15-2148-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHEUNG YIN SUN, LONG MEI FANG, ZONG YANG LI,

Plaintiffs-Appellants,

v.

MASHANTUCKET PEQUOT GAMING ENTERPRISE, INDIVIDUALLY, DBA FOXWOODS RESORT CASINO, ANNE CHEN, INDIVIDUALLY, JEFF DECLERCK, INDIVIDUALLY, EDWARD GASSER, INDIVIDUALLY, GEORGE HENNINGSEN, INDIVIDUALLY, FRANK LEONE, INDIVIDUALLY, MICHAEL ROBINSON, MICHAEL SANTAGATA, CHESTER SICARD,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut (New Haven)

BRIEF FOR DEFENDANTS-APPELLEES MASHANTUCKET PEQUOT GAMING ENTERPRISE, ANNE CHEN, JEFF DECLERCK, EDWARD GASSER, GEORGE HENNINGSEN, FRANK LEONE, MICHAEL SANTAGATA AND CHESTER SICARD

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I. COUNTERSTATEMENT REGARDING JURISDICTION

The plaintiffs filed one notice of appeal, which was directed to the District Court's dismissal of the case for the plaintiffs' failure to establish personal jurisdiction. See District Court Dkt. # 37 (ruling); 45 (notice of appeal regarding dismissal). This is the only ruling for which the plaintiffs have invoked this Court's jurisdiction. Though the plaintiffs filed a post-dismissal motion to reopen in the District Court, which was denied, the plaintiffs never filed a notice of appeal (or amended their prior notice of appeal) to address that ruling. Therefore, as discussed below, see section VI-A-1, pursuant to Rule 4(a)(4)(B)(ii) of the Federal Rules of Appellate Procedure, this Court lacks jurisdiction to consider the District Court's ruling on the motion to reopen. The only ruling that has been appealed is the dismissal for failure to establish personal jurisdiction.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Did the District Court (Hall, C.J.) properly dismiss the Amended Complaint for failure to establish personal jurisdiction?

III. COUNTERSTATEMENT OF THE CASE[1]

The plaintiffs filed a Complaint in the District Court on July 31, 2014, followed by an Amended Complaint three weeks later, in which they made allegations against the Tribal Defendants[2] and Detective Michael Robinson of the Connecticut State Police. See District Court Dkt. # 1, 8. The Tribal Defendants do not set out the facts underlying the plaintiffs' Complaints in this brief because the only salient point for purposes of this appeal is the fact that the plaintiffs never secured personal jurisdiction over the defendants. Neither version of the Complaint was ever served on the Tribal Defendants by any of the means of service identified in Rule 4 of the Federal Rules of Civil Procedure, and the District Court's sole basis for dismissing the plaintiffs' action was for their failure to obtain personal jurisdiction over the defendants.

The Tribal Defendants appeared and, following multiple notices to the plaintiffs regarding the lack of service, including by way of judicial filings, see District Court Dkt. # 15, 30, moved to dismiss the Amended Complaint, see District

[1] The Tribal Defendants offer this "Counterstatement of the Case" because the plaintiffs failed to include a "Statement of the Case" in their brief. See Fed. R. App. P. 28(a)(6).

[2] For ease of reference, this brief will refer to the Mashantucket Pequot Gaming Enterprise, Anne Chen, Jeff DeClerck, Edward Gasser, George Henningsen, Frank Leone, Michael Santagata, and Chester Sicard collectively as the "Tribal Defendants."

Court Dkt. # 31. When the plaintiffs failed to submit any response or opposition to the Tribal Defendants' motion to dismiss, the District Court granted the motion on one specific ground – that the plaintiffs "ha[d] failed to take the necessary steps to establish the court's personal jurisdiction as to any of the defendants." District Court Dkt. # 37. The plaintiffs filed a notice of appeal directed to that decision. See District Court Dkt. # 45.

The plaintiffs subsequently moved under Rule 60 to reopen the case, see District Court Dkt. # 39, which motion the District Court denied, see District Court Dkt. # 51. However, the plaintiffs never filed a notice of appeal directed to the decision on the motion to reopen, nor did they amend their prior notice of appeal directed to the motion to dismiss. As a consequence, this Court lacks jurisdiction to hear any challenge to the District Court's decision on the motion to reopen. See Fed. R. App. P. 4(a)(4)(B)(ii). That means the plaintiffs' focus in their appellate brief on issues of sovereign immunity is fruitless; the only question before this Court is whether the plaintiffs served the defendants. Because they did not, their appeal must fail.

IV. COUNTERSTATEMENT OF FACTS

A. The Plaintiffs Failed To Make Service On The Tribal Defendants, As Required By Rule 4 Of The Federal Rules Of Civil Procedure

The plaintiffs filed a complaint in the District Court on July 31, 2014. The plaintiffs failed to serve the Complaint on any of the Tribal Defendants by any means. The only paper received by some of the Tribal Defendants since July 2014 was a copy of the Amended Complaint, which four – but not all eight – of the defendants received by regular mail having never first been served the plaintiffs' original Complaint. The Tribal Defendants never received any summons, nor were they ever asked to waive service. Having failed to undertake any of the required steps to make proper service, the plaintiffs were of necessity never able to file any Return of Service or any Waiver of Service with the District Court, and thus never established personal jurisdiction over the Tribal Defendants.

