

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK

Case No.: 13-CV-0428

Plaintiff,

- against -

JONATHAN K. SMITH,

Defendant.

**DEFENDANT’S OPPOSITION TO  
PLAINTIFF’S MOTION TO REMAND  
AND CROSS-MOTION FOR  
JUDGMENT OF DISMISSAL**

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Jonathan K. Smith, defendant, respectfully files this his opposition to plaintiff’s motion to remand, (Doc. 3), and cross-moves for judgment of dismissal.

**I. INTRODUCTION**

On January 24, 2013, Jonathan K. Smith, defendant, (“Smith” or “defendant”), filed a Notice of Removal pursuant to 28 U.S.C. § 1443(1), (“the Removal Notice” or “R.Not.”), removing Uniform Traffic Ticket No. AAN6862590, (“the Ticket”), from the Town Court of East Hampton to the United States District Court for the Eastern District of New York. Docket Number 1 (“Doc. No.” 1)

Smith is a member of the Shinnecock Indian Nation (“the Nation”) residing and doing business on the Shinnecock Indian Reservation (“the Reservation”). (R.Not. ¶ 1, Exh. 1) The Ticket was written and handed to Smith on December 10, 2012, by Officer Brian Farrish of the New York Department of Environmental Conservation (“Officer Farrish”). (R.Not. ¶ 2) The Ticket alleged Smith possessed eighty-seven undersized bay scallops at the Montauk Marine

Basin in violation of New York Law 130327(2)(4), a misdemeanor. (R.Not. ¶ 2) A copy of the Ticket and a Receipt of Property Seized is annexed to the Removal Notice as Exhibit 2.

The Ticket was removed pursuant to 28 U.S.C. § 1443(1), alleging civil rights violations of 42 U.S.C. §§ 1982, 1985(3), and 1986. (R.Not. ¶¶ 3-7)

The underlying grounds are “[t]hat 42 U.S.C. § 1982, provides: ‘All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.’ ” (R.Not. ¶ 6)

The alleged section 1985(3) violation is a conspiracy between Officer Farrish, his lieutenant, Joseph Billotto, (“Lt. Billotto”), and a third DEC officer, an Officer Maggio, to deprive Smith, as a member of the Shinnecock Indian racial class of persons, of the equal protection of the laws, and of equal privileges and immunities under the laws. (R.Not. ¶ 4) The alleged section 1986 violation is a failure of each of the three DEC officers to prevent the alleged 1985(3) conspiracy violation.

The section 1982 violations are twofold. The first violation is interference with Smith’s section 1982 right to purchase, hold, sell and convey his personal property on the basis of his membership in the Shinnecock Indian racial class of persons. (R.Not. ¶ 7) The second alleged section 1982 violation classifies his exercise of Shinnecock Indian fishing rights as protected section 1982 property. (R.Not. ¶ 8) The basis for the section 1982 classification of the exercise as a protected right are 1) an aboriginal right with respect to scallops harvested on and in Shinnecock Indian Reservation land and waters, (R.Not. ¶ 8(a)), 2) under the Free Trade Clause of the Fort Albany Treaty, 1664, (R.Not. ¶ 8(b)), and 3) under retained Shinnecock fishing rights in Peconic Bay ceded territory under the Wyandanch to Ogden Deed of 1659, (R.Not. ¶ 8(c)).

Smith further alleges that “New York State’s ‘Indian Laws’ illegally purport to regulate the system of government and other affairs of the Shinnecock Indian Nation and its members by and through Chapter 26, Article 9 of the New York State Indian Law.” (R.Not. ¶ 15)

On February 22, 2013, plaintiff filed a motion to remand. (“the Motion,” or “Mot.”) (Doc. 3) Defendant now files the present opposition, and cross-motion for judgment of dismissal.

## **II. STATEMENT OF FACTS**

The Removal Notice alleges detailed race based facts in support of the violations. (R.Not. ¶¶ 10-14). For example, it is alleged that on or about June 11, 2012, Officer Maggio followed Smith’s fishing captain, Theodore S. Lester, (“Capt. Lester”), into a Montauk deli and claimed Capt. Lester could not “touch anything, the net or any of their gear,” or “fish.” “That is for the Indians.” “You are going to end up going to jail.” (R.Not. ¶ 10) This is an admission of Shinnecock fishing rights, but claiming Capt. Lester could not be a captain of Smith’s Indian fishing boat.

