10-4273-cv

United States Court of Appeals for the Second Circuit

ONONDAGA NATION,

Plaintiff-Appellant,

– v. –

THE STATE OF NEW YORK, GEORGE PATAKI, In His Individual Capacity and as Governor of New York State, ONONDAGA COUNTY, CITY OF SYRACUSE, HONEYWELL INTERNATIONAL, INC., TRIGEN SYRACUSE ENERGY CORPORATION, CLARK CONCRETE COMPANY, INC., VALLEY REALTY DEVELOPMENT COMPANY, INC., and HANSON AGGREGATES NORTH AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK
Case No. 05-cv-314 - U.S. District Judge Lawrence E. Kahn

AMICUS BRIEF ON BEHALF OF PETITIONERS

Matthew L.M. Fletcher
Michigan State University
College of Law
Indigenous Law and Policy Center
648 N. Shaw Ln.
East Lansing, MI 48824
Tel: 517-432-6909

Kathryn E. Fort
Michigan State University
College of Law
Indigenous Law and Policy Center
648 N. Shaw Ln.
East Lansing, MI 48824
Tel: 517-432-6992

Carrie Garrow
Syracuse University
College of Law
Center for Indigenous Law, Governance & Citizenship
263 White Hall
Syracuse, NY 13244
Tel: 315-443-9558

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Pages***

Statutes

Legislative Materials

Other Authorities

INTEREST OF AMICI CURIAE*

Amici are Matthew L.M. Fletcher and Kathryn E. Fort, Director and Acting Associate Director of the Indigenous Law and Policy Center at Michigan State University College of Law, and Carrie Garrow, Director of the Indigenous Law, Governance & Citizenship Center at Syracuse University College of Law. All three are professors whose scholarship and clinical practice focuses on the subject matter areas – federal jurisdiction, federal Indian law, and remedies – addressed by the district court's decision in this case. We submit this brief to highlight the extent to which the ruling below – dismissing the Onondaga Nation's land claim on summary disposition based on the disruption associated with the passage of time – contravenes the considered judgment of the legislative branch of the government; departs from basic principles of equity, both historic and modern; and threatens unwarranted adverse consequences for the ability of New York Indian Tribes to vindicate their legal rights.

---

* No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received timely notice of intent to file this brief and gave consent to its filing.

SUMMARY OF THE ARGUMENT

In the decision below, the district court interpreted this Court's decision in *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d. Cir. 2010) (*Oneida III*), and prior circuit precedent, *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), as empowering federal courts to dismiss all Indian land claims arising out of State and local authorities' violations of federal law, based on the passage of time and the disruption that enforcing federal rights would entail, irrespective of the character of the relief sought and without any discovery, and without regard to federal statutes providing that claims of this type be heard in federal courts. The district court incorrectly determined that dismissal of the Onondaga Nation's claims on the pleadings was "mandatory," despite guidance from this Court that trial courts must develop a full factual record and make findings on subjective factors such as regulatory disruption and societal expectations.

First, Congress previously contemplated the justiciability this type of claim. The Indian Claims Limitations Act (ICLA) of 1982 expressly establishes a process by which the federal government and Indian tribes may deliberate on whether to bring land claims actions. Congress dealt with Indian land claims questions for over a decade before enacting a statute that preserves the land claims of Indian tribes without a limitations period. The district court decision also ignores the equitable rules that federal courts generally lack power to impose equitable bars to prevent any possible relief, legal or equitable, without the development of a full factual record and findings of fact by the trial court.

Second, although ostensibly based on equity and prior precedent, the district court's dismissal of the Onondaga Nation's claims is, in the many different senses of that term, inequitable. Instead of undertaking to adjust the parties' legal relationship with an eye toward doing substantial justice, the district court was forced to find a complete maximal equitable bar, one that left the Onondaga Nation without any ability to factually distinguish its claims from those dismissed in the *Cayuga* and *Oneida III* cases. *See Onondaga Nation v. New York*, No.05-0314, slip op. at 15-16 (N.D. N.Y., Sept. 22, 2010). The lower court wrongly interpreted this Court's precedents in *Cayuga* and *Oneida III* in holding that dismissal of the Onondaga Nation's claims on the pleadings was "mandatory." *Onondaga Nation*, No. 05-0314, slip op. at 15. This Court should allow the Onondaga Nation to present its case on the merits and force the trial court to make findings of fact that demonstrate the *actual* applicability of *Cayuga* and *Oneida III* instead of merely *assuming* that those precedents apply. Prior Supreme Court precedent requires it. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*).