B. The Tribal Defendants Appeared In The District Court And Repeatedly Informed The Plaintiffs About The Lack Of Service

The Tribal Defendants appeared in the District Court in December 2014, see District Court Dkt. # 12-14, and immediately alerted the Court and the plaintiffs that "[n]either version of the plaintiffs' complaint was served upon any of the [Tribal Defendants]," and asked for a briefing deadline in which to file a motion to dismiss. District Court Dkt. # 15.

Consistent with their failure to make service, the plaintiffs also failed to undertake the required planning process under Rule 26(f) and had not made any report to the Court. Instead, the Tribal Defendants and Det. Robinson were forced to initiate that process themselves and provided a draft report to the plaintiffs on January 9, 2015. See Exhibit 1 to Tribal Defendants' Motion to Dismiss (A156). That draft report noted, again, that the Tribal Defendants had not been served.

The plaintiffs failed to take any action to finalize the Rule 26(f) report until the District Court pressed them to do so during a telephonic status conference on February 11, 2015. See District Court Dkt. # 26. In response, the plaintiffs filed a report that was rife with blank spaces, see District Court Dkt. # 29, completely ignoring the draft language and deadlines previously proposed by the Tribal Defendants and Det. Robinson. As a consequence, it fell to the Tribal Defendants to re-file a corrected report so that the case could go forward, see District Court Dkt. # 30. As filed, the 26(f) report – once again – made clear to the plaintiffs that they had "failed to make proper service of either the Complaint or the Amended Complaint, such that Plaintiffs ha[d] not established personal jurisdiction over Defendants" and noted that a motion to dismiss on this basis, among others, would be forthcoming. Id.

Thus, despite being informed multiple times that they had failed to make service, the plaintiffs never attempted to serve the Tribal Defendants, nor did they ever seek an extension of time to do so.[3]

C. The Plaintiffs Failed To Object To The Tribal Defendants' Motion To Dismiss

The Tribal Defendants filed their motion to dismiss on February 27, 2015, raising, inter alia, the plaintiffs' failure to make service as required by Rule 4 of the Federal Rules of Civil Procedure. See District Court Dkt. # 30. After securing an extension of time, with the Tribal Defendants' consent, until April 20, 2015 to respond to that motion, the plaintiffs did nothing to oppose the Tribal Defendants' motion. In other words, knowing that they needed to respond to the motion to dismiss – because they sought and received more time to do so – the plaintiffs nonetheless never filed any objection or response to the motion to dismiss, nor did they seek an extension of time to make service.

[3] By way of his Motion for Judgment on the Pleadings, filed on January 22, 2015, Det. Robinson also informed the plaintiffs that they had failed to make service on him. See District Court Dkt. # 20-22. His counsel also noted the lack of service on Det. Robinson in an email to all counsel, including the plaintiffs' attorneys. See Exhibit 1 to Tribal Defendants' Motion to Dismiss (A156). The plaintiffs also took no steps to remedy their failure to serve Det. Robinson.

D. The District Court Dismissed The Plaintiffs' Case Because They "Failed To Take The Necessary Steps To Establish The Court's Personal Jurisdiction As To Any Of The Defendants"

On May 29, 2015, more than a month beyond the extended deadline without any response from the plaintiffs, the District Court granted the Tribal Defendants' motion to dismiss and Det. Robinson's motion for judgment on the pleadings. See District Court Dkt. # 37. In doing so, Chief Judge Hall's order relied on only one ground for dismissal: both motions were "granted absent objection because the plaintiffs have failed to take the necessary steps to establish the court's personal jurisdiction as to any of the defendants." Id. (emphasis added). Judgment entered accordingly. See District Court Dkt. # 38.

Thereafter, the plaintiffs moved to reopen the case, see District Court Dkt. # 39, and filed a notice of appeal with respect to the District Court's dismissal for lack of personal jurisdiction, see District Court Dkt. # 45. As noted, the appeal of the dismissal for lack of personal jurisdiction is the only appeal that the plaintiffs ever filed in this case.

E. The Plaintiffs Admitted That They Failed To Get Executed Waivers Of Service And Did Not Argue That Service Was Made On The Tribal Defendants

During a hearing on the plaintiffs' motion to reopen the case, Chief Judge Hall asked one of the plaintiffs' lawyers: "[D]id the defendants execute waiver of service?" Tr. July 20, 2015, p. 18 (A291). The plaintiffs' counsel responded, "No."

Id. The Court also noted to the plaintiffs' attorney that this case presented not just a failure to return service, but a failure to make service in the first instance. Id. ("You didn't get the service returned. You didn't have the service. It is not failure to return the service. It is failure to effect service . . . ."). The plaintiffs' counsel offered arguments for why these failures to serve should not matter, but he never contested the simple fact that the Tribal Defendants had not been served. See id., pp. 18-19 (A291-92).

