10-3115-cv

United States Court of Appeals for the Second Circuit

CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,
by Lawrence Francis, Chief, and LLOYD BENEDICT, MIKE MITCHELL,
BRUCE ROUDPOINT, JOE JACOBS, JOHN OAKES,
ANGUS BONAPARTE, JR., DAVID BENEDICT,

Plaintiffs-Counter-Defendants-Appellees,

ST. REGIS MOHAWK TRIBE, by The St. Regis Mohawk Tribal Council,
PEOPLE OF THE LONGHOUSE AT AKWESASNE, by the Mohawk Nation
Council of Chiefs,

Plaintiffs-Consolidated-Plaintiffs-Counter-Defendants-Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Plaintiff-Counter-Defendant-Appellee,

(Continuation of Caption on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE ST. REGIS MOHAWK TRIBE

MARSHA K. SCHMIDT
Hobbs, Straus Dean & Walker, LLP
2120 L Street, N.W. Suite 700
Washington, D.C. 20037
(202) 822-8282
Attorney for Appellee St. Regis Mohawk Tribe

JEROME COOK, BASIL COOK, CHERYL ROURKE, PATRICIA PHILLIPS, DEBRA THOMAS, SARAH DAVID, CAROLINE DAY,

Plaintiffs,

– v. –

TOWN OF BOMBAY, NY, COUNTY OF FRANKLIN, NY,

Defendants-Intervenor-Defendants-Counter-Claimants-Appellants,

PAUL PERRYON, HELGA PERRYON, EVA L. KLEINERT, FARMER NATIONAL BANK, NATIONWIDE MUTUAL INSURANCE COMPANY, MARINE MIDLAND PROPERTIES CORPORATION, WALSH REALTY CORPORATION, MARIO CUOMO, as Governor of the State of New York,

Defendants-Intervenor-Defendants,

STATE OF NEW YORK, CANADIAN NATIONAL RAILWAYS, NIAGARA MOHAWK POWER CORPORATION, TOWN OF MASSENA, NY, VILLAGE OF MASSENA, NY, FORT COVINGTON, NEW YORK, TOWN AND VILLAGE, COUNTY OF ST. LAWRENCE, NY,

Defendants-Intervenor-Defendants-Counter-Claimants,

POWER AUTHORITY OF THE STATE OF NEW YORK,

Defendant-Consolidated-Defendant-Counter-Claimant,

KEY BANK OF NORTH NEW YORK, N.A.,

Defendant-Consolidated-Defendant-Intervenor-Defendant,

WILLIAM J. BROCKWAY, LORETTA BROCKWAY, JAMES CHAPMAN, MARY CHAPMAN, ROBERT CHAPMAN, BURTON CHAPMAN, PAUL COMPEAU, CATHERINE COMPEAU, REAL C. COUPAL, THELMA B. COUPAL, HARRY GROW, LAURENT HEBERT, VINCENT JERRY, DANIEL JERRY, ERNEST L. JOCK, CARRIE JOCK, ALPHA LATRAY, DUANE STEWART, KAY STEWART, THOMAS TORREY, ELOISE TORREY,

Consolidated-Defendants-Intervenor-Defendants.

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JURISDICTIONAL STATEMENT

The Appellee St. Regis Mohawk Tribe files its own statement of jurisdiction in this case. According to FRAP 28 (a)(4)(B), the Appellants are required to set forth not only the statutory basis for this Court's jurisdiction but also provide any facts to support such assertion. In citing to 28 U.S.C. § 1292(a)(1), the Appellants rely on this Court's authority to review an interlocutory order from denial of an injunction. However, the Appellants are appealing from the denial of a request for an emergency temporary restraining order. *See* Joint Appendix at A 55, Dkt. 508, (listing motion for emergency TRO) and A 181 (request for temporary restraining order denied). Therefore, this Court does not have jurisdiction over this interlocutory order and Appellants have otherwise failed to provide the basis upon which this Court would have jurisdiction.

ISSUES PRESENTED

1. Whether the District Court abused its discretion when it denied the request for an injunction under the All Writs Act, 28 U.S.C. § 1651(a), when: (1) the Appellants failed to establish that the actions of the non-parties sought to be enjoined threatened the court's ability to reach and resolve the case before it or to enforce its (future) decision or judgment in the case; (2) the injunction would pertain to one defendant and one discrete piece of property; (3) a motion for

judgment on the pleadings filed by the Appellants would end this court's jurisdiction; and (4) the state court is available as an alternative remedy.

ANSWER: The district court has full discretion to determine whether to issue an order under the All Writs Act and the court did not abuse its discretion in finding that the Appellants failed to establish that the actions of the non-parties threatened the court's authority.

