2010 WL 5122525 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

SOVEREIGN CONSULTING, LLC. an Oklahoma Limited Liability Co., Appellant,
v.
DELAWARE NATION OF OKLAHOMA, Appellee.

No. 108,180.
November 8, 2010.

Appeal from Final Order of Judgment in the District Court of Caddo County, Case No. CJ-2006-134, The Honorable Richard Van Dyck, District Judge, presiding

Brief in Chief of Appellant

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***1** COMES NOW the Appellant, Sovereign Consulting, L.L.C., an Oklahoma Limited Liability Company, and respectfully submits its Brief in Chief of Appellant. Appellant shall refer to itself as "Appellant" or "Appellant Sovereign Consulting." Appellant shall refer to the Appellee as "Appellee" or "Appellee Delaware Nation." References to the transcripts of September 27, 2006, February 18, 2009, and February 17, 2010, shall be made as (Tr. 9/27/06 at _____); (Tr. 2/18/09 at _____); or (Tr. 2/17/10 at _____) respectively according to page number(s). References to the original record shall be made according to the document indexed by the Caddo County Court Clerk according to instrument number (e.g. Inst. 44), or instrument number and page number(s) in the index. For example, a reference to the Answer may be made as (Inst. 17, Answer, at Index, vol. I, pp. 214 - 222).

***2** A. STATEMENT OF THE CASE:

Appellant Sovereign Consulting filed suit against Appellee Delaware Nation in Caddo County District Court Case No. CJ-2006-134 on April 21, 2006. The petition alleged, in brief, causes of action and/or equitable remedies by Appellant Sovereign Consulting against Appellee Delaware Nation for breach of contract, quantum meruit, estoppel, tortious breach of contract, and specific performance. (Inst. 1, Petition, at Index, vol. I, pp. 1 - 14, at document pp. 9-13). Appellee Delaware Nation filed a motion to dismiss for failure to state a claim upon which relief should be granted. (Inst. 4, Defendant's Motion to Dismiss with Prejudice and Brief in Support, Index, vol. I, pp. 69-82). The District Court, per the Honorable Richard Van Dyck, District Judge, overruled the motion to dismiss after hearing argument of counsel and review of the pleadings in an order dated October 10, 2006. (Tr. 9/27/06 at p. 18) (Inst. 11, vol. I, Order Denying Defendant's Motion to Dismiss, at pp. 173-175).

The Appellee Delaware Nation moved to certify the case for an interlocutory order from this Court. (Inst. 12, Delaware Nation's Combined Motion to Certify Interlocutory Order and Brief in Support, Index, vol. I, pp. 176-190). Appellee Delaware Nation received Appellant Sovereign Consulting's motion for default judgment on February 16, 2007. (Inst. 15, Delaware Nation's ***3** Objection to Motion for Default Judgment or In the Alternative, Motion for Leave to File Answer, Index, vol. I at pp. 192-198). The District Court overruled the Appellee Delaware Nation's Motion to Certify Interlocutory Order in a journal entry order dated March 28, 2007. (Inst. 17A, Journal Entry, vol. I, pp. 223-224). At that time, the district court gave Appellee Delaware Nation an additional twenty (20) days to file its answer or be in default. (Inst. 16, Court Minute, vol. I, at p. 213). Appellee Delaware Nation filed its answer and proceeded to seek extraordinary relief in this Court in Case No. MA-104481. (Inst. 17B, Index, vol. I at pp. 225-226). This Court denied Appellee Delaware Nation's request for mandamus relief in a unanimous decision on May 14, 2007.

On October 15, 2008, Appellant Sovereign Consulting filed for summary judgment. (Inst. 19, Index, Plaintiff's Motion for Summary Judgment and Brief in Support, vol. II at pp. 242-257). Appellee Delaware Nation in turn filed for summary judgment. (Inst. 20, Index, Defendant's Combined Cross-Motion for Summary Judgment and Response to Plaintiff's Partial Motion for Summary Judgment, vol. II at pp. 259-307). At a hearing on February 18, 2009, District Judge Van Dyck overruled both parties' motions for summary judgment. (Tr. 2/18/09 at 28-29). A scheduling order was entered on the date of the hearing, February 18, 2009. (Inst. 26, Index, vol. III, Motion of Defendant Delaware ***4** Nation, Ex. 3). A two week trial date for February, 2010 was scheduled by Judge Van Dyck. *Id.* The attorneys for Appellant Sovereign Consulting filed a motion to withdraw on April 15, 2009, alleging that its last payment received by Sovereign Consulting for services rendered was March, 2008. (Inst. 28, Index, vol. III, Motion to Withdraw, pp. 530-531). On the very date of filing the motion to withdraw, Judge Van Dyck entered an order allowing withdrawal of Appellant Sovereign Consulting's attorneys. The order stated in pertinent part that Sovereign Consulting

must enter an appearance pro se or through other counsel within thirty (30) days. (Inst. 29, Index, vol. III, Order Allowing Withdrawal, pp. 532-533). Malcolm Hall entered an appearance on behalf of Appellant Sovereign Consulting on May 19, 2009.

Delaware Nation filed a motion to amend its answer and make counterclaims, as well as a motion for sanctions, and the district court set the hearing for June 26, 2009. (Inst. 30, 31, 32, Index, vol.. III). The district court granted these motions on July 10, 2009, after it appears that Mr. Hall did not appear at the hearing on June 26, 2009, though Appellant Sovereign Consulting had sought to have the hearing re-set. (Inst. 33, Index, vol. III, Order Granting Motion to Amend, p. 540). In their amended answer, Appellee Delaware Nation made general denials of Appellant Sovereign Consulting's claims for breach of ***5** contract, quantum meruit, estoppel, tortious breach of contract and specific performance. (Inst. 34, Index, vol. III, First Amended Answer and Counterclaims). In its counterclaims, Appellee Delaware Nation alleged fraudulent misrepresentation or omission; and constructive fraud/misrepresentation/negligent misrepresentation. (Inst. 34, Index, vol. III, First Amended Answer and Counterclaims).

