Northern District of Mississippi

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISION

THEODORE STERN

PLAINTIFF

v.

No. 4:97cv4-D-B

**TED GATZAROS and
400 MONROE ASSOCIATES**

DEFENDANTS

OPINION

In this diversity action, the parties dispute whether a document is an enforceable contract for the sale of real property. Presently before the court are the parties' cross-motions for summary judgment. After considering both motions, the court finds that each should be denied. This action shall proceed to trial.

Factual and Procedural Background

In April of 1995, the Plaintiff Theodore Stern acquired a parcel of land located on the bank of Lake Ferguson in Greenville, Mississippi. In October of 1995, the Plaintiff met with the Defendant Ted Gatzaros and his partner Jim Papas to inquire whether they wished to purchase Stern's land. Gatzaros and Papas were partners in 400 Monroe Associates (Monroe), a partnership which is the other Defendant in this action. See footnote 1. Gatzaros and Papas declined to purchase Stern's land but asked Stern if he was interested in participating in a limited partnership to operate a casino on that land. Stern was amenable to the idea, so the men began discussing an arrangement whereby Stern would provide his land in consideration for a minority interest in the limited partnership. Stern would also provide a barge on which to construct the casino, as required under Mississippi law. Stern owned an option to purchase a barge for $1.2 million.

Early in the negotiation process, it became apparent that the casino venture would cost more than Monroe could afford. Therefore, Monroe contacted the Sault Ste. Marie Tribe of Chippewa Indians, who had extensive experience in operating casinos and possessed the financial strength to fund the entire project. In December of 1995, the parties (Stern, Monroe and Gatzaros) and the Tribe began drafting an agreement entitled "Memorandum of Understanding." The Memorandum of Understanding essentially provided that Stern, Monroe and the Tribe would form a joint venture which would purchase the land from Stern, secure $40 to $45 million in financing, then develop and operate the casino. During the next few weeks, approximately twenty versions of the Memorandum of Understanding were drafted, some numbering as many as fourteen pages.

On January 26, 1996, negotiations broke down over several issues. One issue concerned a then-pending lawsuit See footnote 2 against Stern affecting the same parcel of land which is the subject of the present action. The Tribe and Monroe requested that Stern indemnify them from any claim related to the lawsuit (hereinafter the "Hollowell litigation"), and Stern refused. The plaintiff in the Hollowell litigation had filed a lis pendens notice against Stern's land in the Office of the Chancery Clerk of Washington County, Mississippi.

During the next few days, Monroe and the Tribe discussed several ideas for jumpstarting negotiations. They approached Stern with one of the ideas, which altered the original conception of the project by removing Stern from the limited partnership. Basically, the idea was that Stern would sell his land to a limited partnership consisting only of Monroe and the Tribe. On January 31, 1996, Stern, Monroe and the Tribe signed a document expressing the idea. Drafted by counsel for Monroe and the Tribe, this one-page document was entitled "Summary of Memorandum of Understanding between 400 Monroe Associates and Sault Ste. Marie Chippewa Indian Tribe and Theodore Stern," (hereinafter "Summary"). It is this document which Stern asserts to be an enforceable contract for the sale of real property. The entire document provides as follows:

[1] A gaming entity will be formed with the participants being the Sault Ste. Marie Chippewa Indian Tribe (the "Tribe") and 400 Monroe Associates (the "Entity").

[2] Mr. Ted Stern will transfer title of the land that he owns in Greenville, Mississippi described in the title policy number FA-20-97753 issued by First American Title Insurance Company (the "Real Property") and assign lease rights to any portion of leased land in Greenville, Mississippi in relationship to the Casino to the Entity, pursuant to a Purchase Agreement.

[3] Mr. Stern will receive $4 million at the date of Closing of the permanent financing, which shall occur as soon as possible but not later than January 1, 1998.

[4] Mr. Stern, for his contributions in assembling the land, clearing title, vacating streets (or obtain[ing] legal governmental approval of the planned use of the Real Property which also allows certain of the streets to remain open to the public), [and obtaining] permits and related developments, will also receive at the end of each calendar year of operations of the Casino $1 million per year for four (4) years.

[5] A good faith deposit of $100,000 will be made to Mr. Stern upon signing the Purchase Agreement (including transfer of leasehold interest) of the land in Greenville, Mississippi.

[6] Mr. Stern will provide the Entity with clear title to all owned land. Title to be acceptable to the title insurance company and the permanent financier.

(Defendants' Motion for Summary Judgment, Exhibit "J").