STATEMENT OF THE CASE

The Appellants, County of Franklin, Town of Bombay and the Class of Individual Property Owners are among the defendants[1] in the Indian land claim filed in the federal district court by the Plaintiff-Appellees St. Regis Mohawk Tribe ("the Tribe"), Mohawk Nation Council of Chiefs, the Mohawk Council of Akwesasne,[2] and the United States. This consolidated lawsuit, filed against the State of New York and other Defendants has been pending since 1982. The Mohawks claim that the State of New York and other Defendants violated the Nonintercourse Act, 25 U.S.C. § 177, by purchasing Mohawk land without federal

[1] The caption reflects the entire array of Defendants. However, the All Writs Act motion was filed by only the following Defendants: County of Franklin, Town of Bombay, and Defendant Class of Individual Property Owners. As noted below, this motion actually only pertains to one member of the Class.

[2] For ease of reference: The St. Regis Mohawk Tribe will be referred to as "the Tribe." The Mohawk Council of Akwesasne, which was titled the Canadian St. Regis Band of Mohawks at the time the complaint was originally filed, will be referred to as "MCA" or "the Canadian Tribe." The People of the Longhouse, who are now called the Mohawk Nation Council of Chiefs, will be referred to as "the Nation." Collectively this group will be referred to as "the Mohawks."

approval as required by law. The record owner of property in question, Horst Wuersching ("Wuersching") is an individual defendant in the land owner class. Thus, whether Wuersching has valid title to this property is being challenged in the land claim case. The rest of the Appellants, including the Town of Bombay and Franklin County ("Local Governments"), are named defendants in the lawsuit. However, they have no claimed ownership interest in the subject property.

On November 6, 2006 all of the land claim Defendants, including the State of New York, filed a Motion for Judgment on the Pleadings under Fed. R. Civ. Pro 12(c), asking the district court to dismiss the Plaintiffs' claims. A 48, Dkt. No. 449 ("motion to dismiss" herein). After extensive briefing, on September 12, 2007, the Defendants requested a stay of the proceedings pending this Court's ruling in *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) *cert. denied*, 132 S. Ct. 452 (2011). A 53, Dkt. No. 490. The district court granted that stay request on May 19, 2008. A 55, Dkt. No. 504.

While that stay was in place, the Appellants filed a motion under the All Writs Act asking the district court to issue an order to show cause and a TRO against non-parties who entered onto the Wuersching's land. Because the relief sought was a restraining order against third parties, the Appellants relied on the All Writs Act, 28 U.S.C. § 1651(a), rather than under Rule 65 of the Federal Rules of Civil Procedure. The briefing of the motion was completed April 1, 2009. The

non-parties were not served any of the briefing, or the notice of motion, and were unaware of the proceedings against them. A 148.

Not having been granted immediate relief by the district court, on July 1, 2009, Wuersching filed a petition to recover real property in state court seeking an order of eviction. The State Court granted the warrant of eviction on July 14, 2009. A 171. However, the Sheriff declined to serve the order based on his own policy of not serving orders in the land claim area. A 172. Wuersching did not seek further state court relief to have the warrant served.

On March 4, 2010, the Magistrate Judge issued a Report-Recommendation on the All Writs Act motion. A 175. Applying the standard under the All Writs Act, the Magistrate found that the Appellants had not established the facts necessary to justify issuing a temporary restraining order under the All Writs Act. Specifically, the Magistrate held that even if the encroachment of the non-parties on the property was more than *de minimis*, the Appellants had failed to establish that the court's jurisdiction was threatened or that the actions of the non-parties rose to such a level that they threatened the ability of the federal district court to effectuate future decisions or to render judgment. A 179. Citing to the action in State court, the Magistrate also denied the requested relief on the separate ground that there was an alternative remedy available. A 180.

On May 13, 2010, Judge McCurn accepted and adopted the Magistrate's recommended decision. A 183. The Appellants filed a motion for reconsideration claiming new facts. On July 12, 2010, that motion was also denied. A 191. The Appellants then appealed.

As a result of the CAMP conference on October 19, 2010, the Appellants filed a stipulation to withdraw the appeal under Local Rule 42.1, in order to determine if federal mediation could resolve the dispute without the need for court intervention. This Court ordered the case withdrawn on October 28, 2010. Document 42. The federal mediator did meet with both sides but was unable to reach any agreement. Thereafter, the Appellants filed a notice to reinstate their appeal, which this Court so ordered on September 13, 2011.

During this period of withdrawal, on November 19, 2010, the stay of the land claim case was lifted. The parties completed the briefing before the district court of the Defendants' motion for judgment on the pleadings. Oral argument was held on June 17, 2011. The issue has now been submitted to the Magistrate Judge for a recommended decision and has been pending for seven months.

STATEMENT OF FACTS

The property at issue is located in the original boundaries of the federal reservation set aside by the Treaty with the Seven Nations of Canada, 7 Stat. 55 (1796). More specifically, the property is located in a disputed land claim area

known as the Hogansburg Triangle, a large 2,000-acre area and which is adjacent to the St. Regis Mohawk Tribe's undisputed 14,000 acre federal reservation. The Triangle is overwhelmingly populated by Mohawks. *See* A 75.[3] Much of the land in the Triangle that is owned by non-Indians either stands abandoned or is vacant, as is true of the Wuersching property. *Id.*

The Mohawk land claim was initially filed almost 30 years ago in 1982. The land claim asserts that individual land owners, like Wuersching, do not hold valid title since that claim to ownership is based on an illegal purchase of land from the Mohawks by the State of New York. The parties have also tried for many years to settle this claim. After a settlement was reached with the State and other parties in 2005, which would have resolved title issues as well as jurisdiction and taxes, the Local Governments changed their position and withdrew, deciding to pursue litigation. A 111-113.

