UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BERGAL MITCHELL III,

Plaintiff,

v. Case No.: 12cv0119

SENECA NATION OF INDIANS, et al.

Defendants.

PLAINTIFF BERGAL MITCHELL'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Respectfully Submitted,

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INTRODUCTION

Plaintiff Bergal Mitchell (herein "Plaintiff" or "Mitchell") alleges that Defendants violated his *habeas corpus* rights under the Indian Civil Rights Act, 25 U.S.C. § 1303, by passing a Resolution that effectively banishes him from the tribe. The Defendants herein consist of the Seneca Nation of Indians (the "Nation"); sixteen individual defendants who compromise the Nation's Tribal Council; and a individual defendant who is the Nation's President. Those seventeen individual defendants shall be referred to herein, collectively, as the "Tribal Council."

Mitchell's Amended Complaint sets forth, in great detail, the relevant factual history regarding his claim. Those facts will not be repeated herein except in connection with the Argument. In addition, the Resolution referred to herein is the same Resolution referred to in the Amended Complaint.

ARGUMENT

POINT I. Standard of Review on a Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the court should only dismiss a complaint for failure to state a claim upon which relief can be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004). The court must first accept all of Plaintiff's factual allegations to be true before determining whether they plausibly give rise to an entitlement to relief. Novak v. Kasaks, 216 F.3d 300, 305 (2d Cir. 2000).

In addition, the court must "draw all reasonable inferences" in favor of the plaintiff when deciding whether to grant a motion to dismiss a complaint for failure to

state a claim upon which relief can be granted. Selevan v. New York Thruway Authority, 584 F.3d 82, 88 (2d Cir. 2009) (internal citations omitted). Further, the court must not dismiss the case if "factual allegations that are enough to raise a right to relief above the speculative level" have been satisfied. Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010).

As set forth below, the Amended Complaint alleges facts sufficient to allege that Defendants have violated Mitchell's habeas corpus rights by banning him from the tribe. Thus, Defendants' motion should be denied in its entirety.

POINT II. The Nation's Sovereign Immunity Defense

Plaintiff recognizes that in Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 894 (2d Cir. 1996) the Second Circuit determined that the proper defendants in this type of habeas corpus case are the tribal members that issued the order of detention, not the tribe. In light of the Second Circuit's holding on this issue, Plaintiff will only be proceeding with his claim against the Tribal Council, not the Nation. Therefore, the sovereign immunity arguments raised by the Nation will not be addressed, as they are moot.

POINT III. The Amended Complaint alleges, and the Resolution imposes, Sufficiently Severe Potential and Actual Restraints on Mitchell's Liberty to Satisfy the Jurisdictional Prerequisites for Habeas Review.

A writ of habeas corpus is available to a person "to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. "[T]he inquiry into whether a petitioner has satisfied the jurisdictional prerequisites for habeas review requires a court to judge the 'severity' of an actual or potential restraint on liberty." Poodry, 85 F.3d at 894. Here, the Resolution passed by the Tribal Council, and Tribal Council's

enforcement of the Resolution, places both actual and potential restraints on Mitchell's liberty with sufficient severity to state a claim for habeas review.

Within the Second Circuit, there are two seminal decisions that articulate the standards for determining if a tribe's actions are a sufficient restraint on liberty to give rise to a habeas claim under 25 U.S.C. §1303. Those cases are Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996) and Shenandoah v. Halbritter, 159 F.3d 708 (2d Cir. 1998) hereinafter ("Shenandoah I").

In Poodry, the plaintiffs were summarily convicted of treason and banished from the tribe. 85 F.3d at 878. The order of banishment read as follows:

> You are to leave now and never return…..[Y]our name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.

Id. The Second Circuit held that this order of banishment was a sufficient restraint on liberty to warrant a habeas review despite the fact Plaintiffs were never removed from the reservation. Id. at 895.

Two years after deciding Poodry, the Second Circuit dealt with a similar, though less severe, situation in Shenandoah I. In Shenandoah I, the plaintiffs alleged that they:

> [W]ere suspended or terminated from employment positions, lost their 'voice[s]' within the Nation's governing bodies, lost health insurance, were denied admittance into the Nation's health center, lost quarterly distributions paid to all Nation members, were banned from various businesses and recreational facilities such as the casino, Turning Stone park, the gym, and the Bingo Halls, were stricken from the membership rolls, were prohibited from speaking with a few other Nation members, and were not sent mail.