These counterclaims were filed on July 21, 2009, more than three years after the initiation of suit by Appellant Sovereign Consulting. Appellant Sovereign Consulting filed a witness list on September 1, 2009, and Appellee Delaware Nation filed a preliminary witness and exhibit list on September 2, 2009. (Inst. 39, 40, Index, vol. III, Plaintiff's Witness List, Defendant's Preliminary Witness and Exhibits Lists).

On August 19, 2009, Appellee Delaware Nation filed a Motion for Default Judgment on Counterclaims and a Notice of Hearing on Motion for Default Judgment. (Inst. 37, 38, Index, vol. HI, Defendant's Motion for Default Judgment on Counterclaims; Notice of Hearing on Motion for Default Judgment). The motion for default judgment requested ". . . recession of the Development Agreement, Memorandum of Understanding, and any other agreements or approvals of the Nation, and judgment against Sovereign on the claims in its ***6** Petition relying upon such alleged agreements. In addition, upon granting Default Judgment, the Nation respectfully requests that the Court schedule a later hearing to determine the damages awardable to the Nation." (Inst. 36, Defendant's Motion for Default Judgment on Counterclaims, Index, vol. III, pp. 571-601, at document p. 3). A notice of refusal of certified mail was filed by Appellee Delaware Nation on August 31, 2009. (Inst. 38, Notice of Refusal of Certified Mail, Index, vol. III, pp. 604-641). This document purportedly refers to Exhibit 3 within the Appellee Delaware Nation's "Notice of Refusal of Certified Mail," filed on August 31, 2009. (Inst. 38, Notice of Refusal of Certified Mail, Index, vol. III, pp. 604-641).

On September 18, 2009, Appellant Sovereign Consulting filed its answer to Appellee Delaware Nation's counterclaims. (Inst. 41, Plaintiff's Answer to Defendant's Counterclaims, Index, vol. III, pp. 650-662). Despite Appellant Sovereign Consulting's answer to Appellee Delaware Nation's counterclaims, and despite the exchange of filed witness lists by both parties during the pendency of the motion for default judgment, the district court granted the Appellee Delaware Nation's motion for default judgment on Appellee Delaware Nation's counterclaims at the hearing held on September 23, 2010. (Inst. 43, Order Granting Default Judgment on Defendant's Counterclaims, Index, vol. III, pp. 664-665).

***7** On October 5, 2009, Appellant Sovereign Consulting filed a combined motion that requested:

(1) vacation of the default judgment;

(2) leave to file its answers to the Nation's counterclaims out of time; and

(3) default judgment in favor of Appellant Sovereign Consulting.

(Inst. 44, Plaintiff/Counter-Defendant's Motion for Reconsideration to Vacate Default Judgment Granted in Favor of Defendant/Counter-Plaintiff, Motion for Leave of Plaintiff/Counter-Defendant to File Answers to Defendant/Counter-Plaintiff's Counterclaims Out of Time and for Default Judgment in Favor of Plaintiff/Counter-Defendant, Index, vol. III, pp. 666-676).

The Appellee Delaware Nation responded to this motion, and it further moved for reconsideration on its cross-motion for summary judgment. (Inst. 45, 46, Defendant's Motion for Summary Judgment on Trust Issue, and Motion to Reconsider Defendant's Motion for Summary Judgment). The Appellee Delaware Nation further moved to strike the scheduling order on January *1*, 2010. (Inst. 48, Index, vol. IV, pp. 821-824). In this motion, the Appellee Delaware Nation requested that the district court enter a new scheduling order on the grounds, *inter alia*, that ". . . significant additional discovery will be required ***8** before the case is ready for trial, including out-of-state discovery. . . ." Malcolm Hall filed an affidavit on February 17, 2010 stating that he, as attorney for Appellant Sovereign Consulting, ". . . did not refuse any certified mail or correspondence from Jay Walters [attorney for Delaware Nation] related to a Motion for Default Judgment, nor did Mr. Hall authorize any staff or employees to refuse certified mail from Jay Walter[s] or anyone. . . ." On that date, Mr. Robles entered his appearance for the Appellant Sovereign Consulting and he appeared at a hearing before the district court on the motions then pending. (Inst. 49, 50, Affidavit of Malcolm Hall, Motion to Withdraw and Substitution of Counsel, pp. 825, 826).

At the hearing before the district court, the counsel for Appellee Delaware Nation stated that there were some additional things they needed to do to be ready for trial. (Tr.2/17/10 at 15). Nevertheless, the district court ruled:

(1) That the Appellant Sovereign Consulting's Motion for Reconsideration, to Vacate Default Judgment, motion for leave to file answers to Appellee Delaware Nation's Counterclaims out of time, and for default judgment in favor of Appellant Sovereign Consulting is denied;

(2) That the Appellee Delaware Nation's Motion for Judgment or Summary Judgment on Appellant Sovereign Consulting's Claims is granted; and

***9** (3) That the Appellee Delaware Nation's Motion for Summary Judgment on Trust Issue, and Motion to Reconsider Appellee Delaware Nation's Cross-Motion for Summary Judgment are granted.

The Journal Entry of Judgment entered on March 8, 2010, specifically stated in its closing paragraph, "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered on behalf of Defendant and against Plaintiff on all of Plaintiff's claims in this action. IT IS SO ORDERED." (Inst. 53, Journal Entry of Judgment, Index, vol. IV, pp. 829-831).

It is from this final order that Appellant Sovereign Consulting has perfected this appeal.

