UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 15-705

X----------X

JEFFREY PITRE, SR. and AWENHA PITRE,
Individually and on behalf of their children
DP, SK, DP, SP, EP and JP
Appellants-Plaintiffs

-v-

LORRIE A. SHENANDOAH; JAMES DOOLEY;
ONONDAGA SOCIAL SERVICES DEPARTMENT;
OSWEGO SOCIAL SERVICES DEPARTMENT; and
the ONONDAGA NATION
Appellees-Defendants

X----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF ON APPEAL

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APPELLANTS' BRIEF IN REPLY

INTRODUCTION

Appellees contend in this Court that the District Court properly granted their motions to dismiss and assert:

(1) that the Parents and the Children were the losers in a prior state court judgment--the February 6, 2013 Family Court Permanency Hearing Order (Appellants' Addendum G)--and that the within Complaint constituted a request that the District Court review and reject such order, and, therefore, the District Court correctly dismissed the Complaint as barred by the Rooker-Feldman doctrine (see, Onondaga Nation Brief at pp. 2, 8-10; Oswego Social Services Brief at pp. 1, 6-9; Onondaga Social Services Brief at pp. 6-10);

(2) that the Parents and Children contend that the February 6, 2013 Permanency Hearing Order caused them to suffer injury for which the Complaint seeks damages (see, Onondaga Nation Brief at pp. 2, 8-10; Oswego Social Services Brief at p. 7; Onondaga Social Services Brief at pp. 8); and

(3) that the February 6, 2013 Permanency Hearing Order (Appellants' Addendum G) was issued pursuant to the Indian Child Welfare Act (the "ICWA"), and that appellees conduct following such order was justified by the ICWA (see, Onondaga Nation Brief at pp. 1-2, 4-5, 13-15; Oswego Social Services Brief at pp. 10-11; Onondaga Social Services Brief at p. 2).

The Parents and the Children submit the within brief in reply to the appellants' assertions.

POINT I

ALTHOUGH APPELLEES ARGUE OTHERWISE, THE ROOKER-FELDMAN DOCTRINE DID NOT WARRANT DISMISSAL OF THE PRO SE COMPLAINT.

On July 10, 2012 and on September 12, 2012, the Oswego Department of Social Services commenced abuse petitions against the Parents in Oswego Family Court. Those petitions charged that the Parents had engaged in improper sexual conduct with one of their daughters. When the petitions were filed the Parents were in jail on criminal charges alleging the same sexual misconduct. Upon information and belief, in July 2012, in the context of the abuse proceeding, the Oswego County Family Court directed that the Children be temporarily placed in foster care.

In January 2013, the criminal charges were dismissed against the Parents. On January 25, 2013, the Family Court issued a Corrected Order of Dismissal (Appellants' Addendum F) providing that the abuse petitions were dismissed.

Close to two weeks later, on February 6, 2013, the Family Court issued a Permanency Hearing Order (see, Appellants' Addendum G at pp. 1-4). That order identified "the permanency planning goal of return to parents" (see, Appellants' Addendum G at p. 3). It further provided a reasonable efforts determination based in part on the information that there had been "weekly visitation" (see, Appellants' Addendum G at p. 3).

In addition the Permanency Order contained a section entitled "Findings and Orders." There, the court detailed that the temporary placement of the Children had continued "from January 11, 2013 through January 25, 2013" "because the permanency hearing was not completed until January 25, 2013," and that "on January 25, 2013," the temporary removal of the Children "[wa]s terminated" "due to the transfer of the proceedings to the jurisdiction of the Onondaga Nation" (see, Appellants' Addendum G at p. 4). The February 6, 2013 Permanency Order referenced a "transfer of the proceedings to the jurisdiction of the Onondaga Nation," however, it appears that there was, in fact, no actual order of transfer issued.

On March 18, 2014 the within Complaint was filed in which the Parents and Children assert that the Onondaga Nation, Lorrie Shenandoah, and the Oswego and Onondaga Social Services Departments (the "Appellees") have unlawfully detained the Children against the wishes of the Parents, without court authorization for such detention, without the pendency of a state or Onondaga Nation proceeding, without issuing notice of charges and an opportunity to be heard, and without affording the Children and the Parents the right to associate with each other and to maintain the integrity of their family (see, Appellants' Addendum B, Complaint at paras. 2, 13-15,18, 39, 64).

