

No. COA12-493

14th DISTRICT

NORTH CAROLINA COURT OF APPEALS

WILLIAM DAVID CARDEN,)
)
 Plaintiff,)
)
 v.)
)
 OWLE CONSTRUCTION, LLC,)
)
 Defendant.)
)

From Durham County
No. 11 Cvs 05119

DEFENDANT APPELLEE'S BRIEF

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 OF NORTH CAROLINA

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STATEMENT OF THE FACTS

The Defendant provides a brief statement of the facts for the sole purpose of emphasizing undisputed facts relevant to this appeal.

On December 12, 2003, the Plaintiff, as a pedestrian on or near N.C. Highway 19 on the Qualla Boundary Indian Reservation in Cherokee, North Carolina, was injured when struck by an automobile. In December 2003, defendant Owle Construction, LLC ("Owle"), an Indian owned corporation (R p. 29), was constructing a sidewalk adjacent to Highway 19 near the Cherokee Casino under a contract with Harrah's NC Casino Company, LLC. (R p. 8) The Plaintiff filed an action in Durham County Superior Court on or about December 8, 2006 against Harrah's NC Casino

Company, LLC, Harrah's Operating Company, Inc., (collectively, "Harrah's") and Owle, alleging tort liability for injuries sustained in the accident.

On March 12, 2008, Harrah's filed motions in Durham County Superior Court to dismiss the case for lack of subject matter jurisdiction, to dismiss the case for failing to name the Tribal Casino Gaming Enterprise as a necessary party, to remove the case to the Cherokee Court, and to dismiss for failure to state a claim for which relief can be granted. (R p. 10)

On April 19, 2008, a Consent Order filed in Durham County Superior Court directed that the matter be removed to Cherokee Tribal Court¹, (the "Cherokee Court"), and the case was transferred to the Cherokee Court. (R p. 11, 28)

In November, 2009, the Cherokee Court conducted a multi-week jury trial that resulted in a mistrial. Following the mistrial, the plaintiff settled with Harrah's and the Tribal Casino Gaming Enterprise, and those defendants were dismissed from the case. (R p. 29)

After settling with Harrah's and the Tribal Casino Gaming Enterprise, the Plaintiff then sought an order in Cherokee Court

¹The Cherokee Code provides for a Judicial Branch of the Eastern Band of Cherokee Indians. The Judicial Branch consists of a Trial Court, called the Cherokee Court, and a Supreme Court. The Supreme Court hears appeals from the Trial Court. Cherokee Code §7-2(3).

to stay or dismiss the action to "effectively transfer the case to Superior Court of Durham County." (R p. 28) In support of the motion, the Plaintiff argued that his dismissal of the tribal defendants destroyed the Cherokee Court's jurisdiction over the case, thus mandating a transfer of the case back to Durham County Superior Court. By order entered September 2, 2010, the Cherokee Court rejected that argument, denied the motion to transfer, and expressly found that the Cherokee Court had jurisdiction over the parties and the subject matter of the action. (R pp. 28-32) The Plaintiff did not appeal the Cherokee Court's ruling to Cherokee Supreme Court.

On October 27, 2010, the Plaintiff filed a Voluntary Dismissal without Prejudice in the Cherokee Court as to the remaining defendant, Owle Construction, LLC.² (R p. 16)

On October 21, 2010, the Plaintiff filed a "Motion to Lift Stay" in Durham County Superior Court. (R p. 11) The Honorable Shannon Joseph, Superior Court Judge Presiding, heard arguments on the motion on December 15, 2010, and entered an Order denying the motion on December 16, 2010. Judge Joseph's Order found

² The dismissal document cites "Rule 41(a) of the Rules of Civil Procedure." §7-14 of the Cherokee Code provides that proceedings in the Judicial Branch of the Cherokee Courts shall be governed by the North Carolina Rules of Civil Procedure. The Code states, "The Cherokee Tribal Council adopts these North Carolina rules as a matter of comity to promote respect for the Cherokee Courts and to facilitate the practice of law in the Cherokee Courts."

that the Plaintiff's action had been dismissed without prejudice, and that the Plaintiff could refile an action against the defendant Owle Construction "if proper under applicable law." The Order expressly did not reach any jurisdictional issues, and made no findings or rulings concerning the proper jurisdiction, venue or forum for any refiling of any action. (R pp. 18-21)

