

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Crystal Tiessen,

Court File No. 0:16-CV-00422-JRT/LIB

Plaintiff,

v.

**REPLY MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO
DISMISS**

Chrysler Capital, Repossessors, Inc., PAR
North America, d/b/a PAR, Inc., and John
Doe Repossession Agent,

Defendants.

INTRODUCTION

Tiessen's complaint is peppered with statements about the expansive nature of tribal authority. Her arguments to the contrary in response to this motion should be disregarded as unsupported by the facts and the law in this case. If the Fond du Lac tribe has jurisdiction to regulate repossession activities on its reservation, it should necessarily follow that its courts have authority to interpret and enforce those regulations. Indeed, Tiessen points to no cases where a federal court has refused to apply tribal exhaustion under similar facts. While Tiessen asserts a federal FDCPA claim, that claim, and all of her common-law claims, are based solely on conduct that allegedly occurred on the Fond du Lac reservation and which allegedly violated a tribal ordinance. Tiessen's allegations fall squarely within the tribal court's jurisdiction and require this Court to abstain.

Tiessen's assertion of an FDCPA claim does not deprive the tribal court of jurisdiction, and abstention is mandatory when jurisdiction is even questionable.

Likewise, the fact that more than one year has passed since the repossession does not affect the tribal exhaustion analysis nor does it suggest that Defendants are acting in bad faith. Repossessors, Inc. (“Repossessors”) requests that this Court dismiss, or in the alternative stay, this matter because Tiessen has not exhausted her tribal remedies.

I. The Court Should Abstain Because the Fond du Lac Court, and not this Court, Must Address Tribal Jurisdiction in the First Instance.

Indian tribes have civil jurisdiction over claims that arise on their reservation lands and involve their ordinances. This jurisdiction is a result of the inherent sovereignty of the tribes over their land. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Where tribal jurisdiction is questionable, the tribal court, and not the federal court, must be given the first opportunity to decide whether it has jurisdiction. *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (holding “examination [of jurisdiction] should be conducted in the first instance in the Tribal Court itself”).

A. The Tribal Court Has Subject-Matter Jurisdiction over Tiessen's Claims.

Tiessen argues that the tribal court does not have subject-matter jurisdiction despite the fact that her claims all relate to a repossession that took place on the reservation and alleged violation of a tribal ordinance. She tries to persuade the Court that the Fond du Lac civil code does not give the tribal court subject-matter jurisdiction over the FDCPA claim. Overlooking portions of the civil code which provide for jurisdiction, Tiessen asserts that because the civil code does not specially mention the FDCPA or similar federal statutes, the tribal court does not have jurisdiction. Plaintiff's argument fails because Tiessen's claims fall within several the categories of subject-matter

jurisdiction provided for under the civil code. In most relevant part, the civil code grants subject matter jurisdiction for actions:

- (c) arising under the inherent authority of the Fond du Lac Band of Lake Superior Chippewa;
- (d) arising under the Constitution of the Minnesota Chippewa Tribe or as is recognized under the Constitution and laws of the United States;
- (e) arising under the bylaws, statutes, ordinances, resolutions, codes, and laws enacted by the Fond du Lac Reservation Business Committee;

Here, the tribal court has subject-matter jurisdiction under subpart (c) because Tiessen's claims all arise out of the tribe's inherent authority to regulate activity on its reservation. Tribes have sovereignty over both their members and their territory, unless specifically abrogated by treaty or federal law. *Wheeler*, 435 U.S. at 323; *Duncan Energy Co.*, 27 F.3d at 1299; *Bruce H. Lein v. Three Affiliated Tribes*, 93 F.3d 1412, 1419 (8th Cir. 1996). Likewise, under subpart (d), the tribal court has subject-matter jurisdiction to the full extent allowed under laws of the United States, which includes the authority to regulate activity on its reservation, which is at issue here. Finally, under subpart (e), the tribal court has jurisdiction over Tiessen's claims, because they are all based on Repossessors' alleged violation of a tribal ordinance. Because tribal court has subject-matter jurisdiction over Tiessen's claims, she cannot proceed in this court unless she exhausts her tribal court remedies.