It is further alleged on November 21, 2012, that Lt. Billotto stopped Smith’s captain and a crew member while driving in a car, threatening them with “running that boat” and “fishing” and “am going to put you in jail,” and “[t]he Treaty is not worth shitpaper.” (R.Not. ¶ 11)

On the day of the Ticket, December 10, 2012, when Smith was confronted by Lt. Billott and Officer Farrish on his fishing boat at Montauk Marine Basin, Lt. Billotto “unsnapped his holster” when ordering Smith to put a bag of scallops down, “you do not have a choice – trust me – it can get ugly – so let’s keep this civil,” and then ticketed only Smith and not Smith’s captain, or crew after claiming he could ticket them if he wanted. (R.Not. ¶¶ 12(g)-(l))

On January 11, 2013, Smith’s captain, while standing on Smith’s fishing boat at Jackson’s Marina in Southampton, was shot in the foot by an unknown person or person(s). “The

second bullet hit the instep area of Capt. Lester's right foot as he was stepping off the boat, spinning Capt. Lester around, and taking out a dime size area of skin." (R.Not. ¶ 13)

Plaintiff raises, and admits, in a footnote, that the removed Ticket fails to cite any legal violation. "The summons attached to the Notice of Removal ... references ECL § 13-0327 (2) (a), which is the statutory analogue and enabling provision...." (Mot. p.1, n.1). Plaintiffs attempts to replace this fatally defective Ticket, with a new "clarified" ticket as Exhibit A, seen here for the first time, to which defendant of course objects.

Even though it is the facial validity of the Removal Notice at issue, plaintiff is uncomfortable enough with the four corners to dispute factual allegations, even attaching a roster as plaintiff's Exhibit D to quarrel with the date of an "on or about" pleading, but notably, plaintiff does not deny the substance of the event itself. (Mot. p. 5, fn2) Defendant stands by the facts in the Removal Notice.

### III. ANALYSIS

Plaintiff's motion to remand is based on two grounds, 1) the contention that Smith failed to establish a basis for removal, (Mot., p. 2), and 2) the contention that the removal is barred by collateral estoppel, (Mot., p. 7). Annexed to the Motion are Exhibits A-D. Annexed as plaintiff's Exhibit A is a copy of a ticket number "AAN6862494." (hereinafter "Ticket No. 2") Annexed as plaintiff's Exhibit B is a copy of Memorandum & Order, dated July 31, 2009, *NY v. Gerrod T. Smith*, Case No. 08-cv-4422 (E.D.N.Y.). (hereinafter "*NY v. Gerrod Smith*") Annexed as plaintiff's Exhibit C is a copy of Memorandum & Order, dated June 17, 2011, *NY v. Jonathan K. Smith*, Case No. 09-cv-2221 (E.D.N.Y.), affirmed by the U.S. Court of Appeals for the Second Circuit, by Summary Order, August 29, 2012, and certiorari denied by the U.S. Supreme Court on January 14, 2013. (hereinafter "*NY v. Jonathan Smith*").

First defendant will address the Exhibits annexed to plaintiff's motion, and then address the grounds of the Motion and defendant's cross-motion.

**A. Plaintiff's Exhibits**

Ticket No. 2 has mysteriously appeared in this case as plaintiff's exhibit, and has never been seen before by Smith or the undersigned, and was never served. In fact, plaintiff admits, in a footnote, that the removed Ticket fails to cite any legal violation, and hence is fatally defective. "The summons attached to the Notice of Removal ... references ECL § 13-0327 (2) (a), which is the statutory analogue and enabling provision...." (Mot. p.1, n.1). Plaintiff contends Ticket No. 2 is "a second summons that was filed with the East Hampton criminal court." *Id.* Plaintiff further characterizes Ticket No. 2 as a "clarified summons." *Id.* In short, Plaintiff's motion seeks remand of the Ticket – a now admittedly invalid ticket on its face.

