

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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BGA, LLC and THE WESTERN MOHEGAN
TRIBE AND NATION OF THE STATE OF
NEW YORK,

Plaintiffs,

v.

Index No. 06-CV-0095 (GLS)(RFT)

ULSTER COUNTY, NEW YORK,
a municipal corporation of the State of
New York,

Defendant.

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**PLAINTIFFS' LOCAL RULE 7.1(a)(3) STATEMENT
OF MATERIAL FACTS IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs BGA, LLC ("BGA") and The Western Mohegan Tribe and Nation of the State of New York (the "Tribe"), plaintiffs herein ("Plaintiffs"), by and through their counsel, Todtman, Nachamie, Spizz & Johns, P.C., submit this Statement of Material Facts as to which Plaintiffs contend there is no genuine issue of fact, in support of Plaintiffs' motion for summary judgment on their claim for declaratory relief, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 7.1(a)(3) of the Local Rules of this Court.

A. History of The Tribe and the Property

1. The Tribe is a Native American tribe whose members are the biological descendants of the historical Muh-hea-kun-nuk, an eastern Algonquin tribe, also known as the Muh-he-con-ne-ok, Mohegan, Mohican or Mahican Indians. (Complaint, ¶ 7; Answer ¶ 2; Lawson Report p. 1; Roberts Aff., ¶ 8).

2. All of the Tribe's members claim Indian ancestry either through genealogical documentation and/or biological evidence such as DNA and HLA blood tests, which genetically connect them to their eastern Algonquin predecessors, all of whom are of the same or similar race. (Complaint, ¶ 8; Answer ¶ 2; see also Lawson Report pp. 12-14; Roberts Aff., ¶¶ 21-25; Goldstein Report pp. 5-6).

3. The Tribe has never relinquished its sovereign powers to the United States, has never been at war with the United States and has never defeated by the United States Army. (Complaint, ¶ 9; Answer ¶ 2; Roberts Aff., ¶ 9; see also Lawson Report pp. 6-11.)

4. The Tribe has a government-to-government relationship with the Federal government. (Complaint, ¶ 9; Answer ¶ 2; see Roberts Aff., ¶ 9).

5. The Tribe has never been conquered by the United States or Great Britain or its predecessor entities, or the State of New York. (Complaint, ¶ 10; Answer ¶ 2; Roberts Aff., ¶ 9; see also Lawson Report pp. 6-11.)

6. The Tribe occupied and was in possession of certain real estate located in Ulster County, New York, prior to the arrival of the European settlers. (Complaint, ¶ 11; Answer ¶ 2; Roberts Aff., ¶ 5; see also Lawson Report pp. 14-15).

7. A part of that land is the real estate commonly known as the former "Tamarack property" or "Tamarack" (the "Property") located in Greenfield Park, Ulster County. (Complaint, ¶ 11; Answer ¶ 2; Roberts Aff., ¶ 34; see also Lawson Report p. 14).

8. The Property is located on part of the Tribe's ancestral lands. (Complaint, ¶ 12; Answer ¶ 2; see also Roberts Aff., ¶ 5; Lawson Report p. 14).

9. The Property is located on land occupied by the Tribe and its ancestors since prior to the arrival of the European settlers. (Complaint, ¶ 13; Answer ¶ 2; Roberts Aff., ¶ 5; see also Lawson Report p. 14).

10. The Tribe has functioned under its traditional government and as a united community continuously since prior to the arrival of Henry Hudson in New York. (Complaint, ¶ 14; Answer ¶ 2; see also Roberts Aff., ¶ 26; Lawson Report pp. 6-11).

11. As successor to the historical Muh-hea-kun-nuk, the Tribe has been treated by federal, state, tribal and local governments (including Ulster County) as being a sovereign Indian nation with distinct rights. (Complaint, ¶ 15; Answer ¶ 2; Lawson Report pp. 17-21; Roberts Aff., ¶¶ 10-18.)

12. Examples of such treatment of the Tribe are as follows:

(i) The Tribe received unambiguous legal and de facto recognition by the federal government as recently as October 14, 1999 when it received the Right of Entry (an interest in land) from the Department of the Army dated October 14, 1999 which confirmed the Army's "government to government" relationship with the Tribe. (Complaint, ¶ 15; Answer ¶ 2; see Lawson Report p. 18; Roberts Aff., ¶ 11.)

(ii) The Tribe has been validly recognized by the federal government for its participation in the American Heritage Rivers Initiative. (Complaint, ¶ 15; Answer ¶ 2; see Lawson Report p. 17; Roberts Aff., ¶ 11.)