F. The District Court Denied The Plaintiffs' Motion To Reopen, Which The Plaintiffs Did Not Appeal

On August 3, 2015, the District Court denied the plaintiffs' motion to reopen. Ruling Denying Motion to Reopen, p. 8 (A261). Chief Judge Hall denied the motion to reopen because the plaintiffs lacked a meritorious claim for two, independent reasons: (1) because the plaintiffs had failed to make service on any of the defendants, leaving the court without personal jurisdiction, id., pp. 14-20 (A267-73), and (2) because the plaintiffs had failed to allege any conspiracy under 42 U.S.C. § 1983, such that sovereign immunity would have applied and the court would lack subject matter jurisdiction., id., pp. 11-14 (A264-67). To understand that the plaintiffs are now making irrelevant arguments to this Court, it is critical to know that the plaintiffs never filed a notice of appeal with respect to the District Court's decision on the motion to reopen. Thus, that decision is not before this Court on appeal.

V. SUMMARY OF THE ARGUMENT

The question properly before this Court is straightforward. The plaintiffs never served either their Complaint or their Amended Complaint on the defendants as required by Rule 4 of the Federal Rules of Civil Procedure. This Court will search the District Court's docket in vain for any proof of service or any waivers of service. See Docket Sheet (A1-A12). They do not exist because service was neither attempted nor effected, nor were any waivers of service either sought or obtained. The plaintiffs do not argue otherwise in their brief to this Court.

The Tribal Defendants made this deficiency known to the Court and the plaintiffs on multiple occasions, and still the plaintiffs did nothing to remedy the problem. In fact, between the Tribal Defendants and Det. Robinson, the defendants made no fewer than five filings on the public docket clearly stating that the defendants had never been served as required. See Docket Sheet (A7-A8); District Court Dkt. # 15 (Tribal Defendants' motion for extension of time to move to dismiss); 20 (Det. Robinson's motion for judgment on the pleadings); 22 (Det. Robinson's memorandum in support of same); 30 (report under Rule 26(f) noting that defendants had not been served); 31 (Tribal Defendants' motion to dismiss). Each of those filings was served on counsel for the plaintiffs. Yet, at no time during the ten-month period from July 31, 2014, when the Complaint was filed, to May 29, 2015, when the District Court dismissed the action, did the plaintiffs either take steps

to serve the defendants or seek an extension of time to do so, despite having been advised repeatedly of their failure to serve the defendants. The District Court's Order dated June 1, 2015, granted dismissal for one reason, and one reason only: the plaintiffs had "failed to take the necessary steps to establish the court's personal jurisdiction as to any of the defendants." District Court Dkt. # 37.

In response to the District Court's dismissal, the plaintiffs filed a Notice of Appeal on June 30, 2015. See District Court Dkt. # 45 (A241). That dismissal for lack of personal jurisdiction is the only decision of the District Court that the plaintiffs have appealed, and it is unassailable. When the District Court thereafter denied the plaintiffs' Motion to Reopen under Rule 60(b) on August 3, 2015, the plaintiffs did not file a new or an amended Notice of Appeal from that decision. As a consequence, under Rule 4(a)(4)(B)(ii) of the Federal Rules of Appellate Procedure, this Court does not have jurisdiction to consider the District Court's decision on the Motion to Reopen.

In light of this indisputable history, the plaintiffs' brief is troubling. It makes almost no mention of the only issue before this Court – whether the case was properly dismissed for failure to make service – and instead addresses issues of sovereign immunity that are not before this Court. The plaintiffs' brief makes clear in one astonishing sentence the plaintiffs' disregard for the need to obtain personal jurisdiction:

> Some of the tribal Defendants began complaining that they were not served in accordance with tribal law, but Plaintiffs believed this was a circular argument pertaining to the underlying question of tribal sovereign immunity and thought it best to go forward with the litigation, believing the Defendants had in fact been properly served.

Pl. Br. at 6. In fact, all the defendants had made clear multiple times that they had not been served in any way, under any legal system – federal, state, tribal, or otherwise. Rather than address that deficiency, however, the plaintiffs chose to "believ[e]" the Tribal Defendants had properly been served and went "forward with the litigation." That disregard for the fundamental requirement to obtain personal jurisdiction over one's defendants is fatal, as the District Court correctly concluded.

In the end, this case fails where it never started. The plaintiffs ignored the requirement to make service on the defendants. The Tribal Defendants urge this Court to summarily affirm the District Court Order dated June 1, 2015 – the only issue on appeal. The record before this Court is as clear as it was before the District Court: The plaintiffs never served the defendants and therefore never secured personal jurisdiction of them. The plaintiffs' effort to focus this Court on other matters is flawed for a host of reasons, the most significant of which is that this Court has no appellate jurisdiction to even consider them.