B. This Court Should Defer to the Tribal Court on Jurisdictional Issues Because the Tribal Court's Jurisdiction is Colorable.

Even if this Court is uncertain as to whether the tribal court has jurisdiction, it should defer to the tribal court to make that determination in the first instance. If tribal jurisdiction is colorable, the determination of jurisdiction is for the tribal court in the first instance. *See e.g., National Farmers Union Insurance Co.*, 471 U.S. at 856; *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 983 (9th Cir. 1983) (holding where there was a question of jurisdiction under tribe's code, the "tribal court must first determine its jurisdiction in the matter"); *Michigan Property & Cas. Guar. Ass'n v. Foucault-Funke Am. Legion Post*, 2007 WL 3121583, *2 (Oct. 23, 2007) (holding tribe must decide the scope of its jurisdiction in the first instance). Further, even if the tribe's jurisdiction under its civil code were not clear, that would not mean that the tribal court lacks jurisdiction. Indeed, a Minnesota federal district court has recognized that a tribe may have jurisdiction beyond that specified in its civil code. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1223 (D. Minn. 1995). In rejecting the argument that there was not a colorable claim of tribal jurisdiction under the tribe's civil code, the court stated:

The passage of the tribal ordinance upon which Plaintiffs rely for these assertions enumerates the matters over which the tribal court has "original and exclusive jurisdiction," it does not purport to address the remainder of those matters over which the tribal court may have concurrent jurisdiction. (*Id.*, attach. § 2 (emphasis added).) As set forth above, tribal courts presumptively have concurrent civil jurisdiction over activities on reservation lands unless specifically limited by a treaty or federal statute; such jurisdiction need not be specified in a tribal court enabling ordinance in order to lie with the tribal court.

Id. at 1223, n.4. Here, the tribal court has, at a minimum, a colorable claim for jurisdiction, and thus, Tiessen is required to proceed there first.

II. No Court has Held that a Tribal Court Lacks Jurisdiction Under Similar Facts.

Tiessen's responsive brief fails to point to any cases where a court refused to apply the tribal exhaustion doctrine under similar facts – i.e. where the claims at issue involve on-reservation activities and an alleged violation of a tribal ordinance. Instead, she argues that because the U.S. Supreme Court has held that tribal courts do not have jurisdiction over federal civil rights claims, they also do not have jurisdiction over her FDCPA claim. The main case on which Tiessen relies, *Nevada v. Hicks*, is readily distinguishable, and its holding does not extend to FDCPA claims or generally to claims under other federal statutes.

In *Hicks*, the Supreme Court addressed whether a tribe “can regulate state wardens executing a search warrant for evidence of an off-reservation crime.” 533 U.S. at 358. The Court rejected the argument that the tribe automatically had regulatory jurisdiction over all conduct on reservation lands owned by the tribe simply because of that ownership status. The Court held that the same principles underlying the two *Montana* exceptions¹ also applied to civil regulation of nonmembers on lands owned by the tribe.

¹ The *Montana* exceptions are exceptions to the general rule that Indians do not have jurisdiction over non-Indian activities on non-Indian fee lands within their reservations. The exceptions provide that tribes may exercise jurisdiction over non-members when they (1) “enter into consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,” or (2) when the conduct of non-Indians on fee lands within its reservation “threatens or has some direct effect on the

Id. It then examined whether the tribal court had jurisdiction over the state officers because they had voluntarily entered the tribal land. The *Hicks* court concluded that the officers had not consented to tribal jurisdiction by distinguishing between private consensual contact with tribes and those by government entities. The court balanced the tribe's interest in regulating activity by state wardens with the state's interest in investigating off-reservation crimes and held that the state's interest outweighed that of the tribe. *Id.* at 361–65. In this case, these same competing governmental interests are not at play, and thus, *Hicks* is inapplicable. The non-member Defendants are specifically requesting that Tiessen bring her claims in tribal court, so the usual competing interests between members and non-members are also not at play here.

