IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, et al., Plainitffs, v. PHILIP N. HOGEN, et al., Defendants.	Civil Action No. 07-CV-0451-WMS Hon. William M. Skretny

UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER TO ENFORCE AND/OR FOR CONTEMPT, AND FOR ATTORNEYS' FEES

Defendants Philip N. Hogen, in his official capacity as Chairman of the National Indian Gaming Commission ("Chairman"), the National Indian Gaming Commission ("NIGC"), Dirk Kempthorne, in his official capacity as Secretary of the United States Department of the Interior ("Secretary"), and the United States Department of the Interior ("Interior") (collectively, "United States"), by undersigned counsel, submit this Opposition to Plaintiffs' Motion for an Order to Enforce and/or for Contempt, and for Attorneys' fees.

Plaintiffs move this Court for an order directing the NIGC to close the Seneca Nation of Indians' ("Nation") gaming operations on the Nation's Indian lands in Buffalo, New York and/or to hold the NIGC and the Chairman in contempt for failing to comply with this Court's August 26, 2008 Decision and Order. Dkt. No. 78. Plaintiffs argue that, despite issuing a Notice of Violation ("NOV") to the Nation and initiating the enforcement process, the NIGC has "failed to take reasonable action to comply with the Court's directive." Dkt. No. 78-4 at 9. Plaintiffs' arguments fail because the United States' notice of appeal, Dkt. No. 80, divests this Court of

jurisdiction; the NIGC and the Chairman have discretion over whether to issue a closure order; and neither the NIGC nor the Chairman are in contempt of court. Both as a factual and as a legal matter, Plaintiffs' arguments are wrong and their motion should be denied in every respect.

I. FACTUAL BACKGROUND

On July 8, 2008, this Court issued its Decision and Order in the above-captioned case. Dkt. No. 61 ("July 8 Decision"). The Court held that the parcel set aside for the Nation pursuant to the Seneca Nation Land Claim Settlement Act, 25 U.S.C. §§ 1774-1774h, in Buffalo, New York ("Buffalo Parcel") qualifies as Indian lands under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2703(4). However, the Court also held that the "settlement of a land claim" exception to IGRA's ban on gaming on lands taken into trust after October 17, 1988 does not apply to the Buffalo Parcel. Therefore, the Court vacated the Chairman's July 2, 2007 approval of the Seneca Nation of Indians' site-specific Class III gaming ordinance. Dkt. No. 62.

On July 14, 2008, Plaintiffs moved for an order to enforce the July 8 Decision, Dkt. No. 63, and on August 26, 2008, this Court partially granted Plaintiffs' motion. Dkt. No. 76 ("August 26 Decision"). The Court held that section 2713 of IGRA requires the Chairman to issue a written complaint whenever he believes a violation of IGRA has occurred. Id. at 3-5. As such, the Court ordered that:

> the NIGC and its Chairman are directed to comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3), and with NIGC regulations. Upon issuance of the notice(s) of violation, the Chairman is directed to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations.

Id. at 20. However, this Court specifically denied the relief Plaintiffs now seek–permanent closure of the Buffalo facility. Dkt. No. 76 at 5.

Pursuant to the Court's order, on September 3, 2008, the NIGC issued a NOV against the Nation for operating a Class III gaming operation without an approved Class III gaming ordinance and on Indian lands ineligible for gaming under 25 U.S.C. § 2719. Dkt. No. 77-2. The NOV stated that the Nation could correct the ongoing violation by closing its Buffalo gaming facility within five days of service. Id. at 6.

The Nation immediately appealed the NOV to the Commission. Dkt. No. 78-3, Ex. B. On September 30, 2008, pursuant to 25 C.F.R. § 577.4, the NIGC followed its normal process of requesting the appointment of a Presiding Official from the United States Department of the Interior's Office of Hearings and Appeals to conduct a hearing of the appeal.[1/] The Office of Hearings and Appeals appointed a Presiding Official and requested the administrative record on October 2, 2008. Order, In the Matter of Seneca Nation Indians of New York, Dkt. No. NIGC 2008-1 (Oct. 2, 2008) (attached as Exhibit 1).

