CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS

BANK OF HOVEN now known as PLAINS COMMERCE BANK v. LONG FAMILY LAND AND CATTLE COMPANY, INC., et al.

Nos. 03-002-A and R-120-99 (Nov. 22, 2004)

Summary

The Cheyenne River Sioux Tribal Court of Appeals affirms the trial court and the jury's award in an action relating to land within the exterior boundaries of the Cheyenne River Sioux Reservation.

Full Text

Before POMMERSHEIM, Chief Justice; DUPRIS and LEE, Justices

PER CURIAM

Memorandum Opinion and Order

1. Introduction and Background

The facts in this case involve a series of complex commercial interactions between Ronnie and Lila Long, the Long Family Land and Cattle Company, Inc., Plaintiffs/Respondents/Appellants (Longs), and Plains Commerce Bank (formerly Bank of Hoven), Defendant/Appellant/Respondent (Bank), dating back to 1989. Kenneth Long was a non-tribal member whose first wife, Maxine Long, was a member of the Cheyenne River Sioux Tribe. Kenneth and Maxine owned approximately 2,230 acres of Dewey County real estate in fee simple as well as a house in Timber Lake. All of this real estate is located within the exterior boundaries of the Cheyenne River Sioux Reservation. All of this real estate was mortgaged to the Bank for loans to the Long Family Land and Cattle Company, Inc.

Upon the death of Maxine, Kenneth became the sole owner of the real estate in Dewey County. At the time of Kenneth's death on July 17, 1995, Mr. Long and the Long Family Land and Cattle Company owed the Bank approximately $750,000. Mr. Long's estate acting through Paulette Long, Kenneth's second wife and personal representative of the estate, conveyed the Dewey County real estate, as well as the house in Timber Lake, to the Bank in lieu of foreclosure. As a result of this conveyance on December 5, 1996, the Long Family Land and Cattle Company was given credit for $478,000 on its outstanding debt to the Bank.

Ronnie Long is a member of the Cheyenne River Sioux Tribe and is the son of Kenneth Long. Upon his father's death, Ronnie inherited Kenneth's interest in the 2,250 acres of land in Dewey County on the Cheyenne River Sioux Reservation as well as his father's 49% interest in the Long Family Land and Cattle Company, Inc. The other 51% of the Company is owned by Ronnie and his wife Lila, who is also a member of the Cheyenne River Sioux Tribe. The Company has always been an Indian controlled company.

After Kenneth Long's death, employees of the Bank came to the Longs' land on the Cheyenne River Sioux Reservation to inspect it as well as the cattle, hay and machinery on the land. In addition, Bank officers met several times with the Longs, officials of the Cheyenne River Sioux Tribe, and Bureau of Indian Affairs employees. These meetings all took place on the Cheyenne River Sioux Reservation. All of these activities were directed to establishing a basis from which the Bank would provide new loans to Ronnie Long and the Long Family Land and Cattle Company, Inc. for their ranching operation on this land.

The Bank initially proposed that it would sell the land back to the Longs (which was conveyed to the Bank by the Long Estate) via a 20-year contract for deed. Upon the advice of counsel, in a letter to Ronnie Long dated April 20, 1996, the Bank withdrew this offer because of "possible jurisdictional problems." (Exhibit 4.) The revised proposal of the Bank offered the Longs only a two-year lease and option within which to purchase and pay for the land in full.

The Lease with Option to Purchase included a purchase price of $478,000 for the land. The other features of the lease provided that annual Crop Reserve Program (CRP) payments to the Longs were assigned to the Bank and the right of the Longs to exercise their option to purchase for $478,000 at the conclusion of the lease period. Another document captioned "Loan Agreement" was signed by both the Bank and the Longs. It recited a series of debits and credits of the Longs to the Bank, and also stated that the Bank would request that the BIA increase the loan guarantee to 90% of note # 98181, that the Bank would make an operating loan to the Longs in the amount of $70,000. The Bank also agreed to make another loan of $53,000 to pay off note # 98809 of $17,000 with the balance of $37,000 to be used to purchase 110 cattle. Both the Lease with Option to Purchase and the Loan Agreement were signed by the Bank and the Longs on December 5, 1996.