After execution of the Summary, Stern assigned his option to purchase the barge to the Tribe, and the Tribe purchased the barge for $1.2 million. The Tribe further expended monies on several preliminary aspects of the casino project, including hiring engineers and attorneys. Also, in March of 1996, counsel for the Tribe and Monroe submitted to Stern the first draft of the "Purchase Agreement" envisioned in the Summary. Upon receipt of this draft, which numbered approximately twelve pages, Stern requested certain changes. The Tribe and Monroe agreed to these changes, but they also added a provision obligating Stern to indemnify the "Entity" envisioned in the Summary from any claim arising from the Hollowell litigation. As he did earlier with the Memorandum of Understanding, Stern rejected the indemnification provision. Stern also requested further changes. Mailing a third draft in late April 1996, the Tribe and Monroe incorporated only some of the changes and insisted on the indemnification provision. Stern did not respond. On November 16, 1996, the Tribe and Monroe's counsel informed Stern by telephone that the Tribe was withdrawing from the casino project and that Monroe was not interested in proceeding with the casino project in the Tribe's absence.

On January 7, 1997, Stern filed the present action seeking specific performance of the Summary or damages for its breach. Stern also asked for punitive damages. The Defendants answered averring that the Summary was unenforceable because it lacked essential terms and because certain conditions precedent were never satisfied. Now the parties seek resolution of the matter via cross-motions for summary judgment.

Federal Rule of Civil Procedure 19

Before discussing the parties' motions for summary judgment, the court shall address a

separate issue which the Defendants raised in their Answer _ whether the Tribe is an indispensable party. (Answer and Defenses, Seventh Defense). The court finds it necessary to address this issue because of the Tribe's conspicuous absence from this litigation. The Federal Rules provide, in pertinent part, the following rule regarding indispensable parties:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the

action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. . . .

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19; see also Kelly v. Commercial Union Ins. Co., 702 F.2d 973, 977 n.4 (5*th* Cir. 1983) (explaining that Rule 19 governs whether party is indispensable in diversity case). The Tribe cannot be made a party because it is immune from the present action. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). Therefore, this court must determine whether the Tribe is indispensable, in which case Rule 19 mandates dismissal.

The first issue in this determination is whether the Tribe is a party which should be joined if feasible. Fed. R. Civ. P. 19(b) (referring back to subdivision (a)). In the court's opinion, the Tribe is not such a party. First, the Tribe does not fall under Rule 19(a)(1) because, in the Tribe's absence, complete relief can be accorded among those already parties. While a judgment for the Plaintiff would lack any contribution from the Tribe, the absence of the Tribe does not prevent this court from awarding the Plaintiff the relief he seeks. See Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1309 (5*th* Cir. 1986) ("Since Carol's federal suit seeks only damages for herself, the absence of Lillian and Susan should not prevent the court from awarding Carol money damages."). Second, the Tribe does not fall under Rule 19(a)(2) because it does not claim an interest relating to the subject of the action.

Even if the Tribe were a party which should be joined if feasible under Rule 19(a), the court finds, after considering the non-exclusive list of factors in Rule 19(b), that the Tribe is not indispensable. Without conducting an exhaustive review of each factor, the court notes that a judgment for the Plaintiff in the Tribe's absence would prejudice the Defendants by rendering them liable for a potentially multi-million dollar purchase of land much of which the Tribe was supposed to finance. (See Defendant's Motion, Exhibit "F" ¶ 21 ("From the outset all involved understood [the casino project] could not be funded without the Tribe.")).

Considering another factor under Rule 19(b), though, the court finds that dismissal would be inappropriate because it would leave the Plaintiff with an inadequate remedy. Indeed, the Plaintiff would have no remedy. To be sure, the "lack of an alternative forum does not automatically prevent dismissal of a suit [under Rule 19]. Sovereign immunity may leave a party with no forum for its claims." Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9*th* Cir. 1990)

(citations omitted). "While a court should be extra cautious in dismissing a case for nonjoinder where the plaintiff will not have an adequate remedy elsewhere, it is also important to realize that this does not mean that an action should proceed solely because the plaintiff otherwise would not have an adequate remedy, as this would be a misconstruction of the rule and would contravene the established doctrine of indispensability." Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986) (quotations and citations omitted). Accordingly, a number of courts have dismissed cases under Rule 19 where Indian tribes were indispensable parties. See, e.g., Kescoli v. Babbitt, 101 F.3d 1304, 1307 (9*th* Cir. 1996) ("If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.") (Quotations and citations omitted); Witchita, 788 F.2d at 771 ("[I]f the tribe is an indispensable party, and cannot be joined due to its immunity, the claim may not proceed.") (Citing Lomayaktewa v. Hathaway, 520 F.2d 1324 (9*th* Cir. 1975); Tewa Tesuque v. Morton, 498 F.2d 240 (10*th* Cir. 1974)). However, the tribes in those cases fell under Rule 19 because they had an interest in the outcome of the litigation. See Fed. R. Civ. P. 19(a)(2). Here, on the other hand, the Tribe has no interest in the litigation. Therefore, the court shall not dismiss this action under Rule 19.