B. STATEMENT OF FACTS:

On September 6, 2003, Sovereign, L.L.C. and Sovereign Consulting, L.L.C. entered into a Memorandum of Understanding (hereafter, "MOU") with the Appellee Delaware Nation of Oklahoma. The MOU stated the terms for a business agreement between Sovereign Consulting and the Delaware Nation to develop a gaming facility on a 2.2 acre piece of property in Caddo County, Oklahoma, known as the "Biscuit Hill" property.

On September 9, 2003, the Executive Committee for the Delaware Nation ***10** gave approval for this project for the development of the Biscuit Hill property in its Resolution No. 03-47 (hereafter "Resolution"). The Resolution stated, in pertinent part:

WHEREAS, according to the Constitution and By-Laws, the Executive Committee shall act on behalf of the Nation in all matters upon which the Nation is empowered to act now or in the future. . ."

WHEREAS, the Delaware Nation owns certain property known as "Biscuit Hill" on Highway 281 near Hinton, Oklahoma, . . .

WHEREAS, the Delaware Nation desires to have this site developed for economic development purposes, including, but not limited to Class II gaming:

WHEREAS, Sovereign, L.L.C. will advance up to $200,000 for placement of the Biscuit Hill site into trust evidenced by promissory note that will only be enforceable in the event that the lands are never placed into trust and the terms are acceptable;

NOW THEREFORE BE IT RESOLVED, that the Executive Committee authorizes the Tribal President to sign all documents including, but not limited to Letter of Intent, Memorandum of Agreement and Promissory on behalf of the Delaware Nation on regard to the approved proposal as submitted by Siskind and Sovereign, L.L.C. and as aforementioned above.

Siskind refers to Jeffrey M. Siskind, the president of Sovereign, L.L.C. and Sovereign Consulting, L.L.C. At the time that the gaming facility development contract was entered into, Siskind and the two corporate names were doing business under the name of in the present appellate litigation, Sovereign ***11** Consulting, L.L.C. the Appellant herein. On November 3, 2004, Appellant Sovereign Consulting and Appellee Delaware Nation entered into a Gaming Facility Development and Construction Agreement (hereafter "Development Agreement"). (See especially, Inst. 21). The Development Agreement stated that the parties have entered into a Memorandum of Understanding dated September 6, 2003 that outlined the parties' mutual intention to develop a gaming facility on the Biscuit Hill property, and that they ". . . entered into this Agreement to implement the parties' intentions in a binding and enforceable agreement." *Id.*

Appellant Sovereign Consulting began fulfilling its obligations under the Development Agreement and incurred expenses in excess of $460,000.00 in fulfillment of these obligations. One of the many expenses incurred by Appellant Sovereign Consulting was a $100,000.00 payment made, at the time the parties entered into the Development Agreement, to counsel for Appellee Delaware Nation for the purpose of placing the Biscuit Hill property in trust. Such a request from the Delaware Nation to Appellant Sovereign Consulting was referenced by the Appellee Delaware Nation in Resolution 03-47.

In a letter dated January 11, 2005 to William Siskind from Edgar French, President of the Delaware Nation, that acknowledged the condition to ". . . secure a letter of intent from a nationally or state chartered bank that is willing and able ***12** to finance the Biscuit Hill property by means of a construction and permanent loan not to [exceed] $3,000,000,00 or exceed a ten year term at the best available interest rate had been met to the satisfaction of the Delaware Nation." (Inst. 21, Plaintiff's Exhibit 1 of Reply Brief of the Plaintiff, Sovereign Consulting, LLC, to the Defendant's Combined Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, Index, vol. II, pp. 308-368). The Delaware Nation Executive Committee minutes of January 7, 2005 state that "The Siskind Group is still in flow with the agreement." *Id.* at Plaintiff's Exhibit 3. Two months after the Development Agreement was executed, the Executive Committee of the Appellee Delaware Nation did not consider Appellant Sovereign Consulting to have failed to satisfy a condition precedent to the Appellee Delaware Nation's execution of the Development Agreement. Subsequent to the January 11, 2005 letter, the Appellee Delaware Nation never gave any indication that the Bank of Oklahoma term sheet was not satisfactory nor made any request for a Funding Agreement. On January 12, 2005, the Executive Committee voted to release the 2003 Audit to the Siskind Group to seek financing. On January 14, 2005, the Executive Committee approved Siskind's "inquire only" status with the Bureau of Indian Affairs (BIA) to follow up on the trust application. (Inst. 21, Plaintiff's Exhibit 5 of Reply Brief of the Plaintiff, Sovereign Consulting, LLC, to ***13** Defendant's Combined Cross-Motion for Summary Judgment, Index, vol. II, pp. 308-368). On April 19, 2005, the Executive Committee for the Appellee Delaware Nation approved two resolutions to advance the Development Agreement. Specifically, Resolution # 05-08 authorized Sovereign Consulting to quiet title to Biscuit Hill and Resolution # 05-01 authorized the placement of the Biscuit Hill property in trust. (Inst. 21, Plaintiff's Exhibit 6 of Reply Brief of the Plaintiff, Sovereign Consulting, LLC, to Defendant's Combined Cross-Motion for Summary Judgment, Index, vol. II, pp. 308-368).

Throughout this over sixteen month process from execution of the Development Agreement to the Appellee Delaware Nation's letter denying the Development Agreement on March 21, 2006, the Appellee Delaware Nation received the benefit of having liens released (by payment from Appellant Sovereign Consulting), title corrected and quieted, environmental assessments Phase I, II and II, appraisal, surveys, engineered plans for sewage performed at Sovereign Consulting's expense, and a $100,000.00 payment to the Appellee Delaware Nation's counsel for preparation of the Trust Application. *Id.* The Appellee Delaware Nation received and accepted these benefits, and Appellant Sovereign Consulting incurred costs in pursuit of Appellee Delaware

Nation's aims under the contract, without ever asserting that the Development Agreement ***14** had never been enforceable based on a lack of an agreement. *Id.* In a letter dated August 29, 2005, William Siskind wrote counsel for the Appellee Delaware Nation which set forth the need for a recognition letter from BIA and the National Indian Gaming Commission (NIGC). The letter sets forth the fact that the approval of the Appellee Delaware Nation to proceed with obtaining the recognition letter from those entitles had been pending since October, 2004. (Inst. 21, Plaintiff's Exhibit 10 of Reply Brief of Plaintiff, Sovereign Consulting, LLC, to Defendant's Combined Cross-Motion for Summary Judgment, Index, vol. II, pp. 308-368).