Shortly thereafter, mother nature intervened with a vengeance during the horrific winter of 1996-97. As a result of the failure to provide the $70,000 loan and the implacable force of the brutal winter, the Longs lost 230 cows, 277 yearlings, and 8 horses. The Bank did provide some additional loans that were quite modest. The Longs never recovered from these financial and weather-related blows and were unable to meet their outstanding debt to the Bank and were not able to exercise their option to purchase.

The Longs did not remove from the property in question at the expiration of the lease. The Bank began (state) eviction proceedings by sending a notice to quit to the Cheyenne River Sioux Tribal Court for service on the Longs. Service was apparently never effectuated. There was never any hearing or ruling by the state court. Without any order of eviction and with the Longs remaining in possession of the land, the Bank nevertheless sold the land. On March 17, 1999, the Bank sold 320 acres to Ralph Pesicka for cash and on June 29, 1999, the Bank sold the remaining 1,905 acres to Edward and May Jo Mackjewski on a contract for deed. None of these purchasers are members of the Cheyenne River Sioux Tribe.

The Longs then commenced an action in the Cheyenne River Sioux Tribal Court seeking a restraining order preventing the Bank from selling the real estate. The Bank's motion to dismiss for lack of subject matter jurisdiction was denied as was the Long's motion for a restraining order against the Bank. The Longs subsequently amended their complaint to include several causes of action against the Bank that sought damages and other relief. The Bank counterclaimed seeking eviction of the Longs and damages. The Longs requested a jury trial on their claims. The Bank did not seek a jury trial on its counterclaim.

A two-day jury trial was held on December 6 and 11, 2002. At the close of the Plaintiffs' case, Special Judge B.J. Jones dismissed Plaintiffs' claims that sought to void the contract, alleged fraud, failure of consideration, and unconscionability. The jury returned a verdict in favor of the Longs on their claims that the Bank breached the loan agreement, discriminated against the Longs based on their status as Indians, and acted in bad faith with regard to its dealings with the Longs. The jury awarded the Longs $750,000 along with pre-judgment interest. Special Judge B.J. Jones determined that interest to be $123,131. The jury also found that the Bank did not use self-help remedies in an attempt to remove Plaintiffs from the land. A supplemental judgment was later entered permitting the Plaintiffs to exercise the option to purchase the 960 acres of the land they continued to occupy.

Both sides filed timely notices of appeal with this Court. Oral argument was heard on October 6, 2004.

II. Issues

This appeal involves seven (7) issues raised by the Defendant/Appellant/Respondent and two (2) issues of the Plaintiffs/Respondents/Appellants. They are:

A. Defendant/Appellant/Respondent

1. Whether the Cheyenne River Sioux Tribal Court lacked subject matter jurisdiction for a claim of discrimination against an off-reservation bank.

2. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on the Plaintiffs' breach of contract claim.

3. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on Plaintiffs' separate cause of action based on bad faith.

4. Whether the trial court erred in failing to grant Defendant's motion for a judgment N.O.V. in that the damages awarded by the jury were excessive and controlled by passion.

5. Whether the trial court erred in not granting Defendant's cause of action for eviction against the Plaintiffs.

6. Whether the trial court erred in granting Plaintiffs' motion to exercise its option to purchase some of the real estate sold to Edward and Mary Jo Mackjewski under a contract for deed.

7. Whether the trial court erred in allowing pre-judgment interest on certain damages absent specific instructions to the jury.

B. Plaintiffs/Appellees/Respondents Longs and Long Ranch and Cattle Company, Inc.

1. Whether the trial court erred in its calculation of prejudgment interest.

2. Whether the trial court erred in permitting the Plaintiffs to exercise their option to purchase with regard to only part, rather than all, of the land described in the option to purchase.

Each issue will be discussed in turn.

