

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION
DIVISION

MICCOSUKEE TRIBE OF INDIANS OF
FLORIDA,

CASE NO.: 12-12816-CA-40

Plaintiff/Counter-Defendant,

v.

GUY LEWIS, MICHAEL TEIN, and LEWIS
TEIN, PL,

Defendants/Counter-Plaintiffs.

ORDER GRANTING LEWIS TEIN'S
MOTION FOR SUMMARY JUDGMENT ON THE TRIBE'S CLAIMS
AND ALTERNATIVELY DISMISSING COMPLAINT FOR LACK OF
SUBJECT MATTER JURISDICTION

THIS CAUSE came before the Court on Guy Lewis, Michael Tein, and Lewis Tein, PL's (collectively, "Lewis Tein") Motion for Summary Judgment on Tribe's Claims filed on August 22, 2013 ("Motion for Summary Judgment") and the Supplement to Lewis Tein's Motion for Summary Judgment on Tribe's Claims filed on October 9, 2013. The Court has reviewed the pleadings, motions, memoranda, case law, and heard argument of counsel on December 9 and 13, 2013, finds as follows:

THE COMPLAINT

The Miccosukee Tribe of Indians of Florida brought this case against its former lawyers, Guy Lewis, Michael Tein, and Lewis Tein, P.L. The complaint sounds in nine causes of action: Count I - Legal Malpractice; Count II - Breach of Fiduciary Duty; Count III - Fraud; Count IV - Fraud in the Concealment; Count V - Conspiracy to Defraud; Count VI - Civil RICO Conspiracy; Count VII - Civil RICO; Count VIII - Civil Theft; Count IX - Conversion. The

Defendants have moved for summary judgment on all counts, and to dismiss all counts for lack of subject matter jurisdiction.

BACKGROUND

Lewis Tein represented the Tribe in numerous legal matters from 2005 until January 2010. Lewis Tein also represented numerous individual Tribe members during that period who are not parties to this action.

Billy Cypress was the Chairman of the Miccosukee Tribe for 23 years and hired Lewis Tein in 2005. Bills for legal services were submitted on a monthly basis. Chairman Cypress reviewed these bills and paid them over the course of the next five years, until early 2010.

In late 2009, Chairman Cypress was defeated in an election by its now current Chairman, Colley Billie. After Chairman Billie was elected, several professionals were relieved of their duties on behalf of the Tribe including Lewis Tein, Dexter Lehtinen, the entire in-house legal department, the Chief Financial Officer, the Controller and the outside accountants. Chairman Billie did not approve of the former Chairman's leadership decisions, especially as concerned compensation of professionals, and filed several lawsuits challenging those decisions. The Tribe has pursued its prior attorneys in both state and federal court, alleging malfeasance by prior Chairman Cypress in conspiracy with these professionals. These lawsuits have resulted in various rulings adverse to the Tribe.¹

¹ For example, in the *Miccosukee v. Bermudez*, 92 So. 3d 232 (Fla. 3d DCA 2012) state court post-judgment collection proceeding - a wrongful death case in which Lewis Tein appeared on behalf of two individual Tribe members - the Tribe's new attorney injected the Tribe into a determination by the Court of who had paid the lawyers. Those post-judgment proceedings ultimately resulted in a three million dollar judgment against the Miccosukee Tribe, currently on appeal.

SUMMARY JUDGMENT FINDINGS

The Court addresses the Motion for Summary Judgment first.

At the time of their representation, Lewis Tein had been hired by Chairman Cypress who acted and spoke for the Tribe. The Tribe does not dispute that former Chairman Billy Cypress lawfully occupied his position during the time period set forth in the Complaint. It is undisputed that the former Chairman hired Lewis Tein to provide legal services for the Tribe. It is undisputed that Lewis Tein sent monthly invoices to the Miccosukee Tribe. It is further undisputed that the record evidence consisting of internal Tribe financial accounting documents reflect that many other law firms, including the Tribe's current lawyer, were paid in a virtually identical manner as Lewis Tein. The Tribe does not dispute that it recorded, accounted for and included in its audited financials, legal payments to Lewis Tein.