The Development Agreement had no deadline to obtain trust status for the Biscuit Hill property. First, the Appellee Delaware Nation did not give Appellant Sovereign Consulting any notice, prior to the letter of March 21, 2006, asserting any deadline. Second, Appellant Sovereign Consulting was diligently working with the Appellee Delaware Nation and the BIA in getting the trust application approved without adequate or timely cooperation from the Appellee Delaware Nation. Third, in a letter dated October 18, 2005, counsel for the Appellee Delaware Nation, Steve Sandven, advised the Executive Committee of the need to forward a memorandum to the BIA regarding the trust application. At that same Executive Committee meeting, the minutes reflect that a motion passed to request ***15** a determination letter as requested by Appellant Sovereign Consulting in its August 29, 2005, letter. (Inst. 21, Plaintiff's Exhibit 11 of Reply Brief of Plaintiff, Sovereign Consulting, to Defendant's Cross-Motion for Summary Judgment, Index, vol. II, pp. 308-368). At the time the Appellee Delaware Nation breached its contractual obligations and backed out of the contract, the Appellee Delaware Nation and the BIA had failed to get the property accepted into trust status. If Appellant Sovereign Consulting had received cooperation from Appellee Delaware Nation in obtaining necessary documents and been given adequate time, Appellant Sovereign Consulting would have worked with Appellee Delaware Nation and the Appellee Delaware Nation would have obtained trust status for the Biscuit Hill property.

On March 21, 2006, counsel for Appellee Delaware Nation notified Appellant Sovereign Consulting that ". . . it is the position of the Executive Committee that you do not have a development contract with the Delaware Nation." (Inst. 21, Plaintiff's Exhibit 9 of Reply Brief of Plaintiff, Sovereign Consulting, LLC, to Defendant's Combined Motions for Summary Judgment, Index, vol. II, pp. 308-368). The March 21, 2006, letter from Appellee Delaware Nation asserted that the Development Agreement was not approved by the General Counsel for the Nation. *Id.* What is noteworthy, except for the fact that the ***16** Development Agreement did not need to be approved by the General Counsel for the Appellee Delaware Nation to go forward with contractual obligations by the parties, is the fact that the March 21, 2006 letter did not cite the lack of any funding agreement or even the lack of trust status of the Biscuit Hill property as reasons for Appellee Delaware Nation to renege on its contractual obligations. The lack of a funding agreement or the frustration concerning obtaining trust status for the property were straw men arguments thrown out by the Appellee Delaware Nation later during the course of the litigation, and these arguments did not surface at the time of the March 21, 2006, letter but only much later after the litigation had proceeded.

The National Indian Gaming Commission (NIGC) did not make void the contractual obligations of the parties in this litigation. An advisory letter and an opinion letter of the NIGC raised concerns about some of the language in the Development Agreement and the Promissory Note, but these documents by the NIGC did not void the contract but rather evidenced the NIGC's concerns that Appellant Sovereign Consulting was seeking a proprietary interest in the gaming facility rather than a managerial interest and an interest in the profits of the gaming facility (the actual understanding of the parties), which are far different matters than obtaining a fee interest in the actual Biscuit Hill property. Sovereign ***17** Consulting did not seek out a proprietary interest in the property, always understanding that the property had to be held in trust by the Bureau of Indian Affairs for there to be a legal gaming facility.

It should be noted that once litigation commenced in April, 2006, most of the important rulings by the district court were in Sovereign Consulting's favor. The motion to dismiss by Appellee Delaware Nation was overruled on October 10, 2006. (Inst. 11, Index, vol. I, Order Denying Defendant's Motion to Dismiss at pp. 173-175). The Supreme Court denied interlocutory relief to Appellee Delaware Nation in Case No. MA-104481 on May 14, 2007. (Inst. 17B, Index, vol. I, at pp. 225-226). By October, 2008, Appellant Sovereign Consulting filed for summary judgment, and on February 18, 2009, Judge Van Dyck overruled both parties' motions for summary judgment. (Tr.2/18/09 at 28-29).

Judge Van Dyck scheduled a two week trial date for February, 2010, but on April 15, 2009, the attorneys for Appellant Sovereign Consulting filed a motion to withdraw listing Mr. Siskind's address being in Florida and on the same day this motion was filed Judge Van Dyck granted the attorneys' motion to withdraw, which directed the order to be sent to a different address to Mr. Siskind in Maryland. (Inst. 28, 29, Index, vol. III, Motion to Withdraw, Order Allowing Withdrawal, pp. 530-531, 532-533). After these attorneys were permitted to ***18** withdraw, the district court started to rule against Sovereign Consulting. After Appellee Delaware Nation filed its motion to amend its answer and make counterclaims, the district court granted these motions. Mr. Hall, who entered his appearance on behalf of Appellant Sovereign Consulting, failed to appear for the June 26, 2009 hearing. Appellee Delaware Nation took great advantage of Mr. Hall's inexperience and filed a motion for default judgment on the counterclaims it filed more than three years after the initiation of the suit. It is clear that the parties exchanged witness lists during the pendency of the motion for default judgment. It is also clear that Appellant Sovereign Consulting did file its answer before Judge Van Dyck entered his order on September 23, 2009, granting default judgment for Appellee Delaware Nation. It is further clear that Appellee Delaware Nation sought a new scheduling order as late as February, 2010, on the grounds that "significant additional discovery will be required before the case is ready for trial, including out-of-state discovery . . . ." (Inst. 48, Index, vol. IV, Motion to Strike Scheduling Order, pp. 821-824). What is not clear is why the district court granted default judgment where in the past the district court had allowed Appellee Delaware Nation to file its answer almost one year out of time. (Inst. 16, 17A).

