

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

LEELANAU COUNTY, municipal corporation)	
of the State of Michigan,)	
Plaintiff,)	
v.)	
GRAND TRAVERSE BAND OF OTTAWA AND)	FILE NO. G 87-321 CA7
CHIPPEWA INDIANS, a federally)	
recognized Indian tribe, and THE)	Hon. Douglas W. Hillman
SECRETARY OF THE UNITED STATES)	
DEPARTMENT OF HOUSING AND URBAN)	
DEVELOPMENT,)	
Defendants.)	

MOTION TO DISMISS COMPLAINT

Pursuant to Rule 8(c) and Rule 12(b)(1),(2)&(6), Fed.R.Civ.P., the Grand Traverse Band of Ottawa and Chippewa Indians ("G.T.B.") hereby moves for the dismissal of the Complaint against this defendant. In support of this motion, G.T.B. alleges and says:

1. That this Court lacks jurisdiction over the subject matter of this litigation (to wit: Indian trust lands identified in Plaintiff's Complaint as the "County Parcels") due to the affirmative defenses of estoppel and res judicata arising from a prior litigation in this Court between Plaintiff and G.T.B. in which a final judgment was rendered on January 30, 1985, i.e., Grand Traverse Band of Ottawa and Chippewa Indians v. Leelanau Indians, Inc. and Leelanau County, File No. G 83-834;

2. That this Court lacks jurisdiction over the person of G.T.B. because (a) Plaintiff's Complaint fails to allege any statutory basis for

jurisdiction except 28 U.S.C. §1346 which does not apply to Indian tribes,
and (b) jurisdiction retained in File No. G 83-834 must be invoked in that
proceeding and does not suffice as a jurisdictional basis in a new proceeding;
and

3. That Plaintiff's Complaint fails to state a claim upon which
the requested relief can be granted against G.T.B.

WHEREFORE, Defendant Grand Traverse Band of Ottawa and Chippewa
Indians prays this Honorable Court to dismiss Plaintiff's Complaint against
G.T.B., pursuant to Rule 12(b)(1),(2)&(6), Fed.R.Civ.P.

Respectfully submitted,

DATED: June 9, 1987



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MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS COMPLAINT

A. Rule 12(b)(1)--Lack Of Jurisdiction Over The Subject Matter

Defendant G.T.B.'s defense of lack of jurisdiction over the subject matter is premised upon the affirmative defenses of estoppel and res judicata. Although "(n)umerous cases state that the affirmative defenses listed in Rule 8(c)...must be asserted in defendant's answer and cannot be the basis for a motion to dismiss the complaint,"¹ "the recent cases seem to agree that the matter may be disposed of by a motion to dismiss."² See Pierce v. County of Oakland, 652 F.2d 671, 672 (6th Cir. 1981).

G.T.B.'s argument concerning equitable estoppel/estoppel in pais is set forth at pages 6-7 of the April 15, 1987 Memorandum In Support Of

¹ 5 Wright & Miller, Federal Practice and Procedure §1277, at p.328 (1969) (footnote omitted).

² Id. at p. 332 (footnote omitted).

Plaintiff's Motion For Declaratory Judgment filed in File No. G 83-834, a copy of which is attached as Exhibit A. Defendant G.T.B. adopts and incorporates by reference this argument which concludes that Leelanau County is estopped from denying that G.T.B. is entitled to exercise governmental control over zoning and land use issues pertinent to lands formerly held in trust by the County (and which are identified as the "County Parcels" in Plaintiff's Complaint).

G.T.B.'s assertion of the res judicata affirmative defense also stems from the January 30, 1985 Opinion and Order (and incorporated findings of fact and conclusions of law) as well as the October 1, 1984 Stipulation of Dismissal entered into between G.T.B. and Leelanau County in File No. G 83-834. As stated in §40 of the Restatement Of The Law, Judgments 2d (1982): "A person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement." Additionally, the doctrines of collateral estoppel and/or issue preclusion apply to the facts sub judice as components of res judicata (see id. at §27), resulting in Plaintiff being precluded in the context of this litigation from asserting its claim against G.T.B. raised in Count I of the Complaint. Defendant G.T.B. reserves detailed argument re: the res judicata affirmative defense until after the necessary factual background is established on the record of this litigation, in the event Plaintiff can overcome dismissal under Rule 12(b)(2).

