IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND COMMISSIONER OF FINANCIAL REGULATION	*	
Plaintiff	*	
v.	*	**Civil No. WDQ-11-CV-00735**
WESTERN SKY FINANCIAL, LLC, ET AL	*	
Defendants.	*	

* *

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants, Western Sky Financial, LLC, Great Sky Finance, LLC, Payday Financial, LLC, and Martin A. Webb (collectively, "Defendants"), respectfully submit this Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss ("Plaintiff's Opposition"), and state as follows:

INTRODUCTION

Plaintiff's Complaint is an improper attempt to regulate the business affairs of an enrolled member of the Cheyenne River Sioux Tribe on the Cheyenne River Reservation (the "Reservation"). As explained in Defendants' Memorandum in Support of its Motion to Dismiss ("Defendants' Memorandum"), Defendants are immune from such regulation. Defendants' Memorandum at 3-9. In its Opposition, Plaintiff argues that Defendants are not entitled to dismissal because: (1) the Court lacks removal jurisdiction; (2) Plaintiff properly pled its cause of action; and (3) Defendants are not entitled to Tribal immunity. All of Plaintiff's arguments are meritless. Accordingly, Plaintiff's Complaint must be dismissed.

ARGUMENT

I. THIS COURT HAS REMOVAL JURISDICTION

Plaintiff claims that this Court lacks removal jurisdiction and has filed a Motion to Remand (Document 9). For the reasons explained in Defendants' Opposition to Plaintiff's Motion to Remand (Document 13), which is incorporated by reference herein, this action was properly removed.

II. PLAINTIFF'S COMPLAINT WAS NOT PROPERLY PLED

Plaintiff concedes in its Complaint that, if Defendants are entitled to assert Tribal immunity, it has no right to relief against them. Complaint ¶ 30. However, Plaintiff asserts that Defendants are not entitled to Tribal immunity. Id. at ¶ 31. Plaintiff has not included sufficient facts in its Complaint to support this assertion. See Defendant's Memorandum at 6-9. In tacit recognition of the deficiencies in his Complaint, Plaintiff has filed an affidavit with its opposition purporting to supply facts missing from its Complaint. (Document 10-4) The affidavit should not be considered by this Court for two reasons. First, it is improper because it is not based on personal knowledge. Instead, it is based entirely on inadmissible hearsay and, therefore, should be disregarded.[1] Evans v. Technologies Applications & Service Co., 80 F.3d 954, 962 (4th Cir. 1996) (affirming the striking of portions of affidavit that were conclusory or based on hearsay).

Second, a motion to dismiss tests the sufficiency of the allegations of the **Complaint**, not statements made in an affidavit. Indeed, this Court in Jordan v. Washington Mut. Bank, 211 F. Supp. 2d 670, 673-74 (D.Md. 2002) – the very case relied upon by Plaintiff to establish that it properly pled its Complaint – refused to consider an affidavit submitted by the plaintiff in opposition

[1] The affiant claims to be testifying upon personal knowledge, but the information contained in the affidavit is based on what other people told the affiant or information that the affiant reviewed. Document 10-4 ¶¶ 3-9.

to a motion to dismiss. As this Court held in Jordan, "[p]laintiffs are not entitled to convert defendant's motion into one seeking summary judgment merely by filing an affidavit and other exhibits." Id. at 674. Therefore, Plaintiff's Complaint should be dismissed because it is not based on facts, but rather on conclusory allegations. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007); Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009). Moreover, as discussed below, even if this Court were to consider the purported facts contained in Plaintiff's affidavit, Plaintiff's Complaint still must be dismissed.

III. EVEN IF THE COURT CONSIDERS PLAINTIFF'S AFFIDAVIT, DEFENDANTS ARE STILL ENTITLED TO TRIBAL IMMUNITY

A. Defendants Are Not Claiming Immunity Under An "Arm Of The Tribe" Theory

Plaintiffs argue that Defendants are not entitled to Tribal immunity because the corporate Defendants are not considered an "arm of the Tribe," and Defendant Webb is not a Tribal officer. Opposition 8-11. Defendants, however, are not relying on an "arm of the Tribe" theory. Moreover, there is no requirement that an enrolled Tribal member be an officer of the Tribe to be entitled to immunity.

As Defendants explained in their Motion to Dismiss, states do not have the authority to govern the affairs of Indians on a reservation, absent Congressional approval. Williams v. Lee, 358 U.S. 217, 220-223 (1959). Nor do states have the authority to interfere in contracts between Indians and non-Indians. Montana v. United States, 450 U.S. 544, 565 (1981). Williams and Montana did not rely on an "arm of the Tribe" analysis to confer Tribal immunity. Nor did these cases involve Tribal officers. In fact, contrary to Plaintiff's assertion at page 9 of its Opposition, the Supreme Court has expressly recognized that its decisions and federal law confer rights on **individual** Indians, not just Tribes and Tribal Leaders. McClanahan v. State Tax Commission of

Arizona, 411 U.S. 164, 181 (1973); Williams, 358 U.S. at 220. In McClanahan, the Supreme Court held:

> To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that "the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them." *Williams v. Lee, supra,* at 220 (emphasis added).

