UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,

Plaintiff,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,
Defendants.

Civil Action Nos.
5:82-CV-0783
5:82-CV-1114
(LEK)

THE ST. REGIS MOHAWK TRIBE, by THE ST. REGIS MOHAWK TRIBAL COUNCIL and THE PEOPLE OF THE LONGHOUSE AT AKWESASNE, by THE MOHAWK NATION COUNCIL OF CHIEFS,

Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,
Defendants.

Civil Action No.
5:89-CV-0829
(LEK)

PLAINTIFF ST. REGIS MOHAWK TRIBE'S MEMORANDUM IN SUPPORT OF THE MOTION FOR CLARIFICATION OR TO AMEND THE JUDGMENT AND ORDER OF THE COURT'S MEMORANDUM-DECISION AND ORDER OF JULY 8, 2013

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PLAINTIFF ST. REGIS MOHAWK TRIBE'S MEMORANDUM IN SUPPORT OF THE MOTION FOR CLARIFICATION OR TO AMEND THE JUDGMENT AND ORDER OF THE COURT'S MEMORANDUM-DECISION AND ORDER OF JULY 8, 2013

The Plaintiffs St. Regis Mohawk Tribe has moved this Court pursuant to Federal Rule of Civil Procedure 59(e), Local Rules 59.1 and 7.1(g), to reconsider and amend the Memorandum-Decision and Order dated July 8, 2013, Dkt. No. 638 (hereinafter "Decision" or "Dec."),[1] or in the alternative, to clarify its Decision pursuant to Federal Rule of Civil Procedure 60(a) to indicate whether the Plaintiffs may pursue a claim for the Town of Fort Covington in the Original Land Claim. The Plaintiffs Mohawk Nation Council of Chiefs and the Mohawk Council of Akwesasne join in this motion.

I. Statement of Facts

In its ruling this Court addressed the "Original Reservation" claim. There are two claims to the Original Reservation that the Plaintiffs briefed to the Magistrate—the Hogansburg Triangle and the Town of Fort Covington.[2] As this Court recognized, Dec. at 19, the Plaintiffs presented detailed census data for both of those distinct land claim areas, but the Magistrate treated this data differently. Report-Recommendation at 41 (Dkt. No. 581) (hereinafter "Report-Rec.").[3]

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[1] Though we cite to the Docket for the purposes of this memorandum, the Decision is available on Westlaw and included as an exhibit to this motion: *Canadian St. Regis Band of Mohawk Indians v. New York*, 5:82-CV-0783, 2013 WL 3416499 (N.D.N.Y. July 8, 2013), Mot. Exh. 1.

[2] There is a distinction between the "Town of Fort Covington," an area adjacent to the reservation on the east, and the "Village of Fort Covington," which is to the east of the "Town" area, and which the Mohawks have conceded could be subject to laches. *See* Dkt. No. 581 (hereinafter "Report-Rec.") at 34.

[3] Though we cite to the Docket for the purposes of this memorandum, the Report-Recommendation is available on Westlaw and included as an exhibit to this motion:

For the Hogansburg Triangle, the Magistrate did not use the Defendants' data but accepted the Plaintiffs' data and concluded dismissal was not warranted. Report-Rec. at 43-44. As to Fort Covington, the Magistrate's Report notes that the Defendants did not object to the census data presented by Plaintiffs, Report-Rec. at 39 n.31, but nevertheless the Magistrate declined to take judicial notice of Plaintiffs' data. Report-Rec. at 40. Instead the Magistrate took judicial notice of only the Defendants' data to conclude that dismissal of the claim to Fort Covington was mandatory as development of the record would be superfluous. *Id.* Then, the Magistrate stated, without explanation, that, "Even if the Court were to give judicial notice to the census figures presented by the Mohawks and reject those presented by the Defendants, the Indian presence in Fort Covington is still not sufficient to avoid dismissal of the Town of Fort Covington area claim on laches." *Id.*

The Plaintiffs objected to the Magistrate's ruling on Fort Covington on several specific grounds. Dec. at 20. We argued that the Magistrate erred because she did not take judicial notice of title information. Dkt. No. 594 at 15.[4] We argued that the Magistrate failed to adhere to Federal Rule of Evidence 201 and failed to explain why she could not take judicial notice of the more detailed census data presented by the Plaintiffs as applied to Fort Covington. Dkt. No. 594 at 11.