It should be remembered that the Supreme Court in *Sherrill* took care to relate its defense to traditional equitable doctrines, and to make plain that it was not overturning or questioning *Oneida II*, which had affirmed a money damages award for a violation of possessory rights that occurred centuries ago. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 230 (2005) ("In sum, the question of

damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*.").

ARGUMENT

I. The District Court's Use of the Judicially-Created Bar to Dismiss the Onondaga Nation's Claim Without Hearing Defies the Considered Legislative Judgment Codified in the Indian Claims Limitation Act

The lower courts' application of the Second Circuit's land claims rulings to the Onondaga Nation to dismiss the claims on the pleadings for violations of the Non-Intercourse Act has effectively "frustrat[ed] the will of the Legislature," *Oneida II*, 470 U.S. at 262 (Stevens, J., dissenting), which through sustained democratic contemplation established a structure by which the government and Indian tribes may seek money damages for this and other claims. Congress's considered judgment demonstrates a public policy of leniency toward the bringing of tribal land claims. In turn, the district court's decision to dismiss the Onondaga Nation claim on its face is in conflict with this public policy.

Congress enacted the Indian Claims Limitation Act of 1982 (ICLA), now codified at 28 U.S.C. §§ 2415(a) and (b), to provide a workable structure for bringing land claims like this one. The Act allows these claims to be brought in federal courts under a structure that required specified policy determinations by the Secretary of Interior and the Attorney General as to which (if any) mode of resolution, legislative or judicial, was appropriate for particular claims. The Supreme Court held this to mean "the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations." *Oneida II* 470 U.S. at 244. The Court's decision in *Sherrill* did not change this finding. 544

U.S. at 230. While other panels in this Circuit have found land claims may be foreclosed within a statute of limitations, *Cayuga,* 413 F.3d at 277; *Oneida III,* 617 F.3d at 126, the district court's decision in this case to dismiss the Onondaga Nation claim without any factual findings on the record is contrary to the public policy represented by ICLA.

ICLA was the end result of a decade-long series of laws and represents the final congressional judgment on the procedure for the United States to bring claims for money damages on behalf of Indians and Indian tribes. The ICLA's history is directly relevant to the understanding of the operation of the statute, and the constraints it imposes on judicial lawmaking in this case, including the policy reasons for developing the factual record.

In July 1966, Congress enacted a general statute of limitations on the United States as a plaintiff seeking money damages for tort and contract claims. Pub. L. 89-505, § 1, 80 Stat. 304. That 1966 statute was silent as to claims brought by the United States on behalf of Indians and Indian tribes. As a result of concerns expressed by the Department of Interior in late 1971, "Congress extended the statute of limitations for pre-1966 claims brought by the United States on behalf of Indians to July 7, 1977." *Covelo Indian Community v. Watt*, Nos. 82-2377 & 82-2417, 1982 U.S. App. LEXIS 23138, at * 5 (D.C. Cir., Dec. 21, 1982) (citing Act of October 13, 1972, Pub. L. 92-485, 86 Stat. 803). *See also* H.R. Rep. 95-375 (June 1, 1977). Because "hundreds of newly identified claims could not be researched, identified, and filed by the deadline and would, as a result be lost[,]" Congress again extended

the deadline in 1977 to April 1, 1980. *Covelo Indian Community*, 1982 U.S. App. LEXIS 23138, at *6 (citing Act of Aug. 15, 1977, Pub. L. 95-103, 91 Stat. 842). *See also* H.R. Rep. 96-807 (1980).