On October 10, 2008, the Chairman filed a Motion to Stay the NOV administrative appeal proceedings pending the appeal of this Court's July 8 and August 26 Decisions to the

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[1/]The NIGC has arranged with the Department of the Interior to provide a presiding official from the Office of Hearings and Appeals upon the request of the NIGC's Office of General Counsel. The Office of Hearings and Appeals "provides an impartial forum for parties who are affected by the decisions of the Department's bureaus and offices to obtain independent review of those decisions." About the Office of Hearings and Appeals, http://www.oha.doi.gov/. See also Dep't of the Interior Dep't Manual Part 112, Chapter 13 (Mar. 1, 2005). Contrary to Plaintiffs' assertion, Dkt. No. 78-4 at 7, the presiding official hearing the Nation's appeal does not work for the NIGC and is not directed by the Chairman. After a hearing, the presiding official must issue a recommended decision, which "shall include findings of fact and conclusions of law upon each material issue of fact or law presented on the record." 25 C.F.R. § 577.14. The NIGC Commission then affirms or reverses, in whole or in part, the recommended decision of the presiding official by a majority vote. 25 C.F.R. § 577.15. In the absence of a majority vote by the Commission, the recommended decision of the presiding official is deemed affirmed except that, if the subject of the appeal is an order of temporary closure, the order of temporary closure is dissolved. Id.

Second Circuit Court of Appeals. Dkt. No. 78-3, Ex. G. The Chairman reasoned that because this Court's decisions form the basis of the NOV, a successful appeal may render the NOV and the administrative appeal unnecessary. Id. at 2. The Chairman further stated that "[i]f [an] appeal is not sought by the United States . . . , then the requested stay should terminate and the appeal proceed by NIGC regulations." Id. The Nation consented to the Chairman's motion. Dkt. No. 78-3, Ex. G at 2. On October 28, 2008, the Presiding Official granted the motion and ordered the Chairman to file a status report every 60 days starting on January 12, 2009. Order, In the Matter of Seneca Nation of Indians, Dkt. No. NIGC 2008-1 (Oct. 28, 2008) (attached as Exhibit 2).

On October 23, 2008, Plaintiffs filed a notice of appeal of the Court's July 8 Decision (Dkt. No. 61), and the Judgment thereon (Dkt. No. 62), insofar as they held that the Buffalo Parcel constitutes Indian lands as defined by IGRA. Dkt. No. 79. On October 24, 2008, the United States also filed a notice of appeal of the July 8 (Dkt. Nos. 61, 62) and August 26 (Dkt. No. 76) Decisions. Dkt. No. 80.[2/]

II. ARGUMENT

A. This Court Lacks Jurisdiction to Entertain a Challenge to the NIGC Chairman's Exercise of His Enforcement Discretion.

1. The United States' Notice of Appeal Divests this Court of Jurisdiction.

This Court lacks jurisdiction to act on Plaintiffs' Motion to Enforce because the United

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[2/]The United States filed a protective Notice of Appeal to preserve the right to appeal. It is the responsibility of the Department of Justice Solicitor General to review all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken. See 28 C.F.R. § 0.20(b). The Office of the Solicitor General currently has this matter under advisement.

States has filed a Notice of Appeal in this case. Dkt. No. 80. "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam); Motorola Credit Corp. v. Uzan, 388 F.3d 39, 53 (2d Cir. 2004) (quoting same). While a district court may retain jurisdiction "to aid the appeal, correct clerical errors, or enforce its judgment so long as the judgment has not been stayed or superseded," a notice of appeal "divests [the district] court of jurisdiction to act on the matters involved in the appeal." Ross v. Marshall, 426 F.3d 745, 751 (5th Cir. 2005) (citation omitted). In this case, the United States has appealed both this Court's July 8 and August 26 Decisions. Thus, the matters under appeal include the district court's power to direct the NIGC to take specific enforcement actions under IGRA.

