

Joseph Vorndran,
Breanne Gordon,
STUART & CLOVER, PLLC,
Shawnee, Oklahoma,

For Defendant/Appellee,
Tony D. Holden.

OPINION BY ROBERT D. BELL, VICE-CHIEF JUDGE:

¶1 Plaintiff/Appellant, Peoria Tribe of Indians of Oklahoma (Tribe), appeals from the trial court's grant of summary judgment in favor of Defendants/Appellees, David J. Qualls and Tony D. Holden, in Tribe's action against Defendants arising from the management of Tribe's casino by Defendants' limited liability company. For the reasons set forth below, we affirm the trial court's judgment.

¶2 In 2007, Tribe contracted with Direct Enterprise Development, LLC (DED), to develop and manage Tribe's Buffalo Run Casino. Defendants Qualls and Holden are the sole members of DED. As required by federal Indian gaming law, the agreement was reviewed and approved by the National Indian Gaming Commission (NIGC). Tribe and DED operated under the agreement and an extension thereof until 2017. One of Tribe's gaming requirements was that Qualls and Holden obtain individual gaming licenses from the Peoria Tribal Gaming Commission (PTGC), which they did. Pursuant to the contract, the casino's net revenues were used to calculate Tribe's monthly distributions and DED's monthly management fee.

¶3 Tribe operated its casino under the purview of the PTGC and Tribe's Business Committee. Those entities held monthly meetings where Tribe's independent CPA

presented financial reports regarding the casino operations and management. Among other things, the accountant was tasked with calculating DED's management fee.

¶4 According to Defendants, after the economic downturn in 2008, Tribe sought ways to increase tribal distributions. The record shows that in response, Tribe's independent CPA, with input from Tribe's attorney, implemented a "depreciation add-back" to its accounting method in determining monthly net revenue.¹ The change resulted in an increase in the casino's net gaming revenue, which in turn increased the cash available for monthly distributions. Stated otherwise, the add-back method increased Tribe's monthly distributions (which was Tribe's principal source of revenue) and, to a lesser extent, DED's monthly management fee. For years thereafter, the depreciation add-back and amounts associated therewith were provided in written monthly reports to Tribe's chief, the casino general manager, Tribe's Business Committee, the PTGC, and Tribe's external independent auditor, as well as to the NIGC. Defendants stress they had no contract with Tribe and did not implement the add-back, calculate DED's management fee or issue themselves checks from Tribe's accounts. According to Tribe, Defendants concocted the depreciation add-back scheme without Tribe's knowledge solely to inflate DED's

¹ Under the depreciation add-back method, the depreciation of all non-building assets was excluded from the casino's operating expenses.

management fee. Tribe adds that its CPA also worked for DED and Tribe alleges the CPA implemented the add-back scheme at DED's behest.

¶5 In 2017, NIGC regulators complained to Tribe about the depreciation add-back. In 2019, the NIGC issued a Notice of Violation to Tribe threatening Tribe with millions of dollars in fines related to the use of the depreciation add-back method.² In response, Tribe negotiated with the NIGC to substantially lower its fine in exchange for filing suit against Defendants as the principals of DED. Tribe paid \$26,762.00 in fines, stipulated that it had notice of the NIGC's view on depreciation before the add-back was implemented, and promised to pursue the individual Defendants. Tribe also admitted awareness of its non-compliance with NIGC regulations and acknowledged that compliance with such regulations was Tribe's sole responsibility.

¶6 When DED's management contract with Tribe expired by its own terms on October 7, 2017, the PTGC terminated Defendants gaming licenses and notified the NIGC of its actions. Notwithstanding, the PTGC thereafter initiated proceedings against Defendants under the auspices of its authority to regulate gaming licenses. Therein, the PTGC imposed civil fines of \$2,067,561.00 against Defendants.

² Among other things, the NIGC's letter opined DED received \$2,067,561.00 in excess management fees between March 31, 2008, and the date of the letter. Defendants point out that, during the same time period, Tribe received \$5,279,923.00 in excess distributions as a result of the depreciation add-back.

