

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
TRIBAL COURT

Albert Carey,
Plaintiff

V

Case No: C-062-1005
Hon. Jenny Lee Kronk

Victories Casino,
John Espinosa & Harlan Eckholm,
Defendants

Ellis Boal, P#10913
Attorney for Plaintiff
9330 Boyne City Road
Charlevoix, MI 49720
(231) 547-2626

John Espinosa, Defendant
170 Lorne Avenue
New Market, Ontario
Canada L3Y4J9

Matthew Lesky, P#69418
Attorney for Defendant Casino
7500 Odawa Circle
Harbor Springs, MI 49740
(231) 242-1508

Harlan Eckholm, Defendant
614 5th Street N.E.
Devils Lake, ND 58301

ORDER DENYING MOTION FOR RECONSIDERATION

Procedural History

On October 5, 2005, Plaintiff Albert Carey filed a complaint with Little Traverse Bay Bands (LTBB) of Odawa Indians Tribal Court against Defendant Victories Casino, alleging wrongful termination. The Court subsequently allowed the Plaintiff to amend his complaint to include a whistleblower claim against two named defendants in their individual capacities.

In a written opinion dated April 20, 2006, the Court granted Defendant Casino's motion for summary judgment and dismissed the case, based upon sovereign immunity for Defendant Casino and failure to state a claim as to the individually-named Defendants.

On May 18, 2006, the Plaintiff filed an appeal in this matter with the LTBB Appellate Court. In its decision released on March 27, 2007, the LTBB Appellate Court upheld the

dismissal of the appeal against the Casino but remanded the case against Defendants Eckholm and Espinosa to Tribal Court to give the Plaintiff a second opportunity to properly file his complaint with the proper service on the defendants. The Appellate Court remand order indicated that “On remand, Appellant Carey shall have fourteen days from entry of this Decision to file a complaint.” See, Appellate Decision, p. 11. The Appellate Court further directed that “In this case, the Appellate Court is persuaded that the stringent Michigan Court rules for service of process should be applied to this case and all other civil court cases until the Tribal Court adopts its own civil court rules.” Appellant Decision, p. 10.

On April 9, 2007, Plaintiff attempted to file a defective amended complaint with Tribal Court that did not include an original certificate of service as required by LTBB Civil Court Rules.

Therefore, in a written order dated April 16, 2007, the Court dismissed this case because the Plaintiff failed to file a complaint within “fourteen days from entry of this Decision” using “the stringent Michigan Court rules for service of process”. . . . or “until the Tribal Court adopts its own civil court rules.”

On April 30, 2007, the Plaintiff filed a Motion and Brief to Reconsider Dismissal for Failure to Accompany The Amended Complaint With A Certificate of Service, requesting that the Court set aside the April 16 dismissal and treat the amended complaint as properly filed and the defendants properly served.

Standard of Review

Motions for relief from judgment or orders must be filed within 10 days and such motions are granted on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence or fraud. See, FRCP Rules 59(e) and 60(b).

Discussion

In his request for reconsideration, the Plaintiff has failed to articulate a mistake of fact or law, an inadvertence, excusable neglect, newly discovered evidence or fraud to convince the Court that it should reconsider its April 16 dismissal. The gravaman of Plaintiff’s request for reconsideration is that Michigan Court Rules should apply rather than LTTB Civil Court Rules and that the Plaintiff did comply with the stringent Michigan Court Rules regarding service of process.

When this case began in October 2005 through April 2006 when the first dismissal order was issued in this case, the Tribal Judiciary had not approved its Civil Court Rules. During the pendency of the appeal, however, the Judiciary did approve the rules in September 2006 and the Tribal Court could have implemented the rules at that time. The Appellate Court knew on March 27, 2007 when it released its appellate opinion in this matter that the rules had been approved.

Due to unexpected clerical problems, a “clean” copy of the rules was not available until early 2007. Although not required by Judiciary procedures to do so, the Court posted the rules for 30 days on March 9, 2007, as a courtesy to tribal citizens and officials. Attachment 1 of the Plaintiff’s reconsideration motion is a copy of an email that the Court Administrator sent to the executive and legislative branches of government, as well as the legal department and all directors. This attachment shows that the LTBB’s Civil Court Rules were sent to the Plaintiff’s Attorney by a tribal council member on that same date. No comments were received during the 30-day period. Immediately upon the expiration of the 30-day period, the Chief Judge signed the rules and they went into effect.