In a case similar to the proceedings here, United States District Court Judge Marcia Cooke described the activities as “emotionally and politically charged litigation, occurring in multiple judicial venues...” There, the Tribe sued former Chairman Billy Cypress; Miguel Hernandez, the former finance director of the Tribe; Julio Martinez, the Tribe's former chief financial officer; Dexter Lehtinen, the Tribe's former general counsel; Morgan Stanley Smith Barney, as a former investment firm for the Tribe; and Lewis, Tein and their law firm—the instant defendants in this case. The federal case included claims of federal RICO, conspiracy to commit federal RICO, civil theft, fraud, aiding and abetting fraud, Florida RICO, Florida RICO conspiracy, embezzlement, breach of fiduciary duty, and fraudulent misrepresentation. Judge Cooke dismissed that case for lack of subject-matter jurisdiction and provided in pertinent part:

“...because, at its core, this is a dispute involving the Miccosukee Tribe and the alleged abuse of power granted to its former Chairman under its tribal constitution. The Miccosukee Tribe is bootstrapping what is discontent with the prior leadership onto alleged federal claims that are better resolved in another venue....This quarrel, which necessarily involves interpretation of the Tribal Constitution is intra-tribal.” *Miccosukee Tribe of Indians of Florida v. Cypress*, 2013 WL 5462204, *7–*8 (S.D. Fla. Sept. 30, 2013)

COUNTS I and II

In Count I – Legal Malpractice, Plaintiff alleges that Lewis Tein: (a) disclosed confidential information relating to the inner workings of the Tribe, (b) disclosed confidential and protected financial records of the Tribe and its individual members to third parties, (c) represented clients with an adverse interest to the Tribe, (d) made a statement in Court regarding the *Bermudez* action; (e) filed a witness list in the *Bermudez* action; and (f) obtained and filed affidavits in the *Bermudez* action. Compl. at ¶ 35.

A claim for legal malpractice requires the Tribe to allege and prove that (1) Lewis Tein was hired by the Tribe as the Tribe’s attorney; (2) Lewis Tein neglected a reasonable duty owed to the Tribe; and (3) Lewis Tein’s alleged negligence was the proximate result of the cause of loss to the Tribe. *Law Office of David J. Stern, P.A. v. Security Nat’l Serv. Corp.*, 969 So. 2d 962, 966 (Fla. 2007); *Sure Snap Corp. v. Baena*, 705 So. 2d 46, 48 (Fla. 3d DCA 1998). The facts contained within the record do not support a claim that Lewis Tein breached the requisite standard of care under the second and third elements, nor damage arising therefrom. The record is silent on any proximate causation and damages flowing from any alleged conflict. Similarly, with respect to alleged disclosures to the IRS, the record affords minimal explanation and no notion of why the IRS was not entitled to receive the information, what the supposed damages are, or why the Tribe would not already be required to pay whatever taxes are owed.

The bulk of these allegations stem from statements and filings by Lewis Tein made in the *Bermudez* matter where Lewis Tein was put in the position – by the Tribe itself – of having to defend their handling of the case. *Miccosukee Tribe of Indians of Florida v. Bermudez*, 92 So. 3d 232, 233, 235 (Fla. 3d DCA 2012). Lewis Tein’s actions are thus protected by the litigation privilege, which provides “absolute immunity [for] any act occurring during the course of a

judicial proceeding, regardless of whether the act involves a defamatory statement, or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceedings.” *Boca Investors Group, Inc. v. Potash*, 835 So. 2d 273 (Fla. 3d DCA 2002). The Florida Supreme Court recognizes litigation immunity as extending to “any act occurring during the course of a judicial proceeding.” *Levin, Middlebrooks, Mabie, Thomas, Mayers & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 609 (Fla. 1994); *Boca Investors Group*, 835 So. 2d at 273.

Neither the record nor the Tribe’s opposition reveals any genuine dispute of material fact as to whether these alleged disclosures relate to the proceedings. Indeed, clearly, they do.² Accordingly, the litigation privilege protects Lewis Tein’s statements and conduct.

It must further be noted that under the Rules of Professional Responsibility, a lawyer may reveal confidences “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,” “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,” and “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” Fla. R. Prof. Cond. 4-1.6(c)(2)-(4). The Tribe waived any right to “attorney confidentiality because [it] level[ed] a claim against [its] former attorney[.]” *Miccosukee Tribe of Indians v. Lehtinen*, 114 So. 3d 329, 333 (Fla. 3d DCA 2013). On these facts, Lewis Tein “may disclose whichever confidential information that is necessary to defend [itself] or establish a claim against [its]

² The alleged statements and disclosures were apparently made in response to accusations of perjury and fraud on the court made against Lewis Tein in the *Bermudez* action referenced in Footnote 1. This controversy was ignited when the non-party Tribal attorney disclosed 61 checks to the *Bermudez* Plaintiff’s counsel. The Third District observed that this act was “mystifying” and stated, “[T]he Tribe, admittedly, has purposefully sought to participate in or influence a state court proceeding. We can conceive of no motive for the Tribe...to have done so.” *Bermudez*, 92 So. 3d at 233, 235.

former client to the extent that [Lewis Tein] discloses no more information than is required[.]”
Id.

