

NON-REMOVABLE MILLE LACS BAND OF OJIBWE

FILED EBW

APR 16 PM 3 16

IN THE COURT OF CENTRAL JURISDICTION
COURT OF APPEALS

Loretta Kalk

03 APP 03

Plaintiff - Appellant

vs.

DECISION

Mille Lacs Band of Ojibwe
Corporate Commission

Defendant - Appellee

I.

INTRODUCTION

Plaintiff-Appellant (Loretta Kalk) appeals the District Court's Order dismissing the Plaintiff-Appellant's action (03 CV 729) for failing to file the action in the Court of Central Jurisdiction within the time prescribed by 24 MLBS §2013(a). In dismissing the action, the District Court rejected the Plaintiff-Appellant's arguments that the Defendant-Appellee (the Mille Lacs Band of Ojibwe Corporate Commission) should be equitably estopped from asserting the statute of limitations as an affirmative defense.

For the reasons stated below, the Court of Appeals hereby affirms the District Court order dismissing the Plaintiff-Appellant's action.

II.

FACTS AND PROCEDURAL HISTORY

Loretta Kalk (hereinafter "Plaintiff") is an enrolled member of the Mille Lacs Band of Ojibwe (hereinafter "the Band"). On November 7, 2001, Plaintiff commenced an action against the Mille Lacs Band Corporate Commission (hereinafter "Defendant")

in the Mille Lacs County District Court in the State of Minnesota (State Court of Minnesota). The action related to personal injuries suffered by the Plaintiff due to a fall at the Rainbow Inn. The Plaintiff alleges that her fall is due to the negligent maintenance of the grounds by the Defendant. The Rainbow Inn is a former motel owned by the Band and located within the exterior boundaries of the Mille Lacs Indian Reservation.¹

On December 5, 2001, the Defendant answered the complaint filed by Plaintiff. However, the Defendant did not respond to discovery requests by Plaintiff in the State Court of Minnesota. In response to a motion to compel discovery, the Defendant filed a motion to dismiss and asserted its sovereign immunity from suit in the State Court of Minnesota. After discussions between counsel for the parties regarding the appropriate forum and the defense of sovereign immunity, the parties stipulated to a dismissal of the state action with prejudice.

Plaintiff subsequently filed suit in the Court of Central Jurisdiction. In its response to the suit, the Defendant asserted the defense of the statute of limitations. In particular, the Defendant argued that the suit had not been brought within the required three year statutory time frame as required by the Band's Statutes. The District Court then ordered a hearing on the dispositive issue of the statute of limitations. Although the Defendant did not file the memorandum of law regarding the dispositive motion within the required time prior to a hearing on the matter, the District Court allowed the Defendant to provide an oral argument at the hearing.

After hearing oral arguments, the District Court ruled that the Defendant was not estopped from asserting the defense of the statute of limitations. Subsequent to the ruling by the District Court, the Plaintiff filed additional evidence in the form of a letter from counsel representing the Defendant in the State Court of Minnesota. The District Court considered the additional evidence as a motion to reconsider. After reviewing the letter, the District Court reaffirmed its decision that there was insufficient evidence to justify estopping the Defendant from asserting the defense of the statute of limitations.

¹ The Plaintiff contends that the motel is not located on the Mille Lacs Indian reservation. However, as noted in the District Court's decision, this fact is largely irrelevant because "the Mille Lacs statutes do not draw distinctions between causes of action arising on the reservation and those arising off." *Court Order, civil action 03CV729* page 2 fn. 1 (July 21, 2003).

Plaintiff now appeals the District Court's court order dismissing the Plaintiff's complaint on the dispositive issue of the statute of limitation. Three issues are before this Court: First, whether the District Court erred in applying the laws of equitable estoppel? Second, whether irregularities of the proceedings at the district Court denied Plaintiff due process? And third, whether the District Court's determination, judgment, and Orders are against the judicial philosophy and traditional theory of the law of the Mille Lacs Band? Each of these questions will be discussed in turn.

III. DISCUSSION

A.

