FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT
APR 29 2005
Clerk of Court/Assistant

IN THE

HO-CHUNK NATION SUPREME COURT

MARX ADVERTISING AGENCY, INC.,

Appellant,

vs

HO-CHUNK NATION,
d/b/a **HO-CHUNK CASINO AND BINGO,**
MAJESTIC PINES CASINO AND BINGO,
RAINBOW CASINO AND BINGO and
DEJOPE BINGO,

Appellees.

DECISION

SU 04-07

The case is an appeal in a commercial matter between the Ho-Chunk Nation doing business in its various gaming enterprises as Ho Chunk Casino and Bingo, Majestic Pines Casino and Bingo and Rainbow Casino and Bingo[1] and DeJope Bingo and its advertising agency at the time, Marx Advertising Agency Inc. The Appellant was represented by Mark Goodman of Goodman and Osborne of Sparta WI and Lynn M. Stathaus of Reinhart, Boerner, Van Duren S.C. of Milwaukee, WI. The Appellees were represented by Michael Murphy of the Ho-Chunk Nation Dept. of Justice.

Procedural History

This case was filed October 11, 2004, appealing an *Order (Granting Motion to Dismiss)* entered by the Trial Court on September 10, 2004. *See, Id.* CV 04-016 (HCN

[1] Since the commencement of this case the Bingo Hall long associated with Rainbow Casino has been closed by directive of the Executive Branch of the Ho-Chunk Nation. However, at all times relevant to the case at hand it is understood that Marx Advertising claims it was under contract to provide advertising for this sub entity of Ho-Chunk gaming.

Tr. Ct. Sept. 10, 2004). The appeal was accepted and the full Court entered a *Scheduling Order* setting forth the briefing schedule on November 12, 2004 and set the matter for *Oral Argument* on December 11, 2004. The parties jointly filed a *Motion to Reschedule* and a *Joint Stipulation* and *Motion for Expedited Consideration* on December 10, 2004 requesting postponement of *Oral Argument*. *Oral Argument* was then rescheduled for January 29, 2005 at the Ho-Chunk Waehi Hoci on Hwy 54 East, Black River Falls, WI.

The full court consisting of Chief Justice Mary Jo Hunter, Jo Deen B. Lowe, and Mark Butterfield, Associate Justices heard *Oral Argument* on January 29, 2005. The full Court took the matter under advisement at the conclusion of *Oral Argument*. Due to exigent circumstances involving personal matters of members of the Court extensions to issue a decision were entered on February 25th and March 21, 2005 and until April 30, 2005. The Court having fully considered the matter renders the decision below.

Applicable Law

HCN CONSTITUTION

ART. III. Organization of the Government

Section 1. **Sovereignty.** The Ho-Chunk Nation possesses inherent sovereign posers by virtue of self-government and democracy.

Art. VII. Judiciary

Section 4. **Powers of the Judiciary**. The judicial power of the Ho-Chunk Nation shall be vested in the Judiciary. The Judiciary shall have the power to interpret and apply the Constitution and laws of the Ho-Chunk Nation.

Section 5 **Jurisdiction of the Judiciary**

(b). The Supreme Court shall have appellate jurisdiction over any case on appeal from the Trial Court.

Section 7. Powers of the Supreme Court.

(a) The Supreme Court shall have the power to interpret the Constitution and laws of the Ho-Chunk Nation and to make conclusions of law. The Supreme Court shall no have the power to make findings of fact except as provided by enactment of the Legislature.

(c) Any decision of the Supreme Court shall be final.

Art. XII Sovereign Immunity

Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity, and officials and employees of the Ho-Chunk Nation acting within the scope of their duties of authority shall be immune from suit.

Section 2. Suit Against Officials and Employees. Officials and employees of the Ho-Chunk Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only for declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its jurisdiction for purposes of enforcing rights and duties established by this constitution or other applicable law.

The Ho-Chunk Nation does not have a Commercial Code. Therefore, all contracts either contain their own terms and enforcement mechanisms or they import other sources of law for the same purpose.

