



ENTERED
12/22/2020 AL5
SSM Chippewa Tribal Court

SAULT STE. MARIE CHIPPEWA TRIBAL COURT

Trevor MacLeod, on behalf of himself and his dependent children; Lark Lorenzo, on behalf of herself and her dependent children; Donald MacLeod, on behalf of himself; and all Sault Tribe Members similarly situated,
Plaintiffs,

vs.

Case No. GCV-20-01

Sault Ste. Marie Tribe of Chippewa Indians;
Aaron Payment, Chairperson,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Introduction

The Court must determine whether to grant the Defendants' Motion to Dismiss. The Plaintiffs have not identified an express waiver of the Defendants' immunity from suit. Therefore, the Court grants a dismissal in favor of the Defendants on this issue.

Procedural History

Plaintiffs, by and through lay advocate Phil Bellfy, initiated the current action by filing a *Complaint and Ex Parte Motion to Provide Access to Federal Cares Act Funding* with the Court on September 3, 2020. The Court issued *Order Denying Ex Parte Request* on September 9, 2020. The Court then issued a *Summons* and Advocate Bellfy served the same, along with the *Complaint* and *Exhibits* on the Defendants' representative, Sault Tribe's Legal Department, by personal service on September 28, 2020. Tribal Code 81.204(1)(a). The *Summons* informed the defendants

of the right to file an Answer within thirty (30) days of service of the *Summons* pursuant to Tribal Code § 81.206(1). The *Summons* also cautioned the defendants that a judgment by default could result from failure to file within the required time period.

Defendants filed the *Motion to Dismiss* and accompanying *Brief in Support of Motion to Dismiss* on October 29, 2020, one day delinquent. Although not cited by Defendants, such a motion may serve as the answer pursuant to Tribal Code 81.206(2). On November 9, 2020, Plaintiffs filed *Plaintiff's Answer to Tribe's Motion to Dismiss*. Subsequently, on November 24, 2020, Defendants filed *Reply Brief in Support of Motion to Dismiss*.

Applicable Law

CONSTITUTION AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

Art. IV - GOVERNING BODY

Sec. 1. The governing body of the Sault Ste. Marie Tribe of Chippewa Indians shall consist of a board of directors.

Sec. 2. A chairperson shall be elected at large by the voters of the tribe and shall serve as a member of the board of directors. ...

Art. VII - POWERS

Sec. 1. The board of directors shall exercise the following powers, subject to any limitations imposed by the laws of the United States and subject further to all express restrictions upon such powers contained in this constitution and bylaws:

(g) To promulgate and enforce ordinances governing the conduct of persons within the jurisdiction of the tribe, to establish a reservation court and define its duties and powers;

Art. VIII - BILL OF RIGHTS

All members of the Sault Ste. Marie Tribe of Chippewa Indians shall be accorded equal protection of the law under this constitution. No member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress or grievances, and due process of law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of an Indian entity in the exercise of its powers of self-government shall apply to members of the tribe.

TRIBAL CODE, CHAPTER 44: WAIVER OF TRIBAL IMMUNITIES AND JURISDICTION IN COMMERCIAL TRANSACTIONS

44.105 Waiver of Sovereign Immunity of Tribe.

(1) The sovereign immunity of the Tribe may be waived:

(a) by resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction and applicable law. Such waiver shall be strictly construed and shall be effective only to the extent expressly provided and shall be subject to any conditions or limitations set forth in the resolution; or

(b) by a Tribal entity exercising authority expressly delegated to such entity in its charter or specially by resolution of the Board of Directors; provided, that such waiver shall be made in strict conformity with the provisions of the charter or resolution governing such delegation.

(2) No express waiver of sovereign immunity by resolution shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribe other than the property specifically pledged, assigned or identified in the resolution.

TRIBAL CODE, CHAPTER 80: SAULT STE MARIE CHIPPEWA TRIBAL COURT

80.106 Jurisdiction.

(1) The Tribal Court shall have the jurisdiction provided in the Tribal Code and in any subsequent enactment of the Board of Directors.

(2) The Tribal Court shall have jurisdiction over all persons lawfully before the Tribal Court as parties, witnesses, complainants or otherwise for purposes of its contempt power pursuant to §80.107.