The summary judgment record does not establish any confidential information contained in any of the allegedly offending disclosures, whether in the *Bermudez* action or otherwise. The Tribe’s discontent regarding disclosure of information is based solely on Lewis Tein’s alleged failure to adhere to procedures that the *current* Tribe administration now deems appropriate. Nor does this record demonstrate facts giving rise to any conflict of interest between the Tribe and the individual tribal member. But even the existence of a conflict, without more, does not create a cause of action. *Pressley v. Farley*, 579 So. 2d 160, 161 (Fla. 1st DCA) (*citing Oberon Investments N. V. v. Angel, Cohen, and Rogovin*, 492 So. 2d 1113, 1114 n.2 (Fla. 3d DCA 1986)).

The Court has carefully examined the Plaintiff’s complaint and in particular has considered the allegations contained in paragraph 35a-j, 37 through 39. In so doing the Court finds that either there is no evidence to support the allegations (e.g. 35a; 38 and 39) the allegations raised were either consented to by the former Chairman or individual Tribe members (e.g., 35b,c,f,g) or the acts, if any, were protected by the litigation privilege. (e.g., 35b,d,e,f,g,h,i; 37, 38, 39). Thus there are no material issues of fact to be determined.

Protected by the litigation privilege, and no issue of material fact otherwise having been shown, proven or claimed, the Court grants summary judgment in Lewis Tein’s favor on Count I.

In Count II – Breach of Fiduciary Duty, Plaintiff alleges that Guy Lewis, Michael Tein, and Lewis Tein PL breached their fiduciary duty to the Tribe. The Court determines that these are repetitive allegations of wrongful disclosures and conflict of interest, already discussed above. Lewis Tein is entitled to summary judgment in its favor on Count II on the same basis

that no improper disclosure and no legal conflict appear on the record. Proximate causation, a necessary element to a claim for breach of fiduciary duty, is also not supported by the record. *See Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002) (“The elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff’s damages.”).

Count II likewise rests in part on the allegation that Guy Lewis and Michael Tein “abused their attorney-client relationship” “by creating, designing, preparing, conspiring and implementing” a “scheme to defraud” and a “scheme to conceal and misrepresent.” As discussed in this Order, the record shows no evidence of such a “scheme.”

Based on the lack of material evidence, the Court grants Summary Judgment in Lewis Tein’s favor on Count II.

COUNTS III through IX

Distilled to its essence, the Complaint alleges that Lewis Tein “implemented a secret and sophisticated scheme under which the Miccosukee Tribe and individual members of the Miccosukee Tribe were ... fraudulently charged millions of dollars...by creating fictitious...legal work andexpenses.” (Compl. ¶18, 19). The thousands of pages of record evidence adduced in this matter, ranging from affidavits to deposition transcripts, to Special Magistrate Reports and Recommendations and Orders thereon, all disclose that no false statements or evidence of fictitious or improperly created or fraudulent legal fees or expenses have been perpetrated by Lewis Tein upon the Tribe.

The Tribe has failed to identify one fictitious time entry, invoice or legal matter attributable to Lewis Tein. Instead, the Tribe now contends that Lewis Tein’s time was

“unreasonable” and that the former Chairman “lacked the authority” to ratify the actions of Lewis Tein.

Importantly, during the hearing held on December 9, 2013 this Court made a direct and specific inquiry of all three attorneys representing the Tribe to confirm that the Tribe’s expert, Steven Davis, was not opining on fraud and was offering no opinion or conclusion on fraud as relates to Lewis Tein’s billings. Each lawyer for the Tribe confirmed the Court’s understanding. Accordingly, no evidence of fraud on the part of Lewis Tein in connection with their invoices to the Tribe has been produced.

Subsequent to oral argument on these motions, the Tribe submitted a Notice of Filing Supplement to its Supplement to Tribe’s Response to Lewis Tein’s Motion for Summary Judgment on December 11, 2013, addressing this Court’s request during argument that the Tribe review the spreadsheets produced by Special Magistrate Leesfield containing a summary of Lewis Tein’s non-tribal invoices. As a result, the Tribe’s counsel raised additional factual concerns after the Special Magistrate’s spreadsheets were reviewed.