HCN – Marx Communications Contract:

5 Terms and Termination

(a) The term of the Agreement with respect to delivery of marketing services and in-service mentoring and training provided by Marx will commence on July 1, 2002 and termination on June 30, 2003. The parties currently contemplate that Marx will continue to be agency of record for the Gaming facilities for the Nation's FY 2004 and may continue a service and consulting relationship after the term of this Agreement. The parties shall meet on or before February 15, 2003 to discuss whether they will continue to maintain a relationship after the term and to commence negotiations on its terms and conditions of their relationship if they agree to continue one.

(b) Notwithstanding the forgoing, the Nation shall have the right to terminate this Agreement throughout its term on sixty 60 day [sic] prior written notice to Marx specifying the nation's basis for its decision to terminate. Marx shall have the opportunity to address any deficiencies in its performance cited in the Nation's notice, and the Nation in its sole discretion may rescind the notice of termination absolutely or conditionally based on Marx's response. . .

(c) If the Nation commits any material breach of this Agreement, including non-payment of any fees due to Marx, and the Nation's failure to correct any such default within fifteen (15) days of written notice by Marx. Marx shall have the right to terminate this Agreement upon written notice to the Nation.

10 **Jurisdiction Venue and Immunity.**

(a) Marx does hereby agree that the Trial Court of the Ho-Chunk Nation shall have exclusive jurisdiction over any and all disputes arising hereunder, other than claims precluded by the sovereign immunity of the Ho-Chunk Nation and not within the limited waiver described in paragraph (b)[sic] and Marx does hereby consent to the subject matter and personal jurisdiction of said Court over any such dispute arising pursuant to this contract and any and all subsequent additions, appendixes, addenda or any other amendment to this Agreement.

(b) [There is no paragraph (b) in the Contract] Appellee's *Reply Brief* At 5.

(c) Nothing contained in this Agreement shall in any manner be construed or deemed to be a waiver of the sovereign immunity of the Ho-Chunk Nation, except that the Ho-Chunk Nation agrees that it shall make the payment for services provided under this Agreement in accordance with its terms upon satisfactory performance by Marx of its obligations hereunder. This limited waiver pertains to payment for services delivered in strict accordance with this Agreement, and to no other claim or cause of action whatsoever, whether nor not arising under or in any way in connection with this Agreement. This limited waiver is personally to Marx and is non-assignable.

Decision

The Ho-Chunk Nation Supreme Court having reviewed the decision below affirms the decision of the HCN Trial Court because we find no error in the interpretation of the *Contract* between Marx Advertising Inc. and the Ho-Chunk Nation in its Casino and Bingo Marketing programs. This decision expressly does not foreclose a claim by Marx for work it actually did, nor work it could have done, during the proper 60-day cure period under the *Contract*. However, the Supreme Court is in agreement with the Trial Court in finding that Marx pursued the wrong remedy and is not entitled to damages beyond the cure period when it did not seek an injunction to allow it to cure under the *Contract*.

At issue in this case is the proper construction of a contract between the appellant, Marx Advertising Agency Inc. and the business arm of the Ho-Chunk Nation, its casinos and bingo halls. The *Contract* for services involved a large sum of money and Marx now seeks damages for the breach of this contract. In its *Complaint*, Appellant, requested damages of $1.6 million in lost profits for the period January to June 30, 2004. However, complicating this *Contract* is the fact that it is one between a sovereign entity, the Ho-Chunk Nation and a commercial enterprise. As a sovereign entity the Ho-Chunk Nation possesses one attribute of sovereign, namely sovereign immunity that ordinary commercial enterprises do not possess. This case turns on the issue of the proper resolution of the sovereign immunity waiver clause in the Marx *Contract*.

I. Standard of Review

The Ho-Chunk Nation Supreme Court reviews interpretations of law such as the construction of limited waivers of sovereign immunity under the *de novo* standard. The HCN Supreme Court is the final interpreter of the law and HCN CONSTITUTION pursuant to HCN CONST. Art. VII. § 7(a) & (c). *Hope Smith v. Ho-Chunk Nation,* SU 03-10 (HCN S. Ct. De. 8, 2003).