Plaintiffs' motion requests that this Court attempt to address "questions raised and decided in the order that is on appeal." See Motorola, 388 F.3d at 53 (quoting N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1352 (2d Cir. 1989)). Consideration of Plaintiffs' motion by this Court would therefore undermine the purpose of the divestiture rule: "to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." United States v. Rodgers, 101 F.3d 247, 251 (2d Cir. 1996) (quoting United States v. Salerno, 868 F.2d 524, 540 (2d Cir. 1989)).

Even if this Court retained jurisdiction, a "district court may not alter or enlarge the scope of its judgment pending appeal." City of Cookeville v. Upper Cumberland Elec. Membership Corp., 484 F.3d 380, 394 (6th Cir. 2007) (quoting NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 588 (6th Cir. 1987)). See also Am. Town Ctr. v. Hall 83 Assocs., 912 F.2d 104,

110 (6th Cir. 1990) (courts have drawn a "crucial distinction between expansion and enforcement of judgments"); In re Rains, 428 F.3d 893, 904 (9th Cir. 2005). The Court directed the NIGC to comply with 25 U.S.C. § 2713(a)(3), which requires the issuance of an NOV, and with IGRA and NIGC regulations. Dkt. No. 76 at 20. An order to close the Buffalo gaming facility would go beyond the terms of the August 26 Decision and impermissibly expand this Court's prior judgment.

Moreover, this Court specifically denied the relief Plaintiffs now seek–permanent closure of the Buffalo facility–in its August 26 Decision. Dkt. No. 76 at 5 ("Plaintiffs' request that the Court give effect to its July 8 Decision by directing the Chairman to take a specific enforcement action is not in accord with the IGRA's remedial scheme."). Granting Plaintiffs' motion therefore would not only expand the Court's previous judgment, but also contradict it. See Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992) (per curiam) (because notice of appeal "ousts the district court of jurisdiction," "the district court can entertain and *deny* [a] rule 60(b) motion" but does not have jurisdiction to grant it) (emphasis in original). Plaintiffs are attempting to expand this Court's August 26 Decision and Order in derogation of the jurisdiction now vested in the Court of Appeals.[3/]

2. The NIGC and the Chairman have Discretion over Whether to Issue a Closure Order.

The U.S. Supreme Court "has recognized on several occasions over many years that an

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[3/]Although Plaintiffs' notice of appeal purports only to address the Court's determination that the Buffalo Parcel constitutes Indian lands, their notice also references the Court's August 26 Decision, which did not address that issue. Dkt. No. 79 at 1. Thus, separate and apart from whether the United States' notice of appeal divests this Court of jurisdiction, Plaintiffs' notice of appeal from the August 26 Decision certainly must, as the only part of that order adverse to Plaintiffs' was the denial of the closure order.

agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." Heckler v. Chaney, 470 U.S. 821, 831 (1985) (internal citations omitted). The presumption that enforcement discretion is not subject to judicial review can be rebutted only if Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion . . . ." Chaney, 470 U.S. at 834-35. This presumption should apply both to initial decisions regarding commencement of enforcement actions and discretionary actions taken during the course of administrative enforcement proceedings.

IGRA vests the Chairman with enforcement discretion, stating that he "shall have the power to order temporary closure of an Indian game for substantial violation of the provisions of [IGRA], of regulations prescribed by the Commission . . . , or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of [IGRA]." 25 U.S.C. § 2713(b)(1). Nothing in that language directs or mandates that the Chairman exercise that power, and Congress has not expressed an intent to circumscribe the discretion of the NIGC to decide when or whether to pursue enforcement actions. Chaney prohibits the Court from ordering the Chairman to issue a closure order.

