

Marshall Invs. Corp. v Harrah's Operating Co., Inc.

2009 NY Slip Op 31734(U)

August 3, 2009

Supreme Court, New York County

Docket Number: 102512/08

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Marshall Investments Corporation

INDEX NO. 102 512/08

- v -

MOTION DATE 1/7/09

MOTION SEQ. NO. 002

Kumaks Operating Company

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

NYS SUPREME COURT
RECEIVED
JUL 29 2009
IAS MOTION
SUPPORT OFFICE

~~NYS SUPREME COURT
RECEIVED
JUL 23 2009
IAS MOTION
SUPPORT OFFICE~~

HON. RICHARD B. LOWE, III.

Dated: 6/29/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MAAI

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

309

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
MARSHALL INVESTMENTS CORPORATION,
BRIAN F. LEONARD, as trustee for the estate of
SRC Investments Corporation f/k/a Miller & Schroeder
Investments Corporation, and THIRTY-ONE BANKING
INSTITUTIONS

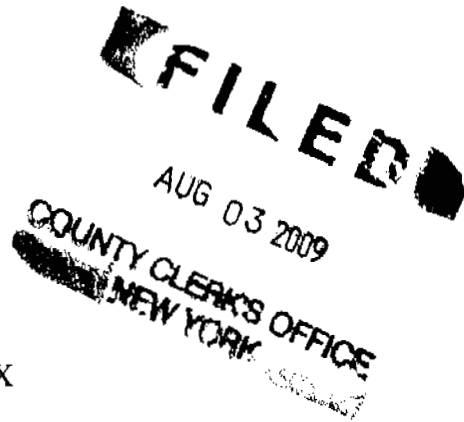
Plaintiffs,

Index No. 102512/08

- against -

HARRAH'S OPERATING COMPANY, INC.,
as successor to Caesar's Entertainment Inc. f/k/a
Park Place Entertainment Corporation, Clive Cummis,
Ivan Kaufman, and Walter Horn,

Defendants.



-----X
LOWE, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, defendants Ivan Kaufman and Walter Horn move for summary judgment dismissing the complaint. In motion sequence number 003, defendants Harrah's Operating Company, Inc. (Harrah's) and Clive Cummis move for the same relief.

The plaintiffs are the bankruptcy trustee for SRC Investments Corporation, formerly known as Miller & Schroeder Investments Corporation (M&S), Marshall Investments Corporation (Marshall), and thirty-one banks. M&S loaned money to non-party President R.C.- St. Regis Management Company (the developer) to develop a casino. The banks purchased participation interests in the loans. Marshall is the subservicer of the loans. Plaintiffs brought this action to recover the money, which was never repaid. The bankruptcy action is proceeding

in Minnesota, the principal place of business for M&S and Marshall.

In 1997, the developer and the St. Regis Mohawk Tribe (the Tribe) entered into the 1997 Management Agreement (Ex. 6, Kaufman/Horn motion), whereby the developer would build and manage Akwesasne Casino on the Tribe's reservation in Hogansburg, New York. Pursuant to the Management Agreement, the developer would provide the funds for building the casino and the Tribe would repay the funds. Repayment of the development expenses and the developer's fees for managing the casino would derive from the casino's net revenues.

In February 1999, M&S loaned \$8,624,000 and \$3,492,000 to the developer for the casino project. As security for the loans, the developer pledged the money that it expected to receive from the casino, namely, the development expenses and the management fees. Around the same time, the Tribe and the developer amended the Management Agreement (the 1999 Management Agreement), and the developer, M&S, and the Tribe entered into a Notice and Acknowledgment of Pledge Agreement (Pledge Agreement, Ex. 10, Kaufman/Horn), whereby the Tribe acknowledged the 1997 and 1999 versions of the Management Agreement. The Tribe also acknowledged the developer's pledge and agreed to repay the development expenses into an escrow account set up by the developer and M&S. The complaint alleges that the Pledge Agreement, combined with parts of the Management Agreement, created an obligation on the Tribe's part to pay M&S.

Also in February 1999, M&S and the developer entered into the Escrow Agreement, whereby the developer reaffirmed that M&S had a first priority security interest in the pledged monies and committed to direct the Tribe to pay those monies into the escrow account.