Thus, over the years, the Mohawk community has watched with increasing frustration as their claims go unresolved. *Id.* It is within this context that the non-parties appear to have acted. A 114-115.

Notably, during this long period of time, land has been bought and sold by Indian and non-Indians alike, and any disputes in the land claim area have been

[3] This is a map that is was presented by the Plaintiffs' as an exhibit in the Rule 12(c) briefing below to show land ownership patterns in the Triangle. The Appellants used it in their All Writs motion to depict the reservation and land claim areas.

dealt with on a local level. This is the first time that a dispute between private parties regarding property located in a land claim area has been brought to the federal court. These individuals are not acting on behalf of, or as representatives of, the Tribe or any other Appellees and regardless of the arguments of the non-parties as to why they are entitled to "occupy" the property, at most, this is a trespass dispute between a private, non-Indian landowner who holds a deed to land in the land claim area, and individual Mohawks who, acting as private citizens, have moved on to the vacant land to assert longstanding Mohawk ownership rights.

Initially, Wuersching sought the assistance of the State Police on the ground that the matter was criminal and not civil in nature. A 118-120. Wuersching's attorney told the State Police that obtaining an eviction order would be a waste of time since the sheriff would not serve it. A 120. The State Police offered no help and Wuersching sought the assistance of the Tribe, requesting that the Tribe buy the land. A 120. The Tribe declined and also would not agree to have its police force take action. Throughout this initial time period, based on the assessment of the Wuersching's attorney that seeking relief in state court would be futile, Wuersching made no effort to go directly to state court. At this time, it also appears that the Local Governments were not involved.

In response to the trespass and in the face of getting no help from the state authorities, the Appellants filed the request for TRO in the land claim case under

the authority of the All Writs Act. At the time of the initial filing, the non-parties had planted flags, brought in a bulldozer to dig a road, and cut down some trees. A 69.

Even though nearly three years have passed since the initial trespass, very little further activity has taken place on this vacant 238-acre parcel. Of that acreage, the non-parties are occupying very little of the land. A 148. While the non-parties have taken some steps to assert their ownership claims, the record does not show that there has been any activity that could permanently injure the land. The Appellants have not offered any evidence of full scale development of the property despite threats by the non-parties to do so.

While the TRO request was pending in federal court, Wuersching finally sought relief in state court and obtained an order of eviction. However, the local sheriff declined to serve the writ. A 172. Wuersching decided not to pursue that matter further in state court, presumably based on his attorney's prediction that the state court would not order the sheriff to proceed. A 119-120.

Separately, the district court declined to issue the TRO and an interlocutory appeal was filed. However, the appeal was withdrawn without prejudice to reinstatement pending an effort by the federal mediator to resolve the situation. Second Circuit Docket, Document Nos. 35, 41, 43, 44, 49-50, 53, 54, 60-61, 66-68, 73-74. No resolution was reached.

In November 2011, after the filing of the Appellants' Opening Brief ("Opening Brief") in this appeal, the local district attorney obtained an indictment for second degree grand larceny against Roger Jock, one of the non-parties trespassing on the property. The local district attorney has stated his intention to pursue the charges against this non-party and if possible to end the trespass. According to press reports, Mr. Jock is scheduled to return to court Jan. 19, all motions must be submitted by Jan. 23 and a plea must be submitted by March 8, 2012. *See* Gardner, A., Jock Out Under Supervision After Land Takeover Arrest, http://www.mpcourier.com/article/20111210/DCO01/312109977 (accessed on January 11, 2012).

SUMMARY OF ARGUMENT

The Tribe asserts three preliminary procedural issues. First, adopting the argument of the United States, this court has no jurisdiction over this appeal since this is an appeal from the denial of a request for TRO.

Second, neither the Local Governments nor the Defendant Class of Land Owners have established standing to request injunctive relief. Aside from Wuersching, none have shown an ownership interest in the land and the actions of the non-parties are not causing them injury. Absent a showing of standing, their appeal should be dismissed. That only the individual Defendant (Wuersching) would benefit from the order sought is also relevant in determining whether the

lower court abused its discretion in denying the order. The limited scope of the dispute suggests the lower court correctly assessed whether its authority would be impacted.

Third, the Appellants have asked this court to reverse and remand to the lower court, presumably with the result that an injunction would issue. Given the pendency of the motion for judgment on the pleadings filed by all of the Defendants, and which was submitted for decision seven months ago, this motion and appeal could be mooted. If the lower court decides to dismiss the land claim, any relief that might be offered by this Court would have no effect since the lower court would have no jurisdiction to issue an interim order. Because of this possibility, this Court should consider whether this appeal will be rendered moot.