VI. ARGUMENT

A. The District Court Correctly Dismissed The Plaintiffs' Case For Failure To Establish Personal Jurisdiction.

Though the plaintiffs devote their brief almost entirely to various pronouncements about sovereign immunity, the truth is that this case involves a far simpler and more elementary legal issue – the service of process to secure personal jurisdiction. The only decision on appeal is the District Court's order granting the Tribal Defendants' motion to dismiss "absent objection because the plaintiffs have failed to take the necessary steps to establish the court's personal jurisdiction as to any of the defendants," District Court Dkt. # 37 (emphasis added). The District Court's subsequent ruling on the motion to reopen, which did not even discuss the out-of-Circuit cases and sovereign immunity issues the plaintiffs suggest, was never appealed and, thus, is not before this Court. Because the plaintiffs manifestly failed to make service in this case, the ruling on the motion to dismiss must be affirmed.

The applicable standard of review for failure to timely serve process is abuse of discretion. See, e.g., Gerena v. Korb, 617 F.3d 197, 201 (2d Cir. 2010). "A district court has abused its discretion if it has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." Lynch v. City of New York, 589 F.3d 94, 99 (2d Cir. 2009) (internal quotation marks

omitted). On the record before this Court, the District Court's ruling on this issue is clearly correct; indeed, it was the only ruling possible given the circumstances.

1. The Only Ruling On Appeal Is The Motion To Dismiss, Not The Motion To Reopen.

As noted, there is only one decision on appeal – the granting of the motion to dismiss for failure to establish personal jurisdiction. See District Court Dkt. # 37 (ruling); 45 (notice of appeal regarding dismissal). Because the plaintiffs also filed a motion to reopen the case, the notice of appeal as to the dismissal became effective upon the District Court's disposition of the motion to reopen. See Fed. R. App. P. 4(a)(4)(A)(vi).

If the plaintiffs had wanted also to appeal the motion to reopen, the Federal Rules of Appellate Procedure required them either to file a notice of appeal as to that decision or to amend their prior notice of appeal. Pursuant to Rule 4(a)(4)(B)(ii), a party that "intend[s] to challenge an order disposing of any motion [under Rule 60] . . . must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." (Emphases added.) Applied here, that means following the denial of the motion to reopen on August 3, 2015, the plaintiffs had thirty days either to file an additional notice of appeal, or to amend their prior notice of appeal. See id. They did neither, and the 30-day deadline has long since passed.

The plaintiffs' failure to appeal the motion to reopen means that this Court lacks jurisdiction to consider the plaintiffs' attempt to challenge the motion to reopen. See Sorensen v. City of New York, 413 F.3d 292, 296 n.2 (2d Cir. 2005); Pappas v. United States, 362 Fed. App'x 175, 176-77 (2d Cir. 2010). See also Gounden v. Campagna, 487 Fed. App'x 624, 626 (2d Cir. 2012) (applying rule against pro se litigant); Dyno v. Vill. of Johnson City, 240 Fed. App'x 432, 433 (2d Cir. 2007) (same). "The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." United States v. Robinson, 361 U.S. 220, 229 (1960). Accordingly, the only decision subject to appellate review is the granting of the motion to dismiss for failure to establish personal jurisdiction.

2. The Plaintiffs Admittedly Failed To Serve The Tribal Defendants.

There is no dispute that the plaintiffs never served the Tribal Defendants. The docket in the District Court is devoid of any waiver of service, see Fed. R. Civ. P. 4(*l*)(1), or any return of service, see Fed. R. Civ. P. 4(*l*)(1), as required by Rule 4 of the Federal Rules of Civil Procedure. See Docket Sheet (A1-11).

Proper service of process is an essential and important requirement in commencing a lawsuit. "The lawful exercise of personal jurisdiction by a federal court requires [that] the plaintiff's service of process upon the defendant must have been procedurally proper." Licci ex rel. Licci v. Lebanese Canadian Bank, 673 F.3d

50, 60 (2d Cir. 2012). See also Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104, (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). The plaintiffs bore the burden to prove to the District Court that it had jurisdiction over the defendant, see Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996), and specifically to prove adequate service, see Dickerson v. Napolitano, 604 F.3d 732, 752 (2d Cir. 2010). Their abject failure to do so makes for a very straightforward analysis of the District Court's dismissal.

The plaintiffs never filed an executed waiver of service, nor any return of process, with respect to any of the Tribal Defendants. Undersigned counsel understands that the only paper related to this case that has been provided to any of the Tribal Defendants since the action was filed in July 2014 is a copy of the Amended Complaint, which four of the eight defendants received by regular mail, having never been served with the original Complaint. In other words, no defendant was ever served the Complaint and summons that commenced the action. [4]

[4] Like a number of troubling representations made in the plaintiffs' brief, the contention that the Tribal Defendants "complain[ed] that they were not served in accordance with tribal law," Pl. Br. at 6, is false. The portion of the Tribal Defendants' motion to dismiss that was directed to a lack of personal jurisdiction simply noted that the Tribal Defendants had not been served with any process under any set of rules – state, federal, or tribal. See District Court Dkt. # 31; 31-1, pp. 6-9 & n.2 ("Regardless of which provision may apply . . . it remains clear that no acceptable form of service was made in this case.").

