

Case No: 10-35455

Court Name: United States Court of Appeals for the Ninth Circuit

Case Title: K2 America Corporation (Plaintiff-Appellant) v. Roland Oil & Gas, LLC (Defendant-Appellee)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

K2 AMERICA CORPORATION,

Plaintiff – Appellant,

v.

ROLAND OIL & GAS, LLC

Defendant – Appellee.

NO. 10-35455

D.C. No. 4:09-cv-00076-RKS
U.S. District Court for Montana,
Great Falls

APPELLANT’S REPLY BRIEF

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ARGUMENT

The Defendant argues that Appellant (“K2”) was required to exhaust tribal remedies in Blackfeet tribal court prior to pursuing its claims in federal court. This was not a basis for the lower court’s decision. Nevertheless, the argument is without merit because, as detailed in K2’s Opening Brief, 28 U.S.C. § 1360(b) and federal preemption require that K2’s action be decided in federal court. Even in the absence of § 1360(b) and federal preemption, however, this case would not be properly before the tribal court.

4. The Limitations on Tribal Jurisdiction

“[T]he power of the Federal Government over Indian Tribes is plenary.” *Nat’l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Therefore, “Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers ‘inconsistent with their status.’” *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (emphasis in original). For example, Indian tribes’ ‘power to dispose of the soil at their own will, to whomsoever they please[]’ was inherently lost to the overriding sovereignty of the United States.” *Id.* at 209; *see also Nat’l Farmers*, at 853 n.14 (discussing divestiture of tribal sovereignty: “Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy.”); *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 2000)

("[W]e recognize that when Congress provides for the conveyance of certain property rights from tribes to nonmember parties, it acts within its unique authority to defease tribal jurisdiction to the extent its purposes require.").

Thus, disposition of interests in land held in trust for the benefit of Indians is an area where the federal government's trust obligation (due to tribes' dependent status) and the overriding sovereignty of the United States categorically preclude tribal court jurisdiction. Section 1360(b) of Title 28 explicitly recognizes this preemption and implicit divestiture of authority. Congress and, by delegation, the Department of Interior, exercise plenary control over oil and gas leases on tribal and allotted lands, and transfers thereof. *See* 25 U.S.C. 396, 396a-396g; 25 C.F.R. Parts 211, 212.

5. Exhaustion of Tribal Remedies

(a) The General Rule for Nonmembers

Even if one were to ignore the divestiture of authority and federal preemption discussed above and in K2's opening brief, this case would not fall within the Blackfeet tribal court's jurisdiction. "The sovereignty that the Indian tribes retain is of a unique and limited character." *Plains Commerce Bank v. Long Family Land & Cattle*, 128 S.Ct. 2709, 2718 (2008) (citation and quotations omitted). Tribes generally do not possess either legislative or adjudicative authority over non-Indians who enter reservations. *Id.*; *Montana v. United States.*,

450 U.S. 544, 565 (1981); *Nevada v. Hicks*, 533 U.S. 353, 367 (2001); *Philip Morris USA, Inc. v. King Mtn. Tobacco Co., Inc.*, 569 F.3d 932, 939 (9th Cir. 2009). The Supreme Court has “never held that a tribal court had jurisdiction over a nonmember defendant.” *Hicks*, at 358 n.2. Indeed, “the inherent sovereignty of Indian tribes [is] limited to ‘their members and their territory.’” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001).

These principles lead to the unavoidable conclusion that the Blackfeet tribal court presumptively lacks jurisdiction to hear this case. It is undisputed that this is a case between a Montana corporation and a Montana limited liability company. (Compl. ¶¶ 1-2, Answer, ¶ 1.) In other words, it is an action between two non-Indians. The only evidence in the district court record on this issue is a document showing that one of the Defendant’s principals is an enrolled member of the Blackfeet Tribe. This fact is irrelevant, however, for jurisdictional purposes. *Zempel v. Liberty*, 143 P.3d 123, 132 (Mont. 2006); *Airvator v. Turtle Mtn. Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983) (“We agree with the statements in Cohen that, for purposes of jurisdictional analysis, state-chartered corporations should be treated as non-Indians independent of their percentage of Indian shareholders.”).

“Accordingly,” this Court should “proceed here without assuming any inherent tribal jurisdiction to adjudicate” this case. *See Zempel*, at 131. Even

ignoring the divestiture of jurisdiction and federal preemption, it is the Defendant's burden to demonstrate why this case falls under one of the exceptions to the general rule of no tribal jurisdiction over nonmembers. *Id.* at 132 (“In conducting this analysis, we note that the party asserting the existence of tribal adjudicative jurisdiction under the Montana exceptions has the burden of demonstrating the facts necessary to support that assertion.”). Those exceptions are discussed below.