Substantively, the district court correctly concluded that its ability to enforce any future orders or to otherwise exercise jurisdiction over the subject property in the Mohawk land claim were not threatened or jeopardized by the trespass of individuals onto the property. Wuersching sought alternative relief in the state court and obtained a writ of eviction. Relying on a so-called "policy" of not serving orders in the land claim area, the sheriff refused to serve the eviction order. Unilaterally concluding that the state court would not order the sheriff to act, Wuersching declined to pursue further remedies in state court. Instead, the Appellants have sought federal court intervention into what is no more than a

trespass, and which can be addressed by local authorities. As evidence that alternative options are available, one of the non-parties has now been indicted by a grand jury for grand larceny.

This kind of illegal activity in no way impairs the federal district court's authority to order any and all remedies in the land claim, including removal of these non-parties as part of any judgment. As the Magistrate noted, "If the Court has the authority now to enjoin the Non-Parties conduct, as the moving Defendants acknowledge by seeking the requested relief, then the Court presumably will have that same authority in the future when it renders judgment." A 180.

STANDARD OF REVIEW

The Appellants moved for a TRO under the All-Writs Act. Contrary to their assertion, injunctions issued under the All-Writs Act are governed by different standards than injunctions issued under Fed.R.Civ.P. 65, because such injunctions "stem from very different concerns than those motivating preliminary injunctions governed by Fed.R.Civ.P. 65." *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985). Injunctions issued under Rule 65 are intended to preserve the status quo between parties who are awaiting a decision on the merits of their case. Injunctions issued under the All-Writs Act are designed to prevent third parties from thwarting a federal court's ability to "reach and resolve the merits of a federal suit before it." *Id.* at 338–39.

A court's authority to act under the All Writ's Act is discretionary. "Once jurisdiction is properly vested in a federal court on some independent basis, the Act empowers that court to enter such orders as it deems necessary, in its discretion, to preserve and protect its jurisdiction. It must be emphasized that the Act, even if found to be applicable here, is entirely permissive in nature; it in no way mandates a particular result or the entry of a particular order. It is addressed to the discretionary power of the court." *Application of the U.S. in the Matter of Order Authorizing Use of a Pen Register*, 538 F.2d 956, 961 (2d Cir. 1976), *rev'd on other grounds*, 434 U.S. 159 (1977). Thus, the lower court's action is reviewed under the abuse of discretion standard. *Spring Spectrum L.P., v. Mills*, 283 F.3d 404, 414 (2d Cir. 2002); *Ass'n for Retarded Citizens of Connecticut, Inc. v. Thorne*, 30 F.3d 367, 369 (2d Cir. 1994).

Relying on a comment by the District Court Judge that the Magistrate's ruling was not based on facts, the Appellants suggest that the decision is subject to plenary review because the district court's ruling rests solely on the interpretation of applicable law. Opening Brief at 8. To the contrary, the record shows that the Appellants requested reconsideration on the ground that new facts proved the intrusion was more than *de minimis*. Judge McCurn noted that the Magistrate's recommendation was based on grounds independent of his conclusion that the intrusion was *de minimis*. In so noting, Judge McCurn was referring to the

Magistrate's holding that even if the intrusion was more than *de minimis*, the Moving Defendants had failed to establish the key fact to obtain an order under the All Writs Act—that the court's authority would be impaired by the actions of the non-parties. Magistrate Lowe stated, "[T]his Court's recommendation would be the same even if the occupation and development were as extensive as the Moving Defendants try to suggest." A 180. The Magistrate went on to hold that the Court would have the same authority in the future as it had at the time of the decision and nothing the Defendants had said changed that conclusion. *Id.* Thus, the focus of the ruling below was not on a question of law. There was agreement about the interpretation of the All Writs Act. The issue was whether the Moving Defendants had met their burden and they had not. As summarized by Magistrate Lowe, "Simply stated, *on the facts presented*, the Court's jurisdiction over the land claim, and its ability to effectuate whatever decision is ultimately rendered, is not threatened." (emphasis added). A 179.

As such the standard of review is abuse of discretion, which may be found only when the district court relies on clearly erroneous findings of fact that an injunction is not necessary or where the court makes an error of law in interpreting the All Writs Act. *Spiegel v. Schulmann*, 604 F.3d 72, 78 (2d. Cir. 2010); *Sheet Metal Contractor's Ass'n of Northern New Jersey v. Sheet Metal Workers Int'l Ass'n*, 157 F.3d 78, 82 (2d Cir. 1998).

ARGUMENT

A. This Court Lacks Jurisdiction Over an Appeal from Denial Of a Request for a Temporary Restraining Order.

The Tribe incorporates by reference herein the argument in the United States' brief, at Section I, regarding this court's lack of jurisdiction over an appeal from the denial of a request for a temporary restraining order.

