UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM B. ROVINSKY, Plaintiff, v. CHOCTAW MANUFACTURING AND DEVELOPMENT CORPORATION, *et al.* Defendants.	Honorable Garrett E. Brown, Jr. Civil Action No. 09-00324 (GEB) (DEA) **DOCUMENT FILED ELECTRONICALLY** **Motion Returnable: July 6, 2009**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS CHOCTAW MANUFACTURING AND DEVELOPMENT CORPORATION, AND JOSEPH MORRIS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) OR 12(b)(6)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Cited

United States Code

Federal Regulations

Court Rules

New Jersey Statutes

INTRODUCTION

Defendants Choctaw Manufacturing and Development Corporation ("CMDC"), and Joseph Morris (collectively, "the Choctaw Defendants" or "Choctaw") bring this motion pursuant to Fed.R.Civ.P. 12(b)(1) to dismiss the complaint due to this court's lack of subject matter jurisdiction. Even if the court were to decide that it has jurisdiction over the Choctaw Defendants, however, the complaint must be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) since it fails to state a claim upon which relief can be granted.[1] The Choctaw Defendants rely upon Plaintiff's complaint, the Affidavit of Stephen R. Benefield, and this Memorandum of Law in support of their motion.[2]

BACKGROUND

A. Choctaw Manufacturing And Development Corporation

Defendant CMDC is under contract with Defendant Department of the Army to provide services at the Fabrication, Fielding and Integration Facility ("FIFF") at Fort Monmouth, New Jersey. Complaint ¶¶ 17 and 20. CMDC is a corporation organized by the Choctaw Nation of Oklahoma ("Choctaw Nation" or "Tribe"), a federally recognized Indian tribe with whom the United States government deals on a government-to-government basis. See Affidavit of Stephen R. Benefield, ¶¶ 4 and 5, filed with this Memorandum of Law in support of the Choctaw Defendants' Motion to Dismiss (hereinafter "Benefield Affidavit").

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[1] As set forth herein, the Choctaw Defendants do not submit to the jurisdiction of this court and file the Rule 12(b)(6) motion for alternative relief only because it is required to be joined with the Rule 12(b)(1) motion by Fed.R.Civ.P. 12(g)(2). Therefore, the Rule 12(b)(6) motion is only presented to the Court for consideration and should only be considered if the court first finds that it has jurisdiction.

[2] To the extent the Choctaw Defendants refer to the allegations in the Complaint, such allegations are accepted as true solely for purposes of the instant motion and the Choctaw Defendants preserve the right to challenge the allegations, if necessary.

The United States government has adopted a policy of encouraging Indian tribes to engage in economic development to become financially self-sufficient. Since the Choctaw Nation, like other Indian tribes, has virtually no tax base, it raises revenue by engaging in various commercial enterprises. Benefield Affidavit, ¶ 6. The revenue produced from these commercial activities is then used to support tribal programs such as building and maintenance of roads, transportation, social services, healthcare, education, economic development, and other similar services that benefit tribal members. Benefield Affidavit, ¶ 7. CMDC, like other companies owned by the Choctaw Nation, is an economic arm and enterprise of the Tribe. Benefield Affidavit, ¶ 3. CMDC contracts primarily with the federal government, and under the FIFF contract provides engineering, fabrication, integration, prototyping, logistics, and technical support services. Benefield Affidavit, ¶ 23.

Because CMDC is a federally-recognized tribal corporation wholly owned by the Choctaw Nation, it enjoys immunity from suit. Since there has been no waiver of tribal sovereign immunity as pertains to the allegations raised in Plaintiff's complaint either by the Choctaw Nation or by an Act of Congress, the complaint must be dismissed based on this court's lack of jurisdiction.

B. Plaintiff's Complaint

Plaintiff Rovinsky, an at-will employee of CMDC, was hired to perform services under the FIFF contract in January 2007. Complaint ¶¶ 15, 20 and 21. On April 16, 2007, Defendant Morris, shop foreman for CMDC, advised Plaintiff that his employment would be terminated. See Complaint ¶ 21. Thereafter, on or about February 20, 2009, Plaintiff filed the subject complaint against Choctaw and his former supervisor, Morris.

Plaintiff's suit also names as co-defendants the United States of America, the Department of the Army, and Gordon McCormick, a federal government employee (collectively, "Federal Defendants").

