



ENTERED
11-4-2022 Hls
SSM Chippewa Tribal Court

SAULT STE. MARIE CHIPPEWA TRIBAL COURT

DJ HOFFMAN,

Plaintiff,

v.

Case No. GCV-2022-03

**SAULT STE. MARIE TRIBE OF CHIPPEWA
INDIANS BOARD OF DIRECTORS,
AUSTIN LOWES, Vice-Chairperson,
BETTY FREHEIT, Director,
ISAAC MCKECHNIE, Director,
ROBERT MCRORIE, Director,
KIMBERLY HAMPTON, Director,
DARCY MORROW, Director,
MICHAEL MCKERCHIE, Director,
TYLER LAPLAUNT, Treasurer
LANA CAUSLEY-SMITH, Director,
KIMBERLY LEE, Director,
SHAWN BOROWICZ, Director,
BRIDGET SORENSON, Director,
Defendants.**

OPINION & ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Plaintiff's Motion for Temporary Restraining Order and Defendants' Motion to Dismiss in a case contending that the resolution in which Plaintiff Hoffman was removed as Chairperson and a special advisory election announced was in contravention of tribal law.

Factual Background and Procedural History

Former Tribal Chairperson, Aaron Payment, resigned from the position and the Board of Directors accepted his resignation during a May 20, 2022 Board meeting. At the time, a general

election of the Tribe was underway (although the Chairperson seat was not up for election at this time), with the Notice of Election published on January 22, 2022, setting forth various significant dates in the election cycle, including the Primary Election on May 19 and the General Election day on June 23. Thereafter, on June 27, 2022, the Board voted to appoint DJ Hoffman as Chairperson to fill the vacancy for the remainder of the term expiring in 2024 and on July 1, 2022, the Plaintiff accepted the appointment and took the Tribal Oath of Office.

On July 5, following the general election, the newly-elected Board members were seated. On August 30, 2022, the Board adopted amendments to Chapter 10, Election Ordinance, in relevant part, deleting the provision in effect prior to that date that prohibited special advisory elections after the posting of a Notice of Election for a general election. *Resolution 2022-228, Amending Chapter 10, Subchapter II, Special Advisory Elections; Compare Tribal Code, § 10.204, effective January 27, 2016 through August 30, 2022, with Tribal Code § 10.204, effective August 20, 2022 to present (present version no longer containing subsections (3)).*

The Board of Directors, on September 13, 2022, declared that the June 27 appointment of the Plaintiff “did not follow the Code or Constitution” and further declared the Chair seat vacant. *Resolution 2022-38, Declaring Chair Seat Vacant.* In accordance with the Election Ordinance as amended, a special advisory election to fill the vacancy was announced. On September 22, the Plaintiff filed a *Verified Complaint for Injunctive Relief and Plaintiff’s Verified Ex Parte Motion for Temporary Restraining Order, Order to Show Cause, Preliminary Injunction, and Brief in Support* against the Board of Directors and the individual Board members seeking equitable relief enjoining the special advisory election and ordering his reinstatement as Chairperson. He based his claims on the Tribe’s Constitution. The Court denied his *ex parte* (emergency) request for a temporary restraining order September 23, 2022.

On October 7, 2022, the Board of Directors and individually-named directors filed a *Motion to Dismiss* the complaint in its entirety claiming lack of Tribal Court jurisdiction to hear the claims and sovereign immunity. Following briefing by the parties, the Court heard oral

arguments on the Plaintiff's motion for a temporary restraining order and Defendants' motion to dismiss on October 27, 2022.¹

Discussion

Following federal recognition of the Sault Ste. Marie Tribe of Chippewa Indians in 1972, the Tribe sought formal organization of its government by way of a constitution. The CONSTITUTION AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS was adopted by the tribal membership via an election supervised by the Secretary of the Interior on October 9, 1975. Following approval by the Acting Deputy Commissioner of Indian Affairs on November 13, 1975, the CONSTITUTION AND BYLAWS went into effect. CONST. AND BYLAWS of SSMTCI, History Note, 2.²

The CONSTITUTION AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS provides that the Board of Directors shall exercise, among other enumerated powers, the power “[T]o 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[.]*” CONST. AND BYLAWS of SSMTCI art. VII, § 1(g) (emphasis added). Thus, and as recognized by this Court previously, under our Tribe’s current constitutional governmental framework the Tribal judiciary only has the jurisdiction that the Board of Directors grants it. *MacLeod v. Sault Ste. Marie Tribe of Chippewa Indians*, GCV-20-01, Dec. 22, 2020, *appeal pending*, APP-21-01.

