UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE	:	
v.	:	Case No.: 17-125-S-LDA
RHODE ISLAND DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; ADVISORY COUNCIL ON HISTORIC PRESERVATION; RHODE ISLAND HISTORICAL PRESERVATION & HERITAGE COMMISSION	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO FEDERAL AND STATE DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT

The Narragansett Indian Tribe, by and through the Narragansett Indian Tribe Historic Preservation Office ("Plaintiff") brought this action seeking relief, including declaratory relief, from the Court to enforce the terms of a programmatic agreement (the "PA") which was entered into by and between the Federal Highway Administration ("FHWA"), the Rhode Island State Historic Preservation Officer, the Plaintiff, and the Rhode Island Department of Transportation ("RIDOT") (RIDOT along with the Rhode Island Historical Preservation and Heritage Commission are referred to as "State Defendants").

BACKGROUND

The PA, entered into by the parties on October 3, 2011, was to govern the implementation of the Viaduct Project and to take into account both foreseen and unforeseen effects on historic properties. See Compl. ¶ 10. The PA included certain stipulations, which were later amended by the parties on January 17, 2013. Id. at ¶ 11. According to one of the amended stipulations, RIDOT was required to "acquire and transfer ownership of the so-called 'Providence Boys Club – Camp

Davis' (a 105+/- acre parcel), a significant Narragansett Indian Tribal cultural property located in Charlestown, Rhode Island, to the Narragansett Indian Tribal Historic Preservation Office for and/on behalf of the Narragansett Indian Tribe. . . . Appropriate covenants that preserve the property and its cultural resources in perpetuity shall be included in the deed for said property." Thereafter, by letter dated September 16, 2013, RIDOT informed Plaintiff that it refused to transfer the Providence Boys Club – Camp Davis property unless Plaintiff agreed to subject the property to the civil and criminal laws and jurisdiction of the State of Rhode Island.

Plaintiff refused to assent to this additional requirement of the RIDOT, as it was not required in the original PA or any subsequent amendment thereto. See Compl. ¶¶ 16-17. The parties attempted to resolve the impasse through the dispute resolution clause of the PA, which permitted the FHWA to forward all documentation regarding the dispute to the Advisory Council on Historic Preservation ("ACHP") (collectively with FHWA "Federal Defendants"). The ACHP was then authorized to provide the FHWA with recommendations on a final decision.

On February 15, 2017, RIDOT terminated the PA. On March 3, 2017, Plaintiff received correspondence from ACHP requesting comment pursuant to the dispute resolution clause of the PA. Of note, the letter stated: "Both the FHWA and the ACHP concluded that the requirement by RIDOT that the tribe waive its sovereign immunity in order to receive this land was not a requirement of the PA; however, efforts to urge the state to reconsider that condition have been unsuccessful." During this period, RIDOT continued with the Viaduct Project without making any provisions for the impact upon historical land, despite the fact that it terminated the PA.

STANDARD OF REVIEW

"When subject matter jurisdiction is challenged, the plaintiff has the burden of establishing that jurisdiction exists." Smith v. O'Connell, 986 F. Supp. 73, 75 (D.R.I. 1997) (citing Bank One,

Texas, N.A. v. Montle, 964 F.2d 48, 50 (1st Cir. 1992)). The court must treat all of plaintiff's well-pleaded facts as true and must draw all reasonable inferences favorable to the plaintiff. Id. "The pertinent inquiry is whether or not the challenged pleadings set forth allegations sufficient to demonstrate that the subject matter jurisdiction of the court is proper." Ducally v. R.I. Dep't of Corr., 160 F. Supp. 2d 220, 224 (D.R.I. 2001).

In order to survive a motion to dismiss based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" and "possess[] enough heft to sho[w] that the pleader is entitled to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007) (internal quotation marks omitted). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." Id. at 570. A complaint presents a plausible claim "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Aschcroft v. Iqbal, 556 U.S. 662, 678 (2009). Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Additionally, it is well established that in evaluating a Rule 12(b)(6) motion, the Court must accept all well-pleaded facts alleged in the complaint as true. See Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 53 (1st Cir. 2013).