Contrary to Plaintiffs' assertions, the Chairman has performed his enforcement duties under IGRA and as directed by this Court in its July 8 and August 26 Decisions. The Chairman issued the NOV as instructed by this Court. The Nation then filed an administrative appeal of the NOV, which initiated the NIGC's appeals process. See 25 C.F.R. Part 577. As required by

25 C.F.R. § 577.4(a), the Commission designated a presiding official and transmitted the administrative record to that official. The regulations also permit the presiding official to extend the commencement of the appeals hearing at the request of the respondent. 25 C.F.R. § 577.4(a). Here, the Nation requested that the hearing be postponed until after October 15, 2008, the date by which the Chairman was required to act on its ordinance amendments. Dkt. No. 78-3, Ex. C. The Nation then consented to the Chairman's Motion to Stay. Dkt. No. 78-3, Ex. G at 2. In filing the Motion to Stay, the Chairman noted that because this Court's decisions are the basis for the NOV, a postponement of the proceeding until a decision is reached on an appeal to the Second Circuit is appropriate. The Chairman stated that the resolution of a judicial appeal could potentially eliminate the need for the administrative appeal. See Chaney, 470 U.S. at 831 (An agency must weigh many variables when deciding whether to enforce, including whether "agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.").

Further, the only authority to which Plaintiffs point in support of their demand for a court order directing the Chairman to close the Buffalo facility is the All Writs Act, 28 U.S.C. § 1651(a). Dkt. No. 78-4 at 10. Plaintiffs assert that because this Court previously held that the case is appropriate for invocation of the Act, it must now apply to Plaintiffs' demand for a closure order. Id. Plaintiffs fail to mention, as this Court noted in its August 26 Decision, that "the All Writs Act does not, by its terms, provide federal courts with an independent grant of jurisdiction." Dkt. No. 76 at 6 (citing Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002)).

The Act only permits courts to issue writs in aid of jurisdiction granted by the underlying statute. Syngenta, 537 U.S. at 28.

To the extent this Court found that it has jurisdiction under the All Writs Act to order compliance with IGRA's mandate that the NIGC "take prompt action once it has reason to believe that a violation [of IGRA] exists," Dkt. No. 76 at 7, the NIGC has acted by issuing the NOV. The authority to determine how the NIGC will proceed with further enforcement proceedings against the Nation is vested in the NIGC and its Chairman. 25 U.S.C. § 2713. While IGRA gives the Chairman the power to issue a temporary closure order, it does not command that he do so or that he do so within a certain time period after the issuance of a NOV. 25 U.S.C. § 2713(b)(1). Thus, the All Writs Act cannot provide the foundation for a court order directing the Chairman to close the Nation's Buffalo gaming facility. See Dkt. No. 76 at 7 ("[W]rits of mandamus under the All Writs Act are 'normally limited to enforcement of a specific, unequivocal command, the ordering of a precise, definite act about which an official ha[s] no discretion whatsoever.'") (quoting Norton v. S. Utah Wilderness Alliance 542 U.S. 55, 63 (2004).

B. The NIGC and the Chairman Are Not In Contempt of Court.

Plaintiffs mistakenly assert that the NIGC and its Chairman "refused to comply with not just one, but two clear and unambiguous orders of this Court" and, therefore, should be held in civil contempt of court. Dkt. No. 78-4 at 11. "A party may be held in civil contempt only where a plaintiff establishes (1) the [court's] decree was clear and unambiguous, and (2) the proof of non-compliance is clear and convincing. Although the defendant's conduct need not be willful, a plaintiff must also prove that (3) the defendant has not been reasonably diligent and energetic in

attempting to comply." Chao v. Gotham Registry, Inc ., 514 F.3d 280, 291 (2d Cir. 2008) (internal citation omitted); accord City of New York v. Local 28, Sheet Metal Workers' Int'l Ass'n, 170 F.3d 279, 282-83 (2d Cir. 1999). Plaintiffs fail to meet that burden.

In its July 8 Decision, the Court ordered that "the National Indian Gaming Commission Chairman's July 2, 2007 administrative decision approving the Seneca Nation of Indians Class III Gaming Ordinance is vacated." Dkt. No. 61 at 122. On August 26, 2008, the Court further ordered the NIGC to "comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3), and with NIGC regulations. Upon issuance of the notice(s) of violation, the Chairman is directed to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations." Dkt. No. 76 at 20.