The Plaintiffs also objected to the Magistrate's rejection of the Plaintiffs' census data percentages as insufficient to overcome dismissal on the ground that the Magistrate did not properly assess the information and gave no legal basis for the rejection. Rather the

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Canadian St. Regis Band of Mohawk Indians v. New York, 5:82-CV-0783, 2012 WL 8503274 (N.D.N.Y. Sept. 28, 2012), Mot. Exh. 2.

[4] The Plaintiffs had presented title and ownership data to show that the Mohawks have lived in the area for generations and that in Fort Covington, the Mohawks own 14% of the land and a large part of the land in the area is vacant. *See* Dkt. No. 594 at 17.

Magistrate simply relied on a "feeling" or "sense" as to whether the census data presented an adequate basis to deny the motion to dismiss. Dkt. No. 594 at 20.

Finally, as part of our Objections, we presented to this Court more recent census data from 2010 showing a significant increase in the Indian population in Fort Covington (which stands at 25% as of the 2010 census and is increasing) and asked the Court to take judicial notice of that data. Dkt. No. 594 at 19-20 and n.7 (this Court may take judicial notice of the census data even if not presented to the Magistrate).

To all of this, the Defendants countered generally that all of the census data presented by the Plaintiffs was based on expert testimony and should have been completely disregarded by the Magistrate for both the Hogansburg Triangle and Fort Covington. Dec. at 27. In objecting to the Magistrate's ruling as to Hogansburg, the Defendants asserted that the Magistrate erred generally in judging the character of an area using population data because there is no bright-line rule on the use of population statistics, i.e., there is no rule setting a threshold population percentage for whether an area is Indian or non-Indian. Dec. at 34.

In resolving this dispute, this Court found that the Magistrate had erred in accepting judicial notice of one set of census data but not both. Dec. at 34. This Court concluded that it could give judicial notice to the census data presented by both parties although that did not mean the evidence was entitled to equal weight. Dec. at 29 n.20. It found that the Plaintiffs' census data was "more useful." Dec. at 28-29. In reaching this conclusion, the Court agreed that the Mohawk claims could be split into their discrete areas and that the Plaintiffs' data was not inadmissible expert testimony. Dec. at 7-8, 27. This Court also agreed that, while there is no bright-line rule as to population statistics in what makes an area Indian or non-

Indian in character, the population statistics are useful in assessing the character of the area and the settled expectations. Dec. at 35-36.

Applying these legal principles and the census data offered by both parties, the Court agreed that Hogansburg is distinguishable and not subject to the laches defense. Dec. at 36. The Court did not, however, separately address Fort Covington even though the Plaintiffs presented that claim area separately, the Magistrate ruled on it separately, and the Plaintiffs expressly objected to the Magistrate's recommended decision as to Fort Covington. Dkt. No. 594 at 14. Indeed, that was the Plaintiffs' main objection as to the Original Reservation claims.

At most, the Court addressed discrete parts of the Magistrate's ruling and our objections. By applying judicial notice to the census data of both parties, this Court rejected one of the Magistrate's reasons for dismissing the claim to Fort Covington—the refusal to give judicial notice to the Plaintiffs' census data. *See* Report-Rec. at 40.[5]

This Court also agreed that there is no bright line population test but that the population statistics are highly relevant. Dec. at 35. The Magistrate did not necessarily apply a bright-line rule to Fort Covington, but the Report-Recommendation did dismiss out of hand the Mohawk population statistics (which did not include the 2010 census) as insufficient without explanation. Report-Rec. at 40.