Standard of Review for Motions for Summary Judgment

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("[T]he burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to

"go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Discussion

In their motions for summary judgment, the parties essentially ask the court to decide whether the "Summary" is enforceable. "Questions of the validity, enforceability and construction of contracts _ of whether the parties have satisfied the law's formal requisites _ are committed to the court as distinguished from the trier of facts." Leach v. Tingle, 586 So. 2d 799, 801 (Miss. 1991). However, "where [a] contract is ambiguous and its meaning uncertain, questions of fact are presented which are to be resolved by the trier of the facts after plenary trial on the merits." Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984).

Here, the Summary only contemplated a sale of land via another document, the Purchase Agreement. (Defendants' Motion for Summary Judgment, Exhibit "J," (describing transfers "pursuant to a Purchase Agreement")). Therefore, at most, the Summary was a contract to enter

into a future contract. Leach, 586 So. 2d at 802 ("The contract of sale . . . by its terms contemplated a consummation via another exchange of documents some weeks in the future and was in this sense a contract to make a contract."). However, under Mississippi law _ which governs the substantive issues in this diversity action _ even a contract to enter into a future contract may be enforceable. Busching v. Griffin, 542 So. 2d 860, 863 (Miss. 1989).

To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. If any essential term is left open to future consideration, there is no binding contract, and an agreement to reach an agreement imposes no obligation on the parties thereto.

Duke v. Whatley, 580 So. 2d 1267, 1274 (Miss. 1991).

Here, the Summary stated (1) the parties to the conveyance, those being Stern, Monroe, and the Tribe; (2) the purchase price of $8 million, some of which to be paid in installments; and (3) a description of the property by reference to another document. See footnote 3 These terms are sufficiently definite to form a contract for the sale of real property. See footnote 4 See Hicks v. Bridges, 580 So. 2d 743, 746 (Miss. 1991) ("The contract recited a description of the property in question, the purchase

price of one hundred and eighty thousand dollars . . . . The terms of the document signed by Hicks are sufficiently definite to form a contract.").

Incidentally, the parties dispute whether the term "Entity" modifies (1) Monroe or (2) the "gaming entity" which the Summary requires Monroe and the Tribe to form. The first sentence of the Summary refers to this "gaming entity," and the term "Entity" is introduced at the end of that sentence. Therefore, it seems clear that the term modifies the gaming entity. The Plaintiff argues, though, that the placement of the parenthesis introducing the term "Entity" immediately after the term "400 Monroe Associates" shows that the term modifies only Monroe. However, that interpretation would be unreasonable because the Tribe would then be left having no rights under the Summary. See Frazier v. Northeast Miss. Shopping Ctr., 458 So.2d 1051, 1054 (Miss.1984) ("A construction leading to an absurd, harsh or unreasonable result in a contract should be avoided, unless the terms are express and free of doubt."). Therefore, the term "Entity" modifies the gaming entity to be formed by Monroe and the Tribe.

Also, the parties dispute whether any obligation arising under the Summary is that of the Defendants or the Entity. The Defendants contend that they are not liable for any of the Entity's obligations because they were merely agents for a disclosed principal _ the Entity. The court acknowledges the general rule of agency law that an agent is not contractually bound by the obligations of a disclosed principal. See, e.g., McFarland v. Utica Fire Ins., 814 F. Supp. 518, 521 (S.D. Miss.1992). However, the court is not persuaded by authority cited by the Defendants in support of the proposition that this general rule of agency law applies even where the principal

is nonexistent and the principal's nonexistence is known to the parties. See Peoples v. Enochs, 153 So. 796 (Miss. 1934). This authority predates Mississippi's adoption of the Revised Model

Business Corporations Act ("RMBCA") in 1988. See Miss. Code Ann. §§ 79-4-1.01 *et seq.* (Mississippi Business Corporations Act). Under the provisions of the RMBCA as statutorily adopted in Mississippi, an agent of a corporation not yet incorporated is personally liable for any agreements made on behalf of the future corporation. "All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation . . . are jointly and severally liable for all liabilities created while so acting." Miss. Code Ann. § 79-4-2.04 (1998 Supp.); see also RMBCA § 2.04. This statutory enactment abrogates Mississippi's common law agency rules in situations involving prein corporation transactions and governs this action. Therefore, the Defendants cannot escape liability for any agreement they made in the Summary solely because they were acting on behalf of the Entity.