II. The Contract Provision on Limited Waiver of Sovereign Immunity

The appellant argues the Trial Court committed error by not finding ambiguity in the *Contract* in question as well as not construing that ambiguity in its favor. Marx apparently rested on its allegations that the Ho-Chunk Nation drafted the *Contract*[2] and therefore argues the applicability of the canon of construction used in Wisconsin Courts

[2] The Trial Court expressly allowed Marx the opportunity to submit discovery and to substantiate its claim that the Ho-Chunk Nation drafted the *Contract* in question or that it had a superior bargaining position. The rationale for construing a contract against the drafter is to protect a party with less power from being bound to onerous terms by a party in superior bargaining position.

that ambiguities in a contract should be construed against the drafter, citing *Estreen v. Bluhm*, 79 Wis. 2d 142, 155 NW2d 473 (1977). *Appellant's Brief* at 9. Marx does not dispute that the Trial Court found that the choice of Wisconsin law clause applied in this case. *See Marx Advertising Agency, Inc. v. Ho-Chunk Nation d/b/a/ Ho-Chunk Casino & Bingo et. Al.*, CV 04-16 at 5 ("This Agreement shall be governed by the laws of the State of Wisconsin."). It instead argues that there is ambiguity in the *Contract*, which the Trial Court did not find. Had their been ambiguity, then some of the law cited by Marx would have been relevant to the extent it was applicable.

Because this Court agrees with the Trial Court that the *Contract* is not ambiguous we find no need to resort to Appellant's reference to Wisconsin contract law. The key clause in the contract is paragraph 10(c), which states:

> Nothing contained in this Agreement shall in any manner be construed or deemed to be a waiver of the sovereign immunity of the Ho-Chunk Nation, except that the Ho-Chunk Nation agrees that is shall make the payment for services provided under this Agreement in accordance with its terms upon satisfactory performance by Marx of its obligations hereunder. This limited waiver pertains to payment for services delivered in strict accordance with this Agreement, and to no other claim or cause of action whatsoever, whether nor not arising under or in any way in connection with this Agreement. This <u>limited waiver</u> is personal to Marx and is non-assignable.

Contract (underlining added). The last sentence of ¶ 10(c) states that it is a limited waiver. The limits of the waiver allow Marx to be paid for services provided under the *Contract*, which due to sovereign immunity it might not otherwise get. *See also, David Ujke v. Ho-Chunk Nation*, CV 98-63 (HCN Tr. Ct. August 17, 1998) *aff'd on other grounds* SU-98-06 (HCN S.Ct. Feb 2, 1999) (holding annual leave already accrued a species of property which the Nation may not take in violation of HCN CONST. ART. X (1) (a) (5)). The paragraph also makes it clear that there is no other provision for "any

other claim or cause of action whatsoever, whether or not arising under or in any way in connection with this Agreement." *Id.* This language clearly cut off any claim for damages for an anticipatory breach such as that claimed by Marx in its *Complaint* for the full $1.6 million it expected to earn during the balance of the term, including incidental and consequential damages. *See Complaint* III (a) at p. 9. In other words, Marx was to be paid everything it had actually earned. There is no ambiguity.

However, Marx goes a bit further and argues that the Trial Court erred by not finding ambiguity in the *Contract* by the interplay between the limited waiver paragraph, ¶ 10, whose subpart (b) is omitted and ¶ 5, subparts (a) and (b). Those paragraphs, which are specifically titled "Term and Termination" state how the parties are supposed to properly terminate the *Contract*. Indeed, the appellant claims the Trial Court's interpretation renders meaningless ¶ 5 (a) and (b). *See Appellant's Brief* at 6.