(iii) The County conveyed the Property to the Tribe in settlement of aboriginal claims. In doing so, the County declared the Tribe to be a "Sovereign Nation." (Complaint, ¶ 15; Answer ¶ 2; see Lawson Report p. 15; Roberts Aff., ¶¶ 38-47.)

(iv) The County stipulated in a Resolution and in a written agreement with the Tribe that the Property was to have the status of "Indian Country". (Complaint, ¶ 15; Answer ¶ 2; see Lawson Report p. 15; Roberts Aff., ¶¶ 41-47.)

(v) The State of Vermont, by written documentation, acknowledged the Tribe as an Indian Tribe. (Complaint, ¶ 15; Answer ¶ 2; see Lawson Report pp. 20-21; Roberts Aff., ¶ 17.)

(vi) On September 19, 1996, the Village of Granville, New York recognized the Tribe as a "self-governing entity". (Complaint, ¶ 15; Answer ¶ 2; see Lawson Report p. 16; Roberts Aff., ¶ 13.)

13. Courts and government officials have also recognized the Tribe as being a sovereign Indian nation with distinct rights. (Complaint, ¶ 15; Answer ¶ 2; see Lawson Report pp. 17-19; Roberts Aff., ¶ 14.)

14. Examples of such recognition are as follows:

(i) On April 17, 2001, the Court of Appeals for the Second Circuit vacated and remanded a decision of the U.S. District Court that the Tribe did not have standing to invoke a First Amendment claim against the State of New York to conduct religious ceremonies on that part of Schodack Island owned by the State of New York. The Court of Appeals declared that the Tribe "consists of the descendants of Native Americans who stayed behind when most of their counterparts left the area in the late 1700's". Western Mohegan Tribe and Nation of New York v. State of New York, 246 F.2nd 230 (2d Cir. 2001). (Complaint ¶ 16; Answer ¶ 2; Lawson Report p. 18; Roberts Aff., ¶ 14.)

(ii) In a joint letter on August 17, 1998, Senators D'Amato and Moynihan and Representatives Benjamin A. Gilman and Maurice D. Hinchey of New York requested President Clinton to reaffirm the Muh-hea-hun-nuk as a federally recognized tribe. (Complaint ¶ 16; Answer ¶ 2; Lawson Report pp. 18-19; Roberts Aff., ¶ 14.)

(iii) President Andrew Jackson's address to Congress in 1829 refers to the "Mohegans" as a recognized Native American tribe. (Complaint, ¶ 16; Answer ¶ 2; Lawson Report pp. 10-11; Roberts Aff., ¶ 14.)

15. The Tribe consists of those Muh-hea-hun-nuk families that remained in New York or returned there subsequently. (Complaint, ¶ 17; Answer ¶ 2; see Lawson Report p. 6-11; Roberts Aff., ¶ 26.)

16. The present membership of the Tribe is based primarily in Washington County, Ulster County and Sullivan County, New York, and Rutland and Bennington Counties, Vermont. (Complaint, ¶ 18; Answer ¶ 2; Lawson Report p. 11; see also Roberts Aff., ¶ 26.)

17. Some of the Tribe's members occupy and reside upon the Property as their Indian reservation and engage in traditional Indian activities pursuant to laws adopted by the Tribe's traditional Indian government. (Complaint, ¶ 19; Answer ¶ 2; see also Roberts Aff., ¶ 9; Lawson Report p. 16.)

18. The Property serves as the official seat of the Tribal government. (Complaint, ¶ 20; Answer ¶ 2; Roberts Aff., ¶ 33; see also Lawson Report p. 16.)

19. The Tribe's official office is located on the Property in Greenfield Park, Ulster County, New York. (Complaint, ¶ 21; Answer ¶ 2; see Roberts Aff., ¶ 33; Lawson Report p16.)

B. The County's Resolution

20. Ulster County adopted Resolution No. 376 (the "Resolution") on December 7, 2000. (Complaint, ¶ 22; Answer ¶ 2; Roberts Aff., ¶ 42 and Exhibit "B").

21. The Resolution authorized Ulster County to convey its interest in the Property to the Tribe to be held as "Indian Country" in exchange for, *inter alia*, (a) the settlement of the Tribe's claims against the County and other property owners as to lands in Ulster County and (b) the payment to the County of approximately Nine Hundred Thousand Dollars (\$900,000.00) for past real estate tax liens on the Property, plus accrued interest. (Complaint, ¶ 23; Answer ¶ 2; Roberts Aff., ¶ 42-44).