ANALYSIS

A. Lack of Final Agency Action Does Not Deprive the Court of Subject Matter Jurisdiction

Both State Defendants and Federal Defendants (collectively, "Defendants") assert that this Court lacks subject matter jurisdiction, as the only permissible way to bring suit against them under the National Historic Preservation Act ("NHPA") is through the APA—which requires a final

agency action—purportedly because the NHPA does not provide a private right of action. It is "[o]nly after an agency's final action" that courts "may . . . review the agency's decision." Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 46 (1st Cir. 2009). Thus, Defendants contend that because the NHPA does not permit a private right of action, outside of an APA appeal, and because a "final" agency action has not been issued, this Court is without jurisdiction to entertain this dispute.

As an initial matter, Defendants' assertion that the NHPA does not authorize a private right of action is not corroborated by decisions made by several federal courts. In fact, these courts have determined that the NHPA does, indeed, provide for a private right of action. See Yankton Sioux Tribe v. United States Army Corps of Eng'rs, 194 F. Supp. 2d 977, 990 (D.S.D. 2002) ("The Court finds that a private right of action exists under the NHPA and that the Tribe may seek injunctive relief against the Corps.") (citing Boarhead Corp v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991)); Presidio Golf Club v. National Park Service, 155 F.3d 1153 (9th Cir. 1998); Vieux Carre Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989) (subsequent history omitted); National Center for Preservation Law v. Landrieu, 635 F.2d 324 (4th Cir. 1980); WATCH v. Harris, 603 F.2d 310 (2d Cir.), cert. denied, 444 U.S. 995 (1979)); but see Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F3d 1291, 1295 (D.C. Cir. 2007); San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1099 (9th Cir. 2005).

Just as in Yankton Sioux Tribe, the Plaintiff, here, is seeking injunctive and declaratory relief under the NHPA. It is also worth noting that the First Circuit, in Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166 n.4 (1st Cir. 2003), stated that "Both the parties and the district court assumed that the NHPA gives the Tribe a private right of action in this case. Because this is a statutory question rather than one of Article III jurisdiction, we may bypass it

where the case can otherwise be resolved in defendant's favor." While not specifically ruling on the NHPA jurisdictional issue, the First Circuit's recognition that the NHPA provides the Tribe a private right of action, is significant. Consequently, this Court should adopt that reasoning here, along with the decisions in the above-cited cases, in finding that the NHPA does provide a private right of action for the Tribe, such that a final agency decision is not inherently necessary to invoke the jurisdiction of this Court. See Yankton Tribe, 194 F.Supp.2d at 992. ("The NHPA does not *require* the Tribe to exhaust administrative remedies prior to seeking judicial review.").

B. Plaintiff's Complaint States a Claim Upon Which Relief May Be Granted

The Federal Defendants assert that the "sole allegation against them is that '[u]pon information and belief, FHWA has in its possession or controls, funds allocated to fulfill its agreements under the [PA].'" However, the Federal Defendants fail to concede that they are actual parties to the PA, which the Plaintiff has asked the Court to construe in declaring the parties' rights.[1]

As this Court has stated, "[t]he [Declaratory Judgment] Act is designed to 'enable parties to clarify legal rights and obligations before acting upon them.'" Essex Ins. Co. v. Westerly Granite Co., 2014 U.S. Dist. LEXIS 142507, at *4 (D.R.I. Oct. 7, 2014) (quoting Atlas Copco Construction Tools, Inc. v. Allied Construction Products LLC., 307 F. Supp. 2d 228, 232 (D. Mass. 2004)). It defies logic that the instant claim does not assert a discernible action against the Federal Defendants when the rights and obligations to an agreement signed by representatives of the United States, the State of Rhode Island, and the Tribe, governing an extensive highway project over historically significant land, are put before the Court for determination. See Unetixs Vascular,

[1] The count for breach of contract is directed only at RIDOT. See Compl. ¶ 36 ("The PA has been breached by RIDOT").

