IN THE COURT OF APPEALS OF IOWA

No. 6-293 / 04-1917
Filed October 25, 2006

WASKER, DORR, WIMMER & MARCOUILLER, P.C., MICHAEL D. MASON, d/b/a MICHAEL D. MASON LAW OFFICE, JORDAN MAHONEY, JORDAN & QUINN, P.C., IOWA MANAGEMENT & CONSULTANTS, INC., JOHN R. HEARN, d/b/a JOHN R. HEARN LAW OFFICES, JAMES DEMASSEO, AND THE CONCEPT WORKS, LLC,
Plaintiffs-Appellees,

vs.

HOMER BEAR, JR., HARVEY DAVENPORT, JR., WAYNE PUSHETONEQUA, KEITH DAVENPORT, DERON WARD, FRANK BLACKCLOUD, AND RAY YOUNGBEAR, Individually, and in any claimed capacity as Tribal Council for the Sac & Fox Tribe of the Mississippi in Iowa,
Defendants-Appellants.

Appeal from the Iowa District Court for Tama County, Thomas M. Horan, Judge.

The defendants appeal the denial of their motion to dismiss. **AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.**

Steven F. Olson and Jeffrey S. Rasmussen of Olson, Allen & Rasmussen, Bloomington, Minnesota, and Wilford Stone of Lynch Dallas, PC, Cedar Rapids, for appellants.

Fred L. Dorr, West Des Moines, for appellees Wasker, Dorr, Wimmer & Marcouiller, P.C., Iowa Management & Consultants, Inc., James Demasseo and the Concept Works, LLC.

John Hearn, Des Moines, pro se.

Michael Mason, Portland, Oregon, pro se.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

The defendants appeal from the district court's order that denied their motion to dismiss. For the reasons discussed below, we affirm the district court's denial of the motion, but conclude the joinder of the Tribe necessary as an indispensable party and remand for further proceedings.

I. Background Facts and Proceedings.

This case is another in a long string of state and federal litigation stemming from a tribal leadership dispute within the Meskwaki Settlement near Tama, Iowa. In September 2002, a dissident faction led by Homer Bear Jr., challenged the authority of the elected council chaired by Alex Walker. The plaintiffs (hereinafter collectively referred to as Wasker), having done business with the Walker Council, found themselves caught in the middle of this tribal leadership dispute. Consequently, Wasker filed a petition for declaratory judgment in Tama County on March 16, 2004, naming as defendants Homer Bear Jr. and others, "individually and in any claimed capacity as Tribal Council for the Sac & Fox Tribe of the Mississippi in Iowa," (hereinafter collectively referred to as the Bear defendants). Wasker and the other plaintiffs allege certain contracts for legal services, arbitration/litigation settlements, and other agreements (hereinafter referred to generally as agreement[s]) exist between the plaintiffs and the Tribe as all were properly approved by the Tribe, as then governed by the Walker Council, the Bureau of Indian Affairs of the Interior Department, and/or reduced to judgment or dismissed by an Iowa or federal court. Wasker seeks a declaration of the parties' rights under the agreements upon allegations that the Bear defendants have attempted to reject or invalidate

the agreements and nullify prior state and federal court action. The Bear defendants filed a motion to dismiss the petition on April 6, 2004, asserting: 1) failure to join the Tribe as an indispensable party and tribal sovereign immunity; 2) failure to state a claim upon which relief may be granted; 3) lack of subject matter jurisdiction; and 4) failure to comply with Iowa Rule of Civil Procedure 1.411(2). The district court denied the motion to dismiss in its entirety, concluding it did have subject matter jurisdiction as Wasker stated a proper claim for relief and an equitable, declaratory action on contracts does not interfere with tribal sovereignty. The Bear defendants appealed the denial of the motion to dismiss on the first three grounds numerated above, to which our supreme court granted interlocutory review.

II. Scope of Review.

We review motions to dismiss for correction of errors at law. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006).

III. Issues on Appeal.

The Bear defendants argue that the district court erred by denying dismissal of the declaratory judgment action against them for several reasons.

A. Indispensable Party. The first ground for dismissal urged by the Bear defendants before the district court and on appeal is failure to join the Tribe as an indispensable party. The district court's ruling does not specifically address whether the Tribe is an "indispensable party" for purposes of this dispute, and the Bear defendants did not file a motion to enlarge under Iowa rule 1.904(2). Nonetheless the district court implicitly rejected the claim by denying the motion to dismiss, "in its entirety for the reasons stated in the resistance." We conclude

there was minimally adequate error preservation for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002).