So, to repeat, the terms regarding the parties to the conveyance, the price and the property description are sufficiently definite to form a contract. However, this does not end the inquiry. The Summary contains other terms besides parties, price and property description. For instance, the Summary mentions "clear title" and "permanent financing." Those terms may constitute conditions precedent which affect the enforceability of the Summary. In Mid-Continent Tel. Corp. v. Home Tel. Co., this court enforced a short, informal letter which constituted an agreement to agree to a corporate merger worth approximately $1.4 million. 319 F. Supp. 1176, 1185, 1189 (N.D. Miss. 1970) (Keady, C.J.). This court enforced the agreement even though performance was conditioned on both regulatory approval and the formation of a contract of employment with one of the stockholders. Mid-Continent, 319 F. Supp. at 1190. However, in doing so, the court explained that each condition was either immaterial or not satisfied because

the parties later negotiated unreasonably. See footnote 5 Id. at 1189, 1195. Therefore, an important question in this case is whether the parties intended in the Summary to agree to certain conditions precedent which, if not satisfied, rendered the contract unenforceable by Stern. On this question, the court declines to rule summarily, for the Summary contains ambiguities which render summary disposition inappropriate. See Nationwide Ins. Co. v. Ladner, 956 F. Supp. 697, 699 (S.D. Miss. 1996) ("[I]f an ambiguity exists, the controversy cannot be resolved on summary judgment, and the agreement of the parties must be ascertained by the trier of fact.") (Citing Dennis, 457 So. 2d at 945).

In addition to ambiguities regarding possible conditions precedent, an ambiguity exists as to the time for performance. The Summary provides that "the date of Closing of the permanent financing . . . shall occur as soon as possible but not later than January 1, 1998." This language could reasonably be interpreted as providing a deadline for performance of January 1, 1998, or _ in light of the "as soon as possible" language _ some reasonable time sooner. See Ingram Day Lumber Co. v. Germain Co., 100 So. 281, 284 (Miss. 1924) (holding that phrase "as soon as

possible" means within reasonable time according to all circumstances). This issue is relevant because, if the time for performance is a "reasonable time," a separate question of fact exists as to whether the Defendants waited a reasonable time before backing out of the casino project in November of 1996, nearly ten months after the formation of the Summary. If they did not wait a reasonable time, or if the deadline was January 1, 1998, Stern's duty to perform any condition

precedent might have been excused. See Warwick v. Matheney, 603 So. 2d 330, 337 (Miss. 1992) ("A repudiation or other total breach relieves performance of conditions precedent.").

Conclusion

Summary disposition is inappropriate in this case because the trier of fact must resolve several ambiguities in the contract at bar. Also, dismissal of this case would be inappropriate under Rule 19 of the Federal Rules of Civil Procedure.

A separate order in accordance with this opinion shall issue this day.
This the ____ day of February 1999.

____
United States District Judge

IN THE UNITED STATES DISTRICT COURT

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GREENVILLE DIVISION

THEODORE STERN PLAINTIFF

v.

No. 4:97cv4-D-B
TED GATZAROS and
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ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT and

DENYING AS MOOT MOTION IN LIMINE

Pursuant to an opinion issued today, it is hereby ORDERED that
the Plaintiff's motion for summary judgment (docket entry 56) is DENIED;
the Defendants' motion for summary judgment (docket entry 54) is DENIED; and
the Defendants' motion in limine (docket entry 65) is DENIED AS MOOT.
SO ORDERED, this the ____ day of February 1999.

____
United States District Judge

Footnote: 1The Plaintiff has sued both the partnership Monroe and its partner Gatzaros. However, the Plaintiff has not alleged that the liability of Monroe is different than that of Gatzaros. See West v. Sanders Clinic for Women, 661 So. 2d 714, 721 (Miss. 1995) (explaining that partner in partnership is agent of partnership and therefore binds partnership if acting within usual scope of partnership).

Footnote: 2See Hollowell v. Stern, 974 F. Supp. 887 (N.D. Miss. 1997) (Senter, C.J.).

Footnote: 3The parties do not provide the court with the document to which the Summary refers in describing Stern's land. However, the parties do not dispute the validity of the description. Therefore, for purposes of analyzing the facts at bar, the court will assume that the description is valid.

Footnote: 4Initially the Plaintiff planned to offer at trial the testimony of an expert who opined that the Summary is an enforceable contract for the sale of real property. However, by letter dated February 2, 1999, the Plaintiff notified this court that he considers such testimony unnecessary and no longer plans to offer it. Therefore, the court shall deny as moot the Defendants' motion in limine objecting to that testimony.

Footnote: 5The court also explained that the conditions were precedent to performance, not formation:

It is settled law that a condition precedent may be a condition which must be performed before the agreement of the parties shall become a binding contract or it may be a condition which must be fulfilled before the duty to perform an existing contract arises.

In the case at bar the parties clearly made the fulfillment of each of the four stated conditions precedent to performance of an existing contract and not precedent to the formation of a binding contract.

Mid-Continent, 319 F. Supp. at 1190. Here, the distinction between a condition precedent to formation and a condition precedent to performance would not alter the outcome of this litigation. In this court's opinion, the contract at bar should not be enforced if a material condition precedent was not satisfied, whether or not the condition was precedent to formation or performance.