¶7 Tribe then instituted the present action against Defendants in state district court to recover what it describes as “misappropriated” management fees paid to DED. Tribe’s suit asserted nine (9) claims, the first of which it later dismissed. The remaining claims were: fraud, embezzlement, unjust enrichment, money had and received, breach of fiduciary duty, constructive trust, chose in action, and enforcement of tribal judgment. Both sides moved for summary judgment. The trial court ruled in favor of Defendants. Specifically, the trial court held the fines assessed against Defendants by the PTGC “were not authorized by the Peoria Tribal Gaming Ordinance since neither the Ordinance [n]or the [PTGC]’s Bylaws identified any amount of potential fine or method of calculation as required by the applicable federal, state, or tribal constitutions.” The trial court therefore held the PTGC lacked jurisdiction to issue any fine against either Defendant and that the unauthorized fines violate due process.³ Tribe now appeals, which stands submitted for accelerated appellate review without appellate briefs on the trial court record pursuant to Rule 13(h), *Rules for District Courts*, 12 O.S. 2021, Ch. 2, App. 1, and Rule 1.36, *Oklahoma Supreme Court Rules*, 12 O.S. 2021, Ch. 15, App. 1.

³ Because the trial court granted summary judgment to Defendants on each of Tribe’s eight (8) remaining counts, the trial court’s order denied as moot Defendant’s motion for partial summary judgment on their statute of limitations defense. The order also denied Tribe’s motion for summary judgment as to actual damages. The order did not specifically identify the grounds for granting summary judgment to Defendants on Tribe’s Counts II through VIII.

¶8 This Court’s standard of review of a trial court’s grant of summary judgment is *de novo*. *Johnson v. Snow*, 2022 OK 86, ¶8, 521 P.3d 1272. “Under this standard, we have plenary, independent, and nondeferential authority to determine whether the trial court erred in its legal ruling.” *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841. Summary judgment is proper when the evidentiary materials establish “there is no genuine controversy as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Johnson* at ¶8. Furthermore:

“To prevail as the moving party on a motion for summary adjudication, one who defends against a claim by another must either (a) establish that there is no genuine issue of fact as to at least one essential component of the plaintiff’s theory of recovery or (b) prove each essential element of an affirmative defense, showing in either case that, as a matter of law, the plaintiff has no viable cause of action.”

Hawk Wing v. Lorton, 2011 OK 42, ¶10, 261 P.3d 1122, quoting *Akin v. Missouri Pac. R.R. Co.*, 1998 OK 102, ¶9, 977 P.2d 1040.

¶9 As previously set forth, Tribe dismissed the first claim it asserted against Defendants in its petition. In its second claim, Tribe alleged Defendants committed fraud by falsely claiming in 2007 that they would not utilize the depreciation add-back method and then by hiding and failing to disclose they had implemented the scheme. Tribe also claimed it relied upon such misrepresentations and concealments to its detriment.

¶10 The elements of actionable fraud are:

1) a false material misrepresentation, 2) made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied on by the other party to his (or her) own detriment.

Bowman v. Presley, 2009 OK 48, ¶13, 212 P.3d 1210. Tribe cannot prove any of the elements required to establish fraud as to either Defendant. First, the decision to implement the depreciation add-back method was made by Tribe's external accountant with the advice of Tribe's counsel. Neither Defendant made a false statement. There was also no attempt by either Defendant to conceal the depreciation add-back from Tribe. As previously stated, the monthly reports of Tribe's CPA were widely disseminated to all relevant controlling members of Tribe, including the chief who presided over the monthly Business Committee meetings. As for the lack of any detrimental reliance, the record shows Tribe admitted it had notice of the NIGC's view on depreciation add-back in 2007 and was aware of its non-compliance with NIGC regulations during the relevant periods. The trial court properly granted summary judgment to Defendants on this claim.

¶11 With respect to Tribe's third claim, Defendants assert Oklahoma does not recognize a civil cause of action for embezzlement. *Nixon v. Berryhill*, 2018 WL 2946424 (W.D. Okla. Mar. 26, 2018), and cases cited therein. Tribe claims the Oklahoma Supreme Court "acknowledged embezzlement in the civil context" in *Terry v. Water Improvement Dist. No. 5 of Tulsa County*, 1937 OK 82, 64 P.2d 904. While *Terry* did discuss embezzlement in a civil context, the case did not address

embezzlement as an independent civil cause of action. Correctly predicting that this Court may conclude that its claim for embezzlement is improperly labeled, Tribe argues the facts alleged in its petition equally support a fraud claim. We have already rejected Tribe's claim of fraud. Assuming *arguendo* Oklahoma law recognized a civil cause of action for embezzlement, we would affirm the trial court's summary judgment of the same. The record reveals Defendants did not embezzle anything: Defendants did not implement the depreciation add-back, did not calculate DED's management fee, and did not have authority to sign checks issued by Tribe.