B. Aside from the Defendant Wuersching, the Appellants Lack Standing to Request the Injunctive Relief Under the All Writs Act.

Upon examination of the record, it is apparent that only Wuersching has clear standing to request this All Writs injunction. The Local Governments have not demonstrated that they can satisfy the elements of standing. The Defendant Class of Land Owners also have no obvious standing.

In this Circuit, the standing requirement is used to "winnow[] out disputes that would be inappropriate for judicial resolution for lack of three constitutionally required elements: (i) an injury in fact (ii) that is fairly traceable to the defendant and (iii) that is likely to be redressed by a favorable decision." *Amador v. Andrews*, 655 F.3d 89, 99-100 (2d Cir. 2011) *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), and *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d Cir. 2004). "Although lack of Article III standing and subject matter jurisdiction are distinct concepts, … Article III standing remains, as we have noted, a limitation on the authority of a federal court

to exercise jurisdiction." *Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n. 6 (2d Cir. 2006)(internal quotations omitted).

The "issue of standing can be raised on motion of a party or even *sua sponte* at any time during the litigation or appeal…" and it must be determined "whether plaintiffs can invoke the power of this Court." *Mancuso v. Consol. Edison Co. of New York*, 130 F. Supp. 2d 584, 588-89 (S.D.N.Y. 2001) *aff'd sub nom. Mancuso v. Consol. Edison Co. of New York, Inc.*, 25 F. App'x 12 (2d Cir. 2002) (emphasis added). *See also Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 107-08 (2d Cir. 1997) ("It is undisputed that the issue of subject matter jurisdiction was never raised before the District Court. This, however, poses no obstacle because … a challenge to subject matter jurisdiction cannot be waived and may be raised … at any time."); *See also*, *Thomas v. City of New York*, 143 F.3d 31, 34 (2d Cir.1998) (noting that because of the "Article III limitations on judicial power ... the [C]ourt can raise [an Article III issue] *sua sponte*, and, indeed, can do so for the first time on appeal.") (internal quotations omitted). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

The request for an order to show cause and a temporary restraining order pertained to an event that occurred in relation to a discreet piece of property located within the land claim area. Thus, the injunction was not geared toward the

entire class of Defendants or the entire land claim area and was not representative of the interests of the Defendants as a whole, but rather of just Mr. Wuersching. Indeed, in the Report-Recommendation Magistrate Judge Lowe correctly identifies this action as a "dispute between the Non-parties and Mr. Wuersching… ." A 180-181, and n. 6.

Because this injunction request was so narrow in it scope and facts, it is not at all clear that the Town of Bombay, the County of Franklin of any other Defendants have standing to request this order. "The party invoking federal jurisdiction bears the burden of establishing these elements. … Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Local Governments have not shown that they personally have been injured. They have no interest in the property as owners and they have not shown that the actions of the non-parties otherwise impact their governmental interests. Despite the Wuersching's request to abate the tax assessment on the property based on the occupation, A 167, the County refused to do so and accordingly has suffered no harm, financial or otherwise. Rather, the Appellants appear to be treating the injury of Wuersching as their own. But, "a named plaintiff cannot acquire standing

… by bringing his action on behalf of others who suffered injury which would … afford[] them standing… it bears repeating that a person cannot predicate standing on injury which he does not share." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) *citing Allee v. Medrano*, 416 U.S. 802, 828-29 (1974). The Town and the County and the rest of those moving for the injunction must demonstrate their own "distinct and palpable injury." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

While we recognize that Wuersching has standing and the dismissal of the other parties may not result in a dismissal of this appeal, the lack of standing of the other Appellants highlights the fact that the denial of the request for injunctive relief was appropriate. The relief requested pertains to one person and one piece of land. The trespass does not impact the local governments, or others in the Defendant class. Given the limited scope of the dispute, it does not amount to a situation which would threaten the lower court's ability to render judgment or to fashion a remedy in the land claim.

C. The Pending Motion May Render this Appeal Moot.

In their statement of the case, the Appellants failed to provide to the Court the context within which this request for All Writs Act relief was made. As explained in our Statement of the Case, all of the Defendants have moved for judgment on the pleadings asking that the land claim be dismissed. The Mohawks

are vigorously opposing this motion. After a stay of proceedings on unrelated grounds, that motion – which has been pending since 2006 – is now under active consideration by the district court.[4] No further stay has been requested. In fact, this appeal and the lower court's consideration of the motion have been proceeding on parallel tracks since November 2010. As a consequence, the district court below could very well be without jurisdiction to grant the relief sought.

Generally, this Court has held that "if an event occurs that renders it impossible for the court to grant any form of effectual relief to plaintiff, the matter becomes moot and subject matter jurisdiction is lost." *In re Flanagan*, 503 F.3d 171, 178 (2d Cir. 2007); *Independence Party of Richmond Cnty. v. Graham*, 413 F.3d 252, 255 (2d Cir. 2005). A dismissal would render this appeal moot. *Case v. St. Paul Fire and Marine Ins. Co.*, 456 F.2d 252, 253 (5th Cir. 1972); *McMurtry v. Aetna Life Ins. Co.*, 273 F.Appx. 758, 759 (10th Cir. 2008)("Mootness arises [when] the underlying litigation is dismissed" and any opinion is such a situation "would be advisory only.")