III. Discussion

A. Defendant/Appellant/Respondent Bank

1. Jurisdiction

The Bank's jurisdictional claim is quite limited in scope and is best understood as involving two separate (but overlapping) legal contentions. As to scope, the Bank argues that the Cheyenne River Sioux Tribal Court does not have jurisdiction over the Longs' discrimination claim. Bank's brief at 6-9. This presumably forecloses any federal appeal under the exhaustion doctrine of any other issue involved in this case save the jurisdiction claim relative to the discrimination cause of action. *See, e.g., National Farmers Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 [12 Indian L. Rep. 1035] (1985). The Bank's two legal arguments, while not drawn as sharply as they might be, assert that the trial court did not have jurisdiction over the discrimination claim because it is a *federal* claim barred under *Nevada v. Hicks*, 533 U.S. 353 [28 Indian L. Rep. 1031] (2002), and because no discrimination cause of action exists as a matter of Cheyenne River Sioux tribal law. Each of these will be discussed in turn concluding with the pertinent jurisdictional analysis under *Montana v. U.S.*, 450 U.S. 544 [8 Indian L. Rep. 1005] (1981).

a) *Nevada v. Hicks* and Federal Causes of Action

The Bank alleges that Cheyenne River Sioux Tribal Court did not have subject matter jurisdiction over Plaintiffs' discrimination claim against the Bank. It is critical to note that the Bank does not challenge (on appeal) the general jurisdiction of the Cheyenne River Sioux Tribal Court over the lawsuit brought by the Longs against the Bank, but only against a single cause of action. Appellant's argument centers its claim on its reading of *Nevada v. Hicks*, 533 U.S. 353 (2002). More precisely, the Bank relies on *Hicks* for the limited proposition that tribal courts do not have jurisdiction over federal causes of action. Appellant's interpretation of *Nevada v. Hicks* in this regard is not incorrect, but it is inapposite. The Court in *Hicks* did hold that tribal courts do not have jurisdiction over a *federal* cause of action alleged under 42 U.S.C. § 1983.[1] The Bank argues by extension that tribal courts would have no jurisdiction over a discrimination claim grounded in 42 U.S.C. § 1981(c). This is likely true, but misses the point. The Plaintiffs discrimination claim is based on a cause of action grounded in tribal, not federal, law.

Plaintiffs' amended complaint did not invoke 42 U.S.C. § 1981 or any federal statute as the source of the discrimination claim and the Bank did not seek to question the source of law for this claim through a motion to dismiss for failure to state a claim on which relief might be granted. In addition, there were no jury instructions provided to the jury on an alleged *federal* cause of action for discrimination. In fact, the Court in the *Hicks* case itself noted that *tribal* law is often a "complex 'mix of tribal codes and federal, state, and traditional law.'" 533 U.S. at 384-85.

In addition, the Court in *Hicks* concluded:

> that tribal authority to regulate *state officers* in executing process related to the violation, off reservation, of state [criminal] laws is not essential to tribal self-government or internal relations.[2]

The case at bar is not a criminal case, does not involve state officers, and did not take place off the Reservation. It is therefore totally inapplicable as to causes of action arising on the Reservation involving private individuals. The *Hicks* opinion limited its holding "to the question of tribal court jurisdiction over state officers" leaving "open the question of tribal court jurisdiction and non-member defendants in general." 533 U.S. 358 n.2.

b) Discrimination Causes of Action Under Tribal Law

Notwithstanding its citation to *Nevada v. Hicks*, the Bank's claim is not really that the Tribal Court does not have subject matter jurisdiction over the discrimination claim, but rather there is no such cause of action under tribal law. In essence, the Bank is claiming that the Longs' discrimination claim should have been dismissed not for lack of jurisdiction, but for a failure to state a claim upon which relief might be granted. This is especially evident in that the Bank's motion to dismiss was not directed to all of the Plaintiffs' claims, but was limited to the discrimination cause of action premised on the (erroneous) theory that it was being pursued as a federal cause of action under 42 U.S.C. § 1981. This more precise claim is also insufficient as a matter of law.

Private claims of discrimination based on status are recognized under federal and state statutes. *See, e.g.*, 42 U.S.C. § 2000 (d), *et seq.* (2003), SDCL § 20-13-21 (2003). They are also recognized under the traditional (or common) law of the Cheyenne River Sioux Tribe.[3] While there is no express tribal ordinance

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[1]The Court's rationale for this holding that there was no congressional delegation of such authority to tribal courts remains unconvincing in light of Justice Stevens' observation that there is no congressional delegation to state courts yet it is unquestioned that state courts have 42 U.S.C. § 1983 jurisdiction. *See Nevada v. Hicks*, 533 U.S. at 402-03 (2002) (STEVENS, J. dissenting).

[2]*Nevada v. Hicks*, 533 U.S. at 364 (2002) (emphasis added).