The Bear defendants' motion to dismiss was a pre-answer motion pursuant to rule 1.421. Even in this utmost preliminary stage of the case, the Wasker plaintiffs' petition on its face seeks to bind the Tribe to a declaratory judgment ruling as a party to the various agreements. While there is no claim the Tribe is attempting to undo what had been done by the Walker Council, each count of the petition contains a prayer of relief asking that, "the court confirm and declare the [agreement] as valid and binding *on the parties to it including the Tribe*. . . . " (emphasis added). The Tribe is clearly indispensable to a declaratory judgment suit involving agreements to which it is a signatory party. *See Irwin v. Keokuk Sav. Bank & Trust Co.*, 218 Iowa 961, 964, 256 N.W. 681, 683 (1934) (holding that some privity must be shown between parties in order to bring them into an action). At this early stage of this declaratory judgment action, we conclude that the Tribe is indispensable. The district court was correct in not dismissing the case as dismissal, is not the appropriate remedy for failing to join an indispensable party. *See* Iowa R. Civ. P. 1.234(3) (providing proper remedy and procedure for joining indispensable parties). Rather, the district court should order the Tribe be brought in. We therefore remand to the district court for joinder of the Tribe as an indispensable party to this declaratory judgment action.

B. Sovereign Immunity. The Bear defendants next argue that sovereign immunity bars prosecution of this case against the Tribe itself, thereby warranting dismissal once the Tribe is joined. Although generally, sovereign immunity will foreclose litigation for damages against a tribe, an exception exists in equitable

actions, such as declaratory judgment suits. *See Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567, 571-72 (5th Cir. 2001) (holding that neither the tribe nor individually-named tribal council members hold sovereign immunity from an equitable suit for declaratory or injunctive relief), *cert. denied by Alabama and Coushatta Indian Tribes of Texas v. Comstock Oil & Gas Inc.*, 535 U.S. 971, 122 S. Ct. 1438, 152 L. Ed. 2d 382 (2002); *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (holding suits for prospective injunctive relief are permissible against Indian tribal officers and do not violate tribal sovereign immunity). Because this declaratory judgment action seeks equitable relief and not damages, we conclude the case may go forward without dismissal on sovereign immunity grounds even after the Tribe is joined as an indispensable party.

C. Justiciable Controversy. The Bear defendants next assert the district court erred by concluding the plaintiffs "have not failed to state claims upon which relief can be granted."

> 'Since the advent of notice pleading under Iowa Rule of Civil Procedure 69(a), it is a rare case which will not survive a [motion to dismiss]. As a result, disposition of unmeritorious claims in advance of trial must now ordinarily be accomplished by other pretrial procedures which permit narrowing of the issues and piercing of the bare allegations contained in the petition.'

Rieff v. Evans, 630 N.W.2d 278, 292 (Iowa 2001) (quoting *Am. Nat'l Bank v. Sivers*, 387 N.W.2d 138, 140 (Iowa 1986)). Therefore, very little is required in a petition to survive a motion to dismiss on the failure to state a claim ground. *Id.* at 292. One is not required to plead ultimate facts that support the elements of the claimed cause of action. But facts sufficient to apprise the defendant of the

incident must be included in the petition in order to provide "fair notice" of the claim asserted. *Id.* A motion to dismiss is properly granted only if a plaintiff's petition "on its face shows no right of recovery under any state of facts." *Schaffer v. Frank Moyer Constr., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997). The petition is assessed in the light most favorable to the plaintiff, and all doubts and ambiguities are resolved in plaintiff's favor. *Below v. Skarr*, 569 N.W.2d 510, 511 (Iowa 1997); *Treimer v. Lett*, 587 N.W.2d 622, 625 (Iowa Ct. App. 1998). Wasker requests equitable relief upon agreements alleged in the petition that the Bear defendants have in some manner sought to dishonor or invalidate. Declaring the rights of parties under contractual agreements is a proper avenue of relief in an equitable declaratory judgment action. *See IMT Ins. Co. v. Crestmoor Golf Club*, 702 N.W.2d 492, 495-96 (Iowa 2005). Therefore, we affirm denial of the motion to dismiss on this ground.

D. The Jurisdictional Question. The Bear defendants' pre-answer motion challenging subject matter jurisdiction relies on facts outside of the pleadings. To resolve the jurisdictional issue, the district court was required to look beyond the pleadings, as:

> Where there is a conflict between the parties as to the existence of a jurisdictional fact, the court should not decide the question on affidavits, even with the consent of the parties; in such case the dispute should be determined by the taking of evidence, either at a hearing on that issue or at the trial of the case.

Tigges v. City of Ames, 356 N.W.2d 503, 511 (Iowa 1984) (citing 21 C.J.S. *Courts* § 112 (1940)). Where the facts pertinent to the determinative issue in a motion to dismiss are disputed, the case usually cannot be resolved on such a motion. *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810 (Iowa 2002).