[4] This interlocutory appeal does not preclude the lower court from continuing to decide other issues in the case unless a stay has been granted. "Congress permits, as an exception to the general rule, an immediate appeal from an interlocutory order that either grants or denies a preliminary injunction. In such case the matter does not leave the district court, but proceeds there on the merits, unless otherwise ordered." *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989)(citing cases); *Compania Espanola de Petroleos, S.A. v. Nereus Shipping*, S.A. 527 F.2d 966, 972-73 (2d Cir. 1975) (filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal).

The Tribe suggests that in assessing the need to grant a remedy, this Court take into account the potential for the lower court to lose jurisdiction, and the position of the Defendants with regard to the merits of this case. Ironically, it is the Appellants who are arguing that the case be dismissed while at the same time invoking the exclusive jurisdiction of the federal court to resolve a trespass issue. Opening Brief at 13. Should the lower court grant the motion to dismiss, the Appellants would have to go to the very forum they seek to avoid. This fact, and the fact that they already have an alternative forum in which to pursue a remedy, necessitates a denial of this appeal.

D. The District Court Correctly Concluded that the Actions of the Non-Parties Did Not Threaten its Jurisdiction.

The application of the All Writs Act to a non-party is appropriate where the non-party is "poised to interfere with the implementation of a prior judicial order," *United States v. Int'l Bhd. of Teamsters*, 266 F.3d 45, 50 (2d Cir. 2001), or to allow the court to reach a decision in a case over which it has jurisdiction. *In re Baldwin*, 770 F.2d 328, 338 (2d Cir. 1985). *See also Sheet Metal Contractors Ass'n of N. New Jersey v. Sheet Metal Workers' Int'l Ass'n.*, 157 F.3d 78 (2d Cir. 1998) (overturning injunction against non-party as abuse of discretion where non-party was not acting in concert with any party to violate existing court order); *See also Ass'n for Retarded Citizens of Connecticut, Inc. v. Thorne*, 30 F.3d 367, 371 (2d Cir. 1994).

The lower court examined these criteria and concluded that the actions of the non-parties would have no impact on the Court's continuing authority over the land, the ability to issue an order in the case, or to fashion an appropriate remedy. The Tribe incorporates by reference herein the argument presented in the brief of the United States, Section II.B, that the injunction was not necessary because the authority of the court was not threatened.

In addition, the Appellants contend that the actions of the non-parties, in effect, constitute self-help because it is giving the Mohawks a remedy that they would not otherwise be able to obtain. Opening Brief at 14-15. There are several assumptions underlying this incorrect contention. First, there is an assumption that the action of the non-parties benefits the Mohawk plaintiffs. But the non-parties are just that—non-parties. They are not acting on behalf of the Plaintiffs and nothing they do can provide a remedy to us. Nor are these non-parties involved in a lawsuit. So they are not obtaining a remedy for any claim of their own. Second, there is an assumption that the district court will never be able to fashion a remedy that will protect Wuersching. But as the lower court concluded, if the court has the power currently to issue an injunction or otherwise issue an order against these non-parties, that same authority will exist later (until and unless the court grants judgment on the pleadings). Third, Wuersching has an alternative remedy--state court, including civil, and now criminal enforcement. The availability of an

alternative remedy is key. The lower court recognized that without exercising discretion in addressing private disputes, the land claim could be swallowed up by micromanaging such disputes in the land claim area.[5]

The All Writs Act provides no authority to issue injunctive relief where alternative remedies are available. *Clinton v. Goldsmith*, 526 U.S. 529, 537-540 (1999) (overturning injunction and holding that availability of remedies in various judicial and administrative fora precluded court action pursuant to the All Writs Act). *See also* 19-201 Moore's Federal Practice – Civil § 201.40 (3d ed. 2011) ("[A] writ may not be used . . . when another method of review will suffice."). [6] The Tribe incorporates by reference herein the arguments of the United States, Section II.C, regarding the availability of an alternative remedy.

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[5] For example, the Appellants brought forth an affidavit from National Grid, a utility company, which stated a concern with having access to the property. A 125. But, as the Tribe pointed out, A 147-149, there was no evidence that any imminent threat existed. Moreover, the utility had taken no steps to determine if access would even be denied. It is essential that these sorts of disputes be solved locally in order to avoid an escalation of conflict as well as to prevent continuous litigation over matters that could be solved informally.

