UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN
Plaintiff

v. **CA 13-185-S**

NARRAGANSETT INDIAN TRIBE
Defendant

DEFENDANT NARRAGANSETT INDIAN TRIBE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

The Defendant Narragansett Indian Tribe (Tribe) hereby moves to dismiss the within matter pursuant to Rule 12 (b)(1), (b)(6) and (b)(7) of the Fed.R.Civ.P.

FACTUAL BACKGROUND

The Plaintiff, Douglas J. Luckerman (Luckerman) alleges that the Tribe has breached a contract between the parties for professional legal services. That for a period of years between 2002 and 2007 Luckerman performed various legal services on behalf of the Tribe specifically "matters relating to tribal lands" and "additional matters relating primarily to tribal sovereignty." (*See,* Complaint generally and specifically, ¶¶ 6 and 7). That as a result, the Tribe is indebted to Luckerman in an unspecified amount in excess of $1.1 million including interest, fees and cost. (*See,* Complaint ¶ 11).

Further, Luckerman states that he prepared an engagement letter dated March 6, 2003, setting forth the terms of the alleged agreement with the Tribe. The so-called "March Agreement." (*See,* Complaint ¶ 8 and Tab A thereof). Additionally, a second agreement was alleged to have been entered into on February 20, 2007, wherein "Plaintiff and the Tribe, through NITHPO, entered into an agreement setting forth the terms of Plaintiff's engagement ('February Agreement')." (*See,* Complaint ¶ 14 and Tab B

thereof). The NITHPO is the Narragansett Indian Tribal Historic Preservation Office, a wholly separate and distinct entity from the Tribe. The "February Agreement" purports to expand the scope of services to "the preservation of Tribal sovereignty, culture and traditions, as well as economic development and other issues . . ." (*See,* Complaint ¶ 13).

Noteworthy is the fact that the "March Agreement" contains no provision for an acknowledgement signature and is unsigned by the Chief Sachem. The "February Agreement" on the other hand contains both an acknowledgement section and signature by NITHPO. Further, the "March Agreement" with the Tribe alleges a waiver of sovereign immunity brought in "state or federal courts." The "February Agreement" states that "NITHPO agrees to a limited waiver of Tribal sovereign immunity in Tribal, federal and state courts . . ." and that "NITHPO clearly and explicitly waived the Tribe's rights to tribal sovereign immunity . . ." (*See,* Complaint at ¶ 15). The NITHPO is not a party in this action and lacks the authority to waive the Tribe's sovereign rights.

The Complaint acknowledges that payments from the Tribe had been received but those payments were never enough and fails to provide any specific account of what was paid and what is allegedly owed. (*See,* Complaint generally and specifically, ¶¶ 17 and 18).

ARGUMENT

Rule 12(b)(1) of the Fed. R. Civ. P. provides for dismissal where the Court lacks subject matter jurisdiction over plaintiff's claims. The Tribe raises the following defenses in regards to subject matter jurisdiction: the first, is that the Tribal Court has jurisdiction over plaintiff's action; the second, is that the Tribe is immune from

unconsented suit under the doctrine of Tribal sovereign immunity; and, the third, the plaintiff has failed to exhaust Tribal Court remedies.

Additionally, the case should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted and Rule 12(b)(7) for failure to join an indispensible party under Rule 19.

1. Subject Matter Jurisdiction of Plaintiff's Claims is Properly in the Narragansett Indian Tribal Court and Thus is a Federal Question

This action was removed by the Tribe from the Washington County Superior Court of the State of Rhode Island on the grounds that Luckerman's claims arise under tribal law therefore a federal question exists regarding the authority of the Tribe to compel a non-Indian to submit to Tribal jurisdiction.

The Narragansett Indian Tribe is a federally acknowledged and recognized sovereign Indian tribe pursuant to 25 C.F.R. § 83.11, as noticed at Fed. Reg. Vol. 48, No. 29, February 10, 1983, pp.6177-6178. Federal recognition brings with it certain rights and privileges. *Maynard v. Narragansett Indian Tribe*, 798 F.Supp. 94, 95 (D.R.I. 1992), *aff'd*, 984 F.2d 14 (1st Cir. 1993).