The Appellee Delaware Nation contended that Mr. Hall refused service of a certified mailing of a Notice of Hearing on Motion for Default Judgment, but the ***19** fact remains that the very return receipt the Appellee Delaware Nation relied upon for its "proof of refused service of certified mail did not have a postmark. (Exhibit 3 of Inst. 38, Notice of Hearing on Motion for Default Judgment, Index, vol. III, pp. 602-641).

This exhibit shows no postmark.

PROPOSITION ONE

THE DISTRICT COURT ERRED IN GRANTING DEFAULT JUDGMENT TO APPELLEE DELAWARE NATION AND COMPOUNDED THIS ERROR BY OVERRULING APPELLANT'S MOTIONS TO VACATE THE DEFAULT JUDGMENT AND ITS SUBSEQUENT MOTION TO RECONSIDER

While the standard of review for vacating or refusing to vacate a default judgment is abuse of discretion, default judgments are not favored. See e.g. *Ferguson Enterprises v. H. Webb Enterprises*, 2000 OK 78, ¶ 5, 13 P.3d 480. In previous cases reviewing a trial court's ruling either vacating or refusing to vacate a default judgment, this Court has considered the following: 1) default judgments are not favored; 2) vacation of a default judgment is different from vacation of a judgment where the parties have had at least one opportunity to be heard on the merits; 3) judicial discretion to vacate a default judgment should always be exercised so as to promote the ends of justice; and 4) a much stronger showing of ***20** abuse of discretion must be made where a judgment has been set aside than where it has not. *Id.* The Court also considers whether substantial hardship would result from granting or refusing to grant the motion to vacate. *Id.* See also, *Burroughs v. Bob Martin Corporation*, 1975 OK 80, 536 P.2d 339, *Hamburger v. Fry*, 1958 OK 287, 338 P.2d 1088 and *Latson v. Eaton*, 1957 OK 105, 311 P.2d 231.

The time frame for determining the proper context for the district court's error in granting Appellee Delaware Nation's default judgment is the one year period from February 18, 2009 to the district court's decision on February 17, 2010. At the February 18, 2009 hearing, the district court overruled both parties' motions for summary judgment. (Tr. 2/18/09 at 28-29). Judge Van Dyck entered a scheduling order. A two week trial date for February, 2010 was scheduled. Approximately six weeks after this hearing on February 18, 2009, Appellant Sovereign Consulting's attorneys filed a motion to withdraw from the case on April 15, 2009. The motion was filed without an affidavit, alleging facts that the attorneys had not been paid since March, 2008. An order allowing withdrawal was entered by Judge Van Dyck on the very day that the unverified motion to withdraw was filed.

A hearing was scheduled on June 26, 2009, and this hearing was specially set by Appellee Delaware Nation, knowing that Mr. Siskind was attempting to ***21** secure counsel. (Inst. 32, Defendant's Objection to Continuance of Hearing Set for June 26, 2009). Mr. Malcolm Hall entered an appearance on behalf of Appellant Sovereign Consulting on May 19, 2009. Appellee Delaware Nation took advantage of the situation by filing a motion for leave to amend its answer and counterclaims more than three years after the beginning of the suit. Appellee Delaware Nation filed a motion for sanctions for bad faith refusal to participate in court-ordered mediation.

Appellee Delaware Nation obtained another hearing date after Mr. Hall did not appear on June 26, 2009, wherein Mr. Hall did not appear on July 10, 2009 on the sanctions motion or the motion for leave to amend and supplement its answer. (Inst. 35, Journal Entry of Order, Index, vol. III, at 568-570). Appellee Delaware Nation filed its first amended answer and counterclaims on July 21, 2009. Appellee Delaware Nation filed a motion for default judgment on its counterclaims on August 19, 2009, less than a month after it filed its counterclaims. (Inst. 36, Defendant's Motion for Default Judgment on Counterclaims, Index, vol. III, at 571-601). A Notice of Hearing on Motion for Default Judgment was filed on August 19, 2009. This motion was addressed to Mr. Hall, and a hearing date of September 23, 2009 was specially set by the district court. On August 31, 2009, twelve days after the motion was filed a ***22** Notice of Refusal of Certified Mail was filed in the district court by Appellee Delaware Nation. (Inst. 38, Notice of Refusal of Certified Mail, vol. III at 604-641). Exhibit 3 of the Notice of Refusal of Certified Mail purports to show that the certified mailing sent by Appellee Delaware Nation to Mr. Hall was refused on August 24. A copy of the certified mail receipt showing Mr. Hall's name and address with the tracking number matching the green card was offered, but *no postmark is on the certified mail receipt. Id.* Furthermore, neither the Notice of Refusal of Certified Mail nor the Appellee Delaware Nation's motion for default judgment was verified or supported by affidavit, as required by Rule 4.c, *Rules for District Courts*, 12 O.S. ch. 2, (app.). A motion to enter a default judgment is among the list of exceptions for filing a brief or a list of authorities, but it is not among the exceptions for attaching an affidavit or verified statement. *Id.*

Appellant Sovereign Consulting filed a Plaintiff's Witness List on September 1, 2009, less than two weeks after the Appellant's motion for default judgment was filed, and Appellee Delaware Nation filed its own preliminary witness list the following day. Appellant Sovereign Consulting filed an answer to the counterclaims of Appellee Delaware Nation on September 18, 2009, five days before the September 23, 2009 hearing on the motion for default judgment. The fact remains that it took Appellee Delaware Nation almost one year to file its ***23** answer to Appellant Sovereign's original petition.

