UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe, Plaintiff, vs. STATE OF NEW MEXICO, Defendant.	)	**NO. 13-cv-01186-JAP-KBM**

DEFENDANT STATE OF NEW MEXICO'S MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT

Defendant State of New Mexico, pursuant to Rules 55(c) and 60(b)(4) of the Federal Rules of Civil Procedure, respectfully moves this Court for an order setting aside the entry of default and default judgment entered in this case. The entry of default and default judgment are void for two reasons. First, Defendant was never properly served with process and thus the Court lacked personal jurisdiction over it. Second, Defendant has not waived its right under the Eleventh Amendment of the United States Constitution to assert its sovereign immunity from suit in this Court. Absent such waiver, the Court also would lack subject matter jurisdiction to enter a default judgment. Defendant thus respectfully requests that the Court set aside the entry of default and default judgment.[1]

Procedural Background

Plaintiff filed its Complaint on December 13, 2013. (Failure to Conclude Compact Negotiations in Good Faith, 25 U.S.C. § 2710(d) ("Complaint") (Doc. 1).) In its Complaint, Plaintiff sought redress from the Court for Defendant's alleged failure (which Defendant

[1] Defendant has filed this motion for the limited purpose of asking the Court to set aside the entry of default and default judgment. Defendant is not waiving Plaintiff's failure to properly serve it or its Eleventh Amendment immunity from suit.

categorically denies) to negotiate a tribal-state compact for the regulation of Class III gaming activities on Plaintiff's Indian lands in good faith pursuant to the federal Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 ("IGRA"). However, Plaintiff recognized that Defendant "has the discretion to consent or not to consent to the jurisdiction of th[e] Court per its immunity from suit vested in the Eleventh Amendment to the United States Constitution." (*Id.* ¶ 10, at 4.) *See generally Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that IGRA did not waive states' sovereign immunity from suit in federal court to compel the state to negotiate with an Indian tribe). Plaintiff further noted that, "*[i]f [Defendant] fails to answer the instant litigation*, or raises Eleventh Amendment immunity as a defense, th[e] Court should dismiss the action due to the State's sovereign immunity under the Eleventh Amendment." (*Id.* (emphasis added).)

Plaintiff sought, and on December 16, 2013, the Court issued a summons to the New Mexico Attorney General. Three days later, on December 19, 2013, Plaintiff filed a return of service. The return of service shows that Plaintiff served a summons and copy of the complaint only on Daniel Rios, who is designated by law to accept service on behalf of the Office of the Attorney General of New Mexico. (Summons and Proof of Service (Doc. 6).) Plaintiff never filed a return of service showing that it delivered a copy of the complaint and summons to the chief executive officer of the State of New Mexico – Governor Susana Martinez.

On January 9, 2014, Plaintiff filed a Praecipe, requesting the issuance of a Clerk's Entry of Default. (Praecipe (Doc. 7).) The Clerk of the Court filed an Entry of Default the following day. (Clerk's Entry of Default (Doc. 8).) Plaintiff then filed – in sharp contrast to the position it took in its Complaint – its Motion for Default Judgment along with its counsel's declaration in support of the Motion. (January 13, 2014 Motion for Default Judgment (Doc. 11); Scott Crowell

Decl. in Support of Motion for Default Judgment ("Crowell Declaration") (Doc. 12).) In its Motion, Plaintiff asked the Court to enter default judgment against Defendant and order the parties to undergo certain remedial procedures set forth in 25 U.S.C. § 2710(d)(7)(B). (*Id.* at 1.) In the declaration, Plaintiff's counsel averred that Defendant was "served with a copy of the summons and complaint on December 17, 2013, as reflected on the docket sheet by the proof of service filed on December 19, 2013." (Crowell Decl. ¶ 4.) Plaintiff's counsel also stated that "Defendant has failed to appear, plead or otherwise defend within the time allowed and, therefore, is now in default." (*Id.* ¶ 6.) The Court entered default judgment on Friday, January 24, 2013. (*See* Default Judgment and Notice of Hearing (Doc. 14)).

Argument and Authorities

Federal Rule of Civil Procedure 55(c) authorizes the Court to set aside an entry of default for good cause, and to set aside entry of a default judgment in accordance with the terms of Fed. R. Civ. P. 60(b). Rule 60(b)(4) allows the court to relieve a party from a final judgment when "the judgment is void." This provision applies "where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1377 (2010); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2862 (2012) ("[A judgment] is void . . . if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law."). "[V]oidness usually arises for lack of subject matter jurisdiction or jurisdiction over the parties." *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979). If a judgment is void, "the court really has no discretion at all; it must recognize that it is a nullity and grant relief." *See* 12 Moore's Federal Practice § 60.44[5][a] (3d ed. 2011); *see also Venable*

v. Haislip, 721 F.2d 297, 300 (10th Cir. 1983) ("If the underlying judgment is void for lack of personal or subject matter jurisdiction or because entry of the order violated due process, the district court *must* grant relief.") (emphasis added).