159 F.3d at 714. There, the Second Circuit held that the defendants' alleged conduct did not constitute a severe enough restraint on the plaintiffs' liberties and upheld the lower court's dismissal of the Complaint. Id.

Thus, using Poodry and Shenandoah I as guide-posts, the question before this Court is a simple one: does the Resolution, which is the basis for Plaintiff's Amended Complaint, constitute a sufficiently severe potential or actual restraint on liberty to satisfy the jurisdictional prerequisites for habeas review? Conclusively, the answer is "Yes".

As set forth in the Amended Complaint, in February of 2011, Mitchell was indicted by a federal grand jury for his alleged involvement in the sale of a parcel of land to the Seneca Niagara Falls Gaming Corporation. Mitchell pled not guilty to all charges; denies all of the charges made against him; and, is awaiting his day in court for vindication.

Days after the indictment, the Tribal Council passed the Resolution, which imposes a criminal punishment against Mitchell for the acts complained of in the federal indictment. Thus, without holding a hearing to determine the veracity of the charges against Mitchell, the Tribal Council summarily "convicted" him of fraud and adopted the Resolution, which banishes him from the Nation.

Specifically, the Resolution states: "the Council believes it is in the best interests of the Nation and its members *to hold agents of the Nation accountable for their activities.*" Doc. 10 Exh. A (emphasis added). Thus, unlike the Federal indictment, where Mitchell is presumed innocent until proven guilty, here, the Tribal Council summarily convicted Mitchell of the charges contained in the federal indictment without even the illusion of Due Process.

As punishment for his conviction, the Council prohibited Mitchell "from entering any Nation building or business" except to defend himself in actions against him and to receive federally funded health care services. Doc. 10 Ex. A. Secondly, the Resolution terminates all annuity payments to Mitchell, requiring the same to be held in escrow, until "all civil and criminal matters, pending or *filed in the future*," are resolved. Id. (emphasis added). Third, and perhaps most importantly, the Resolution revokes Mitchell's Seneca Nation business license. Id. Further, under the Resolution, if anyone holding a license issued by the Nation does business with Mitchell, their license will be automatically revoked. Id.

First, under threat of revoking their license, the Resolution prohibits anyone with a Nation issued business license from doing business with Mitchell. As a result, and as alleged in the Amended Complaint, he must seek employment outside the reservation. Similarly, the Resolution effectively prohibits Mitchell from purchasing food, gasoline and other necessities on the reservation. To enforce this provision of the Resolution, the Tribal Council went to the length of sending out notices warning business that any dealings with Mitchell would lose their business license. See, Exhibit B to Amended Complaint.

In addition, the Resolution revokes all business licenses issued to Mitchell; thus, Mitchell was required to close his business. In addition, the Resolution, and subsequent "Emergency Order to Comply/Temporary Shutdown Order" required Mitchell to close his business and stop all his business operations on the reservation. Undoubtedly, this revocation of Mitchell's business licenses was intended to punish him for the acts

complained of in the federal indictment to and further ostracize him from members of the Nation.

The Resolution also prohibits Mitchell from entering Nation owned buildings except to defend himself and to receive federally provided health case. Thus, Mitchell cannot participate in the Nation's governance or seek redress of grievances through the government. In addition, many cultural and social events for the tribe are held at Nation owned buildings, and, because of the Resolution, Mitchell is prohibited from participating in those activities.

Lastly, the resolution suspends Mitchell's annuity payments indefinitely. The termination of the suspension is contingent on all future litigation being resolved, which makes the suspension potentially limitless in time and purposely vague.

These punishments were meant to segregate and ostracize Mitchell from the community and amount to banishment. Like the plaintiffs in Poodry, Mitchell is allowed to stay on the territory but is otherwise deprived of every other privilege and right afforded to other members to the point where it amounts to banishment.