¹ Because this Complaint was filed with the Court, the matter must proceed as required by Chapter 81, Civil Jurisdiction and Procedure, with the issuing of summons, allowing defendant’ to respond, and the Court setting the matter for hearings as needed. This is the role and duty of a court system. There is no gate-keeping function of courts – this Tribal Court or any other court system - upon the filing of a Complaint. Setting the matter for a hearing and allowing each side a meaningful opportunity affords for due process and is, in fact, the only way for a Court to determine whether a matter is properly before it, which sometimes requires an analysis of various presenting issues. The requirements of due process are meant to protect our people from the mistaken or unjustified acts of another. The core of these requirements is notice and a hearing before an impartial tribune. Due process - for all litigants, both those who file complaints and those to seek to have them dismissed - allows for an opportunity for confrontation and discovery so this court can decide based on the issues presented.

² Only two amendments to the Const. and Bylaws of SSMTCI have been passed since its original 1975 adoption, neither of which are relevant to the issues currently before the Court.

As noted by the Poarch Creek Indians Tribal Supreme Court, many tribes' constitutions "expressly articulate a separation of powers between the tribal legislature and executive and the tribal judiciary[.] E.g., CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. V, § 6 ("The Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions of government shall exercise powers properly belonging to the judicial branch of government....")." *White v. Poarch Band of Creek Indians, et al.*, SC 10-02 (2011) at 3. Tribes with forms of government with two (legislative and judicial), three (legislative, executive, and judicial), and even four (legislative, executive, judicial, and the membership) co-equal branches all separate each branches' respective roles in their tribal constitutions. E.g., CONST. OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS art. IX, Part H, § 1; CONST. OF LITTLE RIVER BAND OF OTTAWA INDIANS OF MICHIGAN art. VI § 9; CONSTITUTION OF THE POKAGON BAND OF POTAWATOMI INDIANS art XII, § 2; CONST. OF THE CHEROKEE NATION art. V; CONST. OF THE MESCALERO APACHE TRIBE art. VII; CONST. OF THE CHICKASAW NATION art. V, § 1; CONST. OF THE CITIZEN POTAWATOMI NATION art. IV, § 3. THE CONST. OF THE HO-CHUNK NATION art I. §§ 2, 3.

Sault's Tribe's Constitution is among the minority in that it does not establish a separation of the powers of the legislative body and judiciary. Rather, our Tribal Court is only empowered with the jurisdiction and authority provided to it by the Board of Directors, the Tribe's sole governing body. The question of whether Plaintiff's action based on Art. VIII of the tribal constitution is within the jurisdiction of the Court can only be answered, then, by looking at the statutes enacted by the Board which define this Court's "duties and powers." CONST. AND BYLAWS of SSMTCI art. IV, art. VII, § 1(g). "Such legislative actions form the bounds of the Tribal Court's jurisdiction." *MacLeod* at 7.

The Board of Directors exercised its constitutional power and established the Tribal Court as it currently exists with the enactment of Chapter 80 of the Tribal Code. Tribal Code, Chapter 80: Sault Ste. Marie Chippewa Tribal Court.³ The Board defined the civil jurisdiction of the Court

³ Chapter 80 of the Tribal Code established the trial-level court, while Chapter 82 established the appellate-level court. Tribal Code, Chapter 82: Appeals.

with the enactment of Chapter 81. Tribal Code, Chapter 81: Civil Jurisdiction and Procedure. Relative to this matter, Section 81.103 Civil Jurisdiction provides that the Court has jurisdiction:

(1) [e]xcept 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.