¶12 Regarding Tribe's claim of unjust enrichment:

The long-standing rule in Oklahoma is that a plaintiff may not pursue an equitable remedy when the plaintiff has an adequate remedy at law. "[W]here the plaintiff has a plain, speedy and adequate remedy at law, equity will not intervene in his behalf." A claim for breach of contract provides such a remedy.

Krug v. Helmerich & Payne, Inc., 2013 OK 104, ¶34, 320 P.3d 1012 (citations omitted). A claim for unjust enrichment is equitable in nature. *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶18, 164 P.3d 1028. Tribe's claim against Defendants in this case is, in essence, that the contractual provision as to depreciation as an operational expense was breached. The parties to that contract were Tribe and DED. Tribe had an adequate remedy at law against DED in the form of a breach of contract claim, but it chose not to pursue the same.

¶13 To the extent Tribe argues the use of the depreciation add-back was unlawful or violated public policy, Tribe's unjust enrichment claim similarly fails. "A court [of] equity will not adjust differences between wrongdoers" *Wickham v. Simpler*, 1946 OK 357, ¶15, 180 P.2d 171.

"Under the maxim, 'He who comes into equity must come with clean hands,' a court of equity will not lend its aid in any manner to one who has been guilty of unlawful or inequitable conduct in the transaction from which he seeks relief, nor to one who has been a participant in a transaction the purpose of which was to defraud a third person, to defraud creditors, or to defraud the government, nor to a party to a transaction whose purpose is violative of public policy."

Nelms v. Newton, 1947 OK 238, ¶9, 185 P.2d 202, quoting *Rust v. Gillespie*, 1923 OK 346, ¶25, 216 P. 480. Tribe participated in, approved of and benefitted from the depreciation add-back.

¶14 Tribe's fifth cause of action is for money had and received, which has been described as follows:

Where money is paid to another under the influence of a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, and the money would not have been paid if it had been known to the payer that the fact was otherwise, it may be recovered.

Continental Oil Co. v. Rapp, 1956 OK 171, ¶22, 301 P.2d 198, quoting 87 A.L.R. 649. The above definition presupposes that the appropriate defendant in an action for money had and received is the person who (or entity that) *received* the plaintiff's money. Stated otherwise, an action for money had and received is properly brought against the party to whom the alleged payments were made. In the present case, as

provided by the parties' contract, the management fees were paid by Tribe's casino to DED.⁴ Any action for money had and received should have been pursued against the separate legal entity DED, not the individual Defendant principals thereof.

¶15 In its sixth cause of action, Tribe contends Defendants breached a fiduciary duty to run the casino and do nothing to impair Tribe's interests in the casino and its revenue. An essential element of a claim for breach of fiduciary duty is "the existence of a fiduciary relationship" between the plaintiff and the defendant. *Orthman v. Premiere Pediatrics, PLLC*, 2024 OK CIV APP 7, ¶34, 545 P.3d 124. Accord O.U.J.I. Civil 26.1. We hold no such relationship existed between Defendants and Tribe.

¶16 Tribe had a contractual relationship with DED, not the individual Defendants. Defendants were neither agents nor trustees of Tribe. The undisputed facts show Defendants received no funds on behalf of Tribe (with the limited exception outlined in n.4), had no signatory authority on Tribe's casino accounts, and did not control the casino's accounting policies. Defendants did not implement the depreciation add-back and did not calculate or pay the management fees. Defendants did not select or pay Tribe's external auditor, nor did they provide the financial statement schedules to Tribe, the PTGC or the NICG. The depreciation add-back was

⁴ Although Defendant Qualls personal bank account was wired some part of the management fees to pay a loan he made for DED expenses, there is no evidence such amounts were attributable to the increase in management fees due to the depreciation add-back.

implemented by Tribe's independent CPA with input from Tribe's legal counsel. Tribe's Business Committee received, reviewed and approved the CPA's monthly schedules. Tribe's chief received and opened the memorandum on depreciation prepared by Tribe's attorney, and he presided over the Business Committee's approval of the CPA's monthly reports. Summary judgment on this count was correctly granted to Defendants.