[3]Discrimination is prohibited under tribal customary law in much the same way that other injurious or tortious conduct is prohibited under the common law. While it is true that discrimination is frequently the subject of legislation, it is also actionable under the common law. The Supreme Court has long recognized that "an action brought for compensation by a victim of ... discrimination is, in effect, a tort action." *Meyer v. Holley*, 537 U.S. 280, 285, 123 S. Ct. 824, 828 (2003) (citing *Curtis v. Loether*, 415 U.S. 189, 94 S. Ct. 1005 (1974)). In *Curtis*, the

creating a civil cause of action based on discrimination, there are nevertheless at least two other sources of tribal law that do recognize such a cause of action. They are tribal common law and the Cheyenne River Sioux Law and Order Code § 1-4-3 which confers jurisdiction on the trial court over claims arising out of "tortious conduct."

Since it is well understood that a claim based on discrimination essentially sounds in tort, jurisdiction over "tortious conduct" necessarily includes jurisdiction over Plaintiffs' discrimination claim.[4] In addition, there is basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play and decency to others," *Miner v. Banley*, Chy. R. Sx. Tr. Ct. App., No. 94-003A, Mem. Op. and Order at 6 [22 Indian L. Rep. 6044] (Feb. 3, 1995); and "the Lakota custom of fairness and respect for individual dignity." *Thompson v. Cheyenne River Sioux Tribal Board of Police Commissioners*, 23 Indian L. Rep. 6045, 6048 Chey. R. Sx. Tr. Ct. App. (1996). Such notions of fair play are core ingredients in federal and state definitions of discrimination. Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Chey- enne River Sioux Tribal Code, as derived from tribal tradition and custom, or even from the federal ingredients defined at 42 U. S.C. §§ 2000-2001.[5]

The core of the Longs' discrimination claim was based on the Bank's letter to the Longs dated April 26, 1996, (Exhibit 4, TR 106-07, 330), in which the Bank withdrew its offer to sell the land back to Longs on a 20-year contract for deed because it involved an "Indian owned entity" and related (but unidentified) "jurisdictional problems." The Bank's subsequent offer as contained in the lease with option to purchase required *full* payment within 60 days of the expiration of the two-year lease. (Exhibit 7.) It is also significant to recall that the land involved is fee land not trust land. While trust land does involve certain federal restrictions on alienability, fee land does not. The Longs contended that this adverse and differential treatment of them was based on their status as "Indians" and constituted discrimination, a question that was ultimately resolved in their favor by the jury verdict.

It is a testament to the vitality and dignity of American jurisprudence that it would most certainly shock the conscience if a claim of discrimination—especially one based on the disparity of treatment on account or race or status—would not be cognizable in state or federal court. In this vein, the Cheyenne River Sioux Tribal Court is no different from its federal and state brethren in its unwillingness to ignore claims of discrimination. In the area of discrimination, there is a direct and laudable convergence of federal, state, and tribal concern.

c) Jurisdiction under *Montana v. United States*

Since there is a discrimination cause of action under tribal law involving fee land, the most relevant case for jurisdictional purposes therefore is not *Nevada v. Hicks* but *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Court held that tribal courts generally do not have jurisdiction over non- Indians involving matters that arise on fee land within the reservation. This presumption against tribal court jurisdiction is nevertheless subject to *Montana*'s well-known proviso which states: "to be sure, Indian tribes retain sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. 565-66 (citations omitted).

It is clear that the case at bar satisfies both prongs. This case is the prototype for a consensual agreement as it involves a signed contract between a tribal member and a non-Indian bank. The contract deals solely with fee land located wholly within the exterior boundaries of the reservation. Fee land that was originally owned by the Longs, but owned by the Bank during the controverted events in this lawsuit. All bank loans in this matter were provided solely for the ranching operation by the Longs taking place on the Bank's land within the reservation. Numerous meetings of the Bank with the Longs, with Cheyenne River Sioux tribal officials, and Bureau of Indian Affairs personnel took place on the reservation, both when the land was owned by the Longs and subsequently when it was owned by the Bank.

It is somewhat misleading for the Bank to identify itself as an *off* reservation Bank, because it *owned* the land *on* the Reservation that is the subject of this lawsuit. As a result, the Bank is more accurately described as owning property and engaged in business activities *both* on and off the Reservation.

