Carls v. Blue Lake Housing Authority
Cal.App. 3 Dist.,2007.
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Court of Appeal, Third District, California.
Rita J. CARLS et al., Plaintiffs and Appellants,
v.
BLUE LAKE HOUSING AUTHORITY, Defendant and Respondent.
No. C052660.
(Super.Ct.No. PC20050114).

July 17, 2007.

John C. Miller Jr., Miller Law, Inc., Folsom, CA, for Plaintiffs and Appellants.
Michael J. Levangie, Prout-LeVangie, Sacramento, CA, for Defendant and Respondent.
CANTIL-SAKAUYE, J.

Plaintiffs appeal the trial court's orders granting the two motions to quash (Code Civ. Proc., § 418.10, subd. (a)(1)) brought by Blue Lake Housing Authority (Blue Lake) and by Blue Lake as successor in interest to J & L Properties on the grounds of tribal sovereign immunity.[FN1] Plaintiffs contend the trial court erred in extending tribal sovereign immunity to activities involving a non-tribal construction company constructing non-tribal housing for sale on non-tribal land and by failing to find the sales contract effected an express waiver of any sovereign immunity. We affirm the order granting the motions to quash.

FN1. An order granting a motion to quash service of summons is an appealable order under Code of Civil Procedure section 904.1, subdivision (a)(3).

BACKGROUND

In November 2005, plaintiffs filed a first amended complaint for damages against JTS Communities, J & L Properties doing business as JTS Communities, Blue Lake (together designated "developer defendants" [capitalization omitted]), North Star Plumbing, Daniel Longacre (together designated "inspection defendants" [capitalization omitted]), and The Advantage Group New Home Marketing, Inc. (designated "broker defendant" [capitalization omitted]). The complaint alleged various tort, statutory and contract causes of action arising out of plaintiff Rita Carls's purchase of a home in the Serrano subdivision of El Dorado Hills in El Dorado County. Plaintiffs alleged the home contained construction defects that resulted in water intrusion, which in turn resulted in toxic mold, which defects were concealed, not disclosed on inspection, and not properly repaired upon discovery, causing both property damage, personal injury, and various other losses.

Blue Lake filed two motions to quash, one as a named defendant and one as successor in interest to J & L Properties, alleging it was immune from suit under the doctrine of tribal sovereign immunity. Blue Lake contended it was a tribal business entity entitled to the sovereign immunity extended to the Blue Lake Rancheria Indian tribe citing *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632(*Trudgeon*). Blue Lake's motions were supported by a declaration of Michael Hansen, its chief operations officer.

In his declaration, Hansen stated Blue Lake was "a tribal governmental instrumentality of Blue Lake Rancheria[,]" a federally recognized Indian tribe, that Blue Lake is "an entity organized and operated by [the tribe] to promote the business and economic interests of the Tribe[,]" that Blue Lake "is engaged in the business of building homes[,]" that it is "an arm of the Tribe in that its business endeavors are dictated by the Tribe's five member Charter Development Corporation (CDC) which determines and manages the Tribe's economic activit-

ies[,]" that on June 30, 2004, Blue Lake "acquired the assets and liabilities of J & L properties, which ceased to exist as of that date[,]" that the tribe has "a tribal claims ordinance which governs the filing and adjudication of claims against the Tribe or any of its business enterprises [,]" that Blue Lake "does not consent or agree to jurisdiction" in the state court, and has not, to Hansen's knowledge, waived its sovereign immunity by any act or communication.

Plaintiffs opposed the motions of Blue Lake contending Blue Lake did not have tribal sovereign immunity for the non-tribal acts of its non-tribal predecessor company that developed homes on non-tribal land. Plaintiffs contended Blue Lake was responsible for J & L's liabilities as its successor in interest and such liabilities were properly contested in the superior court. Plaintiffs claimed *Trudgeon, supra,* 71 Cal.App.4th 632 was distinguishable as it dealt with a bingo hall that was constructed by the tribe and located on tribal land. Plaintiffs contended the facts of this case were more akin to those of two out-of-state cases cited by *Trudgeon.*(*Dixon v. Picopa Const. Co.* (1989) 160 Ariz. 251 [772 P.2d 1104](*Dixon*);*Padilla v. Pueblo of Acoma* (1988) 107 N.M. 174 [754 P.2d 845](*Padilla*).) Plaintiffs submitted no evidence in support of their opposition.