Equitable Estoppel of the Statute of Limitations Defense

The Court of Central Jurisdiction is to apply the written statutory and case laws of the Non-Removable Lacs Band of Chippewa Indians unless there is a lack of written Band law. 24 MLBSA §2007(a). Where there is a lack of written band law, the Court is to apply the laws of the United States of America. *Id.* If there is a lack of written laws of the United States of America, the laws of the State of Minnesota that do not conflict with the unwritten customs and traditions of the Band may be used. *Id.* Both the Corporate Commission and Plaintiff are unaware of any precedent in the written laws of the Band with regards to this issue of equitable estoppel. Therefore, the Court must look beyond the laws of the Band as set out in Band Statute 24 MLBSA §2007.

The District Court applied elements of equitable estoppel set out in a case decided by the Supreme Court of Nebraska. The elements included:

as to the party estopped: conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

Manker v. Manker, 263 Neb. 944, 945-46 (2002).

The District Court focused on the first element, “conduct which amounts to a false representation,” in rejecting the Plaintiff’s equitable estoppel argument. *See Court Order, civil action 03CV729* page 4-5 (July 21, 2003).

The Plaintiff asserts that the District Court failed to follow 24 MLBSA §2007(a) in applying the elements of equitable estoppel from the *Manker* case. In support of the Plaintiff’s position, the Plaintiff cites various federal court decisions dealing with equitable estoppel in private party actions². These cases set forth three general requirements to show equitable estoppel. These requirements include 1) representations or affirmative conduct designed to mislead or unmistakably likely to mislead another person, 2) who then reasonably relies on those representations and 3) who suffers harm due to her reliance. *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 659 (8th Cir. 1992); *Bell v. Fowler*, 99 F.3d 262, 266 (8th Cir. 1996); *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 666 (8th Cir. 1995); *See Also Maitland v. University of Minnesota*, 43 F.3d 357, 364 (8th Cir. 1994); *Kriegsmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 358-59 (8th Cir. 1984). If all of these elements are present, it is appropriate to apply the principle of equitable estoppel to prevent the party that made the representations from availing himself of the advantage gained by inducing the other person to act. *See Glus v. Brooklyn Eastern Dist. Terminal*, 259 U.S. 231, 234.

Despite the similarities between the present case and the facts in *Garfield*³, Plaintiff further argues that Minnesota State law may be more appropriate because the

² While the City of North Sioux City, South Dakota was a defendant in *Bell*, the other defendants were sued individually as well as in their official capacity.

³ The Court finds the facts of the present appeal regarding the issue of equitable estoppel to be very similar to the facts in *Garfield v. J.C. Nichols Real Estate* cited by Plaintiff. In *Garfield*, the plaintiffs had brought suit in the proper forum prior to the expiration of the statute of limitations. *Garfield*, 57 F.3d 662, 664 (8th Cir. 1995). However, counsel for the plaintiffs and counsel for the defendants stipulated to a dismissal of the suit without prejudice after the limitations period had expired. *Id.* In discussion of the dismissal, counsel for the plaintiffs indicated that the plaintiffs may likely refile the suit at a later date. *Id.* As in the present case, neither counsel for the plaintiffs nor counsel for the defendants mentioned or brought up the issue of the statute of limitations during their discussion of the dismissal. *Id.* at 664, 666. Once the claim was refiled, the defendants asserted the defense of the statute of limitations. *Id.* at 664. The Court rejected the plaintiffs’ argument that “the defendants ‘should have unmistakably understood’ that the defendants agreement to the stipulated dismissal . . . would cause the plaintiffs to believe they could refile the claims without any adverse consequence from the dismissal.” *Id.* at 666. Additionally, the Court “seriously” doubted that the defendants had any obligation to disclose that the statute of limitations would bar refileing of the claims. *Id.* As in the District Court’s decision, the Court in *Garfield* found that the plaintiff’s

federal cases “have fact scenarios that greatly differ from this case.” *Plaintiff’s Appeal Brief* pg. 15. Accordingly, Plaintiff cited some Minnesota state cases regarding equitable estoppel which have similar elements for equitable estoppel as the Federal cases cited by Plaintiff. See *Northern Petrochemical Co. v. United States Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1979); *Brenner v. Nordby*, 306 N.W.2d 126,127 (Minn. 1981) (“Its elements are representations or inducements by the defendant upon which the plaintiff has reasonably relied to his detriment.”) citing *Northern Petrochemical Co. v. United States Fire Ins. Co.*