TRIBAL CODE, CHAPTER 81: CIVIL JURISDICTION AND PROCEDURE

81.103 Civil Jurisdiction.

The Tribal Court shall have jurisdiction of actions:

(1) Except as otherwise provided by federal law and unless waived in accordance with Tribal Code Chapter 44, where the defendant is:

(a) The Sault Ste. Marie Tribe of Chippewa Indians.

(b) A Tribal entity as defined in Tribal Code Chapter 85.

(c) An officer or employee as defined in Tribal Code Chapter 85 and the action arises from a Tribal function as defined in Tribal Code Chapter 85.

(2) Where the Tribe or a Tribal entity claims an interest in any real or personal property located on Tribal lands which is the subject of the action.

(3) Where the Plaintiff is the Tribe or Tribal entity.

(4) As provided in any other chapter of the Tribal Code.

(5) Where the transaction or occurrence giving rise to the cause of action arose or occurred within the Tribal lands; and

(a) The defendant is a tribal member, a tribal member owned business, or an Indian or business owned by an Indian.

(b) The defendant does business upon Tribal land with the Tribe, a tribal member, or 81-4 a tribal member owned business.

(c) The property involved in the action is located on Tribal land.

81.104 Sovereign Immunity.

Nothing contained herein shall constitute a waiver of the sovereign immunity enjoyed by the Tribe, any Tribal entity, officer, employee or agent. Any such waiver must be made pursuant to Chapter 44 of the Tribal Code.

81.201 Federal Rules of Civil Procedure.

In the absence of a specific rule governing proceedings brought pursuant to this Chapter, the Federal Rules of Civil Procedure shall govern to the extent that they are not inconsistent with this Chapter.

81.203 Summons: Issuance and Form.

(1) Upon the filing of a complaint, the Clerk shall immediately issue a summons and provide it to the plaintiff or plaintiff's counsel for service on the named defendant(s), together with a copy of the complaint.

(2) The summons shall be signed by the Clerk, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, and otherwise the plaintiff's address, and the time specified in this Chapter within which the defendant is required to appear and defend and shall notify the defendant that in the event that defendant shall fail to do so, judgment by default will be rendered against the defendant for the relief requested in the complaint.

81.204 Service of Summons and Complaint.

It shall be plaintiff's responsibility to ensure service on the defendant pursuant to this

Chapter:

(1) Service of the summons and complaint on the defendant may be by:

...

(b) Mailing a copy of the summons and complaint by first class mail, postage prepaid, to the person to be served together with two copied of a notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service is received by

the sender within 20 days after the date of mailing, service shall be made as prescribed under other provisions of this subsection.

...

(3) Service of process shall be made on the following:

(c) Upon the Tribe or an entity, by delivering a copy of the summons and complaint to an officer, a managing or general agent or to any other agent authorized by appointment or law to receive service of process, as well as mailing a copy to the defendant.

81.206 Answer; Time and Form.

(1) The defendant shall have 30 days after service within which to file a response to the complaint.

(2) The answer may be in the form of a factual and legal response to the complaint, a motion to dismiss or other responsive pleading. A copy of the answer shall be served by mail on plaintiff by defendant.

TRIBAL CODE, CHAPTER 82: APPEALS

82.110 Who May Appeal.

Any person adversely affected by a decision of the Tribal Court in a civil case may appeal. Any party in a criminal case, except the prosecution, may appeal a judgment or sentence. The prosecution may appeal a decision to the extent it raises a question of law, rather than of fact.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b). How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Findings of Fact

In deciding the motion for dismissal, the Court construes the facts as set forth in the pleadings in the light most favorable to the Plaintiffs. The following undisputed facts reflect common assertions of the parties and references to public documents.

1. The Plaintiffs, are enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians, who reside outside of the seven-county service area.
2. The Defendant, Sault Ste. Marie Tribe of Chippewa Indians, is a federally recognized Indian tribe with principal offices located on trust lands at 523 Ashmun Street, Sault Ste. Marie, Michigan. Defendant, Aaron Payment, is the Chairperson of the Board of Directors of the Tribe.
3. The Defendants, Sault Tribe and Chairperson Payment, possess sovereign immunity from suit absent an express legislative waiver. Tribal Code §§ 44.105, 81.104; *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890-891 (1986); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977).
4. On July 21, 2020, the Board of Directors adopted Resolution 2020-168 entitled “Approving COVID-19 Disaster [sic] Relief Program,” which approved a program “to offer financial assistance to meet necessary and eligible expenses incurred as a result of COVID-19 public health emergency and resulting economic condition” and which consisted “of \$1,000 per tribal member residing within the service area.”