The trial court issued a tentative ruling granting Blue Lake's motions to quash. Plaintiffs requested oral argument. Although plaintiffs' written opposition raised no issue of Blue Lake's waiver of tribal immunity, the parties agree plaintiffs argued orally at the subsequent hearing on Blue Lake's motions that an arbitration clause contained in the sales agreement between plaintiff Carls and J & L Properties operated as an express waiver of Blue Lake's sovereign immunity. The trial court rejected plaintiffs' waiver argument and granted Blue Lake's motions. This appeal followed.

DISCUSSION

A defendant bringing a motion to quash under Code of Civil Procedure section 418.10 must present some admissible evidence (declarations or affidavits) to place the issue of lack of jurisdiction before the court. (*School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1131.)Once the defendant does so, "the burden of proof is on the plaintiff to establish, by a preponderance of the evidence, a basis for jurisdiction," normally personal jurisdiction, but here subject matter jurisdiction over a defendant claiming to be an arm of an Indian tribe.(*Ibid.*) The question of whether a court has subject matter jurisdiction over an action against an Indian tribe is generally a question of law subject to de novo review on appeal. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180(*Warburton*).)

Although even the United States Supreme Court recognizes there are "reasons to doubt the wisdom of perpetuating the doctrine" (*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 758 [140 L.Ed.2d 981, 987](*Kiowa*)), it is still settled law that (with the possible exception of a state asserting federal constitutional claims) an Indian tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."(*Id.* at p. 754 [140 L.Ed.2d at p. 985]; see *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [56 L.Ed.2d 106, 115](*Santa Clara Pueblo*); see *United States v. United States Fidelity & Guaranty Co.* (1940) 309 U.S. 506, 512 [84 L.Ed. 894, 899];*Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384, 387(*Redding Rancheria*); compare *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239.)"Indian tribes enjoy immunity because they are sovereigns predating the Constitution, [citations], and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy."(*American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe* (8th Cir.1985) 780 F.2d 1374, 1377-1378.)Tribal sovereign immunity applies to commercial as well

as governmental activities, both on and off tribal land. (*Kiowa, supra,* at p. 760 [140 L.Ed.2d at p. 988];*Redding Rancheria, supra,* at p. 388 .)It extends to both contract and tort claims against a tribe. (*Trudgeon, supra,* 71 Cal.App.4th at pp. 636-637;*Redding Rancheria, supra,* at pp. 389-390.)

Tribal sovereign immunity may also extend to tribal business entities. (*Trudgeon, supra,* 71 Cal.App.4th at pp. 636-642;*Redding Rancheria, supra,* 88 cal.app.4th at pp. 388-389;*Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority* (1st Cir.2000) 207 F.3d 21, 29 ["The [Housing] Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"].) To determine whether to extend tribal immunity to a particular tribal business entity, courts consider three relevant factors. These are: " '1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; [¶] 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and [¶] 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.' " (*Trudgeon, supra,* at pp. 638-639, following *Gavle v. Little Six, Inc.* (Minn.1996) 555 N.W .2d 284, 294.)

Here Blue Lake submitted a declaration of its chief operations officer addressing these factors. According to the declaration Blue Lake is a "tribal governmental instrumentality" of a federally recognized Indian tribe; it is "organized and operated by" the tribe "to promote the business and economic interests" of the tribe and "its business endeavors are dictated by the Tribe's five member Charter Development Corporation (CDC) which determines and manages the Tribe's economic activities."Although conclusory, these statements were adequate to bring Blue Lake within the factors identified by *Trudgeon.*The burden shifted to plaintiffs to challenge Blue Lake's assertion of tribal immunity. To meet this burden, plaintiffs could have conducted discovery limited to the jurisdictional issue raised by Blue Lake's motions. (*Warburton, supra,* 103 Cal.App.4th at p. 1190;*Factor Health Management v. Superior Court* (2005) 132 Cal.App.4th 246, 250;*School Dist. of Okaloosa County v. Superior Court, supra,* 58 Cal.App.4th at p. 1132.)

