



Pokagon Band of Potawatomi Indians Court of Appeals

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CASE NO. 14-003-AP

Appellant:
LOIS LUCILLE DYER

V.

Appellee:
POKAGON GAMING AUTHORITY, an
unincorporated governmental instrumen-
tality of the Pokagon Band of Potawatomi
Indians; FOUR WINDS CASINO RE-
SORT; and JOHN DOE, an unknown in-
dividual

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OPINION

TOMPKINS, ASSOCIATE JUSTICE

Appellant, Lois Lucille Dyer appeals from the decision of the Pokagon Band Tribal Court granting the Appellee, Pokagon Band Gaming Authority d/b/a Four Winds Casino Resort's (hereinafter "Four Winds") motion for summary disposition dismissing her claim for negligence, premises liability and for Four Winds' alleged failure to investigate, identify and disclose the

identity of an individual who collided with her at the Four Winds Casino Resort causing injury. We affirm.¹

I. BACKGROUND

A. *Facts*

On January 8, 2013, at approximately noon, the plaintiff was visiting the Four Winds Casino Resort. Plaintiff finished playing at the slot machines and began to traverse the casino floor in pursuit of further gaming. She walked between two parallel rows of slot machines. After looking to her left and right and not observing any other patrons approaching her, she stepped out from in between the rows of slot machines. A man who the plaintiff describes as being tall, African-American, in his late 20s, wearing eyeglasses and walking at a rapid rate of speed collided with her. The impact of the collision caused plaintiff to fall to the floor fracturing her right hip. The plaintiff, age 83, was hospitalized and underwent a two-hour surgical repair to her hip. Thereafter she was discharged to a rehabilitative care facility where she convalesced for several weeks. She is claiming damages in an amount of more than twenty-five thousand dollars (\$25,000.00).

B. *Proceedings Below*

On March 15, 2013, plaintiff filed pre-suit discovery petition “Verified Petition for Deposition Before Action” in the Tribal Court. The petition sought an order authorizing the taking of the depositions of Four Winds employees as means of fact gathering in order to eventually file suit. In particular, plaintiff was seeking to learn the identity of the man who collided with her. On March 27, 2013, the Tribal Court initially granted the petition. After hearing argument on

¹ The Court determined that oral argument would not be necessary to resolve this appeal.

the Four Winds Casino Resort's (hereinafter "Four Winds") motion for reconsideration however, the petition was dismissed on June 13, 2013.² On November 27, 2013, plaintiff then filed a "Complaint and Jury Demand" against Four Winds and "John Doe," the patron who collided with her, alleging common law negligence, negligence and premises liability. Plaintiff named "John Doe" as a defendant because even though Four Winds supplied her with its surveillance video and the incident report, the man's identity still could not be ascertained. Four Winds filed its answer and affirmative defenses denying the complaint's allegations on January 14, 2014. On the same date, Four Winds filed a motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) and 2.116(C)(8) (failure to state a claim on which relief may be granted.) By *Opinion and Order* dated May 6, 2014 the Tribal Court granted the motion for summary disposition finding that the plaintiff's claim is time barred by Section 10 of the Pokagon Band of Potawatomi's Tort Claims Ordinance.³ The trial court further found that the plaintiff failed to state a claim upon which relief can be granted and dismissed the complaint. On July 29, 2014, the Tribal Court denied the plaintiff's subsequent motion for reconsideration. This timely appeal followed.

² After the Tribal Court dismissed the petition for deposition before action, on August 6, 2013 plaintiff subsequently filed a "Complaint and Demand for Jury Trial" in the Van Buren County Circuit Court (Case No. 13-63-432-NO). On November 21, 2013, this action was dismissed.

³ The Tort Claims Ordinance was enacted on January 30, 2001 by adoption of Pokagon Band Tribal Council Resolution No. 01-01-30-01. The ordinance was comprehensively amended, reformatted, and renamed the "Tort Claims Act" by enactment of Tribal Council Resolution no. 14-05-19-03 on May 19, 2014. The provisions of the original Tort Claims Ordinance govern this appeal.

C. *Issues on Appeal*

The central issues raised in this appeal are whether the lower court erred: (1) in dismissing the complaint on summary disposition finding that further discovery did not stand a fair chance of uncovering the identity of the man who collided with the plaintiff; (2) in declining to apply the doctrines of judicial and equitable tolling to its interpretation of the statute of limitations found in Section 10 of the Tort Claims Ordinance; and (3) finding that the defendant had no legal duty to plaintiff to investigate, identify or disclose the name of an alleged third party tortfeasor for the purpose of pursuing litigation. We find that the lower court properly dismissed the action for failure to file her complaint within the period required by the statute of limitations.

