



SEP 12 2016

**IN THE DISTRICT COURT
CANADIAN COUNTY, OKLAHOMA**

BY Holly Ector
DEPUTY

**RJG LAW, PLLC, an Oklahoma Professional
Limited Liability Company,
Plaintiff,**

v.

**HOBBS, STRAUS, DEAN & WALKER, LLP, a
District of Columbia Limited Liability
Partnership,**

Defendant.

Case No CJ-2016-84

SET FOR HEARING BEFORE
JUDGE GARY E. MILLER ON
THE 21 DAY OF October
2016 AT 9:15 M

DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW Defendant Hobbs, Straus, Dean & Walker, LLP ("HSDW"), and respectfully requests the Court dismiss this action pursuant to 12 O.S. § 2012(B)(6) as follows:

SUMMARY OF MOTION

Based on the allegations in the Petition, Plaintiff's claims are time-barred and must be dismissed. 12 O.S. § 95(A)(3). As to the \$9.4 million apparently claimed as potential damages, Plaintiff is not the real party in interest and has no standing upon which to assert the claim. Accordingly, this action should be dismissed for failure to state a claim upon which relief can be granted under 12 O.S. § 2012(B)(6). Moreover, because all of the activity alleged by Plaintiff occurred within Indian Country, the Court lacks subject matter jurisdiction under the Constitution of the State of Oklahoma, article 1, section 3, and the case should be dismissed pursuant to 12 O.S. § 2012(B)(1).

BACKGROUND

Plaintiff has sued HSDW, the current attorneys for the Executive Branch of the Cheyenne and Arapaho Tribes ("Tribes"), alleging that Plaintiff's termination by the Tribes' Gaming Commission ("Gaming Commission") was the result of HSDW's actions, amounting to tortious

interference with contract.

STANDARD OF REVIEW

When the allegations within a pleading "indicate beyond any doubt that the litigant can prove no set of facts which would entitle the plaintiff to relief," dismissal is proper. *Tuffy's, Inc. v. City of Okla. City*, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1162. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. *Id.* Because Plaintiff is not the real party in interest and lacks standing to bring this suit, Plaintiff has failed to state a claim upon which relief may be granted. No set of facts can save Plaintiff's case; therefore the Petition should be dismissed.

Oklahoma law requires a pleading to contain a short statement of facts explaining why the pleader is entitled to relief. 12 O.S. § 2008(A)(1). "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, **shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . .**" *Id.* (emphasis added). When a complaint contains no legal basis for awarding the requested relief, such as is the case here, Oklahoma law authorizes the Court to dismiss the case for failure to state a claim upon which relief can be granted. 12 O.S. § 2012(B)(6).

A complaint does not need detailed factual allegations to prove the plaintiff is entitled to relief, but it must contain more than mere labels and conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level. . ." and must contain enough information to make the legal claim *at least* plausible on its face. *Id.* at 555, 570. If the facts alleged, even if true, do not raise a claim that entitles the plaintiff to relief, "this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558. If it appears from the

face of the complaint that the conduct alleged does not suggest any violation of legal rights, dismissal is proper. *Id.* at 556-57, 570.

In this case, because no amendment to the Petition can cure the Plaintiff's statute of limitations or standing problems, the Court may dismiss this case without granting Plaintiff leave to amend as otherwise required by 12 O.S. § 2012(G).

In order for the courts to dismiss a claim for failure to state a cause of action without giving the plaintiff the opportunity to amend, it must appear that the claim does not exist rather than the claim has been defectively stated. In this situation, the trial court's order must contain a statement that no amendment of the petition could cure the defects in [Plaintiff's] petition.

Pellebon v. State ex rel. Bd. of Regents of Univ. of Okla., 2015 OK CIV. APP. 70, ¶ 14, 358 P.3d 288, 292 (internal citations and quotations omitted).

ARGUMENTS AND AUTHORITIES

Plaintiff's Claims are Time-Barred Under 12 O.S. § 95(A)(3)

Oklahoma case law regarding when the statute of limitations begins to run is clear and conclusive. Claims for tortious interference with contractual rights are subject to a two-year statute of limitations. *Neff v. Willmott, Roberts & Looney*, 1935 OK 119, 41 P.2d 86, 89. A statute of limitations begins to run from the time the cause of action accrues. *McCain v. Combined Commc'ns Corp.*, 1998 OK 94, ¶ 8, 975 P.2d 865, 867; *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 820. A cause of action accrues when a party could have first maintained the cause of action to conclusion. *Id.*; see also *Sherwood Forest No. 2 Corp. v. City of Norman*, 1980 OK 191, 632 P.2d 368, 370; *MBA Comm'l Constr., Inc. v. Roy J. Hannaford Co., Inc.*, 1991 OK 87, 818 P.2d 469, 471-73. The elements of a cause of action arise, and the cause of action accrues, when a litigant first could have maintained his action. *Brown v. Creek Cty. ex rel. Creek Cty. Bd. of Cty. Comm'rs*, 2007 OK 56, ¶ 5, 164 P.3d 1073, 1075. "[A] cause of action accrues

upon the date the tortious act, or the happening of the breach, and not the date of the resulting damage." *Metro Oil Co. v. Sun Ref. & Mktg. Co.*, 936 F.2d 501, 504 (10th Cir. 1991).