¶17 In the seventh and eighth claims asserted in its petition, Tribe ostensibly asserts causes of action for a constructive trust and a chose in action. Neither of these concepts are recognized under Oklahoma law as independent causes of action. A constructive trust is a remedy in aid of an equitable claim, *Cacy v. Cacy*, 1980 OK 138, ¶7, 619 P.2d 200, and a chose in action is "a right to recover money or other personal property, by judicial proceedings." 60 O.S. 2021 §312. *See also ACCOSIF v. American States Ins. Co.*, 2000 OK 21, ¶2, n.4, 1 P.3d 987. The trial court correctly granted Defendants summary judgment on these alleged claims.

¶18 As its final claim, Tribe seeks judicial enforcement of the fine levied against Defendants by the PTGC. Tribe contends the fine was authorized pursuant to §15.1(a) of the Peoria Tribe's Gaming Ordinance, which states:

The Tribal Commission [PTGC] may take any one or a combination of the following actions with respect to any person or entity who violates any provision of this Ordinance:

- (a) Impose a civil fine, as outlined in the By-Laws for each violation, and if such violation is a continuing one, for each day of such violation.

Neither the PTGC's decision nor the Tribe's extensive pleadings identify the By-Law relied upon by the commission in assessing the subject fine against Defendants.

¶19 As previously stated, the trial court held the fine was assessed without affording Defendants due process of law. Assuming for the sake of argument that the PTGC had jurisdiction over Defendants by virtue of its authority to regulate gaming licenses, we hold the trial court correctly rejected Tribe's attempt to enforce the PTGC's fine order in state court. "The full faith and credit clause of the United States Constitution does not extend to foreign nation judgments, but state courts have the power to recognize them." *Panama Processes, S.A. v. Cities Service Co.*, 1990 OK 66, ¶7, 796 P.2d 276 (footnotes omitted). "The important principles of comity compel deference and mutual respect for concurrent foreign proceedings." *Id.* at ¶12. However, "[c]omity is not an inexorable command, . . . and a request for recognition of a foreign judgment may be rebuffed on any number of grounds, . . ." *MacArthur v. San Juan County*, 497 F.3d 1057, 1067 (10th Cir. 2007).

A foreign-country judgment may be denied recognition when it is contrary to the crucial public policies of the forum in which enforcement is requested. This rule concedes that a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.

Panama Processes at ¶10 (footnote omitted).

¶20 The *MacArthur* Court reiterated:

[R]ecognition of a tribal court judgment *must* be refused where one of two circumstances exist. First, comity must not be granted where the tribal court

lacked either personal or subject matter jurisdiction. Second, a tribal court judgment must not be enforced where the party against whom enforcement was sought was not afforded due process of law (emphasis in original).

MacArthur, 497 F.3d at 1967, citing *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006). In the present case, we assume for purposes of our analysis that the first circumstance discussed in *MacArthur* is inapplicable, notwithstanding that the PTGC admittedly had already revoked Defendants' individual gaming licenses *before* it held a hearing and issued the subject fine. However, application of the second circumstance set forth above - lack of due process - is undoubtedly fatal to Tribe's quest to enforce its fine against Defendants in district court.

¶21 In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, the United States Supreme Court reiterated, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Id.*, 538 U.S. at 417 (citation omitted). The Oklahoma Supreme Court has similarly noted that due process requires statutory notice of amounts of fines.

A statutory provision for a reasonable and measured recovery, as a civil penalty, for violation of a statute involving the public interest in not violative of the due process clause.

* * *

“Due process of law with respect to the imposition of penalties requires that the legislature shall prescribe the amount of the penalty, or some definite standard for fixing the amount, or else that the amount shall be determined in a judicial proceeding instituted against the offender.”

State ex rel. Pollution Control Co. v. Kerr McGee Corp., 1975 OK 28, ¶8, 532 P.2d 1386 (citations omitted). Tribe has identified no By-Law authorizing the imposition of a fine, much less one identifying the potential amount of any such fine or the method of calculating the same. The trial court properly refused to recognize the PTGC's fine order.

¶22 Upon *de novo* review, we hold there exists no genuine controversy as to any material fact and that Defendants are entitled to judgment as a matter of law. Accordingly, the judgment of the trial court is affirmed. Tribe's motion to supplement the record with material not presented to or considered by the trial court at the time of its decision is denied. *See* 12 O.S. 2021 §952(a); Supreme Court Rule 1.36(c).

¶23 AFFIRMED.

SWINTON, P.J., and PRINCE, J., concur.