

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff,

v.

HO-CHUNK NATION,

Defendant.

MEMORANDUM AND ORDER
05-C-632-S

Plaintiff commenced this action to compel arbitration pursuant to provisions of the gaming compact between the parties and the Federal Arbitration Act. The Court compelled arbitration and defendant appealed arguing, among other things, that this Court lacked subject matter jurisdiction. The Court of Appeals determined on appeal that the Court lacked jurisdiction and remanded the case with instructions to dismiss. Wisconsin v. Ho-Chunk Nation, 463 F.3d 655, 661 (7th Cir. 2006). However, the Court of Appeals suggested the possibility of permitting amendment of the complaint on remand, Id., a suggestion which this Court adopted on December 22, 2006.

Defendant moved to dismiss the amended complaint for lack of subject matter jurisdiction and in the alternative for summary judgment on a variety of claims. On March 9, 2007 the Court denied defendant's motion to dismiss holding, among other things, that the

Court had jurisdiction over the controversy and that defendant was not immune from suit. Defendant took an immediate appeal from the order on March 14, 2007, based on the denial of its immunity defense.

On March 19, plaintiff filed a motion in the Court of Appeals to dismiss the appeal for lack of appellate jurisdiction. Pursuant to a Court of Appeals order, defendant responded to that motion in the Court of Appeals on April 2, 2007.

Defendant's appeal of the order denying defendant's immunity defense deprived this Court of jurisdiction. Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989), subject only to its limited right to certify to the Court of appeals that the appeal is frivolous. Id. at 1339. If such a certification is issued defendant may seek a stay in the Court of Appeals. Id.

Once the appeal transfers jurisdiction here, the burden rests with plaintiffs rather than defendants. Plaintiffs contending that the claim of immunity is feeble may ask us to affirm summarily.

Id.

Plaintiff having pursued this alternative remedy as suggested by the Court of Appeals and the matter having been fully and expeditiously briefed, a finding of frivolousness would serve no purpose but to multiply the already numerous filings. Such a certification would surely bring a motion to stay, facilitating yet another round of filings. The judicious course is to await the

imminent decision of the Court of Appeals on the expedited motion for summary affirmance.

ORDER

IT IS ORDERED that plaintiff's motion to certify that defendant's appeal is frivolous is DENIED.

Entered this 4th day of May, 2007.

BY THE COURT:

s/
JOHN C. SHABAZ
District Judge