Casinos on Tribal lands are governed by the Indian Gaming Regulatory Act of 1988

(IGRA) (25 USC § 2701, *et seq.*) and the regulations of the National Indian Gaming Commission (NIGC) (25 CFR § 501.1 *et seq.*). As discussed below, certain contracts between Tribes and non-tribal parties are void without NIGC approval.

Akwesasne Casino opened in April 1999 and, according to the complaint, began to lose hundreds of thousands of dollars each month. Defendants Kaufman and Horn were, respectively, the developer's chief executive officer and general counsel. Kaufman operated the casino. The complaint alleges as follows. Kaufman and Horn acted against the interests of their employer, the developer, for their personal gain. They breached the fiduciary duty that they owed to the Tribe. Park Place (predecessor to defendant Harrah's) wanted to persuade the Tribe to sponsor the development of a second casino, this one in the Catskills. At the behest of defendant Cummis, senior vice-president and general counsel of Park Place, Kaufman and Horn agreed to introduce Park Place to the Tribe. By about November 1999, Park Place and Kaufman agreed that Park Place would pay \$12 million to the developer in exchange for the developer's interest in the Management Agreement, and that they would keep one another advised of opportunities to participate in future gambling enterprises with the Tribe. At the end of November 1999, at a meeting, Park Place represented to the Tribe that it would provide the \$12 million within 20 days and that it would consider building a hotel on tribal property.

Plaintiffs allege that defendants had no real interest in Akwesasne Casino and pretended to do so in order to convince the Tribe to build a Catskills casino. By February 2000, Akwesasne Casino was in danger of closing, which would entail the loss of several hundred jobs held by Tribe members. It is alleged that Kaufman, Horn, and Cummis had a plan to exert economic pressure on the Tribe. In late 1999 or early 2000, Kaufman began withholding payroll and

expense money from the casino to make its financial condition seem even more precarious. This was done so that Park Place, by investing in the casino, could pose as the Tribe's rescuer.

Plaintiffs allege that the plan worked. On April 14, 2000, Park Place and the Tribe made a Letter Agreement (Ex. 15, Kaufman/Horn) whereby they agreed that Park Place would develop a casino on the Tribe's lands in the Catskills and would pay the Tribe \$3 million to use as it pleased. On April 17, 2000, the Tribe revoked the developer's casino license, stripped it of its managerial duties, and barred its employees from entering Akwesasne Casino.

On May 8, 2000, at a meeting between the Tribe and plaintiffs, the Tribe acknowledged its obligation to repay plaintiffs and stated that it would honor the Pledge Agreement by placing payments into the escrow account. On May 24, 2000, in a telephone conversation with plaintiffs, the Tribe again acknowledged that it owed them the loan amounts.

On October 3, 2000, M&S, representatives of the participating banks, and the Tribe held a meeting, at which the Tribe stated that it would not make any payments to plaintiffs pursuant to the Pledge Agreement. The reason given was that the Pledge Agreement was void, because it was not approved by the NIGC.

Around March 2001, Park Place offered the Tribe a loan to finance improvements to Akwesasne Casino. Allegedly, Park Place made this offer in order to obtain the Tribe's agreement to build the casino in the Catskills. Also, Park Place wanted to be reimbursed for its past and future investments in Akwesasne Casino. Accordingly, Park Place induced the Tribe to enter into the Business Turn Around Consulting Agreement (Consulting Agreement, Ex. 25, Kaufman/Horn) on March 22, 2001. The Consulting Agreement provided Park Place would provide consulting services for the Akwesasne Casino and a loan of \$6 to \$8 million for

improvements. Repayment of Park Place's loan would have first priority on any net revenues and Park Place would have a first priority security interest on the net revenues of Akwesasne Casino and any other casinos operated by the Tribe. Plaintiffs point out that they already had a first priority security interest in the net revenues of Akwesasne Casino.

The Tribe never deposited any monies into the escrow account. Akwesasne Casino and the Catskills project gave rise to many federal and state lawsuits in New York and Minnesota. On December 8, 2003, plaintiffs sued these same defendants in the United States District Court for the Eastern District of New York for tortious interference with contract and other things (Original complaint, Ex. 1, amended complaint, Ex. 4, Kaufman/Horn). The parties engaged in motion practice and extensive disclosure. Most of the evidence submitted in the instant motions was discovered in the federal action. On January 11, 2008, the District Court dismissed the action for lack of diversity jurisdiction, without prejudice (Order, Ex. 1 [V] [4], Harrah's). Plaintiffs commenced the instant action on February 11, 2008.