When the district court was presented with the jurisdictional challenge, it appears to have allowed the parties an opportunity to develop the record and submit evidence outside of the pleadings. *See Hayden v. Ameristar Casino Council Bluffs, Inc.*, 641 N.W.2d 723, 724 (Iowa 2002) (reversing and remanding with instructions for evidentiary development on a jurisdictional issue involving a mixed question of law and fact contested by the parties); *Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308, 311 (Iowa 1982) (adopting the notion that in motions to dismiss where matters outside the pleadings are relied upon in support of the motion, the proper procedure is to treat the motion as one for summary judgment). However, the only evidence submitted by the Bear defendants was three affidavits from counsel or others regarding matters not directly relevant to the jurisdictional issue. At least one of the affidavits, sworn by tribal Executive Director Larry Lasley the month following the motion hearing,[1] simply attests to the formation and jurisdiction of the tribal court. Another affidavit filed after submission of the motion was sworn by trial counsel, Steven Olson, merely presenting evidence of media coverage of the tribal dispute in 2003. None of the affidavits appear to have any direct bearing on the agreements at issue in this case. Indeed, no copies of the agreements, or other evidence of their contents or attempts to dishonor the same, appear to be in the record for consideration of the motion to dismiss. As many of the crucial underlying facts of the plaintiffs' claims remain unknown on this scant record, we

[1] We question the timeliness of the Bear defendants' affidavits, as they were filed after submission of the motion upon hearing. Although our court rules ordinarily require attachment of all supporting affidavits in such a motion, *see* Iowa R. Civ. P. 1.981, Wasker appears not to have objected to the submissions, which were accepted by the district court.

cannot say that the district court erred by denying the motion to dismiss for lack of subject matter jurisdiction.

We next address the Bear defendants' assertion that the proper jurisdiction is with the tribal court. The district court concluded the state court had jurisdiction because, "the Meskwaki Tribal Court was not established until after the commencement of these proceedings; Plaintiffs could not have exhausted use of the tribal court for their remedy because the tribal court did not exist when the claims were brought." We agree. *See National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 856 n. 21, 105 S. Ct. 2447, 2454 n. 21, 85 L. Ed. 2d 818 (1985) (holding exhaustion would not be required where it would be "futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction."); *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622-24 (8th Cir. 1997) (holding that a litigant need not exhaust tribal remedies when no functioning court existed at the time of filing the original complaint because exhaustion would have been futile and would have violated principles of judicial economy, and as a matter of law, a plaintiff who files a timely claim in an existing forum is not required to exhaust tribal remedies at a later time when a tribal court comes into existence). We affirm denial of the motion to dismiss for want of jurisdiction based upon the futility of attempting to try an issue in a non-existent tribal court.

The district court also found, "the infringement doctrine on which Defendant's rely is inapplicable in these proceedings because, as Plaintiffs argue, the relief sought in this matter is equitable and sounds in contract and does not interfere with tribal sovereignty and self-government." We affirm the

district court on the scant record before us. However, because the Tribe was not joined as an indispensable party, we make no determination as to the merits of the infringement claim should it be reasserted.

E. Conclusion. We conclude the Tribe must be joined as an indispensable party because plaintiffs seek relief necessarily affecting the Tribe. Once the Tribe is joined, the case may proceed in district court, as sovereign immunity is not a defense in this equitable cause of action for declaratory judgment. We affirm the denial of the motion to dismiss based upon failure to state a claim as the petition alleges a substantive justiciable controversy. The district court also properly denied dismissal for lack of subject matter jurisdiction as to prosecution in tribal court, as no such court existed when this action was initiated. Finally, we affirm denial of dismissal based upon infringement because the early posture of this case and minimal record do not conclusively support the allegation that the plaintiffs' claims would infringe upon tribal self-governance without joinder of the Tribe.

Therefore, on this interlocutory appeal, we affirm the district court's denial of the Bear defendants' motion to dismiss and remand to the district court for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

Zimmer, J., concurs; Vaitheswaran, J., concurs in part and dissents in part.

VAITHESWARAN, J. (concurring in part and dissenting in part)

I concur in the majority's conclusion that the Tribe is an indispensable party and the case should be remanded to add the Tribe as a party. *Francksen v. Miller*, 297 N.W.2d 375, 378 (Iowa 1980); *Ditch v. Hess*, 212 N.W.2d 442, 450 (Iowa 1973). I dissent from the majority's decision to decide the sovereign immunity question. I believe that is a question that should be decided only after the Tribe is added and only if the Tribe raises it as a basis for dismissal.