The entry of default and default judgment entered herein are void and must be set aside for two reasons. First, the Court lacked personal jurisdiction over Defendant, because Defendant was never properly served with process. Second, Defendant has sovereign immunity pursuant to the Eleventh Amendment. It has not yet determined whether to waive its sovereign immunity, and thus on the present record the Court would lack subject matter jurisdiction to enter default judgment against Defendant.

I. The Default Judgment Is Void Because Defendant Was Never Properly Served With Process.

"[A] default judgment in a civil case is void if there is no personal jurisdiction over the defendant." *Hukill v. Ok. Native Am. Domestic Violence*, 542 F.3d 794, 797 (10th Cir. 2008) (quoting *United States v. Bigford*, 365 F.3d 859, 865 (10th Cir. 2004)). "[S]ervice of process [under Fed. R. Civ. P. 4] provides the mechanism by which a court having venue and jurisdiction over the subject matter of an action asserts jurisdiction over the person of the party served." *Okla. Radio Assocs. v. F.D.I.C.*, 969 F.2d 940, 943 (10th Cir. 1992) (citing *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946)). Fed. R. Civ. P. 4(j) states that "[a] state . . . must be served by: (A) delivering a copy of the summons and of the complaint to its chief executive officer; or (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant." New Mexico law, in turn, provides that "[s]ervice may be made upon the State of New Mexico . . . (a) in any action in which the state is named a party defendant, by delivering a copy of the process to the governor and to the attorney general." Rule

1-004(H) NMRA. Thus, under either prong of Federal Rule 4(j), obtaining personal jurisdiction over the State of New Mexico requires serving a summons and copy of the Complaint on the Governor, which Plaintiff has never done.

Despite failing to serve the Governor in this lawsuit as required by both Fed. R. Civ. P. 4(j) and Rule 1-004(H), Plaintiff has made repeated representations that it served the State of New Mexico, first to the Clerk of Court and again to this Court. In reliance on those untrue representations, the Clerk of the Court entered a default on January 10, and the Court entered its default judgment on January 24. (Doc. 12.) At best, Plaintiff has failed to comply with a rule of which it clearly should have known.

Because Plaintiff did not properly serve Defendant, the Court lacked personal jurisdiction over Defendant. *See Hukill*, 542 F.3d at 797; *see also Chester v. Green*, 120 F.3d 1091, 1091 (10th Cir. 1997) ("The first requirement of [the rules of civil procedure] is to obtain service on the defendants so the court would have jurisdiction over them."). When the court fails to obtain personal jurisdiction over a defendant, a default judgment entered against the defendant is void. *Burnham v. Superior Court of California, County of Marin,* 495 U.S. 604, 608-609 (1990); *United States v. Bigford,* 365 F.3d 859, 864-865 (10th Cir. 2004). Accordingly, the default judgment entered against Defendant is void and the Court must set the default judgment aside. *See* Fed. R. Civ. P. 60(b)(4).

II. The Default Judgment Is Void Because Defendant Has Eleventh Amendment Immunity From Suit.

The Court should set aside the default judgment on the basis of Plaintiff's failure to properly serve process on the State of New Mexico. The Court should note, however, that even if Plaintiff had accomplished proper service of process, in the absence of evidence of an "unequivocal" waiver of Defendant's Eleventh Amendment immunity, *see Jicarilla Apache*

Tribe v. Kelly, 129 F.3d 525, 528 (10th Cir. 1997) (holding also that waiver of Eleventh Amendment immunity is "not easily presumed"), entry of default judgment against Defendant still would be improper.

"The Eleventh Amendment is a jurisdictional bar that precludes unconsented suits in federal court against a state." *Wagoner County Rural Water v. Grand River Dam*, 577 F.3d 1255, 1258 (10th Cir. 2009); *see Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir. 1999) ("[A] State's assertion of Eleventh Amendment immunity challenges the subject matter jurisdiction of a district court."), *overruled on other grounds by Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

In particular, "under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 . . . (1996), the Eleventh Amendment shields the state from an action seeking to compel the state to negotiate with the Tribe in good faith." *Jicarilla Apache Tribe v. Kelly*, 129 F.3d at 538; *see Seminole Tribe of Florida*, 517 U.S. at 47 (holding that the Indian Commerce Clause does not grant Congress the power to abrogate the States' sovereign immunity and thus Section 2710(d) of IGRA, which provides that a tribe may sue a State for alleged violation of the requirement of good faith negotiation, cannot grant jurisdiction over a State that does not consent to be sued).