The key provision in *Contract* ¶ 5 (a) and (b) is notice. The *Contract* required both that the Nation meet, on or before February 15, 2003, to discuss whether they would maintain the *Contract* after its term expired on June 30 2003, <u>and</u> key here, that it give Marx sixty days notice of its basis for wanting to terminate the *Contract* prior to its date of termination. However, while ¶ 5 allows Marx to have the opportunity to address any deficiencies in it s performance cited in the Nation's notice, the Nation "in its sole discretion" may rescind the notice of termination absolutely or conditionally based on Marx' response." *Contract* ¶ 5(b). This notice provision gives the Nation the sole discretion to terminate the *Contract* despite Marx' response after sixty days.

Admittedly, as pled and admitted, the Nation first gave Marx only seven days notice of its decision to terminate on December 10, 2003. It later rescinded that notice

before its own term expired on December 16, 2003. The *Notice to Terminate* was formally rescinded and reissued alleging the same grounds for termination but giving the full sixty days notice of intent to terminate on March 8, 2004.[3] *See Decision* below at 7. However, prior to the expiration of the second *Notice to Terminate* and opportunity to correct, Marx had already filed suit in the Trial Court, *Complaint* filed February 23, 2004, but in its claim for relief, Marx did not ask for an injunction to enforce the notice provision and to argue what it appears to be arguing now, that the Nation had a duty to bargain in good faith and continue to allow it to perform under the *Contract*.

The Trial Court held that there was no ambiguity in the *Contract* and that the provisions of ¶ 5 could clearly have been made effective by the resort to an injunction under well-established Ho-Chunk precedent. *See Decision* at 8, *citing Robert A. Mudd v. HCN Legislature et. Al,* CV 03-01 (HCN Tr. Ct. Jan 17, 2003); *Coalition for Fair Government II v. Lowe and Whiterabbit*, SU 96-02 at 7 (HCN S. Ct. July 1, 1996). Such a remedy would have given full meaning to notice provisions within the *Contract* in ¶ 5(b) and therefore there is no ambiguity. We agree with the Trial Court that such a remedy was within the appellant's grasp, but they failed to plead it.

Given the absolutely clear terms in the limited waiver paragraph, *Contract* ¶ 10(c), prohibiting other causes of action, and the repeated holdings of the Ho-Chunk Courts that *injunctive relief is not barred by sovereign immunity*; it appears that injunctive relief was the most prudent course of action. *See Generally*, HCN CONST. ART. XII. Injunctive relief, if granted, would have permitted the appellant to continue to

[3] There is a dearth of evidence as to what happened during this period and no specific findings of fact other than mere assertion that Marx was affirmatively prevented from performing after the first notice.

deliver services for the sixty day notice period, and during that time, the Nation would have been obligated to pay for services rendered.

Had the injunction been sought and granted, beyond the sixty days, it would have given the appellant the ability to compel the Nation to bargain in good faith during the notice period and it would have provided the basis of a claim, in the absence of good faith bargaining, that an injunction should continue until the end of the contract period.[4] Since an injunction in that case would have been directed forward in time for payment of actual services rendered, the Nation would have been compelled to pay and Marx would have realized most, if not all, of its anticipated bargain.

The Ho-Chunk Nation Courts have routinely protected the rights of persons harmed in Ho-Chunk society, even by such powerful entities as the General Council, *Roger Littlegeorge v. Chloris Lowe & Kathyleen Lonetree-Whiterabbit,* CV 96-21 (HCN Tr. Ct. June 4 1995) (General Council attempt to dismiss employee overturned); the Legislature, *Robert A. Mudd v. HCN Legislature, id.,* and the Executive branch, *Parmenton Decorah v. HCN Legislature and Dept. of Personnel*, CV 99-08 (HCN Tr. Ct. July 1, 1999) (law attempting to bar ex-felon from employment as high official held barred as application of ex post facto and bill of attainder) as well as awarding damages to employees harmed by the improper conduct of supervisors and officials acting outside the scope of their authority. *E.g. Margaret G. Garvin v. Donald Greengrass, et. Al.,* CV 00-10 (HCN Tr. Ct. Mar 9, 2001) (Awarding plaintiff lost wages and benefits, reinstatement and removal of negative references from personnel file); *Ho-Chunk Nation v. Harry Steindorf and Jess Steindorf*, SU 00-04 (HCN S.Ct. Sept. 29, 2000) (Affirming