22. The Resolution stated that the Tribe would "withdraw any claims it may have against Ulster County or other property owners as to any lands in Ulster County except the Tamarack property or other lands conveyed to it or its trustee...." (Complaint, ¶ 24; Answer ¶ 2; see Roberts Aff., Exhibit "B").

23. The Resolution states that the Property would be held for the benefit of the Tribe as "Indian Country". (Complaint, ¶ 25; Answer ¶ 2; Roberts Aff., ¶ 43 and Exhibit "B").

24. In the Resolution, the County states that "the Tribe is a tax-exempt organization." The Resolution further states that notwithstanding such fact, the Tribe will agree to pay certain payments in lieu of taxes to the County in lieu of taxes. (Complaint, ¶ 26; Answer ¶ 2; Roberts Aff., ¶ 43 and Exhibit "B").

25. The Resolution required payments of Twenty-Five Thousand Dollars (\$25,000.00) per year in lieu of taxes, or Five Percent (5%) of any net revenue derived by any use or activities on the Property, whichever is greater, to a maximum of Two Hundred Fifty Thousand Dollars (\$250,000.00) per year. (Complaint, ¶ 27; Answer ¶ 2; Roberts Aff., ¶ 44 and Exhibit "B").

26. The Resolution states that no future taxes would be owed by the Tribe on the Property. (Complaint, ¶ 28; Answer ¶ 2; Roberts Aff., ¶ 43 and Exhibit "B").

27. The Resolution states that the County held tax title to the Property, and that the County was "in the process of completing the foreclosure of its mortgage upon the Property given by the owner, Neil's Mazel, Inc., which owner is now in bankruptcy...". (Complaint, ¶ 29; Answer ¶ 2; Roberts Aff., Exhibit "B").

C. The Western-County Agreement Settled The Tribe's Land Claim Against The County

28. Prior to the Resolution, the Tribe had asserted land claims in Ulster County. (Roberts Aff., ¶ 38; Lawson Report, p. 15.)

29. As contemplated by the Resolution, the Tribe and the County entered into an Agreement and Mutual Release, dated January 5, 2001 (the "Western-County Agreement"), which, inter alia, provided for the settlement of the Tribe's claims against the County and other property owners as to lands in Ulster County and provided for the County to convey its interest in the Property to the Tribe or its trustee. (Complaint, ¶ 30; Answer ¶ 2; Roberts Aff., ¶ 46 and Exhibit "C".)

30. The Western-County Agreement was drafted by Frank Murray, the County Attorney. (Complaint ¶ 31, Answer ¶ 2; see also Roberts Aff., ¶ 48.)

31. It was signed by the Tribe and by Ward Todd, Chairman for the County, pursuant to authorization of the Resolution. (Complaint, ¶ 31; Answer ¶ 2; Roberts Aff., ¶ 48.)

32. The Western-County Agreement recognizes the Tribe as a sovereign Indian nation, states that the Tribe is a sovereign nation and extracts from the Tribe a limited waiver of its sovereign immunity. (Complaint, ¶ 32; Answer ¶ 2; Roberts Aff., ¶¶ 46-47 and Exhibit "C"; see also Lawson Report, p. 15.)

33. The Western-County Agreement states that "The County shall not adopt any Resolutions or take any other action to contravene the subject matter of the Resolutions or affect the Real Property's trust status and/or 'Indian Country' status". (Complaint, ¶ 33; Answer ¶ 2; Roberts Aff., ¶ 46 and Exhibit "C".)

34. The Western-County Agreement further provides that the Tribe "hereby waives its right to sovereign immunity only to the extent of and in connection with the enforcement by the County of the Tribe's obligations hereunder, including but not limited to its obligations to make payments in lieu of property taxes as herein provided." (Roberts Aff., ¶ 47 and Exhibit "C".)

35. The Resolution and the Western-County Agreement admit that as to Ulster County: (a) the Tribe is tax exempt, (b) no future taxes would be owed by the Tribe on the Property, (c) the Property would be conveyed to the Tribe (or its trustee) for the benefit of the Tribe as "Indian Country", and (d) the Tribe had agreed to make certain annual payments to the County in lieu of taxes. (Complaint, ¶ 34; Answer ¶ 2; Roberts Aff., ¶¶ 43-47.)