There is nothing in the record suggesting plaintiffs did so. Plaintiffs simply filed oppositions focusing on the fact Blue Lake's predecessor in interest, J & L Properties, was not an Indian tribe, had nothing to do with any Indian tribe when it developed the homes in the Serrano area, and had constructed plaintiff's home on non-tribal land. Plaintiffs argued Blue Lake's responsibility for J & L Properties' liabilities, distinguished the facts of *Trudgeon* from this suit seeking redress for the actions of J & L Properties, and argued tribal sovereign immunity should not be extended to a construction company that is not related to the function and purpose of the tribe, citing out-of-state cases (*Dixon, supra,* 160 Ariz. 251 [772 P.2d 1104];*Padilla, supra* 107 N.M. 174 [754 P.2d 845]) decided prior to *Kiowa, supra,* 523 U.S. 751, 760 [140 L.Ed.2d 981, 988]. However, plaintiffs submitted no *evidence* that Blue Lake was not related to the function and purpose of the tribe. (See *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247-248 [tribal immunity " 'apparently does not cover tribally chartered corporations that are completely independent of the tribe' "], quoting Cohen, Handbook of Federal Indian Law (2005 ed.) § 7.05[1][a], p. 636.) Plaintiffs submitted no *evidence* Blue Lake was subject to state suit for the liabilities of J & L Properties. Plaintiffs submitted no evidence at all in opposition to Blue Lake's motions. On this record, we must conclude Blue Lake established it was an arm of the tribe, entitled to tribal sovereign immunity. (See *Redding Rancheria, supra,* 88 Cal.App.4th at p. 389.)

Tribal immunity, however, may be waived. (*C & L Enterprises, Inc. v. Citizen Band Pot-*

awatomi Indian Tribe of Okla. (2001) 532 U .S. 411, 418 [149 L.Ed.2d 623, 631](*C & L Enterprises*).) While no magic words specifically referencing "sovereign immunity" are required (*Id.* at pp. 420-421 [149 L.Ed.2d at p. 632]), the "tribe's waiver must be 'clear.' " (*Id.* at p. 418 [149 L.Ed.2d at p. 631.)It " ' "cannot be implied but must be unequivocally expressed." ' " (*Santa Clara Pueblo, supra,* 436 U.S. 49, 58 [56 L.Ed.2d at p. 115]; see, e.g., *Allen v. Gold Country Casino* (9th Cir.2006) 464 F.3d 1044, 1047;*Demontiney v. United States* (9th Cir.2001) 255 F.3d 801, 812-813.)Put another way, it must be "unmistakable." (*Arizona Public Service Co. v. Aspaas* (9th Cir.1995) 77 F.3d 1128, 1135.)"Waivers are 'strictly construed' [citation], and there is a 'strong presumption' against them. [Citation.]" (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1193-1194(*Big Valley*).)

Plaintiffs point to the arbitration language in the purchase contract between plaintiff and J & L Properties as evidence of a clear and express waiver of tribal immunity. It is true similar language of an arbitration clause has been held to be a waiver, at least a limited waiver (*Big Valley, supra,* 133 Cal.App.4th at pp. 1193-1195) of a tribe's sovereign immunity. (*C & L Enterprises, supra,* 532 U.S. at p. 423 [149 L.Ed.2d at p. 634];*Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 6 [arbitration clause in contract is explicit waiver of immunity].) But the contract to which plaintiffs point is not a contract between Blue Lake and plaintiff Carls. It is plaintiff Carls's contract with Blue Lake's predecessor in interest, J & L Properties. For such contract to constitute Blue Lake's waiver of tribal immunity, plaintiffs must show some affirmative, express, clear and unequivocal action by Blue Lake agreeing to be bound by the terms of such contract. Plaintiffs simply argue Blue Lake is bound as successor in interest to J & L Properties. The problem for plaintiffs once again is evidentiary.

The declaration of Blue Lake's chief operations officer states Blue Lake "acquired" the assets and liabilities of J & L Properties, which ceased doing business on June 30, 2004. The declaration does not state the manner of Blue Lake's acquisition.[FN2] A business successor in interest may assume its predecessors liabilities in a number of ways, including express or implied agreements of assumption or the consolidation or merger of two corporations. (*Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust* (2002) 95 Cal.App.4th 1182, 1188;*Petrini v. Mohasco Corp.* (1998) 61 Cal.App.4th 1091, 1094;Corp.Code, § 1107.) A waiver of tribal immunity, however, cannot be based on implication or operation of law. It must be express. (*Santa Clara Pueblo, supra,* 436 U.S. at p. 58 [56 L.Ed.2d at p. 115].) Thus, while as a theoretical premise Blue Lake might have waived its tribal sovereign immunity by expressly assuming J & L Properties' obligations and liabilities under its sales contracts with its home buyers (no magic words referencing "sovereign immunity" are necessary and waiver can be found based on a tribe's agreement to contractual terms incorporating other matters (see *C & L Enterprises, supra,* 532 U.S. at p. 419, fn. 1 and pp. 420-421 [149 L.Ed.2d at pp. 632, 633]), to establish such fact plaintiffs needed to provide in evidence a copy of the agreement between Blue Lake and J & L Properties.[FN3] Without such agreement, neither the trial court nor this court can evaluate whether Blue Lake has expressed a clear and unequivocal waiver of its tribal immunity. Without such evidence, plaintiffs failed to establish the unmistakable waiver necessary to show subject matter jurisdiction over Blue Lake in this action.