Plaintiff's five count complaint seeks declaratory relief and monetary damages for alleged losses associated with termination of his employment. In counts one and two, Plaintiff asks the court to order the defendants to reverse CMDC's employment termination decision, to reverse any finding of termination for cause, and to compel the defendants (presumably, the Federal Defendants) to continue his security clearance status. There is no claim regarding Plaintiff's security clearance advanced by Plaintiff against the Choctaw Defendants. Clearly, the Choctaw Defendants have no authority to provide or continue the federal government's security clearance. In counts three and four, Plaintiff seeks compensatory and punitive damages from the Choctaw Defendants for losses allegedly suffered as a result of termination of his employment. Plaintiff asks the court to award him punitive damages based on alleged slander, libel, and deprivation of unspecified constitutional rights by the Choctaw Defendants. Finally, in count five, Plaintiff asks the court "to exercise ancillary jurisdiction over any New Jersey state statute involving slander, libel and wrongful discharge in violation of company policy and/or wrongful discharge in violation of public policy including but not limited to N.J.S.A. 40A:14-151." Plaintiff provides no facts to support the conclusory allegations of statutory violations. Indeed, N.J.S.A. 40A:14-151 relied upon by the Plaintiff lends no support to his allegations and has no relevance since that statute applies only to members or officers of a municipal police department and entitles them to back-pay where a court makes a finding of an illegal dismissal or suspension from office. Since

Plaintiff is not a municipal officer he is not entitled to the protections afforded by the statute.

A separate motion to dismiss the complaint, originally returnable June 15, 2009 (and recently requested by the Federal Defendants to be rescheduled to July 6, 2009), has been filed by the Federal Defendants.

As set forth below, the complaint against the Choctaw Defendants must be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) because this court lacks jurisdiction to consider claims against a sovereign tribal entity such as CMDC. Because he was acting within the scope of his employment, Defendant Morris is similarly immune from suit. Even if the court were to decide that it has jurisdiction to hear Plaintiff's claims against the Choctaw Defendants, the complaint should, nevertheless, be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) since it fails to state a claim upon which relief can be granted. Accordingly, this court should dismiss all counts against the Choctaw Defendants.

ARGUMENT

POINT I

PURSUANT TO RULE 12(b)(1), PLAINTIFF'S COMPLAINT MUST BE DISMISSED BECAUSE THIS COURT LACKS JURISDICTION OVER THE CHOCTAW DEFENDANTS

A. Standard Of Review For Rule 12(b)(1) Dismissal

Pursuant to Fed.R.Civ.P. 12(b)(1), a defendant may move to dismiss on the grounds that the court lacks subject matter jurisdiction over the dispute. A motion to dismiss for lack of subject matter jurisdiction challenges the court's power to hear the case. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). A defendant may challenge the subject matter jurisdiction as pleaded on the face of the complaint, and may also challenge the factual underpinnings alleged as the basis for the court's subject matter jurisdiction. Ibid. "A challenge to a complaint for failure to allege subject matter jurisdiction is known as a 'facial' challenge, and must not be confused with a 'factual' challenge contending that the court in fact lacks subject matter jurisdiction, no matter what the complaint alleges..." NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 n.7 (3d Cir. 2001), citing Mortensen, 549 F.3d at 891.

In reviewing a factual attack, as presented by the instant motion, the court may consider evidence outside the pleadings. Gould Elecs, Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). "In such a situation, 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000) (quoting

Mortensen, 549 F.2d at 891). In adjudicating a factual Rule 12(b)(1) challenge, a court may consider affidavits, depositions, and testimony to resolve factual issues, and weigh the evidence to satisfy itself as to the existence of its power to hear the case. Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424, 438 (D.N.J. 1999). Here, to support their jurisdictional challenge, the Choctaw defendants rely upon the Affidavit of Stephen R. Benefield. When subject matter jurisdiction is challenged under Rule 12(b)(1), plaintiff must bear the burden of persuasion. Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005); Gould, 220 F.3d at 176. In the instant matter, where Plaintiff provides no support in his complaint to convince this court that it possesses jurisdiction over the Choctaw Defendants, relying instead on a general assertion of diversity jurisdiction pursuant to 28 U.S.C. § 1332, see Complaint ¶ 1, the complaint must be dismissed for want of jurisdiction.

B. CMDC, A Subordinate Economic Entity Of The Tribe, Is Immune From Suit

Sovereign immunity is jurisdictional in nature. F.D.I.C. v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). It is well-settled that "as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized suit or the tribe has waived its immunity." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998); see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991) ("Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by a tribe or congressional abrogation").