Plaintiff fails to inform the Court of the outcome of *NY v. Gerrod Smith*. This case was appealed by Gerrod Smith to the U.S. Court of Appeals for the Second Circuit, where the parties stipulated to a voluntary dismissal of the appeal, in return for dismissal by New York of the underlying state fishing case against Gerrod Smith. A copy of the state Certificate of Disposition, dated October 14, 2009, in favor of Gerrod Smith, is annexed hereto as defendant's Exhibit 1.

Plaintiff also fails to inform the Court there was a companion removal case to *NY v. Jonathan K. Smith*, with a U.S. District Court judgment of dismissal in favor of Smith for plaintiff's failure to prosecute. *See*, Order of Dismissal, dated June 15, 2010, *NY v. Jonathan K. Smith*, Case No. 09-cv-0571 (E.D.N.Y.), annexed hereto as Exhibit 2.

Plaintiff further fails to inform the Court that the sole issue raised on appeal by Smith in *NY v. Smith*, was whether the plaintiff was barred by the 30 day statutory time limitation

provided in 28 U.S.C. § 1447(c) because plaintiff waited over one year from the date of removal to file a motion to remand. *See*, Summary Order, p. 2.

Plaintiff further fails to mention that the statutory grounds for removal in both *NY v. Gerrod Smith* and *NY v. Smith* were completely different than in the present case. In both cases cited by plaintiff, the removal grounds for invoking 28 U.S.C. § 1443(1) was 18 U.S.C. § 245(b)(1)(B), and plaintiff mistakenly points the Court to the wrong statutory scheme. *NY v. Gerrod Smith*, p. 3; *NY v. Smith*, p. 3. In the case at bar, the removal grounds for invoking 28 U.S.C. § 1443(1) is a completely different statutory scheme involving equal protection and privileges and immunities, to wit: alleged violations of 42 U.S.C. §§ 1982, 1985(3), and 1986.

**B. Plaintiff established a basis for removal under 28 U.S.C. § 1443(1) alleging civil rights violations of 42 U.S.C. §§ 1982, 1985(3), and 1986.**

The removing party under 28 U.S.C. § 1443(1) must satisfy a two-prong test under *Georgia v. Rachel*, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966). The test is first that the right under federal law allegedly denied is one “providing for specific civil rights stated in terms of racial equality.” *Id.*, at 792. Second, the petitioner cannot enforce the federal right in state court. *Id.*, at 794-99. Section 1443(1) is strictly construed. *City of Greenwood v. Peacock*, 384 U.S. 808, 827-28, 86 S.Ct. 1800, 1812-13, 16 L.Ed.2d 944 (1966).

**1. The Removal Notice is pursuant to 42 U.S.C. §§ 1982, 1985, and 1986, which are federal laws providing for equal rights.**

With respect to the first-prong, “When the removal statute speaks of ‘any law providing for equal rights,’ it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. s 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all.” [quoting *People of the State of New York v. Galamison*,

342 F.2d 255, 269, 271. (2<sup>nd</sup> Cir 1965)] *Rachel*, 384 U.S., at 792. The Supreme Court in *Rachel* specifically pointed to section 1983 as an example of specific civil rights stated in terms of racial equality. In the present case, the Removal Notice is pursuant to sections 1982, 1985, and 1986, companion civil rights statutes to 1983, and is squarely within *Rachel*. See, *Wyche v. State of Louisiana*, 394 F.2d 927 (5<sup>th</sup> Cir.1967); See also a line of FHA cases implicating equal civil rights. *Sofarelli v. Pinellas County*, 931 F.2d 718, 725 (11<sup>th</sup> Cir.1991); *Emigrant Sav. Bank v. Elan Management Corp.*, 668 F.2d 671, 673 (2d Cir.1982); *Oxford House, Inc. v. Town of Babylon*, 819 F.Supp. 1179, 1182 (E.D.N.Y.1993).

The alleged section 1982 violations are twofold, and form the basis for the conspiracy and failure to prevent allegations underlying sections 1985 and 1986.

The first is interference with Smith's section 1982 right to purchase, hold, sell and convey his personal property on the basis of his membership in the Shinnecock Indian racial class of persons.

