UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,

Plaintiff,

v.

AARON PAYMENT, *et al.*,

Defendants.
_____/

CASE NO. 1:12-CV-962

HON. ROBERT J. JONKER

OPINION AND ORDER

This matter is before the Court on Defendants' Motion to Dismiss for Lack of Jurisdiction (docket # 68). The motion is fully briefed. The Court heard oral argument on the motion on June 16, 2015. The Court has thoroughly reviewed the record and carefully considered the applicable law. The motion is ready for decision.

BACKGROUND

A. Parties and Earlier Proceedings

The Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe"), a federally-recognized Indian Tribe, "is the modern day political organization of the Chippewa bands which inhabited the eastern portion of the Upper Peninsula of Michigan since before the coming of Europeans." *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 840 (W.D. Mich. 2008) (internal quotation marks omitted). The Tribe's tribal offices and reservation are in Michigan's Upper Peninsula. (Am. Compl., docket # 67, at ¶ 17.) Under a Compact the Tribe and the State of Michigan entered into in 1993, the Tribe currently operates five casinos with class III gaming on

tribal lands in the Upper Peninsula. (docket # 42.) In 2012, the Tribe purchased land within the City of Lansing, Michigan (the "Casino property") for the purpose of building and operating another class III gaming facility. (*Id.*) The Tribe used income from the Self-Sufficiency Fund it created with funds it had received under the Michigan Indian Land Claims Settlement Act ("MILCSA") to purchase the Casino property. MILCSA provides that "[a]ny lands acquired using amounts from interest or other income from the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the Tribe." MILCSA § 108(f).

The State of Michigan filed this lawsuit seeking to prevent the submission of a trust application. (Compl., docket # 1.) The State contends that the submission of an application to have the Casino property taken into trust without first entering into a revenue-sharing agreement with the State's other federally-recognized Indian Tribes would violate the Compact, which provides that

> [a]n application to take land into 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.

(Am. Compl., docket # 67, ¶ 27.) This Court granted the State's Motion for a Preliminary Injunction, in part, and ordered the Tribe not to proceed with a land in trust application without first obtaining a tribal revenue-sharing agreement as required by the gaming Compact with the State of Michigan.

The Sixth Circuit reversed, finding the State's claims against the Tribe itself were either barred by sovereign immunity (Counts 1-3), or not yet ripe (Count 4). The Court of Appeals recognized that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710 *et seq.*, contains

statutory exceptions for tribal sovereign immunity, but it found that none applied. In particular, IGRA did not abrogate the Tribe's sovereign immunity to the extent the Tribe submits a trust application under MILCSA: "Because the State is not suing to enjoin a class III gaming activity, but instead a trust submission under MILCSA, § 2710(d)(7)(A)(ii) of IGRA does not abrogate the Tribe's sovereign immunity." *State of Michigan v. Sault St. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1076 (6th Cir. 2013). The State's claim that a successful trust application will inevitably lead unauthorized class III gaming, though not barred by sovereign immunity, was not yet ripe and would have to await a later lawsuit. The Sixth Circuit found that "[t]he issue of whether class III gaming on the casino will violate IGRA if the Tribe's MILCSA trust submission is successful is not ripe for adjudication because it depends on contingent future events that may never occur." *Id.* After the Sixth Circuit's decision, trust applications for both the Casino property and a 71-acre parcel of land in Huron Charter Township, Michigan (the "Huron property), were submitted for the purpose of making it possible for the Tribe to operate one or more casinos on the Casino property and Huron property. (Am. Compl., docket # 68, ¶¶ 22, 23.)

In the original proceedings, the State sued not only the Tribe itself, but also thirteen Directors of the Tribe. The State attempted to proceed against them individually on an *Ex parte Young* theory. In effect, the State argued that even if it was precluded by sovereign immunity from proceeding against the Tribe directly to stop a trust application, it could obtain the same functional relief by obtaining a prospective injunction against Directors of the Tribe from pursuing a trust application in violation of the gaming Compact. Because this Court found no jurisdictional barrier to proceeding against the Tribe directly, this Court found no need to address the *Ex parte Young* theory, and dismissed the individual defendants without prejudice. (Op. and Ord., docket # 37.)