In reviewing 24 MLBSA §2007(a), the Court in this case is to apply the laws of the United States. In particular, since the Defendant is an entity of the Mille Lacs Band of Ojibwe, federal laws relating to equitable estoppel against a government entity should apply. In providing the rationale for applying separate rules when a government entity is involved, the Supreme Court of the United States has stated, “[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, *the interest of the citizenry as a whole in obedience to the rule of law is undermined*. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.” *Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984) (emphasis added). Accordingly, the interests of the whole Band citizenry (Band Members) is effected when the issue of equitable estoppel is raised against the Band. The elements required for equitable estoppel against a government entity are: (1) false representation by the government; (2) the government had the intent to induce the claimant to act on the misrepresentation; (3) the claimant's lack of knowledge or inability to obtain the true facts; (4) the claimant's reliance on the misrepresentation to her detriment and (5) affirmative misconduct by the government. *Varela v. Ashcroft*, 368 F.3d 864, 866 (8th Cir. 2004) citing *Story v. Marsh*, 732 F.2d 1375, 1383 (8th Cir. 1984) and *Wang v. Att’y Gen.*, 823 F.2d 1273, 1276 (8th Cir. 1987). Affirmative misconduct has been defined as “a ‘deliberate lie’ or ‘a pattern of false promises.’” *Id.* citing *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001).

equitable estoppel argument failed because “the plaintiffs failed to show any affirmative conduct by the defendants that was designed to mislead or was unmistakably likely to mislead the plaintiffs.” *Id.*

In deciding the present appeal, the Court need only look to the first element of equitable estoppel requiring "false representation by the government." As the District Court noted, "Plaintiff has not pointed to any false representation by the Defendant in the state court that led her to believe that a cause of action could be timely prosecuted [in tribal court]." *Court Order, civil action 03CV729* page 5 (July 21, 2003). The evidence submitted by Plaintiff only reveals that counsel for the Defendant asserted that Minnesota State Court was an improper forum, that the Tribal Court was the proper forum and that the Defendant would not assert its sovereign immunity in an action brought in tribal court. There is no evidence that counsel for the parties ever discussed or even considered the statute of limitations in coming to an agreement to dismiss the state court proceeding with prejudice.

Remanding the case back to the District Court to apply the stricter standard set out in *Heckler v. Community Health Services* provides no purpose since neither the elements of equitable estoppel as set out in the case followed by the District Court nor elements set out in the cases provided by the Plaintiff are met under the fact pattern of the present case. In particular, the cases cited by Plaintiff still contain the requirement that representations be made by the party being estopped. *See Northern Petrochemical Co. v. United States Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1979); *Brenner v. Nordby*, 306 N.W.2d 126,127 (Minn. 1981); *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 666 (8th Cir. 1995); *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 659 (8th Cir. 1992). As stated above, the evidence is void of any representation made by the Defendant regarding not asserting the statute of limitations.

Although silence may amount to a representation in certain fact scenarios, the facts of this case do not give rise to such a conclusion. There is nothing on record that would indicate that the Defendant was even aware of the statute of limitations in Band Statutes. Moreover, it is the responsibility of counsel to protect their client's interests. Pursuant to Court Order #39, "all attorneys practicing before the Court of Central jurisdiction shall comply with the current Minnesota rules of Professional Conduct." *Court Order #39, Court of Central Jurisdiction*. "In representing a client, a lawyer shall exercise independent professional judgment" *Rule 2.1, Minnesota Rules of Professional Conduct*. Accordingly, Plaintiff's counsel has the responsibility to make an

independent professional decision and cannot rely on Defendant's counsel who is legally obligated to act with commitment and dedication to the interests of the Defendant. It is the responsibility of Plaintiff's counsel to adequately prepare and research the law. *Rule 1.1, Minnesota Rules of Professional Conduct*. The Band's Statutes are conveniently located in the law libraries of the three major law schools in the State of Minnesota. Moreover, access to the Bands statutes and court orders can be obtained from the Court upon request. In addition, as the record indicates, Plaintiff's counsel is well aware of the importance of verifying the statute of limitations of a jurisdiction. As noted on the Plaintiff's Attorney's website;

Statutes of Limitations are very tricky and require the opinion of a lawyer to interpret the facts of your individual case and determine the correct number of years within which your claim may be brought. Because these Statutes of Limitations are so varied, it is critical to your case to consult a lawyer to assist you in bringing your claim in a timely manner.