[6] The Defendants argue incorrectly that the federal court has exclusive jurisdiction over this controversy citing to 25 U.S.C. § 233. Opening Brief at 13. Section 233 and the parallel criminal provision 25 U.S.C. § 232, define the extent of New York state court jurisdiction over causes of actions involving Indians. Section 233 precludes state court jurisdiction over any claim to Indian land which relates to events "transpiring prior to" September 13, 1952. The Appellants posit that Section 233 prohibits the state court from exercising jurisdiction over a land claim and that surely these non-parties are making a land claim based on events transpiring hundreds of years ago. On this point the Appellants are once again inconsistent. First, in their motion for judgment on the pleadings, they deny these are Indian lands. Second, the state court has already exercised jurisdiction over Wuersching's petition for eviction and is now acting on the criminal matter. We note that Section 233 does not necessarily apply to any dispute over individual parcels within the land claim area simply because individual Indian people are involved in the dispute. Only tribes may bring land claims. 25 U.S.C. § 177.

The Appellants claim that the case of *St. Regis Dev. Corp. v. Nemier*, 166 A.D.2d 861, 563 N.Y.S.2d 189 (3d Dept. 1990), clearly established that the state court would uphold the sheriff's refusal to serve the eviction warrant. Opening Brief at 16. But that cannot be known since Wuersching failed to seek this remedy. In *Nemier*, the sheriff had the burden of establishing that mandamus should not issue to force him to serve a warrant. The sheriff did so, establishing that, in 1982, the reservation was facing mass unrest, with armed Mohawks, burned buildings, riots, a police action onto the reservation, and deaths. 166 A.D.2d at 862, 563 N.Y.S.2d at 190.

There was no such situation here, nor even a possibility that the *Nemier* analysis would apply. The Appellants presented no evidence of the non-parties being armed or that there was tension on the reservation that would result in violence in the same manner as justified the sheriff's action in *Nemier*. On the Motion for Reconsideration, the Appellants offered a letter from the Franklin County District Attorney which stated the "trespassers … are considered armed and dangerous." A 190. As the Tribe pointed out in its response, Supplement to Joint Appendix,[7] the District Attorney presented no evidence supporting this conclusion, such as who "considered" these non-parties armed and dangerous.

[7] Contrary to the mandate of FRAP 30(b)(1), the Tribe was not consulted by Appellants regarding the content of the "Joint" Appendix prior to its being submitted to the Court and thus we were given no opportunity to comment on its contents or to request that additional materials

The fact is that Wuersching and his attorney unilaterally concluded that the state court would uphold the sheriff's refusal to serve the warrant without considering that the sheriff would have to show that his exercise of discretion was justified in the circumstances. The Appellants cannot be permitted to determine in theory whether they have an alternative remedy by forecasting what a court might do. If that were the case, then the restriction on the All Writs Act injunction would be meaningless.

The district court was not convinced that Wuersching had made the case that state court was not a viable alternative. Correctly so. As it turns out, a remedy was available despite *Nemier*. One of the non-parties was indicted on criminal charges (see discussion above) having been served a warrant by the St. Regis Tribal Police. Thereafter no violence ensued, thus disproving that the same situation as existed in *Nemier* would have occurred again had the Sheriff served the eviction warrant.

CONCLUSION

For these reasons, the Court should deny the appeal and affirm the court's denial of the injunction.

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be included. While we sought a correction, given that the appendix has already been submitted and paginated, the Tribe concluded it would be most efficient to attach the document that was omitted in an addendum hereto and to be considered a supplement to the appendix. The omitted document, *Letter from Marsha K. Schmidt to the Honorable Neil P.McCurn* dated May 28, 2010, Dkt. No. 534, A 58, addresses disputed facts (similar in content to Schmidt Letters already in the Joint Appendix at A 111 and A 147).

DATED**:** January 23, 2012

s/ Marsha K. Schmidt

MARSHA K. SCHMIDT
Hobbs, Straus Dean & Walker, LLP
2120 L Street, N.W. Suite 700
Washington, D.C. 20037
(202) 822-8282
Attorney for St. Regis Mohawk Tribe

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that this brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,805 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6)(B) this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point font in the Times New Roman style.

s/ Marsha K. Schmidt
MARSHA K. SCHMIDT
Hobbs, Straus Dean & Walker, LLP
2120 L Street, N.W. Suite 700
Washington, D.C. 20037
(202) 822-8282
Attorney for Appellee St. Regis Mohawk Tribe

Dated: January 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012, I 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. I certify that all participants in the case are registered CM/ECF users and that service will accomplished by the appellate CM/ECF system.

s/ Marsha K. Schmidt
MARSHA K. SCHMIDT
Hobbs, Straus Dean & Walker, LLP
2120 L Street, N.W. Suite 700
Washington, D.C. 20037
(202) 822-8282
Attorney for Appellee St. Regis Mohawk Tribe

Supplement to Joint Appendix

Letter from Marsha K. Schmidt to the Honorable Neil P.McCurn dated May 28, 2010, Dkt. No. 534, A 58.