In their Objections, the Plaintiffs provided to this Court further census data for 2010, which, if subject to judicial notice, could be considered by this Court *de novo*. *See* Dkt. No.

[5] This Court did find that the failure of the Magistrate to give judicial notice to the Defendants' census data for Hogansburg was harmless error because: (1) she mentioned it in her ruling as being insufficient to establish the non-Indian character of the area, and (2) this Court considered the data in its de novo review and reached the same result. Dec. at 34 and n.30. This Court has not made a similar review for Fort Covington.

594 at 19 n.7. That census data showed a dramatic increase in the Indian population in Fort Covington, data not readily available to the Magistrate. This Court did not address that evidence at all.[6] Fort Covington also shares a narrative similar to that of the Triangle—it is an area never left by the Mohawks and is being absorbed into the Reservation.

Given the facts, it is critical that the Court issue an express ruling as to Fort Covington. We believe that the Court's ruling on judicial notice and the evidence presented as to the 2010 census justify reconsideration and amendment of the order to allow the claim to go forward. Fed. R. Civ. P. 59(e) and L.R. 7.1(g). At minimum, we request that the Court issue a clarification to make clear the rights of the parties as to this area going forward. FRCP 60(a).

II. ARGUMENT

A. Standards for Motion

Motions to clarify have been considered under three different rules--Federal Rule of Civil Procedure 59(e) and 60(a), and local rules allowing a request for reconsideration. In an abundance of caution, the Tribe relies on all three rules and argues them in the alternative. *See e.g.*, *American ORT, Inc. v. ORT Israel*, No. 07 Civ. 2332 2009 WL 233950, at *2 (S.D.N.Y. 2009), Mot. Exh. 3 (citing to all three rules); *E*Trade Financial Corp. v. Deutsche Bank AG*, No. 05 Civ. 0902, 2006 WL 2927613, at *1 (S.D.N.Y. 2006), Mot. Exh. 4 (same); *GMBH v. American Showcase, Inc.*, No. 97 Civ. 6576, 1999 WL 111931, at *1 (S.D.N.Y. 1999), Mot. Exh. 5 (Rules 59(e) and 60(a)); *But see In re Methyl Tertiary Butyl*

[6] The Court stated, Dec. at 28, n.19, that the Plaintiffs do not appear to request that notice be taken of any other information. This is incorrect. The Plaintiffs objected that the Magistrate had failed to take judicial notice of title records for Fort Covington. Dkt. No. 594 at 51. The Plaintiffs also asked the Court to take judicial notice of the updated 2010 census data for Fort Covington. *Id.*

Ether Products Liability Litigation, 593 F.Supp.2d 549, 569 (S.D.N.Y 2008) (request for clarification may only be made under Rule 60(a) and not local rule asking for reconsideration).

1. Motion to Clarify. "Clarification of a prior order is within the sound discretion of the Court." *American ORT*, 2009 WL 233950, Mot. Exh. 3, at *3; *Royal Sun Alliance Ins., PLC v. TA Operating LLC*, No. 09 Civ. 5586, 2011 WL 2416886, at *2 (S.D.N.Y. 2011), Mot. Exh. 6; *A.V. by Versace, Inc., v. Gianni Versace, S.p.a.*, 126 F.Supp.2d 328, 334 (S.D.N.Y. 2001).

2. Motion to Alter or Amend Judgment. Federal Rule of Civil Procedure 59(e) permits motions to alter or amend a judgment. Local Rule 59.1 cross refers to Local Rule 7.1(g) which governs motions for reconsideration, thereby relating a motion to reconsider to a motion to amend a judgment. It states, **"**Unless Fed. R. Civ. P. 60 otherwise governs, a party may file and serve a motion for reconsideration or reargument no later than FOURTEEN DAYS after the entry of the challenged judgment, order, or decree." L.R. 7.1(g).