The Appellate Court had given the Plaintiff fourteen days to file a new complaint. When the Plaintiff’s Attorney appeared at Tribal Court on the thirteenth day, he was told that the new LTBB Civil Court Rules had been adopted and would apply to this filing. Plaintiff’s Attachment 1 clearly shows that he had knowledge of the Rules on March 9, a full month before his filing. Even though the Plaintiff’s Attorney told the Court Clerk that he was aware of the rules, she gave the Plaintiff’s Attorney a copy of the Rules. The Plaintiff’s Attorney had twenty-six (26) hours to file a certificate of service as required by LTBB rules. This was not an unreasonable task for the Plaintiff to accomplish to perfect his defective filing in Tribal Court.

The Plaintiff argues that Michigan Court Rules should apply to his April 9 filing. The Plaintiff Attorney opines that he has complied with the Michigan Court Rules’ service requirements because he personally gave three copies of Plaintiff’s amended complaint to the Defendant Casino’s attorney, Mr. Lesky. Although there is no written appearance in the file to indicate that Mr. Lesky would be appearing on behalf of Mr. Espinosa and Mr. Eckholm, the Plaintiff argues that Mr. Lesky was the legal representative for those defendants, therefore, they had been served properly and this case should not have been dismissed.

Although the Court disagrees that the Michigan Court Rules apply to the April 9, 2007 filing in this matter, even if they did, the Plaintiff did not correctly serve the defendants as required under MCR 2.104, 2.105, and 2.107. Those rules require an affidavit of service and that the defendant is personally served in person, by certified mail, or through an agent authorized in writing who can accept court documents on the defendant’s behalf.

Finally, the Court would like to clear up a misstatement of fact in Plaintiff’s motion for reconsideration. Plaintiff’s statement of Fact Number 31 on page 8 of his motion brief alleges that on April 24, he faxed a letter to the Court asking that it withhold responding to the Defendant’s April 23 clarification request until he had filed his reconsideration motion. This is not true.

The Court received the Plaintiff Attorney’s letter by fax on April 25, at 9:21 a.m. See, Appendix A attached to the end of this order. In Fact Number 32 on page 8, the Plaintiff’s Attorney infers that the Court responded to the Defendant’s clarification request after the Plaintiff requested that the Court wait until his reconsideration motion

was filed. Although it is true that the Court responded to the Defendant's Clarification Request on April 24 (see, Appendix B), it was the day before the Court received the Plaintiff Attorney's request to delay responding to Defendant.

Such misstatements of fact show carelessness at the very least and possibly even disrespect for the Tribal Court. The Court cautions the Plaintiff's Attorney that in the future, his proffered facts in court filings should be double-checked and grounded in the truth.

Conclusion of Law

Because the Plaintiff has failed to identify a mistake of fact or law, inadvertence, excusable neglect, newly discovered evidence or fraud, the Court will not set aside the April 16 dismissal, treat the amended complaint as properly filed, and find that the defendants were properly served. Plaintiff's motion for reconsideration of the Court's April 16 decision in this matter is denied.

THEREFORE, BASED UPON ALL OF THE ABOVE, IT IS ORDERED THAT BECAUSE PLAINTIFF FAILED TO PROPERLY FILE A COMPLAINT WITH A CERTIFICATE OF SERVICE WITHIN THE FOURTEEN DAYS ALLOWED BY THE TRIBAL APPELLATE COURT IN ITS REMAND ORDER, THIS CASE IS DISMISSED WITH PREJUDICE.