HOBBS STRAUS DEAN & WALKER

2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

May 28, 2010

The Honorable Neil P. McCurn
Senior Judge
United States District Court
Northern District of New York
100 South Clinton Street
P.O. Box 7346
Syracuse, NY 13261-7346

Re: Statement of the St. Regis Mohawk Tribe Regarding the Motion for Reconsideration Filed By Defendants in Canadian St. Regis Band of Mohawk Indians v. State of New York, et al., 82-CV-783; 82-CV-1114; 89-CV-829

Dear Judge McCurn:

The Plaintiff St. Regis Mohawk Tribe hereby files a short statement regarding Defendants Franklin County, Town of Bombay, and Mr. Wuersching's continuing request for a TRO against the individuals who are allegedly in occupation of property in the land claim area. These third parties are not representatives of the Tribe and the Tribe does not purport to represent their interests. But the Tribe does believe that it is useful for the Court to have its views on the requested TRO, the request for reconsideration, and the latest supplemental filings.

From the Tribe's perspective, the most important fact in this case is that the Defendants have already obtained a warrant of eviction from a State court that was issued on July 14, 2009. See Recommended Order, p. 9. See also, Dkt. #521, p. 6. As Magistrate Judge Lowe found, this eviction order gives the Defendants "virtually all of the relief" that they are seeking. The issue for the Defendants then is not that they cannot obtain relief from a court because they have. The real problem is that the Sheriff has not served the order. So the Defendants have come to this court seeking a similar order and presumably, hoping that this order would be served.

This raises two points. First, if the Sheriff will not act, this is a matter for the State court to address. The State court has exercised jurisdiction but apparently its orders are not being carried out. If true, the Defendants need to take this issue to the State court that issued the order. We agree that enforceability may be a problem since another State court facing a similar enforcement matter concluded that the Sheriff has the discretion on how or whether to proceed. *See St. Regis Mohawk Development Corp. v. Nemier,* 563

N.Y.S.2d 189 (3d Dept. 1990). Even so, the Defendants' request amounts to forum shopping. They have not sought any further relief from the State court and it is not known how that court might respond to the Sheriff's position. They still have this option and they should be required to see it through. Instead, the Defendants seek a new order from this court raising duplication and comity questions.[1]

This brings us to the second and more important issue for the Tribe—enforcement. The Defendants have filed with the court a statement by the local district attorney, which alleges that those on the property are armed and dangerous, with no evidence whatsoever that this is the case. This statement is not only not helpful, it is irresponsible and inflammatory and it could cause an unnecessary escalation in force to respond to this situation

The District Attorney does not explain how he came to his "armed and dangerous" conclusion. There are no eyewitness accounts of firearms. There are no photographs. The only evidence in the record regarding potential violence is a statement by Brian Stewart that his tire was slashed when he met with the group and that one of the men on the property told him he could not vouch for his safety. Indeed, the area has been so quiet that the Sheriff believed it to be abandoned. Thus, the District Attorney's letter should be given no weight.

The Defendants tried similar scare tactics in an earlier briefing regarding access to electrical utilities. The Tribe filed a letter with the court on March 29, 2009 that addressed this concern. Having met with the group on the property, the Tribe reported that the group would be fully cooperative and that no one from National Grid would be threatened.

The Tribe does not wish to see a confrontation within its territory and it is concerned that this sort of alarmist statement can result in an escalation of force to serve a

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[1] The Defendants claim the State court had no jurisdiction to issue the order, but they are the ones that sought relief there. The Tribe does not concede state court jurisdiction over its reservation lands including this area, except to the extent defined by federal law. However, the Tribe is not party to that eviction action. It may be that if the state order were served, these third parties would challenge the order on the ground of lack of court jurisdiction under § 233. (The Defendants make no mention of 25 U.S.C. § 232, which is the parallel criminal jurisdiction statute.) But until the State court concludes that it has no jurisdiction, or until it is willing to relinquish its authority and jurisdiction to the federal court, it seems that the Defendants have chosen their forum and they have to see it through to the end. This includes seeking an order for the Sheriff to act if necessary, and defense of the court's jurisdiction if a jurisdictional motion is filed. If a state court finds it is within the Sheriff's discretion to not serve an eviction order then that should end the matter.

court order.[2] If this court were to issue its own order, it is unclear whether or how that order would be served and the district attorney's statement suggests that officials may assume force would be necessary to do so.

The Tribe's view is that this matter needs to be solved in a non-confrontational way but the Defendants have made only half-hearted efforts to do so. The State has been noticeably absent in offering any assistance with resolution. There was a federal mediator who had made some contacts but the Defendants relied on a third party to pursue that option and now appear to have let that effort lapse. This should be the first option. The persistent pursuit of a court order in this case will not likely lead to the resolution of this matter. Certainly, the Tribe would oppose any effort by State or Federal officials to enforce a court order in a way that is based on an assumption that the parties on the land are armed and dangerous.

Respectfully submitted,

/s/_____
Marsha K. Schmidt
Counsel of Record for Plaintiff
St. Regis Mohawk Tribe

Cc: All counsel per ECF System

[2] The Sheriff has wisely sought to avoid confrontation in serving the state court eviction notice and according to the record, the State Police have also been unwilling to take steps that may cause unnecessary conflict.