Faris & Faris website, <http://www.faris-faris.com/statuteoflimitations.htm>

Plaintiff's counsel did not fulfill this responsibility.

As stated above, the Plaintiff's estoppel argument regarding the statute of limitations fails under the standards set out by this Court, used by the District Court and the cases cited by the Plaintiff.

B.

Irregularity of the proceedings

Plaintiff argues that irregularities in the proceedings in the tribal court denied her due process. In support of this argument, Plaintiff points to the Local Rules of Civil Procedure for the United States District Court for the District of Minnesota. The local rules do require the submission of a memorandum of law with sufficient time prior to the hearing. *Loc. R. Civ. P. 7.1(b)(1)*. Additionally, as stated by Plaintiff, the rules allow the Court to refuse to hear oral argument from the party that did not submit the required memorandum or proceed in any manner the court determines is necessary if "a party fails to timely deliver and serve a memorandum of law." *Id.* at 7.1(e) However, the local rules also allow the Court to "continue the hearing." *Id.* Accordingly, the District Court had the discretion to allow the Defendant to make an oral argument.

Irregularities did occur with the filing of the memorandum. However, these irregularities did not prevent Plaintiff from making her arguments effectively or deny her due process. There is no indication that if Plaintiff had been given an additional 10 days, that the arguments made or evidence presented would have been any different from what was actually presented to the Court. In fact, the Plaintiff was allowed to submit additional evidence taken as a motion to reconsider by the District Court. *Court Order, civil action 03CV729* page 1 (July 28, 2003). The additional evidence and arguments were taken into consideration by the District Court but did not change the District Court's decision. Therefore, we conclude that Plaintiff has not been denied due process based on the irregularities of the proceedings.

C.

Judicial philosophy and traditional theory of law of the Mille Lacs Band

The traditional theory of law of the Mille Lacs Band as explained in the written statute states:

“The purpose of sha wa ni ma is to keep the people together as one. This purpose is good for all people. It serves to balance the forces of life and brings stability to the people. To achieve this way of life, the laws of the Band shall be construed to balance the rights of the individual with the need to continue to co-exist in peace and harmony with one another. In this way, order will be preserved and justice shall be accorded to each person who has cause to appear before the Court of Central Jurisdiction.”

24 MLBSA §2003.

Additionally, the written statute states that the judicial philosophy of the Court of Central Jurisdiction is to promote the traditional teachings of the elders in order to restore the circle of life “in a manner that permits the integrity of the individual to be maintained so that the community will continue to grow and prosper.” *Id.* at §2002.

The statute of limitations included in the written statutes of the Band serves the purposes outlined above. It balances the rights of the individual with the needs of the community for peace and harmony. It does this by allowing a reasonable time period to bring actions before the Court while also ensuring that the community will be able to

move forward in achieving peace and harmony by preventing perpetual disruptions in the circle of peace and harmony. Hence, Band Assembly has balanced these issues in enacting the three year statute of limitations.

IV.

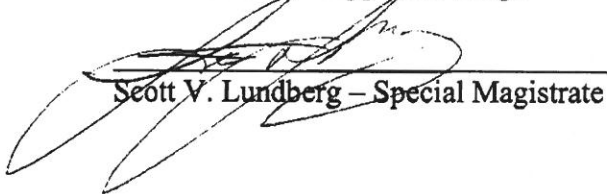
For the reasons set forth in this opinion, we affirm the District Court's dismissal of Plaintiff-Appellant's action.

It is so Ordered.

BY THE COURT:


Alvina Aubele – Appellate Judge

9-14-04
Dated


Scott V. Lundberg – Special Magistrate

9-17-04
Dated