The Complaint makes plain that the period of the complained-of wrongful detention followed the transfer of the proceedings to the Onondaga Nation and continued until the March 18, 2014 filing of the Complaint and thereafter. In that regard, the Complaint asserted:

> (1) that at the filing of the Complaint [i.e., March 18, 2014], the Father and the Mother had been denied parenting time with the Children "for in excess of one year" and for that period of time, the Children were "wrongfully withheld" from the Parents against their will and without lawful authority supporting such detention (see, Appellants' Addendum B, Complaint at paras. 20, 22, 55, 56, 60).
>
> (2) that such complained-of wrongful detention occurred absent any "child protective proceeding" regarding the Children "pending in any court" or pending within the

> Onondaga Nation (see, Appellants' Addendum B, Complaint at para. 22);
>
> (3) that on August 5, 2013, the Onondaga Nation and Shenandoah had detained the Children for a period of "about 8 months" without exerting any effort to reunite the family and having barred any connection and communication amongst the Parents and the Children (see, Appellants' Addendum B, Complaint at para. 32).

Such conduct caused irreparable harm and suffering to the family and, as set forth in the Complaint (see, Appellants' Addendum B, Complaint at paras. 16-a, 16-c, 16-d, 61), warranted declaratory relief and the imposition of damages. In short, the alleged constitutional wrong was not the issuance of the February 6, 2013 Permanency Order, but the conduct thereafter and the interruption and deprivation of the family's constitutionally-protected liberty interests.

Appellees' moved for dismissal in the District Court because, they assert, the Complaint invited review of the February 6, 2013 state judgment and accordingly, the Rooker-Feldman doctrine required dismissal. The District Court granted dismissal on the basis of Rooker-Feldman (Appellants' Addendum D).

The Parents and Children maintain that the Complaint does not invite review and rejection of the February 6, 2013 state court judgment; that they were not the losers in the state court proceeding; and that they were not

injured by that state court judgment. Rather, as noted above, the Parents and Children complain that after the January 25, 2013 termination of the temporary removal and after the February 6, 2013 Permanency Hearing Order, the Appellees deprived them of their constitutionally-protected right to maintain a family relationship by detaining the Children without a due process adjudication, including notice and the right to be heard, and without permitting the family to associate with each other.

As set forth in their main brief to this Court (see, Appellants' Brief on Appeal at pp. 6, 8), the Rooker-Feldman doctrine does not require dismissal of the Complaint. Appellees' arguments to the contrary (see, Onondaga Nation Brief at pp. 1-2, 8, 11; Oswego Social Services Brief at p. 6; Onondaga Social Services Brief at pp. 6-10), lack merit and are not persuasive.

To begin, and as noted above, contrary to Appellees' arguments (see, Onondaga Nation Brief at pp. 7-8; Oswego Social Services Brief at p. 7, 9; Onondaga Social Services Brief at p. 8-9), the February 6, 2013 Permanency Hearing Order did not result in injury to the Parents and the Children. Nor does the Complaint invite review or seek rejection of that order. There was no reason for the federal action filed by Parents and Children to challenge such order. The February 6, 2013 Permanency Hearing Order identified

return to parents as the goal and recognized that on January 25, 2013, the temporary placement that the Family Court commenced in July 2012 had terminated. These findings were not adverse to the Parents and the Children.

Further, though Appellees contend otherwise (see, Oswego Social Services Brief at pp. 7, 9; Onondaga Social Services Brief at pp. 8-9), the transfer of jurisdiction to the Onondaga Nation did not constitute a per se injury to the Parents and Children. Notably, had the Onondaga Nation actually exercised jurisdiction, leveled charges, afforded due process notice and a right to be heard and completed an adjudication, there is reason to believe that, as occurred in the state proceedings, no charges would have been sustained against the Parents and the separation of the family would have ended.

In short, this record does not support a finding that the state judgments were adverse to the Parents and Children, that the Parents or Children were losers in the state proceedings or that the state court judgment caused them injury. Accordingly, the Rooker-Feldman bar does not apply to the Complaint.

The determination in VS v. Muhammad, 595 F.3d 426 (2d Cir. 2010) supports the conclusion that in this case the Family Court order did not require dismissal. In VS v. Muhammad, there had been a Family Court trial

on neglect charges against the mother and the grandmother. Pending the Family Court's consideration and prior to issuance of a decision, the charges were withdrawn and dismissed against the respondent-mother and the children were returned to her.