The NIGC cannot be held in contempt for violating the Court's July 8 Decision because it did not order the NIGC to act. The Court merely vacated the NIGC's approval of the Nation's ordinance; it did not issue a "clear and unambiguous" decree to the NIGC. See N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351-52 (2d Cir. 1989) (a clear and unambiguous order must "be specific and definite enough to apprise those within its scope of the conduct that is being proscribed") (citing In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985)); Swift v. Blum, 502 F. Supp. 1140, 1143 (S.D.N.Y. 1980) (civil contempt "results from 'a failure of a litigant to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein.'") (quoting Walling v. Crane, 158 F.2d 80, 83 (5th Cir. 1946)). Because the July 8 Decision did not direct the NIGC to act, the NIGC and the Chairman have not failed to comply with it and should not be held in civil contempt.

Plaintiffs have also failed to establish that the Court's August 26 Decision clearly and

unambiguously directed the NIGC and the Chairman to issue a closure order, and to offer any clear and convincing proof of non-compliance with that order. See King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995) (to hold a party in contempt, the alleged contemnor "must be able to ascertain from the four corners of the order precisely what acts are forbidden") (citing Drywall Tapers & Pointers of Greater N.Y., Local 1974 v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n, 889 F.2d 389, 395 (2d Cir. 1989), cert. denied, 494 U.S. 1030 (1990)). Nowhere in its Decision did the Court direct the NIGC or the Chairman to issue a closure order. See Dkt. No. 76 at 20. Moreover, neither IGRA nor NIGC regulations require the Chairman to stop gambling at a facility immediately or within a certain time period after the issuance of an NOV. As explained above, though IGRA provides the Chairman the power to order the temporary closure of an Indian gaming facility for substantial violations, it does not mandate when or how the Chairman exercises that power. 25 U.S.C. § 2713(b)(1). Likewise, NIGC regulations give the Chairman the discretion to order a temporary closure of all or part of an Indian gaming operation, but, like IGRA, do not require such action. 25 C.F.R. § 573.6(a) ("the Chairman may issue an order of temporary closure . . . if one or more of the following substantial violations are present") (emphasis added). In fact, if the Chairman decides to issue a temporary closure order, NIGC regulations permit the order to be issued "[s]imultaneously with or subsequent to the issuance of a notice of violation." Id.

Though Plaintiffs may prefer swifter enforcement proceedings and a particular outcome of the process, IGRA and NIGC regulations lay out a number of different options for how the NIGC Chairman may proceed in enforcing a violation of IGRA. 25 U.S.C. § 2713; 25 C.F.R. Parts 573 & 575. Only one of those options is closure of a gaming operation. Id. (NIGC may

levy fine instead of closing facility). While it is true that the Chairman has declined to issue a temporary closure order of the Buffalo facility up to this point, it is within his discretion to issue such an order in the future. Neither the Chairman's exercise of this discretion nor Plaintiffs' presumptions about the Chairman's ultimate intentions regarding the Buffalo facility, Dkt. No. 78-4 at 12, place the Chairman and the NIGC in civil contempt.

C. Plaintiffs are Not Entitled to Attorneys' Fees or Costs.

Attorneys' fees and costs are a sanction to be imposed "after a finding of civil contempt." Swift, 502 F. Supp. at 1145. Sanctions for a finding of civil contempt serve two functions: "to coerce future compliance and to remedy past noncompliance" with a court's order. Id. (quoting Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979)). Here, Plaintiffs have failed to establish that the NIGC and the Chairman violated a clear and unambiguous order from this Court or that the NIGC and the Chairman are not in compliance with the Court's orders. As such, they have failed to show that the NIGC and the Chairman are in contempt of court and they are not entitled to attorneys' fees.

III. CONCLUSION

For the forgoing reasons, Plaintiffs (1) are not entitled to an order directing the Chairman to issue a temporary closure order against the Seneca Nation of New York's gaming facility in Buffalo, New York; (2) do not raise factual or legal allegations supporting an order of civil contempt; and (3) are not entitled to attorneys' fees or costs, and their motion should be denied in all respects.

DATED: November 4, 2008

Respectfully submitted,

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