

No. 16-6348

IN THE
United States Court of Appeals
FOR THE TENTH CIRCUIT

KEITH FINN,
PLAINTIFF-APPELLANT,

v.

GREAT PLAINS LENDING, LLC
DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
Honorable Vicki Miles-LaGrance
Civil Acion No. 5:16-CV-00415-M

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

A. The District Court Abused Its Discretion in Denying Plaintiff-Appellant's Request for Jurisdictional Discovery As "A More Satisfactory Showing of the Facts is Necessary"

The District Court abused its discretion in denying Plaintiff-Appellant's request for jurisdictional discovery. Jurisdictional discovery works on a premise similar to the old adage, "where there is smoke, there is fire." Where "a more satisfactory showing of the facts is necessary" to establish jurisdiction prior to a decision on a 12(b)(1) motion, jurisdictional discovery is warranted and a court abuses its discretion by denying it. Sizova v. Nat. Inst. of Standards & Tech, 282 F.3d 1320, 1326 (10th Cir. 2002); Ignatiev v. United States, 238 F.3d 464, 467 (DC Cir. 2001). A Plaintiff need only show he has a particular reason to believe that Defendant is in possession of material evidence necessary to establish jurisdiction. Sizova at 1326; Ignatiev at 467; Campbell Pet Co. v. Miale, 542 F.3d 879, 888-889 (Fed. Cir. 2008); Goodwin ex rel. Goodwin v. United States, 2014 WL 4846400 at *2 (S.D. Miss. Sept. 29, 2014).

Plaintiff's showing need not be made on authenticated, admissible evidence as it is offered to show discovery is needed, not to prove the substance of jurisdiction. Ignatiev at 467; Campbell at 888-889; Goodwin at *2. That evidence is unavailable to Plaintiff until after jurisdictional discovery is had. Ignatiev at 467. This is especially true where the defendant is a company as, "A plaintiff who is a total

stranger to a corporation should not be required, unless he has been undiligent to try such issue on affidavits without the benefit of full discovery." Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723 F.2d 357, 362 (3d Cir. 1983) (quoting Surpitski v. Hughes-Keenan Corp., 362 F.2d 254, 255-256 (1st Cir. 1966)). Finally, such jurisdictional discovery is available for all kinds of 12(b)(1) motions, and is appropriate in cases involving claims of sovereign immunity where limited to material facts for the immunity determination. Butler v. Sukhoi Co., 579 F.3d 1307, 1314 (11th Cir. 2009); Ortiz v. United States, 2013 WL 303821 at *3 (D. Colo. Jan. 25, 2013).

In our case, Defendant-Appellee filed a Motion to Dismiss based on a claim that tribal sovereign immunity extended to it as an arm or instrumentality of the Otoe-Missouria Tribe. See Aplt. App. At 110-111. Defendant-Appellee is an LLC created by the tribe. Id. Corporations, LLCs, and other separate entities created by tribes do *not* automatically share this immunity. Rather, tribal immunity extends to them only where "the entity acts as an arm of the tribe so that its actions are properly deemed to be those of the tribe." Allen v. Gold County Casino, 464 F.3d 1044, 1045 (9th Cir. 2006). The Tenth Circuit considers several highly fact specific factors in determining whether tribal immunity extends to such entities: (1) the method of the entity's creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has; (4) whether the tribe intended the entity

to have immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting it to the entity. Breakthrough Financial Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1191 (10th Cir. 2012).

In his Opposition to Defendant's Motion to Dismiss, Plaintiff-Appellant in detail the particular reasons he believes Defendant has material evidence likely to show that a non-tribal third party, Think Finance, has de facto control of Defendant's operations and siphons off most of the profits. Such evidence would be material to: Factor 3 structure, ownership, management and control; Factor 5 financial relationship; and Factor 6 whether purposes of tribal immunity served. Therefore, Plaintiff asked for specific limited jurisdictional discovery on this issue alone. Specifically, Plaintiff asked for limited jurisdictional discovery on the "contractual relationship between Think Finance and its affiliated entities and Defendant, the software used by Defendant to make loans, the financing of loans, the distribution of profits, the ownership of loans after origination, the use of tribal employees of Defendant versus non-tribal employees of Think Finance and affiliated companies..." See U.S. District Court Docket No. 16.

