15-705

United States Court of Appeals for the Second Circuit

JEFFREY PITRE, RR. And AWENHA PITRE, Individually and on behalf of their children DP, SK, DP, SP, EP and JP,

Appellants-Plaintiffs,

vs.

LORRIE A. SHENANDOAH; JAMES DOOLEY; ONONDAGA SOCIAL SERVICES DEPARTMENT; OSWEGO SOCIAL SERVICES DEPARTMENT; and the ONONDAGA NATION,

Appellees-Defendants.

BRIEF ON BEHALF OF APPELLEES/DEFENDANT OSWEGO COUNTY SOCIAL SERVICES DEPARTMENT

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PRELIMINARY STATEMENT

This appellate brief is submitted on behalf of defendant Oswego County, improperly identified in the Summons and Complaint as "Oswego County Social Services Department" and "Oswego Social Services Department", in response to the appellate brief of Jeffrey Pitre, Sr. and Awenha Pitre, individually and on behalf of their children DP, SK, BP, SP, EP and JP.

SUMMARY OF THE ARGUMENT

Defendant Oswego County contends that the Decision and Order of the District Court was proper and well supported by the evidence and applicable statutes and case law.

The District Court properly found that the *Rooker-Feldman* Doctrine applied to the facts of the case and required dismissal of the action. As the District Court noted, the parents and children did not identify any case law in opposition to the application of the *Rooker-Feldman* Doctrine in the Court below. Oswego County contends that the *Rooker-Feldman* Doctrine was clearly applicable and the District Court properly applied it to the facts of this case and dismissed the Complaint.

Oswego County further contends that the District Court properly determined that pursuant to the Indian Child Welfare Act (ICWA), defendant Onondaga Nation has exclusive jurisdiction over the custody proceedings that formed the basis of the

Complaint and that the Oswego County Family Court properly transferred jurisdiction of the custody proceedings to the Onondaga Nation pursuant to 25 U.S.C. § 1911(b). In addition, the District Court correctly determined that the parents and children did not object to the transfer of the proceedings at the time it was made and did not appeal from the State Court Order, although they had the right to do so and were represented by counsel. (Onondaga Co.App. pp. A59-A61).

It is well established that an argument not raised on appeal is deemed abandoned. Deep Woods Holdings L.L.C. v. Savings Deposit Ins. Fund of the Republic of Turkey, 745 F.3d. 619 (2d. Circuit, 2014); U.S. v. Quiroz, 22 F.3d. 489 (2d Circuit, 1994). Therefore, it is respectfully submitted that the parents and children have abandoned any arguments that are not contained in their brief including any opposition to the additional arguments that were submitted in support of Oswego County's motion to dismiss in the District Court. Although the District Court did not reach and address the additional arguments submitted in support of Oswego County's motion to dismiss, this Court nevertheless has the discretion to consider issues raised, briefed and argued in that Court but not reached there. Booking v. General Star Management Company, 254 F.3d 414, (2d Circuit, 2001). Therefore, Oswego County contends that even if it were to be found that the *Rooker-Feldman* Doctrine and the ICWA did not require dismissal of the complaint it is nevertheless entitled to dismissal for several reasons.

First, Oswego County may be sued for damages under 42 U.S.C. Section 1983 only where the alleged violations were committed pursuant to an official policy, custom or established practice and there is no evidence of any policy, custom or established practice in this case that caused the alleged violation. In addition, Oswego County contends that to the extent that the Complaint can be construed to set forth a claim or claims against the County for damages under New York State Law it must be dismissed for failure to file a Notice of Claim. Finally, Oswego County maintains that punitive damages are not recoverable against a municipality and the claim for such damages must also be dismissed.

STATEMENT OF THE CASE

In June 2012 Jeffery Pitre, Sr. and Awenha Pitre were arrested and charged with multiple crimes arising out of alleged sexual activity with one of their children. At or about that time the Oswego County Department of Social Services placed their children into protective foster care because the children and parents were residents of Oswego County. Thereafter a Severe Abuse Petition was filed against Jeffrey Pitre, Sr. and Awenha Pitre in Oswego Family County Family Court.

After proceedings that were held in the Family Court a Permanency Hearing Order was issued by Oswego County Family Court Judge Kimberley M. Seagar on February 6, 2013. That Order specifically provided for the transfer of the proceedings including custody of the children to the jurisdiction of the Onondaga Nation. The

parents were represented by counsel throughout the proceedings and did not object to the transfer nor did they appeal the Order in New York State Court although they had the right to do so.

Thereafter, the parents brought the action in the District Court alleging violations of their Federal and State constitutional rights and State law and seeking the return of the custody of the children to them.

The District Court granted the Defendants' motions to dismiss by Decision and Order dated February 17, 2015. Pitre v. Shenandoah, 2015 WL 667540. The parents and children now appeal that decision.