"Indian tribes are, distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia,* 6 Pet. 515, 559, 8 L.Ed 483 (1832). Indian tribes possess attributes of sovereignty over both their members and their territory. *United States v. Mazurie,* 419 U.S. 544, 557 (1975). As separate sovereigns Indian Tribes possess the power to regulate their own internal and social affairs. *United State v. Wheeler,* 435 U.S. 313, 322 (1978).

As stated in *Ninigret Development Co. v. Narragansett Indian Wetuomuck Housing Authority,* 207 F.3d 21, 25 (1st Cir. 2000), "This matter requires us to explore the complex web of considerations that envelops the interrelationship between federal courts and Indian tribal courts." An Indian tribe's authority to compel a non-Indian to submit to the jurisdiction of the Tribal court is a matter of federal law. *Id.*

2. Tribal Sovereign Immunity Bars the Relief Requested

Judge Selya in *State of Rhode Island v. Narragansett Indian Tribe*, states that Federal Recognition is the "recognition of a previously existing status." Furthermore, that the Narragansett Indian Tribe's "retained sovereignty predates federal recognition – indeed it predates the birth of the republic – and it may only be altered by an act of Congress." *Id.*, 19 F.3d at 695. (Internal citations omitted).

Ninigret states that the issue of Tribal sovereign immunity must be first decided in the federal courts and not in Tribal court.[1] *Ninigret,* 207 F.3d at 29.

This Court has, on at least two other occasions, addressed the question of whether an individual can maintain a civil suit against the Tribe absent a clear and explicit waiver of tribal immunity. The first, *Maynard v. Narragansett Indian Tribe,* 798 F. Supp. 94 (D.R.I. 1992), *aff'd.*, 984 F.2d 14 (1st Cir. 1993) held that: "As a sovereign entity with a government-to-government relationship to the United States, the Narragansett Indian Tribe retains common law sovereign immunity unless specifically waived or abrogated by the United States Congress." *Id.*, 798 F.Supp. at 99. It is settled that a waiver of

[1] The First Circuit notes that there is a split of authority on whether the federal or tribal courts should be first to address the issue of tribal sovereign immunity. *Ninigret*, at 29, FN 4. *See, National Farmers,* which states that Tribal court jurisdiction should be decided in the first instance in Tribal court and addresses the rational including its expertise in tribal matters. *National Farmers*, 471 U.S. at 856. Contrary to the First Circuits holding in *Ninigret,* what can be more fundamental than permitting a Tribal court to rule in the first instance on any aspect of the Tribe's sovereignty and immunity.

sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-59 (1978).[2]

The second case, Judge Pettine dismissed a breach of contract action for personal services brought against the Tribe by a legislative lobbyist. In that case plaintiff argued that the "Tribe engaged in commercial activity with a non-Indian citizen of the United States and thereby waived immunity . . ." *Federico v. Capital Gaming International,* 888 F.Supp. 354, 356 (D.R.I. 1995). The Court held that a waiver of sovereign immunity cannot be inferred in a commercial contract and further stated that the denial of federal jurisdiction is not the equivalent of allowing the Tribe to abrogate unilaterally a contract where (as here) the plaintiff "is free to seek a remedy in a tribal forum . . ." *Id.* at 357.

The *Federico* court further stated that plaintiff is "free to request a waiver of sovereign immunity" before conducting business with the Tribe. *Id.*

In this action a unilateral "March Agreement" letter from Luckerman to the Chief Sachem fails to satisfy the strict requirement that to be effective there must be an "unequivocally expressed" waiver of immunity. The "March Agreement" does not contain an acknowledgment signature from the Chief Sachem or the Tribe. The Complaint fails to set forth any other evidence or allegation that the Tribe agreed to a waiver of its immunity or for that matter the remaining terms of the agreement. As Luckerman well knows in his years of dealings with the Tribe (and other tribe's) waivers are not lightly granted in any transaction. Moreover, in the case of the Narragansett Tribe they require an explicit resolution of the Tribal government by a vote of the Tribal Council and the signature of the Chief Sachem.

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[2] This action is distinguishable from *State of Rhode Island v. Narragansett Indian Tribe,* 449 F.3d 16 (1st Cir. 2006). Therein the Court found that the Tribe waived and abrogated its immunity to the State *qua state* and not to individuals under contract with the Tribe.

The subsequent "February Agreement" is even more ambiguous and fails also to set forth an express waiver of the Tribe's immunity. This engagement letter is addressed not to the Tribe but to the NITHPO, an entity of the Tribe.[3] Further, the letter states that it "will constitute the agreement between us for me to represent NITHPO." There is no mention of the Tribe as a client or that work is to be performed for any entity other than NITHPO. As a separate entity, with no authority to waive the Tribe's immunity, any waiver by NITHPO is wholly inapplicable to the Tribe's immunity.

