure to prosecute their appeal. Consequently, there are no longer the number of Appellees required to pursue an action to remove LSI officers. See Corporation Ordinance § 25.3 (requiring ten percent of the General Council membership to pursue a removal action). Hence, the removal action has been mooted because Appellees have declined to pursue the claim and the issue is no longer live.

None of the exceptions to the mootness doctrine are applicable to the removal action, any more than they are applicable to the document production issue. Certainly, an action to remove LSI officers is capable of being repeated, but it will only evade review in the future if, as here, sufficient numbers of persons fail to prosecute their claim on appeal. Appellees argue that the public policy of holding LSI accountable for its actions justifies adjudicating this claim; but where the requisite percentage of Community members no longer seek accountability, this Court will not step in on its own accord to adjudicate a claim that is no longer live.

Having concluded that the claims of Appellees are moot, in our view the most appropriate course in this case is to vacate the decision below, and remand with instructions to dismiss -- the established practice of federal courts in these circumstances. U.S. Bancorp, 513 U.S. at 22-23; Blackwelder, 866 F.2d at 550. This practice clears the path for the future relitigation of the

issues between truly adverse parties, and eliminates a judgment the review of which has been prevented by happenstance or by the unilateral action of party prevailing below. Davis, at 22-23.

Appellees argue that vacatur is not proper because they contend that the case was settled while on appeal -- at least as far as the document request is concerned. To support this contention, they point to their second document request, and the accompanying stipulation of confidentiality that was filed in this Court. But nowhere in those materials, or in the pleadings submitted to the court, is there any mention either of a settlement or a dismissal of claims. A stipulation of confidentiality, with nothing more, is not sufficient to indicate to us that the parties intended to settle and/or dismiss any of the claims between them.

The issues in this suit became moot, not through settlement, but through the unilateral action of Appellees. Their claims became moot because they submitted a second document request, and because a substantial number of Appellees failed to prosecute the removal action on appeal. Vacatur will be granted, because a successful party below should not be able to preserve a favorable ruling by taking actions which moot the case on appeal. Davis, 22-23.

ORDER

The decision of the trial court is vacated and the case is

remanded with instructions to dismiss.

Dated: May 27, 1998

John E. Jacobson
Judge

Robert A. Grey Eagle
Judge

remanded with instructions to dismiss.

Dated: May 27, 1998

John E. Jacobson
Judge

Robert A. Grey Eagle
Judge

IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Louise B. Smith, Winifred S. Feezor, Cecilia M. Stout, Alan M. Prescott, Cynthia L. Prescott, and Patricia A. Prescott, Appellants, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Business Council, Stanley R. Crooks, Kenneth Anderson, Darlene McNeal, in their official positions as members of the Shakopee Mdewakanton Sioux (Dakota) Community Business Council and individually; Shawn Bielke, James Bigley, Robert Bigley, Anthony Brewer, Teresa Coulter, Cheryl Crooks, Clarence Enyart, Stephen Florez, David Matta, Don Matta, Elizabeth Totenhagen, Robert Totenhagen, Barbara Anderson, James Anderson, Keith Anderson, Jr., Lesli Beaulieau, Lisa Beaulieau, Lori Beaulieau, Walter Brewer, Jennifer Brewer, Roberta Doughty, Selena Mahoney, Lori Ann Stovern, Linda Welch, and Maxine Woody, Respondents.	COURT OF APPEALS FILE NO. 011-96

MEMORANDUM DECISION AND ORDER

Before Judges John E. Jacobson and Robert GreyEagle. (Judge Henry M. Buffalo, Jr. took no part in this decision).

Summary

In this action, the Plaintiffs/Appellants contend that business proceeds owned by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") have been distributed to persons who are not eligible to receive those proceeds, under the Community's 1988 Business Proceeds Distribution Ordinance, Ordinance No. 12-29-88-001 ("the BPDO") and the 1993 amendment thereto, Ordinance No. 10-27-93-002 ("the Amended BPDO"). The Defendants/Respondents are the Business Council of the Community ("the Business Council"), the three persons who were serving on the Business Council at the time this action was filed, and the twenty-seven persons who, it is claimed, have improperly received the business proceeds.

This appeal is from a December 16, 1996 Order, by Judge Buffalo, granting the Defendants/Respondents' Motion to Dismiss the Amended Complaint for failure to state a claim under which relief can be granted, under Rule 12(b)(6) of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux (Dakota) Community.

Because prior decisions of this Court, and the record of the Community, clearly establish that the complained-of payments are consistent with the law, we affirm.

Scope of Review

As we stated in Welch v. the Shakopee Mdewakanton Sioux (Dakota) Community, App. No. 009-96 (Shak. Ct. App., decided October 14, 1996), the standard for this Court's review, on appeal, of an order of dismissal, under Rule 12(b)(6), is de novo.