B. Current Proceedings

It is now necessary to address the *Ex parte Young* theory in light of the Court of Appeals ruling. Under a stipulated Order (docket ## 64, 65), the State filed an Amended Complaint naming as defendants the thirteen individual Tribal Directors identified in the original Complaint. (Am. Compl., docket # 67.)[1] The State alleges that in June 2014, "the Defendants caused an application to be submitted to the Secretary to have [the Casino property taken into trust for the sole purpose of making it possible for the Tribe to operate one or more casinos" on the Casino property. (*Id.* at ¶ 22.) Around the same time, "the Defendants also caused an application to be submitted to the Secretary to have a 71-acre parcel of land in Huron Charter Township, Michigan [(the "Huron Parcel")] taken into trust for the sole purpose of making it possible for the Tribe to operate one or more casinos on the Huron [P]arcel." (*Id.* at ¶ 23.) The State asserts that because "the applications submitted by the Defendants to take land into trust for gaming purposes occurred after October 17, 1988, these applications were made pursuant to § 20 of IGRA and are governed by § 9 of the Sault Tribe compact." (*Id.* at ¶ 29). The Defendants did not obtain a revenue sharing agreement with the State's other federally-recognized Indian Tribes before submitting the applications. (*Id.* at ¶ 31.) The State contends that the submission of the trust applications without such a revenue-sharing agreement amounts to: a breach of section 9 of the Compact (Count 1); a breach of section 4(C) of the Compact, which requires "[a]ny violation of this Compact" to be corrected (Count 2); conspiracy to breach compact (Count 3); and intentional interference with compact (Count 4). (*Id.*, ¶¶ 32-50.)

[1]The Sault Tribe points out that three of the named defendants, Debra Ann Pine, D.J. Malloy, and Joan Anderson, are no longer members of the Board of Directors, and that some of the officeholders on the Board have changed. (Docket # 69, Page ID# 1146.) Ultimately, this does not affect the legal analysis in this Opinion.

The Tribe moves for dismissal of all counts, arguing that the Court lacks jurisdiction because sovereign immunity bars the suit.[2]

LEGAL STANDARDS

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity protects tribal officers when they act in their official capacity and within the scope of their authority. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212, 1225 (11th Cir. 1999); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir. 1993); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir.1991); *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 574-75 (10th Cir. 1984). The same basic regimen applies in the context of sovereign immunity for states and officials of a state.

In *Ex parte Young*, 209 U.S. 123 (1907), the Court created a pathway that limits the ability of state officials to rely on sovereign immunity in a suit that seeks to achieve compliance with federal law. The Court reasoned that "because an unconstitutional legislative enactment is 'void,' a state official who enforces that law 'comes into conflict with the superior authority of [the] Constitution,' and therefore is 'stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'" *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) ("VOPA") (quoting *Ex parte Young*, 209 U.S., at 159-60). The *Ex parte Young* doctrine exists to "permit the federal courts to vindicate federal rights."

[2]The Tribe alternatively moves for dismissal based on failure to state a claim. The Court need not reach this issue and expresses no opinion about the merits of the theory.

Pennhurst State School and Hospital v. Halderman, 456 U.S. 89, 105 (1984). The doctrine "rests on the premise – less delicately called a 'fiction,' . . . that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes." *VOPA*, 131 S. Ct. at 1638 (internal quotation omitted).

But does the same theory apply to tribal sovereign immunity? Circuits that have considered whether the *Ex parte Young* doctrine applies by analogy in the tribal context have concluded that it does. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-55 (10th Cir. 2011) ("Today we join our sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity.") (citing *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir. 1993); *Tamiami Partners, Ltd. Ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225-16 (11th Cir. 1999); *cf. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (leaving open *Ex parte Young's* applicability in tribal context)). The Supreme Court has cited to *Ex parte Young* in observing that "tribal immunity does not bar . . . a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035 (2014) (emphasis in original) (citing *Santa Clara Pueblo*, 436 U.S. at 59). The Sixth Circuit has not ruled on the issue.