The first cause of action for tortious interference with contractual relations alleges that defendants induced the Tribe to terminate the Management Agreement and breach the Pledge Agreement, thus preventing plaintiffs from being repaid the loans that they made to the developer. Plaintiffs claim that they were third-party beneficiaries of the Management Agreement between the Tribe and the developer.

The second cause of action is denominated tortious interference with business relations. It alleges that plaintiffs had an existing economic relationship with the Tribe and the developer. It is alleged that defendants disrupted the present and future deals.

On a motion for summary judgment, it is the proponent's burden to "make a prima facie

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005] [internal citations omitted]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). However, if this showing is made, “the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Each set of defendants moves for summary judgment dismissing the complaint on the same grounds. First, the Management and Pledge Agreements are void, as they were never approved by the NIGC. Therefore, the tortious interference claim must be dismissed, since it cannot be based on an unenforceable contract. Second, the complaint fails to state a cause of action for tortious interference with business relations. Third, the statute of limitations on the claims has elapsed.

A tortious interference with contract claim consists of: “(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff” (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). A contract that is not enforceable cannot be the subject of a tortious interference claim (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]).

Under IGRA, all casino management contracts relating to a tribal gaming operation must be submitted to the NIGC for approval or declination (25 CFR § 533.1; 25 USC § § 2710 [d] [9];

2711 [a] [1], [a] [3]). Two categories of such contracts exist: (1) “management” agreements (25 CFR § 502.15) and (2) all agreements “collateral” to the management contracts (25 CFR § 502.5). An agreement is “collateral” to a management contract if it is “related, directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe . . . and a management contractor” (*id.*). Absent NIGC approval, both management contracts and their collateral agreements are void and unenforceable (25 CFR § 533.7; *Machal, Inc. v Jena Band of Choctaw Indians*, 387 F Supp 2d 659, 667 [WD La 2005]; *Scutti Enters. LLC v Park Place Entertainment Corp.*, 322 F3d 211, 215 n 2 [2d Cir 2003]).

The Pledge Agreement was submitted to the NIGC for approval. Plaintiffs state that the NIGC never notified them whether the agreement was approved or not, and whether it required approval in the first place. The case of *McIntosh County Bank v Dorsey & Whitney, LLP* (745 NW2d 538 [Sup Ct, MN 2008]), which also involves the Akwesasne Casino, fleshes out some of the circumstances surrounding the submission to the NIGC. Some of the loan participants sued the law firm that drafted the loan documents. Allegedly, the firm engaged in legal malpractice when it advised closing the loans without waiting for NIGC approval of the Management and Pledge Agreements. As *McIntosh* relates, the NIGC approved the 1997 Management Agreement (*id.* at 542). In 1999, the Tribe and the developer amended the Management Agreement and incorporated the amendments into the Pledge Agreement. The amended 1999 Management Agreement and the Pledge Agreement were submitted to the NIGC. In February 1999, the NIGC notified the developer and the Tribe that it would need additional time to complete its review of the amended Management Agreement. The NIGC neither approved, nor disapproved, the agreements, nor did it determine whether approval of the Pledge Agreement was required (*id.* at

543 n 2). Apparently, no other steps were taken in regard to obtaining NIGC approval of the agreements.

The effect of NIGC's silence is disapproval of the 1999 Management Agreement and the Pledge Agreement. Under the regulations, if the NIGC does not approve or disapprove a modified management agreement, it shall respond noting that no action has been taken on the proposed modification (25 CFR § 535.1 [d] [2]). The request for approval "shall therefore be deemed disapproved and the parties shall have thirty (30) days to appeal the decision under part 539 of this chapter" (25 CFR § 535.1 [d] [2]). Failure to file an appeal within 30 days of the NIGC's service of its determination shall result in a waiver of the opportunity for an appeal (25 CFR § 539.2).

Plaintiff cites to *United States ex rel. St. Regis Mohawk Tribe v President R.C.-St. Regis Mgt. Co.* (451 F3d 44 [2d Cir 2006]) for the proposition that the Tribe must exhaust its administrative remedies under IGRA before the Pledge Agreement can be held void. In that case, the Tribe sued the developer and the construction company which had entered into a contract with the developer. The construction contract was never submitted to the NIGC. The Tribe sought a declaratory judgment that the construction contract was collateral to the Management Agreement and thus void for lack of NIGC approval. The court found that it was "without jurisdiction to order any form of relief because the Tribe failed to comply with the mandatory, statutorily prescribed remedies that must be exhausted before proceeding to the federal courts" (*id.* at 51). For that reason, among others, the court affirmed the dismissal of the Tribe's suit.

