

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

PUEBLO OF POJOAQUE, a federally recognized
Indian Tribe; JOSEPH M. TALACHY, Governor
of the Pueblo of Pojoaque,

Plaintiffs,

v.

Case No. 1:15-CV-00625 JB/GBW

STATE OF NEW MEXICO, SUSANA
MARTINEZ, JEREMIAH RITCHIE, JEFFERY(sic) S.
LANDERS, SALVATORE MANIACI,
PAULETTE BECKER, ROBERT M. DOUGHTY
III, CARL E. LONDENE and JOHN DOES I-V,

Defendants.

MOTION TO DISMISS COUNT V OF PLAINTIFFS' COMPLAINT

Defendants move to dismiss Count V of the Complaint. Concurrence in this motion was sought but denied. As grounds for this motion, Defendants state as follows.

1. In Count V of their Complaint, Plaintiffs Pueblo of Pojoaque (“Pueblo”) and Joseph M. Talachy (“Talachy”) seek unspecified relief against both the State of New Mexico and all of the Individual Defendants based on a claim that the actions of the Individual Defendants alleged in paragraphs 65-81 of the Complaint constitute tortious interference with existing contractual relations as “recognized by the courts of the State of New Mexico.” (Compl. ¶ 153, Dkt. No. 1.)

2. The State of New Mexico is immune from suit in federal court pursuant to the Eleventh Amendment to the United States Constitution.

3. Further, pursuant to the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -30 (1976, as amended) (“NMTCA”), the State and its employees generally are immune from liability under state tort liability: “A governmental entity and any public employee while acting

within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act and by Sections 41-4-5 through 41-4-12 NMSA 1978.” NMSA 1978, § 41-4-4 (2001) (citations omitted).

4. As used in the NMTCA, “scope of dut[ies] means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time or place of performance.” *Id.* § 41-4-3(G) (2015). “Scope of duties” encompasses actions by “employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity.” Celaya v. Hall, 2004-NMSC-005, ¶ 25, 135 N.M. 115, 85 P.3d 239; accord, Derringer v. State, 2003-NMCA-073, ¶ 17, 133 N.M. 721, 68 P.3d 961 (“scope of duties” as used in NMTCA is broader than common law term “scope of employment”). Paragraphs 65-81 of the Complaint allege actions taken by the Individual Defendants within the scope of their duties, as that term is used in the NMTCA.

5. Sections 41-4-5 through 41-5-12 waive immunity only for liability grounded in negligence. See Lujan v. N.M. Dep’t of Transp., 2015-NMCA-005, ¶ 7, 341 P.3d 1 (“liability under the Act is premised on traditional concepts of negligence” (internal quotation marks and citation omitted)) (quoting NMSA 1978, § 41-4-2(B) (1976) (“liability under the [NMTCA] ‘shall be based upon the traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty’”)), cert. denied, 2014-NMCERT-011, 339 P.3d 841.

6. Intentional tort liability, including liability for tortious interference with contract, is not waived by the NMTCA. El Dorado Utils., Inc. v. Eldorado Area Water and Sanitation Dist., 2005-NMCA-036, ¶¶ 24-25, 137 N.M. 217, 109 P.3d 305; see also Silva v. Town of Springer, 1996-NMCA-022, ¶¶ 26-27, 121 N.M. 428, 912 P.2d 304 (dismissing an interference

with contractual relations claim because the NMTCA granted immunity to the defendants for that claim); Garcia-Montoya v. State Treasurer's Office, 2001-NMSC -003, ¶ 49, 130 N.M. 25, 16 P.3d 1084 (NMTCA does not waive immunity for liability for intentional infliction of emotional distress or defamation); Derringer, 2003-NMCA-073, ¶ 17 (NMTCA does not waive immunity for liability for prima facie tort).¹

7. Defendants have not waived their immunity under the Eleventh Amendment and the NMTCA. (See Defs.' Ans. to Compl., at 20-21, Dkt. No. 16.)

8. For all of these reasons, the Court should dismiss Count V of the Complaint.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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¹ The Complaint does not allege tortious interference with any contracts to which Plaintiff Talachy (or any of the other members of the Pueblo, on whose behalf he purports to sue) is a party. Rather, in Count V Talachy effectively is joining with the Pueblo in complaining about alleged interference with the Pueblo's contracts with its vendors. For this reason as well, Talachy cannot state a claim for tortious interference with existing contractual relations. Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 20, 125 N.M. 748, 965 P.2d 332 ("To prove intentional interference with (existing or prospective) contractual relations, a plaintiff must prove that the defendant improperly interfered with the plaintiff's contractual relations, either through improper means or improper motive." (emphasis added)).

