UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SEMINOLE TRIBE OF FLORIDA,

Plaintiff,

CONSOLIDATED CASE
CASE NO.: 4:15-CV-516-RH/CAS

v.

STATE OF FLORIDA,

Defendant.

MEMORANDUM IN OPPOSITION TO STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

A. The State's Erroneous Statement of the Tribe's Claim

The State's motion mischaracterizes the Tribe's Count I claim as a "state law claim for Breach of Compact." ECF 38 at 3. But as the Tribe made clear in its Response to Defendant State of Florida's Motion to Dismiss, ECF 13, the Tribe's Count I claim to enforce the compact arises under federal law. ECF 13 at 7-12.

B. The State's Erroneous Statement of "Undisputed Facts"

The State's motion contains what the State purports to be a "Statement of Undisputed Facts" for which there can be "no genuine dispute." ECF 38 at 5-8. To the contrary, the Tribe very much disputes how the State has characterized facts in its Motion. For example, in paragraphs 6 and 7, the State says that the Tribe's five year authorization to conduct banking or banked card games will automatically terminate five years from the effective date of the 2010 Compact

unless it was renewed by an affirmative act of the legislature, and that the Tribe's authorization to conduct banking or banked card games terminated on July 31, 2015. ECF 38 at 6. In paragraph 8, the State says that the Tribe's authorization to conduct such games has not been renewed by the Legislature, "or otherwise." *Id*. The Tribe disputes these assertions, as the 2010 Compact provides that the Tribe's right to conduct banking or banked card games will terminate after five years unless it is either renewed by the parties, or the State permits "any other person, organization or entity" [except another tribe] to conduct such games. As set out in the Tribe's Statement of Facts in its Motion for Summary Judgment and Memorandum of Law, ECF 37, the State has in fact triggered the exception to the five year limitation by permitting numerous parties to conduct such games throughout the State. As a result, the Tribe disputes these factual assertions and any others made by the State inconsistent with the Tribe's Statement of Facts in its Motion for Summary Judgment and Memorandum of Law.

The Tribe disputes the State's claims that "Florida Law Governs Interpretation of the Compact," ECF 38 at 8-9. The Tribe agrees that the Compact provides that "[t]he obligations and rights of the State and the Tribe under this Compact are contractual in nature, and are to be construed in accordance with the laws of the State of Florida." However, that provision does not make the entire body of State law, including its gaming laws, applicable to the Tribe where such

laws are not specifically referenced, e.g., Compact, Part III.J (defining "bingo game" by specific reference to Section 849.0931(1)(a), Florida Statutes).

C. The State's Attempt to Re-Argue What this Court has Already Decided

The State's motion attempts to argue again that "a claim for violation of the IGRA's good-faith negotiation requirement mandates proof that a Tribal-State compact does not already exist," ECF 38 at 10, but this Court already decided that matter in favor of the Tribe in its order denying the State's motion to dismiss, ECF 15 at 2-4. The State now raises two cases it asserts support its argument, ECF 38 at 11-14, but these cases do not disturb the Court's decision in favor of the Tribe because, unlike the tribes involved there, the Tribe here has not recently executed an existing compact in which it bargained away its right to negotiate over banked card games, the Tribe is not seeking to renegotiate or otherwise challenge the negotiations that led to the 2010 Compact, and circumstances have changed in the gaming market in the State since execution of the Compact.

D. The State has Voluntarily Invoked the Jurisdiction of this Court to Enforce IGRA and has Thereby Waived Eleventh Amendment Immunity.

The State filed suit in the Middle District of Florida, later transferred and consolidated in this action, asserting jurisdiction under the Indian Gaming Regulatory Act (IGRA). In its statement of jurisdiction, the State's Complaint states:

> 6. The State alleges violations of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2701, *et. seq*. ("IGRA"), and asks this Court to enjoin the Class III gaming activities that continue despite the fact the Tribe's right to conduct the subject gaming has expired by the Compact's terms. Title 25 U.S.C. §2710(d)(7)(A)(ii) specifically gives this Court jurisdiction over "any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact... that is in effect."