The second circuit case does not apply here. Here, the Pledge Agreement was submitted for approval, it was not approved, and the time to take administrative remedies has elapsed.

That the 1999 Management Agreement between the Tribe and the developer required

NIGC approval is not disputed. Since it was not approved, that agreement is not enforceable and cannot form the basis of an interference claim. The next issue is whether the Pledge Agreement requires approval, that is, whether it is an agreement that “provides for the management of all or part of a gaming operation” (25 CFR § 502.15; 25 CFR § 533.1; 25 USC § § 2710 [d] [9]; 2711 [a] [1], [a] [3]; *see Machal* 387 F Supp 2d at 667). Whether an agreement meets this requirement is not always evident on its face (*see First Am. Kickapoo Operations LLC v Multimedia Games, Inc.*, 412 F3d 1166, 1172-75 [10th Cir 2005]). To identify the features that would render a contract a management contract or collateral to a management contract in regard to the gaming, the tenth circuit examined the terms that 25 USC § 2711 and 25 CFR § 531.1 require to be included in a management contract (*id.* at 1173-1174). The checklist, adopted by *Jena Band of Choctaw Indians v Tri-Millennium Corp.* (387 F Supp 2d 671, 676-677 [WD La 2005]), is as follows:

1. Transferring responsibility for the performance of the daily operations and maintenance of a gaming operation.
2. Transferring responsibility for the establishment and maintenance of accounting procedures for the gaming operation.
3. Transferring responsibility for financing procedures such as financial reporting and the paying of taxes, employees and other costs.
4. Setting term limits for transfers of powers or conferrals of rights.
5. Quantifying the payments or compensation to which the parties are entitled.
6. Delineating the sources from which payments are to be made. In particular, specifying whether payments are to be based on a percentage of net revenues realized by a gaming operation.
7. Transferring responsibility for and control over the construction of a gaming operation

(*id.*, citing 25 USC § 2711; 25 CFR § 531.1).

Taken together, the terms on the checklist “give content to the concept of management” in that they “indicate a transfer of management authority” related to gaming activities from a Tribe to a party other than the tribe (*Jena Band*, 387 F Supp 2d at 676). An agreement need not contain all

seven features to be a management agreement and the transfer of authority may be partial rather than comprehensive (*First Am.*, 412 F3d at 1174, 1175). A contract that has no terms that explicitly obligate the non-tribal party to perform management functions may nonetheless require NIGC approval, if the overall tendency of the contract is to give the non-tribal party managerial authority related to the gaming (*id.* at 1175).

The Pledge Agreement recited the following (Ex. 10, Kaufman/Horn). The Tribe and the developer had entered into a Management Agreement, under which the developer would pay all of the development expenses of the casino. The Tribe would repay the development expenses to the developer in monthly payments consisting of a monthly base payment and an additional payment of \$500,000 (together, the repayment amounts), as described in the Management Agreement. The repayment amounts would come out of the revenues, gaming and non-gaming, generated by the casino. This obligation would survive any termination of the Management Agreement for cause until all the development expenses were repaid. M&S agreed to loan money to the developer to finance the development expenses. As security for the loan, the developer pledged to M&S the monthly repayment amounts and all other amounts payable by the Tribe to the developer under the Management Agreement, including the management fees. In furtherance of the pledge, the developer wanted the Tribe to make all the payments called for in the Management Agreement in the manner described in the Pledge Agreement.

The Pledge Agreement further provided that the loan was not an obligation of the Tribe (§ 1). The Tribe agreed to pay the repayment amounts and the management fees into an escrow account (§ 2). The development expenses would be repaid to the developer with interest (§ 3). The Tribe acknowledged that its obligation to repay the repayment amounts would survive any

termination of the Management Agreement, and that M&S was lending to the developer in reliance on the Tribe's continuing obligation to pay the development expenses (§ 4). The Tribe agreed to pay all the repayment amounts owed to the developer into an escrow account established by the developer and M&S, without any set-off or deduction, notwithstanding any prior termination of the Management Agreement or any defense, set-off, counterclaim or recoupment rights it might have against the developer or M&S until all the development expenses were fully repaid (§ 4). The Tribe agreed that M&S had not assumed any duties under the Management Agreement (§ 5). The Tribe agreed that it would not make any changes to the Management Agreement affecting any section relating to the repayment amounts without M&S's prior written consent (*id.*). The Tribe agreed that until the loan by M&S was paid in full, M&S would be entitled "to the benefits of and to enforce the agreements of the Tribe under the [Management Agreement] relating to the payment of the Repayment Amounts to the same extent as [the developer]" (§ 7).

The Tribe, the developer, and M&S agreed that each could sue or be sued to enforce the terms of the Pledge Agreement or to enforce the obligations or rights of the parties thereto (§ 8).

The Pledge Agreement implicates items 5, 6, and 7 in the checklist. The repayment amounts that the Tribe agreed to pay into the escrow account were to derive from revenue generated by Akwesasne Casino. Item 5 from the checklist is quantifying the payments to which the parties are entitled and item 6 is specifying whether payments are to be based on a percentage of net revenues realized by a gaming operation. One factor leading to the determination that an agreement was "related" to a management agreement was that it provided that loans were to be repaid from gaming revenues (*Machal*, 387 F Supp 2d at 667-668). Plaintiffs also allege that the

Pledge Agreement required the Tribe to furnish plaintiffs with the casino's financial information.

Sections 5 and 7 of the Pledge Agreement transferred the developer's rights and benefits related to the repayment amounts to M&S. Under section 5, the Tribe had to obtain M&S approval to change the Management Agreement. Under section 7, M&S was given the right to enforce the parts of the Management Agreement related to repayment. In this manner, the Pledge Agreement gave M&S some managerial power over the gaming activity. Checklist item 7 concerns transferring responsibility for and control over the construction of a gaming operation. In addition, section 4 of the Pledge Agreement provided that M&S's loan to the developer was in reliance on the Tribe's continuing obligation to pay the development expenses. This provision is another link between the developer's obligations as manager of the casino and the Pledge Agreement. .

The Pledge Agreement provided that M&S did not assume management duties. However, disclaimer language is not determinative under the IGRA (*Match-E-Be-Nash-She-Wish Band of Pottawatomie Indians v Kean-Argovitz Resorts, LLC*, 249 F Supp 2d 901, 905, 907 [WD Mich 2003], *vacated and remanded on other grounds* 383 F3d 512 [6th Cir 2004]). Courts will look beyond the parties' benign intent in entering agreements and the promises of future performance contained in those agreements and will instead concentrate on the practical consequences of a particular provision that effectuates a transfer of managerial authority (Staudenmaier and Khalsa, *Theseus, The Labyrinth, and The Ball of String: Navigating the Regulatory Maze to Ensure Enforceability of Tribal Gaming Contracts*, 40 John Marshall L Rev 1123, 1135 [Summer 2007] [discussing *Machal*, 387 F Supp 2d 659, and *Jena Band*, 387 F Supp 2d 671] [Westlaw cite: 40 JMARLR 1123]).

Here, the Pledge Agreement envisioned a situation where the authority that the developer had over the gaming operations of the casino under the Management Agreement could be handed to M&S. Therefore, in spite of the disclaimer, the Pledge Agreement is void without NIGC approval and cannot form the basis of a tortious interference with contract claim. The first cause of action must be dismissed.

However, the lack of a valid contract is not a barrier to the second claim for tortious interference with business relations (*Scutti*, 322 F3d at 215). Plaintiffs can recover if they can prove that the defendants tortiously interfered with “a continuing business or other customary relationship not amounting to a formal contract” (*id.*, quoting Restatement [Second] of Torts § 766B, Comment c). Tortious “interference with business relations applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant” (*WFB Telecom. v NYNEX Corp.*, 188 AD2d 257, 257 [1st Dept 1992]). Wrongful acts include fraud, misrepresentation, crime, and some degrees of economic pressure (*Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332, 333 [1st Dept 2006]).