<https://www.saulttribe.com/government/board-of-directors/board-download-files/download-file?path=Board%2BMeeting%2BVotes%2Band%2BApproved%2BResolutions%252F2020%252FBOD%2BMeeting%2BVotes%2B07-21-20.pdf>. (last visited December 7, 2020).

5. Tribal members residing in the service area had to submit their applications by September 4, 2020. *Pl. 's Compl*, Ex. A.
6. The source of funding for the COVID-19 Disaster Relief Program is the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act. 116 P.L. 136, 2020.
7. The Tribe's "service area" is commonly known as the seven counties located in the eastern half of the Upper Peninsula, to wit: Chippewa, Mackinac, Luce, Delta, Marquette, Alger, and Schoolcraft Counties. <https://www.saulttribe.com/about-us/service-area> (last visited December 7, 2020).

Decision

A court may exercise subject matter jurisdiction over a cause of action if empowered to hear such cases. *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). However, unlike state, federal, or some other tribal courts who are constitutionally separate from their legislative and executive branches, authority to hear cases in our Tribe's Court must be granted via legislative action. CONSTITUTION AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, Art. VII, §1(g); Tribal Code § 80.106(1) ("The Tribal Court shall have the jurisdiction provided in the Tribal Code and in any subsequent enactment of the Board of Directors.") Such legislative actions form the bounds of the Tribal Court's jurisdiction.

In this case, the Plaintiffs allege a violation of their rights to equal protection of the Tribe's laws and due process, presenting a matter over which Tribal Court has subject matter jurisdiction. § 81.103(1)(a), (c). However, even though they allege a violation of their Tribal Constitutional rights, the Plaintiffs must still also properly identify a waiver of the Tribe's sovereign immunity from suit. Subject matter jurisdiction and sovereign immunity are two separate and distinct issues. Plaintiffs submit that because they allege a Constitutional violation, the Court must be able to hear the case. Simply alleging a Constitutional violation does not itself permit this Court to hear the matter. Both requirements must be met. That is, they must properly plead both subject matter jurisdiction and a waiver of the Tribe's sovereign immunity before the Court may hear a case. *Id.*, § 81.104. See, e.g., *Kirkwood v. Ho-Chunk Housing Department and Ho-Chunk Nation Legislature*, CV 03-62, 2004 Ho-Chunk Trial LEXIS 3, *17. They have failed to do so here.

Tribes maintain broad sovereign immunity from suit unless abrogated by Congress or waived by the Tribe. *Michigan v. Bay Mills Indian Cmty.* 572 U.S. 782 (2014); *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890-891 (1986); *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977). Waivers of the Tribe's sovereign immunity may only be provided by express action of the Board of Directors in accordance with Chapter 44 of the Tribal Code. §§ 81.104, 44.105. Absent such an express waiver, the Tribe retains its immunity from suit. *Id.*

The only method for waiving the Tribe's immunity is by resolution adopted by the Board of Directors. § 44.105(1)(a). The resolution that is the focus of this suit contains no such express waiver. SSMTCI Res. 2020-168, "Approving COVID-19 Disaster [sic] Relief Program," <https://www.saulttribe.com/government/board-of-directors/board-download-files/download->

<file?path=Board%2BMeeting%2BVotes%2Band%2BApproved%2BResolutions%252F2020%252FBOD%2BMeeting%2BVotes%2B07-21-20.pdf>.) The only potential waiver of sovereign immunity offered by the Plaintiffs within their responsive pleading is a purported implicit waiver within the CARES Act. *Pl. 's Answer to Tribe 's Mot. To Dismiss* at 1-3. The Plaintiffs contend that by accepting the federal funds under the CARES Act, the Tribe implicitly waived its immunity for actions related to the distribution of the funds. Even if this was the case – which the Court does not find, as such acceptance is not an explicit waiver of immunity in accordance with Tribal law – the Plaintiffs would not be the appropriate party to bring suit to address alleged violations of the Act. Rather, the federal government would need to bring suit. The CARES Act provides no cause of action against the Tribal government for individual tribal members in Tribal Court. 116 P.L. 136, 2020

Plaintiffs bear the burden of establishing a waiver of sovereign immunity in bringing a case against the Tribe. In the case at hand, Plaintiffs cannot establish an express waiver of the Tribe's immunity in relation to the distribution of funds under the COVID-19 Disaster Relief Program. Therefore, the Tribe is immune from suit.