Complaint for Declaratory and Injunctive Relief at 2, *State of Florida v. Seminole Tribe of Florida*, No. 8:15-cv-02568-VMC-TBM (M.D. Fla 2015). Under Count II, the State's Complaint states:

> 26. The Tribe's refusal to comply with the Compact's requirement that it cease offering banking or banked card games as of October 30, 2015, is a violation of IGRA in that those games were no longer a lawfully authorized activity being conducted in conformance with the Compact pursuant to the requirements of 25 U.S.C. §2710(d)(1)(C).

Id. at 5-6. Having invoked the jurisdiction of this Court for the purpose of enforcing a provision of IGRA, the State now attempts to assert sovereign immunity to block the Tribe from invoking the jurisdiction of this Court for the purpose of enforcing another directly related provision of IGRA.

The provisions of IGRA upon which the State and the Tribe rest their respective cases are interdependent as demonstrated by IGRA's legislative history. Prior to the enactment of IGRA, the State of Florida had no power to enforce its gaming regulations on Indian lands. In 1987, the United States Supreme Court

held that, due to tribal sovereignty, states such as Florida lacked such authority. *California v. Cabazon Band of Mission Indian*s, 480 U.S. 202 (1987). Following the *Cabazon* decision, Congress enacted IGRA. The act was designed to balance the interests of states in regulating gambling within their borders with the interests of Indian tribes in regulating such activities on tribal lands. *See* S. Rep. No. 100-446, at 1-2 (1988), *reprinted* in 1988 U.S.C.C.A.N. 3071, 3071.

The provision of IGRA upon which the State relies provides that Class III gaming activities are lawful on Indian lands only if such activities are conducted in conformance with a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C). However, that provision is conditioned upon a state's obligation to negotiate with a tribe in good faith for adoption of a compact. 25 U.S.C. § 2710(d)(3)(A). If a state fails to negotiate in good faith, IGRA provides a procedure by which the tribe will be authorized to engage in Class III gaming by operation of federal law without the consent of the State. 25 U.S.C. § 2710(d)(7)(B). In short, a state cannot enforce the IGRA provision upon which the State relies if the state fails to abide by the IGRA provision on which the Tribe relies: negotiate of a compact in good faith. The Tribe seeks enforcement of section (d)(3)(A), alleging that the State has failed to negotiate in good faith.

Congress' provisions for federal court enforcement of the respective rights of states and Indian tribes are also equally balanced. Subsection (d)(7)(A) provides in pertinent part:

> (A) The United States district courts shall have jurisdiction over –
>
> > (i) Any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
> >
> > (ii) Any cause of action initiated by a State or Indian Tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect,

25 U.S.C. § 2710(d)(7)(A)(i-ii). The Tribe asserts the Court's jurisdiction pursuant to subsection (A)(i), the State pursuant to subsection (A)(ii). Congress lacked the constitutional power to waive states' Eleventh Amendment immunity with respect to IGRA and, consequently, the State may assert such immunity in defense to a federal court action initiated by a tribe. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).[1] However, the State cannot frustrate Congress' intent that the availability of federal court enforcement be even-handed[2] by voluntarily invoking the Court's jurisdiction under subparagraph (A)(i) and then asserting Eleventh Amendment immunity to block the Court's jurisdiction under subparagraph (A)(ii).

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[1] Unlike the instant case, the State in *Seminole* had not separately invoked federal court jurisdiction.

[2] S.Rep. 100-446 at 14 -15.

To do so would not only undermine Congress' carefully established balance in IGRA, but would result in the "seriously unfair results" that concerned the Supreme Court in *Lapides v. Board of Regent*s, 535 U.S. 613 (2002).