The second is interference with Smith's section 1982 right to purchase, hold, sell and convey his personal property on the basis of his membership in the Shinnecock Indian racial class of persons, and that Smith's exercise of Shinnecock Indian fishing rights is a protected section 1982 property right. The basis for the section 1982 classification of the exercise as a protected right is 1) an aboriginal right with respect to scallops harvested on and in Shinnecock Indian Reservation land and waters, 2) under the Free Trade Clause of the Fort Albany Treaty, 1664, and 3) under retained Shinnecock fishing rights in Peconic Bay ceded territory under the Wyandanch to Ogden Deed of 1659. Massachusetts Appellate Courts have upheld Mashpee Wampanoag fishing rights. *Commonwealth v. Maxim*, Barnstable County District Court, Nos. cr-95-8157 and 8158 (October 22, 1996), *rev'd*, 45 Mass. App. Ct. 49, 695 N.E.2d 212 (June 11,

1998), 429 Mass. 287, 708 N.E.2d 636 (April 7, 1999). Retained fishing rights on ceded Indian territory are usufruct rights within the meaning of section 1982 property rights. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse – Wisconsin, Inc.*, 781 F.Supp. 1385, 1392-95 (W.D. Wis.1992), *rev'd* on other grounds, 991 F.2d 1249 (7<sup>th</sup> Cir1993), 843 F.Supp. 1284 (W.D. Wis.1994), *aff'd*, 41 F.3d 1190, 1194 (7<sup>th</sup> Cir1994), *cert. den.* 115 S.Ct. 1823, 131 L.Ed.2d 745 (1995). Usufruct rights are also section 1983 rights. *Fond du lac Bank of Chippewa Indians v. Carlson*, 68 F.3d 253, 257 (8<sup>th</sup> Cir 1995). Whether aboriginal rights exist is a factual matter. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345, 86 L.Ed.260, 62 S. Ct. 248 (1941). “Aboriginal rights” and usufruct rights” are distinct, as the latter refers to rights arising under treaty. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351-352 (7<sup>th</sup> Cir 1983).

None of the cases cited by plaintiff involve 42 U.S.C. §§ 1982, 1985(3), and 1986.

**2. Smith is denied and cannot enforce in state court the underpinning property rights protected under 42 US.C. §§ 1982, 1985, and 1986 because of the contrary manifestations of state law under Article 9 of New York State law.**

With respect to the second, “denied and cannot enforce,” prong, in *Rachel* the Supreme Court stated, “The *Strauder-Rives* doctrine, as consistently applied in all these cases, required a removal petition to allege, not merely that the rights of equality would be denied or could not be enforced, but that the denial would take place in the courts of the State. The doctrine also required that the denial be manifest in a formal expression of state law.” *Rachel*, 384 U.S. at 804. “Thus, the Court in *Strauder* and *Rives* concluded that a state enactment, discriminatory on its face, so clearly authorized discrimination that it could be taken as a suitable indication that all courts in that State would disregard the federal right of equality with which the state enactment was precisely in conflict.” *Id.*, at 805.



Chapter 26, Article 9 of the New York State Indian Law regulates the real property rights of Smith on the basis of his membership in the Shinnecock Indian Nation racial class of persons. New York Indian Law Art. 9, §§ 120, 121. New York Indian Law Art 2, §§ 2, 6, 7. *Montauk Tribe of Indians v. Long Island R. Co.*, 28 A.D. 470, 51 N.Y.S. 142 (1898); *Johnson v. Long Island R. Co.*, 16 E.H.Smith 462, 162 N.Y. 462, 56 N.E. 992 (1900); *Smith v. Anderson*, 20 Misc.2d 1038, 188 N.Y.S.2d 756 (1959); *King v. Warner*, 137 N.Y.S.2d 568 (1953). Other property and tax rights of Smith are also regulated on the basis of his race. New York Indian Law Art 2, § 2 (Power to contract)(“Upon becoming a free-holder to the value of one hundred dollars an Indian shall be subject to taxation.”) The implication being that if not a free-holder, or if a free-holder but less than the the value of one hundred dollars Smith is not subject to taxation. A “free-holder” is defined as “One who possesses a freehold.” *Black Law Dictionary*, 9<sup>th</sup> Ed., p. 736. A “freehold” is defined as “An estate in land held in fee simple, in fee tail, or for term of life; any real-property interest that is or may become possessory.” *Id* ; § 6 (Exemption of reservation lands from taxation)(“No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same.”)