The Second Circuit distinguished Shenandoah I from Poodry by stating "plaintiffs in the instant case have not alleged that they were banished from the Nation, deprived of tribal membership, convicted of any crime, or that defendants attempted in anyway to remove them from Oneida territory." 159 F.3d at 714. Here, as was just explained, the Amended Complaint alleges that the Tribal Council deprived Mitchell of his tribal membership, convicted him of a crime, and banished him from the tribe. Thus, the Resolution when viewed in its totality is closer to that of Poodry than that of Shenandoah I.

In Poodry, the defendants unabashedly revoked the plaintiffs' tribal membership. Here, the Tribal Council has achieved the same result by passing the Resolution, which adroitly strips Mitchell of his Nation privileges without employing the draconian and caustic language used in Poodry. Undoubtedly, the Tribal Council (or more likely its attorneys) were keenly aware of the decision in Poodry and avoided including within the Resolution phrases such as "banishment" and "leave now". Instead, the Tribal Counsel carefully crafted the Resolution so that it banishes Mitchell from the tribe, without using the draconian, caustic language contained in Poodry.

The Resolution places penalties on Mitchell that when viewed individually seem mild in comparison to those in Poodry, but when viewed in totality effectively restrain Mitchell's liberty with a severity equal to that in Poodry. As the court aptly stated in Poodry, "[w]e deal here not with a modest fine or a short suspension of a privilege-found not to satisfy the custody requirement for habeas relief-but with coerced and peremptory deprivation of the petitioner's membership in the tribe and their social and cultural affiliation." 85 F.3d at 895. Here, when the Resolution and its penalties are viewed as a whole, it becomes evident that Mitchell's only remaining right is to reside in the Nation's territory, which is the same right afforded to the plaintiffs in Poodry. As such, Plaintiff's Amended Complaint adequately states a claim for habeas corpus review based upon the Tribal Council's unlawful banishment of Mitchell from the Nation.

POINT IV: Analysis of Remaining Cases Cited by Defendants

Undoubtedly, this motion centers upon Poodry and Shenandoah I. However, Defendants cite to several other cases in support of their motion. In this section, those cases will be briefly addressed and distinguished.

First, Defendants cite to Jeffredo v. Macarro, 599 F.3d 913 (9th Cir. 2010) for the proposition that exclusion from tribal buildings does not give rise to a habeas claim. Their reliance on this case is misplaced. In Jeffredo, the defendants, pursuant to the tribe's disenrollment procedures, disenrolled the plaintiffs after an investigation revealed that the plaintiffs were not lineal decedents from the Pechanga Temecula people, which was a requirement for tribe membership. The plaintiffs brought suit to contest their disenrollment and the Ninth Circuit concluded that Plaintiff could not challenge the disenrollment via a habeas claim. Simply stated, the issues presented in Jeffredo are wholly irrelevant to the issues currently before this Court.

Similarly, Defendants cite to Shenandoah v. Halbritter, 366 F.3d 89 (2d Cir. 2004) ("Shenandoah II"); Ginsberg v. Abrhams, 702 F.2d 48, 49 (2d Cir. 1983); and Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987) for the proposition that simply revoking a business license does not give rise to a habeas corpus claim. While this may be true, Mitchell is not seeking relief based solely upon the revocation of his business license. As explained above, the revocation of his business license is merely one aspect of the severe restrictions placed upon Mitchell by the Resolution.

Finally, Defendants cite to Shenandoah II for the contention that restraints on economic liberties, as a general rule, do not give rise to *habeas* jurisdiction. Again, the

fact that Mitchell cannot do business in the Nation is merely one aspect of his claim, not the entirety of it.

POINT V: **Mitchell is not required to exhaust his administrative remedies and any attempt to do so would be futile.**

In an abundance of caution, the Amended Complaint alleges, at paragraph 50: "***If*** Mitchell is required to exhaust his administrative remedies prior to seeking habeas corpus relief, and such efforts by Mitchell would be futile." (emphasis added). Thus, it is Mitchell's position that he is not required to exhaust his administrative remedies; however, if he were required to do so, any effort would be futile.