Tribal sovereign immunity prohibits suit against Indian nations without congressional authorization. This sovereign immunity enjoyed by a tribe is "as though the immunity which was theirs as sovereigns passed to the United States for their benefit..." United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940). The judicial doctrine of tribal sovereign immunity has long protected Indian tribes from suit in state and federal courts. White v. Pueblo of San Juan, 728 F.2d 1307, 1311-12 (10th Cir. 1984); see also Kennerly v. United States, 721 F.2d 1252, 1258 (9th Cir. 1983). Sovereign immunity for Indian tribes is necessary to promote "the federal policies of tribal self-determination, economic development, and cultural autonomy. American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985).

Tribal sovereign immunity has long been recognized in the context of tribal commercial activity as well as governmental actions both on and off tribal property. Kiowa Tribe, 523 U.S. at 754-755. Indian tribes have long structured their commercial dealings "upon the justified expectation that absent an express waiver, their sovereign immunity stood fast." American Indian Agricultural Credit Consortium, 780 F.2d at 1378. "Relaxation of th[is] settled standard invites challenge to virtually every activity undertaken by a tribe..." Ibid. What is more, a waiver of sovereign immunity by tribal action "represents a substantial surrender of sovereign power and therefore merits no less scrutiny than a waiver based on congressional action." Id., citing Maryland Casualty Co. v. Citizens National Bank, 361 F.2d 517, 521-22 (5th Cir.), cert. denied, 385 U.S. 918, 17 L.Ed.2d 143, 87 S.Ct. 227 (1966) ("To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the

very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and the property of tribes...").

Under the "subordinate economic organization" doctrine, tribes are allowed to conduct their economic affairs through subordinate entities without fear of unintended waiver of sovereign immunity. See White Mountain Apache Indian Tribe v. Shelley, 480 P.2d 654, 657 (Ariz. 1971). Tribal subordinate economic entities will be protected from suit just as the tribes would be protected. Ibid. The theory behind this doctrine is that "an action against a tribal enterprise is, in essence, an action against the tribe itself." Barker v. Menominee Nation Casino, 897 F.Supp. 389, 393-4 (E.D. Wis. 1995) (holding tribal gaming commission and casino immune from suit).

A tribal business entity is considered a subordinate economic organization entitled to tribal sovereign immunity if the tribal entity is (1) organized to serve a governmental rather than a purely commercial purpose; (2) closely linked to the tribe; and (3) the extension of immunity furthers federal policies intended to promote tribal autonomy. Gavle v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn. 1996), cert. denied, 524 U.S. 911, 118 S.Ct. 2075, 141 L.Ed.2d 151 (1998) (holding that the tribal business entity, formed to enhance the well-being of the tribal community and closely linked to the tribe in governance enjoyed sovereign immunity from suit). Subordinate economic organizations are, thus, themselves entitled to the protection of the tribe's sovereign immunity from suit.

Under these tests, there is no question that CMDC is a subordinate economic entity of the Tribe, entitled to the same degree of sovereign immunity accorded the Tribe. CMDC's sole and express purpose is "to create and maintain a wholly owned for-

profit business to develop, manufacture, and sell products and services to further tribal self-determination and economic self-sufficiency." Benefield Affidavit, ¶ 8. CMDC was created to generate revenue for the benefit the Tribe and for no other purpose than to provide financial stability to the Tribe – its sole stockholder. Benefield Affidavit, ¶¶ 7 and 13. In addition, all CMDC surplus monies are to be forwarded to the Tribe to be "apportioned as the Choctaw Nation Tribal Council deems proper." Benefield Affidavit, ¶ 19.

CMDC's subordinate economic status is further evident in its very corporate formation. CMDC exists as a result of the Tribe's exercise of its discretion. Benefield Affidavit, ¶ 10. CMDC's corporate authority rests exclusively in the Chief of the Tribe, subject to approval of the Tribal Council. Benefield Affidavit, ¶ 13. Unlike most corporations, in which ownership typically vests in private citizens for purposes of private gain, CMDC is wholly owned by the Tribe and its stock certificate is issued exclusively for the benefit of the Choctaw Nation of Oklahoma. See Gavle, 555 N.W.2d at 295 (distinguishing a tribal business enterprise established for the benefit of the tribe from a business enterprise established under state corporate law that is wholly owned by private citizens for their personal benefit). Thus, CMDC is a special form of corporation which was created exclusively at the behest of and for the benefit of the Tribe.