By this motion, the Plaintiff seeks to clarify how the Court intended to address the claim to the Original Reservation area of the Town of Fort Covington. Generally, a request to clarify whether a claim has been omitted or whether a claim has been addressed falls within Rule 59(e). *See e.g., Cosgrove v. Smith*, 697 F.2d 1125, 1127-1128 (D.C. Cir. 1983) (clarification that a judgment resolved a portion or the entire case falls within Rule 59(e)); *Barry v. Bowen*, 825 F.2d 1324, 1328 and n.1 (9th Cir. 1987) (clarification of judgment falls under Rule 59(e)); *Continental Casualty Co. v. Howard*, 775 F.2d 876, 883-884 (7th Cir. 1985) (correcting judgment to make clear if relief is granted on a claim is proper under Rule

59(e)); *State of New Hampshire v. DOE*, No. Civ. 01-346-M, 2003 WL 21251889 (D.N.H. 2003), Mot. Exh. 7 (request for clarification and reconsideration to make clear the extent of order filed under Rule 59(e)); 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2810.1 (3d ed. 2012) (Rule 59(e) is appropriate if the original judgment failed to give relief on a claim when the court had found the party is entitled to relief); *See also, Old Line Life Ins. Co. v. Garcia*, 418 F.3d 546 (6th Cir. 2005) (motion for clarification as to whether all defenses had been disposed of); *Pittsburgh Corning Corp. v. Travelers Indemnity Co.*, CIV. A. No. 84-3985, 1988 WL 25286 (E.D. Pa. 1988), Mot. Exh. 8 (request to clarify if court considered and ruled on affirmative defenses).

The same standard is used to assess a motion to alter or amend a judgment or a motion for reconsideration under the local rule: "to prevail the moving party must present 'controlling decisions or factual matters that were put before [the court] on the underlying motion ... and which, had they been considered, might have reasonably altered the result before the court,' or otherwise demonstrate 'the need to correct a clear error or prevent manifest injustice.'" *American ORT*, 2009 WL 233950, Mot. Exh. 3, at *3, citing *Herschaft v. New York City Campaign Fin. Bd.*, 139 F.Supp.2d 282, 283-84 (E.D.N.Y. 2001); *See also In re Evergreen Mut. Funds Fee Litig.*, 240 F.R.D. 115, 117 (S.D.N.Y. 2007). The reconsideration of a judgment under Rule 59(e) is "an extraordinary remedy to be employed sparingly in the interests of finality and the conservation or scarce judicial resources." *Stewart Park and Reserve Coalition, Inc. v. Slater*, 374 F.Supp.2d 243, 253 (N.D.N.Y. 2005) (citing cases).

3. Motion for Relief from Judgment or Order.

Federal Rule of Civil Procedure 60(a) allows a court to "correct a clerical mistake or a mistake arising from an oversight or omission whenever one is found in the judgment, order, or other part of the record." The purpose of Rule 60(a) is "to afford courts a means of modifying their judgments in order to ensure that the record reflects the actual intentions of the court." *Ferguson v. Lion Holdings, Inc.*, Nos. 02 Civ. 4258, 02 Civ. 4261, 2007 WL 2265579, at *3 (S.D.N.Y. 2007), Mot. Exh. 9.

The Second Circuit has set forth a test for distinguishing between Rule 59(e) requests and those properly filed under Rule 60(a). "The relevant distinction is 'between what is erroneous because the thing spoken, written or recorded is not what the person intended to speak, write or record, and what is erroneous because the person later discovers that the thing said, written or recorded was wrong. The former comes within Rule 60(a); the latter does not.'" *In re Marc Rich & Co.*, 739 F.2d 834, 837 (2d. Cir 1984) *quoting Allied Materials Corp. v. Superior Products Co.*, 620 F.2d 224, 226 (10th Cir. 1980).

