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 REPLY IN SUPPORT OF MOTION TO REVISE ORDER DISMISSING TRIBAL OFFICIALS

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I. The breach of compact has occurred and the action is ripe — there is no reason for the State to sit on its right to obtain a remedy until some unpredictable future date.

American jurisprudence generally encourages parties to pursue their claims in a timely manner. Statutes of limitations and the doctrine of laches are the two most obvious means that the law employs to ensure that plaintiffs do not unfairly delay bringing their claims until after they have gone stale. *Order of R. R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) ("Statutes of limitation, like the equitable doctrine of laches. . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.")

Here, the Sault Tribe contends that the State should wait to bring its breach of contract and other claims until the Tribe is no longer immune — a determination that will require application of the somewhat vague test devised by the Sixth Circuit in its decision in this case. Under this test, according to the Tribe, its

immunity will not be abrogated until gaming at a new Lansing casino is "imminent."[1] The Tribe now takes the position that because the State can sue it once gaming is imminent, there is no need to bring an action against its officials now. At the same time, the Tribe strenuously argues it will successfully operate casino games in Lansing at some future date. If the Tribe is correct, that means its immunity will be abrogated under the Sixth Circuit test.

This scenario suggests an obvious question: If the Tribe is certain it will open its casino at some future date, which will trigger abrogation of its immunity, but it is also concerned both about the expense incurred by its officials having to defend this action and the inter-governmental tension that such an action might create, why not just waive its immunity so that the question of whether it violated its gaming compact can be decided *now*? But for its immunity, the action against the Tribe is ripe – the Tribe violated § 9 of the Compact by submitting two trust applications. If it waived that immunity now, the case could proceed just as this Court envisioned – against the Tribe alone. Such a waiver would ameliorate any inconvenience its officials might experience as defendants, and these cross-motions could be dismissed. The parties could then focus on litigating the central question

[1] Defendant's Opposition to the State of Michigan's Motion to Revise Order Dismissing Tribal Officials, p. 4, quoting *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1082 (6th Cir. 2013). The Sixth Circuit said that the State's action against the Tribe would be ripe "at some point . . . before the gaming starts" but it declined to identify when that point in time would occur. *Id.* at 1083. The court used the word "imminent" only once in its opinion, and it wasn't discussing *when* gaming would occur, but rather whether it would occur at all. Presumably, *when* this action will ripen will depend on future events.

here: whether the Tribe's application to take land into trust violated § 9 of the Compact.

On the other hand, if the State is forced to wait to bring this action because the Tribe does not waive its immunity or this motion is not granted, there may well be serious consequences. There are good reasons that courts encourage plaintiffs to bring their actions in a timely manner. The longer an unprosecuted claim sits, the more difficult it may become to obtain reliable evidence in support of the claim or in support of a defense. *Telegraphers, supra.* This is particularly problematic here where the central issue will require interpretation of a contract that was negotiated and signed over 20 years ago. If testimony from the negotiators becomes relevant to this issue, it will only become more difficult, or even impossible, to obtain their testimony with each passing year. Delaying litigation of a ripe claim against the officials under these circumstances makes no sense.

Furthermore, any inconvenience or intergovernmental tension resulting from an action against tribal officials pales in comparison to the negative impacts caused by delaying this action. If during this delay the Tribe builds and staffs a major casino in downtown Lansing, and then is enjoined from operating it, hundreds of people will lose their jobs. Some of those people may have quit other jobs to take what may have seemed like a better position with the new casino. This will seem extremely unfair, and the Tribe may even attempt to shift the blame for these job losses to the State for seeking the injunction. Similarly, if the casino cannot be operated, what happens to the elaborate facilities that have been built in a

conspicuous location downtown? Having a large, vacant building that was designed and built to house a casino will likely cause land use and planning issues for the city, which will ultimately have to deal with the problem.

Finally, Tribal members are citizens of Michigan. The State does not want to see the horrendous waste of their tribal resources that will result from the construction and staffing of a Lansing casino that is closed at the conclusion of some future lawsuit brought by the State. The State will bring an action when it is ripe because the proposed casino will be illegal and the State can't just turn a blind eye to it, but forcing the State to wait until then will cause harm to the State and its citizens.

This harm is all preventable merely by letting this litigation proceed now against the officials. Such prevention of foreseeable and unnecessary injuries is another reason the law encourages plaintiffs not to sit on their claims, in addition to the goal of avoiding stale claims. *EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988) ("If the defendant in a suit for trademark infringement had been led to believe that the plaintiff would not sue, and in reliance expended large sums of money on exploiting the allegedly infringing trademark, he can plead laches if the plaintiff later sues, even if the delay has not impaired his ability to defend in the slightest.")

But for the Tribe's good fortune that it is immune, this action would logically be brought against it now. This immunity, however, does not extend to tribal officials. The same recent Supreme Court decision that confirmed a tribe's immunity from suit made it clear that tribal officials could be sued both directly for violations of state or federal law, or via an *Ex parte Young*-type claim. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014).[2] Given the absence of immunity for these tribal officials, the indisputable ripeness of the State's claims, and the weight of years of jurisprudence favoring the timely pursuit of available claims, the Tribe's objections to the State's request to revive its claims against tribal officials should be rejected.