The Court held two additional telephone conferences on December 13, 2013 with all counsel. The parties stipulated that these three potential issues of material fact were part and parcel of the summary judgment motion. An in-camera review of the Lewis Tein invoices in question was conducted by the Court following the first conference. Redacted copies of the invoices were also given to counsel for the Tribe. They revealed no disputed issues of material fact. The Tribe agreed that Lewis Tein associate Mr. Gaunt did no work for the Tribe on April 1, 2010. Lewis Tein associate Ms. Capote’s actual billable hours for the Tribe totaled .5, not 22.5. As to the 5/12/05 billing by Michael Tein, the Tribe was billed 1.3 hours, not the mistaken 31.2 hours reflected on the spreadsheet. While there may have been an input and merging error in the

1531 page document relied on by the Plaintiff, the Court specifically finds that there is no evidence, disputed or otherwise, that the billing was fraudulent, fictitious or false.

The record does not reveal a genuine issue of material fact. There is no evidence in the record of any fraud or overbilling. The Tribe's expert opines that some work performed by Lewis Tein was excessive (i.e., it took too long to research an issue). Not a single piece of evidence reveals, and no witness testified, that any work was done maliciously or simply not done. The claims levied by the Tribe require such evidence, because otherwise any former client could survive summary judgment in a malpractice case simply by alleging, long after the fact, that work was unnecessary, no matter how successful. There is no evidence of fraud. There is no evidence of any damages resulting from any purported bad act. There is no record evidence that any hypothetical damages were proximately caused by Lewis Tein. Finally, any damages allegedly flowing from Lewis Tein's positions taken in the *Bermudez* matter are flatly barred by the litigation privilege.

Thus the Tribe's claims of Count III Fraud; Count IV Fraud in the Concealment; Count V Conspiracy to Defraud; Count VI Civil RICO Conspiracy; Count VII Civil RICO; and Count VIII Civil Theft, necessarily require some evidence of Lewis Tein's intent to defraud or otherwise deliberately harm the Tribe. See *Gersh v. Cofman*, 769 So. 2d 407, 409 (Fla. 4th DCA 2000) (civil theft requires proof of criminal intent); *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc.*, 881 So. 2d 565, 571 (Fla. 3d DCA 2004) (RICO claim requires proof that a defendant intentionally participated in a scheme to defraud); *Blue Cross/Blue Shield of Florida, Inc. v. Weiner*, 543 So. 2d 794, (Fla. 4th DCA 1989) ("recovery for fraud requires proof of intentional and knowing misrepresentation[.]"). *Cedar Hills Properties Corp. v. Eastern Federal Corp.*, 575 So.2d 673,676 (Fla. 1st DCA 1991)("corporation cannot conspire with its own agent

unless agent has a personal stake in activities that are separate and distinct from corporation's interest"). The record is utterly devoid of any evidence of criminal intent or intentional misconduct.

Instead, the record thoroughly reveals that the Tribe's officers (e.g. Business Council member, Lawmaker William Osceola) and former employees (e.g., Finance Director of 21 years Jodi Rae Goldenberg) possess no knowledge of Lewis Tein allegedly overbilling the Tribe, committing fraud, violating the Tribe's trust, submitting inaccurate or untruthful bills, or doing anything wrong. To the contrary, the Tribe's own submitted internal financial records and administration confirms that all actions were fully disclosed and memorialized in audited financials and other Tribal records.

By way of example, the Tribe's auditor, Jose Menendez, testified that he is unaware of any indicia of Lewis Tein engaging in a scheme to defraud the Tribe and that he knew of no fraud or misrepresentation. The auditor also produced the Tribe's audited financial statements and other internal accounting records negating the Tribe's allegations of a secret scheme to defraud the Tribe. In an effort to create an issue of fact, the Tribe contends that its own auditor could have or should have done more to unearth the alleged fraud and conspiracy among Lewis Tein, the Tribe's former chairman, and other former tribal employees. Thus, the Tribe seems to assert a challenge to its own audited financial statements and internal accounting records as reliable. However, this Court will not critique the Tribe's internal documents, policies, and the like because the Court cannot question the internal operating procedures of a sovereign nation. Such an exercise would engage this Court in an intra-tribal dispute over which it lacks subject matter jurisdiction. *Miccosukee Tribe of Indians of Florida v. Cypress*, 2013 WL 5462204, *7–*8 (S.D. Fla. Sept. 30, 2013).

Assuming *arguendo* Tribe Auditor Menendez could have done more to confirm all the numbers in the Tribe's audited financial statements, it is clear that this in no way shows what Lewis Tein knew or did. It simply does not speak to Lewis Tein's intent.