Plaintiff has clearly and correctly stated that his cause of action accrued no later than January 31, 2014. Plaintiff alleges that he was damaged "[a]s a direct and proximate result of the termination of his contract with the CAGC . . ." Pet. ¶ 56. Plaintiff states that he was notified of the termination on January 31, 2014. Pet., ¶§ 33-34. Plaintiff emphasizes the date of the contract termination by stating that "At all relevant times prior to January 2014, Plaintiff and CAGC had a contractual relationship governing the conduct of each." Pet. ¶ 58. Plaintiff alleges activities by HDSW prior to January 31, 2014, and of which he was contemporaneously aware, contributed to his contract termination. Specifically, Plaintiff alleges that a memorandum drafted by HSDW in April, 2013, was circulated by HSDW prior to his termination on January 31, 2014, thus leading to his termination. Plaintiff's cause of action, then, arose on the date of his termination, and any action brought by Plaintiff should have been brought within two years of this date, or no later than January 31, 2016.

Plaintiff may not sit on its rights indefinitely after being put on notice of the facts upon which it has based its claims. *Smith v. Westinghouse Elec. Corp.*, 1987 OK 3, 732 P.2d 466, 468 n. 11 ("In a practical sense, a statute of limitation implicitly seeks to punish those who sleep on their rights . . ."). As reflected in Section 95, Oklahoma law mandates that Plaintiff's claims must be foreclosed at some point. Once Plaintiff had notice of, or reasonable access to, the facts informing him of his possible claims, Plaintiff was required to act in the time allowed by statute or accept the consequences of its inaction. *See, e.g., McCain, supra*, 1998 OK 94 at ¶¶ 8 and 13, 975 P.2d at 867-868 (because plaintiffs possessed a copy of the written contract, they had the means to determine differences between contract and prior negotiations, thus fraud action was

time-barred).

Plaintiff's cause of action accrued when he was terminated by the Gaming Commission on January 31, 2014. "The limitation periods in § 95 begins to run from the time the elements of a cause of action arise." *MBA Comm'l Constr., Inc.*, 1991 OK 87, 818 P.2d at 473. Plaintiff did not file suit until February 22, 2016, which is more than two years after his cause of action accrued. Accordingly, Plaintiff's claims for relief are barred by 12 O.S. § 95(A)(3), and this case should be dismissed.

Plaintiff Does Not Properly Plead Damages and Is Not the Real Party in Interest

Plaintiff indicates he is seeking damages "up to and including \$9.4 million." Pet. ¶ 72.¹ This number appears to be based on the amount the Tribes paid for the failed Pokertribes venture. Pet. ¶¶ 26, 46. Plaintiff does not state a basis for this damages figure as required by 12 O.S. § 2009. *Niemeyer v. U.S. Fid. & Guar. Co.*, 1990 OK 32, 789 P.2d 1318, 1321. Instead of a supportable damages calculation, the figure seems to be little more than a publicity stunt and pandering to tribal members opposed to the venture.

Standing requires a plaintiff to show: (1) an injury in fact, which is cognizable and real, not merely imaginary or conjectural; (2) the injury is traceable to the defendant's challenged action; and (3) the Court can redress such injury. *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996). Plaintiff bears the burden of establishing these three elements by clearly alleging facts to demonstrate that it has standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Courts should not toss these requirements aside in order to permit a suit by a

¹ This statement violates 12 O.S. § 2009(G): When items of special damage are claimed, their nature shall be specifically stated. In actions where exemplary or punitive damages are sought, the petition shall not state a dollar amount for damages sought to be recovered but shall state whether the amount of damages sought to be recovered is in excess of or not in excess of the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code.

plaintiff who lacks standing. *Id.* at 1548.

Standing is not a mere academic exercise. Actual, concrete harm is the cornerstone for establishing an injury-in-fact. "[A] plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[N]ormally, aggrieved status is limited to those persons whose pecuniary interest in the subject matter is directly and injuriously affected or one whose rights in property is either established or divested by the decision appealed. . . . The adverse affect must be direct, substantial and immediate, rather than contingent on some possible remote consequence or possibility of some unknown future eventuality.

Toxic Waste Impact Grp., Inc. v. Leavitt, 1994 OK 148, 890 P.2d 906, 911 (citations omitted).

To show an injury in fact is "particularized," it must affect the plaintiff personally; for the injury to be concrete, it "must actually exist," and not be abstract or imaginary. *Spokeo, Inc.*, 136 S.Ct. at 1548. Plaintiff must set forth specific facts showing there is a genuine issue for trial. When, as here, it is clear from the complaint that the plaintiff was not the party harmed in the manner alleged, the plaintiff lacks a concrete, particularized injury, dismissal is proper. *Id.* at 1550.

