UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA NATION OF NEW YORK,

Plaintiff,

v.

DAVID A. PATERSON, in his official capacity as Governor of New York, JAMIE WOODWARD, in her official capacity as Acting Commissioner of the N.Y. Department of Taxation & Finance, WILLIAM COMISKEY, in his official capacity as Deputy Commissioner for the Office of Tax Enforcement for the N.Y. Department of Taxation & Finance,

Defendants.

Civil Action
No. 6:10-CV-1071
(DNH/ATB)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR DISMISSAL WITHOUT PREJUDICE

INTRODUCTION

In May, the U.S. Court of Appeals for the Second Circuit held that the Oneida Nation's claims in this litigation were meritless. *See Oneida Nation of New York v. Cuomo*, 645 F.3d 154 (2d Cir. 2011). State defendants will shortly file a motion for summary judgment based on the Second Circuit's comprehensive opinion. To forestall that motion, the Oneida Nation now seeks to avoid the preclusive effect of the Second Circuit's judgment by moving for a voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a).

This Court should deny that request. The Second Circuit's decision was a determinative adjudication on the merits that requires the dismissal of the Oneida Nation's claims. The Nation's motion is a transparent attempt to avoid an adverse

judgment in this Court, but such a motivation cannot justify a dismissal without prejudice. To the contrary, permitting the Oneida Nation to wipe the slate clean would prejudice defendants, who have expended considerable efforts over the past year to prevail in this case. Accordingly, this Court should deny the Oneida Nation's motion and permit the litigation to continue to the summary-judgment stage.

A. The Second Circuit Conclusively Rejected the Oneida Nation's Claims.

In *Oneida Nation*, the Second Circuit upheld New York's 2010 amendments to its Tax Law against the challenges of several Indian nations and tribes, including the Oneida Nation. In particular, the court reached three holdings that conclusively rebutted the Oneida Nation's objections to the 2010 amendments.

First, the Second Circuit squarely held that the 2010 amendments' precollection scheme was not "a categorically impermissible direct tax on tribal retailers." 645 F.3d at 168. Indeed, the court found that "New York's precollection scheme is materially indistinguishable from those upheld in" *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980). *Oneida Nation*, 645 F.3d at 169.

Second, the Second Circuit held that the coupon system did not infringe the Cayuga Indian Nation's right of self-government. *Id.* at 171. Although the Oneida Nation did not challenge the coupon system, it is similarly situated to the Cayuga

Indian Nation because "the governing bodies of the Cayuga and Oneida Nations centralize tobacco retail within their respective territories." *Id.* at 163. As a result, the Second Circuit's holding that "the coupon system does not impose allocation burdens on the Cayuga Nation because its government owns and operates the Nation's two cigarette retailers," *id.* at 171, applies as well to the Oneida Nation.

It is immaterial that the Oneida Nation has declined to elect into the coupon system. For one thing, the Department's regulations permit late elections. *See* 20 N.Y.C.R.R. § 74.6(b)(1)(ii). More fundamentally, the Oneida Nation cannot make a tax scheme inadequate simply by boycotting it. Nor can the Oneida Nation expect to maintain access to tax-free cigarettes if it refuses to participate in a valid tax-collection scheme. *Colville* held that the State would not "unnecessarily intrud[e] on core tribal interests" if it chose to seize all cigarette shipments to Indian nations or tribes that "refused to fulfill collection and remittance obligations which the State has validly imposed"—even when "the cigarettes in transit are as yet exempt from state taxation." 447 U.S. at 161-62. Thus, tribal sovereignty is not infringed if an Indian nation like the Oneida Nation loses its access to tax-free cigarettes because it "do[es] not cooperate in collecting the State's taxes." *Id.* at 161.

Third, the Second Circuit held that the Oneida Nation could not challenge the prior approval system based on "'consequences that, while possible, are by no means predictable.'" *Oneida Nation*, 645 F.3d at 167 (quoting *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 69 (1994)). Specifically, the court rejected the Oneida Nation's speculation about potential abuses by stamping

agents and wholesalers as a basis for striking down the prior approval system. *See id.* at 173 n.20.

In short, under the Second Circuit's decision, the 2010 amendments properly respect the Oneida Nation's sovereignty and provide two adequate mechanisms for the Nation and its members to purchase tax-exempt cigarettes. The Oneida Nation does not dispute this conclusion. Instead, it asserts that the Second Circuit's decision "concerned only interlocutory injunctive relief" and not "a final merits determination" binding on this Court (Oneida Nation Memo at 2). That assertion is incorrect.

The mere fact that a legal ruling was reached in an interlocutory posture does not prevent it from constituting a determinative conclusion as a matter of law. *See Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (holding that First Circuit ruling on temporary injunction bound the parties); *Int'l Equity Investments, Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 559-60 (S.D.N.Y. 2006) (rejecting plaintiff's attempt to revisit earlier findings). To the contrary, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964); *see also United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) ("[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case.").

