

**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
REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

The Defendant Narragansett Indian Tribe (Tribe) hereby responds to Plaintiff Douglas J. Luckerman (Luckerman) memorandum in opposition the Tribe's motion to dismiss the within matter pursuant to Rule 12 (b)(1), (b)(6) and (b)(7) of the Fed.R.Civ.P. and motion to remand.

ARGUMENT

Luckerman's response to the Tribe's Motion to Dismiss is premised on two false assertions; that both the Tribe's sovereign immunity from unconsented suit and the Tribal exhaustion doctrines are inapplicable to this case. There can hardly be a case where they are more applicable than this one. This is an action for recovery of attorney's fees for services allegedly performed to protect Tribal sovereignty and promote Tribal economic development for the Narragansett Tribe by an out-of-state licensed attorney "knowledgeable in American Indian law." *See*, Luckerman's Affidavit at ¶ 2.

1. The Narragansett Indian Tribe Has Not Waived its Sovereign Immunity

Attorney Luckerman goes to great length to argue and distinguish this case from many other cases wherein the federal courts, including this Court and the First Circuit Court of Appeals, have long held that "Tribal immunity applies to governmental and

commercial activities, whether conducted on or off a reservation.” *Kiowa Tribe of Oklahoma v. Manufacturing Techs. Inc.*, 523 U.S. 751, 754-755 (1998); *see also*, *Maynard v. Narragansett Indian Tribe*, 798 F.Supp. 94 (D.R.I. 1992), *aff’d*, 984 F.2d 14 (1st Cir. 1993) (Tribal immunity applies to a civil suit for off-reservation activities.) and *Ninigret Development Co. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000). (Tribal immunity applies to a contract to be performed off-reservation by a Rhode Island incorporated non-Indian contractor.).

Luckerman argues that the 2003 and subsequent 2007 Agreements waive the Tribe’s sovereign immunity. *See*, Luckerman’s Memorandum pg. 14 to 21. The premise is that the waiver, or waivers, are clear and unambiguous. Luckerman goes to great lengths to say how this is so, thus it requires seven pages to explain. The First Circuit has long held that a waiver of tribal sovereign immunity must be unequivocally expressed. "It is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’ " *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 15 (1st Cir. 1993). *See also Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 58; *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (The Court dismissed a suit for attorneys fees on the basis of Tribal sovereign immunity.) and *Federico v. Capital Gaming International*, 888 F.Supp. 354, 356 (D.R.I. 1995)(Dismissed action for breach of contract.)

Relying upon *C&L Enterprises, Inc. v. Citizens Band Potawatomi Indian Tribe of Oklahoma*, gives little support to his waiver argument. 532 U.S. 411 (2001). “The Tribe offers no support for its argument that the waiver is ineffective because it is unsigned.” *See* Luckerman’s Memorandum at pg.15. *C & L Enterprises* involved an off reservation

commercial contract signed by both parties. *Id.* at 414. The case was not decided on whether the contract was indeed executed by the parties. The Supreme Court found that by entering into an explicit arbitration provision, which the Tribe had proposed and signed, the Tribe consented to a waiver its immunity. *Id.* at 423. *See Ninigret Development Co.*, 207 F.3d at 30. (Finding a waiver in an arbitration clause of a signed contract between the Tribe and a third party.)

Luckerman further argues that the Tribe waived its immunity through its course of conduct. *See* Luckerman's Memorandum pg. 16. This would require a waiver by implication, which is wholly contrary to the precedents of Supreme Court and of this Court. *See Frederico*, 888 F.Supp. 354 (D.R.I. 1995) (Court rejected plaintiff's arguments of waiver by conduct, including payments made under a contract.) and *Maynard*, 981 F. 2d at 16. (Waiver cannot be inferred.)

Luckerman's affidavit offers no support to his argument that the Tribe has explicitly waived its sovereign immunity. Noteworthy is that the affidavit fails to refute the Tribe's argument in its Memorandum in Support of its Motion to Dismiss which states that:

"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." (*See* Tribe's Memorandum at pg. 5).

Tribal immunity precludes subject matter jurisdiction in an action against the Tribe. *Ninigret*, 32 F.Supp. at 502.

The Court thus lacks subject matter jurisdiction over the Tribe and the case must be dismissed pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil

Procedure

2. **The Holding of *Narragansett Indian Tribe v. Rhode Island* Does Not Waive or Abrogate the Tribe's Immunity in this Contract Action**

Luckerman's reliance on *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) is overstated. True and ironic is the statement that the case *Narragansett Indian Tribe v. Rhode Island* represents an "adverse impact" in the legal history of the Tribe's sovereign immunity. See Luckerman Memorandum pg. 19. Whatever the adverse impact that case may have upon the Tribe however is not applicable in a civil suit, by a private individual, for an alleged breach of contract.

As the First Circuit stated "we rest our decision squarely on the[se] idiosyncratic features" of the case at hand. *Id.* at 22. Those idiosyncratic features the Court in *Narragansett Indian Tribe v. Rhode Island* refers to involve the narrow interpretation of the relationship between the State of Rhode Island and the Tribe over the tax free sale of tobacco products and the enforcement of a criminal warrant upon the Tribe and its lands. Clearly not the case before the Court today.¹

The Supreme Court recently had to interpret whether a federal statute regarding prisoners rights waived a States right to sovereign immunity. The Court found the statute to be ambiguous and thus no waiver of immunity. The Court states that a "[w]aiver of immunity may not be implied[.]" Furthermore, "a waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Sossamon v. Texas*, 563 U.S. ____ (2011), *slip op.* p. 5.