Dismissals under our Rule 12(b)(6) are appropriate only if there is no reasonable view of the facts alleged in the Complaint which would support the Plaintiffs' claim. See generally, Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157 (Fed. Cir. 1993). In making such a decision, we naturally begin with the four corners of the Complaint; but we also will consider pertinent matters of public record--statutes and ordinances of the Community, decisions of administrative bodies, and decisions of courts of record, including, of course, our own decisions. And in that last regard, we think it is appropriate to adopt the approach of the United States Court of Appeals for the Second Circuit, in Day v. Moscow, 955 F.2d 807 (2nd Cir., 1991), cert. denied 113 S.Ct. 71 (1992), and the United States Court of Appeals for the Ninth Circuit, in Commodity Future Trading Commission v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982), which permits us to take judicial notice of matters which are of record in litigation which previously has been before us.

History of the Case

The Appellants initiated this litigation on October 18, 1995, and filed an Amended Complaint on January 9, 1996. On January 10 1996, the Respondents filed a Motion to Dismiss. The parties then attempted to settle the case; those attempts were unsuccessful; and on June 19, 1996, after a hearing on the record, Judge Buffalo

granted the Respondents' Motion to Dismiss[1]. On December 16, 1996, Judge Buffalo filed a written Memorandum setting forth in more detail the basis for the dismissal, and this appeal followed.

Discussion

In deciding this appeal we are again obliged to visit the history of the BPDO and the Amended BPDO, and the Community's history of accepting persons into Community membership under the provisions of Article II, section 2 of the Community's Constitution.

The BPDO was adopted in 1988. It mandated that the Business Council make monthly payments, from all of the Community's business proceeds, to persons who were named in lists which were appended to the ordinance. We have observed that the BPDO was adopted by the Community's General Council as a grand compromise, to resolve "nearly constant turmoil" over membership rights. See Ross v. Shakopee Mdewakanton Sioux Community, No. 013-91 (decided July 17, 1992), at 1.

It is clear from the face of the BPDO that some of the persons who received payments under the BPDO, including three of the individually named Respondents here (Walter Brewer, Cheryl Crooks, and Linda Welch), are not members of the Community. The list of

[1] Appellants' counsel failed to timely file any response to the Motion to Dismiss, and accordingly was not permitted to make oral argument to Judge Buffalo on June 19, 1996. On appeal, the Appellants have moved to supplement the record with significant amounts of material which were not before Judge Buffalo. Judge Buffalo's decision certainly was not inappropriate, under the circumstances. But under the standard we have articulated in this opinion, we think the some of the materials submitted by the Appellants are appropriate for judicial notice, and we therefore have considered them in deciding this appeal.

names, on which those persons appeared, was captioned "Persons who are not Mdewakanton but who now receive payments as Indian spouses of members". Hence, when the BPDO was adopted, the Community's General Council obviously was perfectly aware that the persons on that particular list were not members of the Community; and the General Council nonetheless concluded that payment to those persons, for their health and welfare was appropriate and warranted.

Some time ago, this Court held that, under the BPDO, the Business Council had no discretion with respect to the payments that it made. Specifically, we held that during the effective life of the BPDO, the Business Council was mandated to make payments to the persons whose names appeared on the ordinance's lists. Welch v. Shakopee Mdewakanton Sioux Community, No. 022-92 (decided June 3, 1993), at 5.

The Community's payment system changed in 1993, with the passage of the Amended BPDO. Section 14 of the Amended BPDO denied any future payments, derived from the Community's gaming enterprises, to persons other than Community members. The General Council of the Community chose instead to provide for the welfare of non-members who in the past had received payments under the BPDO by adopting a Non-Gaming Program Allowance Ordinance, Ordinance No. 10-27-93-003 ("the NGPAO"). Section 2 of the NGPAO provides:

> The following individuals are receiving revenue allocations under the Business Proceeds Distribution Ordinance. However, because of new requirements issued by the Secretary of Interior, it has become clear that non-members of Tribes cannot receive revenue allocations from Tribal gaming revenues. These individuals cannot qualify to receive gaming

revenue allocations to them shall cease:

1. Todd Weldon
2. Ron Perrault
3. Linda Welch
4. Walter Brewer
5. Cheryl Crooks

Section 3.1 of the NGPAO provides that those five listed persons will receive an allowance of four thousand dollars per months from the Community's non-gaming revenues.

The provisions of the Community's Constitution which relate to Community membership, like the BPDO and the Amended BPDO, repeatedly have been before this Court; and those proceedings have established, inter alia, two conclusions--one general and one specific--which directly bear on this appeal:

First (the general conclusion), it is clear that from the earliest days, following the adoption of the Community's Constitution in 1969, the Community's General Council has interpreted the authority which is granted in Article II, section 2, to permit the "voting in" of new members to the Community without requiring those persons to demonstrate that they possess one-quarter degree Mdewakanton blood; and we have held that that practice was and is a reasonable and fair interpretation of Article II, section 2, of the Community's Constitution, to which we should defer. See, In Re: Election Ordinance 11-14-95-004, (decided January 5, 1996), at 11.