DISCUSSION

Whether sovereign immunity bars the claims the State asserts against the individual defendants in the Amended Complaint depends upon whether the doctrine of *Ex parte Young* applies. The State posits that the tribal officers named as defendants submitted or caused the

submission of applications to have the Casino Property and the Huron Property taken into trust; that the submission violated the IGRA-mandated Compact; that the Tribe cannot authorize any unlawful act, including a breach of Compact; and that by submitting or causing the submissions of trust applications, the tribal officers acted outside the scope of their authority and may therefore be sued under *Ex parte Young*. The Tribe contends that *Ex parte Young* does not apply in the tribal context, and that even if it does apply in the tribal context, it cannot be used to remedy a breach of Compact.

The Court need not decide whether *Ex parte Young* may apply to tribal officers the way it applies to state officers. There are certainly good reasons to imagine the doctrine should apply, as the Supreme Court's citation in *Bay Mills* suggests, and as other Circuits have expressly held. But even assuming the *Ex parte Young* doctrine is generally available as an exception to tribal sovereign immunity, this is not an appropriate case for its application. The claims at issue in this action are all contract claims in one form or another.[3] *Ex parte Young* focuses on identifying an unconstitutional – or at least unlawful – action implemented by a state officer. The purpose of the doctrine is to vindicate federal rights, not bilateral contracts. In most cases in which the doctrine applies, the underlying wrong is in the nature of a constitutional tort. The *Bay Mills* case suggests that another potential source to strip immunity may be generally applicable state criminal law – such as a law against gambling. When a tribe chooses to open a casino that is not on Indian land, there is no reason it should be in any better or worse position than anyone else, and so even if that tribe still has sovereign immunity, *Ex parte Young* would allow the federal court to stop the action –

[3]Three claims explicitly reference alleged breach of contract theories. The fourth claim – intentional interference with the Compact – is functionally a restatement of the contract theories under another label.

criminal under state law – by ordering prospective injunctive relief against tribal officers to stop the gaming.

This is a very different case. There is no constitutional tort in play. There is no underlying federal or state law criminal prohibition. There is nothing wrong in principle with filing a land in trust application. To the contrary, such a filing would normally be protected First Amendment activity. The only thing the filing allegedly violated here was a bilateral promise – a contract. Extending *Ex parte Young* to such a theory would open federal courts to routine breach of contract claims that can and ordinarily should be resolved in the state Court of Claims (when a state contract is at issue), or whatever forum the parties choose for themselves in the case of a tribal contract. Here, the parties did negotiate expressly over both the issues of sovereign immunity and dispute resolution. They concluded in their Compact that neither side was agreeing to waive sovereign immunity, and negotiation and arbitration would be the preferred methods of dealing with disputes. (Compact, docket # 67-1, § 7.)

The State identifies a single case in support of its position that *Ex parte Young* may permit a breach of contract suit against a state or tribal official acting in his or her official capacity: *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891). In *Pennoyer*, the state of Oregon passed legislation that created a mechanism by which individuals could purchase swamp land by satisfying certain conditions and paying 20% of the purchase price. Plaintiff purchased land under the act, but the legislature soon passed a new act repealing the act under which plaintiff had purchased land and declaring void purchases such as plaintiff's. The plaintiff sued, arguing that the new statute amounted to an unconstitutional taking and seeking to enjoin defendants from voiding his purchase of the land. Defendants claimed sovereign immunity from the suit, but the Court found that

sovereign immunity did not extend to the voiding of the contract. *Pennoyer* does not support the State's position. The language and tenor of the decision focus on identifying an unconstitutional state action by a state actor. The unconstitutional action was the legislative action that essentially reneged on an earlier transaction and thereby impaired what the Court treated as a contract. *Pennoyer* differs fundamentally from the case at hand, which involves a bilateral contract negotiated between two sovereigns.

CONCLUSION

This is not the last word in the ongoing controversy between the State and the Tribe over potential new gaming sites. The parties can and will continue to negotiate with each other as old compacts expire. The parties may choose to litigate when a ripe dispute within the scope of IGRA presents itself, and there may yet be a case that presents a viable *Ex parte Young* theory of relief. But in the Court's view, this is not such a case. *Ex parte Young* does not permit the State to convert a basic breach of contract dispute into a prospective relief claim against Tribal Directors. Accordingly, Defendants' Motion to Dismiss for lack of jurisdiction (docket # 68) is **GRANTED**. Judgment shall enter accordingly.

Dated: September 16, 2015

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE