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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1324**

City of Duluth,
Appellant,

vs.

Fond du Lac Band of Lake Superior Chippewa,
Respondent.

**Filed April 15, 2013
Reversed and remanded
Huspeni, Judge***

St. Louis County District Court
File No. 69DU-CV-12-857

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Huspeni, Judge.*

UNPUBLISHED OPINION

HUSPENI, Judge

Appellant, the City of Duluth (the city), challenges the dismissal of its breach-of-contract claim against respondent, the Fond du Lac Band of Lake Superior Chippewa (the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

band), arguing that the district court erred by determining that (1) it did not have jurisdiction over the claim because the band had only waived immunity with respect to claims asserted in federal court and (2) the city's claims were not ripe because the contract at issue had not yet been breached. We reverse and remand.

FACTS

This appeal arises out of the legally complex relationship between the city and the band in relation to the Fond du Luth Casino in downtown Duluth. The casino was created as a result of several agreements reached between the city and band in 1986 (the 1986 agreements).

The 1986 commission agreement

The 1986 agreements included what the parties refer to as the commission agreement, which created the Duluth-Fond du Lac Economic Development Commission (the commission) as a political subdivision of the band for the purpose of establishing and operating the casino. Under the commission agreement, the city was entitled to share in casino profits. Early language in the commission agreement states that it was created:

[I]n response to the following situation:

- A. The City of Duluth and the Fond du Lac Band desire to encourage economic development and growth within the City of Duluth.
- B. By combining the talents and resources of the City of Duluth and the Fond du Lac Band, economic development activities not otherwise possible may be accomplished.

Through the commission agreement, the city and the band acknowledged that the casino project would require the band to seek the creation of "Indian Country," which

could not be accomplished without approval from the city. The commission agreement in section 3.a defined “Indian Country” as

all land located within the corporate limits of the City of Duluth which is transferred by the Fond du Lac Band to the United States of America to hold in trust for the Fond du Lac Band pursuant to 25 U.S.C. § 465, and which is made part of the Fond du Lac Indian Reservation pursuant to 25 U.S.C. § 467, and all buildings and structures located on such land.

The commission agreement in section 10.a addressed the need for initial approval by the city, stating

The City of Duluth hereby agrees to approve the transfer by the Fond du Lac Band of the land . . . which the . . . Band has purchased, to the United States of America to hold in trust for the . . . Band, pursuant to 25 U.S.C. § 465 *and* the making of such land part of the Fond du Lac Reservation pursuant to 25 U.S.C. § 467.

(Emphasis added.) And the agreement in section 10.b stated that

The City, in its sole discretion, shall have the right to disapprove the creation of additional Indian Country, as defined herein. The Fond du Lac Band shall not create any additional Indian Country, as defined herein, unless the City of Duluth approves.

The commission agreement included, at section 19, a limited waiver of the band’s tribal sovereign immunity, consenting to jurisdiction in Minnesota state or federal court:

The Fond du Lac Band consents to be sued in any Minnesota state court or in federal court in connection with this Agreement or any agreement executed and delivered pursuant to this Agreement or any activity undertaken by the Fond du Lac Band pursuant to this agreement and does hereby waive forever any and all immunity granted it under any treaties or laws or the Constitution of the United States or of any state or otherwise from any suits or claims, whether at law or in equity, by the City of Duluth or the Commission against the

Fond du Lac Band arising from this Agreement or any activity undertaken by the Commission under this Agreement.

The 1994 Agreements

In 1994, in response to a determination by the National Indian Gaming Commission (NIGC) that the 1986 commission agreement violated the Indian Gaming Regulatory Act (IGRA), the city and band negotiated a new set of agreements (the 1994 agreements). Under the 1994 agreements, the band subleased the casino property back from the commission, and the commission assigned rent payments—calculated as a percentage of casino profits plus one dollar—to the city. The NIGC approved the 1994 agreements as consistent with IGRA, and the federal district court entered a consent decree.¹

The 1994 agreements included two provisions relevant here: a limited waiver of sovereign immunity and a dormancy clause. In the waiver, section 9 of what the district court refers to as the umbrella agreement, the band consented to jurisdiction only in federal district court in Minnesota:

The Fond du Lac Band consents to be sued by the City in the United States District Court for the District of Minnesota for

¹ Over time, the NIGC's interpretation of IGRA changed, and in 2011 it issued a notice of violation (NOV) to the band ordering it to cease performing under the 1994 agreements. The city brought suit in federal district court, and that court ultimately determined that the 1994 agreements were inconsistent with NIGC's present interpretation of IGRA and relieved the parties from their prospective obligations to perform under the 1994 agreements. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 724 (D. Minn. 2011), *aff'd in part, rev'd in part*, 702 F. 3d 1147 (8th Cir. 2013). In January, the Eighth Circuit affirmed that relief, but reversed and remanded for further consideration of the band's request for retrospective relief. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F. 3d 1147, 1156 (8th Cir. 2013).

any claim arising out of this Agreement or any Exhibit thereto, or arising out of any activity taken pursuant to such agreements, and does hereby waive any and all immunity granted it under any treaties or laws or the Constitution of the United States or of any state or otherwise, from any suits or claims, whether at law or in equity, by the City against the Fond du Lac Band arising from this Agreement or any Exhibit thereto, or arising out of any activity taken pursuant to such agreements.

The dormancy clause, section 2 of a 1994 agreement amending the commission agreement (exhibit C to the umbrella agreement), provided that

Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 commission agreement, *insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space*, shall be dormant and of no force or effect for so long as the Sublease is in effect.

(Emphasis added.)

This litigation

In December 2011, the city became aware that the band had purchased and sought to put in trust a parcel of land near the casino, which the parties refer to as the former Carter Hotel property. Believing that this conduct breached section 10.b of the 1986 commission agreement, the city brought a breach-of-contract claim in state district court. The city moved for temporary injunctive relief; the band opposed the motion, arguing that the district court lacked jurisdiction under the 1994 waiver of sovereign immunity and, alternatively, that the band had not breached the agreement and thus that the controversy was not ripe.

The district court dismissed the action. In doing so, the district court did not address the issue the city had brought for resolution: was a temporary injunction

warranted? Instead, the district court agreed with the band on both of the issues it had raised. First, the district court held that it did not have jurisdiction to interpret the 1994 agreements to determine whether the dormancy clause applied, stating:

Sections 9 through 11 of the Umbrella Agreement clearly give exclusive jurisdiction over the contract to the federal courts. . . . [T]he clause must be read to strictly limit the Bands [sic] ability to be brought to court under the Umbrella Agreement to federal district courts. While the primary cause of action in this case is based in the Commission Agreement, this issue is clearly a dispute over the interpretation of a clause in the Umbrella Agreement. Such interpretation is governed by federal law, per Section 10, and jurisdiction is expressly given to the United States District Court for the District of Minnesota and taken away from any Tribal Courts or State of Minnesota courts per Sections 9 and 11. Therefore, this court will not venture into interpreting the Dormancy Clause of the Umbrella Agreement and applying it to these facts. That issue is appropriately reserved for federal court determination.

The district court did not conclude its analysis with this jurisdictional determination, however. The district court ultimately concluded: “Even if the Dormancy Clause does not apply, however, the City’s cause of action is not yet ripe, as the Band has not yet attempted or indicated an intent to have the Second Avenue Parcel added to the Band’s reservation.”

In reaching its ultimate conclusion regarding “ripeness,” the district court discussed at length the positions of the parties and stated:

The contract at issue clearly and plainly sets forth two elements which must be present for land to be considered Indian Country. First, the land must be held in trust for the Band pursuant to 25 U.S.C. § 465. Second, the land must be added to the Band’s reservation pursuant to 25 U.S.C. § 467. These have been shown to be two distinct processes, and

although the land cannot be added to the reservation before being placed in trust, simply applying to place the land into trust does not equate to an attempt to add Indian Country as defined by the contract. Therefore, the City's claim of breach of contract is unripe.

The city appeals.²

DECISION

I.

The city challenges the district court's determination that it did not have jurisdiction to determine whether the dormancy clause applied.³ Both the existence of jurisdiction and the interpretation of contracts, on which the jurisdictional issue in this case depends, are determinations of law subject to de novo review. *Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010) (contract interpretation); *Tischer v. Hous. & Redevelopment Auth. of Cambridge*, 693 N.W.2d 426, 428 (Minn. 2005) (subject-matter jurisdiction);.

The district court essentially determined that, although section 19 of the 1986 commission agreement provided for state-court jurisdiction over disputes under that agreement, the dormancy clause in the 1994 agreements potentially rendered section 19

² Almost two months after the district court's dismissal order, the city submitted a letter requesting permission to seek reconsideration pursuant to Minn. R. Gen. Pract. 115.11. The district court judge originally assigned to this case recused himself, and another judge was assigned. At the time the city filed this appeal, the district court had not ruled on the letter request, and the deadline for taking an appeal was approaching.

³ "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote federal policies of tribal self-determination, economic development, and cultural autonomy." *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292 (Minn. 1996) (quotation omitted). "[T]ribal sovereign immunity may be waived, but such a waiver must be express and unequivocal and may not be implied." *Id.* at 296.

ineffective. And the district court concluded that determining the effect of the dormancy clause would require interpretation of the 1994 agreements, and that it could not do so because the waiver of sovereign immunity in section 9 of the 1994 umbrella agreement is limited to suits in federal district court.