II. Federal precedent authorizes the State's *Ex Parte Young*-type claims.

A. Any defenses to the State's claims against the officials can be addressed in a motion to dismiss.

The State agrees with the Tribe that procedurally it makes sense – if the Court agrees that there is good reason to revive the claims against the tribal officials – to address the efficacy of those claims once the officials have been made parties and after the State files an amended complaint.

[2] This particular ruling was not dicta as the Tribe contends: The Court specifically relied on the availability of a remedy against officials to deny the State's request to modify tribal immunity. *Id.* at 2036 n.8.

B. *Bay Mills* resolved any question whether tribal officials are subject to *Ex parte Young*-type claims.

Whether or not the Sixth Circuit has recognized *Ex parte Young*-type claims against tribal officials, as noted above and in the State's main brief, the Supreme Court unequivocally blessed their availability in the *Bay Mills* decision. Moreover, there was no limitation or qualification of such claims as otherwise suggested by the Tribe. And even if the offending conduct must involve off-reservation activity as the Tribe asserts, which is far from clear, this is not an issue here as the illegal conduct alleged in the complaint involved filing an application with the Department of Interior to take *off-reservation land* in trust, which would necessarily require delivering such an application to an *off-reservation address* where Interior is located. Thus, *Bay Mills* defeats the Tribe's assertion that as a matter of law an *Ex parte Young*-type claim is not available here.

C. The Court can enjoin the tribal officials' breach of the compact.

The *Ex parte Young* defense that such claims can't seek specific performance of a contract, asserted in the Tribe's brief, at best applies only when actions are brought against *state* officials. Neither the Sixth Circuit nor the Supreme Court has adopted the Tribe's contention that *tribal* officials can't be held to the terms of a contract signed by their tribe. While the *Bay Mills* decision confirmed the application of an *Ex parte Young*-type claim against tribal officials, it made it clear that it was merely "analogizing" to *Ex parte Young*. *Bay Mills,* 134 S. Ct. at 2035. So even if it is true that *state* officials may not be sued for specific performance in an

Ex parte Young action, this alone is not dispositive of the question of whether it makes equal sense to protect *tribal* officials from such claims.

Though similar, the two actions are based in entirely different contexts. Tribes are not protected by Eleventh Amendment immunity, so the immunity being avoided in an *Ex parte Young*-type claim is *common law* immunity as opposed to the *constitutional* immunity afforded states. Likewise, under a traditional *Ex parte Young* action, a plaintiff may only seek enforcement of *federal* law. *Bay Mills* makes it clear that an *Ex parte Young*-type claim is available when suing tribal officials who have violated *state laws*. *Bay Mills,* 134 S. Ct. at 2035 (referring to various remedies, including an *Ex parte Young*-type claim, the Court stated, "the panoply of tools Michigan can use to enforce *its laws* on its own lands . . . can shutter . . . an illegal casino") (emphasis added). Given these fundamental differences between the two types of claims, the Tribe's assumption that the Supreme Court intended that all defenses to a traditional *Ex parte Young* claim would automatically apply in an action against tribal officials is unwarranted. This is confirmed by the Court's statement in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514(1991) that it "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*." In a traditional *Ex parte Young* action, damages are not awarded, yet apparently they may be awarded in an *Ex parte Young*-type action against tribal officials. This is a material distinction.

Given these differences, were the Court to consider creating such a common law defense to a claim against tribal officials, at a minimum, the Court should first conduct a thorough analysis of precedent and legal policy that isn't feasible in the context of this non-dispositive motion. And in any event, the State believes such an examination would convince the Court *not* to create such a defense.

Furthermore, the claims brought by the State here are not just breach of contract claims; they are breach of *compact* claims. While compacts are sometimes interpreted using rules of contract construction, they are different from contracts, particularly where they are authorized by an act of Congress. The Tribe has cited to no case that says *Ex parte Young* cannot be used to force government officials to comply with the terms of a compact between two sovereigns that has been authorized by Congress. In fact, this is not the law. See, e.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1851) (actions taken pursuant to legislation that conflicts with a congressionally approved compact may be enjoined).

D. IGRA does not prohibit an *Ex parte Young*-type claim.

The Tribe asserts that allowing an *Ex parte Young*-type remedy would be inconsistent with the remedial scheme adopted in the Indian Gaming Regulatory Act, citing *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 74 (1996). This argument is moot as the State's amended complaint will not include an IGRA claim against the officials. Because the Sixth Circuit ruled that the only remedy available under IGRA is an injunction of gaming, and that gaming is not imminent, the State cannot in good faith pursue an IGRA claim against these officials at this time, even

though they are not protected by tribal immunity. Thus, the State is not pursuing tribal officials for the IGRA claim it brought against the Tribe.[3] Although the State is still researching and drafting its amended complaint, the claims it will assert against the officials will at a minimum be based on the state and federal law of contracts and compacts, and will likely also include a state law tortious interference claim. The *Seminole* rationale is irrelevant to such claims.

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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[3] The State however adamantly disagrees that *Seminole* limits actions against a tribe under 25 U.S.C. § 2710(d)(7)(A)(ii).