UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISON

Dreama Sullivan, Plaintiff, vs. Harrah's Operating Company, Inc., Owle Construction, Inc., Mill End Enterprises, Inc. d/b/a Carpet One & Home, and John Does 1-10 , Defendants.	)	Case No: 8:14-4815-BHH **DEFENDANT HARRAH'S OPERATING COMPANY, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Defendant, Harrah's Operating Company, Inc. (Harrah's), hereby submits its Memorandum in Support of Motion to Dismiss for Plaintiff's failure to exhaust Tribal Court remedies, sovereign immunity, and pursuant to Rules 12(b)(1), 12(b)(6) and 12(b)(7) of the *Federal Rules of Civil Procedure*.

PROCEDURAL BACKGROUND

Plaintiff Dreama Sullivan filed this action on December 19, 2014, in the United States District Court, District of South Carolina, Anderson/Greenwood Division. The lawsuit alleges personal injuries sustained when she was a business invitee at Harrah's Cherokee Casino Resort in Cherokee, North Carolina on June 6, 2013. The action was originally stayed because Harrah's Operating Company, Inc. filed for an automatic stay pursuant to a Chapter 11 Bankruptcy Petition. (ECF 21, Order). The stay was modified on September 16, 2016, pursuant to an Agreed Order Modifying the Automatic Stay in the United States Bankruptcy Court Northern District of Illinois Eastern Division (ECF, 24-1, Agreed Order Modifying the Automatic Stay).

I. TRIBAL COURT EXHAUSTION DOCTRINE

Harrah's Cherokee Casino Resort is owned and operated by the Tribal Casino Gaming Enterprise, a Tribal Corporation formed pursuant to federal Indian law by the Eastern Band of Cherokee Indians. The Eastern Band of Cherokee Indians entered into a contractual agreement with Harrah's NC Casino Company, LLC (not Harrah's Operating Company, Inc.) to manage the Casino. Harrah's Operating Company, Inc. is only a member of Harrah's NC Casino Company, LLC, and, as such, it has no liability in this case. Plaintiff's Complaint does not allege that Harrah's NC Casino Company, LLC is an instrumentality or the alter-ego of Harrah's Operating Company, Inc.

Although at first glance it may seem that Cherokee interests are not at stake since neither the Tribe or its Tribal Corporation is named as a party Defendant, a closer look contravenes that argument. This very issue has been addressed in the United States District Court for the Western District of North Carolina, Bryson City Division in the case of *Madewell v. Harrah's Cherokee Smokey Mountains Casino, et al.*, 730 F. Supp. 2d 485, 210 U.S. Dist. LEXIS 61469 (2010). See also *Jaramillo v. Harrah's Entertainment, Inc.*, No. 09 CV 2559 JM (POR), 2010 U.S. Dist. LEXIS 14236, 2010 WL 653733, at *2 (S.D. Cal. Feb. 16, 2010).

In *Madewell*, the Court stated that it had subject matter jurisdiction over Plaintiff's claims against Harrah's NC Casino Company, LLC. In that case the parties were citizens of different states and Plaintiff sought damages in excess of $75,000.00. Accordingly, there was a basis for the exercise of diversity jurisdiction by the Court. 28 U.S.C. §1332(a)(1). However, it was also held that the Cherokee Court had concurrent jurisdiction over the claims. The *Madewell* Court noted that although Plaintiff's claims were only against Harrah's NC Casino Company, LLC, a

non-Indian party, "the events which give rise to these claims occurred on Tribal property." *Id.* at 488. Therefore, important tribal interests were involved.

Harrah's Cherokee Casino Resort clearly has a substantial and direct impact on the economic security and health of the Eastern Band of Cherokee Indians. Entertaining over one million visitors a year and employing some 5,000 persons, the Casino generates millions of dollars annually for the benefit of the Tribe. Indeed the changes brought by the Casino for the benefit of the Tribe are quite substantial. The Cherokee have been able to substantially upgrade their medical facilities, schools, water/sewer facilities and roads and each high school graduate gets substantial money for college tuition or to start a business. The Cherokee have built a language immersion school. The Museum of the Cherokee Indians is one of the best of its kind in the country and it is obvious to any observer who was familiar with the state of affairs on the Qualla Boundary prior to the coming of the Casino that this operation has brought dramatic economic and health benefits to the Eastern Band of Cherokee Indians.

The Supreme Court of the United States has long recognized the rights of Indian Tribes to exercise civil jurisdiction over the conduct of non-Indians on Tribal land "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245, 67 L.Ed.2d 493(1981). Moreover, in those circumstances (which are present in this case) civil jurisdiction over such disputes "presumptively lies in the tribal court unless specifically limited by treaty provision or federal statute…" *Strate v. A-1 Contractors*, 520 U.S. 438, 453 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987)).

Where (as here) there is a "colorable question" and whether a Tribal Court has subject matter jurisdiction over a civil action, a federal court should stay or dismiss the action to "permit a tribal court to, in the first instance, whether it has the power to exercise subject matter jurisdiction." *Nat'l Farmers Union Ins. Companies v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).

It is well established that tribal court remedies must be exhausted before a state or federal court considers relief in a civil case regarding tribal related activities on reservation land. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10, (1987). The United States Supreme Court has explained the purpose of the doctrine as follows:

> The existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

II. SOVEREIGN IMMUNITY/FAILURE TO NAME PROPER PARTY

The Tribal Casino Gaming Enterprise (TCGE) has the power and authority to waive its right and the right of the Tribe to exercise tribal sovereign immunity in any contract, agreement or undertaking to which the TCGE is a party. Cherokee Code §16A-5, *et seq.* The TCGE waives sovereign immunity involving tort claims against the Tribe when the action is brought before the Cherokee Court. See Cherokee Code Chapter 1, §1-2(g). The United States Supreme Court had

repeatedly held that Indian tribes are immune from suit (brought by anyone other than the United States) unless Congress has authorized it or they consent to be sued. *U.S. Fidelity & Guarantee Co v. United States,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed.2d 894 (1940). The cases have reiterated the doctrine which is now clearly established, e.g., *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977), *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), *Blatchford v. Native Village of Noatak,* 501 U.S. 775 (1991). See also *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). The Supreme Court has recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388 (1976), may "undermine the authority of the Tribal Court…and hence…infringe on the right of the Indians to govern themselves." *Williams v. Lee,* 358 U.S. 217 (1959).

The lawsuit fails to name a proper party, namely, Harrah's NC Casino Company, LLC and fails to name the Tribal Casino Gaming Enterprise (TCGE), a necessary party. At the same time, while this action does not name the TCGE or the Eastern Band of Cherokee Indians as party Defendants, the claim involves Harrah's Cherokee Casino Resort, and therefore, threatens the economic security and health of the Tribe.

In this case, the Eastern Band of Cherokee Indians and TCGE object to this lawsuit on the grounds of sovereign immunity. Moreover, the TCGE is a necessary party Defendant and they waive sovereign immunity only if this case is brought in the Cherokee Court. Accordingly, Court should dismiss Plaintiff's Complaint in its entirety without prejudice.

Respectfully submitted,
COLLINS & LACY, P.C.

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