...

If the inquiry were to end there, the Court would have jurisdiction over this matter. However, this section must be read *in pari materia* with the Code's provisions regarding sovereign immunity in order to determine if the Court has the authority to hear a case. The subsequent section of Chapter 81 provides as follows:

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.

The Tribe's sovereign immunity is further reaffirmed in Tribal Code, Chapter 44. Therefore, and as this Court previously analyzed in *MacLeod*, when Plaintiffs bring suit alleging violations of our Tribal constitution, they must still properly identify a waiver of the Tribe's, a Tribal entity's or Tribal officer's sovereign immunity from suit. "Simply alleging a Constitutional violation does not itself permit this Court to hear the matter...they must properly plead a waiver of sovereign immunity" before the Court may adjudicate the merits of an action. *MacLeod* at 8.

Plaintiff makes his claims both against the Board of Directors and also its individually-named members, but has not identified a waiver of immunity as to either. As to the Board of Directors, the Court finds that the Board is a "tribal entity" as defined by § 81.102(4): "any entity created [] by the Tribe for [] governmental purposes and any entity which is controlled by the Board of Directors" whose immunity from suit is preserved by § 81.104. Therefore, action is barred against the Board of Directors unless Plaintiffs identify and plead a waiver of the Board's immunity from suit.

Plaintiff did not plead any waiver of sovereign immunity, and the only waiver he argues later in his response is one under the Indian Civil Rights Act (ICRA). However, even if the Plaintiff had asserted an ICRA claim (which he does not) the vast majority of tribal courts agree that ICRA did not create a general waiver of an Indian tribe's sovereign immunity in tribal court actions. *White v. Poarch band of Creek Indians, et al.*, SC-10-02 (2011) at 5. This Court agrees. Waivers of immunity must be explicit, and the authority to waive the tribal sovereign immunity of the Board of Directors is vested in the Board of Directors and not in this Tribal Court. *White v. Poarch Band of Creek Indians, et al.*, SC-10-02 (2011) at 5. Sault Tribe has not waived the Board of Directors' immunity from suit that would allow the Tribal Court to adjudicate Plaintiff's claims.⁴ The Plaintiff's demands for injunctive and declaratory relief against the Board of Directors must be dismissed.

The individually-named defendants also enjoy immunity from suit as tribal officials and the Plaintiff has not pled a waiver of their tribal official immunity nor pled that they were acting outside their official capacities as members of the Board of Directors. Tribal Code § 81.104; Fletcher, Matthew L. M. and Fort, Kathryn E, *Advising - and Suing - Tribal Officials: On the Scope of Tribal Official Immunity* (February 20, 2009). MSU Legal Studies Research Paper No. 07-02, Available at <https://ssrn.com/abstract=1346977>, citing *Satiacum v. Sterud*, No. 82-1157, 1982.NAPU.0000001 (Payallup Tribal Court 1982).

⁴ Plaintiff cites to the case of *Chapman v. Little River Band of Ottawa Indians*, No. 07-164-CC and 08-034-AP as support for a Tribal Court hearing a case in which a Plaintiff filed suit against the Tribal Council alleging what she was denied due process when removed as a tribal judge. However, the critical difference in that case is that the Tribal Constitution of the Little River Band of Ottawa Indians contains the following section conferring jurisdiction upon its Tribal Court to hear the claim:

(a) Little River Band, its Tribal Council members, Tribal Ogema, and other Tribal officials, acting in their official capacities, shall be subject to suit for declaratory or injunctive relief in the Tribal Court system for the purpose of enforcing rights and duties established by this Constitution and by the ordinances and resolutions of the Tribe.

...

Chapman at *5. Plaintiff's reliance on *McCoy v. Bd. of Elections of E. Band of Cherokee Indians*, No. CSC-19-03, 16 Am. Tribal Law 13 fails for the same reason. The Cherokee Code, Chapter 1-Civil Procedure art I., § 1-2:

...