In *Marc Rich*, the Court found an order was correctly issued under Rule 60(a) because the court corrected the order "not to reflect a new and subsequent intent of the court, but to conform the order to the contemporaneous intent of the court." *Id.* (citations omitted). However, if the change is more substantive, then Rule 60(a) is not the appropriate vehicle. "Errors of a more substantial nature are to be corrected by a motion under Rule 59(e) or 60(b). When the change sought is substantive in nature, such as a change in the calculation of interest not originally intended, … or the broadening of a summary judgment motion to dismiss all claims, relief is not appropriate under Rule 60(a)." 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2854 (3d

ed. 2012). *See also Dudley ex rel. Estate of Patton v. Penn-America Ins. Co.*, 313 F.3d 662, 665 (2d. Cir. 2002) (an amended judgment that corrected the failure to include a monetary award in the original judgment was correctly construed as a motion under Rule 60(a)); *In re Frigidtemp Corp.*, 781 F.2d 324, 326-327 (2d. Cir 1986) (failure to award prejudgment interest is a clerical mistake to be corrected under Rule 60(a) if the court intended to award interest); *But see Paddington Partners v. Bouchard*, 34 F.3d 1132, 1140 (2d Cir. 1994) (failure to award prejudgment interest not a clerical error when interest not requested).

B. The Requested Clarification is Warranted Under Either Rule.

We acknowledge that the Court addressed the Hogansburg Triangle in detail and that the Court's final Order states that the Report and Recommendation is accepted in part and rejected in part consistent with the Order. However, in the body of the ruling, the Court directly addressed each claim except Fort Covington, even those claims to which we did not object. In addition, the Court's decision on judicial notice and rejection of the Magistrate's treatment of the evidence, i.e., giving judicial notice to some data but not other data, creates an ambiguity as to how the Magistrate's Order would be accepted or rejected for that particular claim. For example, did the Court accept the Magistrate's summary conclusion that the census data as to Fort Covington, even if given judicial notice, was inadequate to warrant denial of the dismissal? On what ground? Did this Court reject the 2010 Census data that was proffered in our objections; was it not adequate per the Magistrate's summary statement or was this evidence overlooked?

It is likely that the Defendants interpret this Court's decision as accepting the Magistrate's ruling as to Fort Covington and affirming the dismissal of the claim. If the Court had that intention and simply failed to say so, then Rule 60(a) is properly invoked to

correct that error. However, if the Court had no such intention, or if the Court agrees that the Plaintiffs have established that the claim for Fort Covington may go forward, then the amendment of the order would be substantive and fall within Rule 59(e) and Local Rule 7.1(g).

1. Rule 59(e). As noted above, generally, if a decision has omitted a claim or if it is not clear if a claim has been addressed, this Court may clarify and amend the judgment under Rule 59(e) to reflect the Court's intention. The Court may also reconsider and amend the judgment in the case of manifest injustice or overlooked evidence. Reconsideration and amendment under Rule 59(e) are justified when the court has overlooked the additional evidence, particularly if it would lead to a different result. *See Eisert v. Town of Hempstead,* 918 F.Supp. 601, 606 (S.D.N.Y. 1996) (granting a motion to reconsider means a court found it overlooked a matter which would mandate a different result).

In this case, it would be manifestly unjust to leave the order ambiguous. The parties will now be proceeding either to the merits of the claims or, if requested, a potential interlocutory appeal. If we sought an appeal, we would be guessing at the basis of this Court's ruling as to Fort Covington—whether legal or factual. If the Plaintiffs seek summary judgment on the remaining claims, and if we wrongly assume the Court accepted the Magistrate's ruling as to Fort Covington, we would potentially and unknowingly lose the opportunity to litigate that claim. Alternatively, the Plaintiffs believe that given the Court's rulings on judicial notice, the Magistrate's conclusion regarding Fort Covington is questionable. If, based on its rejection of the Magistrate's treatment of census data, we read the Court's decision as one that allows the claim to go forward, the Defendants will no doubt file motions to prevent summary judgment by filing their own motion to clarify.