Second (the specific conclusion), all of the non-Business Council Defendants in this matter--except for Walter Brewer, Cheryl Crooks, and Linda Welch, who concededly are not members, and who do

not receive monies under the Amended BPDO--already have been determined by this Court to be members of the Community. Specifically, the membership of each of those persons was challenged in the last election of the Community; the extensive documentation relating to the adoption of each was examined by this Court; and the membership of each was upheld. Again, see In Re: Election Ordinance 11-14-95-004, supra.

With this background, it becomes apparent why Judge Buffalo's dismissal of the Amended Complaint must be affirmed. The entire thrust of the Amended Complaint was that the Business Council Defendants violated Community law by paying monies to the twenty-seven named individual Defendants, and that the twenty-seven individual Defendants should be required to disgorge the payments they received. The violation of Community law allegedly flowed from the fact that none of the twenty-seven was a "qualified enrolled member" of the Community. But, as we have noted, the payments which were made to the twenty-seven persons under the BPDO were mandated by the law of the Community; and the payments which have been made since, under the Amended BPDO and the NGPAO, are entirely consistent with the status of the twenty-seven recipients: the three persons among that group who are not members of the Community do not receive any monies under the Amended BPDO, and the remaining twenty-four persons previously have been determined by this Court to be members of the Community and therefore are entitled to receive monies under the Amended BPDO.

Nothing in the materials submitted by the Appellants to

"supplement the record" alters our conclusions. Among those materials are a decision by a Interior Department Secretarial Election Board, in connection with an April, 1995 election on proposed amendments to the Community's Constitution; a subsequent decision by the U.S. Department of the Interior's Assistant Secretary -- Indian Affairs, with respect to the same election; and a decision of the United States District Court for the District of Columbia, in Feezor v. Babbitt, Civil No. 96-1678 (D.D.C., decided December 20, 1996).

The Election Board decision and the decision of the Assistant Secretary set forth the views of those officials as to the eligibility of certain persons, who are not parties to this litigation, to vote in the Constitutional referendum election held by the Secretary of the Interior in 1995. Neither the Election Board decision nor the decision of the Assistant Secretary addresses or affects this Court's long-established conclusion that Article II, section 2 of the Community's Constitution always has permitted, and continues to permit, the Community to adopt persons into membership without scrutinizing their degree of their Mdewakanton blood. And neither of the two administrative decisions in any way concerns the propriety of payments made under the BPDO or the Amended BPDO.

Nor does the decision of the United States District Court in Feezor v. Babbitt impact this litigation. In that decision, United States District Judge James Robertson remanded, to the United States Department of the Interior, an appeal (by many of the

persons who are Appellants here) from an administrative decision approving the Adoption Ordinance under which the Community currently operates. Judge Robertson's holding was not that the Adoption Ordinance was invalid, but that the record of the Department's decision required supplementation. And as with the agency materials just discussed, nothing in the District Court's decision suggests to us that our conclusions with respect to the effect of Article II, section 2 of the Community's Constitution, or the BPDO, or the Amended BPDO, are erroneous.

The Appellants also submitted lists of persons receiving payments from gaming revenues. Assuming these are public records with respect to which we appropriately can take notice, the lists actually serve to confirm that the three non-member Defendants are not participating in those revenues. And nothing in the remainder of the documents (correspondence, handwritten notes on lists, etc.) operates to change our conclusion that the Amended Complaint was properly dismissed for failing to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, the decision to dismiss the Amended Complaint in this matter is AFFIRMED.

August 7, 1997

John E. Jacobson
Judge

Robert GreyEagle
Judge

persons who are Appellants here) from an administrative decision approving the Adoption Ordinance under which the Community currently operates. Judge Robertson's holding was not that the Adoption Ordinance was invalid, but that the record of the Department's decision required supplementation. And as with the agency materials just discussed, nothing in the District Court's decision suggests to us that our conclusions with respect to the effect of Article II, section 2 of the Community's Constitution, or the BPDO, or the Amended BPDO, are erroneous.

The Appellants also submitted lists of persons receiving payments from gaming revenues. Assuming these are public records with respect to which we appropriately can take notice, the lists actually serve to confirm that the three non-member Defendants are not participating in those revenues. And nothing in the remainder of the documents (correspondence, handwritten notes on lists, etc.) operates to change our conclusion that the Amended Complaint was properly dismissed for failing to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, the decision to dismiss the Amended Complaint in this matter is AFFIRMED.

August 7, 1997

John E. Jacobson
Judge

Robert GreyEagle
Judge