Inc. v. CorVascular Diagnostics, LLC, 217 F. Supp. 3d 537 (D.R.I. 2016) ("In a situation like this, the 'general, well-settled proposition' is that a 'party to a contract which is the subject of the litigation is a necessary party.'") (quoting Downing v. Globe Direct LLC, 806 F. Supp, 2d 461, 466 (D. Mass. 2011)); see also G.L. 1956 § 9-30-11 ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."). While the positions of the Tribe and the Federal Government may not be entirely adversarial, the Federal Defendants are clearly parties to a justiciable controversy.

C. Plaintiff's Breach of Contract Claim States a Plausible and Substantive Claim

The State Defendants assert that because the PA includes a clause permitting termination, that a cause of action cannot be maintained for breach of contract. Yet, merely because the PA contains a termination provision within it, does not mean that the State Defendants cannot breach any obligations pursuant to that contract. As an initial matter, the termination clause is actually qualified since termination may only be "for cause." This is especially so when the parties have materially changed their positions and rendered consideration. Additionally, it is presumed that "[w]hen there is a contract [a party] with discretion to terminate should be required to terminate only in good faith." See Frederick W. Claybrook, Jr., Good Faith in the Termination and Formation of Federal Contracts, 56 Md. L. Rev. 555, 561 (1997) (quoting Steven J. Burton & Eric G. Anderson, Contractual Good Faith: Formation, Performance, Breach, Enforcement (1995)); see also Hord Corp. v. Polymer Research Corp. of Am., 275 F. Supp. 2d 229, 237 (D.R.I. 2003) ("It is well established in Rhode Island that, virtually every contract contains an implied covenant of good faith and fair dealing between parties.") (internal quotation marks omitted).

The allegations contained in the complaint contend that the State Defendants acted without cause and in bad faith when terminating the PA. See Compl. ¶¶ 14, 17, 20. This is not a case of "impossibility" of contract completion or some other excusable cause to allow termination. All parties to the contract were well counseled and agreed to its terms voluntarily. Accordingly, while the PA may contain a "for cause" termination clause, this does not equate to a "get out of jail free card," nor does it mean that the State Defendants' actions in terminating the PA pursuant to that clause can never amount to a breach of contract. There is clearly a factual issue presented here. See Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 335 (R.I. 1992) ("[I]f a termination clause allows a party to terminate at any time at will without more, that promise is illusory."). Inherent in this contract, as in any contract, is an obligation of good faith and fair dealing which must be read in conjunction with a termination "for cause" provision. Just because the State now doesn't like a particular contract provision it willingly entered into, does not give it the power to claim it has a right to terminate the contract "for cause." In essence, that would allow the state, like the spoiled kid in a sandlot baseball game, to take his bat and ball and go home because he didn't like some of the umpire's calls. Here, there is a justiciable and factual claim that the State Defendants' actions were not done in "good faith;" that the termination was not "for cause;" that the other parties have provided consideration to their detriment; and therefore a claim for breach of contract is real and viable.

D. Plaintiff Has Appropriately Requested Injunctive Relief

The State Defendants seek dismissal of Count II, alleging that Plaintiff has not shown a clear entitlement to injunctive relief. While Count II is titled "Injunctive Relief," the Plaintiff recognizes that "[a] claim for injunctive relief is not a standalone cause of action." Doe v. Brown Univ., 166 F. Supp. 3d 177, 197 (D.R.I. 2016) (quoting Doe v. Salisbury Univ., 123 F. Supp. 3d

748 (D. Md. 2015)). While dismissal of this count may be appropriate, as injunctive relief is not a separate cause of action, any dismissal should be "without prejudice to the claim for injunctive relief [] laid out" in the Complaint. See id.

CONCLUSION

For the foregoing reasons, Plaintiff requests that Defendants' motions to dismiss be denied.

Respectfully submitted,

NARRAGANSETT INDIAN TRIBE BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE

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CERTIFICATION

The undersigned hereby certifies that on this 30th day of June, 2017 this document was filed electronically and is available for reviewing and downloading by the ECF registered counsel of record.

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