As set forth, the Tribe has not waived its sovereign immunity and therefore the case should be dismissed.

3. The Doctrine of Tribal Exhaustion in the Narragansett Indian Tribal Court Requires Dismissal

"A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 566 (1981)

The Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987). "Tribal courts play a vital role in tribal self-governance and the Federal Government has consistently encouraged their development." *Id.* at 14. (Internal citations omitted). "Regardless of the basis for jurisdiction, the federal policy supporting tribal self-governance directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction." *Id.* at 14. (Internal citations omitted)

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[3] Like the Narragansett Indian Wetuomuck Housing Authority, the NIHPO "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity." *Ningret,* 207 F.3d at 29.

In *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 105 S.Ct. 2447, 2454 (1985), the Supreme Court states that the issue of the existence and extent of Tribal court jurisdiction should first be conducted in the Tribal court. Tribal court remedies should be exhausted before the matter is heard in federal court. The Court's ruling supports the commitment of Congress to promote tribal self-determination and tribal self-government. "Tribal courts play a vital role in tribal-government and the Federal Government has consistently encouraged their development." *Iowa Mutual v. Laplante*, 107 S.Ct. 971, 975 (1987). [Internal citations omitted].

The Ninth Circuit as recently as April 2013, had an opportunity to once more address the issue of Tribal jurisdiction over non-Indians doing business in Indian country stating that: "Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction." *Grand Canyon Skywalk Development, LLC v. SA NYU WA Inc., 2013 U.S. App. LEXIS 8512*, p. 7 (9th Cir. April 26, 2013).

The First Circuit has held that "as a general rule, if a tribe has not explicitly waived exhaustion, courts lack discretion to relieve its litigation adversary of the duty of exhausting tribal remedies before proceeding in a federal forum." *Ninigret*, 207 F.3d at 31. " Civil disputes arising out of the activities of non-Indians on reservation lands almost always require exhaustion if they involve the tribe." *Id* at 32, *citing to, Iowa Mutual,* 480 U.S. at 18. "Courts regularly have held that a contract dispute between a tribe and an entity doing business with it, concerning the disposition of tribal resources, is a tribal affair for purposes of the exhaustion doctrine." *Ninigret,* 207 F.3d at 32.

In this Complaint there is first, no allegation setting forth that the Tribe waived exhaustion of Tribal court jurisdiction. Indeed, the agreement solely with the Tribe, fails to even mention the Tribal court. Second, the agreement with NITHPO states immunity will be waived in Tribal court – not that the Tribal court lacked jurisdiction.

Furthermore, the services to be performed go to the very essence of Tribal sovereignty and self-determination as stated in *National Farmers* as the basis for Tribal Court exhaustion. The services here were for "matters relating to tribal land" and "matters relating primarily to tribal sovereignty." (*See,* Complaint generally and specifically, ¶¶ 6 and 7).

The First Circuit and the Supreme Court have long recognized that Tribal courts play a vital role in tribal sovereignty and self-determination. Given this long-standing precedent the Complaint should be dismissed for failure to exhaust Tribal court jurisdiction.

4. Other Affirmative Defenses

NITHPO is not a party. NITPHO also can neither bind the Tribe to a contract nor waive the Tribe's immunity. Factually, it is wholly unclear in the pleadings what services and what sums are at bar that plaintiff claims are due from the Tribe, as opposed to any from NITHPO. Additionally, Plaintiff's allegations that he is owed for services dating back to 2002 are barred by the Rhode Island statute of limitations of 10 years for contract actions.

Plaintiff's claims should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted and Rule 12(b)(7) for failure to join an indispensible party.

CONCLUSION

For the compelling reasons set forth herein Plaintiff's Complaint must be dismissed.

Respectfully submitted,

NARRAGANSETT INDIAN TRIBE

/s/ John F. Killoy, Jr.

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CERTIFICATION

I hereby certify that I filed the within on the 13th day of May 2013, and that notice will be sent via the ECF system Notice of Electronic Filing (NEF) to the above-named counsel who are registered participants identified on the Mailing Information for Case No. 13–185-S.

/s/ John F. Killoy, Jr.

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