Thereafter, the mother commenced a federal action, which this Court found was not barred by the Rooker-Feldman doctrine. Specifically, Rooker-Feldman was inapplicable because the mother had not lost in state court, because the social services department had withdrawn the Family Court claims against the mother, the claims were dismissed and the mother's federal action did not invite review and rejection of the state court judgment. Except for the return of the children, the factors present in V.S. are present in the case at bar and here Rooker-Feldman is equally inapplicable.

Contrary to Appellees' contention (see, Oswego Social Services Brief at p. 6; Onondaga Social Services Brief at pp. 6-9), this Court's determination in Hoblock v. Albany County Board of Elections, 422 F.3d 77 (2d Cir. 2005) does not support dismissal of the within complaint. Significantly, the facts in Hoblock are starkly different that those in the case at bar.

The plaintiffs in Hoblock were a group of voters who commenced a federal action seeking an order directing the Board of Elections to count

absentee ballots. The federal action commenced after the New York Court of Appeals had directed the Board not to count such ballots. Accordingly, the Hoblock plaintiffs requested a federal directive directly opposite to that issued by the state court. Had the federal court granted the requested relief, the Board would not have been able to comply with both the state court judgment and the federal order. This Court found that the Hoblock plaintiffs had been injured by the state court judgment and were requesting the District Court to review and reject the state court judgment. Thus, the Hoblock complaint was barred by the Rooker-Feldman doctrine. Nonetheless, this Court remanded the Hoblock complaint in order to determine whether the plaintiffs in the federal action were the same or in privity with the parties in the state court proceeding--a procedural requirement of the Rooker-Feldman doctrine.

As noted, the facts in Hoblock are starkly different than those in the case at hand. Here, the Parents and Children did not ask the federal court overrule, change or vacate the state court orders. Nor is the relief requested by the Parents and Children such that were it granted the state court judgment would effectively be vacated. Rather, the pro se Complaint sets forth that when the Onondaga Nation concluded that it had jurisdiction, even in the absence of an order providing such to it, the Onondaga Nation

apparently in the mistaken belief that it had authority to do whatever it thought best for the Children, it adopted and implemented a course of conduct--detention without due process, notice, opportunity to be heard or to affiliate with family--that violated the constitutionally-protected rights of the Parents and the Children.

Moreover, it is also relevant that such conduct violated the Onondaga Nations obligation to afford due process that is mandated by the Indian Child Welfare Act. See, 25 U.S.C. 1302(a)(6) providing that an Indian tribe is prohibited from "deny[ing] to any person within its jurisdiction the equal protection of its law or depriv[ing] any person of liberty or property without due process of law." Of course, it is long settled that New York State law prohibits the removal of custody from a parent absent a finding of unfitness or abandonment. See, Matter of Bennett v. Jeffreys, 40 N.Y.2d 543 (1976).

See also, Morrison v. City of New York, et. al. 591 F.3d 109 (2d Cir. 2010) in which the existence of a Family Court prior judgment did not bar the plaintiffs' federal action. In Morrision, the plaintiff conduct in the Family Court waiting area resulted in the Family Court issuance of an order directing that the plaintiff be hospitalized at Elmhurst Hospital for a psychiatric evaluation. The evaluation was completed on the first day of admission and the hospital found the plaintiff to be suffering from a mental

disorder. The hospital detained the plaintiff for another fourteen days until it returned her to Family Court on the adjourned date.

Later, the plaintiff sued in federal court for "torts under the United States Constitution and state law" and challenged not the Family Court order remanding her for psychiatric evaluation, but rather challenged the independent determinations made by hospital personnel that caused her to be detained for 14 days after completion of the evaluation.

This Court held that the Rooker-Feldman doctrine did not require dismissal since the complaint did not attack the Family Court order, although the plaintiff did not dispute that she lost in Family Court when it ordered her remand for psychiatric evaluation. Instead, the plaintiff sought relief based on the hospital staff's discretionary decisions--finding her mentally ill and detaining her for 14 days--that were not mandated by the Family Court order.

This Court found that the Family Court order was unclear. The order did not specify that the hospital was to detain plaintiff for two weeks and New York State Mental Hygiene Law would not permit the Family Court to order a period of hospitalization if such were not medically/psychiatrically required and thus, that the plaintiff's interpretation of the court order--that the court order did not mandate or condone the hospital's detention of

plaintiff for fourteen days rather than return her to Family Court upon completion of the evaluation that had occurred on day one of her hospitalization--was reasonable and that in the federal action, the plaintiff did not challenge the Family Court order, but only the treatment by the hospital staff that occurred after the order was issued and was constitutionally improper conduct.