We disagree with the district court. Section 9 of the umbrella agreement provides that the band consents to be sued by the city in federal court for “any claim arising out of this Agreement or any Exhibit thereto, or arising out of any activity taken pursuant to such agreements.” The 1994 umbrella agreement and exhibits, however, do not control or address the trust application which is at the heart of this litigation. Thus, section 9 of that umbrella agreement does not prevent the district court from interpreting the 1994 agreements to determine their impact on the waiver of sovereign immunity in the 1986 commission agreement.

The district court has authority to decide legal issues necessary to determine whether it has jurisdiction. *See, e.g., J.E.B. v. Danks*, 785 N.W.2d 741, 747 (Minn. 2010) (explaining that factual disputes may preclude summary judgment on immunity grounds but that legal issues can be decided to determine immunity); *cf. Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004) (“Every federal court has the inherent power to determine as a preliminary matter its own subject matter jurisdiction.” (quotation omitted)). Accordingly, we conclude that the district court erred by declining to interpret the 1994 agreements to determine whether it had jurisdiction over the city’s claim.

The legal issue underlying the question of whether the state courts of Minnesota have jurisdiction in this case is whether the language of the dormancy clause renders

ineffective the waiver of sovereign immunity in section 19 of the commission agreement. That language renders section 19 “dormant and of no force or effect” with two qualifiers: it is dormant only “insofar as [it] pertain[s] to gaming activities and Ancillary Businesses at the Sublease space,” and only “as long as the Sublease is in effect.” The Carter Hotel property is not “at the Sublease space.” Therefore, as regards this litigation, the dormancy clause does not render ineffective the waiver of sovereign immunity in the commission agreement. That agreement allows for claims under the 1986 agreements to be asserted in state court. Accordingly, we conclude that the district court has jurisdiction over the city’s claim.

II.

The district court did not rest, however, on its jurisdictional determination. The court went on to further determine that even if it did have jurisdiction, the city’s claims were not ripe for adjudication. As with our determination on the jurisdictional issue, we disagree with the district court’s determination that claims of the city are not ripe.

“The [ripeness] doctrine bars suits brought before a redressable injury exists.” *State ex rel. Friends of the Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 592 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). This court “review[s] justiciability issues de novo.” *Id.* The city has a ripe claim because it asserts that the band, by seeking to put the Carter Hotel property into trust, has breached the 1986 commission agreement. The band argued, and the district court determined, that the city’s claim is not ripe because the band has not yet created Indian Country and thus has not yet breached the 1986 commission agreement. We conclude, however, that the

analysis of the district court conflates the ripeness of the city's claims with the merits of those claims. There is a very clear and present dispute here over whether the intent of the parties has been disregarded by the action of the band in taking the first step in what may be regarded as a two-step action. Indeed, one of the strongest arguments put forth by the city is that it suffers a tax loss when the subject property is placed in trust (the first step) and is therefore irrevocably harmed even if the second step, (the completion of denominating the land as Indian Land) has not yet occurred.⁴ Accordingly, we conclude that the district court erred by dismissing the city's claims on ripeness grounds.

Our analysis cannot conclude with the determination that the district court has jurisdiction here and that dismissal based on "ripeness" was in error. This case was brought before the district court on the city's motion for temporary injunctive relief. The city deserves an answer to its request. Having determined that jurisdiction is present and that this case is ripe for adjudication, we believe the proper decision of this court is to remand and direct the district court to address the question brought to it by the city: Is the city entitled to injunctive relief? *See Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965) (holding that district court exercises discretion to determine whether injunctive relief is appropriate, upon consideration of

⁴ Events are continuing to unfold with regard to the Carter Hotel property. Along with its letter requesting permission to seek reconsideration, the city submitted two letters that were sent after the court's order dismissing this matter, the first in which the United States Department of the Interior expresses its intent to cancel the sublease, and the second in which the Bureau of Indian Affairs references the band's desire "to have the property taken into trust to enable its Reservation Business Committee to manage it as Reservation land." The parties dispute the impact of these letters on the breach issue.

factors including the likelihood of success on the merits, the balance of hardships, and the administrative burdens).

As part of determining the appropriateness of injunctive relief, the district court will be required to make findings regarding the city's likelihood of success on the merits. *Id.* at 275, 137 N.W.2d at 821. The district court's decision dismissing the case reflects its plain-language interpretation of the commission agreement's definition of "Indian County" to preclude the city's claim. But we conclude that, when read in the context of the entire agreement, the "Indian Country" definition is ambiguous. Accordingly, on remand, the district court should consider all available evidence of the parties' intent and may, in its discretion, reopen the record to consider more recent developments that may bear on intent. *See, e.g., Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012) (explaining that "if [contractual] language is ambiguous—that is, susceptible to more than one reasonable interpretation—parol evidence may be considered to determine the intent of the parties").

Reversed and remanded.