ARGUMENT

I. THE *ROOKER-FELDMAN* DOCTRINE WAS PROPERLY APPLIED BY THE DISTRICT COURT AND REQUIRED DISMISSAL OF THE COMPLAINT.

As the District Court noted in its decision, the parents and children did not cite any case law in opposition to the application of the *Rooker-Feldman* Doctrine on the motions to dismiss. Pitre, supra *3. However, they now contend that the *Rooker-Feldman* Doctrine did not bar the complaint and dismissal was not warranted. In its decision, the District Court specifically and thoroughly addressed the applicability of the *Rooker-Feldman* Doctrine to the underlying action.

The crux of the claim against defendant Oswego County is contained in paragraph 13 of the Complaint where it is alleged that Oswego County, "acting through its employees and agents, took custody of the children and without authority or permission from the mother and father, upon information and belief, permitted and allowed the Onondaga Nation to take custody of the children, then permitted the transfer of the children to Lorrie Shanendoah (sic) and James Dooley". The Complaint goes on to request relief in the form of declaratory judgment declaring that the defendants, including Oswego County, "have detained then held custody of the children in violation of the rights of the mother and the father and the children as guaranteed by the Federal and New York State constitutions and by the laws of the State of New York" and that "the Defendants, individually and collectively, shall immediately return custody of the children to the mother and father". As the District Court correctly recognized, the Complaint is nothing more than a direct attempt to have the federal Court review, revive and reject State Court orders. Pitre, supra *3.

However, it is respectfully submitted that the District Court properly found that it lacked subject matter jurisdiction over the claims of the parents and children pursuant to the *Rooker-Feldman* Doctrine. The *Rooker-Feldman* Doctrine provides that, in most circumstances, the lower Federal Courts do not have subject matter jurisdiction to review final judgments of State Courts. Rooker v. Fidelity Trust

Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983);Morrison v. City of New York, 591 F. 3d 109 (2nd Circuit, 2010).

It is well established and the District Court found that the *Rooker-Feldman* Doctrine applies to Federal actions "brought by state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments". Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005).

There are four requirements for application of the *Rooker-Feldman* Doctrine: "First, the federal court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state court judgment must have been rendered before the district court proceedings commenced". Hoblock v. Albany County Board of Elections, 422 F. 3d 77 (2nd Circuit, 2005).

It is respectfully submitted that the District Court properly found that all four requirements are present in this case. Pitre, supra *3. As set forth previously, the New York State Family Court (Judge Seagar) issued a Permanency Hearing Order on or about February 6, 2013, that specifically provided for the transfer of custody and jurisdiction over the children to the Onondaga Nation. The Plaintiffs were

represented by counsel in the Family Court proceedings, consented to the transfer, and did not appeal that decision, even though they had the right to do so (Onondaga Co. App. pp. A59-A61).

The second requirement of the *Rooker-Feldman* Doctrine is that the plaintiff complains of injury caused by a State court judgment. Here, the parents are complaining that they have been wrongfully deprived of the custody of their children as a result of the Family Court Order of February 6, 2013.

The third *Rooker-Feldman* Doctrine requirement is satisfied in this case as well since the parents and children are effectively seeking review and reversal of the Oswego County Family Court Order of February 6, 2013. That Order transferred the custody of the children and all jurisdiction of the proceedings to the Onondaga Nation. As a direct result of that Order the children were not returned to the parents. In the District Court action the parents were specifically seeking to have the federal Court review and reverse the Oswego county Family Court Order and direct that the custody of the children be returned to the parents.

Finally, the fourth requirement of the *Rooker-Feldman* Doctrine has also been satisfied because the Complaint was clearly filed well after the Family Court Order of February 6, 2013.

Under these circumstances, the District Court properly determined that the action is subject to the *Rooker-Feldman* Doctrine and must be dismissed because the

District Court lacks jurisdiction in this matter. Pitre, supra 3; See Dayton v. City of Middletown, 786 F. Supp 2d. 809, (S.D.N.Y. 2011).

The parents and children contend that the *Rooker-Feldman* Doctrine did not require dismissal of their complaint in this case. (Appellants Brief, p.8). In support of their argument, they state that the complaint did not claim that the parents and children were injured by the prior State Court judgments or Orders and that they did not seek review or nullification of the prior state court judgments. (Appellants' Brief, p.8). However, as the District Court correctly stated, the Complaint is clearly an attempt to have the Federal Court review, revive and reject the Orders of the Oswego County and Onondaga County Family Courts. Pitre, supra *3. Those Courts initially granted Onondaga Social Services and the Oswego County Social Services Department authority to remove the children from the parents' custody and ultimately transferred jurisdiction of the custody matters to the Onondaga Nation. The parents are seeking the immediate return of the custody of the children to them and are directly challenging the authority of the Onondaga Nation to maintain jurisdiction over the ongoing custody matters pursuant to the State Court Orders and the ICWA. The parents specifically allege that Defendants "wrongfully hold custody of the children in violation of the mother and father's State and Federal Constitutional Rights and in violation of New York State Law".