In addition, the case clearly involves the "economic security" of the Tribe in that the Cheyenne River Sioux Tribe (along with the Bureau of Indian Affairs) was a direct participant actively consulted by both the Longs and the Bank seeking economic data and support relevant to the cattle operation on the Longs' land. If the economic security of the Tribe was not involved, the Tribe would not have played such a large role in these events in seeking to support and advance the opportunity for tribal members to succeed in their ranching operation on the Reservation.

2. Breach of Contract Cause of Action

Appellant Bank asserts that the Longs' breach of contract claim was improperly submitted to the jury or if properly submitted to the jury, improperly decided by it because no contract existed as a matter of law or fact. In particular, the Bank contends that the key document captioned "Loan Agreement" which was prepared by the Bank and signed by both the Bank and the Longs on December 5, 1996 and recites, among other things, the Bank's commitment to provide two loans to the Long Land and Cattle Company, Inc. was not a contract at all. It was merely some kind of balance sheet that mainly recited a list of debts and credits relative to the real estate conveyed by the Long Estate to the Bank. In essence, according to the Bank, there was no consideration and hence no contract.

In the Bank's motion for judgment N.O.V. on this issue, Judge B.J. Jones decided against the Bank finding there was sufficient

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Court held that a claim for damages under the Civil Rights Act of 1968 "sounds basically in tort" and "is analogous to a number of tort actions recognized at common law." 415 U.S. 189, 195-196, 94 S. Ct. 1005, 1008-1009. The Court noted that, "[a]n action to redress racial discrimination may be likened to an action for defamation or intentional infliction of mental distress," and further that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." 415 U.S. at 195-196, n.10, 94 S. Ct. at 1008-1009, n.10. These are precisely the kinds of actions over which the tribal courts have jurisdiction. Under tribal law, the courts "have jurisdiction over claims and disputes arising on the reservation." CRST By-Laws, Art. V, § I(c), including claims arising out of "tortious conduct." Cheyenne River Sioux Tribal Code § 1-4-3. Cheyenne River Sioux Tribe's Amicus Brief at 14, footnote 3.

[4]One kind of classical tort is the harm that results from the differential and invidious treatment of one individual by another individual or entity.

[5]Note this last theory is *not* the pursuit of a *federal* cause of action in tribal court like the 42 U.S.C. § 1983 claim in *Nevada v. Hicks*, but that of a "borrowing" of federal law to stand in or amplify tribal law where it is necessary. *See, e.g.*, Cheyenne River Sioux Tribal Law and Order Code, Title VII Rule I(d).

consideration when the "Loan Agreement" is considered as part of the Lease with Option to Purchase under the integrated document doctrine. These documents were contemporaneous, applied to the same subject matter, and were interrelated as to terms. *See Battey Steamship Co. v. Refineria Panama, S.A.*, 513 F.2d 735, 738 n.3 (2d Cir. 1975). Judge Jones had already adopted the integrated document doctrine in denying the Defendant's motion for summary judgment on its counterclaim for eviction and it appropriately became the law of the case. This Court now adopts the substance of this rule as appropriate law within this jurisdiction. In this view, it is reasonable to construe the Loan Agreement along with the Lease with Option to Purchase and find sufficient consideration provided by the Longs in their commitment to assign their CRP payments to the Bank and their commitment to continue the operation of their ranch in an attempt to pay off their debts to the Bank without the Bank having to resort to legal action and the less than complete loan guarantees provided by the BIA.

The analysis set out by Judge Jones in his well-reasoned opinion of June 7, 2003 is persuasive. As noted above, there certainly was enough evidence submitted to the jury for it to have found adequate consideration. In reviewing a jury's determination on a motion for a judgment N.O.V., the South Dakota Supreme Court has established a reasonable standard of review, which this Court adopts. This standard directs the reviewing court to review the testimony and evidence in a light most favorable to the verdict or nonmoving party and then to decide without weighing the evidence if there is evidence which did support the verdict. *Matter of Estate of Holan*, 621 N.W.2d 588, 591 (S.D. 2000).

In sum, the application of the integrated documents doctrine is an appropriate legal standard within this jurisdiction. In addition, its legal elements of contemporaneity, similar subject matter, and interrelatedness of terms were also satisfied as a matter of law and there was a sufficient factual basis for the jury to find there was adequate consideration for a contract, and the Bank's failure to perform breached this contract.