The Plaintiff appealed Judge Joseph's December 16, 2010 order to the North Carolina Court of Appeals. As part of the appeal, the Plaintiff argued that Judge Joseph's ruling was erroneous because the Cherokee Court lacked jurisdiction over the action after the dismissal of Harrah's and the Tribal Casino Gaming Enterprise. The Court of Appeals rejected the contention, and held that any argument concerning the jurisdiction of the Cherokee Court should be raised in the Cherokee trial or appellate courts as an exercise of the self-governance of the Eastern Band of Cherokee Indians. *Carden v. Owle Construction, LLC*, ___ N.C. App. ___, 720 S.E.2d 825, 829 (2012). The Plaintiff never refiled his action in the Cherokee Court. He filed a new action against Owle concerning the December 2003 accident in Durham County Superior Court on September 8, 2011. (R p. 8)

On December 16, 2011, Owle filed a motion in the new Superior Court case pursuant to Rule 12 of the North Carolina

Rules of Civil Procedure to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim for which relief can be granted. (R p. 22) The trial court granted Owle's motion by Order entered March 5, 2012 (R pp. 25-27). The trial court's Order incorporates by reference the September 2, 2010 Cherokee Court order. The Plaintiff appealed.

ARGUMENT

THE TRIAL COURT CORRECTLY FOUND THAT THE SUPERIOR COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THIS CASE AND THAT THE COMPLAINT FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

The Eastern Band of Cherokee Indians ("EBCI") is a federally recognized Indian tribe. As such, it possesses the status of a domestic dependent nation with "certain retained inherent sovereign powers." *Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E.2d 870, 874 (1984). The retained sovereign powers include the power to create civil laws governing conduct and business relations on tribal lands and the power to establish a tribal court system. The EBCI has enacted a civil code, and in 1980, pursuant to federal authorization, established a tribal court system. *Id* at 872, fn. 1. Cherokee Civil Code Section 1-2(a) provides the Cherokee Court with jurisdiction over "all persons in civil suits which arise on the Cherokee Indian Reservation and involve the personal, property or legal rights of an individual Indian or an Indian owned business, corporation

or other legal entity." Section 1-2(c) provides Cherokee Court jurisdiction over tortious conduct of all persons where the conduct occurs on Indian trust land. Section 1-2(g) establishes Cherokee Court jurisdiction over direct claims against the Tribe.

In his original case arising out of the December, 2003 accident on the Qualla Boundary Indian Reservation, the Plaintiff consented to Cherokee Court jurisdiction over his claims against, among others, Owle Construction, LLC, an Indian owned business. After a multi-week jury trial and a settlement with certain defendants connected with the tribe, the Plaintiff asked the Cherokee Court to find that it lacked subject matter jurisdiction over his claims. The Cherokee Court refused to make such a finding, specifically holding in its Order that it had jurisdiction over the subject matter and the parties of the case. (R pp. 28-32)

The Plaintiff now seeks to avoid Cherokee Court jurisdiction by procedural maneuver. Instead of appealing the Cherokee Court's jurisdictional decision to the Cherokee Supreme Court, the Plaintiff filed a voluntary dismissal "without prejudice" in the Cherokee Court. He then filed a new action in North Carolina Superior Court. The Plaintiff argues that the procedural maneuver should succeed because (1) the North Carolina courts have subject matter jurisdiction over his case,

and (2) his cause of action is timely filed because it is "saved" under North Carolina Rules of Civil Procedure 41(a)'s one year refiling provisions. Those contentions ignore the Cherokee Court's finding that it has subject matter jurisdiction, applicable law dealing with issues of North Carolina court jurisdiction and Cherokee sovereignty, and applicable law interpreting the savings provisions of statutes such as Rule 41(a) of the North Carolina Rules of Civil Procedure.

A. THE SUPERIOR COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THE CHEROKEE COURT ASSUMED AND RETAINED JURISDICTION OVER THE CASE.

Under N.C.G.S. §1E-1, North Carolina courts are required to give full faith and credit to orders "... signed by a judicial officer of the Eastern Band of Cherokee Indians and filed in the Cherokee Tribal Court to the same extent as is given a judgment, decree, or order of another state." Therefore, the September 2, 2010 order finding that the Cherokee Court retained jurisdiction, signed by Cherokee Court Judge Matthew Martin and filed in the Cherokee Court, is entitled to full faith and credit from the North Carolina courts.

The Plaintiff and the North Carolina courts cannot simply ignore Judge Martin's order finding Cherokee Court jurisdiction. To do so would serve to deny the order the full faith and credit

that it is due and would unduly infringe on the sovereignty of the Eastern Band of Cherokee Indians.

