

INTRODUCTION

Plaintiffs filed their Complaint in this case on November 7, 2007, naming the Nation as a Defendant. The Complaint was served on the Nation on November 15, 2007. The Nation, filed an unopposed Request for Extension of Time to respond to the Complaint. By Order dated December 5, 2008, this Court granted the Nation's Request for Extension of Time and set January 4, 2008, as the date by which the Nation should file an answer or other responsive pleading. Pursuant to FRCP 12(b), a Defendant must file a Motion to Dismiss asserting certain defenses prior to a responsive pleading, including the defense of lack of subject matter jurisdiction and lack of personal jurisdiction. By this Motion, the Nation moves to dismiss because the Court lacks subject matter jurisdiction.

The Nation's Motion to Dismiss is premised upon the grounds that it is a federally recognized Indian Tribe, and as such it is entitled to sovereign immunity. There has been no waiver of that immunity, so this Court lacks subject matter jurisdiction to consider Plaintiffs' claims against the Nation. In support of its Motion to Dismiss, the Nation provides the following brief.

BRIEF IN SUPPORT

The Nation's Motion to Dismiss must be granted because the doctrine of sovereign immunity bars Plaintiffs' claims against the Cherokee Nation. The Cherokee Nation is a sovereign nation, with an inherent right of self-government. Wheeler v. United States Department of Interior, 811 F.2d 549, 551 (10th Cir. 1987); Wheeler v. Swimmer, 835 F.2d 259, 261 (10th Cir. 1987). Courts have long recognized that Indian tribes possess common law

immunity from lawsuits. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). In 1991, the Supreme Court clarified reaffirmed the rule of law that "Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 507 (1991).

The Plaintiffs' Complaint at paragraph 12, page 3, alleges that the Cherokee Nation is a federally recognized Indian Tribe and the Court may take judicial notice of that legal status for purposes of this Motion to Dismiss. As a federally recognized Indian Tribe, the Cherokee Nation is entitled to the sovereign immunity long recognized at common law and by the Courts. Since the Nation is entitled to that immunity as a matter of law, the Plaintiffs cannot pursue their claims against the Nation unless one of the conditions set forth in the Oklahoma Tax Commission case (waiver or Congressional abrogation) exists. The Plaintiffs' Complaint fails to allege that either condition exists. Further, the Court may take judicial notice of the absence of a Congressional Act to abrogate the sovereign immunity of the Cherokee Nation for the purpose of Plaintiffs' litigation. Since there has been no Congressional abrogation of the Nation's immunity, Plaintiffs can not proceed unless there has been a waiver of sovereign immunity by the Nation itself.

The Plaintiffs' Complaint does not allege that the Nation has waived its sovereign immunity and indeed the Nation has not done so. The Tenth Circuit has held that a waiver of tribal sovereign immunity cannot be implied, but must be unequivocally expressed. See, e.g., Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1171 (10th Cir. 1992) (citing Santa Clara Pueblo, 436 U.S. at 58). The Tenth Circuit and other federal Courts have strictly

construed the rule that tribal waivers of sovereign immunity must be expressed, not implied. For example, tribal actions, such as filing of suit by the tribe, and intervention of a tribe in a suit, have not been found to constitute express waivers of sovereign immunity. See, e.g., Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 773 (D.C. Cir. 1986) and Ramey Const. V. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982). The Cherokee Nation has not unequivocally expressed its intent to waive sovereign immunity for the purposes of Plaintiffs' claims.

In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), the Supreme Court reaffirmed again that "as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity," and this rule of law remains in effect today. Application of this rule of law clearly requires that the Plaintiffs' Complaint against the Cherokee Nation must be dismissed.

CONCLUSION

The Defendant Cherokee Nation is a federally recognized Indian tribe entitled to sovereign immunity and, since there has not been any Congressional action to abrogate that immunity and the Nation has not waived its immunity, this Court must dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.

WHEREFORE, the Defendant, Cherokee Nation, respectfully requests that the Court grant this Motion to Dismiss and enter an Order Dismissing Case With Prejudice as to Defendant Cherokee Nation.

DATED this the 4th day of January, 2008.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2008, I transmitted the foregoing Cherokee Nation Motion to Dismiss and Brief in Support to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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