3. Bad Faith Cause of Action

In a similar vein to the breach of contract claim, the Bank makes two contentions. First, that such a cause of action does not exist as a matter of law because it is subsumed in the breach of contract claim and second, even if such an independent cause of action does exist, there was insufficient evidence submitted to the jury to sustain a verdict upholding such a bad faith claim.

The question of law concerning a bad faith cause of action involves an issue of first impression within this jurisdiction. The trial court ruled that such a cause of action does exist within this jurisdiction and that it is one that is independent of any breach of contract claim. More precisely, it might be stated that the trial court ruled that the bad faith claim *derives from* but is *severable* and hence independent of the breach of contract claim. As Judge Jones stated in his order of June 7, 2003 on the post-trial motions, the heart of the breach of contract claim was the failure to *provide* the $70,000 loan, while the heart of the bad faith claim was the Bank's failure to follow through with its promise to seek an increase in the level of the BIA guarantee for several outstanding loans.

This statement of the governing law is reasonable and appropriate. While it appears that no other tribal court has addressed this issue, it is true that the rule articulated by the trial court is within the ambit of both South Dakota Law, *see, e.g., Garrett v. Bank West, Inc.*, 459 N.W.2d 833 (S.D. 1990), and the general rule as articulated in the *Restatement 2d of Contracts* § 204 (1990) that every contract includes an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed upon benefits of the contract.

The Bank's challenge to the sufficiency of the evidence in this issue is likewise rejected. Given the standard of review articulated in Part IIIA2 at p. 11 [6003-6004], clearly there was sufficient evidence in the record concerning the Bank's failure to respond to the BIA's request for a more detailed application relative to potential increased loan guarantees from which the jury might conclude that the Bank acted in bad faith.

4. Excessive Damages Controlled by Passion or Prejudice

The jury awarded damages to the Plaintiffs in the amount of $750,000. The Bank claims this was "excessive and controlled by passion and prejudice." (Bank's brief at 16.) This conclusion remains just that, a conclusion unsupported by reason or law. Plaintiffs sought damages in the amount of $1,236,792 (Exhibit 23) and thus the award of $750,000 represents an award of only 60% of the amount requested. The trial judge also sustained a number of objections made by the Bank to the Plaintiffs' claimed damages and Exhibit 23 was changed accordingly. The Bank did not object, stating, "I have no objections with these changes," TR 308, and therefore the Bank waived any subsequent right to appeal. The absence of "prejudice" is also further evidenced by the jury's rejection of the Longs' claim of improper self-help eviction by the Bank.

The Plaintiffs provided extensive evidentiary data and testimony relative to their damages. The Bank had the same opportunity. Given the appropriate standard of review in challenging a jury finding of fact as noted above, this Court cannot conclude that the jury award in this context lacked a sufficient factual predicate, even disregarding the Bank's waiver of this issue.

Ordinarily, this would conclude the Court's analysis of this otherwise legitimate issue, but for the Bank's decision to characterize the entire trial as "tainted":

> Once a claim for discrimination was allowed to be tried to the jury, where no one but tribal members could serve, the Bank could no longer obtain a fair trial. Allegations of racial discrimination by a nonmember Bank located off the reservation *completely enflamed the jury*. They became incapable of rendering a fair and impartial verdict. The *race card tainted* the entire trial process. (emphasis added) (Bank's brief at 23).

This rhetoric is itself inflammatory. At oral argument, counsel for the Bank admitted that he did not challenge any juror for cause, did not challenge the jury panel as a whole because it did not contain any non-tribal members, and perhaps most importantly, he did *not* request that the trial court use its discretionary power under Sec. 1-6-1(2) of the Tribal Code to "adopt procedures whereby non-enrolled Indians and non-Indians may be summoned for jury duty in cases in which one or more non-Indian parties are involved."