Cherokee sovereignty has been explicitly recognized by the Court of Appeals in the context of the Plaintiff's claim. In a previous appeal, the Plaintiff argued that after he dismissed his Cherokee Court case against the Owle, he should have been allowed to proceed in North Carolina Superior Court because "... in December 2010 no further jurisdiction existed in the Tribal Court for the dispute between Plaintiff and [Defendant]." *Carden, supra* at 829. The Court of Appeals refused to consider the argument, stating:

Any argument concerning the jurisdiction of the Tribal Court would not be a matter for this Court to consider and rule upon. Rather, such issues should be raised before the Tribal Court and the appellate courts of that jurisdiction, as an exercise of the "self governance of the Eastern Band of Cherokee Indians."

Id.

When the Plaintiff argued to the Cherokee Court that it lacked jurisdiction over his claim, the Cherokee Court rejected his argument and asserted jurisdiction.³ Instead of raising the

³ The Cherokee Court ruled that it possessed subject matter and personal jurisdiction in the case. While the Cherokee Court indicated that the holding of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) may have affected Cherokee Court jurisdiction had the case been originally filed in tribal court without tribal agencies or agents as parties, it made no definitive

jurisdictional issue before the Cherokee appellate courts, the Plaintiff now seeks to invoke North Carolina state court jurisdiction and avoid Cherokee Court jurisdiction.

When a plaintiff seeks to invoke state court jurisdiction and avoid tribal court jurisdiction, questions of tribal sovereignty are triggered. Specifically, in cases such as this, the question of whether an exercise of state court jurisdiction

rulings in that regard. Given the court's analysis of its jurisdiction over the subject matter and parties, no definitive rulings on *Strate* type arguments were necessary. In any event, strong arguments exist that the *Strate* case would not abrogate the tribal court's jurisdiction. *Strate* concerned a nonmember suing a nonmember company for alleged negligence in the operation of a motor vehicle on a federal highway in an Indian reservation. The instant case concerns a nonmember's claim against an Indian owned business for construction work occurring adjacent to a roadway within a reservation. Jurisdiction exists under the language of the Cherokee Code as it involves allegedly tortious conduct on Indian lands (Cherokee Code §1-2(c)), and it involves the legal rights of an Indian owned business. (Cherokee Code §1-2(a)).

Additionally, any analysis of the tribal court jurisdictional may involve a variety of factors, including an examination of the membership status of the plaintiff as opposed to the defendant and the nature of commercial activities carried on inside the reservation. See, *Montana v. United States*, 450 U.S. 544 (1981). This is true even if the case involves a highway on a reservation. See, *Smith v. Salish Kootenai College*, 434 F3rd 1127(9th Cir. 2006).

In any event, such arguments are initially addressed to the tribal courts as a function of tribal sovereignty, not to state or federal courts. The U.S. Supreme Court has held that a federal court considering claims arguably within tribal court jurisdiction should "stay its hand" until the tribal court has an initial and full opportunity to determine its own jurisdiction. *Strate*, *supra* at 1406, citing *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 105 S. Ct. 2447 and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971.

unduly infringes on the self-governance of the Indian tribe must be addressed. See, *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959), *Jackson Co. v. Swayney*, 319 N.C. 52, 352 S.E. 2d 413 (1987).⁴

When the Cherokee Court has assumed jurisdiction over subject matter of a case prior to a subsequent North Carolina state court filing, North Carolina's Supreme Court has found that an exercise of North Carolina state court jurisdiction would constitute an unlawful infringement on tribal sovereignty. In *Jackson Co. v. Smoker*, 341 N.C. 182, 459 S.E. 2d 789 (1995), the Tribal Court adjudicated child custody and support matters between EBCI members. After the adjudication, the plaintiff wife assigned rights concerning tribal court ordered child support to a North Carolina county department of social services. The county then filed suit in North Carolina District Court against the defendant husband seeking reimbursement of Aid to Families with Dependent Children funds and payment of future child support.

⁴ The Plaintiff relies on *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E. 2d 577, *disc. rev. denied*, 298 N.C. 300, 259 S.E. 2d 915 (1979) to argue that the North Carolina courts have jurisdiction of claims against EBCI members arising on the Qualla Boundary. *Sasser*, however was decided prior to the establishment of the EBCI court system. Thus, *Sasser* does not examine whether state court jurisdiction unduly infringes on tribal sovereignty. See *Wildcatt*, *supra* at 877 fn. 16. Such an examination is now required.

In holding that to allow the North Carolina court to exercise jurisdiction would constitute unlawful infringement on tribal sovereignty, the Supreme Court stated:

The Cherokee Indians have an interest in making their own laws and enforcing them. *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). This interest would be undermined if the Tribal Court were deprived of jurisdiction of a case after it had assumed it. We hold that it would have been an unlawful infringement on the Cherokee tribe had the district court taken jurisdiction of this case.

