Superior Court of Connecticut.

BBQ LLC v. Mohegan Tribal Gaming Authority

Big Bubba's BBQ, LLC v. Mohegan Tribal Gaming Authority

KNOCV131020764

-- May 23, 2013

MEMORANDUM OF DECISION ON MOTION TO DISMISS

FACTS

By a "Verified Lockout Complaint and Application for Temporary Injunction" ("Complaint"), an Application for Injunctive Relief ("Application"), an Affidavit of Victor Krasner and Request for Waiver of Bond, the plaintiff Big Bubba's BBQ, LLC, initiated this suit on April 8, 2013. The plaintiff is tenant and the defendant Mohegan Tribal Gaming Authority is landlord under a "Mohegan Sun Casino Complex Lease" dated March 30, 2001, as amended on or about April 7, 2003. A copy of the Lease (without pages numbered 16, 18, 19 and 20) and a copy of a purported letter of amendment dated April 7, 2003 (together, the "Lease"), are attached to the Application.

Summarizing the Complaint, the factual allegations of which are here taken as true and in their best light for the plaintiff,[1] since March 30, 2001, the plaintiff has been the actual possessor of certain leased premises at 1 Mohegan Sun Boulevard, Montville, Connecticut ("the premises"). In violation of Conn. Gen.Stat. § 47a–43(a), the defendant or its agents have taken the following actions without the consent, and against the will, of the plaintiff: on or about October 31, 2012, the defendant entered, and locked the plaintiff out of, the premises and since then has prevented the plaintiff from occupying the premises. These actions of the defendant or its agents have caused irreparable loss or damage in that the plaintiff is being deprived of its leased premises and its possessions in the premises. As a result, the plaintiff is without any adequate remedy at law.

The premises are within the Mohegan Sun Casino. Application, p. 2.

The plaintiff alleges that, at the time of the lock-out, the plaintiff had paid in full all lease payments and that, at the time of the Application, the defendant has engaged a competitor of the plaintiff to take over the premises and to open a new restaurant. Application, p. 3.

Turning to the Lease, Section 23.15 of the Lease is entitled "Landlord's Consent to Suit" and provides as follows:

Landlord expressly waives its immunity from unconsented suit for the purpose of permitting a suit by Tenant in any court of competent jurisdiction for any claims by Tenant for the purpose of enforcing this Lease and any judgment arising out of this Lease. Landlord's waiver of immunity from suit is specifically limited to the following actions and judicial remedies: (a) the enforcement of Landlord's obligations under this Lease with an award of actual damages in connection with any breach of the provisions hereof provided, however, that the court shall have no authority or jurisdiction to order execution against any assets or revenues of Landlord except cash of Landlord (other than cash which Landlord can demonstrated was derived from a source other than the Retail Facilities); and (b) an action to prohibit Landlord from taking an action that would prevent the operation of this Lease pursuant to its terms, or that requires Landlord to specifically perform any obligation under this Lease. In no instance shall any enforcement of any kind whatsoever be allowed against any assets of Landlord other than the limited assets of Landlord specified in the foregoing clause (a).

The plaintiff claims Section 23.15 is a waiver by the defendant of sovereign immunity such that this court has jurisdiction over this suit. Application, p. 2.

Section 23.18 of the Lease, entitled "Governing Law," provides as follows:

The rights and obligations of the parties and the interpretation and performance of this Lease shall be governed by the law of the Tribe [defined on page 1 of the Lease as The Mohegan Tribe of Indians of Connecticut, a federally recognized Indian Tribe, of which the defendant is an instrumentality], and to the extent not addressed by the law of the Tribe, by applicable federal law, and, to the extent not addressed by the law of the Tribe or applicable federal law, the law of the State of Connecticut, without regard to its principles regarding conflicts of law.

The Tribe of which the defendant is an instrumentality has been recognized by an act of Congress and by the State of Connecticut.[2] The Mohegan Tribal Council established, in the Tribal Constitution, a Gaming Disputes Court with jurisdiction for the Tribe over disputes arising out of, or in connection with, the actions of the defendant and contracts entered into by the defendant in connection with gaming at the Mohegan Sun Casino, where the premises are located, including disputes arising between any entity and the defendant.[3]

On April 15, 2013, the defendant moved to dismiss this case for lack of subject matter jurisdiction.[4] The defendant filed a brief in support of its motion. The plaintiff filed an opposing brief on April 17, 2013. The Motion to Dismiss was argued May 17, 2013.

A hearing on the plaintiff's Complaint and Application is scheduled for May 23, 2013.

DISCUSSION

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) Housatonic Railroad Co., Inc. v. Commissioner of Revenue Services, 301 Conn. 268, 274, 21 A.3d 759 (2011). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) Fort Trumbull Conservancy, LLC v. New London, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) The St. Paul Travelers Companies, Inc. v. Kuehl, 299 Conn. 800, 808, 12 A.3d 852 (2011).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Kizis v Morse Diesel International, Inc., 260 Conn. 46, 52, 794 A.2d 498 (2002). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). The tribe must have consented to suit in a specific forum. Kizis v. Morse Diesel International, Inc., 260 Conn. at 53, citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). " 'Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe.' Romanella v. Hayward [,] 933 F.Sup. 163, 167 (D.Conn.1996). 'However, such waiver may not be implied, but must be expressed unequivocally.' McClendon v. United States, 885 F.2d 627, 629 (9th Cir.1989)." Kizis, 260 Conn. at 53–53.