¹ "The Tribe's surrender of its right to sue for non-settlement lands neither says nor implies anything about a surrender of its immunity from suit relating to its territorial or extraterritorial actions." *Maynard* 984 F.2d at 16.

Luckerman is in essence asking this Court to overturn *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993), an action that the First Circuit refused to do in *Narragansett Indian Tribe v. Rhode Island*, which states that: “The facts of the *Maynard* case dictate that any holding there was necessarily limited to civil suits premised on activities occurring outside the settlement lands.” *Id.* at 29. The First Circuit in an *en banc* decision refused overturn to *Maynard v. Narragansett Indian Tribe*, which as stated above requires that any waiver of the Tribe’s sovereign immunity be explicit.²

Luckerman goes to great lengths to distance his activities from Tribal lands for purposes assumed to avoid Tribal Court jurisdiction. He states that his services were “performed largely in office and courthouses outside tribal land” and “my legal work for the Tribe was performed for the most part at my law office in Lexington, Massachusetts, and in federal courthouses in Providence and Boston.” *See* Luckerman’s Memorandum pg. 9 and Affidavit ¶¶ 4 and 6. The Supreme Court in *Kiowa* disagrees and has held that sovereign immunity applies to activities on or off the Tribal lands. Regardless of whether or not Tribal Court jurisdiction applies Luckerman’s own actions fall squarely under *Maynard*.

Further, the scope of any waiver of immunity found in *Narragansett Indian Tribe v. Rhode Island* must be strictly construed in favor of the Tribe. *Sossamon v. Texas*, 563 U.S. ____ (2011), *slip op.* p. 5.

The Court thus lacks subject matter jurisdiction over the Tribe and the case must be dismissed pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil

² Noteworthy is the fact that the First Circuit knows how to explicitly overrule its own decisions by expressly overruling *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48 (1st Cir. 2005). *See, Narragansett Indian Tribe v. Rhode Island*, 449 F.3d at 25.

Procedure.

3. The Narragansett Indian Tribal Historic Preservation Office Lacks Authority to Waive the Tribe's Immunity

Luckerman seeks to bootstrap an alleged claim for relief and a waiver immunity by NITHPO upon the Tribe. If so, the absurd conclusion would be that any Tribal department, entity, or member is capable of waiving the governmental immunity of the Tribe *qua Tribe*. There is no basis for this conclusion either on the facts or in law. Waiver of sovereign immunity applies to the Tribe as a sovereign entity, not to individuals. *See generally, Cohen's Handbook of Federal Indian Law*, § 7.05[1][a].

Tribal sovereign immunity “rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance. The [authority] Tribal entity as an arm of the Tribe, enjoys the full extent of the Tribe's immunity.” *Ninigret*, 207 F.3d at 29 (*citations omitted*). In *Ninigret* a Tribal housing authority was sued for breach of contract. Just as here the contracting party to the February 3, 2007 Agreement was not the Tribe, but an entity of the Tribe. Whether NITPHO can waive its own sovereign immunity, as the Court found in *Ninigret*, is not at issue here because NITHPO is not a party to this action.

The power to waive Tribal sovereign immunity, like to power to legislate or carry out any of its governmental functions of the Tribe rests solely with the Tribal government.

A clear and concise reading of the February 2007 agreement cannot provide a factual basis that the Tribe consented to an explicit waiver of its immunity. The reading suggested by Luckerman is woefully ineffective to meet the high burden necessary to

find a waiver. The agreement state that “Luckerman will represent the NITHPO;” that the agreement is “between us for me to represent NITHPO;” that “NITHPO agrees to pay;” that “work I am doing for NITHPO;” that “NITHPO agrees to establish an escrow account;” and, “I look forward to working with NITHPO.”

Finally, that “NITHPO agrees to a limited waiver of Tribal sovereign immunity.” This is so not because the Tribe agreed to an agreement but because as the *Ninigret* court stated sovereign immunity extends to Tribal entities.

4. The Tribe Has Not Consented to a Waiver of Immunity In the Purported Agreements, By Resolution or Otherwise

Attached hereto and incorporated herein for purposes other than ruling upon the Tribe’s Rule 12(b)(6) motion is an Affidavit of Chief Sachem Mathew Thomas.

5. The NITHPO is an Indispensable Party Under R 12(b)(7)

As argued above, the Tribe has not waived its sovereign immunity thus claims against the Tribe must be dismissed. Claims against NITHPO, if any, require a direct action against it as an independent entity of the Tribe. *See, Ninigret*.

As Luckerman correctly points out a Rule 12(b)(7) motion will succeed (1) where there is an absent person without whom complete relief can be granted and (2) whose interest might be prejudiced in their absences. *See, Luckerman’s Memorandum* pg. 11. Clearly, absent a finding of waiver of immunity against the Tribe no relief can be granted in this action and any action against NITHPO in its absence would be prejudicial.

Whether or not NITHPO is subject to suit in this Court or whether Tribal exhaustion applies cannot be decided in this action.

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.

John F. Killoy, Jr., Esq. (#3761)