IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JENNIFER PABLO,[1]	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-427C
	)	(Judge Firestone)
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"), defendant, the United States, respectfully requests that this Court enter summary judgment in its favor. The so-called "bad men" provision of the June 1, 1868 Treaty with the Navajo Indians ("Navajo Treaty"), 15 Stat. 667, pursuant to which plaintiff is seeking relief on behalf of her minor daughter, expressly provides that those who leave the Navajo Reservation to settle elsewhere forfeit all of the rights and privileges conferred by the terms of the treaty. It is undisputed that plaintiff's daughter was not living on the Navajo Reservation at the time of the alleged wrong. Therefore, plaintiff is entitled to no relief as a matter of law.

In support of this motion, defendant relies upon plaintiff's complaint, the instant motion, and the attached exhibits.

QUESTION PRESENTED

1. Whether plaintiff, purportedly acting as guardian *ad litem* for her minor daughter, may recover damages pursuant to the "bad men" provision of the Navajo Treaty for an alleged wrong suffered by her daughter while the daughter was living outside the Navajo Reservation, despite

[1] Ms. Pablo purports to act as guardian *ad litem* for her minor daughter, F.C., also known as F.W.

the treaty's plain language stating that any Navajo who leaves the reservation forfeits all rights and privileges conferred by the treaty.

STATEMENT OF THE CASE

I. Nature Of The Case

Originally proceeding pursuant to the "bad men" provision of the April 29, 1868 Treaty with the Sioux, 15 Stat. 635, plaintiff Jennifer Pablo, purportedly serving as guardian *ad litem* for her minor daughter, F.C. (also known as F.W.), filed a complaint on July 6, 2010, seeking $2 million in damages from the United States and Daniel Kettell "individually and jointly and severally" for wrongful acts that were allegedly perpetrated upon F.C. by Kettell while he was an officer of the Rosebud Sioux Tribe Law Enforcement Services. Complaint at 5. Ms. Pablo also sought costs, attorney's fees, and any other damages permitted by the Sioux Treaty.

On September 7, 2010, the United States filed a Motion to Dismiss Plaintiff's Complaint in Part and for Summary Judgment. The United States established that this Court did not possess jurisdiction to entertain plaintiff's claim against Kettell because the Tucker Act does not grant jurisdiction to entertain claims against individuals. The United States also demonstrated that it was entitled to entry of summary judgment in its favor because the Sioux Treaty's "bad men" provision was inapplicable to cases like this one where the victim and the alleged "bad man" were members of the same tribe.

Ms. Pablo did not oppose the United States' motion. Rather, she filed an unopposed Motion to Amend Complaint on November 30, 2010. This Court granted that motion on December 1, 2010. In her amended complaint, Ms. Pablo appears to drop her claim against

Kettell.[2] She also no longer alleges that her daughter is a member of the Rosebud Sioux Tribe. Now, she asserts that her daughter is a member of the Navajo Nation and, accordingly, seeks relief pursuant to the Navajo Treaty.

II. Statement Of Facts[3]

Daniel Kettell is a member of the Rosebud Sioux Tribe. Exhibit 1 (Redacted Factual Basis Statement filed in United States v. Kettell, No. 08-30107 (D.S.D.)) at 2. On or about July 5, 2008, he was employed as a patrol officer by Rosebud Sioux Tribe Law Enforcement Services. Exhibit 1 at 1; Exhibit 2 (Rosebud Sioux Tribe Personnel Action) at 1.

Ms. Pablo's daughter, F.C., is a member of the Navajo Nation. Amended Complaint at ¶ 1. Ms. Pablo alleges that, on or about July 4 or 5, 2008, Kettell arrested F.C. at the Rosebud Casino because he suspected that she had been drinking alcohol while underage. Amended Complaint at ¶ 6. According to Ms. Pablo, Kettell subsequently "physically and sexually abused/molested/assaulted" F.C. while she was intoxicated. Amended Complaint at ¶ 8. Ms. Pablo further alleges that Kettell took compromising photographs of F.C. Id. These acts took place on the Rosebud Sioux Indian Reservation. Exhibit 1 at 2.