II. DISCUSSION

A. *Standard of Review*

When considering a motion for summary disposition brought pursuant to MCR 2.116(C), the Tribal Court must accept as true the contents of the complaint and construe all well-pleaded factual allegations in the light most favorable to the non-moving party.⁴ *Halford v. Four Winds Casino, et al.*, No. 14-2709-CV at 3-4 (Pokagon Tr. Ct. Oct. 23, 2014) citing *DMI Design & Manufacturing, Inc. v. ADAC Plastics, Inc.*, 418 N.W.2d 386, 388 (Mich.App.1987). Neither the Pokagon Tribal Court Code nor the Pokagon Rules of Appellate Procedure prescribe a standard of appellate review. Section 11 of the Tort Claims Ordinance provides that claims brought under the Ordinance “. . . shall be determined by the Tribal Court in accordance with the law of the Band and the principles of law applicable to similar claims arising under the laws of the State of

⁴ Since the Pokagon Band Court of Appeals has not yet promulgated tribal-specific rules of civil procedure, the Court must look to Michigan Rules of Civil Procedure. Pokagon Tribal Court Code, Sections 7(B).

Michigan if not inconsistent with any express provision of this Ordinance or other laws of the Band.” This Court’s decision, *Estate of Rodney Holmes v. Pokagon Gaming Authority*, Case No. 12-001-AP (Pokagon Ct. of App. Mar. 27, 2013), also concerned an appeal from a Tribal Court’s ruling on a motion for summary disposition. We ruled that, “A trial court’s ruling on a motion for summary disposition is subject to *de novo* review.” *Id.* at 4, citing *Maskery v. Univ. of Michigan Bd. of Regents*, 664 N.W.2d 165, 167 (2003); *Kreiner v. Fischer*, 683 N.W.2d 611, 623 (2004). Thus, this Court will again employ the *de novo* review standard.

B. Tribal Sovereign Immunity

The legal and political status of the Pokagon Band of Potawatomi Indians as a federally-recognized Indian tribe was reaffirmed on September 21, 1994 with the enactment of United States Public Law 103-323, 108 Stat. 2152, 25 U.S.C. 1300j-8. P.B. CONST. Preamble, ¶ 1. As a federally recognized Indian tribe, the Pokagon Band enjoys certain rights and privileges traditionally enjoyed by a sovereign power. *See* 25 U.S.C. § 1300j-1. “Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 20301 (2014) (citation omitted).

Tribal sovereignty may be limited only by Congress: “The sovereignty that the Indian tribes retain is of a unique and limited character.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Only the federal government or the tribes themselves can subject the tribes to suit; tribal immunity “is not subject to diminution by the States.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014), citing, *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Suits against Indian tribes “are thus barred by sovereign immunity absent a

clear waiver by the Tribe or congressional abrogation.” *Halford* at 4-5 citing *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). “Tribal sovereign immunity may extend to subdivisions of a Tribe, including those engaged in economic activities, provided the relationship between the Tribal and the entity is sufficiently close to properly permit the entry to share in the Tribe’s immunity.” *Id.* at 5 citing *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010). The Pokagon Gaming Authority, d/b/a, Four Winds Casino Resort, was established “as a tribal governmental instrumentality of the Band . . . which shall have all of the privileges and immunities of the Band, and shall exercise the Band’s ownership, management and supervision of the Gaming Business and the Gaming Assets pursuant to the specific authority delegated by the Tribal Council” Pokagon Gaming Authority Ordinance, Sec. III(c) (as amended June 27, 2011). A waiver of a tribe’s immunity by Congress or by the Tribe itself must be “unequivocally expressed” and may not be inferred. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The Pokagon Tribal Tort Claims Ordinance set the parameters of the Band’s express waiver of immunity for injuries proximately caused by the negligence or wrongful conduct of the Pokagon Band or its instrumentalities or by a dangerous condition existing on the Pokagon reservation, its structures or other improvements.

Article XVIII, Section 1 of the Pokagon Band’s Constitution provides that: “[t]he Pokagon Band, as a sovereign Indian Nation is immune from suit in all forums except to the extent that *immunity is expressly waived* as provided in this Article.” (emphasis supplied).

The jurisdiction of the Pokagon Band Tribal Court is set forth in Pokagon Band Tribal Court Code, Section 3. With respect to jurisdiction over tort claims such as the one at bar, the Tribal Court may hear and decide, “tort claims against the Band, or any of its agencies, instrumentali-

ties, officers or employees, but only to the extent provided in the Pokagon Band of Potawatomi Indians Tort Claims Ordinance.” Tribal Court Code, Section 3(A)(d).