It is clear that the parents and children are seeking to have the Federal Court set aside the prior State Court Orders, most notably the Oswego County Family Court the Order of February 6, 2013, which transferred the proceedings to the jurisdiction to the Onondaga Nation. It cannot be disputed that the parents and children lost in State Court in that custody was not returned to the parents and jurisdiction and custody was transferred to the Onondaga Nation. Hoblock, supra at 88.

The parents and children claim injuries caused by the State Court Orders. They contend that if jurisdiction had not been transferred to the Onondaga Nation, then the parents would have regained custody of the children and there would be no basis for the allegation that defendants "wrongfully hold custody of the children in violation of the mother and father's State and Federal Constitutional rights".

However, the District Court properly found that it lacked jurisdiction and the *Rooker-Feldman* Doctrine required dismissal of the Complaint. In the present case, the parents' proper course of action would have been to challenge the Family Court Order of February 6, 2013, by means of an appeal to the New York Appellate Division which they also could have done as a matter of right, pursuant to New York Family Court Act § 1112 (a). It is not disputed that the parents and children were represented by legal counsel throughout the Family Court proceedings. (Onondaga Co. App. pp. A59-61).

All of the elements of the *Rooker-Feldman* Doctrine were present here and the District Court lacked subject matter jurisdiction and correctly dismissed the complaint.

II. THE INDIAN CHILD WELFARE ACT (ICWA) PROVIDED THE ONONDAGA NATION WITH EXCLUSIVE JURISDICTION OVER THE ISSUE OF CUSTODY AND THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

In the District Court, the parents of the children argued that the ICWA did not grant the Onondaga Nation exclusive jurisdiction because the father is not Native American, the family did not reside on a reservation at the time of the children's removal and the parents did not consent to the transfer of custody. However, as the District Court correctly determined, ICWA provides the Onondaga Nation with exclusive jurisdiction over the issue of the children's custody, and as a result the District Court lacked subject matter jurisdiction.

25 U.S.C. 1911(a) provides that "an Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of the tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." In addition, as the District Court noted, in the absence of good cause or objection by either parent, ICWA mandates the transfer of "any State Court proceeding for the foster care placement

of...an Indian child not domiciled or residing within the reservation of the Indian child's tribe" to the jurisdiction of said tribe. 25 U.S.C. § 1911(b); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). In this case, there is no dispute that the children were Indian children within the meaning of the ICWA, (25 U.S.C. 1903(4), and they were not residing on the reservation at the time of their removal.

As the District Court further noted, the parents, who were represented by counsel throughout the Family Court proceedings, did not object to the transfer of jurisdiction to the Onondaga Nation, nor did they appeal in New York State Court, although they had the right to do so. (Onondaga Co. App. pp. A59-A61). The parents never identified any "good cause" to prevent the transfer, and in fact, expressly consented to the transfer of jurisdiction to the Onondaga Nation while represented by counsel in the Oswego County Family Court proceedings.

The contention that the Oswego County Family Court did not expressly refer to the ICWA when the transfer of jurisdiction was made to the Onondaga Nation does not alter the fact that the transfer was proper and clearly mandated by the ICWA as the District Court properly determined.

III. THE §1983 CLAIMS MUST BE DISMISSED AS AGAINST OSWEGO COUNTY

It is well established that a municipality may be held liable for damages under 42 U.S.C. §1983 only where the constitutional violations have been committed pursuant to an official policy, custom or established practice. Sorlucco v. New York

City Police Dep't., 971 F.2d 864 (2d Circuit, 1992); Singleton v. City of New York, 632 F. 2d 185 (2d Circuit, 1980), citing Monell v. Dep't. of Social Services, 436 U.S. 658. However, in this case the plaintiffs have completely failed to allege any custom, policy or established practice on the part of Oswego County that could give rise to any liability (*See* Bezerra v. County of Nassau, 846 F. Supp 214 (E.D.N.Y.,1994). In addition, it has been held that an official policy cannot be inferred from a single incident without some additional circumstances. Turpin v. Mailet, 619 F. 2d 196 (2d Circuit, 1980).

Here plaintiffs have failed to set forth any facts that in any way establish, or that could even create an inference of, a policy or custom of Oswego County which led to a violation of any constitutional right of the plaintiffs. Therefore, plaintiffs' claims against Oswego County for any alleged violation of rights under 42 U.S.C. §1983 must be dismissed.