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[2] Unlike the original complaint, the amended complaint does not identify Kettell as a defendant in the caption. Additionally, the amended complaint concludes by stating, "WHEREFORE, [plaintiff] demands judgment against the Defendant, the United States, for compensatory damages . . ." and does not indicate that plaintiff seeks any damages from Kettell. Although paragraph 18 of the amended complaint suggests that plaintiff is making a claim for damages against Kettell, it appears that this paragraph was included in the amended complaint inadvertently. To the extent that plaintiff is making a claim for damages against Officer Kettell, this claim should be dismissed pursuant to RCFC 12(b)(1) for the reasons set forth in defendant's Motion to Dismiss Plaintiff's Complaint in Part and for Summary Judgment.

[3] For purposes of this motion only, the factual allegations contained in plaintiff's amended complaint will be treated as true.

At the time of the incident, F.C. was living with her father in the Ring Thunder Community on the Rosebud Sioux Indian Reservation. Exhibit 3 at 1 (Memorandum of Interview of Guy Colombe, dated October 1, 2008); Exhibit 4 at ¶ 4 (Declaration of Cleve J. Her Many Horses, dated December 8, 2010.) F.C. also occasionally stayed with her grandparents, who lived in Mission, South Dakota, which is located on the Rosebud Sioux Indian Reservation as well. Exhibit 3 at 1; Exhibit 5 at 1 (Memorandum of Interview of Jackie Colombe, dated October 1, 2008); Exhibit 4 at ¶ 3.

As a result of the events at issue in this case, Kettell was charged with one count of abusive sexual contact in violation of 18 U.S.C. §§ 1153, 2244(a)(2), and 2246(3). Exhibit 6 (Redacted Indictment in United States v. Kettell, No. 08-30107 (D.S.D.)). He pled guilty in the United States District Court for the District of South Dakota and was sentenced to two years in prison and ordered to pay a fine. Exhibit 7 (Judgment in United States v. Kettell, No. 08-30107 (D.S.D.)).

ARGUMENT

I. Standard Of Review

A. Standard of Review Under Rule 56(b)

Pursuant to RCFC Rule 56(b), summary judgment is properly granted when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561 (2007) ("a wholly conclusory statement of claim" cannot "survive a motion to dismiss" simply because "the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery"). While it is true that in considering a motion for summary judgment, the evidence must be viewed, and

inferences drawn, in a light most favorable to the non-moving party, Litton Indus. Prod., Inc. v. Solid State Sys. Corp., 755 F.2d 158, 163 (Fed. Cir. 1985); D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1146 (Fed. Cir. 1983), when faced with a motion for summary judgment, the non-moving party may not simply rest on the pleadings, but is required to come forward with relevant, admissible and specific evidence demonstrating a genuine issue of material fact. Fed.R.Civ.P. 56(e). Moreover, a nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

II. The United States Is Entitled To Summary Judgment Because The Navajo Treaty Provides That Those Who Leave The Navajo Reservation And Settle Elsewhere Forfeit The Rights And Privileges Of The Treaty, And F.C. Was Not Living On Navajo Reservation At The Time Of The Alleged Wrong

Ms. Pablo has filed suit pursuant to the "bad men" provision of the Navajo Treaty, which was signed June 1, 1868 and proclaimed August 12, 1868. That provision states:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

15 Stat. 667 at Article I.

Ms. Pablo alleges that the United States is obligated to reimburse her daughter, F.C., for injuries F.C. allegedly sustained as a result of Mr. Kettell's actions, which occurred on the Rosebud Sioux Indian Reservation. F.C. was living on the Rosebud Reservation at the time of

the incident. As this Court has recognized, the Navajo Treaty provides that those who leave the Navajo Reservation and reside elsewhere forfeit the rights and privileges conferred by the Navajo Treaty. Herrera v. United States, 39 Fed. Cl. 419, 421 (1997) citing Navajo Treaty at Article XIII. Thus, Ms. Pablo is not entitled to relief, and this Court should enter summary judgment on behalf of the United States.

A. Treaty Interpretation

"A treaty with an Indian tribe is a contract and should be interpreted to give effect to the intent of the signatories." Elk v. United States, 87 Fed.Cl. 70, 78 (2009) quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty . . . is essentially a contract between two sovereign nations."); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931); Tsosie v. United States, 825 F.2d 393, 397 (Fed. Cir. 1987). "[T]he Supreme Court has made clear that while the court should look to the parties' 'choice of words,' it should also consider the 'larger context that frames the Treaty,' including its 'history, purpose and negotiations.'" Elk, 87 Fed.Cl. at 79, quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196-203 (1999). Treaties are construed "to give effect to the terms as the Indians themselves would have understood them." Minnesota, 526 U.S. at 196; Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970). Although treaties are liberally construed in favor of Indians, this canon of construction "is not a license to disregard clear expressions of tribal and congressional intent." Herrera, 39 Fed.Cl. at 420-21 (1997); DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179 (1947) ("[w]hile it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians,

we cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean.").