The Bank, apparently excusing its own ('benign') neglect of the issue at the trial, then twists it (somehow) to contend that the very existence of a discrimination cause of action was playing the 'race card.' The Bank's apparent 'solution' to this 'problem' is that claims of discrimination against non-resident Banks should not exist as a matter of tribal law. This asserts a rather extravagant privilege for the Bank that is presumably not available to others, especially tribal members and the Tribe itself. Whether intended or not, this is the Bank playing its own 'race card,' which at a minimum is quite baffling and potentially quite disturbing in the context of seeking to maintain a fair and reasonable legal context for the necessary commercial transactions involving individual tribal ranchers and business people and the banking establishment. Both tribal members and the Bank need each other and it is quite disheartening to have the Bank interject the potentially destabilizing 'race card' into these proceedings.

5. Eviction

The trial court dismissed the Bank's counterclaim for forcible entry and detainer against the Longs. The counterclaim was not tried to the jury as neither party requested it. The trial court rendered its decision after the jury verdict. It reasoned that based

on its own previous decision that the loan agreement and the lease with option to purchase formed an integrated document and the jury's verdict that the Bank breached the contract, it could not render a favorable decision to the Bank on its counterclaim for eviction. The court's reasoning was that the jury finding that the Bank breached the contract (including the lease) effectively precluded any finding that Longs had breached the lease or otherwise improperly held over and were subject to eviction.

In addition, the Bank made no attempt to comply with the Tribal Law and Order Code provisions for recovering the possession of real property set out in §§ 10-2-1—10-2-8. Section 10-2-6 (6) specifically provides that when a tenant has held over for more than sixty days without any notice to quit by the landlord, the tenant shall have the right to remain in possession for a full year after the lease termination date. The lease between the Bank and the Longs ran from December 5, 1996 to December 6, 1998. The Longs held over but no notice to quit was served within the sixty days (i.e. February 5, 1999) and thus the Longs had the right to hold over to December 6, 1999. Indeed, the notice to quit was not served on the Longs until June 16, 1999. (Exhibit 20.) The notice to quit described the Longs as still in possession of the entire 2,230 acres. Despite the fact that the Longs were legally in possession of this land as a matter of express tribal law during this period, the Bank *sold* the land to two different purchasers in violation of the Longs' right to hold over and exercise their option to purchase under the original lease. (Exhibit 20.) At no time did the Bank ever get an order from the tribal court removing the Longs from the land. (TR 370.)

6. Option to Purchase

The trial court granted partial relief to the Longs on this issue when it ruled that the Longs would be permitted to exercise their option to purchase the 960 acres they were currently occupying but not the 960 acres that were sold to the Maciejewskis and the 320 acres sold to the Pesickas. The Bank asserts that the trial court in essence ordered (partial) specific performance be granted against the Bank, but that such a remedy was never sought by the Longs and that such a remedy is equitable in nature and not available in a breach of contract action which is 'action at law' that does not authorize equitable relief. These statements constitute legal observations of a quite general kind and are not part of the positive law of the Cheyenne River Sioux Tribe.

In the instant case, the trial court attempted to strike a balance between law and equity and to secure fairness to both sides. The specific performance element involving the option to purchase involved land originally owned by the lessee and lost because of the inability to pay a significant debt to the Bank. The fact that the Longs were seeking to (re)purchase land that had been in their family for generations takes the case outside the realm of the formal law/equity distinction. In addition, Judge Jones was careful not to interfere with the property rights of the Maciejewskis and the Pesickas as good faith purchasers. The balance struck by the trial court is fair, reasonable, and violated no rule of Cheyenne River Sioux tribal law.

7. Pre-Judgment Interest

The Bank objects to the award of pre-judgment interest.[6] Its essential argument—drawn primarily from South Dakota and California law—is that prejudgment interest should only be awarded if the defendant knows or should have known based on reasonably accessible information what the amount owed was. This general observation however does not require a different result. It is routine in the West—including South Dakota—to calculate pre-judgment interest on lost cattle based on their market value at the time of the loss. Deciding the date of loss—if contested—is a factual question to be resolved by the jury. Thus the method of awarding pre-judgment interest in this case conforms to the general practice throughout western parts of the United States.

The Bank's claim is further undermined by the fact that it did not object to special jury interrogatory 6 or jury instruction 10a on the issue of the potential award of interest and it did not propose any special jury interrogatories of its own. Such failure ordinarily precludes raising the issue on appeal. *See, e.g., Alvine v. Mercedes-Benz of North America*, 620 N.W.2d 608 (S.D. 2001). In addition, the trial court adopted and accepted (to the penny) the Bank's proposed interest of $123,131.81 as opposed to the Plaintiffs' proposal of $453,698.