In 1980, for reasons similar to earlier extensions, Congress once more extended the deadline; that time, to December 31, 1982. *Covelo Indian Community*, 1982 U.S. App. LEXIS 23138, at *7 (citing Act of March 27, 1980, Pub. L. 96-217, 94 Stat. 126). *See also* S. Rep. 96-569 (Feb. 7, 1980). Congress added a requirement to the 1980 extension that the Secretary of Interior and the Attorney General must submit legislative proposals to Congress by June 30, 1981 "to resolve those Indian claims . . . that the Secretary of Interior or the Attorney General believes are not appropriate to resolve by litigation." Pub. L. 96-217, § 2. The government's failure to produce these proposals by the deadline prompted litigation by tribal interests that resulted in a court order mandating the government submit the legislative proposals by December 31, 1982. *See Covelo Indian Community v. Watt*, 551 F. Supp. 366, 384 (D. D.C. 1982), *aff'd*, 1982 U.S. App. LEXIS 23138, at *36-37.

Congress was well aware in 1982 of the potential liability to the United States if the statute of limitations was allowed to expire prior to the filing of certain land claims. As the Acting Assistant Secretary for Indian Affairs testified, the federal government believed without the deadline extended there would be "the filing of massive lawsuits seeking title to, and possible ejectment of present occupants from vast areas claimed by the tribe involved." *Statute of Limitations for Certain Claims by the United States on Behalf of Indians: Hearing on S. 2222 Before*

Subcomm. on Administrative Law and Governmental Relations of the H.R. Comm. on the Judiciary, 96th Cong. 6 (1980) (statement of Rick C. Lavis, Acting Assistant Secretary for Indian Affairs, Department of Interior).

The Assistant Secretary also testified that extending the deadline would "avoid our possible liability for break of our fiduciary responsibilities to the Indians involved." *Id.* The Senate Report accompanying the legislation reinforced the potential liability of the federal government to these types of claims if the statute of limitation was allowed to expire:

> A question has also been raised regarding the potential liability of the United States to Indian tribes or individuals for failure to actively pursue claims on their behalf. The question springs from the trust relationship which exists between the United States and the Indian tribes. The Library of Congress opinion also addressed this issue and concluded that this issue too, is not free from doubt. There have been some judicial decisions holding the United States liable for mismanagement of trust property.

S. Rep. No. 96-569 at 4 (1980). *See also* Richard C. Ehlke, Cong. Research Serv., Am. Law Div., *Effect of Expiration of Statute of Limitations (28 U.S.C. 2415) on Suits by Indian Tribes and Individual Indians* (1979), *as reprinted in Statute of Limitations Extension: Oversight on Identifying and Processing of Claims of Indians and Individuals and Necessity of Extending the Statute of Limitations*, *Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. at 311, 321-2 (1979) ("The court in *Passamaquoddy* declined to spell out the duties which flowed from the Nonintercourse Act's trust obligations, although the Justice Department apparently felt obligated to file comprehensive ejectment and damages actions.") (discussing

Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), which held that the Department of Justice likely had an affirmative duty to bring land claims against the State of Maine on the Tribe's behalf.).

On December 30, 1982, Congress enacted ICLA, enabling the Department of Interior avoid the *Covelo* court order. Pub. L. 97-394, 96 Stat. 1966. That statute established a one-year limitations period for tribal claimants to bring suit once the Secretary of Interior published in the Federal Register a notice rejecting a claim, and a three-year limitation period for tribal claims once the Secretary submitted legislation or a legislative report to Congress to resolve those claims. 28 U.S.C. § 2415(a). Congress incorporated a modified form of Section 2 of the 1980 enactment, granting extensive agency discretion to bring suit, decline to bring suit, or submit proposed legislation to Congress.

ICLA represents Congress's considered response to the complexity and consequences of claims like this one, and its codified judgment concerning the proper procedure for identifying, investigating, adjudicating, and otherwise resolving Indian land claims. As the political branches carefully considered both the age and effect of allowing such claims to proceed, the district court lacked authority to apply a judicial rule that eliminates the opportunity for the Onondaga Nation to be heard and distinguish its claims from those dismissed in *Cayuga* and *Oneida III*.