Jurisdictional discovery exists for just this kind of situation, as where there is reason to believe Defendant has material facts necessary to establish jurisdiction it is "required that plaintiffs be given an opportunity to discover facts necessary to

establish jurisdiction prior to decision of a 12(b)(1) motion.” Ignatiev at 467. Based on this principal, in Ignatiev the D.C. Circuit reversed a District Court’s denial of jurisdictional discovery to plaintiff suing the United States government (the Secret Service) and facing a motion to dismiss based on sovereign immunity. Id. Since under the Federal Tort Claims Act the federal government would not be entitled to immunity if it acted according to internal objectives or policies that created its obligation to plaintiffs, the existence or non-existence and content of any such guidelines was a material fact on the sovereign immunity defense to jurisdiction. Id. at 465-466.

And in Sizova v. Nat. Inst. of Standards & Tech, 282 F.3d 1320, 1326 (10th Cir. 2002), the Tenth Circuit reversed denial of jurisdictional discovery in a case where defendant sought dismissal for lack of jurisdiction based on failure to exhaust administrative remedies and file an administrative complaint timely, and plaintiff alleged that as an academic fellow, the administrative filing requirements might not apply to her depending on how the university treated its fellows and that she needed discovery on its practices. Id. at 1327-1328. The Plaintiff did not know the specific practices the university employed and could not plead them to show that jurisdiction was established, but she had reason to believe that such policies existed and would provide material evidence that would resolve the issue.

Accordingly, the showing that jurisdictional discovery is necessary, is a separate question from whether the Plaintiff has admissible evidence showing that jurisdiction exists. Indeed, if a Plaintiff already had such evidence, there would be no need for jurisdictional discovery at all. It would be superfluous. Indeed the Courts in Ignatiev and Sizova acknowledged respectively that Secret Service guidelines and university policies would be internal to the defendant not public; thus, the plaintiffs could not present evidence of their content and had to imply their existence from context – they had reason to believe that this evidence existed and would be material. Ignatiev at 467 and Sizova at 1327-1328. As the DC Circuit explained, District Court in Ignatiev abused its discretion when it denied jurisdictional discovery based on plaintiffs not having substantive evidence of the guidelines – jurisdictional discovery was warranted since “Appellants have some reason to believe that some such guidelines exist, since the Secret Service’s only mandate is to protect Washington’s missions is to “perform such duties as the Director...may prescribe.” Ignatiev. at 467.

This is because a Plaintiff need only show he has a particular reason to believe that Defendant is in possession of material evidence necessary to establish jurisdiction. Sizova at 1326; Ignatiev at 467; Campbell at 888-889; Goodwin at *2. Indeed, in Goodwin ex rel. Goodwin v. United States, the Court granted jurisdictional discovery based on hearsay statements, because while they would not

be admissible as substantive evidence in deciding the actual Motion to Dismiss, they were sufficient to give the plaintiff a reason to believe that the defendant had particular material evidence as to jurisdiction. Goodwin at *2. Plaintiff-Appellant in our case has clearly done that; the Court just brushed aside his well-researched and extensive reasons to believe that Defendant-Appellant is de facto controlled by and has its profits siphoned off by a non-tribal entity, Think Finance (and its affiliates). Plaintiff-Appellant has reason to believe that this is so because:

- After signing the agreement with the Chippewa Cree in March 2011, Think Finance reached out to the Otoe-Missouria in Oklahoma. Walsh at 6.
- Think Finance was introduced to the Otoe-Missouria by Mark Curry (hereinafter “Mr. Curry”) of MacFarlane Group, Inc. Faux, Zeke. “Behind 700% Loans, Profits Flow Through Red Rock to Wall Street,” p. 2, Bloomberg Business, 24 November 2014, Web. 23 December 2015, <<http://www.bloomberg.com/news/articles/2014-11-24/payday-loanfortune-backed-by-medley-found-behind-indian-casino>>.
- In 2010, Mr. Curry had entered into an agreement with the Otoe-Missouria and then-tribal vice chairman Charles Moncooyea (hereinafter “Mr. Moncooyea”) to create an online payday lender called American Web Loan, which generated over \$100 million in profit with only about 1% going to the

tribe. Id. Mr. Moncooyea later stated about this arrangement that "As time went on, I realized that we didn't have any control at all." Id.