Section 10 of the Tort Claims Ordinance requires that: “All Claims shall be filed with the Tribal Court within 180 days of the date on which the Claim accrued.” A “Claim” is defined by Section 2(D) as “a petition for an award under this Ordinance. A Claim may be filed with respect to any injury as defined in this Ordinance and which is covered by the liability insurance of the Gaming Enterprise without regard to any deductible amount contained in the insurance policy.” The term “Award” is defined as “money damages which the Tribal Court or the Court of Appeals determines are payable to compensate for any injury recognized under this Ordinance.” *Id.* at Section 2(B).

Ms. Dyer’s injuries occurred on January 8, 2013 and her complaint for an award of damages was filed on November 27, 2013. 323 days elapsed between the date of the injuries and the filing of the claim—clearly greater than 180 days. Plaintiff urges this Court to adopt and apply the doctrines of judicial or equitable tolling of statutes of limitation found in State of Michigan law in order to find her claim timely filed. Michigan’s judicial tolling statute, MCL 600.5856. “applies to prior lawsuits between the parties which have not been adjudicated on the merits, “*Fed Kemper Ins. Co. v. Isaacson*, 377 N.W. 2d 379 (1985). It should be noted that Michigan courts have held that absent statutory language allowing it, judicial tolling is general unavailable to remedy a plaintiff’s failure to comply with express statutory requirements. *Ward v. Siano*, 730 N.W.2d 1, 2 (Mich. 2006) (reversed on other grounds, 741 N.W.2d 836 (Mich. 2007). Even if the judicial tolling statute applied, plaintiff would not be able to avail herself of it due to her failure to comply with the requirements of Section 10 of the Tort Claims Ordinance.

Given that at the time the Tort Claims Ordinance was originally enacted, the Tribal Court was still in its formative stage and no body of tribal caselaw existed, in Section 11 of the Tort Claims Ordinance, the Tribal Council authorized the court to rely on Michigan law as follows:

Any Claim brought under this Ordinance shall be determined by the Tribal Court in accordance with the law of the Band and the principles of law applicable in similar claims arising under the laws of the State of Michigan *if not inconsistent with any express provision of the Ordinance or other laws of the Band.*

Tort Claims Ordinance, Section 11 (emphasis supplied).

Section 10 of the Tort Claims Ordinance does not include any tolling provision. Adoption of Michigan's judicial tolling statute, MCL 600.5856, is inconsistent therefore with the express language of the Ordinance. Section 4(A) of the Ordinance explicitly sets forth the limited waiver of the Tribe's sovereign immunity: "As to all matters within the scope of this Ordinance, the sovereign immunity of the band shall continue in full force and effect except to the extent that it is expressly waived by this Ordinance." The rule of tribal sovereign immunity with respect to the Pokagon Band is that the Band cannot be sued without the consent of the Pokagon Band Tribal Council. A "necessary corollary of this rule is that when [the Tribal Council] attaches conditions to legislation waiving the sovereign immunity of the [Band], those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota*, 456 U.S. 273, 287 (1983) (internal citations omitted). The 180 day statute of limitation set by Section 10 of the Tort Claims Ordinance constitutes an express condition on the waiver of sovereign immunity and an exception cannot be implied.

Equitable tolling of a statute of limitations under Michigan caselaw is permissible if "such tolling is necessary to prevent unfairness to a diligent plaintiff." *Ward v Rooney-Gandy*, 696 N.W. 2d 64, 66 *citing* 51 Am. Jur. 2d, Limitation of Actions, § 174, p. 563. "In order to

serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, *provided it is in conjunction with the legislative scheme.*” *Id.* citing 54 C.J.S., Limitations of Actions, § 86, p. 122 (emphasis supplied). Adoption of Michigan’s doctrine of equitable tolling is at odds with the provisions of the Ordinance, which require strict construction of the limited waiver of immunity, and therefore was properly not adopted by the Tribal Court. Even if the doctrine of equitable tolling were applicable in this case, tolling may only occur where a “plaintiff’s failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a *negligent failure to preserve her rights.*” *Id.* at 72 (emphasis added). In the case at bar, plaintiff negligently failed to file her claim within the 180 day limitation period so even under Michigan law equitable tolling of the statute of limitations would not apply.

III. CONCLUSION

The 180 day limitation period in the Tort Claims Ordinance, Section 10, is jurisdictional in nature. The timely filing of a claim is a jurisdictional prerequisite to a cognizable suit under the Ordinance. The remedies provided for in the Ordinance exist only in the prescribed period. Because the plaintiff failed to file her complaint within the required period by the Band’s tort claim ordinance, we affirm the lower court’s grant of Four Winds motion for summary disposition.

ANDERSON, CJ AND FLETCHER, JJ, concur