Under section 1982, Smith’s property rights are guaranteed to be free of racial discrimination. Under Articles 2 and 9, Smith’s property rights are regulated based upon his membership in the Shinnecock Indian Nation racial class of persons. Under section 1982, Smith’s property cannot be taxed on the basis of his race. But under Art. 2, sec. 2, Smith’s property is specifically subject to tax, or not subject to tax, based upon his race, and, upon his free-hold status and the value of any free-hold. The outcome of application of the Ticket, even if valid on its face, which it is not, against Smith thus turns on his racial and freehold status.

This statutory conflict between section 1982 and New York State's Indian Law is direct.

**C. Collateral estoppel does not apply**

Plaintiff contends the doctrine of collateral estoppel applies to bar the present removal. Since plaintiff asserts the doctrine, this is "offensive use of collateral estoppel" which "does not promote judicial economy in the same manner as defensive use does." *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. [internal citation omitted] *Id.*, at 326.

Collateral estoppel does not apply in the present case because the removal issue previously litigated between the parties is not identical. Here, the grounds for removal under 28 U.S.C. § 1443(1) are alleged violations of 42 U.S.C. §§ 1982, 1985(3), and 1986. (R.Not. ¶¶ 3-7) In both cases cited by plaintiff, the removal grounds for invoking 28 U.S.C. § 1443(1) was a completely different statutory scheme, 18 U.S.C. § 245(b)(1)(B). *NY v. Gerrod T. Smith*, p. 3; *NY v. Smith*, p. 3.

Further, plaintiff cites no cases to support a proposition, nor does plaintiff attempt to argue, that Smith's scallops, fishing boat, equipment and crew used by Smith are not "property" free of discrimination under section 1982.

**D. Judgment of dismissal should be granted because the removed Ticket is admittedly invalid on its face**

Plaintiff admits the removed Ticket fails to cite any legal violation. (Mot. p.1, n.1). Defendant requests judgment of dismissal on grounds the Ticket fails to cite any legal violation.

#### IV. CONCLUSION

The Shinnecock Indian defendant removed Uniform Traffic Ticket No. AAN6862590, alleging possession of undersized Peconic Bay scallops in violation of ECL 130327(2)(4), from South Hampton Town Court to the United States District Court for the Eastern District of New York, under 28 U.S.C. § 1443(1), alleging violations of his property rights relating to his fishing boat, scallops, and crew, and his exercise of aboriginal and usufruct fishing rights, protected under civil rights laws 42 U.S.C. §§ 1982, 1985(3), and 1986. Section 1982 prohibits discrimination in property rights on the basis of race. The state's Indian Laws, particularly Articles 2 and 9, flatly regulate and tax the defendant's property rights based upon his race. Article 2, section 2 subjects the defendant to tax or no tax based upon his Indian racial status, and whether he is a freeholder, and if so, the value of the freehold. As such, the federal right to be free of discrimination in and use of his property cannot be enforced in state court because the statutory state law is a diametrically opposed race based law.

Defendant cross-moves for a judgment of dismissal on the grounds that the removed Uniform Traffic Ticket No. AAN6862590 fails to cite any state law which was allegedly violated, which plaintiff raised, and admitted, in its moving papers.

Defendant respectfully requests the plaintiff's motion to remand be denied, and defendant's cross motion for judgment of dismissal be granted.

Dated: New York, New York  
March 22, 2013

Respectfully submitted,

/s/

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Scott Michael Moore, Esq. (SM7478)  
MOORE INTERNATIONAL LAW PLLC  
45 Rockefeller Plaza, Suite 2000  
New York, NY 10111  
T. 212-332-3474  
F. 212-332-3475  
E. [smm@MILOPC.com](mailto:smm@MILOPC.com)

Counsel for Defendant, Jonathan K. Smith

**CERTIFICATE OF SERVICE**

I hereby certify that on the date below, I served a true copy of the annexed Instrument by ECF electronic service to all parties or their counsel of record in the ECF system.

Dated: New York, New York  
March 22, 2013

/s/

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Scott Michael Moore, Esq.