CMDC is without question, then, a subordinate economic organization of the Tribe, whose corporate existence is inextricably intertwined with the Tribe. Absent a specific, clear, and knowing waiver of the immunity accorded by law, the court must dismiss the complaint for want of jurisdiction. See Barker, 897 F.Supp. at 393-4.

C. There Has Been No Knowing Waiver Of Sovereign Immunity For Employment Suits

Before a court can acquire jurisdiction over a tribe, it must affirmatively appear that "there has been a congressional or tribal waiver of immunity." Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 318 (10th Cir. 1982). In Ramey, the court noted that the commercial enterprise created by the Apache Tribe was "clothed with the sovereign immunity of the Tribe," and that the "sue or be sued" clause in the corporate charter did not constitute a waiver of sovereign immunity. Ramey, 673 F.2d at 320. Absent an "express and unequivocal" statement of waiver, the tribe's sovereign immunity remains intact and the court lacks power to hear or decide any litigation in which such tribe has been sued. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 172, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

CMDC's Corporate Charter contains a "sue and be sued" clause. Benefield Affidavit, ¶ 21. CMDC also agreed to a limited waiver of sovereign immunity to enable it to sue and be sued in federal courts for all matters related to the SBA's Section 8(a) Program.[3] Benefield Affidavit, ¶ 23. The limited waiver is expressly restricted and confined to matters relating to the SBA Section 8(a) program, including program participation, loans, advance payments, and contract performance. Benefield Affidavit, ¶ 24. Neither of these provisions constitute express and unequivocal waivers of CMDC's immunity from suits such as that instituted by the Plaintiff here.

[3]See generally, 15 U.S.C. § 631 et seq. 15 U.S.C. § 637(a)(4)(A)(i)(II) makes contracting opportunities available to socially and economically disadvantaged small business concerns that are wholly-owned business entities of an Indian Tribe. 13 CFR 124.109(c)(1) requires a Section 8(a) participant to agree to a provision allowing it to "'sue and be sued' ... for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance."

Rather, the Corporate Charter's "sue and be sued" clause states only that the corporation has the right, subject to its discretion, to sue and be sued; while the SBA Section 8(a) limited waiver is confined to matters relating to the federal program. Courts have generally recognized that "sue and be sued" clauses, alone, are insufficient to establish waiver of sovereign immunity. See, e.g., Dillon v. Yankton Sioux Tribe Housing Authority, 144 F.3d 581, 583-85 (8th Cir. 1998) (absent an express contractual waiver, "sue and be sued" clause in resolution establishing tribal housing authority does not constitute an express waiver of sovereign immunity); Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040, 1043-44 (8th Cir. 2000) ("sue and be sued" provision in tribe's college charter, without more, does not constitute a waiver of sovereign immunity); Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 87 (2nd Cir. 2001) (bare sue and be sued clause in tribal ordinance does not constitute a waiver of immunity); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth., 207 F.3d 21, 30 (1st Cir. 2000) ("the better view holds that the enactment of such an ordinance [containing a 'sue and be sued' clause], in and of itself, does not waive a tribe's sovereign immunity").

In rare instances, not present here, courts have found that a tribe has effectively waived the sovereign immunity of its tribal business. For example, courts have found that the sovereign immunity of a tribal business has been waived where the tribe itself passed a law providing that sovereign immunity could be limited by the tribal business' charter, and the tribal business entered into a contract agreeing that disputes would be governed by state law. See Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 812 (7th Cir. 1993), cert. denied, 510 U.S. 1019, 114 S.Ct. 621, 126 L.Ed.2d 585 (1993). In

Altheimer, the charter of a wholly-owned tribal corporation of the Sioux expressly provided that sovereign immunity "is hereby expressly waived with respect to any written contract entered into by the Corporation." Ibid. Support for the clear and knowing express waiver was also found in a letter of intent signed by the tribe and the tribal business wherein both agreed to "waive all sovereign immunity in regards to all contractual disputes." Id. See also Snowbird Const. Co., Inc. v. U.S., 666 F.Supp. 1437, 1441 (D. Idaho 1987); Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 517 F.2d 508, 509 (8th Cir. 1975); and Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552 (8th Cir. 1989). Such circumstances are not present here.

CMDC's Corporate Charter language is clearly distinguishable from those cases where courts have found an express waiver of sovereign immunity to exist. Here, unlike in those cases, the CMDC "sue and be sued" provision does not express an intention that CMDC would invoke or exercise the power to sue, waive its immunity, and submit to the jurisdiction of the courts to resolve corporate matters or employment disputes. Indeed, the "sue and be sued" clause mentions no right of an employee to sue for injuries, breaches of contract, employment disputes, or other disagreements. Nor does the clause identify particular jurisdictions or tribunals in which such suits may be initiated.