Despite receiving explicit notice from the Tribal Defendants and Det. Robinson on numerous occasions regarding the lack of service, see District Court Dkt. # 15, 20, 22, 30, 31, plaintiffs' counsel never attempted to make service or to seek any extension of time to do so. Nor did the plaintiffs ever submit any opposition – despite an extended briefing deadline, and then another 39 days after that extended deadline had passed – before the District Court granted the Tribal Defendants' motion "because the plaintiffs ha[d] failed to take the necessary steps to establish the court's personal jurisdiction . . . ." District Court Dkt. # 38 (emphasis added). This dismissal was correct, and is beyond reproach on appeal.

The plaintiffs appear to admit as much before this Court, suggesting that their attorneys somehow "believed they had good service of process because they relied on the paralegal-office manager" and did not "realize[] that there may have been defects in the service of process" until the District Court granted the motion to dismiss. Pl. Br. at 8. Given the multiple pre-dismissal alerts provided by each of the defendants, however, this claim lacks credibility.

Before the plaintiffs' counsel admitted to the District Court that there had been no waiver of service as to the Tribal Defendants, see Tr. July 20, 2015, p. 18 (A291), the plaintiffs attempted to advance the fanciful argument that "[p]er FRCP 4(d)(1)(G), Plaintiffs served process by way of U.S. mail upon Defendants at their known place of employment." District Court Dkt. # 40. As a factual matter, this

assertion was incorrect because the plaintiffs did no such thing, as a review of the District Court's docket sheet attests. See Docket Sheet (A1-11). The legal argument also failed, under the plain reading of Rule 4 of the Federal Rules of Civil Procedure. Under Rule 4(d)(1), a plaintiff who submits a request to a defendant seeking a waiver of service must include a specific notice requesting that waiver. That notice and request must satisfy several specific requirements, including, inter alia, "[two] copies of a waiver form, . . . a prepaid means for returning the form," and specific language concerning "the consequence of waiving and not waiving service." Fed. R. Civ. P. 4(d)(1)(A)-(G). The plaintiffs did not take any of those steps in this case, and did not even claim otherwise, instead suggesting service was made under only Rule 4(d)(1)(G). But a proper request for a waiver of service requires compliance with each of the subsections of Rule 4(d)(1), not a choice of just one subsection. Most importantly, a waiver of service effects service only if it is accepted. That never happened here, as waiver was never even attempted. As a consequence, the plaintiffs filed no waiver paperwork in the District Court. Though the plaintiffs have apparently abandoned this argument on appeal, the fact that the plaintiffs made it below further confirms that they never made valid service on the Tribal Defendants.

3. The Plaintiffs Never Sought An Extension Of Time To Serve And, Even If They Had, There Was No Good Cause To Extend The Period Of Time For Service.

Although Rule 4(m), which provides for dismissal if a defendant has not been properly served, allows for an extension to make service "if the plaintiff shows good cause for the failure," Fed. R. Civ. P. 4(m), the plaintiffs failed to file a timely response to the motion to dismiss or otherwise demonstrate good cause prior to the District Court granting the motion to dismiss. As a result, they never gave the Court any possible basis for finding "good cause" to allow for service beyond the deadline. The plaintiffs' arguments in their appellate brief related to the District Court's denial of the motion to reopen are not before this Court because the plaintiffs chose not to appeal the District Court's decision denying the motion to reopen. See section VI-A-1. Therefore, the "good cause" question is not before this Court on appeal. See Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 90 (2d Cir. 2004) (instructing that, "[i]n general, [this Court] refrain[s] from analyzing issues not decided below . . . .").

Even if the plaintiffs had made their arguments below prior to dismissal, they would have fallen well short of what Rule 4(m) requires. District Courts within the Second Circuit have consistently interpreted "good cause" as being "evidenced only in exceptional circumstances, where the insufficiency of service results from circumstances beyond the plaintiff's control." Feingold v. Hankin, 269 F. Supp. 2d 268, 276 (S.D.N.Y. 2003) (emphases added). Notably, "[a]n attorney's

inadvertence, neglect, mistake, or misplaced reliance does not constitute good cause for the purposes of Rule 4(m)." Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 658 (S.D.N.Y. 1998).

Far from taking any steps that would come anywhere close to "good cause," the plaintiffs and their counsel blatantly ignored their obligations to effect service and establish jurisdiction. From the July 2014 filing of this case, through the May 2015 dismissal, the plaintiffs never made service on any of the defendants, nor did they move for any extension of time to make service. These failures are all the more inexcusable in light of the repeated notices from the Tribal Defendants and Det. Robinson regarding the lack of service. See District Court Dkt. # 15, 20, 22, 30, 31.