IV. TO THE EXTENT THAT THE COMPLAINT CAN BE CONSTRUED TO SET FORTH A CLAIM AGAINST OSWEGO COUNTY FOR DAMAGES UNDER NEW YORK STATE LAW, IT MUST BE DISMISSED FOR FAILURE TO FILE A NOTICE OF CLAIM

In this case, a Notice of Claim was required to be filed against Oswego County as required by New York County Law Section 52 and §50-e of the New York General Municipal Law. However, no Notice of Claim was filed and, therefore, the complaint as against Oswego County must be dismissed.

Section 52 of the New York County Law provides that "a notice of claim must be filed against a county in any action for damage…or for invasion of personal or property rights, of every name and nature…or any other claim for damages arising in law or in equity, alleged to have been caused…because of any misfeasance, omission of duty, negligence or wrongful act, on the part of the county, its officers, agents, servants or employees." The required Notice of Claim must be served in compliance with New York General Municipal Law § 50-e and any legal action based upon such claim must be commenced in accordance with New York General Municipal Law § 50-i. Pursuant to General Municipal Law § 50-e a Notice of Claim must be filed within ninety days after the incident giving rise to the claim. In addition, § 50-i of the General Municipal Law requires that the Complaint include a recitation that a Notice of Claim was served, that at least thirty days have elapsed since service of the Notice of Claim, and that the defendant has failed to address the claim. The plaintiff must prove that he or she has complied with the statutory notice of claim requirements. Henneberger v. County of Nassau, 465 F. Supp. 3d. 176 (E.D.N.Y., 2006). Failure to timely serve a Notice of Claim is fatal unless the action has been brought to vindicate a public interest or leave to serve a late Notice of Claim has been granted. Keating v. Gaffney, 182 F. Supp. 2d 278 (E.D.N.Y., 2001). In this case, there is no dispute that the parents and children failed to serve a Notice of Claim in regards to any of their claims of New York State Law and Constitutional violations as required by New

York County Law § 52 and General Municipal Law § 50-e. The parents and children never sought leave to file a late notice of claim nor does the Complaint meet the pleading requirements outlined in General Municipal Law § 50-i.

It is respectfully submitted that the Plaintiffs and children were required to serve a Notice of Claim under New York law, and failed to do so. Therefore, their claims against Oswego County under New York Law and the New York Constitution must be dismissed.

V. THE CLAIM FOR PUNITIVE DAMAGES MUST ALSO BE DISMISSED

It is well established that punitive damages are not available in an action against a municipality. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Sharapata v. Town of Islip, 56 N.Y.2d 332 (1982). Therefore, Plaintiffs are not entitled to maintain a claim against Oswego County for punitive damages and therefore their claim for such damages must be dismissed.

VI. THE COMPLAINT MUST BE DISMISSED UNDER THE PRINCIPLES OF COLLATERAL ESTOPPEL AND *RES JUDICATA*

The Complaint in this case seeks to relitigate the very same issues that were determined in the Oswego County Family Court. The Family Court Order of February 6, 2013 determined that ICWA applied and transferred custody of the children and all further proceedings to the Onondaga Nation. The Complaint of the

parents and children seeks to have the District Court review and determine the very same issues.

Collateral estoppel prevents parties from re-litigating issues that were decided against them in a prior proceeding where they already had a full and fair opportunity to litigate that issue. Hoblock v. Albany County Board of Elections, 422 F. 3d. 77. In this case, the proceedings in the Oswego County Family Court determined that the parents and children were subject to ICWA and that custody and jurisdiction belonged to the Onondaga Nation. The parents and children were represented by counsel throughout the Family Court proceedings and did not object to the transfer of custody and jurisdiction to the Onondaga Nation nor did they appeal that Order. (Onondaga Co. App. pp. A59-A610).

Under these circumstances, the Plaintiffs are therefore prevented by collateral estoppel from maintaining a Federal Court action to reverse the Oswego County Family Court Order.

The complaint in this case is also barred by the doctrine of *res judicata*, Under that doctrine when a claim has been brought to a final conclusion, any other claim arising out of the same transaction or series of transactions are barred, even if they are based upon different theories or seeking a different remedy. O'Brien v. City of Syracuse, 54 N.Y 2d. 353 (1981).

In this case, the parents and children were parties to all of the Oswego County Court proceedings and all of the same issues relating to ICWA, the jurisdiction of the Onondaga Nation, and custody of the children were fully considered and determined in that Court.

Therefore, collateral estoppel and the doctrine of *res judicata* prevent the parents and children from now maintaining the action in Federal Court and the complaint was properly dismissed.

CONCLUSION

For the reasons set forth, the Decision and Order of the District Court should be upheld and the appeal should be dismissed.

Respectfully submitted,

Dated: July 30, 2015
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