Similarly, the limited Section 8(a) waiver applies only to SBA programmatic disputes. In fact, in Graham v. Applied Geo Technologies, 593 F. Supp. 2d 915 (S.D. Miss. 2008), the court expressly rejected an employee's charge of race discrimination in violation of federal law on the ground that the Section 8(a) limited waiver did not apply

to employment suits. In explaining that the tribal entity had not waived its sovereign immunity, the court said:

> ... it is clear to this court that the waiver of immunity in AGT's Amended Charter does not apply to the claims herein. The waiver created by the charter is expressly limited to claims 'relating to Small Business Administration programs' engaged in by AGT. Plaintiff's claims in this case do not relate to AGT's SBA programs within the meaning of the waiver. [Graham, 593 F. Supp. 2d at 921.]

Absent more, the "sue and be sued" provisions in CMDC's Corporate Charter and the limited SBA Section 8(a) waiver are insufficient to constitute an "express and unequivocal" wholesale waiver of sovereign immunity. "The mere fact that a tribal corporation ... is empowered to 'sue and be sued' does not automatically subject that corporate entity to any court's jurisdiction where jurisdiction is otherwise lacking." In re Ransom v. St. Regis Mohawk Education and Community Fund, Inc., 658 N.E.2d 989, 995 (N.Y. 1995). In other words, "the general powers provisions of the corporation are not self-executing, and express invocation of the power to sue and be sued and submission to a particular forum by official tribal action is required." Ibid (the "sue and be sued" clause of the tribal business's corporate charter did nothing more than recognize the business as an entity with the capacity to enter the court system). See also, Danka Funding Company, LLC v. Sky City Casino, 329 N.J. Super. 357 (Law Div. 1999) (holding that forum selection clause in contract executed by subordinate economic organization of tribe did not constitute a waiver of sovereign immunity).

Because the Choctaw Defendants have not waived their sovereign immunity, this court lacks discretion to hear the issues raised in the complaint. The only proper disposition of the action, therefore, is dismissal since "sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize."

California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979). Since subject matter jurisdiction is lacking, the complaint as to the Choctaw Defendants must be dismissed. In re Orthopedic "Bone Screw" Products Liability Litigation, (Ray v. Eyster), 132 F.3d 152, 155 (3d Cir. 1997) ("If a court ... determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits.") (citations omitted).

D. Sovereign Immunity Extends To Defendant Morris, Where The Complaint Fails To Show That He Acted Beyond The Scope Of His Employment

CMDC and the Tribe's sovereign immunity extends to Defendant Morris for the claims asserted against him by Plaintiff. The protection of tribal sovereign immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985); see also Dry v. United States, 235 F.3d 1249, 1253 (10th Cir. 2000).

Here, although the caption to the complaint identifies Morris individually, the body of the complaint appears to refer only to acts undertaken within Morris' official capacity since: (1) the caption does not identify suit against Morris in his individual capacity; (2) paragraphs 10 and 11 of the complaint specifically provide that the named defendants (including Morris) were acting as agents, servants, and employees; and (3) paragraph 21 of the complaint expressly provides that Plaintiff's termination was conveyed by Morris while acting "in his capacity as shop foreman for Choctaw." Thus, Morris is sued as an employee of CMDC, acting within the scope of his employment,

The issue of whether tribal employees enjoy sovereign immunity for their actions turns on the question of whether the relief requested as a result of the employee's actions would run against the tribe itself. Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997). Sovereign immunity does extend to employees sued in their

official capacities as officers of a tribe. Id. at n.12. Acts taken within the scope of powers delegated to an official are entitled to sovereign immunity. Burrell v. Armijo, 456 F.3d 1159, 1174 (10th Cir. 2006), cert. denied, 549 U.S. 1167, 127 S.Ct. 1132, 166 L.Ed.2d 893 (2007); see also Native American Distributing v. Seneca-Cayuga Tobacco, Co., 546 F.3d 1288, 1297-99 (10th Cir. 2008) (dismissing complaint against individual defendants employed by subordinate economic organization of tribe on finding of sovereign immunity).

Here, because the complaint expressly provides that Morris is an employee acting in a representative capacity and within the scope of his official authority, sovereign immunity extends to his acts and the complaint against him must be dismissed for want of jurisdiction.