Taken in the light most favorable to the Tribe, the record confirms that there is no genuine issue of material fact as to whether Lewis Tein acted with any bad intent, made intentional misrepresentations to the Tribe, or otherwise intended to harm the Tribe. Thus, summary judgment in favor of Defendants on Counts III through VIII is GRANTED.

As to Count IX – Conversion, based on previous representations made to the Court by counsel for the Tribe, Lewis Tein has returned the case files and documents sought and thus this Count is deemed moot.

SUBJECT MATTER JURISDICTION

Notwithstanding the above determination, and given that the conduct of this litigation has resulted in multiple appeals, the Court now addresses the issue of subject matter jurisdiction.

Subject matter jurisdiction “concerns the power of the trial court to deal with a class of cases to which a particular case belongs.” *Klonis v. Dep’t of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000). The Court may consider the issue of subject matter jurisdiction at any time and it may never be waived. *Id.* (“The defense of lack of subject matter jurisdiction may be raised at any time.”) (citing *Cunningham v. Standard Guaranty Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)); Fla. R. Civ. P. 1.140(b) (“Any ground not stated [in a motion to dismiss] shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.”) Moreover, “[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings . . . the court

should notice the defect and enter an appropriate order.” *Greene v. Greene*, 432 So. 2d 62, 65 (Fla. 3d DCA 1983).

The Tribe fails to state a cause of action which can survive in this Court because the Tribe’s Complaint is predicated on intra-tribal disputes over which this Court lacks subject matter jurisdiction. An intra-tribal dispute is one that affects matters of tribal self-government and sovereignty. *Miccosukee Tribe of Indians of Florida v. Cypress*, 2013 WL 5462204, *7, (S.D. Fla. Sept. 30, 2013).

The Miccosukee Tribe’s exhibit list submitted as part of the September 27, 2013 joint case status report is filled with intra-tribal governance documents. For example, the Miccosukee Tribe intends to use “The Miccosukee Tribe’s Constitution and Criminal and Civil Code” as evidence in this case. The Tribe lists various “Miccosukee General Council Resolutions” as evidence, including “Resolution 02-12,” “Resolution 03-10,” and “Resolution 01-12.” *Id.* All three resolutions are also attached to the Miccosukee Tribe’s Opposition.

The Miccosukee Tribe’s dispute concerns the allegation that under its own Constitution, laws, rules and guidelines, its former chairman exceeded the lawful, broad and virtually unfettered power bestowed upon him by the Tribe and the Tribal Constitution. This quarrel and this Complaint, which necessarily involves a request for this Court to interpret the scope and application of a sovereign’s constitution, laws, and rules, is intra-tribal in nature. *See Cypress*, 2013 WL 5462204 at *7-8. The Tribe is ““attempting to move this dispute, over which this court would not otherwise have jurisdiction, into [state] court because at its core, this is a dispute involving the [Tribe] and the alleged abuse of power granted to its former chairman under its tribal constitution.” *Cypress*, 2013 WL 5462204 at 7 (quoting *Smith v. Babbitt*, 100 F. 3d 556, 558 (8th Cir. 1996)).

Accordingly, the Court finds that it lacks subject matter jurisdiction over this intra-tribal dispute regarding the alleged misuse of broad and unfettered power bestowed on its former chairman, or to determine whether the former chairman exceeded the powers vested in him by the Tribe, thus violating internal Miccosukee Tribe rules or customs.

This Court finds that this matter is essentially a conflict between the prior Miccosukee administration and the current Tribal leadership about the former duly-elected Chairman's decisions under the Miccosukee Constitution, Criminal and Civil Code, and General Council Resolutions. The claims brought in this case arise from bills for legal work performed by these lawyers, specifically found not to be fraudulent, which were submitted and paid by the Miccosukee Tribe while under Chairman Cypress' constitutional authority. This case is an attempt by the Miccosukee Tribe's current leadership to bring to this Court what can properly be described at its core as an intra-tribal dispute over alleged abuses of power by a former chairman.

This Court cannot exercise jurisdiction over these matters.

CONCLUSION

For the foregoing reasons the Defendants' Motion for Summary Judgment is **GRANTED** on all counts. Alternatively, the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is **GRANTED** on all counts.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 12/15/13.


JOHN W. THORNTON
CIRCUIT COURT JUDGE

**No Further Judicial Action Required on THIS
MOTION
CLERK TO RECLOSE CASE IF POST
JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

Copies to:

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