Therefore, during the pendency of Appellee Delaware Nation's unverified motion for default judgment:

a) Appellee Delaware Nation filed an unverified Notice of Refusal of Certified Mail less than two weeks after its motion for default judgment;

b) The certified mail return receipt supporting this Notice of Refusal did not have a postmark;

c) Appellant Sovereign Consulting filed its witness list the day after Appellee Delaware Nation filed the Notice of Refusal of Certified Mail;

d) Appellee Delaware Nation waived its earlier motion for default judgment by filing a preliminary witness list on the next day, September 2, 2009.

Appellee Delaware Nation's action of filing a witness list while its motion for default judgment was pending waived its motion for default judgment. A party cannot file a trial instrument leading the district court to discern matters concerning the conduct of a trial while that party also files a motion for default judgment because the intentions of the two instruments are contradictory. The latter instrument waives the intent of the pending motion for default judgment. Either a party says it is asking for a default judgment or it is asking for a trial: a party cannot ask the court for both at the same time, and this is precisely what ***24** Appellee Delaware Nation did in the instant case. A party should seek a stay on the pendency of its trial instruments if it files for default judgment and a scheduling order has been put in place, as the situation was in the instant case.

Because litigants are entitled to a fair day in court, the policy in this State favors resolution of actions on their merits. *Durant Civic Foundation v. The Grand Lodge of Okla. Of the Indep. Order of Odd Fellows,* 2008 OK CIV APP 54 ¶ 6, 191 P.3d 612. The actions of Mr. Hall, including the filing of a witness list and the filing of an answer to the counterclaims without leave of court, are indeed curious, but tend to demonstrate participation in the case rather than a refusal to engage the opponent in the case. Motions to enter default judgment make sense when a party refuses to engage in a case, but that was not the situation in the district court.

What is clear is that Sovereign Consulting had a difficult time from April 15, 2009 to February 17, 2010 in obtaining competent counsel to litigate its very demanding case.

What is clear is that the Delaware Nation presented a Notice of Refusal of Certified Mail without a postmark demonstrating proof of service by the post office.

What is clear is that Mr. Hall adamantly insists that neither he nor anyone ***25** under his direction refused any certified mail, as his affidavit filed on February 17, 2010 shows, and as it was presented to the district court before its ruling on the motion for reconsideration/motion to vacate the default judgment on that date. (See Inst. 49, Affidavit of Malcolm Hall, Index, vol. IV, at 825, and Transcript 2/18/10).

What is clear is that Judge Van Dyck's order of September 23, 2009, does not state whether counsel for Appellant Sovereign Consulting appeared at the September 23, 2009 hearing. (Inst. 43, Order Granting Default Judgment on Defendant's Counterclaims, Index, vol. III, pp. 664-665). The order was entered without a signature approval of the attorney of record for Appellant Sovereign Consulting.

The order did not conform to the dictates of 12 Okla. Stat. § 696.3. (Inst. 43). The order contains matters changed by interlineation without any notation, initials of counsel or the court, nor any supplemental order clarifying this irregularity. The order rescinded the Development Agreement and other agreements of the parties, but recision was not pled as an affirmative defense in the "Defendant's First Amended Answer and Counterclaims." (Inst. 34). Rather, only the prayer for relief touched upon any request for recision of the contractual obligations of the Appellee Delaware Nation. (Inst. 34).

***26** Mr. Hall timely filed a motion to vacate the default judgment. The judgment was entered on September 23, 2009. Mr. Hall filed his motion to vacate, or motion to reconsider, on October 5, 2009, well within the thirty (30) day deadline required by 12 Okla. Stat. § 1031.1. Section 1033 of Title 12 controls motions to vacate filed more than thirty days after the entry of judgment, and in such circumstances, a verification by affidavit is required. 12 Okla. Stat. § 1033. Section 1031.1, directly referenced in the motion filed by Mr. Hall, does not have such a requirement for verification by affidavit. 12 Okla. Stat. § 1031.1. The motion to vacate, filed initially on October 5, 2009, was supported by a forty-eight paragraph statement of objections to the entry of the judgment, supported by legal authority. (Inst. 44, Index, vol. III, pp. 666-676).

The motion to vacate stated in pertinent part, or, should be understood by surrounding facts to be understood in relevant part, as saying:

1) That Sovereign Consulting lacked knowledge of Delaware Nation's filing of its Amended Answer and Counterclaims until August 28, 2009;

2) That Sovereign Consulting sent its answer to the district court by Federal Express on September 17, 2009, twenty days from the date of its receipt of the Appellee Delaware Nation's Amended Answer and Counterclaims;

3) That Sovereign Consulting sent copies of its answers to opposing counsel by ***27** email as well as U.S. mail on September 18, 2009;

4) That Sovereign Consulting endeavored to act expeditiously;

5) That while Delaware Nation's counsel had corresponded by email on prior occasions, when it came to the matter of the motion for default judgment, Delaware Nation did not do so;

6) That Sovereign Consulting's failure to timely answer the counterclaims was excusable **neglect** due to not having received the Notice of Filing of Default Judgment;

7) That on the very day the Notice of Filing Default Judgment was filed, the parties met in a mediation conference to settle the case. However, the Delaware Nation's counsel and its president stated to Mr. Hall that they did not have settlement authority, which indicated insincerity and bad faith in attending a mediation conference without authority to settle the case;

8) That the Delaware Nation acted purposefully in refusing to cooperate with the mediation order of the district court;

9) That there were many errors in the district court's default judgment order, such as including statements that were untrue, such as that a number of notices were received by Sovereign Consulting which actively refused to receive or refused to respond to;

***28** 10) That Delaware Nation's attorneys led Mr. Hall to believe that the motion for default judgment was mooted by Mr. Hall filing an answer out of time. By not only relying upon Mr. Hall's incorrect understanding of the law of civil procedure, but also encouraging without correcting Mr. Hall's misunderstanding that an answer filed out of time without leave of court is a nullity, the attorneys of the Delaware Nation led Mr. Hall into believing that the motion was mooted by his filing of the answer, all in anticipation of the upcoming hearing on September 23, 2009. (Inst. 44).