Indeed, the federal courts continue to recognize that tribal courts can have jurisdiction over federal statutory claims, particularly those that arise on tribal land, even in cases where the federal statute suggests that claims should be filed in state or federal court. *See e.g., Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (tribal exhaustion of FMLA claims was required); *See Paddy v. Mulkey*, 656 F. Supp. 2d 1241, 1244 (D. Nev. 2009) (same). The *Paddy* and *Sharber* courts held that the tribal courts must be given the opportunity to decide if they have jurisdiction over a Family Medical Leave Act ("FMLA") claim even though the FMLA provides that a claim may be brought before "any Federal or State court of competent jurisdiction." The FDCPA, unlike the FMLA, does not attempt to limit jurisdiction to federal or state courts.

political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981)

Instead, it provides that a claim may be brought in "any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction." 15 U.S.C. 1692k(d). Here, just as the *Sharber* and *Paddy* court concluded, the tribal court should be given the first opportunity to examine whether it has jurisdiction over Plaintiff's federal statutory claim.

The other cases Tiessen cites do not support her claim that the tribal court lacks jurisdiction over her claims. (Doc. 28, Plaintiff's Response, p. 7-8.) The decision in *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 672 (8th Cir. 2015) is distinguishable because, like *Hicks*, it involved a tribal member suit against a non-tribal government entity. In *Fort Yates*, tribal members sued a non-Indian school district in tribal court alleging that it failed to take action to prevent a student fight. The Eighth Circuit found no colorable claim for tribal jurisdiction based on *Hicks* because contracts between tribes and governmental entities do not create a "consensual relationship" with a tribe that could give rise to tribal jurisdiction. *Id.* at 672.

Gaming World Int'l, Ltd. is also unhelpful to Tiessen because the Eighth Circuit actually required tribal exhaustion in that case. 317 F.3d 840, 849 (8th Cir. 2003). It overruled the district court and held that a dispute over a gaming contract required the exhaustion of tribal remedies, and that the tribal court must be given the first opportunity to address whether it has jurisdiction. *Id.* at 852. *Burrell v. Armijo*, contrary to Tiessen's characterization, did not examine whether a tribal court could have jurisdiction over civil rights claims under § 1981 or § 1985 – the plaintiff never challenged the tribal court's

jurisdiction over those claims. *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006). Tiessen's brief quotes a concurring opinion, which has no precedential value. *Id.* at 1175.

III. The Tribal Court Should be Allowed to Decide Whether the FDCPA Claim is Time-Barred.

Tiessen next argues that the tribal court does not have jurisdiction over her FDCPA claim because more than one year has passed since the repossession occurred, and a one-year statute of limitations applies to that claim. She asserts that if her FDCPA claim is dismissed, she will be precluded from proceeding in tribal court.

Plaintiff cannot avoid tribal exhaustion simply because the statute of limitations may have run. The issue of whether the FDCPA claim is time-barred, should be decided by the tribal court in the first instance. While the Minnesota district court has ruled that the FDCPA statute of limitations cannot be equitably tolled, we do not know how the Fond du Lac tribal court would rule. Indeed, those federal circuit courts that have addressed the issue are split on where the FDCPA statute of limitations is jurisdictional. Compare *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 261 (8th Cir.1992) with *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939 (9th Cir. 2009). The Fond du Lac tribal court should be given the opportunity to examine whether tolling is appropriate or whether the tribal complaint is deemed timely because this lawsuit was filed within one year. See, *United States v. Ray*, No. C11-5056 BHS, 2011 WL 2490001, at *3 (W.D. Wash. June 21, 2011) (holding "statute of limitations under [tribal] law, and in accordance with its own judicial decisions, is a question for the [] Tribal Court to examine.").