B. Plaintiffs/Respondents/Appellants Issues on Appeal

The Plaintiff Longs raise two issues on appeal and they are the mirror images of the Bank's issues numbers six and seven, namely that trial court erred in not awarding Plaintiffs complete specific performance to (re)purchase all the land involved in the original lease and option to purchase and the trial court erred in its calculation of pre-judgment interest to be awarded. Each issue will be discussed in turn.

1. Option to Purchase

The Longs contend that the trial court erred in its failure to permit the Longs to exercise its option to purchase all of their 2,225 acres rather than just 960 acres on which they effectively heldover. The Bank had already sold 320 acres to Pesickas and 960 acres to Maciejewskis and Judge Jones decided the option to purchase would *not* apply to these parcels.

In Judge Jones' supplemental judgment of February 18, 2003, he expressly stated:

> The court first notes that the tribal jury returned a verdict for the Bank and against the Plaintiffs on the Plaintiffs' claim that the Bank violated tribal law against self- help remedies when it sold certain parcels of the land the Plaintiffs had an option to purchase. The Court construes this to mean that the jury found that the sale of the land to the other parties was not done in violation of tribal law and the other defendants [i.e. the Pesickas and Maciejew skis] were good faith purchasers.

Counsel for the Longs does not state what the appropriate standard of review is and more directly, why this legal determination of Judge Jones is wrong as a matter of tribal law.[7] Under these circumstances, Judge Jones' decision violated no rule of tribal law and balanced the equities in a most reasonable and fair manner.

2. Pre-Judgment Interest

The Longs contend that while the trial court was correct in submitting the question of whether to award pre-judgment interest to the jury (which answered in the affirmative), the trial judge erred in his calculations of the amount of pre-judgment interest to be awarded. The core of the Longs claim on this issue is that the trial judge should have adopted the South Dakota statute, SDCL 21-1-13.1, which sets a rate of 10% for pre-judgment interest. Working from this assertion, plaintiffs' counsel does what he regards as the necessary mathematical calculations and arrives at the figure of $453,698. (Respondents-Appellants brief at 9.)

There are several shortcomings in this line of argument. Counsel for the Longs does not identify what the appropriate standard

[6]Pre-judgment interest is neither directly authorized nor prohibited by the Tribal Code. This might be an area where direct legislative guidance by the Cheyenne River Sioux Tribal Council would be beneficial, especially as to the rate of interest and the means of calculation of such interest.

[7]The discussion of Cheyenne River Sioux Tribe Law and Order Code Sec. 10-1-5 is inappropriate as it deals with the proposed sale of foreclosed property which is not involved in this lawsuit.

of review is and whether the trial judge's mistake was one of law and/or fact. There can be no mistake of law because there is no express rate of interest specified in the tribal code and therefore any (reasonable) rate of pre-judgment interest would be an appropriate legal standard.[8] Judge Jones required that counsel for both parties submit proposals to him. Then Judge Jones accepted the Bank's proposal of pre-judgment interest in the amount of $123,131.81 based on a rate of 8.5%, the rate of interest identified in the lease with option to purchase to be charged the Longs if they exercised their option to purchase.

In addition to different rates of interest, the proposals of both parties used slightly different mathematical models of calculation based on the varying assessments as to the time of loss, value at the time of loss, and whether interest would be simple or compound. While these differences in approach lead to quite different final calculations, there is no demonstration by the Longs that these figures are clearly erroneous or arbitrary and capricious and therefore the amount of pre-judgment interest awarded by Judge Jones is affirmed.

Unfortunately, a final concern must be addressed. In his concluding summation to this Court, counsel for the Bank stated that a lot of banks and lenders were watching this case. While it seemed jarring and inappropriate at the time, it is even more so upon reflection. It is difficult to see the statement as merely some form of artless advocacy, but rather more as some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system, which this Court finds most offensive and unprofessional. Such statements must not be made again. Though it hardly needs repeating, the Court restates its commitment to fair play, the rule of law, and cultural respect for *all* parties who appear in the courts of the Cheyenne River Sioux Tribe.

IV. Conclusion

For all the reasons above stated, the decision of the trial court is affirmed on all issues.

Ho Hec'etu Ye Lo

It is so Ordered.