It is clear that the Delaware Nation took advantage of the situation where Mr. Hall, an **elderly** solo practice attorney, had problems receiving mail and attending court on at least one occasion. The critical period between April 15, 2009 and October 5, 2009 shows that Sovereign Consulting was deprived of justice by excusable **neglect**, and the district court assisted the Appellee by granting motions, such as the unverified motion to withdraw and the unverified motion for leave to file an amended answer with counterclaims without notice and opportunity to be heard on the motion.

There is no doubt that Sovereign Consulting paid $100,000.00 to counsel for the Delaware Nation to have the Biscuit Hill property placed in trust, and the Delaware Nation cheated Sovereign Consulting out of this money by refusing to ***29** obtain the approval of the Bureau of Indian Affairs when the political leadership of the Delaware Nation changed its mind about the terms of the Development Agreement and the Gaming Facility and Construction Agreement, both entered into in 2004.

There is no doubt that the parties entered into a contract, that there was an offer, an acceptance and an exchange of consideration in pursuit of the aims of that contract. There is no doubt that Sovereign Consulting lost a considerable amount of money acting to accomplish the terms of the contract.

There is no doubt that Sovereign Consulting was cheated out of the environmental assessment costs, the surveying costs, the attorney costs, the travel. costs of its principals, and especially the percentage of profits that would have been earned from the casino that it took serious and costly efforts to initiate on the Delaware Nation's behalf.

There is no doubt that the district court cleared its docket of a two week trial when it erred by granting the motion for default judgment.

This Court has always stood for the proposition that the most important criterion in assessing default judgments is whether ". . . justice would be better served by permitting a litigant to have his 'day in court.' Also . . . this Court [has] on occasion been more impressed with the need to grant relief to a defaulting ***30** litigant than the lower court believed the party deserved."

Burroughs v. Bob Martin Corporation, 1975 OK 80 ¶ 13, 536 P.2d 339. In this case, as in the case of *Latson v. Eaton,* 1957 OK 105, 311 P.2d 231, no rights of strangers to the action have intervened, the motion to vacate could have been granted without substantial delay or injustice, and the denial of the motions to vacate worked a serious injustice, and was an abuse of discretion. *Latson* at ¶ 5. The question is not whether Appellant Sovereign Consulting did everything perfectly to salvage its case during its time of difficulty in a six month period from April, 2009 to October, 2009. It did not do everything perfectly, and it was hard pressed to act, especially when the president of the company, Mr. Siskind, had only limited funds and resided thousands of miles from Oklahoma. The question is whether the district court rightly saw Appellant Sovereign Consulting refusing to engage its opposition in the case. In this vein, the district court abused its discretion.

The district court abused its discretion under Section 1031.1 of Title 12. The journal entries of judgment of September 23, 2009 and March 8, 2010, including the erroneous grant of the remedy of recision of the contract, should be vacated and the case should be reversed and remanded in accordance with substantial justice.

***31 PROPOSITION TWO**

THE DISTRICT COURT ERRED BY GRANTING THE ATTORNEYS' MOTION TO WITHDRAW WITHOUT GIVING SOVEREIGN CONSULTING NOTICE AND OPPORTUNITY TO BE HEARD ON THE MOTION

On April 15, 2009, attorneys Richard A. Mildren and Terry D. Kordeliski, II with Riggs, Abney, Neal, Turpen, Orbison & Lewis filed a two page motion to withdraw, without affidavit or verification, from the case in violation of Rule 4.c, *Rules of District Courts,* 12 O.S., ch. 2 (app.). (Inst. 28, Motion to Withdraw, Index, Vol. III, pp. 530-531). The order allowing withdrawal of these attorneys was entered on the same date, April 15, 2009. (Inst. 29, Order Allowing Withdraw, Index, Vol. HI, pp. 532-533). The district court directed that the order be mailed to an address in Maryland for Mr. Siskind, but the motion to withdraw had Mr. Siskind's address, in the certificate of service, as West Palm Springs, Florida. Permitting this kind of service of a motion to withdraw by attorneys, where the motion is addressed to a party at one address and the judge directs the written order sent to a different address, but to the same party, is not only highly suspect, but error requiring reversal as it deprived the party of the type of due process of law requiring notice and opportunity to be heard to contest the motion to withdraw. U.S. Const. amend. XTV; Okl. Const. Art. II, § 7.

***32** The Sixth Judicial District, wherein Caddo County District Court lies, does not have local court rules published with the Administrator of the Courts online. However, counsel for the Appellee practices in the Seventh Judicial District. The Seventh Judicial District, in Rule 49.C. requires all motions to withdraw contain a certificate that (1) the client has knowledge of counsels' intent to withdraw, or (2) counsel has made a good faith effort to notify the client and the client cannot be found. Rule 49.C. *Rules of the Seventh Judicial Administrative District*. This Court has considered the effect of local court rules in determining the propriety of a motion to withdraw. See e.g. *Harris v. Wabaunsee,* 1979 OK 39, ¶ 4, 593 P.2d 86. The Sixth Administrative Judicial District does not have local rules governing withdrawal of counsel. As persuasive authority, the rule of the Seventh Judicial Administrative Judicial District states in pertinent part:

> . . . In civil actions, the Court may grant a motion to withdraw where there is no successor counsel only if the withdrawing party clearly states in the body of the order the name and address of the party. The order allowing withdrawal shall notify the unrepresented party that an entry of appearance must be filed either by the party pro se or by substitute counsel, within thirty (30) days from the date of the order permitting the withdrawal, and that a failure of the party to prosecute or defend the case may result in dismissal of the case without prejudice or the entry of a default judgment against the party . . . . Local Rule 49.C, *Rules of the Seventh Judicial Administrative District.*

It is not just another irregularity that the address on the motion to withdraw ***33** differed from the address of the order allowing withdrawal, it was error that deprived Mr. Siskind and Appellant Sovereign Consulting due process of law. U.S. Const. amend. XIV; Okl.Const. art. II, § 7.

