United States District Court
for the
Southern District of Florida

Seminole Tribe Of Florida, Plaintiff	)	
	)	
v.	)	
	)	
State Of Florida, Department Of Revenue, and Marshall Stranburg, as Interim Executive Director and Deputy Executive Director, Defendants	)	Civil Action No. 12-62140-Civ-Scola

Order Following Remand

This matter is currently before the Court upon the Mandate of the United States Court of Appeals for the Eleventh Circuit, reversing in part the Court's entry of judgment for the Seminole Tribe of Florida and remanding for further proceedings consistent with the Mandate. (ECF No. 93.) After the filing of the Mandate, Defendant Marshall Stranburg moved for entry of judgment. (ECF No. 105.) The Seminole Tribe opposed the motion, (ECF No. 206), and the Court held a hearing on September 29, 2016. For the following reasons, the Court interprets the Mandate as requiring the Court to vacate its prior summary judgment order as it relates to the Utility Tax, grant summary judgment for Stranburg on those claims, and enter judgment in his favor. The Court believes that Mandate does not permit the Court to hear new arguments or consider new evidence. Moreover, even if the Mandate permitted the Court to consider new arguments, the Court is not required to do so and, based upon the procedural posture of this case, declines to exercise its discretion to allow new arguments which were not raised by the Seminole Tribe prior to the *final* summary judgment state.

1. Background[1]

The Seminole Tribe of Florida is a federally recognized Indian tribe, with reservations throughout Florida. On October 20, 2012, the Seminole Tribe sued Marshall Stranburg, the executive director of the Florida Department of

[1] The Court will only provide a limited recitation of the necessary facts. A more complete background of this case can be found in the Eleventh Circuit's appellate opinion. *See Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1326–28 (11th Cir. 2015).

Revenue,[2] for declaratory judgment and permanent injunctions related to Florida's tax on the rent paid to the Seminole Tribe by lessees ("Rental Tax") and a Utility Tax on electricity delivered to the Seminole Tribe's reservations. In order to show that the Utility Tax was pervasively regulated by federal law and invalid under the interest-balancing test set forth in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), the Seminole Tribe, as part of the Complaint, asserted that "[t]he Tribe consumes electricity in connection with every activity it conducts on Tribal Land, including providing Essential Government Services, leasing Tribal Land and conducting gaming operations." (ECF No. 1 at 11.)

On December 2, 2013, the parties filed cross–motions for summary judgment. (ECF Nos. 59, 61.) The two motions raised identical issues related to the Utility Tax: whether the legal incidence of the tax impermissibly fell on the Seminole Tribe and whether the tax was preempted under *Bracker* based on the activities asserted by the Seminole Tribe in the Complaint and repeated in its motion for summary judgment. On September 5, 2014, the Court issued its order on the cross motions for summary judgment. (ECF No. 84.) The Court concluded that the legal incidence of the Utility Tax rested with the Seminole Tribe and, thus, violated federal law. Further, "[s]ince the Court [] concluded that Florida's Utility Tax [was] an impermissible direct tax upon the Seminole Tribe on its reservation, the Court [did] not address the Tribe's alternative argument[] that the tax is impermissible under a *Bracker* preemption analysis . . . ." (*Id.* at 15.) Based on its legal incidence analysis, the Court entered judgment in favor of the Seminole Tribe. (ECF No. 85).

On appeal, the Eleventh Circuit determined that the legal incidence of the Utility Tax "falls on the non–Indian utility company." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1345 (11th Cir. 2015). Rather than remanding for this Court to perform the analysis, the Eleventh Circuit performed the *Bracker* preemption inquiry and held "[a]fter careful consideration, . . . that the Utility Tax does not violate federal law." *Id.* at 1352. In reaching this holding, the Eleventh Circuit looked to the activities listed by the Seminole Tribe in the Complaint and the summary judgment briefing. The Eleventh Circuit concluded that the listed activities were insufficient to show preemption because the Seminole Tribe was "essentially express[ing] a generalized desire to avoid the Utility Tax." *Id.* at 1353. "Just as the state cannot assert a generalized interest in raising revenue to support its taxes, the Tribe cannot demonstrate congressional intent to preempt a specific state tax

[2] The Seminole Tribe also sued the Florida Department of Revenue, but the Court dismissed the Department as a party based on Eleventh Amendment sovereign immunity.

by bundling up an assortment of unrelated federal and tribal interests tied together by the common thread of electricity use." *Id.*

In a footnote, the Eleventh Circuit noted that the Seminole Tribe had provided a "non–exclusive list of activities it asserts are exclusively and pervasively regulated by federal law." *Id.* at 1352 n. 22. Because the Tribe "failed to demonstrate that the existence of these statutes represents an exclusive or pervasive federal regulation of those [listed] activities," the Eleventh Circuit declined to engage in the *Bracker* inquiry in relation to these activities. Thus, the Eleventh Circuit offered no opinion "on whether, if properly framed, the Tribe may be able to demonstrate that the Utility Tax is preempted with respect to some or all of the specific activities it [] listed." *Id.*

Because the Eleventh Circuit found that the Court "erred in placing the legal incidence of the Utility Tax on the Tribe and . . . , on [the] record, the Tribe [did] not demonstrate that the Utility Tax is generally preempted by federal law," it reversed the Court's entry of judgment with respect to the Utility Tax and remanded "for proceedings consistent with [its] opinion." *Id.* at 1353.

After the entry of the mandate, Stranburg moved for entry of judgment, arguing that the Eleventh Circuit found that the Utility Tax did not violate federal law. (ECF No. 105.) In its opposition, the Seminole Tribe argues that the Eleventh Circuit remanded for the Court to perform the *Bracker* inquiry for the list of activities noted in Footnote 22, and included a list of fourteen activities for the Court to analyze. (ECF No. 106 at 9–10.) On September 29, 2016, the Court held a hearing to consider the arguments of the parties.

2. Legal Standard

"The law of the case doctrine and the mandate rule ban courts from revisiting matters decided expressly or by necessary implication in an earlier appeal of the same case." *AIG Baker Sterling Heights, LLC v. Am. Multi–Cinema, Inc.,* 579 F.3d 1268, 1270–71 (11th Cir. 2009). The law of the case doctrine dictates that "an appellate decision is binding in all subsequent proceedings in the same case unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice." *Litman v. Mass. Mut. Life Ins. Co.,* 825 F.2d 1506, 1510 (11th Cir. 1987) (en banc). "The doctrine's purpose is to bring an end to litigation. It also 'protects against the agitation of settled issues and assures obedience of lower courts to the decisions of appellate courts.'" *Wheeler v. City of Pleasant Grove,* 746 F.2d 1437, 1440 (11th Cir.1984) (citations omitted) (quoting *United States v. Williams,* 728 F.2d 1402, 1406 (11th Cir.1984)).

"The mandate rule is simply an application of the law of the case doctrine to a specific set of facts." *United States v. Amedeo,* 487 F.3d 823, 830 (11th Cir. 2007). "Accordingly, when acting under an appellate court's mandate, a district court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *Id.* (quotation marks and citation omitted). "Although the trial court is free to address, as a matter of first impression, those issues not disposed of on appeal, it is bound to follow the appellate court's holdings, both expressed and implied." *Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1331 (11th Cir. 2005) (quoting *Piambino v. Bailey,* 757 F.2d 1112, 1120 (11th Cir. 1985) (citations omitted)); *see also Buckley Towers Condominium, Inc. v. QBE Ins. Corp.*, No. 07–22988, 2014 WL 1319307, at *4 (S.D. Fla. Mar. 31, 2014) (Torres, Maj. J.) (explaining that the mandate rule only applies to holdings and not dicta).

The Eleventh Circuit has recognized that "[d]etermining the scope of a mandate can present problems [of] interpretation." *Litman,* 825 F.2d at 1511. To give the mandate its full effect, the district court must examine the scope of the issues during appeal, *id.*, and "implement both the letter and the spirit of the mandate . . . taking into account the appellate court's opinion . . . and the circumstances it embraces," *Piambino,* 757 F.2d at 1119.

3. Analysis

As previously mentioned, the Seminole Tribe asserts that it should be allowed to present new evidence that the Utility Tax is preempted by federal law. This assertion rests on two central arguments: (1) the Eleventh Circuit remanded for "further proceedings" rather than for entry of judgment, and (2) Footnote 22 referenced the Seminole Tribe's list of activities and states that the Tribe may be able to show that the Utility Tax is preempted "if" their argument is "properly framed." Both of these arguments, however, ignore the letter and spirt of the Mandate as a whole.

As an initial matter, the Court rejects the Seminole Tribe's arguments that further proceedings should be allowed because Stranburg, at some point, believed that more evidence would be permitted and the Court entered a scheduling order after remand that appeared to contemplate further discovery and motions. Neither the parties, nor the Court, even by agreement, may alter the Eleventh Circuit's mandate. *See Litman,* 825 F.2d at 1515 ("Even at the joint request of the litigants, the district court may not deviate from the mandate of an appellate court." (quoting *Atsa of California, Inc. v. Continental Insurance Co.,* 754 F.2d 1394, 1396 (9th Cir. 1985)).

The Seminole Tribe's argument that the Eleventh Circuit's instruction remanding the case "for proceedings consistent with [its] opinion" must be read as an instruction for the Court to hear the new *Bracker* arguments is equally unpersuasive. Essentially, the Seminole Tribe argues that the absence of one specific instruction (i.e. to enter judgment) necessarily implies the presence of a different specific instruction (i.e. to consider new evidence). However, a general instruction is simply a general instruction, not a specific instruction in disguise. Just as the Eleventh Circuit had the opportunity to specifically instruct the Court to enter judgment, it also had the opportunity to instruct specifically instruct the Court to allow the Seminole Tribe to start anew with the new *Bracker* arguments. *See Friedman v. Mkt. Street Mortg. Corp.*, 520 F.3d 1289, 1292 (11th Cir. 2008) (analyzing a specific mandate which provided the plaintiffs with "a limited opportunity to amend their complaint" to include a new argument). The Eleventh Circuit chose not to provide either instruction.

Moreover, the Seminole Tribe, and to a certain extent Stranburg, assume that the Court is only faced with two options—entry of judgment or hearing new evidence. However, the "further proceedings" ordered by the Eleventh Circuit could cover a wide array of actions, for example, vacating a prior order. *See Prescott v. Seterus, Inc.*, No. 13–62338, Dkt. No. 115 at 3 (S.D. Fla. Apr. 7, 2006) (Bloom, J.) (entering an order after remand "for further proceedings" vacating prior summary judgment order and granting summary judgment for a party on a limited issue). That is why the Court must look to the opinion as a whole to determine the scope of the Mandate rather than simply focusing on a single line.

Throughout the opinion, the Eleventh Circuit clearly holds that the Utility Tax does not violate federal law. *See, e.g.*, *Seminole Tribe of Florida*, 799 F.3d at 1326 ("In this appeal, we consider whether . . . Florida's Utility Tax, as applied to matters occurring on Seminole Tribe lands, violate the tenets of federal Indian law. For the reasons that follow, we find that the Utility Tax as it involves activities on Tribe land does not . . . ."). Most notably, after concluding that the legal incidence of the Utility Tax did not rest with the Seminole Tribe, the Eleventh Circuit chose not to remand the case for this Court to perform the *Bracker* analysis. Instead, performing the inquiry on its own, the Eleventh Circuit unequivocally states, "After careful consideration, we hold that the Utility Tax *does not violate federal law*." *See id.* at 1352 (emphasis added).

In an attempt to avoid the Eleventh Circuit's clear holding, during the hearing, the Seminole Tribe argued that the Eleventh Circuit misunderstood its argument and did not fully consider the record. The Court cannot and will not engage in such a review of the Eleventh Circuit's analysis. *See Amedeo,* 487 F.3d at 830. The Tribe also argued that the Eleventh Circuit only described the

Bracker analysis, but never engaged in the inquiry. Not only is this assertion contradictory to the Tribe's own argument that the Eleventh Circuit misunderstood the Tribe's position on *Bracker*, it is also unequivocally afoul of the Eleventh Circuit's opinion. Under the heading, "Is the Utility Tax Preempted by *Bracker*?," the Eleventh Circuit stated that it "must determine whether federal law preempts imposition of the Utility Tax on non-Indian utility companies operating on-reservation." *Seminole Tribe of Florida*, 799 F.3d at 1352. The Eleventh Circuit then concluded that "the Utility Tax does not violate federal law." *Id.* There is no escaping that the Eleventh Circuit engaged in the *Bracker* analysis based on the activities that the Seminole Tribe had argued and pled up that point and found that the Seminole Tribe had failed to prove preemption.

In light of the Eleventh Circuit's unambiguous holding, it is clear the Footnote 22 was intended as dicta, a minor limitation placed on the reach of the Eleventh Circuit's holding if another federally recognized tribe or the Seminole Tribe brought suit in the future. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("All statements that go beyond the facts of the case—and sometimes, but not always, they begin with the word 'if'—are dicta."). Not only are the Eleventh Circuit's comments regarding further *Bracker* analysis contained in a footnote compared to the clear statements that the Utility Tax does not violate federal law in the body of the opinion, but to allow further evidence would contradict the Eleventh Circuit's long-held stance against allowing parties to present new arguments on remand that were previously available. *See United States v. Cauley*, 199 F. App'x 893, 894 (11th Cir. 2006); *cf. OSI v. United States*, 510 F. Supp. 2d 531, 536 (M.D. Ala. 2007) ("[I]n the interest of finality, courts should not depart from the law of the case doctrine where the new evidence was available at the first examination of the issue."). Otherwise, parties would be incentivized to present their arguments in a "piecemeal fashion." *See Cauley*, 199 F. App'x at 894. The Seminole Tribe consistently chose to present only three activities as a basis for preemption of the Utility Tax. Now, nearly four years after filing its Complaint, the Seminole Tribe cannot present new arguments with the benefit of the Eleventh Circuit's analysis because its previous evidence was rejected.

The Seminole Tribe also appears to forget that these issues were before the Court and the Eleventh Circuit on cross motions for summary judgment. Despite the Seminole Tribe's protests to the contrary, the procedural posture of this case is significant. This Court and the Eleventh Circuit considered fully-briefed and extensive cross-motions for *final* summary judgment. *See Piambino,* 757 F.2d at 1119 (instructing trial courts to take into account the "circumstance [a mandate] embraces"). If the Court had originally concluded

that the incidence of the Utility Tax did not rest on the Tribe, the Court would have engaged in the *Bracker* analysis based on those briefings. Although the Seminole Tribe states that it generally raised the issue of the Utility Tax being preempted by "essential government services," the only specific services and statutes cited by the Tribe were the three originally contained the Complaint, the same arguments that the Eleventh Circuit rejected on appeal. Therefore, in finding that the Seminole Tribe's named activities did not preempt the Utility Tax, the Eleventh Circuit did not just find that the Court improperly entered summary judgment for the Tribe. If not explicitly, than at the very least implicitly, the Eleventh Circuit also found that Stranburg was entitled to summary judgment on this issue. *See Seminole Tribe of Florida*, 799 F.3d at 1345 ("Although the district court did not conduct an alternative *Bracker* inquiry for the Utility Tax, we also find that the Tribe has not established as a matter of law that federal law preempts the Utility Tax."); *see also Transamerica Leasing, Inc.*, 430 F.3d at 1331 (finding that the district court is bound by both the explicit and implied holdings in the appellate court's opinion). The presence of dicta in a footnote indicating an issue that may arise in a future case cannot alter the Eleventh Circuit's explicit and implied findings. *See Buckley Towers Condominium, Inc.*, 2014 WL 1319307, at *4 (delineating how the mandate rule does not apply to dicta).