The district court's decision to dismiss the Onondaga Nation's claims on the pleadings undermines Congress's policy choices by denying the Nation a single day in court. In barring this claim without developing the facts, the district court's

decision conflicts with cardinal principles governing the relationship between the respective branches: "Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001). Congress's demonstrated public policy not to foreclose these claims outright indicates a benefit of the doubt toward tribal land claims, at least as to a development of the record before making a decision in equity on the claim.

II. The District Court's Dismissal of the Onondaga Nation's Claims on the Pleadings Are Untethered From Longstanding Principles of Law and Equity and Therefore Contrary to Equity Jurisprudence

The district court extended this Court's land claims jurisprudence far beyond the equitable principles established in *Cayuga* and *Oneida III* to bar the entire class of claims without determining if the equitable defenses even apply on the facts presented, a fundamental aspect of equity. The equitable defenses articulated by this Court in *Cayuga* and *Oneida III*, as well as the defenses in *Sherrill*, all require the development of an extensive factual record to determine whether those factors apply in this case.

The equitable defenses articulated in *Sherrill* required extensive factual findings on questions of the reliance of the defendants and others: "The appropriateness of the relief OIN here seeks *must be evaluated in light of the long history of state sovereign control over the territory*." 544 U.S. at 214 (emphasis added); *see also id.* at 219-20 (identifying factors such as the "burde[n on] the administration of state and local governments"; and impacts on "local zoning and

regulatory controls"). The *Sherrill* Court's discussion of laches demonstrated the subjective character of the defense: "[L]aches is not . . . a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Id*. at 217-18 (quoting *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892)).

Similarly, the defenses adopted by this court in *Cayuga* and *Oneida III*, based on the *Sherrill* reasoning, also are fact-heavy determinations requiring the development of a long record. The *Oneida III* Court listed an extensive set of subjective factors for the lower court to consider before dismissing New York Indian land claims:

> [T]he equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury.

Oneida III, 617 F.3d at 127. The equitable defenses available to defendants in New York Indian land claims are new, and likely inapplicable in all other contexts. As this court wrote in *Oneida III*:

> We have used the term "laches" here, as did the district court and this Court in *Cayuga*, as a convenient shorthand for the equitable principles at stake in this case, but the term is somewhat imprecise for the purpose of describing those principles. As *Cayuga* recognized, "[o]ne of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable in other areas do not translate neatly to these claims."

Id. (citations omitted). Those factors may or may not be present in the Onondaga Nation case.

The inherent complexity of the defenses, coupled with the unique histories of the Onondaga Nation and local communities at issue, compel the development of a factual record. While this court stated that the determination of whether Indian tribes were justified in their delays in bringing land claims is no longer relevant, *see id.* at 127-28, the other factors still require the district court to make relevant findings of fact.

To dismiss the Onondaga Nation's claims without allowing the Nation to develop a factual record to combat the equitable defenses constitutes a basic and fundamental inequity. The Supreme Court's case law provides ample evidence that those presenting equitable defenses must first *prove* the facts that give rise to the defense. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-2 (2002) ("*this defense requires proof* of … (2) prejudice to the party asserting the defense") (emphasis added) (quoting *Kansas v. Colorado*, 514 U.S. 673, 687 (1985)); *New Jersey v. New York*, 523 U.S. 767 (1998); *Costello v. United States*, 365 U.S. 265 (1961); *Bowman v. Wathen*, 42 U.S. (1 How.) 189, 195 (1843).

In addition to being a fact-heavy, case-specific inquiry, as equity jurisprudence is distinguished by "[f]lexibility rather than rigidity," *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), equitable defenses must serve "[t]he essence of equity jurisdiction." *Id.* In essence, "the power of the Chancellor [is] to do equity and *to mould each decree to the necessities of the particular case*." *Id.* (emphasis added).