(b) The Consensual Relationship Exception

“A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members” *Montana*, at 565. Thus, if he or she has a qualifying “consensual relationship,” a tribe may have legislative and/or adjudicative jurisdiction over a nonmember's activities. There are, however, important limitations to the consensual relationship exception.

First, the consensual relationship must exist between the litigants. *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1076 (9th Cir. 1999) (“[T]he dispute arises not from the *parties'* contractual relationship, *as the first Montana exception requires*, but from alleged conduct governed by the Montana Unfair Claims Settlement Practices Act.”) (emphasis added); *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *Zempel*, at 132. Courts must not look to other, secondary, consensual relationships between a party and the tribe or its members to form the

basis for tribal jurisdiction. “A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another – it is not ‘in for penny, in for a Pound.’” *Atkinson*, at 655; *Plains Commerce*, at 2725 (“But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank’s sale of land it owned in fee simple.”)

Here, there is no consensual relationship between the Defendant and K2. The Defendant committed its tortious acts against K2’s will, and it is those acts which form the basis of K2’s cause of action. Moreover, K2 and the Defendant are market competitors. “The first question, however, is whether there is a contract or consensual relationship between [the parties] Philip Morris and King Mountain, the tribal member. The answer is undisputably no. Philip Morris has no consensual commercial relationship with King Mountain; rather, they are market competitors.” *Philip Morris*, at 941. Neither the Blackfeet Tribe nor its members are parties to this suit. They are strangers to the Defendant’s tortious conduct. *See Zempel*, 133 (“Because the relationship at issue here is between TTC and Zempel, and because neither TTC nor Zempel are tribal members, no relationship with the ‘tribe or its members’ exists to provide a basis for tribal jurisdiction under this exception.”).

Second, an oil and gas lease does not qualify as a consensual relationship in any event:

The first Montana exception does not apply in this case. King argues that the original easement granted to the State created a continuing consensual relationship between the Community and the State. However, transfers of property interests . . . create property rights; they generally do not create continuing consensual relationships.”

State of Mont. Dept. of Transp. v. King, 191 F.3d 1108, 1113 (9th Cir. 1999); *see also Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 2000). Like the easement in *King*, the disputed oil and gas leases here “create property rights . . . not [] continuing consensual relationships.”

(c) The Self-Government Exception

In addition to jurisdiction over disputes involving qualifying consensual relationships, “[a] tribe may also retain power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, at 566. This exception focuses on tribes’ ability to punish tribal offenders, determine tribal membership, regulate domestic relations, and to prescribe rules of inheritance. *Id.* at 564; *Strate*, at 459; *Hicks*, at 360-61; *Zempel*, at 133. K2 is aware of no case where this exception has established tribal court adjudicative jurisdiction. *See King*, at 1114 (“The second Montana exception must be narrowly applied.”). It is difficult to fathom how it

would apply in this case given the divestiture of tribal authority over land dispositions and federal preemption. This exception is nonetheless discussed below.

For this exception to apply, the nonmember's conduct must "do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce*, at 2726. The elevated threshold suggests that tribal jurisdiction must be necessary to avert catastrophic results or relieve the tribe from "demonstrably serious" threats to sovereignty. *Id.*; *Red Wolf*, at 1065; *Philip Morris*, at 943. Even careless driving that endangers tribal members does not pose such a threat. *Strate*, at 458 ("But if *Montana's* second exception requires no more [than physical endangerment of members], the exception would severely shrink the rule" of no tribal jurisdiction over nonmembers."). That being the case, a business tort between two non-Indians does not fall under this exception to *Montana's* general rule of no jurisdiction over nonmembers.

6. Conclusion

Where tribal jurisdiction is lacking because there is no conferral by treaty or statute and no sovereign jurisdiction, exhaustion is not required because it would serve no purpose other than delay. *Strate*, at 459 n.14; *Hicks*, at 369. In this case, the Blackfeet Tribe has no jurisdiction due to federal preemption, divestiture of authority, and common law limitations on tribal jurisdiction. "[T]he bare assertion

of tribal jurisdiction by one of the parties . . . [is not] sufficient to require abstention by the district court.” *Stock West v. Taylor*, 964 F.2d 912, 922 (9th Cir. 1992) (O’Scannlain, J., dissenting) Additionally, “[a]bstention comes at a high cost. It deprives the plaintiff of his statutory entitlement to choose a federal court as his forum. Moreover, it ultimately delays the final resolution of the case, and increases the costs of litigation.” *Id.* at 923 (O’Scannlain, J., dissenting). It is an extraordinary and narrow exception to the duty of a federal court to decide the case before it. *Id.* It does not apply to this case. The district court’s dismissal order should be reversed and the case should be remanded for further proceedings.

DATED this 3rd day of November, 2010.

K2 America Corporation,
Plaintiff-Appellant

/s/ Nick A. Swartzendruber

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