B. Rule 12(b)(2)--Lack of Jurisdiction Over Person (Indian Tribe)

Defendant G.T.B.'s defense of lack of jurisdiction over the "person" of G.T.B. (a federally-acknowledged Indian tribe) stems from Plaintiff's failure to allege any basis for this Court's jurisdiction over G.T.B.

The only allegation in Plaintiff's Complaint concerning jurisdiction is contained in paragraph 4, at page 2, which states:

4. Jurisdiction in this Court is proper under 28 U.S.C. §1346 and the January 30, 1985 Opinion and Order issued by the Honorable Richard A. Enslen in Case No.: G-83-834, filed (in) the United States District Court for the Western District of Michigan ("GTB Case"), where Judge Enslen retained jurisdiction over the "County Parcels" described below.

It seems unlikely that Plaintiff's general citation to 28 U.S.C. §1346 is sufficient even to premise jurisdiction against G.T.B.'s co-defendant, the Secretary of the United States Department of Housing and Urban Development,³ because Plaintiff's other allegations do not support a claim under either the Tucker Act [§1346(a)(2)] or the Federal Tort Claims Act [§1346(b)]. Regardless, under no circumstances can the jurisdictional basis alleged by Plaintiff--28 U.S.C. §1346, "United States as defendant"--be used to justify this Court's jurisdiction over a federally-acknowledged Indian tribe. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978) (citations omitted). And this sovereign immunity can be waived only by an unequivocal expression of congressional authorization (id., 436 U.S. at 58-59, 98 S.Ct. at 1677), which is not contained in 28 U.S.C. §1346.

Regarding Plaintiff's alternate allegation that "Judge Enslen retained jurisdiction over the 'County Parcels'" in the January 30, 1985 Opinion

³ "Suits against federal agencies and officers may be barred by the doctrine of sovereign immunity if the conduct in question is on behalf of the government. Although the United States district courts have general jurisdiction over actions brought by federal agencies or officers who are authorized to sue, there is no corresponding general statutory jurisdiction to entertain suits against federal agencies and officers. Consequently a person attempting to sue a federal agency or officer must demonstrate that the claim is covered by a specific statutory authorization to sue the United States, or that in effect it is not a suit against the United States. This is a fundamental jurisdictional requirement for suits against the United States." 14 Wright, Miller & Cooper, Federal Practice and Procedure §3655, at p. 211 (1985) (footnotes omitted).

and Order in File No. G 83-834, this simply provides no basis for overcoming G.T.B.'s sovereign immunity in a new lawsuit. If Plaintiff desires relief based upon retained jurisdiction in File No. G 83-834, then pleadings should be filed in that case.

C. Rule 12(b)(6)--Failure To State A Claim Upon Which Relief Can Be Granted

The only claim alleged in the Complaint against Defendant G.T.B. is contained in Count I, which is premised upon Plaintiff's allegations in paragraph 14 (at page 4) that "(t)he Grand Traverse Band has begun construction work on the HUD project", and in the subsequent prayer which commences, "WHEREAS, the Grand Traverse Band is utilizing HUD funds to construct a building on County property...." These claims are not true. The June 9, 1987 Affidavit of G.T.B. Tribal Chairman Joseph C. Raphael attached as Exhibit B attests: (a) that no HUD funds were utilized to construct the building, i.e., a model house paid for with tribal revenues, and (b) that G.T.B. has not been involved in any construction whatsoever of a HUD "housing project." Thus, Plaintiff's Complaint fails to state a claim upon which relief can be granted.

Conclusion

The foregoing discussion demonstrates that Defendant G.T.B. is entitled to dismissal of the Complaint pursuant to Rules 12(b)(1),(2)&(6), Fed.R.Civ.P.

Respectfully submitted,

DATED: June 9, 1987

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