> FN2. In its points and authorities in support of its motions to quash, Blue Lake references a purchase and sale agreement between it and J & L Properties, but it also states a "de facto merger" between the two occurred. It notes a merger may effect an assumption of liabilities "by operation of law" and then states this is especially true where there is an express agreement that

the acquiring entity will assume all obligations and liabilities. No where does Blue Lake actually state the purchase and sale agreement it signed with J & L Properties contains an express assumption of liabilities. Moreover, these comments are not evidence. They are arguments of counsel in Blue Lake's points and authorities. (See *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578 [matters in points and authorities are not evidence].)

FN3. Again, plaintiffs could have conducted discovery to obtain evidence of Blue Lake's acquisition of J & L Properties' assets and liabilities. (*Warburton, supra,* 103 Cal.App.4th at p. 1190.)

We are not unsympathetic to plaintiffs' situation. Plaintiff Carls can have had no notice at the time of buying her house, which was not on any tribal land, from J & L Properties, a company apparently unconnected with any Indian tribe, that she would eventually run into the obstacle of tribal sovereign immunity when she tried to bring a court action seeking damages from alleged construction defects in the house. She had no control over, and probably no notice of, the decision of J & L Properties to go out of business, transferring its assets and liabilities to a tribal business entity. Nevertheless, a court does not have power to deprive an Indian tribe of its sovereign immunity based on the equities. (*Big Valley, supra,* 133 Cal.App.4th at pp. 1195-1196;*Warburton, supra,* 103 Cal.App.4th at p. 1182;*Ute Distributing Corp. v. Ute Indian Tribe* (10th Cir.1998) 149 F.3d 1260, 1267.)

DISPOSITION

The order granting respondent's motions to quash is affirmed. Costs on appeal are awarded to respondent. (Cal. Rules of Court, rule 8.276(a).)

I concur: SIMS, J.SCOTLAND, P.J.

In my view, the trial court erred in granting the motions to quash. (Code Civ. Proc., § 418.10.)

Rita Carls purchased a home built by J & L Properties in the Serrano subdivision of El Dorado Hills. When she discovered construction defects, she sued J & L Properties and its successor in interest, Blue Lake Housing Authority, as well as a subcontractor, the inspectors, and the real estate broker.

The Blue Lake Rancheria Indian tribe filed a motion to quash on the ground that its sovereign immunity makes it immune from suit in state court. The trial court agreed.

On appeal, Carls contends that sovereign immunity should not extend to the successor in interest to a non-tribal construction company that builds non-tribal housing on non-tribal land and that, in any event, the purchase contract contains an arbitration clause saying the award may be enforced in "any court having jurisdiction," language that has been interpreted in other cases to operate as a waiver of sovereign immunity.

In my view, the second argument has merit.

Courts have held that an arbitration clause which states that an award in a dispute arising out of a contract can be enforced "in any court having jurisdiction thereof" operates as a waiver of sovereign immunity if the tribe is a party to the contract. (E.g., *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 6 .) By acquiring the assets *and liabilities* of J & L Properties, the tribe stepped into J & L Properties' shoes, effectively becoming a party to all the contracts between J & L and the buyers of the homes that it built. The tribe is presumed to have known of the arbitration clause in the contracts, allowing any court to enforce an award of damages arising out of the contracts. I know of no legal basis upon which the tribe could acquire the contractual liabilities of J & L Properties without also assuming the contractual burden that the liabilities could be enforced in state court. It is all or nothing as I understand the law.

Civ.Code, § 1589 ["A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting"]; Civ.Code, § 3521 ["He who takes the benefit must bear the burden"].)

Thus, the tribal chief operations officer's declaration that the tribe acquired J & L's liabilities constitutes an affirmative expression that, in doing so, the tribe agreed to be subject to state court enforcement of damages arising out of the J & L home sales contracts, thereby waiving its sovereign immunity with respect to claims arising out of those contracts.

Accordingly, I would reverse the trial court's orders.

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Carls v. Blue Lake Housing Authority
Not Reported in Cal.Rptr.3d, 2007 WL 2040562 (Cal.App. 3 Dist.)

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