The excuses offered by the plaintiffs' counsel at the hearing on the motion to reopen and in their brief before this Court – some of which are not supported by anything in the record – amount to nothing more than attorney "inadvertence, neglect, mistake, or misplaced reliance," none of which is sufficient to show "good cause." Howard, 977 F. Supp. at 658. Courts have found "good cause" to be lacking even in cases where the attorney who failed to make service was far more diligent than the plaintiffs' counsel was in this case. See, e.g., Romero v. Keeney, 168 F.R.D. 483, 485 (S.D.N.Y. 1996) (dismissing case where failure to make service was "the product of counsel's failure to inform himself as to the nature of the entity he sued and the method prescribed for effecting service upon it"); Delicata v. Bowen, 116

F.R.D. 564, 566 (S.D.N.Y. 1987) (no "good cause" where plaintiff's attorney "serv[ed] process 47 days after the 120 day deadline" because of a claimed "clerical error in [the attorney's] office"). See also McGregor v. United States, 933 F.2d 156, 160 (2d Cir. 1991), superseded on other grounds by Zapata v. City of New York, 502 F.3d 192 (2d Cir. 2007) (finding that District Court did not abuse its discretion in refusing to find "good cause" for failure to make service after "finding that it was attorney neglect rather than misleading government conduct that resulted in the service defect").

The plaintiffs never argued below, prior to dismissal, that they had "good cause" for an extension of time to make service. Thus, there is no basis for this Court to revisit the District Court's decision. Despite repeated notice of the lack of service, the plaintiffs neither made service, nor requested waivers of service, nor sought an extension of time, nor attempted to demonstrate "good cause." Dismissal was, and remains, the proper course on these facts. See, e.g., Gerena v. Korb, 617 F.3d 197, 201 (2d Cir. 2010) (affirming dismissal where plaintiff served defendant well after the 120-day deadline and "had neither sought nor received an extension of time to serve [the defendant]"); Bogle-Assegai v. Connecticut, 470 F.3d 498, 508-509 (2d Cir. 2006) (affirming dismissal where plaintiff "made no showing whatever as to any effort on her part to effect personal service on [the defendants] . . . [and] also

made no effort to show good cause for her failure and never requested an extension of time").

B. The Plaintiffs Repeatedly Misrepresent The Record Below.

In addition to misrepresenting the issues and rulings that are on appeal, see section VI-C, the plaintiffs misstate the record in a number of other disturbing ways.

The plaintiffs never "sought multiple continuances" to respond to the Tribal Defendants' motion to dismiss. See Pl. Br. at 7. They filed for just one extension, with the Tribal Defendants' consent, see District Court Dkt. # 34, which the Court granted, see District Court Dkt. # 35. But the plaintiffs never sought any other extension of the response deadline, either by way of a motion with the Court or any contact with opposing counsel. See Docket Sheet (A1-11). Instead, they simply chose not to respond.

Neither did the District Court "repeatedly refuse[] [Attorney Vining's] pro hac vice application." Pl. Br. at 8. The plaintiffs made just one motion to admit Attorney Vining as a visiting attorney. See District Court Dkt. # 27. The District Court denied the motion "without prejudice to renewal" because the plaintiffs had failed to comply with a Local Rule, which the District Court specified in its order. See District Court Dkt. # 35. The plaintiffs never again filed a *pro hac vice* motion, much less one that complied with the Local Rule. See Docket Sheet (A8-11). The plaintiffs' attempt to blame the District Court for their failure to gain Attorney Vining's *pro hac vice*

admission is disingenuous, at best. And, in any event, the plaintiffs at all times had Connecticut counsel who was admitted to practice before the District Court.

Finally, the plaintiffs make a false allegation against the Tribal Defendants that is so utterly devoid of any support as to be sanctionable. Just one page after the plaintiffs effectively admit that they never made service – claiming that they "believed they had good service of process because they relied on the paralegal-office manager" and did not "realize[]" that service was defective until later, see Pl. Br. at 8 – the plaintiffs change course and claim that "[a] reasonable inference can be drawn from the facts that the real reason Plaintiffs were unable to file return waivers of service of process is because each Defendant was served but deliberately chose to thwart process." Pl. Br. at 9.

The reason the Tribal Defendants were not served is because the plaintiffs never served them – not because they dodged service. The Mashantucket Pequot Gaming Enterprise and its employees are part of a major business enterprise located in a fixed, known location. If the Tribal Defendants had been seeking to dodge service, they would not have appeared in the case without having been served, nor would they have repeatedly informed the plaintiffs that they had failed to make service. Not having been served, the Tribal Defendants were under no obligation to undertake any of these steps, yet they did so anyway. The plaintiffs' counsel's baseless attempt to shift the blame for their own failures is inexcusable.

C. The Plaintiffs Misrepresent The District Court's Decision On The Motion To Reopen.

As noted, the District Court's ruling on the motion to reopen is not before this Court. As discussed above, see section VI-A-1, this Court lacks jurisdiction to consider any challenge to that ruling because the plaintiffs failed to appeal it, and this appeal is limited to the District Court's dismissal for the plaintiffs' failure to establish personal jurisdiction. It should be noted, however, that the ruling on the motion to reopen did not address the particular sovereign immunity arguments that the plaintiffs now ask this Court to consider on appeal.