[4] This of course is hypothetical, as the facts of the case were not well developed as the case was dismissed on the basis of a *Motion to Dismiss*.

dismissal of case brought by Nation for breach of fiduciary duty against two tribal members for lack of subject matter jurisdiction). With this history, and a clear separation of powers embedded in the HCN CONSTITUTION, including the direct election of Justices of the HCN Supreme Court by the electorate who are independent of the Legislature and Executive, the Courts are well able to protect the rights of parties wronged by official misconduct.

This Court's analysis and treatment of ¶ 5 of the *Contract* is fully consistent with a meaningful interpretation Contract as a whole and gives meaning to each and every clause and is quite at odds with Appellant's contention that the Trial Court's "refusal to enforce – much less acknowledge – the termination clause is an abuse of discretion." *Appellant's Brief* at 7. How can the Trial Court have enforced a notice provision it was never asked to enforce because the appellant never asked for an injunction? One purpose of the law is parties to act reasonably to avoid unnecessarily accruing damages. It is not necessary for a contract to expressly mention that an injunction be mentioned for it to be available as a remedy. This is especially true in a system where parties are presumed to bargain at arms length and in good faith with the counterparts under a system of government that strictly construes waivers of sovereign immunity. So long as the injunction sought "pertains to payment for services delivered in strict accordance with this Agreement…" it was available as a potential remedy.

What the Appellant is left with, is a claim, as yet unproven, that it was unpaid for actual services rendered, which the Trial Court and this Court at *Oral Argument* have indicated still remain to it. While this Court is not unsympathetic to the Appellant's claim for damages in the period up to the expiration of the sixty-day period, it has no

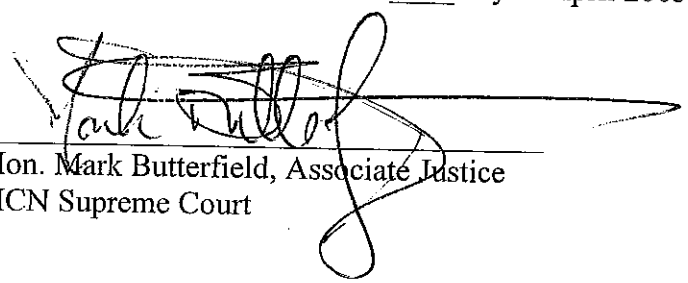
facts before it to conclude that the Nation acted in bad faith such that Marx was absolutely barred from performing, or that Marx reasonably attempted to perform its part of the *Contract*. The *Contract* as written by its plain language in ¶ 5 gave the Nation the sole discretion to rescind, and by implication, NOT rescind its notice of termination, therefore there can be no reasonable claim that damages could have continued to the end of the term of the *Contract* or June 20, 2004.

Lastly, the appellant claims the Trial Court committed error by misreading *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla,* 532 U.S. 411 (2001) and *Sokaogan Gaming Enter. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3rd 656 (7th Cir. 1996). These are both arbitration cases where the contract at issues specifically mentioned the method of resolving disputes was in arbitration, under state law, and enforceable in a Court of competent jurisdiction. Here the exclusive forum is the Ho-Chunk Nation Court System, there is no arbitration clause and there is no need to resort to Wisconsin canons of contract construction when there is no ambiguity in the contract requiring that this or the Trial Court resort to them. The waiver in this Contract is limited and the Trial Court and this Court simply hold that there is no need to resort to reading the intent of the parties or other cannons of construction either from Wisconsin or in this court when there is no ambiguity in the contract.

CONCLUSION

For the forgoing reasons the decision of the Trial Court is affirmed and this case is remanded for the final disposition consistent with the Court's finding that the Appellant's claims for damages, also referenced by the Trial Court in footnote 4, have not been resolved.

EGI HESKEKJET. Dated this 29 day of April 2005. Per Curiam.



Hon. Mark Butterfield, Associate Justice
HCN Supreme Court