

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANTHONY JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 2:14-cv-02117-CM-TJJ
)	
WYANDOTTE TRIBE OF OKLAHOMA)	
a/k/a WYANDOTE NATION)	Removed from the District Court
d/b/a 7 TH STREET CASINO,)	of Wyandotte County, State of Kansas,
Defendants.)	No. 14-CV-155

**DEFENDANT’S REPLY TO PLAINTIFF’S MEMORANDUM
IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

Defendant Wyandotte Nation (“Nation”) removed the current action from the District Court of Wyandotte County, Kansas [Doc. 1] and thereafter filed a motion to dismiss [Doc. 6] pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff Anthony Johnson filed *Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss*¹ [Doc. 12] on May 5, 2014. Hereafter, the Nation replies to Plaintiff’s motion.

Introduction

The Nation², a federally recognized Indian tribe, is immune from unconsented suit. The Nation has not waived its sovereign immunity from suit and, in her response, Plaintiff has failed to set forth any facts to support any claim that the Nation has waived its sovereign immunity or that Congress has abrogated the Nation’s sovereign immunity for this tort claim.

Plaintiff, instead, advances the broad suggestion that this Court should overturn nearly one hundred years of United States Supreme Court precedent recognizing the sovereign

¹ In her motion to dismiss, Plaintiff asks this Court to “remand the case back to the District Court of Wyandotte County.” Doc. 12, p. 15. However, Plaintiff did not file a motion to remand within thirty days of the notice of removal, as required by 28 U.S.C. § 1447(c), and thus the issue of remand is not before this Court.

² Plaintiff now states that she “brought her Petition . . . against three distinct, but related entities: Wyandotte Tribe of Oklahoma, Wyandotte Nation and 7th Street Casino.” However, Plaintiff brought this action in state court against “[t]he Wyandotte tribe of Oklahoma, also known as, The Wyandotte Nation doing business as the 7th Street Casino.” See Petition, Doc. 1-1. This is clearly an action against the Wyandotte Nation.

immunity of Indian tribes. But Plaintiff goes on to narrow the her argument as follows: “The issue in this case is whether the balance of powers as framed in the U.S. Constitution prevent the extension of Indian Sovereign Immunity to the Wyandotte Nation for **off-reservation** tortious conduct.” Doc. 12, p. 8. (emphasis added)

Because the incident on which Plaintiff’s cause of action is based was not off-reservation, but instead was on Indian lands over which the Nation exercises jurisdiction to the exclusion of the state of Kansas, the entire argument advanced by Plaintiff is not relevant to the issues raised in the Nation’s motion to dismiss. This Court should, therefore, grant the Nation’s motion to dismiss.

Argument and Authorities

There are probably few tracts of land located in Wyandotte County that have been subject to more litigation than the land upon which the 7th Street Casino is located (“Shriners Tract”). The Shriners Tract was taken into trust for the Wyandotte Nation in 1996 and the resulting litigation challenging that action lasted more than 10 years. At the conclusion of the litigation two legal principles were clear: (1) the Shriners Tract was held in trust for the Wyandotte Nation³ and (2) the Wyandotte Nation could conduct gaming on the Shriners Tract under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.⁴ because the land was held in trust for the Nation.

³ See *Governor of Kansas v. Norton*, 430 F.Supp.2d 1204, 1226 (D. Kan. 2006) (affirming Secretary of Interior’s decision taking the land into trust for the Wyandotte Nation.)

⁴ See *Wyandotte Nation v. National Indian Gaming Com’n*, 437 F.Supp.2d 1193, 1207-1212 (D. Kan. 2006)(holding that the Shriner’s Tract was acquired in settlement of a land claim and thus fell under one of the exceptions which authorized gaming upon the land under IGRA § 2719(b)(1)(B)(ii).)

A. 7th Street Casino is located on land held in trust for the Wyandotte Nation and thus all activities conducted on the Shriner's Tract are on-reservation activities

Plaintiff states in her petition that the land upon which the 7th Street Casino is located is “held in trust for the Wyandottes.” Doc. 1-1, p. 3, ¶8. Having conceded the Shriner's Tract is in trust (which as a matter of law she had to do), Plaintiff states in her *Response Brief* that “[t]he Shriner Tract is not a reservation.” Doc. 12, p. 14. Plaintiff goes on to argue that the Nation does not have immunity from suit because the alleged incident took place “off-reservation.” Plaintiff does not understand the legal significance of the Shriners Tract being in trust.

Plaintiff's apparent argument that there is a difference between “trust land” and “reservation” has been consistently rejected by the Courts. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 907 (1991), the United States Supreme Court stated no “precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges.” Citing to *Potawatomi*, the Tenth Circuit has recognized the equivalent treatment of trust land and reservation land for tribal immunity purposes.

Moreover, we acknowledge that trust land, validly set apart for Indian use under government supervision, **"qualifies as a reservation for tribal immunity purposes."** [citation omitted]. [fn 2] The Supreme Court has made it clear that established principles of tribal immunity extend to trust lands as well as reservations. *Potawatomi*, 111 S.Ct. at 907.

Sac and Fox Nation v. Oklahoma Tax Com'n, 967 F.2d 1425 (10th Cir. 1992) (emphasis added). See also *HRI Inc. v. Env'tl. Protection Agency*, 196 F.3d 1224, 1249 (10th Cir. 2000), (“Under Supreme Court and Tenth Circuit precedent, trust lands . . . are Indian country. (citation omitted); [*United States v. Roberts*, 185 F.3d [1125] at 1131 (holding that "official 'reservation' status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian country pursuant to [18] U.S.C. 1151").”)