The fact that the motion and the order were filed on the same day is proof that the district court erred by permitting the attorneys to withdraw to the prejudice of the client. The fact that no separate hearing was scheduled by the district court which would permit Mr. Siskind to travel to Oklahoma from thousands of miles away is proof that the order permitting withdrawal of the attorneys was error by the district court that deprived Appellant Sovereign Consulting of due process of law without adequate notice and an opportunity to be heard on the motion. The fact that one instrument listed Mr. Siskind's address as being in Maryland and the other instrument listed Mr. Siskind's address as being in Florida is proof that faulty notice prejudicially led Appellant Sovereign Consulting to a default judgment. This faulty notice led to the prejudice of having to obtain a lawyer without adequate research or investigation into the lawyer's fitness in handling such a complex civil case, and it created difficulties for Mr. Siskind in general. The fact that the motion to withdraw was unverified, yet was granted on the day it was filed, was error that deprived Appellant Sovereign Consulting of due process of law without notice and opportunity to be heard to its manifest prejudice and in ***34** violation of Rule 4.c, *Rules of District Courts*, 12 O.S., ch. 2 (app.).

The district court granted the motion to withdraw at a critical juncture in the proceedings, just as the opposing party was also filing a motion to amend their answer and file counterclaims. It turned out that this motion was also unopposed after Mr. Mildren and Mr. Kordeliski were permitted to withdraw from the case, all to the manifest prejudice of Appellant Sovereign Consulting.

The manifest prejudice consisted, among other things, in a violation of Appellant Sovereign Consulting's right to equal protection of the law and fundamental fairness given the fact that Appellant Sovereign Consulting, through Mr. Hall, indicated a willingness to engage in the case by filing a witness list and an answer, though without leave of court, before the ruling on the motion for default judgment. The district court had previously overruled Appellant Sovereign Consulting's own motion for default judgment earlier though Appellee Delaware Nation had refused to file an answer for almost one year after the date of the filing and service of the original petition upon it. U.S. Const. amend. XTV.

For the foregoing reasons, Appellant Sovereign Consulting prays that this Court vacate the judgment and the subsequent order denying reconsideration and remand the case to effectuate substantial justice in favor of Appellant Sovereign Consulting.

***35 PROPOSITION THREE**

THE DISTRICT COURT ERRED IN OVERRULING APPELLANT SOVEREIGN CONSULTING'S MOTION FOR SUMMARY JUDGMENT

The material facts not in dispute are outlined cogently in Instruments 19 and 21 and the exhibits thereto. Paragraph (e) of Article VI of the Tribal Constitution of the Delaware Nation clearly grants the Executive Committee the right to “enter into, perform and enforce contracts.” (Inst. 22, Exhibit 2). The resolutions of the Appellee Delaware Nation show that the General Council meeting minutes reflect that the Executive Committee acted with authority to enter into contracts with private parties. The General Council was aware of the Development Agreement between Sovereign Consulting and the Nation and the activities that were taking place. In the nearly two year period from the time of the Development Agreement to the March 21, 2006 letter, no member of the General Council of the Nation objected in any of the meetings that the Executive Committee lacked authority to enter into any contracts with Sovereign Consulting. The Nation's President, with the approval of the Executive Committee, executed the Development Agreement by signature which bound the Nation to perform on its contract.

The sole act of placing the Biscuit Hill property in trust status was frustrated by the actions of the Delaware Nation. Sovereign Consulting should not be ***36** penalized for the inaction of the Nation. There was no failure of consideration because the issue of trust status of the property was not an issue until Delaware Nation's attorneys, paid by Sovereign Consulting to assist in getting the property into proper trust status, failed to act and refused to cooperate with Sovereign Consulting in getting the proper trust status for the property.

The Development Agreement clearly and unequivocally waived Appellee's sovereign immunity. Article 7.3 of the Agreement gave an explicit waiver of sovereign immunity. (See Inst. 21, Exhibit C). The language in the Development Agreement meets the standards for a waiver of sovereign immunity required by the Supreme Court of the United States in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). See also, *Rosebud Sioux v. Val-U Construction Co.* 50 F.3d 560, 562-563 (8th Cir.1995).

Summary judgment is appropriate where it appears there is no substantial controversy as to any material fact and one party is entitled to judgment as a matter of law. *City of Enid v. PERB,* 2006 OK 16, 133 P.3d 281, 285. The focus of a summary process is not on the facts that might be proven at trial, but rather on whether the evidentiary material before the trial court establishes every fact material to the movant's claim and supports but a single inference that favors the movant's request for relief. *Polymer Fabricating, Inc. v. Employees Workers'* ***37** *Ass'n,* 1998 OK 113, 980 P.2d 109. In this case, the undisputed material facts before this Court support the claim and request for relief of Sovereign Consulting that the Delaware Nation executed a binding and enforceable agreement with Sovereign Consulting to develop a gaming facility casino at the Biscuit Hill property.

The district court erred in its February 18, 2009, ruling overruling Appellant Sovereign Consulting's motion for summary judgment. The ruling of the district court should be reversed and remanded to effectuate substantial justice to the Appellant Sovereign Consulting.

CONCLUSION

For the reasons set forth above, Appellant Sovereign Consulting prays that this Court reverse the final order of the district court, and grant any and all relief to Appellant Sovereign Consulting to effectuate substantial justice.

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