UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Defendant.

Case No. 1:12-cv-00962-RJJ

Hon. Robert J. Jonker

STATE OF MICHIGAN'S BRIEF IN SUPPORT OF MOTION TO REVISE ORDER DISMISSING TRIBAL OFFICIALS

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INTRODUCTION

Nearly two years ago, the State of Michigan brought this action against the Sault Ste. Marie Tribe of Chippewa Indians and several of its officials asserting that they had violated their tribal-state gaming compact and the Indian Gaming Regulatory Act. The Tribe brought a motion to dismiss asserting that it was protected by tribal immunity. While this Court denied the motion to dismiss the Tribe, it did dismiss the tribal officials without prejudice because the Court concluded that there was no reason for the State to sue these officials when, the Court ruled, the State had an action against the Tribe itself. While the Court did not expressly say so, it appears that it believed the action against the tribal officials was unnecessary given that the Tribe could be sued directly.

On appeal, the Sixth Circuit held that the Tribe was, at that point in time, still protected by its immunity. The Sixth Circuit then vacated the preliminary injunction that this Court had entered in favor of the State. Given that the State cannot now sue the Tribe, the action against the officials is no longer unnecessary. The State has thus filed this motion to revise the Court's earlier order that dismissed the tribal officials so that the claims against these officials can be adjudicated in this lawsuit.

STATEMENT OF FACTS

In 1993, the State and the Tribe entered into a tribal-state gaming compact. (Compact, Dkt. # 1-1.) The Compact generally establishes the rights and responsibilities of the parties concerning the operation of class III gaming –

essentially casino-style gaming – in Michigan. Pursuant to the Compact, the Tribe has conducted class III gaming in five casinos it operates on Indian lands in the Upper Peninsula of Michigan, where the Tribe's headquarters and reservation are located. (Opinion, Dkt. # 37.)

Section 9 of the Compact states:

> Off-Reservation Gaming.
>
> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application. (Compact, Dkt. # 1-1.)

In January 2012, the Sault Tribe Board of Directors approved Resolution 2012-11, which stated that the Tribe intended to open a casino in the City of Lansing on land that is not part of the Tribe's reservation. (Resolution, Dkt. # 1-3.) The State sent a letter on February 7, 2012 to the Tribe warning it that the operation of class III gaming at a casino in Lansing would be unlawful and that if it proceeded with its plans, the Tribe would do so at its own risk. (Letter, Dkt. # 1-5.) The State filed the instant lawsuit and a motion for preliminary injunction to enjoin the Tribe from violating § 9 of the Compact by applying to take land into trust where it has not obtained a revenue sharing agreement with the other Michigan tribes.

Instead of answering the complaint, the Tribe filed a motion to dismiss. After oral argument, this Court granted the State's motion for a preliminary injunction that prohibited the Tribe from filing an application to take the Lansing property

into trust for gaming purposes unless the Tribe first obtained a revenue sharing agreement with the other Michigan tribes. (Opinion, Dkt. # 37.) The Court held that it had jurisdiction and that the Tribe's immunity was abrogated whether the State sought to enjoin the application to take land into trust or, alternatively, to enjoin gaming at the Tribe's existing casinos. *Id.* The Court therefore denied the motion to dismiss, except that it granted, without prejudice, the motion to dismiss tribal officials, as the Court determined that the Tribe itself could be sued. It also granted the motion to dismiss, without prejudice, as to Counts V and VI of the complaint, finding they were not ripe for adjudication. The Tribe filed an appeal from the order granting the preliminary injunction.

Sixth Circuit ruling

The Sixth Circuit vacated the injunction and denied the State's petition for rehearing. The Court ruled that the Tribe was immune from the State's claims because the State had yet to allege facts that would support abrogation of that immunity under 25 U.S.C. § 2710(d)(7)(A)(ii).

State's cert petition

The State filed a petition for certiorari, and the Sixth Circuit stayed the issuance of its mandate pending a determination on the petition. However, when the U.S. Supreme Court issued its ruling in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014), the State determined that the issues raised in the cert

petition had been resolved against the State and it withdrew its petition. Thereafter, the mandate issued from the Sixth Circuit.

Following the issuance of the mandate, the Tribe submitted an application to have the property in Lansing taken into trust. At the same time, the Tribe also applied to have 71 acres in Huron Township taken into trust so that it can build a casino there in addition to the Lansing casino. This second application confirms the State's concern that under the Tribe's theory, there is no practical limit on the number of casinos the Tribe will be able to open across the State.

Tribe's motion to dismiss

The Tribe has filed a motion to dismiss all remaining claims in this case. The State informed counsel for the Tribe that it would concur if the Tribe would agree that Counts 1-3 should be dismissed without prejudice. The Tribe has declined to agree to this proposal, so the State is filing a separate response to the latest motion to dismiss.

ARGUMENT

I. Since the State cannot sue the Tribe, the claims against the tribal officials are no longer unnecessary, and the State should be allowed to pursue those claims.