- Still, on May 4, 2011, the Otoe-Missouria created Great Plains Lending, LLC. See Aplt. App. at 110 ¶4.
- Great Plains offers the same services as Plain Green LLC, which was created a few months earlier in March 2011 and use a standard form contract that is nearly identical. See Aplt. App. at 88, 94.
- Great Plains and Plain Green, LLC have extremely similar websites and Think Finance has also listed both Plain Green's website and Great Plain's website as its products. See Aplt. App. at 99, 101, 103.
- The publicly available LinkedIn pages for a former employee identifies Great Plains and Plain Green as Think Finance products on which work was performed in "all areas of business (Release, Management, Development, Compliance, Loan Ops, etc.)". See Aplt. App. at 104 the LinkedIn Page of Eric McLean, Former QA Lead, Think Finance.
- On December 19, 2013, the Consumer Financial Protection Bureau ("CFPB") as part of an investigation into illegal online payday lending issued a civil investigative demand to Think Finance, Inc. seeking information on the services it provided to our Great Plains, Great Plains Lending, LLC, to Green Plains LLC, and to MobiLoans, LLC. In Re Great Plains Lending, LLC;

Mobiloans LLC, and Plain Green, LLC, Decision and Order on Petition of Great Plains Lending, LLC; Mobiloans Lending LLC; and Plain Green, LLC to Set Aside Civil Investigative Demands, 2013- MISC-Great Plains Lending-0001.

- Great Plains sued the New York State Department of Financial Services claiming "that their business collapsed when banks pulled out of the payday lending business" after the state issued a cease and desist letter. Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs., 769 F.3d 105, 115 (2d Cir. 2014). At the same time, Great Plains paradoxically claimed that its loans were all funded out of "tribally owned bank accounts." Id. The Second Circuit dismissed this statement as not credible, stating "the necessary involvement of non-tribal financial institutions is the very basis of [the] plaintiff's claim...." Id. Thus, Great Plains appears to receive at least some, if not significant, funding from non-tribal sources in order to make its loans.
- In a 2012, interview Ken Rees of Think Finance told Bloomberg Business Service that the company's business strategy was to partner with Native American tribes that "don't have to look to each state's lending laws." See Carter, Dougherty, *Payday Lenders and Indians Evading Laws Draws Scrutiny*, Bloomberg Business, 5 June 2012, Web. 28 December 2015,

<<http://www.bloomberg.com/news/articles/2012-06-04/payday-lendersand-indian-tribes-evading-laws-draw-scrutiny-1->>.

Given this information, Plaintiff-Appellant has every reason to believe that contracts between Think Finance and its entities and Defendant-Appellee and documentation of the profit distributions will show whether Defendant-Appellee is actually de facto controlled by non-tribal entities. This is material as, once again, the Tenth Circuit considers several highly fact specific factors in determining whether tribal immunity extends to such entities: (1) the method of the entity's creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has; (4) whether the tribe intended the entity to have immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting it to the entity. Breakthrough Financial at 1191. Such evidence would go to factors 3, 5, and 6. Therefore, Plaintiff's request for jurisdictional discovery was limited to the "contractual relationship between Think Finance and its affiliated entities and Defendant, the software used by Defendant to make loans, the financing of loans, the distribution of profits, the ownership of loans after origination, the use of tribal employees of Defendant versus non-tribal employees of Think Finance and affiliated companies..." See U.S. District Court Docket No. 16.

The Court acknowledged that if Plaintiff could obtain any contract between Think Finance and Defendant this would be material evidence regarding the jurisdictional defense of sovereign immunity. See Aplt. App. At 19. Yet the Court denied jurisdictional discovery seemingly because the Plaintiff had not already – absent discovery – obtained this document or similar documents. Id. Specifically, the District Court held that “due to the lack of substantial evidence, **such as a contractual agreement between Think Finance and Great Plains documenting the profit ratio of the two companies**” the Motion to Dismiss should be granted. See Applt. App. at 19 (emphasis added. Plaintiff-Appellant’s request for jurisdictional discovery requested the Court allow it to obtain that exact documentation. Thus, the Court acknowledge these documents were material and could impact the outcome of the Motion and then denied jurisdictional discovery anyway without further explanation. In doing so, the District Court abused its discretion by denying Plaintiff access to discovery necessary for “a more satisfactory showing of the facts.”

