UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FARMERS UNION OIL COMPANY, Plaintiff, -vs- STELLA GUGGOLZ, WILLIAM P. ZUGER, Tribal Court Judge of the Standing Rock Sioux Tribal Court of the Standing Rock Sioux Indian Reservation; and THE STANDING ROCK SIOUX TRIBAL COURT, Defendants.	Civ. 07-1004 **FARMERS UNION OIL COMPANY'S BRIEF IN RESPONSE TO DEFENDANT GUGGOLZ'S MOTION TO DISMISS OR STAY ACTION PENDING EXHAUSTION OF TRIBAL COURT REMEDIES**

COMES NOW the plaintiff, Farmers Union Oil Company, by and through its attorneys of record, and submits this Brief in Response to Defendant Stella Guggolz's Motion to Dismiss or Stay Action Pending Exhaustion of Tribal Court Remedies. Many of the issues raised by Guggolz were previously raised in the Tribal Defendants' motion and brief, Docs. 10 and 11. Consequently, in addition to the argument raised in this brief, the plaintiff refers the Court to its previous brief, Doc. 13.

ARGUMENT AND AUTHORITIES

I. TRIBAL JURISDICTION IS PLAINLY LACKING AND EXHAUSTION WOULD SERVE NO PURPOSE OTHER THAN DELAY.

A. Montana's Main Rule.

"The question of tribal court jurisdiction is a federal question of law[.]" Smith v. Salish Kootenai College, 434 F.3d 1127, 1130 (9th Cir.), cert. denied, 126 S.Ct. 2893 (2006); Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985). "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in limited circumstances." Strate v. A-1 Contractors, 520 U.S. 438, 445, 117 S.Ct. 1404 (1997).

In Montana v. United States, the United States Supreme Court held that the inherent sovereign powers of an Indian tribe do not, as a general proposition, extend to the activities of nonmembers of the tribe. 450 U.S. 544, 565-66, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). The Court described two instances in which tribes could exercise such sovereignty. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." Id. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." Id. at 566. "The unifying principle behind both

exceptions is that absent express congressional delegation, a tribe has civil authority over non Indians only where such authority is 'necessary to protect tribal self-government or to control internal relations.'" Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., __ F.3d __, 2007 WL 1814661, *5 (quoting Montana, 450 U.S. at 564).

The Supreme Court's recent cases, along with the Circuits which have considered the Montana exceptions, demonstrate that there are two facts courts look to when considering a tribal court's civil jurisdiction over a case in which a nonmember is a party:

> First, and most important, is the party status of the nonmember; that is, whether the nonmember party is a plaintiff or a defendant. As Justice Souter observed in Nevada v. Hicks, "[i]t is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." 533 U.S. 353, 382, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (Souter, J., concurring). The Court has repeatedly demonstrated its concern that tribal courts not require "defendants who are not tribal members" to "defend [themselves against ordinary claims] in an unfamiliar court." Strate, 520 U.S. at 442, 459, 117 S.Ct. 1404. Second, the Court has placed some store in whether or not the events giving rise to the cause of action occurred within the reservation. See Hicks, 533 U.S. at 360, 121 S.Ct. 2304 ("The ownership status of land ... is only one factor to consider....").

Smith, 434 F.3d at 1131.

Guggolz allegedly tripped and fell while she was walking across plaintiff's parking lot. This property, while

within the boundaries of the Standing Rock Sioux Indian Reservation, is owned by plaintiff, a nonmember. "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." Montana, 450 U.S. at 565. The term "non-Indian fee lands," refers to reservation land acquired in fee simple by non-Indian owners. Id. at 548.

Nonetheless, any time a tribal court wishes to exercise civil subject matter jurisdiction over a nonmember of the tribe, the framework in Montana must be satisfied. "Simply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember." Smith, 434 F.3d at 1138. As the Supreme Court has explained:

> Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. In Strate, for example, even though respondent A-1 Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident, we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember "was not a party to the subcontract, and the [T]ribes were strangers to the accident." 520 U.S., at 457, 117 S.Ct. 1404 (internal quotation marks and citation omitted).

Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001).