To have standing, a party must be the real party in interest which has suffered a cognizable and real injury. The pleading must seek to redress that injury which has harmed the plaintiff, and not an unrelated injury suffered by a nonparty to the suit. "Every action shall be prosecuted in the name of the real party in interest." 12 O.S. § 2017(A). The real party in interest is the party legally entitled to the proceeds of a claim in litigation. *Aetna Cas. & Sur. Co. v. Assoc's Transp., Inc.*, 1973 OK 62, 512 P.2d 137, 140. The purpose of the "real party in

interest" statute, so far as a defendant is concerned, is to assure him that he will not be subjected later to a second suit for the same cause. *Meadors v. Majors*, 1994 OK CIV APP 53, 875 P.2d 1166, 1169.

Plaintiff does not plead any facts showing that he was damaged in the amount of \$9.4 million, but seems to portray this litigation as a means for the Tribes to recoup their investment in the failed Pokertribes venture. However, only the Tribes would have standing to pursue a claim to recoup the funds they invested in the Pokertribes venture. Plaintiff has not alleged that he is authorized to pursue this claim on behalf of the Tribes, or has any other particularized right to pursue the claim. Moreover, Plaintiff has not alleged that HSDW had any hand in causing the Tribes to expend \$9.4 million on this failed venture (although Plaintiff *does* assert he was heavily involved in this failed venture with the Tribes; *see* Pet. ¶¶ 14-28, 30-35). Accordingly, Plaintiff is not the real party in interest and does not have standing to pursue a claim for damages in this amount. Because Plaintiff is not the real party in interest harmed by the expenditure of \$9.4 million or the failure of Pokertribes, Plaintiff has no basis for pursuing this claim, and dismissal is proper.

The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims

Beyond the issues with Plaintiff's lack of standing, failure to state a claim, and failure to timely file his Petition, there is a question of whether the Court has subject matter jurisdiction over this case. "A court has a duty to inquire into whether it possesses jurisdiction over the subject matter of an action that has been brought before the court." *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 15, 353 P.3d 532, 538. "When there are no contested jurisdictional facts, the question of subject matter jurisdiction is purely one of law which we review de novo." *Reeds v. Walker*, 2006 OK 43, ¶ 10, 157 P.3d 100, 107.

The Oklahoma Constitution reaffirms that state courts do not have jurisdiction over actions arising out of Indian Country. In establishing Oklahoma, the State "agree[d] and declare[d] that [it] forever disclaimed all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that . . . such public land . . . shall be and remain subject to the jurisdiction, disposal, and control of the United States. Oklahoma Constitution, art. I, § 3. Similarly, federal law mandates that all tribal gaming occurs within Indian Country, outside of state jurisdiction. 25 U.S.C. § 2710(a). Even in regards to issues involving tribal gaming which arise under the Tribal-State Gaming Compacts, the Oklahoma Supreme Court has likewise expressly disavowed state court jurisdiction, instead holding that such matters belong in tribal court. See *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2015 OK 77.

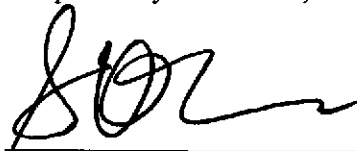
Based on the Petition, all of the actions that Plaintiff complains of occurred within the Tribes' Indian Country. Plaintiff's representation of the Gaming Commission occurred within the Tribes' Indian Country, and Plaintiff was notified of his termination within the Tribes' Indian Country. The Gaming Commission itself serves as the primary regulator of the Tribes' gaming activity, which, as a matter of federal law, occurs exclusively within the Tribes' jurisdiction. 25 U.S.C. § 2710(a). Moreover, the work Plaintiff performed for the Tribes' Gaming Commission is traceable to the Tribes' business operations within the Tribes' jurisdiction; and HSDW's contacts with the Tribes alleged by Plaintiff occurred within the Tribes' Indian Country. Because the subject matter of Plaintiff's contract rested within Indian Country and because the actions about which Plaintiff complains occurred within Indian Country, this Court lacks jurisdiction to adjudicate Plaintiff's claims. Okla. Const. art. I, § 3. Accordingly, this matter should be dismissed pursuant to 12 O.S. § 12(B)(1) for lack of subject matter jurisdiction.

CONCLUSION

Because Plaintiff has filed this action more than two years after his cause of action accrued, Plaintiff is not entitled to relief pursuant to 12 O.S. § 95(A)(3). Plaintiff has not pleaded punitive damages with particularity as required under 12 O.S. § 2009, and in any event is not the real party in interest with standing to claim damages in the amount of \$9.4 million. For these reasons, Plaintiff has failed to state a claim for which relief can be granted, warranting dismissal of this case pursuant to 12 O.S. § 2012(B)(6). Additionally, because Plaintiff has asserted claims that arose within the Indian Country of the Cheyenne and Arapaho Tribes, this Court lacks subject matter jurisdiction, thus warranting dismissal under 12 O.S. § 12(B)(1).

WHEREFORE, Hobbs, Straus, Dean & Walker, LLP, asks that the Court dismiss the Petition, award the Plaintiff nothing, and grant HSDW all further and additional relief to which it is entitled.

Respectfully submitted,



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*ATTORNEYS FOR HOBBS STRAUS DEAN &
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, on September 9, 2016:

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