Generally speaking, a court should revisit an earlier legal conclusion only if there is a change in the law or significant new evidence justifying reconsideration. *See United States v. Adegbite*, 877 F.2d 174, 178 (2d Cir. 1989). Here, however, the Oneida Nation has pointed to no intervening legal or factual changes. Moreover, there is no indication that the Second Circuit's legal conclusions were "intended to be tentative." *Lummus*, 297 F.3d at 89. To the contrary, the Second Circuit concluded that the Oneida Nation was not even able to meet the more lenient standard of a mere *likelihood* of success on the merits. *See Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002); *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199, 204-05 (2d Cir. 1966). And in so ruling, as described above, the Second Circuit used definitive language to express legal conclusions that did not depend on the interlocutory posture of the appeal. Finally, although this Court may be free to re-examine its own interlocutory conclusions of law during a subsequent trial, *see Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998), "[w]hen an appellate court has once decided an issue, the trial court, at a later stage in the litigation, is under a duty to follow the appellate court's ruling on that issue," *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977).

Accordingly, the Second Circuit's decision in this case conclusively defeated the Oneida Nation's claims.

B. The Oneida Nation May Not Obtain a Dismissal Without Prejudice Solely to Avoid an Adverse Judgment.

The Oneida Nation's request here to dismiss its complaint without prejudice—more than a year after it initiated this litigation—is a transparent attempt to avoid the adverse judgment compelled by the Second Circuit's decision. It is well established, however, that "seeking to avoid a judgment that would be adverse to their interest . . . [is] not a legitimate justification for [the] desire to dismiss without prejudice." *Minnesota Mining & Mfg. Co. v. Barr Laboratories, Inc.*, 289 F.3d 775, 783 (Fed. Cir. 2002); *see also Cahalan v. Rohan*, 423 F.3d 815, 818 (8th Cir.2005) ("A party may not dismiss simply to avoid an adverse decision or seek a more favorable forum."); *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir. 1996) ("[A] party should not be permitted to avoid an adverse decision on a dispositive motion by dismissing a claim without prejudice."); *Pace v. Southern Exp. Co.*, 409 F.2d 331, 334 (7th Cir. 1969) (affirming denial of dismissal without prejudice when plaintiff was "attempting to deprive the defendant of a ruling on the summary judgment motion by its dismissal tactic"); *Mountain Pure LLC v. Bank of America, N.A.*, 2008 WL 1913529, *2-*3 (E.D. Ark. Apr. 28, 2008) ("The desire to avoid an adverse judgment is not a sufficient reason to warrant dismissal.").

The Oneida Nation has provided no other justification for a dismissal without prejudice. *See Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990) (citing "the adequacy of plaintiff's explanation for the need to dismiss" as a factor). Indeed, its only contention is that "[i]t would be unfair to Plaintiff to dismiss this action, or any claim in it, with prejudice, as the parties, this Court and the Second Circuit

have addressed only the standard preliminary injunction question concerning likelihood of success on the merits" (Oneida Nation Memo at 4). As explained above, that statement mischaracterizes the Second Circuit's holding. More importantly, this Court will not dismiss this action with prejudice until defendants have moved for summary judgment and the Oneida Nation has had an opportunity to oppose that motion. It would hardly be unfair for the case to be dismissed with prejudice at that stage.

C. Dismissal without Prejudice Would Prejudice Defendants.

Permitting the Oneida Nation to start all over despite its comprehensive loss in the Second Circuit would prejudice defendants. In *Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716 (6th Cir. 1994), the district court certified a question to the Ohio Supreme Court, which answered the state-law question in a way that precluded the plaintiff's claims. The district court nonetheless granted the plaintiff's Rule 41 motion to dismiss without prejudice. The Sixth Circuit held that this was an abuse of discretion: "In view of the extra delay and expense experienced by defendant, and plaintiffs' defeat on the 'determinative' legal issue certified to the Ohio Supreme Court, the district court's order manifestly burdened defendant with clear legal prejudice." *Id.* at 718. The same conclusion applies here. The Second Circuit has definitively resolved the Oneida Nation's legal claims. Allowing the Nation to escape the consequences of its own litigation would prejudice defendants.

Defendants would also be prejudiced because they have expended considerable efforts to prevail in this case. Since the Nation initiated this litigation

over a year ago, the parties have engaged in extensive briefing and multiple hearings before this Court; a preliminary round of motions briefing in the Second Circuit; and an expedited schedule for briefing on the merits in the Circuit that resulted in hundreds of pages of legal argument. Moreover, defendants intend to file a motion for summary judgment in the very near future. The maturity of this litigation counsels against dismissing this litigation without prejudice.

CONCLUSION

The Oneida Nation's motion for dismissal without prejudice should be denied.

Dated: Albany, NY
September 16, 2011

Respectfully submitted,

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