UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

- against - 08-CV-4422 (JS)

GERROD T. SMITH,

Respondent.
----------X

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF ITS CROSS-MOTION TO REMAND

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of petitioner's cross-motion to remand the above captioned matter to Southampton Town Justice Court, its original forum. Mr. Smith was served with three citations by the Department of Environmental Conservation for possessing out of season and undersized fish in violation of 6 NYCRR §40.1. The citations were returnable at Southampton Town Court on November 3, 2008. The Notice of Removal was received by this Office on October 31, 2008, in which Smith claimed that: (1) as a Native American, he legally possessed the fish pursuant to various treaties and under 18 USC §245; (2) his civil rights were violated because he was prevented from fishing by a state official; and (3) New York State illegally regulates the Shinnecock Indian nation so Smith cannot litigate the denial of his civil rights in a New York State forum. In response, petitioner filed a cross-motion to remand the matter to the local court of origin. This memorandum of law is filed in support of its cross-motion to remand.

ARGUMENT

RESPONDENT FAILED TO ESTABLISH A BASIS
FOR REMOVAL AND THE MATTER SHOULD
BE REMANDED.

Introduction

Removal of a state action to federal court is a rare occurrence. The Supreme Court, in *Georgia v. Rachel*, 384 US 780, 792 (1966) set forth a narrow basis upon which removal may be granted. The party seeking removal must satisfy a two prong test: 1) that the right allegedly denied is protected under a federal law providing for that specific civil right, and 2) the party seeking removal is denied or can not enforce the federal right in the state court. Smith's petition fails to present a factual basis establishing his federal right to fish and the matter should be remanded.

The case was properly before a state court.

The federal government gave the states power to regulate hunting and fishing. *Lacoste v. Department of Conservation of La*, 263 US 545, 549 (1924); *Melby v. Duffy*, 304 AD2d 33 (2d Dept 2003). Therefore, a state may regulate fishing for migratory marine fish. *People v. Miller*, 235 AD 226 (1932). The New York State Environmental Conservation Law gave the Department of Environmental Conservation the power to "create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations." ECL §§1-0101(1), 0101(3). DEC regulations regarding catch size, limits, and open and closed seasons are codified in 6 NYCRR §40(1), the very regulations for which petitioner received citations. The federal government

under 25 USC §232 granted concurrent jurisdiction to the state courts for prosecution of Native Americans who violate state laws, leaving the Southampton Town court a proper forum.

Smith's removal petition is substantively flawed.

Smith, as a member of the Shinnecock Indian Nation, and pursuant to various treaties and constitutional rights, claims that he had a federally protected and unrestricted right to fish. He further argues that New York State unfairly regulates the tribe and, therefore, he could not obtain a fair trial if he proceeded in the local court. Finally, Smith claims that the officer who issued the citations acted under color of authority, intimidating petitioner and interfering with his right to fish in violation of 28 USC §245.

"[O]ut of respect for the independence of state courts, and in order to control the federal docket, federal courts construe the removal statute narrowly, resolving any doubts against removability." *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 FSupp2d 177, 179 (SDNY 2003). As such, the removal petition, on its face, must establish the right of the party seeking removal to have the matter proceed in federal court, [*Cent. Hudson Gas & Electric Corp. v. Empresa Naviers Santa S.A.*, 56 F3d 359, 367 (2d Cir 1995)] sufficient to withstand the test enunciated in *Georgia v. Rachel*, 384 US 780, 792 (1966). In that case, the Supreme Court determined that for a case to be removed from state to federal court, a petitioner has to show that he is being deprived of his civil rights, as guaranteed by federal law, and that he cannot enforce his federal rights in state court. In other words, "removal of a criminal case is appropriate only where 'defendant is charged with exactly that conduct which a federal law explicitly makes legal.'" *Negron v. The People of the State of New York*, 2002 WL 1268001 (EDNY 2002), citing *People of the State of New York v. Foster*, 1987 WL 5356 (SDNY 1987).

Smith's petition fails the first prong of the *Rachel* test since he fails to establish that fishing is a federally protected civil right of Native Americans.

Smith's petition for removal refers to various treaties and federal statutes but there are no specifics as to where within those treaties and statutes Smith has been given unrestricted rights to fish. No cases are cited by Smith in support of his argument. None of the treaties or statutes referred to are applicable to individual Native American claims.

A. Sovereign Immunity

With regard to Smith's claim of sovereign immunity from prosecution, he has the burden of showing that he is entitled to this right as an individual member of the tribe. Generally, absent congressional authorization, only federally recognized Native American tribes have sovereign immunity with regard to their governmental and commercial activities. *(Kiowa Tribe v. Mfg. Techs., Inc.*, 523 US 751, 754 (1998). The Shinnecock Indian nation is not a federally recognized Native American tribe by the Bureau of Indian Affairs. Further, sovereign immunity is not applicable to individual tribal members who are not acting on behalf of the tribe. *Puyallup Tribe, Inc. v Dept of Game*, 433 US 165 (1977); *City of New York v. Golden Feather Smoke Shop*, 2009 WL 705815 at 3 (EDNY 2009).