Id at 184.

The case at bar, like *Smoker*, involves a claim over which Cherokee Court has asserted, exercised and retained jurisdiction. Like the plaintiff in *Smoker*, the Plaintiff in the instant case urges this court to find that possible North Carolina court jurisdiction somehow trumps the Cherokee Court's previously asserted and exercised jurisdiction. As was found in *Smoker*, this contention must be denied because its adoption would impermissibly violate Cherokee sovereignty. Therefore, the trial court's order dismissing this action is correct.

B. THE INSTANT CASE WAS FILED IN DURHAM COUNTY SUPERIOR COURT AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

The accident at issue in this matter occurred on December 12, 2003. The Plaintiff filed his new Durham County Superior Court complaint for his claim on September 8, 2011, seven years

and nine months after the accident, and almost five years beyond the applicable three year statute of limitations. If the statute of limitations applies, the plaintiff's case is barred, and the trial court's dismissal of the case for failure to state a claim is correct.

Although the Plaintiff originally filed an action concerning his December 2003 accident in Durham County Superior Court, the case was transferred to the Cherokee Court and tried there. Therefore, logically, the Plaintiff's original action is treated for dispositional purposes as if it had been originally filed in the Cherokee Court. Clearly, the Cherokee Court is not an extension of the North Carolina courts, but is instead treated as a foreign jurisdiction such as another state court. *Carden, supra*, at 828. Therefore, the Plaintiff's dismissal was filed in a foreign jurisdiction.

While some North Carolina appellate cases apply North Carolina Rules of Civil Procedure 41(a)'s savings provision to "save" actions originally dismissed in the federal courts, those cases concern federal diversity cases either originally filed in or removed to federal courts. Such cases are inapplicable to the case at bar because of the nature of federal diversity jurisdiction. Federal courts sitting in diversity jurisdiction and applying North Carolina substantive law are treated "like another court of the state." *Guaranty Trust Co. v. York*, 326

U.S. 99, 108 65 S. Ct. 1464, 1469, 89 L.Ed. 2079, 2086 (1945). They are not treated as foreign jurisdictions.

The North Carolina appellate courts have not addressed whether North Carolina Rules of Civil Procedure Rule 41(a)'s savings provision applies when a party has voluntarily dismissed an action in another state's courts. However, many state appellate courts have considered a savings statute's application when a plaintiff files an action in one state, dismisses that action, and then files a new action for the same claim in another state. The majority rule in the United States is that the savings statute of the second state does not apply, and the claim is barred if the statute of limitations has run. See, *Goyette v. Suprenant*, 622 A2d 101 (1993); *S& H Grocery Inc. v. Gilbert Construction Co., Inc.*, 733 So. 2d 851 (1999).

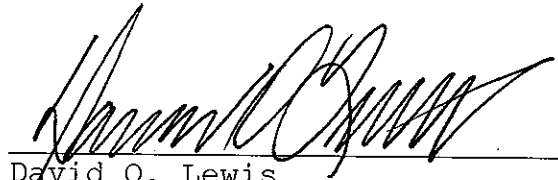
Because his dismissal was filed in a foreign jurisdiction, the Plaintiff is unable to rely on the one year "savings" provision of Rule 41(a) of the North Carolina Rules of Civil Procedure. Had the Plaintiff refiled his action in the Cherokee Court within one year of September 8, 2011, his action would be preserved the under Rule 41(a) of the Rules of Civil Procedure as adopted by the Cherokee Court. However, the Plaintiff chose not to refile in the Cherokee Court, and instead filed the instant case in Durham County Superior Court. Under the circumstances of this case, the statute of limitations bars the

Plaintiff's North Carolina action, and the trial court's dismissal of the case for failure to state a claim for which relief can be granted is correct

CONCLUSION

For the reasons stated herein, the Defendant-Appellee respectfully requests that the decision of the trial court be affirmed.

This the 16th day of JULY, 2012.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached **DEFENDANT-APPELLEE'S BRIEF** in the above-referenced action upon all other parties to this cause by:

 Hand delivering a copy hereof to the attorney for each said party addressed as follows:

 X Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:


Mr. Michael W. Patrick
LAW OFFICE OF MICHAEL W. PATRICK
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 Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

 Telecopying a copy hereof to the attorney for each said party as follows:

This the 14th day of JULY , 2012.



David O. Lewis
Attorney for Defendant-Appellee