The Tenth Circuit has not varied from the rule articulated in *Seminole Tribe of Florida. See Jicarilla Apache Tribe*, 129 F.3d at 538; *Mescalero Apache Tribe v. State of N.M.*, 131 F.3d 1379, 1384 (10th Cir. 1997) ("*Seminole* held that Congress lacked the authority, under the Indian Commerce Clause, to abrogate the states' Eleventh Amendment immunity, and therefore 25 U.S.C. § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued." (internal quotation marks & citations omitted)); *Nelson v. Geringer*, 295 F.3d 1082, 1096 (10th Cir. 2002) (citing *Seminole Tribe v. Florida* for the proposition that "[t]he Supreme Court has

held that the [Eleventh] Amendment bars suit against a state unless the state waives immunity or Congress has validly abrogated immunity").

Unless a state's Eleventh Amendment immunity has been abrogated or waived, a federal court lacks jurisdiction to enter default judgment against it. *See O'Connor v. Florida Bar*, Case No. 05-cv820, slip op. at 3-5 (D.N.M. Feb. 13, 2006) (noting that the Defendant Florida Bar was immune from suit under the Eleventh Amendment and thus setting aside the default judgment due to a lack of subject matter jurisdiction); *Brown v. Florida*, No. 13-cv-49, 2013 U.S. Dist. Lexis 31395, at *9 (M.D. Fla. Mar. 7, 2013) (vacating the clerk's entry of default against the Department of Corrections for the State of Florida based on "its immunity under the Eleventh Amendment"); *see also Watters v. WMATA*, 295 F.3d 36, 39-40 (D.C. Cir. 2002) ("[U]nless [the Washington Metropolitan Area Transit Authority's Eleventh Amendment] sovereign immunity has been waived, the district court lacks jurisdiction to enter judgment against the Authority."); *Thompson v. United States*, 291 F.2d 67, 68 (10th Cir. 1961) (stating that "[i]f the court lacks jurisdiction it cannot render a judgment").

Defendant possesses sovereign immunity from suit in this Court pursuant to the Eleventh Amendment. It has not yet determined whether to waive its sovereign immunity, and it has taken no action on the basis of which the Court could find an unequivocal waiver. At present, therefore, this Court would lack subject matter jurisdiction to enter default judgment against Defendant. *Cf. Lopez v. Ponkilla*, 829 F. Supp. 2d 1093, 1095-96 (W.D. Okla. 2010) (granting the Kikapoo Nation's motion to set aside default judgment pursuant to Fed. R. Civ. P. 60(b), stating that, "[a]s the Kikapoo Nation is immune from suit . . . [t]he entry of default must . . . be vacated"); *see also Red Lake Band of Chippewa Indians v. Baudette*, 769 F. Supp. 1069, 1072 n.1 (D. Minn. 1991) ("Because the state is absolutely immune from suit pursuant to the eleventh

amendment, the Court was without jurisdiction to enter a judgment concerning the state. Since a judgment rendered without jurisdiction is void, defendants' motion for relief is proper pursuant to Fed. R. Civ. P. 60(b)(4).". As the Court of Appeals for the First Circuit stated in *Narragansett Tribe v. Guilbert*, No. 92-1662, 1993 U.S. App. LEXIS 6018 (1st Cir. Mar. 24, 1993):

> [T]he Narragansett Indian Tribe possesses sovereign immunity . . . [and it is] clear that the Tribe . . . did not waive its immunity in respect to the counterclaims. Consequently, the district court lacked jurisdiction over [the] counterclaims, and its default judgment is void [pursuant to Fed. R. Civ. P. 60(b)(4)].

Id. at *3-4 (citing Fed. R. Civ. P. 60(b)(4); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2862 at 198-200 (1973)) (other internal citations omitted). Similarly, because on the present record Defendant's Eleventh Amendment immunity bars this suit, the default judgment is void and the Court should set it aside. *See* Fed. R. Civ. P. 60(b)(4).

Conclusion

For all the foregoing reasons, Defendant State of New Mexico respectfully requests that the Court enter an Order setting aside the entry of Default entered on Friday, January 10, 2014 (Doc. 8), and the Default Judgment entered on Friday, January 24, 2013 (Doc. 14).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of February, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means.

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