The instant case does not fall within either of the Montana exceptions. Importantly, under the first Montana exception, the existence of a consensual relationship is not alone

sufficient to support tribal jurisdiction. See Strate, 520 U.S. at 457, 117 S.Ct. 1404. The tribal exercise of authority must also take the form of taxation, licensing, or "other means" of regulating the activities of the nonmember. Montana, 450 U.S. at 565, 101 S.Ct. 1245. "[T]his regulation must have some nexus to the consensual relationship." Plains Commerce Bank, 2007 WL 1814661 at *6 (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001)). In other words, a nonmember's consensual relationship in one area "does not trigger tribal civil authority in another." Id.

Guggolz does not have a consensual relationship with the plaintiff. Guggolz had no commercial or contractual relationship with the plaintiff whatsoever. It is not as though Guggolz was buying the service station, was a supplier of gasoline or products, or was otherwise contractually tied to the plaintiff. Rather, she was merely visiting the store and had not transacted any business on the date of her alleged slip and fall. The lack of any commercial or contractual relationship whatsoever between a member of the Tribe, and the plaintiff, a nonmember, requires a conclusion that tribal jurisdiction is lacking.

One of the cases cited by Guggolz serves to illustrate the type of consensual relationship between a nonmember and Tribal member to which the first Montana exception applies. In

Plains Commerce Bank, *supra*, the discrimination claim raised by the Longs related exclusively to the manner in which the bank treated the Longs in the various agreements concerning a lease with option to purchase land located wholly within the boundaries of the Cheyenne River Reservation. Important to the decisions of the district court and the Eighth Circuit Court of Appeals was the notion that there was a clear nexus between the bank's tortious conduct and the contractual dealings between the parties. The instant case lacks "commercial dealings, contracts, leases, or other arrangements" between Guggolz and the plaintiff, so the question of whether there is a nexus is not even reached.

The next relevant inquiry is whether the plaintiff had a consensual relationship with the Tribe, and if so, whether there is a fairly direct link between the asserted consensual relationship and this lawsuit. Essentially, Guggolz asks the Court to conclude that, because the plaintiff's location was within the boundaries of the Standing Rock Reservation and the plaintiff transacts business with residents of the Standing Rock Reservation, jurisdiction exists over her personal injury suit. "Simply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember." Smith, 434 F.3d at 1138.

Even if it is assumed, *arguendo*, that a commercial relationship existed between the Standing Rock Sioux Tribe and the plaintiff because the plaintiff was conducting business on the reservation, there is absolutely no link to connect that relationship to the underlying personal injury suit. Although the plaintiff may have an agreement with the Tribe which allows it to conduct business on the reservation, Guggolz has no connection with any such agreement. "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another-it is not 'in for a penny, in for a Pound.'" Atkinson Trading Co., 532 U.S. at 656 (2001) (quoting A E. Ravenscroft, The Canterbury Guests; Or A Bargain Broken, act v, sc. 1). The claimed negligence of the plaintiff in maintaining the concrete in its parking lot has absolutely no connection to a commercial relationship between the Standing Rock Sioux Tribe and the plaintiff.

The second Montana exception is equally inapplicable. As the Supreme Court noted in Strate, the key to the proper application of the second Montana exception is a recognition that "'Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to

control internal relations.'" Strate, 502 U.S. at 459 (*quoting* Montana, 450 U.S. at 564). The fact that Guggolz is an enrolled member of the Standing Rock Sioux Tribe does not, in and of itself, translate to a finding that the dispute between Guggolz and the plaintiff necessarily has an effect on the political integrity, economic security, or the health and welfare of the tribe. In this case, the alleged harm is confined to that experienced by a single member of the tribe.

Based on the foregoing, it is plain that tribal jurisdiction is lacking in this case. Accordingly, Defendant Guggolz's motion to dismiss or stay should be denied.

B. Exhaustion of Tribal Court Remedies.

Defendant Guggolz argues that the plaintiff is required to exhaust tribal remedies prior to bringing this suit. In National Farmers Union Ins. Co. v. Crow Tribe, the United States Supreme Court recognized exceptions to the exhaustion requirement, where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction," 471 U.S. 845, 856, n. 21 (internal quotation marks omitted). The Supreme Court fashioned an even broader exception in Strate v. A-1 Contractors, holding that no exhaustion is

required "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule," so the exhaustion requirement "would serve no purpose other than delay." 520 U.S. 438, 459-460, and n. 14 (1997). More precisely, the Supreme Court stated:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see supra, at 1410-1411, must give way, for it would serve no purpose other than delay.