POINT II

EVEN IF THE COURT WERE TO FIND THAT SUBJECT MATTER JURISDICTION EXISTS, THE COMPLAINT MUST BE DISMISSED SINCE THE ALLEGATIONS THEREIN FAIL TO ASSERT A BASIS FOR RELIEF

If the court determines that it has subject matter jurisdiction to consider the claims against the Choctaw Defendants it should, nevertheless, dismiss the complaint since the allegations therein fail to articulate any entitlement to the relief requested.

A. Standard Of Review For Rule 12(b)(6) Dismissal

Fed.R.Civ.P. 12(b)(6) allows the court to dismiss a complaint for failure to state a claim upon which relief can be granted. The standard for review for a Rule 12(b)(6) motion is set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), where the court explained that "[f]actual allegations must be enough to raise a right of relief above the speculative level." Bell Atlantic, 127 S.Ct. at 1965. The assertions in the complaint must, therefore, be sufficient to "raise a reasonable expectation that discovery will reveal evidence of the necessary element," thereby justifying advancement of the case "beyond the pleadings to the next state of the litigation." Phillips v. County of Alleghany, 515 F.3d 224, 234-35 (3d Cir. 2008). Here, where the complaint articulates no possible basis for a finding of liability against the Choctaw Defendants and no right to relief, it must be dismissed.

B. The Complaint Should Be Dismissed For Failure To State A Claim Since The Allegations Therein Are Speculative And Conclusory

On its face and based on its vague, unspecified, and unsound legal theories, the complaint fails to support an entitlement for relief. The complaint is utterly devoid of any mention of unlawful conduct on the part of the Choctaw Defendants. Further, Plaintiff

fails to allege any legally cognizable right or entitlement to continued employment with CMDC.

Under New Jersey State law, an employment of no set duration may be terminated at the will of either the employer or the employee. This long-standing rule allows either party to the employment relationship, in the absence of an implied or express contract providing otherwise, to terminate that relationship with or without cause or notice. Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 191 (1988); see also Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 397 (1994) ("in New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine.").

Absent a written contract of employment, there are only two exceptions to the at-will doctrine: (1) where the employee is terminated in violation of a clear expression of public policy, see Versarge v. Township of Clinton, 984 F.2d 1359, 1371 (3d Cir. 1993); see also Butler v. Sherman Silverstein & Kohl, 755 F.Supp. 1259, 1263 (D.N.J. 1990); or (2) where the employee handbook creates an implied contract of employment. Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 285-86, modified, 101 N.J. 10 (1985); Witkowski, 136 N.J. at 392; Nicosia v. Wakefern Food Corp., 136 N.J. 401, 407-08 (1994). Here, the complaint does not allege either a public policy claim or that CMDC had an employee manual, let alone an employee manual that constituted an implied employment contract.

The complaint also fails to articulate any legally cognizable wrong on the part of Defendant Morris. The complaint alleges only that Morris advised Plaintiff that his at-will employment with CMDC was being terminated. Complaint ¶ 21. Because the

complaint specified that this termination was communicated while Morris was acting in his supervisory capacity, on the face of the complaint, there is no factual allegation that would remotely entitle Plaintiff to a finding of individual liability, an award of damages, or any other form of relief as against Defendant Morris.

According to common law principles, since the complaint states only that Morris was acting as an agent for CMDC, no individual liability can attach. See Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 475-76 (2000), certif. denied, 165 N.J. 607 (2000) (where in an employment discrimination suit, the Supreme Court affirmed the trial court's dismissal of plaintiff's claims against individually named co-defendants because the individuals were acting within the scope of their employment, they were not seeking personal gain, and punitive damages could be assessed against the company without the individuals); see also, Carter v. Reynolds, 175 N.J. 402 (2003) (finding employer vicariously liable for torts of employee acting within the scope of her employment); Lehmann v. Toys 'R' Us, 132 N.J. 587, 616-20 (1993) (finding corporate liability for acts of individual employee). On its face, the complaint fails to articulate any legally actionable wrong on the part of Morris either acting in his official or individual capacity.

Because the complaint fails to articulate any basis for liability either on the part of CMDC or Morris, individually, there is no basis for entitlement to the relief requested. The complaint must, therefore, be dismissed.

CONCLUSION

For the foregoing reasons, the complaint against Choctaw Manufacturing and Development Corporation, and Joseph Morris should be dismissed.

Respectfully submitted,

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