In *Lapides,* a defendant-state had been sued in state court. The state had waived sovereign immunity in state court, but not Eleventh Amendment immunity in federal court. The state removed the case from state court and then moved to dismiss, asserting 11th Amendment immunity. The Supreme Court reversed an appellate decision that would have permitted the state to assert Eleventh Amendment immunity, stating:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results. Thus, it is not surprising that more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity. *Clark v. Barnard*, 108 U. S. 436, 447, 2 S. Ct. 878 27 L. Ed. 780 (1883). (State's "voluntary appearance" in federal court as an intervener avoids Eleventh Amendment inquiry).

Lapides, 535 U.S. at 619.[3]

[3] The Supreme Court had limited its holding "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides,* 353 U.S. at 617. However, in discussing *Lapides* the Eleventh Circuit noted that "[n]otwithstanding the express limitation on its holding, the Court's subsequent reasoning was in many ways quite broad."

The State has chosen to voluntarily appear in federal court for the purpose of enforcing IGRA. It could have asserted sovereign immunity in response to the filing of the Tribe's complaint in this action. It also could have sought an injunction based upon the provisions of the Compact alone without also seeking an injunction pursuant to IGRA. Seminole Compact, Part XVI.C, p. 50. It did none of those things. Instead, it filed an answer and motion to dismiss that did not assert Eleventh Amendment immunity, and four days after the Tribe filed its suit, the State filed suit in the Middle District claiming a violation of IGRA.

The State has a choice. It can assert its Eleventh Amendment immunity and forego use of the federal forum to secure relief on the same subject matter for which the immunity was asserted, or it can voluntarily seek relief in federal court, in which case it will be deemed to have waived

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Contour Spa at the Hard Rock, Inc. v Seminole Tribe of Florida, 692 F.3d 1200, 1205. The *Contour* case involved a private party's claim against the Tribe, in response to which the Tribe asserted tribal immunity. The court held that the Tribe had not waived immunity by removing to the federal court. The court found the case was distinguishable from *Lapides* for a number of reasons, among them the fact that the Tribe had "in no way consented to be sued on *any* of the claims in [*Contour*] in *any* forum, whether federal or state," *Contour,* 692 F.3d at 1208 [emphasis in original]. *Contour* is distinguishable from the case at bar for a number of reasons, most significantly that in *Contour,* the defendant-Tribe made no claims in state or federal court. Here, the plaintiff-State has voluntarily asserted claims under IGRA in federal court.

its immunity.[4] Any other rule would create precisely the "seriously unfair results" condemned by the Supreme Court in *Lapides*. The fundamental relationship between voluntary submission to federal jurisdiction and fairness was emphasized in the *Lapides* decision:

> In large part the rule governing voluntary invocations of federal jurisdiction has rested upon the problems of inconsistency and unfairness that a contrary rule of law would create. [citation omitted] And that determination reflects a belief that neither those who wrote the Eleventh Amendment nor the States themselves (insofar as they authorize litigation in federal courts) would intend to create that unfairness.

Lapides, 535 U.S. at 622.

E. Even if the Court Determines that the State has not Waived Immunity, Dismissal would be More Appropriate than Summary Judgment.

In the event that the Court determines that the State has not waived its Eleventh Amendment immunity, the Court is requested to dismiss Count II of the Tribe's Complaint without prejudice rather than enter entering summary judgment. Even if the Court determines that the State has not waived immunity at this point,

[4] The fact that the State has not specifically authorized its lawyers to waive immunity is irrelevant. So long as the State has authorized the lawyers to file the suit in federal court, it will be deemed a waiver. *Lapides,* 535 U.S. at 622. ("This Court consistently has found a waiver when a State's attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court's jurisdiction.") (parenthetical in original). Of note, a decision by the Eighth Circuit in *Santee Sioux Tribe v. Nebraska,* 121 F.3d 427 (8th Cir. 1997)(Nebraska assistant attorney general's conduct in answering complaint and filing counterclaim did not waive State's Eleventh Amendment immunity), was issued several years prior to *Lapides*.

it may do so in the future, and the Tribe should not be foreclosed from seeking federal relief at that time.

The Court is respectfully urged to deny the motion for partial summary judgment.

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CERTIFICATE OF SERVICE

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