Plaintiff argues this court should abrogate the Supreme Court decision in *Kiowa Tribe of Oklahoma v. Manufacturing Tech.*, 523 U.S. 751 (1998) because “[t]he Supreme Court has not supplied a legal basis for establishing Indian Sovereign Immunity, but has rather adopted the doctrine without analysis or consideration of state rights.” Doc. 12, p. 14. However, because the *Kiowa* decision considered tribal sovereign immunity as it applied to off-reservation activities—a fact not at issue here—the Court should decline to consider abrogating the *Kiowa* decision in the present case.

The law is settled that tribal sovereign immunity applies to activities on trust land. It is undisputed that the Shriners Tract is trust land. The Nation is immune from any legal action arising on the Shriners Tract unless the Nation unequivocally waives that immunity. The Nation has not waived its immunity and Plaintiff has failed to present any evidence otherwise. Therefore, the Nation’s motion to dismiss should be granted.

B. Kansas State and Federal Courts Have Consistently Recognized the Shriner’s Tract as Indian Country

Plaintiff next argues that because the Indian Commerce Clause [*U.S. Const.*, Art. 1, §8, cl. 3], “did not grant congress power to abrogate of State Powers retained in the Continental Congress . . . [t]he same rationale should be extended to analysis of any federal law pre-empting state legislative authority over **off-reservation** tortious conduct committed by Indian Tribes.” Doc. 12, p. 8 (emphasis added). Of course, as argued above, the Shriners Tract (where Plaintiff alleges she was injured) is trust land and not off-reservation land. Therefore, Plaintiff’s argument to apply the Indian Commerce Clause must fail.

But it is important to note that the Shriners Tract has been consistently recognized as Indian land subject to the exclusive jurisdiction of the Nation in both the Kansas state and federal courts. For example, in 2004, the state of Kansas led a raid on the Nation’s gaming facility on

the Shriner Tract, seizing the gaming machines and a significant amount of cash. As a result of the raid, the state also initiated criminal charges against the general manager of the gaming facility.

The Nation successfully brought an action to enjoin the state from enforcing its laws on the Shriners Tract. See *Wyandotte Nation v. Sebelius*, 337 F.Supp.2d 1253, 1274 (enjoining the state of Kansas from “exercising or asserting jurisdiction over any gaming or related activity on the Shriner Tract.”); See also *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1257 (10th Cir. 2006) (affirming District Court order enjoining the State of Kansas from exercising or asserting jurisdiction over the Shriner Tract.)

Following remand to the District Court after the Tenth Circuit affirmed the injunction, the Nation and the State submitted a *Joint Motion for Entry of Judgment on the Pleadings* (a copy of the joint motion is attached as Exhibit 1). The parties asked the Court to enter the following judgment:

1. As set forth in Count I of the Wyandotte Nation’s Amended Complaint, 28 U.S.C. §§ 2201, *et seq.*, the above Defendants [State of Kansas] have no jurisdiction over gaming or any related activities conducted on the parcel of land termed “the Shriner Tract,” as long as the Shriner Tract is held in trust for the benefit of the Wyandotte Nation; and
2. As set forth in Count VII of the Wyandotte Nation’s Amended Complaint, 28 U.S.C. § 2202, the above Defendants are permanently enjoined from exercising jurisdiction over gaming or any related activities conducted on the Shriner Tract as long as the Shriner Tract is held in trust for the benefit of the Wyandotte Nation.

The District Court entered judgment as requested by the parties. A copy of the Judgment is attached as Exhibit 2.

In the criminal case initiated by the state against the Nation’s general manager, the Wyandotte County District Court dismissed the criminal charges, holding that “In light of the

IGRA's stated purposes and the legislative intent. . . it appears it was Congress' intention for the IGRA to preempt state law in the realm of Indian gaming." Order, p. 6, *State v. Enyart*, Case No. 04-CR-540 (Wyandotte County District Court). A copy of the Order is attached as Exhibit 3. The Tenth Circuit made the following observation about the state court criminal proceedings: "Criminal charges were filed against Enyart but a state court **rightly** dismissed them because Kansas has no authority to enforce its gaming laws on the Shriner Tract." *Wyandotte Nation*, 443 F.3d at 1252⁵ (emphasis added).

Contrary to Plaintiff's assertion, this case presents no issue of pre-emption of state's rights on off-reservation land. Plaintiff's argument on this issue are not relevant. Therefore, the Nation's motion to dismiss should be granted.

Conclusion

The Nation moved this Court to dismiss the present action for lack of subject matter jurisdiction because (1) the Nation has not waived its sovereign immunity from a tort claim action brought by Plaintiff and (2) the Congress has not abrogated the Nation's sovereign immunity from a tort claim action such as the one brought by Plaintiff. In her response, Plaintiff fails to cite to any waiver of sovereign immunity to the tort claim giving rise to her cause of action. For this reason, the Court should dismiss Plaintiff's cause of action for lack of subject matter jurisdiction. In the alternative, the Court should dismiss Plaintiff's cause of action for failure to exhaust her tribal remedies.

⁵ "Kansas appealed this determination but then voluntarily dismissed its appeal on October 14, 2004. *Kansas v. Enyart*, Case No. 04-92855 (Kan.Ct.App.)." *Id.* at fn. 7.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned counsel hereby certifies the foregoing *Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss* was filed via the Court's CM/ECF System on the 19th day of May 2014 and therefore electronically served upon:

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