

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS,

Plaintiff,

2:09-cv-95

v

Hon. Gordon J. Quist

JAMES HAMILTON, CAROLYN HAMILTON,
KELLY DENCKLAU, JAMIE DENCKLAU,
BARBARA DENCKLAU, ROGER DENCKLAU,
NEAL DENCKLAU, TINA GARDER,
BAY MOUNTAIN TRADERS, LLC,
and BMT ENTERPRISES, d/b/a BLACK
MOUNTAIN TRADERS, INC.

Defendants.

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**PLAINTIFF'S MOTION TO DISMISS DEFENDANTS JAMES HAMILTON, CAROLYN
HAMILTON, BAY MOUNTAIN TRADERS AND BMT ENTERPRISES D/B/A BLACK
MOUNTAIN TRADERS' COUNTER-CLAIM**

NOW COMES Plaintiff, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, by and through its attorneys, PLUNKETT COONEY, and for its Motion to Dismiss Defendants' Counter-Claim states onto this Honorable Court as follows:

1. On August 14, 2009, Defendants, James Hamilton, Carolyn Hamilton, Bay Mountain Traders and BMT Enterprises d/b/a Black Mountain Traders (hereinafter referred to as "Defendants") filed their Counter-Claim for defamation and fraud against Plaintiff, Sault Ste. Marie Tribe of Chippewa Indians (hereinafter referred to as "the Tribe").

2. Defendants' Counter-Claim should be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6) because:

(a) The Tribe, as a federally recognized Indian Tribe, is entitled to sovereign immunity; and

(b) Defendants have failed to plead their claims for fraud and defamation with the requisite specificity.

3. Plaintiff incorporates its Brief in Support and the case law cited therein by reference.

4. Plaintiff contacted defense counsel on August 27, 2009 regarding concurrence in this motion and no response was received.

WHEREFORE, Plaintiff respectfully requests this Honorable Court grants its Motion and dismiss Defendants' Counter-Claim.

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BY: s/Peter W. Peacock

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Dated: August 28, 2009

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2:09-cv-95

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PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION TO DISMISS

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STATEMENT OF ISSUES

I.

**WHETHER DEFENDANTS' COUNTER-CLAIM MUST BE DISMISSED
AS THE TRIBE IS ENTITLED TO SOVEREIGN IMMUNITY?**

PLAINTIFF ANSWER: YES.

DEFENDANTS' ANSWER: PRESUMABLY, NO.

II.

**WHETHER DEFENDANTS HAVE FAILED TO ADEQUATELY STATE A
CLAIM FOR DEFAMATION AND DISMISSAL IS APPROPRIATE?**

PLAINTIFF ANSWER: YES.

DEFENDANTS' ANSWER: PRESUMABLY, NO.

III.

**WHETHER DEFENDANTS HAVE FAILED TO ADEQUATELY PLEAD
A FRAUD CLAIM AND DISMISSAL IS APPROPRIATE?**

PLAINTIFF ANSWER: YES.

DEFENDANTS' ANSWER: PRESUMABLY, NO.

IV.

**WHETHER DEFENDANTS HAVE FAILED TO ADEQUATELY STATE A
CLAIM FOR FRAUD AND DISMISSAL IS APPROPRIATE?**

PLAINTIFF ANSWER: YES.

DEFENDANTS' ANSWER: PRESUMABLY, NO.

I. STATEMENT OF FACTS

On April 23, 2009, Plaintiff, Sault Ste. Marie Tribe of Chippewa Indians (hereinafter referred to as “the Tribe”) filed the instant action alleging the various Defendants violated Racketeer Influences and Corrupt Organizations Act (hereinafter referred to as “RICO”), 18 U.S.C. §1961, *et seq.* and committed fraud in perpetrating a multi-year fraudulent scheme, which resulted in the Tribe losing in excess of \$500,000. On August 14, 2009, Defendants, James Hamilton, Carolyn Hamilton, Bay Mountain Traders and BMT Enterprises d/b/a Black Mountain Traders (hereinafter referred to as “Defendants”) filed their Counter-Claim for defamation and fraud against the Tribe.

In lieu of answering Defendants’ Counter-Claim, Plaintiff’s now move for dismissal of Defendants’ Cross-Claim pursuant to Fed. R. Civ. Pro. 12(b)(6) as to Defendants’ Counter-Claim is barred by the Tribe’s sovereign immunity. Further, Defendants have failed to plead their claims for fraud and defamation with the requisite specificity. As such, Defendants’ Counter-Claim must be dismissed.

II. STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. Pro. 12 (b)(6) tests the legal sufficiency of the pleading, asking whether the claimant has stated a claim for which the law provides relief. *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994). Technically, a 12(b) motion does not attack the merits of the case, it merely challenges the pleader’s failure to state a claim properly. In deciding a 12(b)(6) motion, a district court must determine whether the Plaintiff’s complaint sets forth sufficient allegations to establish a claim for relief. The court must accept all allegations in the complaint at face value and construe them in a light most favorable to the

Plaintiff. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983); *Jackson v. Richards Medical Co.*, 961 F.2d 575, 577 (6th Cir. 1992). A court need not, however, accept as true legal conclusions or unwarranted factual inferences, *Morgan v Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). A district court may properly grant a motion to dismiss when no set of facts exists which would allow the Plaintiff to recover. *Carter by Carter v. Cornwell*, 983 F.2d 52, 54 (6th Cir. 1993).

III. LEGAL ANALYSIS

A. DEFENDANTS' COUNTER-CLAIM MUST BE DISMISSED AS THE TRIBE IS ENTITLED TO SOVEREIGN IMMUNITY.

Defendants' Counter-Claim must be dismissed because the Tribe, as a federally recognized Indian Tribe, is entitled to sovereign immunity. Suits against federally recognized Indian tribes are barred by sovereign immunity absent a clear and unequivocal waiver by the tribe or congressional authorization. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509; 111 S. Ct. 905, 112 L.Ed.2d 112 (1991). 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, 56 L.Ed.2d 106 (1978). 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. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

In this case, the Tribe has not waived its right to sovereign immunity nor is there any type of congressional authorization for Defendants' Counter-Claim, which is based on fraud and defamation. Accordingly, in the absence of a waiver or congressional abrogation, the Tribe is immune from suit in this case and Defendants' Counter-Claim must be dismissed.

B. DEFENDANTS HAVE FAILED TO ADEQUATELY STATE A CLAIM FOR DEFAMATION.

Even if the Tribe were not entitled to sovereign immunity, Defendants have failed to adequately state a claim for defamation, and dismissal of Defendants' defamation claim is appropriate. Michigan courts have emphasized the importance of specificity pleading. *Royal Palace Homes v. Channel 7*, 197 Mich. App. 48, 54, 495 N.W.2d 392 (1992). "Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice." *Id.* (quoting the Michigan Supreme Court and affirming the grant of summary disposition in a libel case).

In Michigan, the courts have consistently held that the elements of a claimant's defamation claim must be pled with specificity.¹ *Id.* See also, *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich. App. 415, 421, 205 N.W.2d 504 (1973); *Stencel v. Augat Wiring Sys.*, 173 F. Supp. 2d 669, 680 (E.D. Mich. 2001)(holding that plaintiff did not plead an actionable defamation claim, which requires that the elements of defamation be pleaded with particularity); *Gonyea v. Motor Parts Fed'l Credit Union*, 192 Mich App 74, 77, 480 N.W.2d 297 (1991) (holding that the plaintiff's claim was subject to dismissal because the plaintiff failed to specifically plead all defamation elements). "The essential elements of a cause of action for libel or slander must be stated in the complaint, including allegations as to the particular defamatory words complained of, the connection of the defamatory words with the plaintiff where such words are not clear or are ambiguous, and the publication of the alleged defamatory words." *Pursell*, 44 Mich. App. at 421.

¹ In Michigan, the elements of a defamation claim are"(1) False and defamatory statement concerning the plaintiff; (2) An unprivileged communication to a third party; (3) Fault amounting at least to negligence on the part of the publisher; and (4) Either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v. Campbell*, 474 Mich. 21, 24, 706 N.W.2d 420 (2005).

Here, Defendants have failed to plead either the substance of the allegedly defamatory statements or to whom these statements were allegedly published. For these reasons, their claim for defamation should be dismissed.

a. **Defendants Have Failed To Plead The Substance Of the Allegedly Defamatory Statements.**

The complaint should be dismissed because Defendants do not allege the substance of the defamatory statements. A complaint for defamation should include the essentials of a cause of action for libel or slander, including allegations of the particular defamatory words. *Pursell*, 44 Mich. App. at 421. Although the complaint need not recite the slanderous statement verbatim, to be sufficient the complaint must set out at least the substance of the alleged slander. *Laney v. Blue Cross Blue Shield of Mich.*, (No. 236974, rel'd 3/11/03)(unpublished)(attached as Exhibit A).