Strate, 520 U.S. at 459 n. 14, 117 S.Ct. 1404 (citations omitted). Because tribal jurisdiction is plainly lacking in the instant case, the otherwise applicable exhaustion requirement would serve no purpose other than delay.

In Guggolz's brief, she makes the argument that it is somehow inappropriate for this Court to conduct a Montana analysis in order to determine whether tribal jurisdiction is plainly lacking. Memorandum of Law in Support of Defendant Stella Guggolz's Motion to Dismiss or Stay Action Pending Exhaustion of Tribal Court Remedies, p. 11. This argument defies logic. Montana is the starting point and primary reference point by which the exercise of tribal jurisdiction is judged. The very exception, as pronounced in Strate, makes reference to "land

covered by Montana's main rule." How else is tribal jurisdiction considered in the context of a nonmember's alleged tort on non-Indian fee land within the boundaries of the reservation?

Guggolz's brief makes reference to Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706 (D.Minn. 1998) in support of this argument. Melby involved a tribe exercising zoning authority over non-Indian fee land within the boundaries of the Grand Portage Reservation. It is inapposite and is not binding on this Court. Guggolz also cites law review articles which have considered Strate, but these articles do not appear to reflect the Eighth Circuit's treatment of the Strate exception. See e.g. Christian Children's Fund Inc. v. Crow Creek Sioux Tribal Court, 103 F.Supp.2d 1161 (D.S.D. 2000) (recognizing that "[i]n Strate, the United States Supreme Court narrowed the exhaustion principles discussed in Nat'l Farmers Union and Iowa Mutual," and "[i]n Hornell, the Eighth Circuit Court of Appeals stressed the narrowing of the exhaustion requirements").

In Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998), cited by Guggolz, the Eighth Circuit Court of Appeals cited the Strate exception described above, and then proceeded, in the following paragraphs, to analyze that case under the two Montana exceptions. First, the Court of Appeals noted that "[s]uffice it to say neither the tribal court nor the Estate claim that the first exception of

Montana, regarding nonmembers entering consensual relationships with a tribe or its members, applies in this case." Id. at 1093. "Thus, the primary issue the parties raise on appeal relates to Montana's second exception, namely that the activity engaged in by the nonmember Breweries 'directly affects the tribe's political integrity, economic security, health, or welfare.'" Id. Finding that the brewing company's activity did not "fall within the Tribe's inherent sovereign authority," the Court then noted that it saw "no need for further exhaustion." Id. In other words, the Eighth Circuit Court of Appeals did exactly what the plaintiff asks the Court to do: consider this case in light of the Montana factors and determine whether tribal jurisdiction is plainly lacking.

Exhaustion of tribal remedies in this case would serve no purpose but to delay. The underlying case is a personal injury dispute between a tribal member and a nonmember business. Guggolz had no consensual relationship with the plaintiff, and any relationship between the plaintiff and the Tribe is not at all connected to the underlying tort action. Neither regulatory nor adjudicatory authority over the alleged personal injury at issue is needed to preserve the right of Standing Rock members to make their own laws and be ruled by them. Guggolz is perfectly free to pursue her case against the plaintiff in the Fourth Judicial Circuit in Corson County, South Dakota, Civ. 06-27. The Montana rule, and not its exceptions, applies to this case.

CONCLUSION

Defendant Guggolz asks the Court to dismiss or stay this action pending the plaintiff's exhaustion of tribal remedies. Tribal jurisdiction is plainly lacking and exhaustion would serve no purpose but to delay this case. Dismissing or staying this action in favor of further exhaustion in tribal court would force the plaintiff to appear and defend at a trial on the merits in tribal court; prosecute an appeal through the tribal appellate courts; and, ultimately, end up back in federal court, with the Court reviewing the jurisdictional question de novo.

The plaintiff respectfully requests that the Court deny the pending motions to dismiss and allow the plaintiff to move for a preliminary injunction in this matter. The hearing on the motion for preliminary injunction could be consolidated with the trial on the merits, as is authorized under Fed. R. Civ. P. 65(a)(2).

Respectfully submitted this 9th day of August, 2007.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for plaintiff, hereby certifies that on the 9th day of August, 2007, a true and correct copy of **FARMERS UNION OIL COMPANY'S BRIEF IN RESPONSE TO DEFENDANT GUGGOLZ'S MOTION TO DISMISS OR STAY ACTION PENDING EXHAUSTION OF TRIBAL COURT REMEDIES** was served electronically by the clerk's office on:

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