When the State was contemplating an appropriate course of action following entry of the Sixth Circuit's mandate, it believed it would need to seek relief pursuant to Fed. R. Civ. P. 60. While preparing that motion, however, it became apparent that since no final judgment has been entered in this case, that the correct

avenue for obtaining relief from the Court's order would be a motion to revise the order under Fed. R. Civ. P. 54(b), which provides in part for certification of interlocutory appeals, but also makes clear that an order that does not resolve all the claims in a case is not a final order "and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." *Id.* There can be no dispute that a final order adjudicating all the claims has not been entered in this case. The order dismissing the tribal officials is therefore appropriately reviewed under Rule 54(b).[1]

A. The Court has discretion to revise an earlier interlocutory order under Rule 54(b).

Rule 54(b) does not describe any particular standard to apply when a court is deciding whether to revise an earlier order, other than indicating that it may do so at any time before entry of a final judgment. While the Sixth Circuit does not appear to have established such a standard, other federal courts have held that revision of interlocutory orders is within the discretion of the court. For example, the Tenth Circuit ruled that under Rule 54(b) "'every order short of a final decree is subject to reopening at the discretion of the district judge . . . .'" *Elephant Butte Irrigation Dist. of New Mexico v. United States Dep't of Interior*, 538 F.3d 1299, 1306 (10th Cir. 2008), quoting *Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005). Similarly, the Seventh Circuit has held that Rule 54(b) "governs non-final orders and permits revision at any time prior to the entry of judgment, thereby bestowing

[1] The undersigned apologizes for any confusion caused by his misunderstanding of the correct rule under which to seek relief from the Court's order.

sweeping authority upon the district court to reconsider a new trial motion." *Galvan v. Norberg*, 678 F.3d 581, 587 (7th Cir. 2012) (emphasis added). See also, *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970) (court reviews interlocutory order for abuse of discretion); *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 48 (1943) (court had discretion to grant re-argument of interlocutory decision).

Given that Rule 54(b) itself places no limit on the court's authority to revise its interlocutory orders, as confirmed by wide-ranging court of appeals precedent, for the reasons discussed in this motion, it is appropriate for the Court to exercise its discretion to revise its order dismissing the tribal officials.

B. Since the Court relied solely on its belief that the Tribe was not immune when it dismissed the claims against the tribal officials, reviving the claims against those officials now that the Tribe cannot be sued is well within the Court's discretion and otherwise appropriate.

It was certainly reasonable for this Court to dismiss the tribal officials without prejudice when it appeared that the State could obtain relief from the Tribe itself. As noted above, the claims against those officials could have been considered redundant or unnecessary. However, given the Sixth Circuit's ruling that the Tribe is immune, it now makes sense to allow the State to pursue the officials as was originally contemplated when the complaint was filed.

In fact, the availability of such a course of action was a cornerstone of the Supreme Court's recent ruling in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014). There the State had asked the Court to modify the common law so

that tribes' commercial activities would no longer be protected by immunity. The Court declined, specifically relying on a state's ability to obtain relief from tribal officials. "Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. See *supra,* at 12-13." *Bay Mills*, 134 S. Ct. at 2036 n.8. On page 13 of its opinion the Court said:

> So, for example, Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation casino. See Mich. Comp. Laws Ann. §§432.206–432.206a (West 2001). And if Bay Mills went ahead anyway, *Michigan could bring suit against tribal officials* or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See §432.220; see also §600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young*, 209 U. S. 123 (1908), *tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers*, responsible for unlawful conduct. See *Santa Clara Pueblo*, 436 U. S., at 59. . . . In short (and contrary to the dissent's unsupported assertion, see *post*, at 11), the panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under §2710(d)(7)(A)(ii)—can shutter, quickly and permanently, an illegal casino.

Bay Mills, 134 S. Ct. at 2035 (emphasis added).

In the instant action, the State has only sought to do what the Supreme Court was confident it could do – bring an action against tribal officials to remedy unlawful activity. Certainly in light of the expectation underlying the *Bay Mills* decision, the State is justified in asking for revision of the order dismissing its action against the Sault Tribe officials.

C. If the Court grants this motion, the State will seek leave to file an amended complaint to conform its pleadings to the Supreme Court's *Bay Mills* opinion and to add allegations concerning the application to take land into trust in Huron Township.

So the record is clear, it is the State's intention to seek permission from the Court to amend its complaint against the tribal officials once the order dismissing those officials is revised. The circumstances supporting this action have changed since the original complaint was filed. Significantly, the breach of § 9 has in fact now occurred, with the Tribe applying for both the Lansing parcel and the Huron Township parcel to be taken into trust. This move into southeast Michigan has significantly raised the stakes in this litigation. The complaint should be updated to reflect these recent material facts.

Also, in light of the clarification of the law in the *Bay Mills* opinion, the State believes that tribal officials who act outside Indian country are liable individually for violations of state law. The State expects to include in its amended complaint claims for intentional interference with a contractual relationship and conspiracy to breach a contract under state law. It also believes the complaint could benefit from some clarifying revisions of its claims for breach of contract/compact under state and federal law.

RELIEF REQUESTED

The State respectfully requests that the Court revise and effectively rescind its March 5, 2013 order to the extent it dismissed the State's claims against the named tribal officials.

Respectfully submitted,

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