In deciding the motion to reopen, the District Court never had to consider the merits of the plaintiffs' arguments regarding Pistor v. Garcia, 791 F.3d 1104 (9th Cir. 2015). Rather, the District Court found that the plaintiffs did not have a "meritorious claim" that would justify reopening the case for two separate reasons – (1) the failure to make service; and (2) the failure to allege any conspiracy on the part of the defendants. See Decision on Motion to Reopen, pp. 8-20 (A261-73).

With respect to the deficient service, the District Court recognized that the Tribal Defendants had not been served. Id., p. 15 (A268). The District Court also concluded that there was no "good cause" for failing to make service, noting that the plaintiffs never sought an extension of time, and that while the Tribal Defendants and Det. Robinson had repeatedly informed the plaintiffs about the lack of service,

"the plaintiffs took no steps to properly serve the Tribal [D]efendants or [Det.] Robinson." Id., pp. 18-19 (A271-72).

The other ground for declining to reopen the case was because the plaintiffs had failed to allege any conspiracy between the Tribal Defendants and Det. Robinson under 42 U.S.C. § 1983 sufficient to potentially circumvent the Tribal Defendants' sovereign immunity. What the District Court did not do, however, was to decide the sovereign immunity issue now advanced by the plaintiffs on appeal. That is, the Court did not base its decision on whether the plaintiffs sued the Tribal Defendants in their official or their individual capacities. Instead, after noting the arguments made by both sides regarding sovereign immunity, see id., pp. 9-11 (A262-64), "the court conclude[d] that it d[id] not need to weigh in on this debate," id., p. 11 (A264) (emphasis added). Reasoning that, even if the plaintiffs were correct about sovereign immunity, "at the threshold the plaintiffs would still need to allege such a conspiracy," and the District Court found that "the plaintiffs ha[d] failed to meet this requirement." Id., pp. 11-12 (A264-65). The District Court conducted a full analysis of the plaintiffs' Amended Complaint, noting that the plaintiffs failed to allege any agreement "either express or tacit" between the Tribal Defendants and Det. Robinson, such that they had failed to plead a plausible conspiracy. Id., pp. 12-14 (A265-67). As proof that the District Court was right, the plaintiffs' argument on appeal that they "alleged a conspiracy" still fails to offer any

allegation of any agreement between the Tribal Defendants and Det. Robinson. See Pl. Br. at 14.

This conclusion – that the plaintiffs failed to allege any conspiracy – was the underpinning of the District Court's conclusion that the plaintiffs' claims would have been barred by sovereign immunity. Because the District Court "conclude[d] that the plaintiffs ha[d] not alleged a conspiracy to violate section 1983 under color of state law," the Court "further conclude[d] that the Tribal defendants would be immune from suit based on tribal sovereign immunity, under either the [Tribal Defendants'] or [the plaintiffs'] standard." Decision on Motion to Reopen, p. 14 (A267). Thus, the District Court never had to engage in any substantive analysis of the plaintiffs' sovereign immunity arguments, such that it never had to consider Pistor, which the plaintiffs urge this Court to adopt. Instead, the plaintiffs' failure to allege a conspiracy meant that the Tribal Defendants were immune from suit regardless of whether plaintiffs claimed to be suing them in their individual or official capacities. This defect, along with the failure to make service, provided a second independent ground for the District Court's conclusion that the plaintiffs failed to state any meritorious claim.

Finally, it should be noted that the sovereign immunity precedent in the Second Circuit is far from a blank slate. The decision trumpeted by the plaintiffs as having "change[d] everything," Pl. Br. at 2 (citing Pistor, 791 F.3d 1104), directly

conflicts with this Circuit's established precedent. See Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004) (reasoning that "[plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority").

In short, while the motion to reopen is not before this Court, even if the plaintiffs had appealed that decision, the District Court never reached or decided the question that the plaintiffs press on appeal. The District Court's decision on the motion to dismiss was decided solely on the grounds of personal jurisdiction, and that is the only order that has been appealed. The motion to reopen, which has not been appealed, was resolved because the plaintiffs failed to state a meritorious claim for two separate and independent reasons – the failure to make service and the failure to plead a section 1983 conspiracy. Even if that decision had been appealed, either of those grounds would serve as a basis for affirming the decision. See, e.g., Laurent v. PricewaterhouseCoopers LLP, 794 F.3d 272, 273 n.1 (2d Cir. 2015) (instructing that Court of Appeals "may affirm on any ground the record supports . . . .").

D. In Any Event, Second Circuit Precedent, Not A Ninth Circuit Decision, Governs.

Even if the plaintiffs had appealed from the motion to reopen, and even if the District Court had decided that motion to reopen solely on sovereign immunity grounds tied to the arguments made by the plaintiffs regarding the Tribal

Defendants' individual or official capacities, this Court's existing precedent governs and mandates affirmance.

In Chayoon v. Chao, this Court reviewed a claim brought under the Federal Family Medical Leave Act by a former employee against employees and officials of the Mashantucket Pequot Tribe and the Mashantucket Pequot Gaming Enterprise, an arm of the tribal government ("MPGE"). 355 F.3d at 141. Similar to the plaintiffs' arguments here, the plaintiff in Chayoon argued that sovereign immunity did not apply because he was suing the individual employees in their individual or personal capacities. This Court rejected his arguments reasoning that he could not circumvent tribal sovereign immunity "when the complaint concerns actions taken in the defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." Chayoon, 355 F.3d at 143.