M&S alleges that defendants employed economic pressure and fraudulent representations to cause the Tribe to break off relations with M&S. It is alleged that M&S met frequently with the Tribe to discuss plaintiffs’ investment in the casino and that it reasonably anticipated future contracts with the Tribe. It is alleged that in the world of casino finance, it is typical for a financier, such as M&S, to do multiple deals with the casino owner. Defendants wanted to disrupt the Tribe’s relationship with M&S in order to obtain the Tribe’s cooperation with their own plans for a casino. Defendants “squeezed” the Tribe by withholding or delaying payroll and other

payments for the Akwesasne Casino and misrepresented to the Tribe that they were interested in Akwesasne Casino to gain the Tribe's trust. They thus prevailed upon the Tribe not to enter business deals with plaintiffs.

These allegations state a cause of action for tortious interference with business relations. Defendants do not succeed in proving that they did not interfere as alleged. Whether these allegations of economic pressure and fraudulent statements are of the degree necessary to sustain an action is a question of fact best answered at trial.

Turning now to the statute of limitations issue, tortious interference claims have a limitations period of three years (*Kronos*, 81 NY2d at 92). Defendants argue that December 8, 2003, when plaintiffs began the federal action, was more than three years after the limitations period began to run, and that plaintiffs' claims had to accrue, at the latest, on December 8, 2000. (The parties do not dispute that plaintiffs' claims relate back to the filing in federal court, pursuant to CPLR 205.)

The statute of limitations on a tortious interference claim begins to run on the date of the injury, which is the date that the plaintiff first has a legal right to relief (*Kronos*, 81 NY2d at 94). "Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*id.*).

In *Kronos* (81 NY2d at 94, n 2), the claim did not accrue on the date that the contract was breached, which was when the plaintiff's contracting party made another contract with a third party, at the urging of the defendant. Despite the breach, the plaintiff was not injured, as the plaintiff's contracting party continued to honor the financial terms of the contract with the plaintiff by making payments. The injury to the plaintiff occurred and the tortious interference

claim accrued when the plaintiff's contracting party ceased making payments under its contract with plaintiff. It was then that the plaintiff could allege all of the elements of the tortious interference tort (*id.* at 97).

Thus, the question is when did plaintiffs sustain injury by reason of defendants' allegedly tortious interference. Defendants contend that the statute of limitations began to run on the day of the October 3, 2000 meeting because it was then that the Tribe allegedly repudiated the Pledge Agreement. Plaintiffs state that they were injured in March 2001. That was when defendants caused the Tribe to enter the Consulting Agreement, which gave Park Place a priority security interest on the net revenues of Akwesasne Casino, while those revenues were already pledged to M&S.

The Tribe's action at the October 2000 meeting does not necessarily mean that it repudiated its entire relationship with plaintiffs at that time. Defendants do not prove that was when plaintiffs first had the legal right to relief for tortious interference with business relations. As plaintiffs contend, the accrual date is a question of fact.

Defendants' next objection is that plaintiffs are seeking a double recovery. Plaintiffs sued the developer on the loans and obtained a judgment for \$16.5 million. Thereafter, plaintiffs sold and assigned to the Tribe for \$3.5 million the right to enforce the judgment and the promissory notes that the developer had signed. The Tribe then used the judgment in settling the lawsuit that the developer had brought against the Tribe. Defendants argue that the judgment against the developer satisfied plaintiffs' claim for the loan amounts and that plaintiffs are not entitled to more money.

A party cannot recover more than once for the same injury, even under different theories

of liability (*Zarcone v Perry*, 78 AD2d 70, 79-80 [2d Dept 1980], *affd* 55 NY2d 782 [1981], *cert denied* 456 US 979 [1982]). There is no danger of that in this case, even if defendants are correct that plaintiffs already recovered under their loan claims. The injury of not being paid the loans is not the same as the injury caused by tortious interference. Any damages that plaintiffs recover will be pursuant to the tortious interference with business relations claim and not pursuant to the loans. Plaintiffs cannot recover the loan amounts under the Pledge Agreement, as the claim related to that agreement has been dismissed. Plaintiffs state that they did not assign their tort claims to the Tribe. They may pursue the tort claim left to them.

In conclusion, it is

ORDERED that motion sequence number 002 by defendants Ivan Kaufman and Walter Horn for summary judgment dismissing the complaint and motion sequence number 003 by defendants Harrah's Operating Company, Inc. and Clive Cummis for summary judgment dismissing the complaint is granted as to the first cause of action which is hereby dismissed and is denied as to the second cause of action.

Date: _____

FILED
 AUG 03 2009
 COUNTY CLERK'S OFFICE
 SO ORDERED NEW YORK
 RICHARD B. LOWE III
 J.S.C.