There is no claim that the United States Congress has enacted any law vesting the Connecticut state courts with jurisdiction over this suit. Thus, in the present case, the existence of subject matter jurisdiction depends on whether the defendant clearly and unequivocally waived its sovereign immunity.

"[C]ourts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's interest 'encompasses not merely whether it may be sued, but where it may be sued.' Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (emphasis in the original) (internal quotations omitted) (state sovereign immunity) ." Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 86 (2nd Cir.2006). "[S]uch waiver may not be implied, but must be expressed unequivocally." (Internal quotation marks omitted.) Kizis v. Morse Diesel International, Inc., supra, 260 Conn. at 54. "[T]he [United States] Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." Beecher v. Mohegan Tribe of Indians, 282 Conn. 130, 135 (2007), citing Ute Distribution Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1267 (10th Cir.1998).

The parties agreed in the Lease that Mohegan Tribal law would apply. That law, by the

Mohegan constitution and ordinance, provides a forum—albeit not the plaintiff's preferred forum—for the plaintiff's claims in contract and equity against the defendant. See, Kizis, supra, 260 Conn. at 58.

Proceedings under Conn. Gen.Stat. § 47a–43 et seq., are expedited. See Conn. Gen.Stat. § 47a–43(b) (hearing can be within eight days of complaint). With the hearing in this case two days hence, to analyze in detail the history of the doctrine of Indian Tribal sovereign immunity would not be practical, or necessary, or serve the parties' interests. The applicable legal analysis is well set forth in numerous decisions in addition to those cited above. See, Durante v. Mohegan Tribal Gaming Authority, 53 Conn. L. Rptr. 811, 2012 WL 1292655 (Conn.Super. March 30, 2012), and cases cited therein. The question, in essence, is whether Lease Section 23.15 constitutes a sufficiently clear and specific waiver of sovereign immunity for suit in the Connecticut courts. Put another way, does the phrase "any court of competent jurisdiction" in the Section 23–15 waiver of "immunity from unconsented suit for the purpose of permitting a suit by Tenant in any court of competent jurisdiction for any claims by Tenant for the purpose of enforcing this Lease" include the Connecticut Superior Court? When that provision of the Lease is read in the manner required by federal and Connecticut law, the subject phrase, "any court of competent jurisdiction," does not include the Connecticut Superior Court because the phrase—needed for the plaintiff even to sue in the Mohegan Tribal courts—is not sufficiently specific to extend to this court.

In C & L Enterprises, Inc. v. Citizens Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), the United States Supreme Court found the respondent tribe had waived sovereign immunity. The court found that the defendant tribe had offered, and entered into, a contract stating a) that disputes between a contractor and the tribe would be decided by arbitration, b) that the arbitration provider's rules apply (in the absence of contrary agreement) and c) the contract was governed by the law of the place where the construction project was located—which was not tribal land. The arbitration provider's rules provided that the parties were deemed to have consented that judgment on the arbitration award could be entered in any federal or state court having jurisdiction thereof. C & L Enterprises is factually distinguishable from this case: the acts cumulatively making the tribe's waiver clear in C & L Enterprises are not present here.

This court is aware of the plaintiff's implicit claim that it did not realize the Lease phrase "any court of competent jurisdiction" could possibly exclude the Connecticut courts. However, interpretation of the Lease is a question of law and the plaintiff's implicit plea of unilateral mistake—that "any" must mean "any"—is unavailing. Section 23–15 is not without meaning: given the defendant's sovereign immunity, that section clarifies that, for purposes of Lease disputes, the defendant waived sovereign immunity in the tribal courts—within the section's limits on that waiver.

CONCLUSION

As a matter of fact and of law, this court finds no waiver of sovereign immunity that would permit this court to proceed with this case. More specifically, the court finds no such waiver as

to a suit under Conn. Gen.Stat. § 47a–43, whether the trial be by court or jury (see Conn. Gen.Stat. § 47a–44 and § 47a–45), or as to the equitable relief sought in this case (see Conn. Gen.Stat. § 47a–45a(a), including restitution, and § 52–471 et seq., as to an injunction with or without bond) or as to any potential (but not pled) double damages claim (see Conn. Gen.Stat. § 47a–46).

The defendant's Motion to Dismiss is granted.

Cole–Chu, J.

FOOTNOTES

1. FN1. See, Gold v. Rowland, 296 Conn. 186, 200–01, 994 A.2d 106 (2010).

2. FN2. This recognition, found in Kizis v. Morse Diesel International, Inc., 260 Conn. 46, 54, 794 A.2d 498 (2002), is stipulated in this case.

3. FN3. See Kizis, supra, 260 Conn. at 55–56.

4. FN4. The defendant's Motion to Dismiss included lack of personal jurisdiction based on an apparent error in the summons on the Complaint. That ground was withdrawn at oral argument May 17, 2013.

Cole–Chu, Leeland J., J.