May 3, 2007
May 3, 2007

Honorable Jenny Lee Kronk, Associate Judge

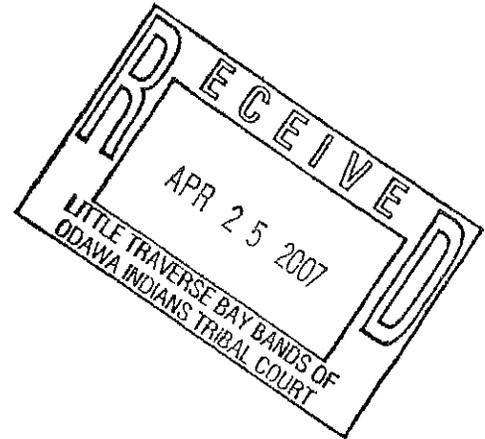
APPENDIX A

ELLIS BOAL
ATTORNEY

9330 BOYNE CITY ROAD, CHARLEVOIX, MICHIGAN 49720
231/547-2626 • FAX 231/547-2828
ellisboal@voyager.net

April 26, 2007

Hon. Jenny Lee Kronk
LTBB Tribal Court
7500 Odawa Circle
Harbor Springs, MI 49770
Fax 231/242-1470



Re: Carey v Victories Casino
LTBB Appellate Case # A-004-0606

Dear Judge Kronk:

I have the letter of Matthew Lesky moving for clarification of your dismissal ruling of April 16.

Plaintiff Carey will shortly be filing a motion for reconsideration of the ruling.

The new court rules give no time limit within which he must file it. On Monday I discussed with clerk Linda Harper what the time period should be. I suggested that the 14-day period of rule XXVI(a) for seeking a new trial seemed most analogous. She said she would research and get back to me if she learned of a different time period. Since then I have heard nothing. Accordingly I will file it by or before April 30.

May I suggest that the court await my motion, receive responses and replies of both counsel to each other, and then rule on both motions at the same time.

APPENDIX A

I am serving opposing counsel with a copy of this letter at the fax number and mailing address shown below.

Very truly yours,

Ellis Boal

c: Matthew Lesky, 7500 Odawa Circle, Harbor Springs, MI, 49770, fax
231/242-1417
Albert Carey, 187 Mishe Mokwa Drive, Harbor Springs, MI, 49740

Little Traverse Bay Bands of Odawa Indians
Tribal Court
7500 Odawa Circle
Harbor Springs, Michigan 49740

APPENDIX B

231-242-1461 • FAX 231-242-1470

April 24, 2007

Mr. Matthew Lesky
Attorney for Defendants
7500 Odawa Circle
Harbor Springs, MI 49770

RE: *Albert Carey v Victories Casino, et al*
Case No. C-062-1005

Dear Mr. Lesky,

I received your April 23, 2007 letter wherein you requested a clarification of my April 16, 2007 order (April 16 order) in this matter.

The April 16 order dismissed the case with prejudice as to all parties, including Victories Casino, John Espinosa, Harlan Eckholm and Susan Keller, the afterward added defendant in the defective April 9, 2007 amended complaint.

The Court found that the filing attempted on April 9, 2007 was defective, because there was no certificate of service attached to the filing as required by court rules. Therefore, Ms. Keller was not added as a defendant in the action within the fourteen days as allowed by the Appellate Court on remand. The Tribal Court had no mailing address for Ms. Keller and was, therefore, unable to send a courtesy notice of the dismissal to her.

I hope this will clear up any questions you have regarding this case and that you will inform Ms. Keller that she has no matter pending in Tribal Court.

Sincerely yours,

Hon. Jenny Lee Kronk
LTBB Associate Tribal Judge

cc: Ellis Boal
Attorney for the Plaintiff

Little Traverse Bay Bands of Odawa Indians
Tribal Court

7500 Odawa Circle
Harbor Springs, Michigan 49740
Ph: 231-242-1462 Fax: 231-242-1470

Albert Carey, Plaintiff,

Case No. C-062-1005

v.

Victories Casino, John Espinosa, Harlan Eckholm, Susan Keller,
Defendant,

Certificate of Service

I certify that a copy of the *Response letter to the Letter for Clarification* was served upon the following parties by first class mail at their last known address and by LTBB internal mail:

Matthew Lesky (P69418)
Attorney for Defendants
7500 Odawa Circle
Harbor Springs, Michigan 49740

Ellis Boal (P10913)
Attorney for Plaintiff
9330 Boyne city Road
Charlevoix, Michigan 49720

On this day April 24, 2007

Linda C. Harper, Court Clerk