36. On January 5, 2001, the Tribe and the County also entered into a Hold Harmless Agreement which stated that the Tribe is "a native American tribe in the State of New York". (Roberts Aff., ¶ 49.)

37. In accordance with the Western-County Agreement, the County paid Ulster County the full purchase price of Nine Hundred Thousand Dollars (\$900,000.00). (See Complaint, ¶ 37; Answer ¶ 2; Roberts Aff., ¶ 54.)

38. The Western-County Agreement contemplated a separate contract between the Tribe and Neil's Mazel, Inc. as debtor-in possession (the "Debtor") to assure that the Tribe or its trustee would obtain clear title to the Property because, despite the County's foreclosure action against the Debtor, the Debtor claimed that it retained an interest in the Property. (Complaint, ¶ 38; Answer ¶ 2; Roberts Aff., ¶¶ 40-41.)

39. On December 12, 2000, Western and the Debtor entered into a contract, providing for the sale of the Debtor's alleged interest in the Property to the Tribe. Under that contract, BGA, on behalf of the Tribe, was required to pay and did pay an additional Nine Hundred Fifty Thousand Dollars (\$950,000.00) to the Debtor. (Complaint, ¶ 38; Answer ¶ 2; Roberts Aff., ¶¶ 40, 45, 53.)

D. The Bankruptcy Court's Approval of the Western-County Agreement

40. In February 2001, the Debtor filed an application (the "Sale Motion") with the EDNY Bankruptcy Court seeking approval of the Western-Debtor Agreement and further seeking approval of the Debtor's participation in connection with the Western-County Agreement. (Roberts Aff., ¶ 50.)

41. The County appeared in the Bankruptcy Court and advocated for approval of the Western-County Agreement. (See Roberts Aff., ¶¶ 41, 51.)

42. On March 6, 2001, the Bankruptcy Court, on the Sale Motion of the Debtor, entered an order (the "Approval Order") approving the Western-Debtor Agreement and also providing, inter alia, that

"ORDERED, that the participation of Neil's Mazel, Inc., debtor and debtor in possession, in connection with the agreement between Western Nation and Ulster County is hereby approved with respect to the payment of the sum of \$900,000 and payment of the current year's school and general property taxes (2000-2001 School taxes and 2001 General, town and county special district taxes) to the County **in full payment of any and all claims of Ulster County involving the subject real property;** and it is further

ORDERED, that the closing and consummation of the Western-Debtor Agreement and the Western-County Agreement. . . . shall have the effect of settling any and all claims that Ulster County and Neil's Mazel, Inc. have against each other (including, without limitation, any tax or mortgage deficiency claim which is disputed by the debtor and the debtor's right, title or interest to the subject real property, which is disputed by the County), all of which enable Ulster County and the Debtor to transfer the subject real property to Western Nation free and clear of all title defects, liens, charges and encumbrances. . . ."

(Roberts Aff., ¶ 51 and Exhibit "E".)

E. The Tribe Acquired The Fee Title To The Property Through Its Trustee

43. The County conveyed title to the Property to the Tribe's Trustee in trust for the Tribe. (Roberts Aff., ¶¶ 4, 53-54; see also Lawson Report. p. 15.)

44. The Tribe is in exclusive possession of the Property. (Roberts Aff., ¶ 72.)

45. The County has not disputed the Tribe's right to possess or govern the Property. (Roberts Aff., ¶ 72.)

46. The Property became occupied and remains occupied by members of the Tribe as their home. (Complaint, ¶ 41; Answer ¶ 2; Roberts Aff., ¶ 32; see also Lawson Report, p. 16.)

**F. The County's Refusal To Accept Pilot Payments,
And The County's Foreclosure Action**

47. The Tribe attempted to timely pay the first Twenty-Five Thousand Dollar (\$25,000.00) payment in lieu of taxes to the County. (Complaint, ¶ 42; Answer ¶ 2; Roberts Aff., ¶ 56.)

48. The County refused to accept such payment, instead demanding that all regular taxes on the Property be paid. The Tribe refused to pay regular taxes on the Property. (Complaint, ¶ 42; Answer ¶ 2; Roberts Aff., ¶ 56 and Exhibit "H".)

49. Lewis C. Kirschner, the County Treasurer, wrote a letter to the Tribe, dated January 17, 2003, stating, in pertinent part:

The County cannot accept the \$25,000.00 payment, in lieu of taxes, as provided in the contract between Ulster County and Western Mohegan Tribe Nation dated January, 2001.

It is the County's position that all regular taxes must be paid, and therefore, we request \$58,436.85 for the 2002 tax.