411 U.S. at 181 (italics in original). Likewise, in Williams, the Supreme Court declared:

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.

358 U.S. at 220. Thus, the right of Defendant Webb to Tribal immunity is beyond dispute.

Likewise, immunity extends to corporations owned by a Tribal member, such as the corporate Defendants here, even if the corporations were formed under state law rather than Tribal law. Defendants' Memorandum at 6-9; Pourier v. South Dakota Department of Revenue, 658 N.W. 2d 395, 403-405 (S.D. 2003), aff'd in part and vacated in part, on other grounds, 674 N.W. 2d 314 (2004); Giedosh v. Little Wound School Bd., 995 F. Supp. 1052, 1059 (D.S.D. 1997). Accordingly, Plaintiff's myopic emphasis on its "arm of the Tribe" argument cannot prevent the dismissal of the Complaint.

B. Plaintiff's Personal Jurisdiction And Choice Of Law Arguments Are Irrelevant

Having no answer to the foregoing argument, Plaintiff attempts to claim that its Complaint pertains to activity outside the Reservation. Plaintiff's Opposition at 11-12. However, rather than explain why it believes the Complaint demonstrates that the loan agreements at issue were entered into outside of the Reservation, Plaintiff claims that it has personal jurisdiction over Defendants and that the choice of law provisions contained in the loan agreements do not divest it of such jurisdiction. Plaintiff's arguments are irrelevant and unpersuasive.

The only fact alleged in Plaintiff's Complaint to support its contention that the loan agreements were entered into in Maryland is the alleged fact that the borrowers submitted on-line applications from Maryland. Complaint ¶¶ 32, 35. Plaintiff does not explain why this fact is dispositive, nor does it provide any authority to support its contention. In fact, Plaintiff's admission that Maryland consumers "had **applied** for their loans from [Defendants] by completing and submitting on-line loan **applications** while these consumers were located in Maryland" (Complaint ¶ 35 (emphasis added)) conclusively demonstrates that their on-line loan applications were accepted on the Reservation. See Motion to Dismiss Ex. 9 (Document 4-11) at pages 1 (first paragraph) and 3 (Governing Law).

Plaintiff again relies on statements contained in the affidavit submitted with its Opposition asserting that Defendants advertised in Maryland, deposited loan proceeds into Maryland banks and accepted repayment from banks in Maryland. Plaintiff's Opposition at 11. For the reasons discussed in Section II, supra, the Court should not consider Plaintiff's affidavit. However, even if the Court does consider Plaintiff's affidavit, it does not support Plaintiff's contention that the loans at issue were **entered into** in Maryland. In recognition of this fact, Plaintiff merely argues in its Opposition that the activities described in the affidavit establish "substantial justification for the Agency to exercise specific jurisdiction over the Defendants." Plaintiff's Opposition at 11. Plaintiff does not explain how "specific jurisdiction" trumps Tribal immunity. In fact, none of the cases relied upon by Plaintiff (Opposition at 12) pertain to immunity. Instead, the cases relate only to personal jurisdiction. Therefore, Plaintiff's argument has no bearing on whether Defendants are entitled to Tribal immunity.

Similarly unavailing is Plaintiff's attempt to question the validity of the choice of law provisions contained in the loan agreements. Plaintiff's Opposition at 13-14. As explained in

Defendants' Memorandum, all of the Maryland borrowers agreed in their loan agreements that their loan agreements were subject solely to the laws of the Cheyenne River Sioux Tribe, and that the Cheyenne River Sioux Tribal Court had exclusive jurisdiction over any disputes. In addition, the borrowers agreed that the agreements were governed by the Indian Commerce Clause of the United States Constitution and not by the laws of any state. Defendants' Memorandum at 4.

Plaintiff claims that Defendants cannot divest it of the authority to regulate the transactions at issue by agreeing that Maryland law does not govern the loan agreements. In support of this contention, Plaintiff relies on PA Dept. of Banking v. NCAS of Delaware LLC, 931 A.2d 771 (Pa. Cmwlth 2007) and BankWest Inc. v. Oxendine, 598 S.E. 2d 343 (Ga. App. 2004). Plaintiff's Opposition at 13-14. However, Plaintiff's argument misses the point. Here, unlike in NCAS and BankWest, it is Tribal immunity — not the choice of law provisions in the loan agreements — that prevents Plaintiff from bringing its enforcement action against Defendants. The choice of law provisions in Defendants' loan agreements are merely factors in determining where the loans were originated. Plaintiff has no basis — and the NCAS and BankWest cases provide none — to inject itself into the loan agreements between the parties and regulate Defendants' Tribal affairs. Indeed, the Supreme Court's decisions in Williams, McClanahan and Montana expressly prohibit such interference. 358 U.S. at 220-223; 411 U.S. at 181; 450 U.S. at 565.

CONCLUSION

Based on the foregoing, and the arguments contained in Defendants' Motion, Defendants' Motion to Dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2011, a copy of the foregoing Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss was filed and served electronically via the Court's CM/ECF system.

/s/ Charles S. Hirsch
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