The case at hand is analogous to the situation in Morrison. Here, the Parents and Children do not challenge the state court judgment, but instead claim that the conduct following such judgment violated their constitutional rights.

See also, Green v. Mattingly, 585 F.3d 97 (2d Cir. 2009). In that case, the New York Family Court issued a temporary order of removal against the mother and later issued an order returning the children. Subsequently, the mother commenced a federal action on behalf of herself and her child. This Court noted that although there had not been a final adjudication in Family Court and there was no final order of disposition removing the child and although the federal action was commenced after the Family Court proceedings were dismissed without a final order of disposition, the federal court, notwithstanding Rooker-Feldman, had jurisdiction of the 1983 complaint. This Court found that under the principles set forth in Exxon

Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), the mother "was not a state-court loser[]" since the children were ultimately returned to her and that her 1983 action did not invite the district court to review and reject the state court judgment. The federal complaint was not barred by Rooker-Feldman.

In sum, the Rooker-Feldman doctrine does not support dismissal of the Complaint because the complained-of constitutional wrong here was not the issuance of the February 6, 2013 Permanency Hearing Order, but the conduct and constrictions imposed on the family thereafter.

POINT II

THE INDIAN CHILD WELFARE ACT DID NOT AUTHORIZE OR SUPPORT THE DETENTION OF THE CHILDREN AGAINST THE WISHES OF THE PARENTS AND THE CHILDREN AND WITHOUT AFFORDING THE PARENTS AND THE CHILDREN THE RIGHT TO SEE EACH OTHER AND COMMUNICATE WITH EACH OTHER AND APPELLEES' ARGUMENTS THAT THE COMPLAINED-OF CONDUCT WAS CONSISTENT WITH THE INDIAN CHILD WELFARE ACT ARE UNPERSUASIVE AND MERITLESS.

Significantly, the Onondaga Nation, Lorrie Shenandoah, Oswego Social Services and Onondaga County Social Services do not dispute that following the February 6, 2013 Permanency Hearing Order setting forth the goal of return to parents, Lorrie Shenandoah and James Dooley detained the Children and there was no notice or right to be heard provided to the Parents,

no adjudication and no existing court order that authorized such detention and refusal to permit visitation amongst the family.

As noted above, the pro se Complaint set forth the facts underlying the claims of the Parents and the Children. Notably, it is settled that for purposes of a motion to dismiss, the court accepts as true all factual allegations in the plaintiff's complaint. Atlantic Mut. Ins. Co. v. Balfour Maclaine Intern. Ltd., 968 F.2d 196, 198 (2d Cir. 1992). With respect to a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court will accept as true all well-pleaded factual allegations and will draw all reasonable inferences in the plaintiffs favor. See, Dangler v. NYC Off Track Betting Corp., 193 F.3d 130, 138 (2d Cir. 1999). In deciding a motion to dismiss, the court may consider documents upon which a plaintiff relies; documents attached to the complaint or incorporated by reference; matters of which judicial notice may be taken; documents in plaintiff's possession or of which plaintiff had knowledge and relied on. Chambers v. Time Warner, 282 F.3d 147, 153 (2d Cir. 2002).

Responding to the Complaint, the Onondaga Nation, Lorrie Shenandoah, Oswego Social Services and Onondaga County Social Services suggest that the complained-of conduct is consistent with the February 6, 2013 Permanency Hearing Order and with provisions in the Indian Child

Welfare Act [the "ICWA"]. Appellees insist that pursuant to ICWA, the Onondaga Nation has "exclusive jurisdiction over these Indian children" (see, Onondaga Nation Brief at pp. 1-2, 4, 5, 13-15; Oswego County Social Services Brief at pp. 10-11; Onondaga County Social Services Brief at p. 2). Such assertions are erroneous as a matter of law. Notably, there is no order directing such transfer to the Onondaga Nation although the Permanency Hearing Order alludes to the transfer. Nor is there any order that references and cites the ICWA. Importantly, the provisions of ICWA did not authorize or condone the complained-of behavior.

To begin, as noted in Appellants' Brief on Appeal (Appellants' Brief at p.), on this record, the Family Court issued no findings regarding the application of ICWA. Nor did the Family Court find that the Parents' children were Indian children in accordance with ICWA. Contending that jurisdiction is with the Onondaga Nation, Appellees focus on the February 6, 2013 Permanency Hearing Order. However, as stated above, that order did not address, cite or refer to the ICWA.