The removal petition does nothing more than prove that Smith is a member of the Shinnecock Indian Nation. As Smith fails to prove that he was acting as "an arm of the tribe," he fails to prove his right to claim sovereign immunity. *Chayoon v Chao*, 355 F3d 141, 143 (2d Cir 2004); New *York v. Shinnecock Indian Nation*, 523 FSupp2d 185 (EDNY 2007).

B. CERD

Smith's reliance on the United Nations International Convention on Elimination of All Forms of Racial Discrimination, adopted by the General Assembly in 1965, is inapplicable to claims by individual Indians. *Smith v. Everson*, 2008 WL 818512 (EDNY 2008). "[T]here is a

strong presumption against inferring individual rights from international treaties" (*United States v. De La Pava*, 268 F3d 157, 164 [2d Cir 2001]), but "even where a treaty provides certain benefits for nationals of a particular state…it is traditionally held that any rights arising out of such provisions are, under international law, those of the states and … individual rights are only derivative through the states." *Id. quoting United States ex. Rel. Lujan v. Gengler*, 510 F2d 62, 67 (2d Cir 1975). Without the Shinnecock tribe as a party to this action, Smith may not claim protection from prosecution under this treaty.

C. Tribal Treaties

The applicability of the Ft. Albany Treaty of 1664 and the Wyandanch Deed of 1659 have already been reviewed and denied in State and federal courts. *Bess v. Spitzer*, 459 FSupp2d 191 (EDNY 2006) (where federal court recognized decision by Supreme Court, Albany County, which held that individual member of tribe may not raise defense of Fort Albany Treaty). Further, in *State of New York v. Shinnecock Indian Nation*, this Court reviewed the Wyandanch Deed, a/k/a Ogden Deed, and determined that the treaty which transferred the land had the "clear and unambiguous intention to extinguish aboriginal rights in the lands involved in the Ogden and Topping Deeds." *Id.*, 523 FSupp2d 185, 269 (EDNY 2007); (see *South Dakota v. Bourland*, 508 US 679, 689 (1993) ("When and Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands.")

D. Federal Statutes

As to the implication of the Federal Contract Clause, the Indian Commerce Clause, the Federal Trust and Congressional Indian Policy, Smith's removal petition is again flawed since he fails to delineate which sections are applicable or how they are applicable, and fails to support

his claims by citing cases holding that individual Native Americans have unrestricted rights to fish. 28 USC §1443; see *Johnson v. Mississippi,* 421 US 213, 219 (1975).

E. There is no evidence that a state official interfered with a federally protected activity.

Since there is no evidence that Smith was engaged in a federally protected activity under 18 USC §245, his argument that Officer Farrish unlawfully interfered with his right to enjoy such activity fails. Broad assertions are insufficient to support a claim of removal. *Alabama v. Conley*, 245 F3d 1292, 1295 (11th Cir 2001). Additionally, the Second Circuit held that "intimidation by force or threat of force" by a law enforcement official, as alleged in Smith's papers, only connotes violent activity. It does not implicate the functioning of the state legal process. The fact that a defendant is given a summons by a state official to appear in court is an insufficient basis to warrant removal of the matter. *People v. Horelick,* 424 F2d 697 (2d Cir. 1970).

Smith's petition fails to establish the second prong of the Rachel test for removal of his action because he does not establish that he is precluded from proceeding in state court.

As to the second prong of the *Georgia v. Rachel* test of the sufficiency of a removal petition, Smith fails to submit any fact to support his argument that State regulation of Indians would prevent him from asserting his federal rights in a state forum. A state is to be given the opportunity to correct any civil rights violation when possible without federal interference. *Moeller v. Rodriguez,* 113 F3d 1246 (10th Cir 1997). Where a moving party, as Smith, only has an apprehension that his rights will not be recognized in state court, he fails to show that the rights will not actually be denied and removal will not be granted. *Emigrant Savings Bank v. Elan Management Corp*., 668 F2d 671, 673-74 (2d Cir 1982). "Removal is warranted only if it can be predicted by reference to a law of general application that the [petitioner] will be denied

or cannot enforce the specified federal rights in the state courts." *Georgia v. Rachel*, 384 US at 800.

Synopsis

Smith failed to satisfy the two- prong test of *Georgia v. Rachel* for removal of this action to federal court. '[N]o federal law conferred on the [Smith] an absolute right to do what [h]e [was] charged with having done, and "no federal law confers immunity from state prosecution on such charges."' *Emigrant Savings Bank v. Elan Management Corp*. 668 F2d at 674, citing *Georgia v. Rachel*.

CONCLUSION

Removal is not warranted and the case should be remanded to Southampton Town Court.

DATED: June 19, 2009
Riverhead, New York

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, the foregoing document was filed with the Clerk of the Court, and a hard copy was served in accordance with the Federal Rules of Civil Procedure and/or the Eastern District's Local Rules and/or the Eastern District's Rules on Electronic Service, upon the following parties and participants:

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