B. History of the Navajo Treaty

The Navajo Treaty was one of nine treaties made in 1868 by and between commissioners representing the United States (including Lt. General William Tecumseh Sherman) and chiefs of various, previously hostile Indian tribes. Tsosie v. United States, 825 F.2d 393, 395 (Fed. Cir. 1987). All of the treaties say that peace is their object and all of them contain similarly worded "bad men" provisions. Id. The Navajo Treaty provided for a permanent reservation to which the Navajos were to be removed. Id.; see also Article II of the Navajo Treaty, 15 Stat. 667. The Navajos agreed to stay on their reservation and to occupy no other land. Id.; see also Article XIII of the Navajo Treaty, 15 Stat. 667.

The plain language of the Navajo Treaty makes clear that those who leave the Navajo Reservation to live elsewhere are not entitled to any of the privileges or rights conferred by the treaty. It states:

> [I]t is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty . . . .

Navajo Treaty at Article XIII, 15 Stat. 667. As this Court observed in Herrera, there is nothing ambiguous about this provision. Herrera, 39 Fed. Cl. at 421 ("[t]he loss of rights provision of article XIII is equally unambiguous.")

At the time of the alleged wrong that forms the basis for Ms. Pablo's amended complaint, F.C. was living with her father in the Ring Thunder Community, which is located on the Rosebud Sioux Indian Reservation. Exhibit 3 at 1; Exhibit 4 at ¶ 4. F.C. also occasionally

stayed with her grandparents, who lived on the Rosebud Reservation as well. Exhibit 3 at 1; Exhibit 5 at 1; Exhibit 4 at ¶ 3. Thus, F.C. had left the Navajo Reservation and settled elsewhere when the alleged wrong took place. Exhibit 4 at ¶ 5. Consequently, F.C. is not entitled to the protections of the Navajo Treaty – including the "bad men" provision – and this Court should deny plaintiff's claim for relief.

Entering summary judgment in favor of the United States in this case is consistent with precedent. This Court has held that the Navajo Treaty precludes those who suffered alleged wrongs while living outside of the Navajo Reservation from obtaining relief pursuant to the "bad men" provision of that treaty. Herrera, 39 Fed. Cl. 419. In Herrera, the plaintiff was a student who was attacked by a fellow student wielding an iron bar. At the time of the attack, the plaintiff's residence was located on land under the control of the Eastern Navajo Agency of New Mexico, which was outside of the boundaries of the reservation recognized by the Navajo Treaty. On Sunday through Thursday of each week, the plaintiff lived in a dormitory at the school, which was also located outside of the boundaries of the reservation recognized by the Treaty. The attack took place on school grounds.

The court in Herrera held that the plaintiff was not entitled to relief, noting that he "may only assert a claim for compensation under the Treaty if [his] permanent residence was located within the boundaries of the reservation recognized by the Treaty." Herrera, 39 Fed. Cl. at 420. The court explained that, "[b]ecause [plaintiff] did not live on the reservation and the attack occurred outside the reservation's boundaries, he is not entitled to the protections afforded by the

Treaty."[4]

Thus, both the plain language of the Navajo Treaty and precedent from this Court make clear that plaintiff is not entitled to relief pursuant to the Navajo Treaty's "bad men" provision because F.C. was not living on the Navajo Reservation at the time of the alleged wrong and, therefore, she was not entitled to the rights and privileges conferred by the treaty.

CONCLUSION

For these reasons, defendant respectfully requests that this Court enter summary judgment in its favor on plaintiff's claim against the United States.

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[4] To the extent that Herrera suggests that a Navajo who had left the reservation and settled elsewhere could obtain relief pursuant to the"bad men" provision for a wrong suffered on the Navajo Reservation, it is contrary to the plain language of the Navajo Treaty. This Court need not consider this issue because the alleged wrong in this case did not take place on the Navajo Reservation.

January 7, 2010 Attorneys for Defendant

CERTIFICATE OF FILING

I hereby certify that on the 7th day of January, 2010, a copy of the foregoing "DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" was filed electronically. I understand that notice of this filing will be sent to plaintiff's counsel by operation of the Court's electronic filing system. Plaintiff's counsel may access this filing through the Court's system.

s/J.Hunter Bennett