B. Jurisdictional Discovery Directed to a Defendant that Claims Sovereign Immunity is Appropriate When, Like Plaintiff-Appellant’s, It is Limited to Facts Material to Whether Immunity Applies

Jurisdictional discovery is available for all kinds of 12(b)(1) motions, and is appropriate in cases involving claims of sovereign immunity where limited to material facts for the immunity determination. Butler at 1314 and Ortiz at *3.

Otherwise, a Defendant claiming sovereign immunity would be able to simply assert the claim, present only the evidence it possesses most favorable to itself while withholding evidence that shows it is not entitled to immunity at all. Therefore, a party seeking jurisdictional discovery to oppose a Motion to Dismiss based on sovereign immunity must plead what he expects to uncover in discovery, how it will help prove the defendant is not entitled to sovereign immunity, in addition to his reasons to believe more specific discovery is necessary.

In our case, the Plaintiff-Appellant clearly did these things. As explained in detail above, whether or not Defendant-Appellee, an LLC created by a tribe, but separate from it, shares in tribal sovereign immunity depends on factors including: Factor 3 - Its structure, ownership, and management, including the amount of control the tribe has; Factor 5- The financial relationship between the tribe and the entity; and Factor 6 - Whether the purposes of tribal sovereign immunity are served by granting it to the entity. Breakthrough Financial at 1191. Plaintiff-Appellant has alleged that there is specific evidence in the form of contracts and profit splits between Defendant-Appellee and a non-tribal entity called Think Finance (and its affiliates) showing that Think Finance has de facto control of Defendant-Appellee and siphons off the profits. If this is proven, Factors 3, 5, and 6 will way heavily toward a finding that Defendant-Appellee is not entitled to sovereign immunity.

The Plaintiff-Appellant sought discovery limited to information about Defendant-Appellee's relationship with Think finance. See U.S. District Court Docket No. 16. The Court itself acknowledged that if Plaintiff-Appellant had copies of contracts and documentation of the profit split, it would be material evidence on these factors and the issue of whether Defendant-Appellee is entitled to sovereign immunity. Applt. App. at 19. In the Ignatiev case, the DC Circuit ordered jurisdictional discovery against the United States government, which was asserting immunity, because the internal guidelines the plaintiffs sought were particular evidence, the plaintiffs had a reason to believe defendant had that evidence, and the evidence was material to whether immunity existed. Ignatiev at 467.

The cases cited by Defendant-Appellee are different. In Everette v. Mitchum, jurisdictional discovery was denied as the plaintiff stated only that discovery would help show how defendant casinos, which claimed tribal sovereign immunity were operated, but did not plead any reason at all for why it believed they were operated in a manner which would impact their claims to immunity. Everette v. Mitchum, 146 F. Supp. 3d 720, 722-723 (D. Md. 2015). In Breakthrough Financial Management Group, Inc. v. Chukchansi Gold Casino and Resort, the Court set out the factors for considering whether tribal sovereign immunity applies to a company or other entity created by a tribe, then ordered jurisdictional discovery in the form of subpoenaing documents and witnesses to determine whether a casino created by a

tribe was entitled to immunity, but denied additional jurisdictional discovery because the plaintiff could not articulate what it hoped to gain from calling more witnesses after the first round of discovery. Breakthrough Financial at 1189-1190.

In our case, Plaintiff-Appellant has provided a detailed explanation for why he believes Defendant-Appellant is de facto controlled by a non-tribal third party that siphons off most of the profits, as explained in detail above, has plead the particular evidence he expects to find to prove these allegations – contracts between Defendant-Appellant and non-tribal entity Think Finance (and its affiliates) and documentation of profit splits – and the District Court acknowledged that such contract and profit documentation were material and could impact the outcome of the Motion, yet paradoxically denied the requested jurisdictional discovery because Plaintiff-Appellant did not already possess those documents. *Applt. App.* at 19. Accordingly, this discovery is necessary to determine whether Defendant-Appellee is actually entitled to sovereign immunity.

CONCLUSION

For the reasons set forth above, Mr. Finn respectfully requests that this Court reverse the District Court's judgment and remand his case to the District Court to perform limited jurisdictional discovery.

Dated: March 16, 2017

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CERTIFICATE OF SERVICE

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