(Roberts Aff., ¶ 56 and Exhibit "H".)

50. In 2002, the County brought an action in the County Court of Ulster, Index No. 02-3818 (the "Foreclosure Action") for foreclosure of its alleged tax lien on various parcels of real property in Ulster County, including the Property. (Complaint, ¶ 43; Answer ¶ 2; Roberts Aff., ¶ 58.)

51. In the Foreclosure Action, the County obtained a Judgment of foreclosure as to the Property (the "Amended Judgment") on or about September 30, 2005. (Complaint, ¶ 44; Answer ¶ 2; Roberts Aff., ¶ 58 and Exhibit "I".)

G. The Escrow Agreement And The Settlement Agreement

52. On March 23, 2006, the BGA, the Tribe and the County entered into an escrow agreement (the "Escrow Agreement") to forestall foreclosure on the Property. (Complaint, ¶ 46; Answer ¶ 2; Roberts Aff., ¶ 59.)

53. In accordance with the Escrow Agreement, BGA deposited into Escrow the sum of \$383,718.17 (the "Escrow Fund"), representing all amounts which would be owed on the Property for general State, County and Town real property taxes through December 31, 2006 and Ellenville Central School taxes through June 30, 2006 in the absence of the Property being exempt from real estate taxes. (Roberts Aff., ¶ 60.)

54. In May 2006, BGA, the Tribe and the County entered into a global settlement (the "Settlement Agreement") to resolve various disputes pending between the County and BGA and between the County and the Tribe. (Roberts Aff., ¶ 61.)

55. Pursuant to the Settlement Agreement, the Escrow Fund was released to the County. (Roberts Aff., ¶ 62.)

56. Under the Settlement Agreement, the County agreed "to treat the Foreclosure Judgment as being of no force or effect and as void *ab initio*. The County did not, however, waive any right to pursue a future tax foreclosure action if taxes were not paid in the future. (Roberts Aff., ¶ 63.)

H. The Plaintiffs Seek Only Declaratory Relief In this Action

57. Pursuant to an agreement between the Plaintiffs and the County, the Complaint herein was amended, inter alia, to omit causes of action against the County for monetary relief and injunction. This action only seeks declaratory relief. (Roberts Aff., ¶ 65.)

58. Pursuant to a Security Agreement dated as of September 30, 2004 between BGA and the Tribe, BGA is a secured party and assignee with respect to various rights of the Tribe including claims against the County set forth in the Complaint in this action. (Complaint, ¶ 45; Answer ¶ 2).

I. The County Continued To Demand Real Property Taxes From The Tribe

59. After the Plaintiffs commenced this action, the County continued to demand that the Tribe pay taxes on the Property and indicated that it may bring a future action to foreclose on the Property. (Roberts Aff., ¶ 67.)

60. The County and the Plaintiffs entered into a Stipulation dated November 29, 2006, which, inter alia, provided that:

"Pending the final disposition of this action, and until such time as this Court declares that the Western Mohegan Tribe and Nation of the State of New York is exempt from taxation on the Property that remains the subject of this litigation, it shall pay all amounts which would be owed on the Property for general State, County and Town real property taxes, special assessments and Ellenville Central School taxes as payments in lieu of taxes in a timely fashion."

See Roberts Aff., ¶ 68, Exhibit "K".

61. Pursuant to that Stipulation, the Plaintiffs have been making payments to the County in lieu of taxes and have paid all amounts which would have been owed for taxes on the Property if the Property had been owned by a private landowner. (Roberts Aff., ¶ 69.)

J. The County Does Not Dispute The Tribe's Ownership Of The Property Or The Tribe's Right To Exclusive Possession of the Property

62. The Tribe is in exclusive possession of the Property. (Roberts Aff., ¶ 72.)

63. The Tribe, through its Trustee, holds the fee title to the Property. (Roberts Aff., ¶ 72.)

64. There is no dispute as to ownership or possession of the Property. (Roberts Aff., ¶ 72.)

65. There are no private landowners on the Property. (Roberts Aff., ¶ 73.)

66. In this action, the Tribe is not asking the Court to overturn years of settled land ownership. (Roberts Aff., ¶¶ 72-73.)

67. The Tribe's claim in this action is not a claim for possession of the Property. (Roberts Aff., ¶ 72.)

68. The Tribe is not seeking a remedy of ejectment. (Roberts Aff., ¶ 73.)

Dated: New York, New York
December 29, 2006

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