In this Court, the Onondaga Nation appears to argue that there has been a determination that the Children are wards of the Onondaga Nation and that "once these children were recognized as wards of the Onondaga Nation, the Nation had and continues to maintain exclusive jurisdiction"

(Onondaga Nation's Brief at p. 5). The Onondaga Nation does not reference anything in the record to support such conclusion. Notably, the record is bereft of such support and the state court judgment did not cite or make a finding pursuant to ICWA. There is no support for the assertion that the Children were determined to be wards of the Onondaga Nation or are, in fact, wards of the Onondaga Nation. Certainly, the February 6, 2013 Permanency Hearing Order (Appellants') did not recognize such. To the contrary, that order specified the goal of return to parents and recognized that the Children's temporary removal had been terminated on January 25, 2013.

The Onondaga Nation maintains that ICWA requires that the Complaint be dismissed (Nation's Brief at p. 2); notes that the purpose of ICWA "is to protect Indian children"; that 25 U.S.C. 1901(3) focuses on the interests of the child and of the tribe "and less so on parents"; and argues that a parent should not "defeat" a tribe's jurisdiction under ICWA (Nation's Brief at pp. 20, 21). It appears that while the Onondaga Nation contends that it has jurisdiction, it believes that it need not implement the goal set forth in the February 6, 2013 Permanency Order--return of children to the Parents.

Indeed, contrary to attempting to implement the goal of return to parents, the Onondaga Nation argues that the Children's interests and the

tribe's interest are stronger than the Parents, who, the Onondaga Nation contends, should not be able to "defeat" the tribe's jurisdiction. From such assertion and from its past conduct with respect to the family, it is evident that the Onondaga Nation is unwilling to comply with the provisions of the Indian Civil Rights Law, 25 U.S.C. 1302(a)(6) that prohibit an Indian tribe from "deny[ing] to any person within its jurisdiction the equal protection of its law or depriv[ing] any person of liberty or property without due process of law." 25 U.S.C. 1302(a)(6) parallels rights guaranteed to the Parents and Children under the state and Federal Constitutions and its amendments.

Here, the Onondaga Nation focuses on its contention that pursuant to ICWA, it has exclusive jurisdiction over the Children and that 25 U.S.C. 1911 mandates that "exclusive jurisdiction over these Indian children remains properly with the Onondaga Nation" (Onondaga Nation's Brief at p. 13). However, notwithstanding section 1911, the Onondaga Nation and its agents are obliged by the Indian Child Welfare Act and the federal constitution to employ due process when interrupting and, in effect, nullifying a family's right to maintain the integrity of the family unit. Even were the Onondaga Nation found to have jurisdiction, such finding would not be dispositive regarding its unlawful conduct to the Parents and the Children and its liability for the irreparable harm resulting therefrom.

Notably, without referring to the record, Appellees contend that the Parents did not object and even consented to the Onondaga Nation exercising control of the Children (Onondaga Nation's Brief at pp. 3, 4, 12; Oswego County Brief at p. 2, 11; Onondaga County Brief at p. 10). On this record, there is no evidence to support such claim. Nor is there any record that the alleged consent was premised on the required notification and explanation by the court of the right involved and the meaning and consequence of the waiver of such rights by a free and knowing relinquishment and consent to a change in jurisdiction.

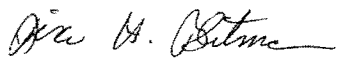
The Onondaga Nation attempts to establish such consent by presenting a copy of its own records [see, Appendix for Defendants-Appellees, at A138]. In that record, an unidentified person hand wrote that "Aweha would like the Nation to step in and take jurisdiction to keep children on reserve with maternal grandmother (Dorothy)." The conclusion that the unidentified person wrote in the Onondaga Nation records is self-serving and does not constitute a showing that there was a valid, knowing or intelligent consent that jurisdiction be transferred to the Onondaga Nation or that the Onondaga Nation assume care, custody and control of the Children.

In sum, the ICWA does not condone or justify the wrongful detention of the Children and the separation of the family.

CONCLUSION

In conclusion and for the reasons set forth above and in Appellant's main Brief on Appeal, it is requested that the Complaint be reinstated and that the Court grant such other further and different relief as shall seem appropriate.

Respectfully submitted,



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Lisa H. Blitman, attorney for appellant, certifies the following: The foregoing reply brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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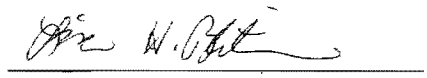

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