Tiessen's argument that she cannot be required to exhaust her tribal court remedies because the one-year statute of limitations may have run, is also without support. As noted, courts that have faced this issue have held that the tribal court must be given the first opportunity to address statute of limitations issues. While some courts have held that it is better to stay the federal action instead of dismissing it,² Tiessen points to no decisions where a court has found tribal exhaustion is not required based on the statute of limitations. Indeed, the Eighth Circuit has recognized that it would be difficult for a defendant seeking to return a matter to tribal court to persuade a court that the statute of limitations bars the plaintiff's claims. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1148 (8th Cir. 1973). The *O'Neal* court then agreed to stay the federal action until it was apparent whether the tribal court would reach the merits of the case, at which time it would dismiss the federal action. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1148 (8th Cir. 1973).

Here, if the Court is concerned about the application of the statute of limitations to plaintiff's FDCPA claim, it may choose to stay the action, instead of dismissing it. *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 852 (8th Cir. 2003) (remanding case with instructions for the district court to either dismiss or stay based on tribal exhaustion); *Duncan Energy Co. v. Three Affiliated Tribes of Ft.*

² See *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1148 (8th Cir. 1973) (staying action while tribal court determined whether it could proceed on the merits); *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d at 976 (holding district court should have stayed the action instead of dismissing it); *Booppanon v. Harrah's Rincon Casino & Resort*, No. 06CV1623 BTM(BLM), 2007 WL 433250, at *3 (S.D. Cal. Jan. 23, 2007) (staying action instead of dismissing it due to potential statute of limitations issue).

Berthold Reservation, 27 F.3d 1294, 1295 (8th Cir. 1994) (same). Even if the tribal court were to decide that it did not have jurisdiction over the FDCPA claim, Tiessen has not disputed its jurisdiction over her common-law claims. Tiessen is required to proceed first in tribal court.

IV. Tiessen's Assertion that Defendants Acted in Bad Faith is Without Merit.

Tiessen's claim that Repossessors' motion was brought in bad faith ignores the parties' pre-motion communications. Repossessors filed this motion shortly after this case was filed, but more than one year after the repossession. But Repossessors notified Tiessen of its intent to file the motion and asked for Tiessen to consent to proceed in tribal court a couple days before the one-year mark, a fact that is omitted from Tiessen's brief. (Doran Dec., Ex. A). Instead of promptly addressing Repossessors request, either by filing a complaint in tribal court or otherwise, Tiessen waited over three weeks to inform Repossessors that it would not agree to proceed in tribal court, during which time the one-year statute of limitations arguably ran. Given that Tiessen's complaint contains detailed allegations regarding the tribe's authority to regulate activity on the reservation (Doc. 2, ¶ 20-26), Repossessors believed that Tiessen might consent to pursue this matter in tribal court. (Doran Dec., Ex. A). Once Tiessen informed Repossessors that she would not agree to proceed in tribal court, Repossessors completed its motion papers and filed them with the court eight days later. Repossessors did not act in bad faith with regard to the timing of its motion.

Repossessors' request that the court dismiss Tiessen's complaint was also not in bad faith. *See Nat'l Farmers Union Ins. Companies*, 471 U.S. at 857 (leaving it to the

district court to decide whether to stay or dismiss based on exhaustion requirement); *Gaming World Int'l, Ltd.*, 317 F.3d at 852 (remanding case with instructions for the district court to either dismiss or stay based on tribal exhaustion); *Duncan Energy Co.*, 27 F.3d at 1295 (same). Tellingly, Tiessen points to no case where a court has refused to apply the tribal exhaustion doctrine based on the moving party's bad faith, and this argument should be rejected.

CONCLUSION

Tiessen's claims center on her allegation that Repossessors violated a tribal ordinance when it repossessed her vehicle from the Fond du Lac Reservation. This allegation falls within jurisdiction of the Fond du Lac tribal courts. Further, even if the tribal court's jurisdiction is questionable because the FDCPA is a federal statutory claim or because the FDCPA statute of limitations may have run, Tiessen must proceed in tribal court so that the tribal court has the first opportunity to determine the scope of its jurisdiction. Tribal exhaustion is mandatory, and this Court should dismiss, or in the alternative stay, Tiessen's claims because she has not exhausted her tribal court remedies.

Dated: June 29, 2016

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