Even if this Court had the discretion to allow the Seminole Tribe to present new arguments, it would decline to do so. This case was filed in 2012. Based on the Court's Scheduling Order, the deadline to amend the pleadings was March 1, 2013, and the deadline to complete fact discovery was July 31, 2013. (ECF No. 23). The parties completed discovery and moved for final summary judgment. At no point did the Seminole Tribe raise the fourteen specific preemption arguments that it has now presented to the Court. If the Court had originally granted Stranburg's motion for summary judgment based on *Bracker*, as described above, in order for the Court to consider the new arguments now raised, the Seminole Tribe would have been required to move for reconsideration or for the Court to amend its judgment. Whether to consider new arguments not raised during summary judgment is soundly within the discretion of the district court. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957–58 (11th Cir. 2009); *Garcia v. United States*, No. 12–1369, 2016 WL 2783504, at *1–2 (M.D. Fla. May 13, 2016); *Prudential Sec. v. Emerson*, 919 F. Supp. 415, 417–18 (M.D. Fla. 1996) ("The Court's reluctance to hear new arguments is based on the notion that district courts are too busy to have parties present arguments one by one. Also, if district courts allowed parties to raise new arguments post-order, they would be affording parties "two bites at the apple.") (citations and quotation omitted). The Court would not

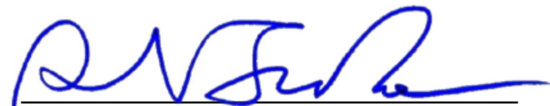
have and will not now exercise such discretion. It was the Seminole Tribe's decision to present its *Bracker* arguments in a specific manner. It cannot now escape the consequence of that choice.

Finally, another footnote in the appellate opinion shows that the Eleventh Circuit did not anticipate any further *Bracker* evidence and arguments. When the Eleventh Circuit began its *Bracker* inquiry, right before stating its holding that the Utility Tax does not violate federal law, it included a footnote on the location of the "taxable event." *See Seminole Tribe of Florida*, 799 F.3d at 1352 n. 21. The court noted that Stranburg had argued before this Court that "the taxable event occurred where the utility company physically received its payments" rather than on the reservation. *Id.* Because Stranburg failed to present legal authority in support, this Court held that the event occurred on the reservation and Stranburg had "forfeited" the argument. *Id.* On appeal, Stranburg "insist[ed] that [the Eleventh Circuit] need not decide th[e] issue, [but] contend[ed] . . . that he ha[d] not abandoned his argument that the taxable event occurs off-reservation." *Id.* Again Stranburg failed to provide evidence or authority in support, and the Eleventh Circuit noted that he had likely waived any further challenge. *Id.* However, and most importantly for this Court's current analysis, the Eleventh Circuit determined that the issue was "essentially moot" and not necessary for consideration because it found that the tax was validly imposed. *Id.* If the Eleventh Circuit intended for this Court to consider further *Bracker* arguments, then Stranburg's argument would not be essentially moot and whether Stranburg had waived his argument would have affected the further proceedings.

4. Conclusion

After careful consideration of both the letter and spirit of the Eleventh Circuit's opinion, keeping in mind that the Court cannot vary from, examine or give further relief than what the Mandate permits, the Court can only conclude that it must vacate its prior entry of summary judgment (ECF No. 84) in so far that it erroneously concludes that the legal incidence of the Utility Tax falls on the Tribe. Further, because the Eleventh Circuit found that the Seminole Tribe failed to show that the Utility Tax was preempted by federal law, the Court must enter summary judgment for Stranburg on Counts Three and Four.

Done and ordered, in chambers, at Miami, Florida, on September 30, 2016.



Robert N. Scola, Jr.
United States District Judge