It is a little unclear from the Plaintiffs' pleadings, but in including the Chairperson separately within the case caption it appears they may be attempting to assert a separate claim for relief against Chairperson Payment. Employees and officials of the Tribe acting within the scope of their duties or authority are likewise immune from suit, except as otherwise waived by Tribal law. Tribal Code § 81.104; see also, *Youvella v. Dallas*, 27 I.L.R. 6020, 6021 (App. Ct. Hopi Tribe 2000)("The majority of federal, state, and tribal courts have held that where an officer is acting

within the scope of his or her valid authority, the doctrine of sovereign immunity protects the officer from suit.").¹

However, actions taken by Tribal employees and officials pursuant to an unconstitutional law or without legal authority are outside of the employees' and officials' scope of duties and authority, and would subject the employees and officials to suit. *Ex Parte Young*, 209 U.S. 123 (1908). This principle establishes a process for overcoming the jurisdictional bar imposed by sovereign immunity as applied to Tribal officials and employees acting outside of the scope of their duties and authority, and thus establishes an avenue for plaintiffs to seek non-monetary declaratory and injunctive relief to address constitutional violations. See, e.g., *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014); *Hwal'Bay Ba:J Enters. v. Beattie*, 2009 Hualapai App. LEXIS 1; *Kirkwood v. Ho-Chunk Housing Department and Ho-Chunk Nation Legislature*, CV 03-62, 2004 Ho-Chunk Trial LEXIS 3, *17 *Stone v. Somday*, 1984 Colville App. LEXIS 1.

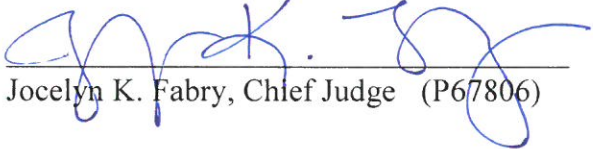
In order to bring an individual claim against Chairperson Payment, Plaintiffs would have had to allege some action by the Chairperson outside the scope of his duties and authority or some illegal action in order to avoid a defense of sovereign immunity. Plaintiffs have done neither. Rather, based upon the relief sought by the Plaintiffs in this matter in compelling the Tribe to take action, the Tribe is the true party in interest. *Native Am. Dist. V. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). As such, sovereign immunity bars the claim against the Chairperson as well.

¹ As this is a matter of first impression before the Court, the Court necessarily looked to the opinions of other Tribal Courts as persuasive, although not binding, authority. As such, several other Tribal Courts' opinions are cited within this section.

Conclusion

Based upon the foregoing, the Court grants the Defendants' Motion to Dismiss on the grounds identified above. The parties retain the right to file a timely appeal in accordance with § 82.110 of the Tribal Code.

IT IS SO ORDERED this 22nd day of December 2020, by the Sault Ste. Marie Chippewa Tribal Court located in Sault Ste. Marie, Michigan, within the sovereign lands of the Sault Tribe.



Jocelyn K. Fabry, Chief Judge (P67806)



SAULT STE. MARIE CHIPPEWA TRIBAL COURT

Trevor MacLeod, on behalf of himself and his dependent children; Lark Lorenzo, on behalf of herself and her dependent children; Donald MacLeod, on behalf of himself; and all Sault Tribe Members similarly situated,
Plaintiffs,

vs. **Case No. GCV-20-01**

Sault Ste. Marie Tribe of Chippewa Indians;
Aaron Payment, Chairperson,
Defendants.

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PROOF OF SERVICE

The undersigned certifies that a copy of each of the following documents was served upon the attorneys/lay advocates or record as listed above by U.S. First Class Mail, or as otherwise stated above to them, and to their last known addresses on **12.22.2020: Order Granting Defendant's Motion to Dismiss**

I declare under penalty of perjury that the statement above is true to the best of my knowledge, information and belief.

Date 12/22/2020



Court Administrator