"The traditional function of equity has been to arrive at a 'nice adjustment and reconciliation,'" one that "'balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding'" of particular relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Hecht* and *Yakus v. United States*, 321 U.S. 414, 440 (1944)). Equitable discretion is to follow "a principle of balancing various ethical and hardship considerations." DAN B. DOBBS, 1 LAW OF REMEDIES 91 (2d ed. 1993). To have claims "equitably barred on their face," *Onondaga Nation*, No. 05-0314, slip op. at 14, is to deny this flexibility and reconciliation and fundamentally upsets the character of equity jurisprudence. *Cf.* 1 LAW OF REMEDIES at 151 ("When chancellors invoked discretion, it was to deny remedies, not to foreclose rights. If a judge in the merged court system were to deny all remedies in her discretion, she would in effect deny all rights.").

To use equity jurisprudence to close the court room doors to all New York Indian land claims runs counter to this foundational understanding of equitable jurisprudence. The historical underpinning of equitable jurisprudence was to provide a forum for claims that could not be heard in the court of common law. SAMUEL R. GARDINER, 3 HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR, 1603-1642, at 10 (1965) ("A custom had gradually arisen of seeking redress in Chancery, in cases where the Common Law courts had failed to do justice on account of the strictness of the rules which they had laid down for their guidance."). Moreover, the new defense used by the district court takes no account of the potential wrongdoing on the part of defendants, and bars all

balancing of equities. *Onondaga Nation*, No. 05-0314, slip op. at 15 ("Given this mandatory basis for dismissing Plaintiff's claims, discovery and further development of the record would be inappropriate and superfluous."). Instead, as this court has held, the defense applies to "all claims [a court views as] 'disruptive,' a category which includes those premised on the assertion of a continuing possessory interest in the subject lands . . . " *Oneida III*, 617 F.3d at 140.

The creation of an "equitable" rule that eliminates an entire claim without considering the inequity of denying relief, without even considering the type of relief requested, turns equity into a "'nuclear weapon' of the law," and is plainly impermissible. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). As Judge Learned Hand wrote, "It is, of course, true that equity will at times affirmatively restore the status quo ante pending the suit. But never, so far as I know, will it take jurisdiction over a legal claim merely to hurry it along by granting final relief at the outset of the cause." *Sims v. Stuart,* 291 F. 707, 708 (D.C.N.Y. 1922) (citations omitted).

This court should hold that the district court reliance upon subjective equitable factors such as "settled" and "societal expectations" without the development of a factual record is reversible error. *See Onondaga Nation*, No. 05-0314, slip op. at 14 ("The claim itself, and the question of what remedy might be fashioned, would thus pose have [sic] serious implications for the settled expectations of private land owners, municipalities and New York State.") (citing *Oneida III*, 617 F.2d at 127 ("societal expectations")). The lower court's dismissal of

the Onondaga claims without an opportunity to distinguish its case from the *Cayuga* and *Oneida* claims recalls Judge Hand's dictum about "hurr[ying a legal claim] along by granting final relief at the outset of the cause." *Sims*, 291 F. at 708. Regardless of the unique aspects of federal Indian law, this use of an "equitable" defense to dismiss a claim prior to any development of the record is contrary to all notions of equity and fair play.

For the foregoing reasons, the decision of the District Court should be reversed.

Dated March 6, 2012

Respectfully submitted,

/s/ Matthew L.M. Fletcher

Matthew L.M. Fletcher
Indigenous Law and Policy Center
Admission Date: February 29, 2012
Michigan State University
College of Law Room 405
648 N. Shaw Lane
East Lansing, MI 48824
Tel: (517) 432-6909
E-mail: matthew.fletcher@law.msu.edu

PROOF OF SERVICE

The undersigned certifies that on March 6, 2012, he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

/s/ Matthew L.M. Fletcher

Matthew L.M. Fletcher
Indigenous Law and Policy Center
Admission Date: February 29, 2012
Michigan State University
College of Law Room 405
648 N. Shaw Lane
East Lansing, MI 48824
Tel: (517) 432-6909
E-mail: matthew.fletcher@law.msu.edu