In *Gonyea*, 192 Mich. App. at 73, the Plaintiff simply pled that her supervisor made statements to fellow employees that the Plaintiff was a thief and should not be trusted. The court held that those allegations were insufficient to state a claim of defamation. *Id.* Further, the court denied the Plaintiff leave to amend her complaint because she admitted to being unsure as to what was said and had presumed the statement was defamatory. *Id.*

Similarly, in *Laney*, supra at *18, the court found a Plaintiff's defamation allegations to be deficient when the Plaintiff failed to provide specifics as to what was said. Although the court recognized the slanderous statements need not be pled word for word, the Plaintiff needed to allege at least the substance of the defamatory statement. *Id.* at *19. Thus, the court upheld the grant of summary disposition for the Defendants when the Plaintiff's allegations lacked specificity as to the substance of the statements. *Id.*, at *18.

The same result is warranted here. In their Counter-Claim, Defendants allege that the Tribe made statements accusing the Hamilton's of fraud and criminal activity. (Exhibit B, Defendants' Counter-Claim, ¶23). Similar to the Plaintiff in *Gonyea*, who only plead that her supervisor made statements that she was a thief; here the Defendants merely make vague allegations about the Tribe accusing them of fraud and criminal activity without stating what the actual statements were or who they were made by. Defendants' allegations are insufficient as a matter of law, and the Court should dismiss Defendants' claim for defamation.

b. Defendants Have Failed To Whom The Allegedly Defamatory Statements Were Published.

Dismissal is also warranted because Defendants have failed to plead to whom the allegedly defamatory statements were published. A claim for defamation must include the essentials of a slander cause of action, including the publication of the alleged defamatory words. *Pursell*, 44 Mich. App. at 421. The pleading must name the specific parties to whom the statement was made. *Wood v. Unison Corp.*, (No.199931, rel'd 12/19/97) (unpublished) (attached as Exhibit C).

In *Wood*, the court affirmed summary disposition of a defamation claim where the Plaintiff alleged two instances of defamation by the Defendants but did not name the particular parties to whom the statements were made. *Id.* at *5. Further, the court noted that even if it allowed the Plaintiff to amend his complaint, the Plaintiff had previously admitted his lack of knowledge as to whom the allegedly defamatory statements were published and thus his complaint would nonetheless fail. *Id.*

The Sixth Circuit has likewise held that a Michigan defamation claim failed as a matter of law where the Plaintiff did not plead to whom the individual Defendants published the

allegedly defamatory statements. *Kahlich v. City of Grosse Pointe Farms*, 120 Fed. App. 580, 586 (6th Cir. 2005)(citing *Gonyea*).

Here, Defendants' claim for defamation is completely devoid of any statements regarding to whom the allegedly defamatory statements were made. (Exhibit B, Defendants' Counter-Claim, ¶ 23-24). Accordingly, it must be dismissed.

C. DEFENDANTS HAVE FAILED TO ADEQUATELY PLEAD A CLAIM FOR FRAUD.

Fed.R.Civ.Pro. 9(b) requires the claimant to plead its allegations of fraud with particularity. The Rule requires that: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Rule 9(b).

The U.S. District Court, Western Division of Michigan has instructed that the pleading requirements of Rule 9(b) are satisfied when the complaint alleges:

(1) the time, place and content of the alleged misrepresentation; (2) the fraudulent scheme; (3) the fraudulent intent of the defendants; and (4) the injury resulting from the fraud.

Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co. 940 F.Supp 1101, 1114 (1996).

The court in *Picard* further stated:

The purpose of Rule 9 is three-fold: (1) it provides defendants with fair notice of the claims against them; (2) it protects defendants from harm to their reputations or goodwill caused by unfounded fraud allegations; and (3) it reduces the number of strike suits and discourages fishing expeditions. (citations omitted).

Id.

In this case, Defendants' fraud claim falls far short of the standard set by Rule 9. Defendants state in their Counter-Claim the following:

18. Members of the Sault Tribe, in concert of action and/or in concert with the Dencklaus, engaged in a plan and artifice to fraudulently divest the Hamilton's long standing business relationship with the Sault Tribe by pattern of false and misleading claims of and concerning the Hamilton's and Tina Gardner.
19. The Sault Tribe had fraudulently claimed the inventory was oversold to it to enable it to breach its' longstanding business relationship to the benefit of other vendors.
20. The Sault Tribe is liable for its actions and inactions in this manner and is vicariously liable for the actions of its member who colluded or conspired to destroy the Hamilton's businesses.
21. As a result of the fraud by the Sault Tribe, the Hamilton's businesses have been irreparably damaged not only in relation to the Sault Tribe, but with respect to other business vendees.