First, there is no precedent that requires an Indian plaintiff to exhaust such remedies before commencing a habeas corpus suit. Defendants argue that the Indian Civil Rights Act and 25 U.S.C. § 1303 contain a mandatory exhaustion requirement akin to that found in 28 U.S.C. § 2254(b)(1), which requires a person in state custody to exhaust all state remedies before seeking federal habeas relief. Simply stated, this is not the law, and there is no requirement that a person seeking habeas relief under 25 U.S.C. § 1303 is required to exhaust his administrative remedies.

Secondly, an exhaustion of administrative remedies is not required, particularly when such efforts would be futile. Indeed, the plaintiffs in Poodry were presented with a similar situation where it was "undisputed that no avenue for tribal review of the actions of the members of the Council of Chiefs is available in this case." 85 F.3d at 876. Here, Mitchell is barred from entering the Nation's courts to protect his civil liberties. Thus, like the plaintiffs in Poodry, he has no avenue for tribal review.

Moreover, assuming, *arguendo* that Mitchell were able to challenge the Resolution through the Nation's judicial process, any such efforts would be futile because

the Nation's Supreme Court is comprised of the same people who serve on its Tribal Council. Thus, Mitchell would be asking the Tribal Council (serving in capacity as the Supreme Court) to overturn its own Resolution, which is highly unlikely.

Indeed, there are countless instances where the courts have waived the exhaustion of remedies when such effort would be futile. In U. S. ex rel. Cobell v Cobell, 503 F.2d 790 (9th Cir. 1974), the court stated the fact that "ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of habeas corpus." In Cobell, a member of an Indian tribe failed to request a hearing before a special tribal appellate court before he petitioned for a writ of habeas corpus in federal district court. 503 F.2d at 793. The court stated "The petitioner had no effective remedies available to him in Tribal Court . . . That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies." Id. at 794.

In Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98 (8th Cir. 1976), the court stated "exhaustion of tribal remedies is not an iron-clad requirement." The court reasoned that exhaustion of remedies would have been "a futile gesture and would cause irreparable harm" because the appellees could not receive a fair hearing from the same body who had made the original decision. 534 F.2d at 101.

In St. Marks v. Chippewa-Cree Tribe of Rocky Boy Reservation, Montana, 545 F.2d 1188 (9th Cir. 1976), the court stated in determining if exhaustion of remedies is necessary "we must first ascertain whether any meaningful tribal remedies exist, and, if so, whether exhaustion will in any way serve the purposes for which it is intended." 545 F.2d at 1189. The court in St. Marks, held "[r]esort to the tribal court will not further the

policies behind the exhaustion requirement. That court has already considered the validity of the physical residency requirement." Id.

In the present case, it is abundantly evident that even if an attempt to exhaust tribal remedies were required, which it is not, it would be an act in futility. Just as the court stated in Cobell, the fact that "remedies are available [to Mitchell] in theory, but not in fact, is not synonymous with failure to exhaust remedies." 503 F.2d at 794. The exhaustion of tribal remedies is not required in this case and further would be an exercise in futility; thus a writ of habeas corpus is the proper avenue for redress of Mitchell's claims.

POINT VI: **The Court may not consider the documents attached to Defendant's memorandum as it would be improper and is not allowed.**

"Consideration of a motion to dismiss under FRCP 12(b)(6) is limited to consideration of the complaint itself." Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006). For purposes of this rule, the complaint consists of "any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). Thus, attachments to a motion to dismiss outside the complaint and documents attached thereto generally may not become a basis for dismissal unless several conditions are satisfied. Faulkner, 463 F.3d at 134 (2d Cir. 2006). These conditions include a document "where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint." Chambers, 282 F.3d at153. Further, "even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document. It must also be clear that

there exist no material disputed issues of fact regarding the relevance of the document." *Faulkner,* 463 F.3d at 134 (internal citations omitted).

Here, the documents labeled as the Constitution of the Seneca Nation of Indians of 1848 and the Seneca Nation of Indians Ethics Law that are attached to the Defendant's motion to dismiss are not documents that are heavily relied upon by the Plaintiff's complaint and thus, are not "integral" to the complaint and should not become a basis for dismissal. Thus, the Defendants should not be able to attach the documents to their memorandum of law in support of their motion to dismiss.

CONCLUSION

Based upon the foregoing, it is respectfully requested the Court deny Defendants' motion in its entirety.

Dated: June 28, 2011
Buffalo, New York

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