(g) The Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over actions against the Easter Band of Cherokee Indians seeking the following relief:
(1) an injunction, writ of mandamus or a declaratory judgment concerning individual rights guaranteed by the Indian Civil Rights Act.

...

Our Tribal Constitution is not one that creates co-equal branches of government, based on a system of checks and balances, or one that empowers the Court to review the actions of the Board of Directors as presented by the Plaintiff here. It may be difficult to contemplate, given our Tribe's current level of sophistication, that the intention was for one governing body to hold nearly all of the authority and to be the determinants of whether or not they had violated the rights of our people, but the Court must respect the voice of the membership who adopted our present Constitution in 1975. But, this is the legal framework that we operate under and that the Court is duty-bound to base its decision upon.⁵

Simply put, neither our Tribal Constitution nor our legislation⁶ includes any provision that provides that the court has the authority to review whether any act by the council or any tribal

⁵ Some commenters have described the difficulties in the modern circumstances of Tribes who do not have an adequate separation of powers between the political branches of government and tribal judiciaries.

The majority of tribes recognize the fact that for a strong judiciary, judges must be free of political pressures, and therefore have enacted sections in their Constitution and Law and Order Code clearly defining judicial independence, therefore, separating the judicial branch from the executive and legislative branches of tribal government." Hon. Fred W. Gabourie, *Judicial Independence of Tribal Courts*, 44 ADVOCATE (State Bar of Idaho), October 2001, at 24.

Indian legal scholar Kirke Kickingbird of the Kiowa Tribe cautioned that a lack of tribal judicial independence can negatively impact tribal governments, economic interests, and tribal well-being:

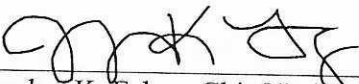
What has become clear to tribal government is that development of governmental infrastructure and economic projects requires Indian law expertise because of the complex issues that arise in applying its many doctrines. Concerns expressed by tribal members; by non-Indians visiting Indian Country, and by businessmen, corporations, and lenders who want to do business in Indian Country center around assurances that tribal authority is enforceable. Likewise, tribal governments need an appropriate forum to address the conflicts affecting tribal members, whether the issue is a domestic matter such as child welfare or a dispute involving major business operations and related financing. Yet, the authority of tribal governments has become more controversial as tribes have engaged in more extensive use of their authority. Kirke Kickingbird, *Striving for the Independence of Native American Tribal Courts*, 36 HUM. RTS., Winter 2009, at 16, 19-20, quoted in Matthew L.M. Fletcher, *American Indian Tribal Law* (2011).

⁶ Some tribal governments have a separations of powers created by statute rather than by constitution. *E.g.*, Section 1-916 of Winnebago Tribal Code. "The tribal courts shall have authority to review any act by the tribal council, or any tribal officer, agent, or employee to determine whether that action, and the procedure or manner of taking that action, is constitutional under the tribal constitution, authorized by tribal law, and not prohibited by the Indian Civil Rights Act." *Rave v. Reynolds*, Winnebago Tribe of Nebraska Supreme Court, No. SC 96-01, 23 Indian L. Rep. 6150 (1996) (finding that the action in equity against tribal council members was not barred by sovereign immunity based upon the statutory grant of jurisdiction.)

officer is constitutional. It is not the Court's role to set policy, but rather to interpret the law of our Tribe as enacted.

The Court must honor and respect the Constitution and law under which it was established, and which was adopted by our people. The Court expressly leaves open the question of whether the Defendants' actions are valid under the constitution, as this Court has not been granted the jurisdiction to rule on that issue, as the matter is dismissed before this Court on grounds of tribal entity and official sovereign immunity.

Based upon the foregoing, the Court grants the Defendants' Motion to Dismiss as the Court lacks the jurisdiction to hear the matter. The parties retain the right to file a timely appeal in accordance with § 82.110 of the Tribal Code. **IT IS SO ORDERED** this 4th day of November 2022, by the Sault Ste. Marie Chippewa Tribal Court located in Sault Ste. Marie, Michigan within the sovereign lands of the Tribe.



Jocelyn K. Fabry, Chief Judge (P67806)