(Exhibit B, Defendants' Counter-Claim, ¶18-21.)

Defendants' Count for fraud lacks any statement of the "time, place and content of the alleged misrepresentation" and any statements regarding "the fraudulent intent" of the Tribe. In *Yuhasz v. Wellman*, 341 F.3d 559 (2003), the Court addressed a similarly deficient claim for fraud and dismissed it. In doing so, the court stated:

The district court correctly found that Yuhasz had failed to allege an FCA claim with sufficient particularity as required by Rule 9(b). Yuhasz's complaint is short on specifics. For example, the complaint notes only that " *certain* testing that was outsourced according to a particular EAB number did not match-up to any heat number for alloy bar stock" and that " *certain* alloys of [Brush] *may have been* mismarked." (emphasis added). However, the complaint contains no particularized allegations of wrongdoing. The failure to identify specific parties, contracts, or fraudulent acts requires dismissal. *See United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1312 (11th Cir.2002) ("failure to allege with any specificity if-or when-any actual improper claims were submitted to the Government is indeed fatal"); *U.S. ex rel. Walsh v. Eastman Kodak Co.*, 98 F.Supp.2d 141, 147 (D.Mass.2000) ("Relator's First Amended

Complaint, in essence, sets out a methodology by which the vendors might have produced false invoices, which in turn could have led to false claims. Without citing a single false claim arising from an allegedly false invoice, Relator has not met even a bare-bones Rule 9(b) test.”); *United States ex rel. Butler v. Magellan Health Serv., Inc.*, 101 F.Supp.2d 1365, 1369 (M.D.Fla.2000) (“Plaintiff does plead a fraudulent scheme of conduct which may well be prohibited by law. However, Plaintiff pleads no specific occurrences of a false claim.... [T]he absence of specific allegations of fraudulent false claims is determinative.”).

Id., at 563.

Here, just as the Plaintiff’s claim in *Yuhatz*, Defendants’ claim of fraud is “short on specifics,” and Defendants’ Count for fraud should be dismissed.

D. DEFENDANTS HAVE FAILED TO ADEQUATELY STATE A CLAIM FOR FRAUD.

Additionally, Defendants have failed to state a claim for fraud. In Michigan, in order to establish a claim for fraud, a claimant must allege:

(1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury.

Novi v. Robert Adell Children's Funded Trust, 473 Mich. 242, 253 n. 8, 701 N.W.2d 144 (2005).

Failure to adequately state a claim for fraud requires dismissal. For example, in *Rubin v Ramco Kentwood Associates*, (No. 214560, rel’d 3/27/01)(unpublished)(attached as Exhibit D), the Michigan Court of Appeals dismissed plaintiff’s claim for fraud when it was not plead with the sufficient specificity. *Id.*, at *2. Specifically, the court stated: “Indeed, the claim does not

specifically indicate what the ‘false capital call’ consisted of or how plaintiffs acted on the falsehood to their detriment.” *Id.* Accordingly, the court dismissed the claim for fraud. *Id.*

Again, Defendants’ claim of fraud by the Tribe falls far short of stating a valid claim. Specifically, Defendants have not included any averments that the allegedly false statements made by the Tribe were: (a) a material representation that the Tribe knew was false, or was made recklessly, without any knowledge of its truth and as a positive assertion; (b) made with the intention that it should be acted upon by the other party; or (c) that the Defendants acted in reliance upon the Tribe’s alleged material misrepresentation. (Exhibit B, Defendants’ Counter-Claim, ¶¶18-21). Therefore, Defendants’ claim of fraud should be dismissed.

IV. CONCLUSION

For all the reasons stated above, Plaintiff’s respectfully request this Honorable Court grant its Motion to Dismiss Defendant’s Counter Claim.

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Dated: August 28, 2009

PROOF OF SERVICE

The undersigned certifies that on I electronically filed the foregoing pleading with the Clerk of the Court using ECF system which will send notification of such filing to the all attorneys of record of all parties in the above cause

s/Peter W. Peacock

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