It is possible that the Court simply overlooked Fort Covington and failed to separately analyze it after it ruled on judicial notice and rejected the Defendants' arguments on the use of an expert witness. Part of that missing analysis is the Court's failure to address the new census data presented by the Plaintiffs and which is subject to judicial notice, as well as our argument that ownership information is subject to judicial notice and highly relevant to assessing the character of an area. The Plaintiffs' view is that the Court's ruling as to Hogansburg is logically extendable to Fort Covington - particularly given the 2010 census data, and given the Court's holding that the Magistrate erred in not giving judicial notice to the Fort Covington census data.

The new census data for 2010 (presented to the Court but not the Magistrate) shows an Indian population of 25%, not a majority but clearly more than the less than 1% at issue in the Oneida land claim. This Court did not mention or give consideration to that data even though it could have and, under its reasoning, should have weighed it against the Defendants data as to Fort Covington. Having put forth factual matters that the Court does not appear to have considered and which could alter the judgment, *American ORT*, 2009 WL 233950, Mot. Exh. 3, at *3, the Plaintiffs have met the standard under Rule 59(e). In these circumstances, reconsideration and amendment of the judgment to allow the claim for Fort Covington to go forward is warranted.

2. Rule 60(a). "Rule 60(a) contemplates the correction of clerical mistakes which do not attack the party's fundamental right to a judgment at the time it was entered. … Such mistake must be mechanical in nature, apparent on the record, and not involve an error of substantive judgment." *In re Bell Offset*, No. 89-CV-1274, 1990 WL 3587, at *2 (N.D.N.Y. 1990), Mot. Exh. 10. Rule 60(a) cannot be used to "alter the substantive rights of the parties

but rather may only correct the record to reflect the adjudication that was already made." *Pietras v. Board of Fire Comm'rs,* No. 94 Civ. 0673, 2009 WL 1797135, at *7 (E.D.N.Y. 2009), Mot. Exh. 11. Rule 60(a) allows for a clarification to correct an order that fails to "memorialize part of its decision, to reflect the necessary implications of the original order, to ensure that the court's purpose is fully implemented, or to permit enforcement." *Garamendi v. Henin*, 683 F.3d 1069, 1079 (9th Cir. 2012) (internal quotes omitted).

In this situation, it is possible that this Court simply failed to state its decision as to Fort Covington and as such it is a simple omission covered by Rule 60(a). The Court's decision covers all claims considered by the Magistrate, even those to which we did not object, and expresses its intention to either accept or reject the Magistrate's recommendation. But there is no separate order regarding Fort Covington. This Court has discretion to amend the ruling to reflect its intentions with regard to that claim. If this Court intended Fort Covington to be subsumed within the reasoning of the Hogansburg claim, or if it intended to affirm the Magistrate as to Fort Covington, the Court could use Rule 60(a) to clarify that. *See Update Art., Inc. v. Maariv Israel Newspaper, Inc.*, 635 F.Supp 228, 230 (S.D.N.Y. 1986); *Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1445 (9th Cir. 1990).

Conclusion

This Court should grant the Plaintiffs motion to amend the judgment to allow the claim for Fort Covington to proceed or to provide more detail of its treatment of the Plaintiffs' census data for Fort Covington. In the alternative, the Court should clarify its Order to indicate whether it accepted or rejected the Magistrate's Report and Recommendation as to Fort Covington.

Dated: July 19, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July 2013, I electronically filed the foregoing PLAINTIFF ST. REGIS MOHAWK TRIBE'S MEMORANDUM IN SUPPORT OF THE MOTION FOR CLARIFICATION OR TO AMEND THE JUDGMENT AND ORDER OF THE COURT'S MEMORANDUM-DECISION AND ORDER OF JULY 8, 2013 with the Clerk of Court through the CM/ECF System which sent notification of such filing to the following:

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