Similarly, in Bassett v. Mashantucket Pequot Museum and Research Center, 221 F.Supp.2d 271 (D. Conn. 2002), Judge Droney, then a District Judge, extensively analyzed this issue of "individual capacity" claims against tribal officials and employees and concluded that "[i]n the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads – and it is shown – that a tribal official acted beyond the scope of his authority on behalf of the Tribe." Id. at 280; see also Frazier v. Turning Stone Casino, 254 F.Supp.2d 295, 308-309 (N.D.N.Y. 2003); Chayoon v. Sherlock, 89

Conn. App. 821, 827 (2005). The Bassett court explained that "a tribal official – even if sued in his individual capacity – is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority." 221 F.Supp.2d at 280. A plaintiff cannot simply label or claim that they are suing individual tribal defendants in their "individual capacity" and thereby avoid the jurisdictional impediment of tribal sovereign immunity. Id. Rather, a plaintiff must allege and prove that a tribal official acted "'without any colorable claim of authority,' apart from whether they acted in violation of federal or state law." Id. at 281.

Thus, even if the issue were properly before this Court, the plaintiffs' arguments would require this Court to abandon its own precedent and follow the Ninth Circuit decision in Pistor v. Garcia, 791 F.3d 1104 (9th Cir. 2015). Pl. Br. at 10-14. The Pistor case adopts a "remedy-focused" analysis, which has not been adopted by any other Circuit, including the Tenth Circuit, even though Pistor relies upon language from a Tenth Circuit decision.[5] In fact, a later Tenth Circuit decision explains tribal immunity in a manner similar to the Second Circuit. Burrell v. Armijo, 603 F.3d 825, 832 (10th Cir. 2010) ("[T]he immunity question hinges on the breadth of official power the official enjoys and not whether the official is

[5] Pistor quotes language from a Tenth Circuit decision; however that decision does not decide the issue of the application of tribal sovereign immunity to tribal officials. See 791 F.3d at 1112-13 (quoting language from Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1296-1298 (10th Cir. 2008)).

charged with using that power tortiously or wrongfully."). There is no principled reason for reversing this Circuit's precedent to adopt the unique Ninth Circuit approach, especially in a case, such as this, in which the issue is not properly before this Court, and where the District Court did not consider or decide the issues pressed by the plaintiffs.

Moreover, even under the flawed Ninth Circuit approach, the court recognized that sovereign immunity would apply if the relief sought would "expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." Pistor, 791 F.3d at 1113 (quoting Maxwell v. County of San Diego, 708 F.3d 1075, 1089 (9th Cir. 2013)). Here, the plaintiffs sued MPGE (the same entity whose officials were sued in Chayoon), an arm of the tribal government, along with tribal officials and employees, and sought the return of so-called front money allegedly paid to MPGE, their alleged winnings from MPGE, as well as $100,000 for each plaintiff. The plaintiffs therefore seek monetary damages from the sovereign. In addition, the plaintiffs' lawsuit essentially asks the Court to reverse the decision of a Tribal regulatory agency, the Mashantucket Pequot Tribal Gaming Commission.[6]

[6] The Mashantucket Pequot Tribal Gaming Commission is a tribal agency created under tribal law and pursuant to Federal Gaming Procedures promulgated by the Secretary of the Interior under the Indian Gaming Regulatory Act. See Mashantucket Pequot Gaming Procedures, 56 Fed. Reg. 24996 (May 31, 1991), Section 13; 3 Mashantucket Pequot Tribal Laws Ch.1, Section 7. Pursuant to the

Even under Pistor's faulty analysis, sovereign immunity would apply since the relief sought by plaintiffs would require payment from the Tribal treasury and reversal of a tribal regulatory agency's decision – going to the core of tribal sovereignty.

As discussed in Section VI-A-1, above, the District Court's decision on the motion to reopen is not before the Court; thus, the sovereign immunity arguments urged by plaintiffs in their brief are not before this Court. Even if that decision were before this Court, the sovereign immunity issues argued by plaintiffs relating to whether tribal officials are being sued in their individual or official capacities was not addressed by the District Court. And, even putting aside all of those impediments, the relevant Second Circuit precedent on tribal sovereign immunity supports the District Court's finding that the plaintiffs' claims are unmeritorious.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's

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Indian Gaming Regulatory Act, federal Gaming Procedures, and tribal law, the Gaming Commission regulates gaming on the Mashantucket Pequot Reservation and as part of its regulatory authority it hears complaints and decides cases. It decided this case against the plaintiffs and they, in essence, seek a reversal of that decision.

decision dismissing the plaintiffs' Amended Complaint for failure to establish personal jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 7,495 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

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CERTIFICATION

I hereby certify a copy of the foregoing Brief of the Defendants-Appellees was filed electronically on June 3, 2016. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

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