UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-62775-Middlebrooks/Brannon

SEMINOLE TRIBE OF FLORIDA,

Plaintiff,

v.

LEON BIEGALSKI, as Executive Director
of the Florida Department of Revenue,

Defendant.
_____________________________________/

DEFENDANT'S MOTION TO DISMISS

Defendant, Leon Biegalski, pursuant to Rule 12(b)(6), Fed. R. Civ. P., hereby moves to dismiss Plaintiff, Seminole Tribe's complaint and states:

1. Plaintiff brings this action seeking a declaration that Florida's gross receipts tax, which is imposed on utilities for the privilege of doing business in Florida, is preempted by federal law and that no tax would be due for payments related to utilities serving the Tribe's reservations.

2. In 2012, the Seminole Tribe brought suit challenging the imposition of this very same tax. See, Seminole Tribe of Florida v. Florida, 49 F. Supp. 3d 1095 (S.D. Fla. 2014)(Indian tribe brought action against executive director of State Department of Revenue challenging state's imposition of . . . utility tax on electricity delivered to tribe on tribal reservations.)

3. The trial court found that the utilities tax was a tax on the Tribe and was preempted by federal law. *Id.* at 1108. (The Court also finds that federal law prohibits Florida from collecting the Utility Tax from the Tribe since the legal incidence of the Utility Tax falls on the Seminole Tribe.) The Eleventh Circuit reversed, holding that the legal incidence of the tax was on the utilities and that the tax was not preempted by federal law. Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324, 1352 (11th Cir. 2015). Once the court determined that the legal incidence of the tax fell on the utilities, it went on to say, "we must determine whether federal law preempts imposition of the Utility Tax on non-Indian utility companies operating on-reservation. **After careful consideration, we hold that the Utility Tax does not**. Id. (e.a.)

4. Res Judicata (claim preclusion), therefore, bars Plaintiff from bringing the same claim that the utilities gross receipts tax is preempted by federal law.

WHEREFORE, Defendant respectfully requests that this court issue an order dismissing the Tribe's Complaint with prejudice.

MEMORANDUM

In the instant case, Plaintiff, Seminole Tribe, has sued the executive director of the Florida Department of Revenue seeking the following:

> (1) a judgment declaring that the application of Utilities Tax to utilities services, specifically electricity, that the Tribe uses on its reservations and other property held in trust for its benefit by the United States of America (collectively, "Tribal Land") in the conduct

> of any activity that (i) is exclusively and pervasively regulated by federal law; (ii) constitutes the exercise of its sovereign functions; and/or (iii) constitutes the use of its Tribal Land, is prohibited by federal law; and (2) a permanent injunction enjoining the further imposition or collection of Utilities Tax on utilities services used to conduct any of those activities. [D.E. 1]

In Seminole Tribe of Florida v. Florida, 49 F. Supp. 3d 1095 (S.D. Fla. 2014), aff'd in part, rev'd in part sub nom. Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324 (11th Cir. 2015), the Tribe sought the following:

> A judgment declaring that utility services provided to the Tribe on Tribal Land are not subject to Utilities Tax; and . . . a permanent injunction precluding further imposition or collection of Utilities Tax on utility services provided to the Tribe on Tribal Land. [Case No. 0:12-cv-62140-RNS, D.E.1][1]

In the previous case, the Tribe asserted that the tax was preempted with respect to "Essential Government Services" because of the pervasive regulation of those services under the Indian Self-Determination And Education Assistance Act (ISDEAA). [Case No. 0:12-cv-62140-RNS, D.E.1, ¶46] It also asserted that federal law preempts any tax with respect to its gaming activities because of the pervasive regulation of the Indian Gaming Regulatory Act (IGRA) and other laws. [Case No. 0:12-cv-62140-RNS, D.E.1, ¶49]. Finally, the Tribe alleged that the tax

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[1] Contemporaneously with the filing of this motion, Defendant has filed a request that the court take judicial notice of its files in Seminole Tribe of Florida v. Florida, Case No. 0:12-cv-62140-RNS (USDC SD Fla.). A district court may take judicial notice of certain facts without converting a motion to dismiss into a motion for summary judgment. *See Bryant v. Avado Brands, Inc.,* 187 F.3d 1271, 1278 (11th Cir.1999).

was preempted with respect to the leasing of Tribal land.[2] In count III of its previous complaint, the Tribe sought a judgment "Declaring that the utility services that are provided to the Tribe on Tribal Land are not subject to Utilities Tax."

Res judicata or claim preclusion applies where ""(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." *Ragsdale,* 193 F.3d at 1238." Horne v. Potter, 392 F. App'x 800, 802–03 (11th Cir. 2010). United States v. Beane, 841 F.3d 1273, 1283 (11th Cir. 2016).

> Res judicata—or, to use the more modern terminology, "claim preclusion"—is a bedrock principle of our legal system. As we said many years ago, "[p]ublic policy dictates that there be an end of litigation[,] that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244 (1931). This doctrine "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.... To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). These are "vital public

[2] In later filings, the Tribe identified the Indian Reorganization Act of 1934, 25 U.S.C. §465 and its implementing regulations (IRA) as part of the source of this preemption. [Case No. 0:12-cv-62140-RNS, D.E. 35 at pg.3]

> interests" that should be " 'cordially regarded and enforced.' " *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2331 (2016), as revised (June 27, 2016)(Alito dissenting).

It is appropriate to address an assertion of claim preclusion on a motion to dismiss. On a motion to dismiss under rule 12(b)(6) based on claim preclusion, the court in Nassar v. Nassar, No. 3:14-CV-1501-J-34MCR, 2017 WL 26859, at *11 (M.D. Fla. Jan. 3, 2017) ruled: "[T]he Court determines that Defendant has established that all of the requirements for application of res judicata are satisfied here. As such, the Motion is due to be granted to the extent that the Court finds the claims set forth in the Amended Complaint are barred by res judicata and due to be dismissed."

In this case, the four elements of claim preclusion are satisfied and the case should be dismissed.

(1) there is a final judgment on the merits

On remand from the Eleventh Circuit, the District Court, in response to a motion for entry of judgment filed by Defendant Biegalski, [Case No. 0:12-cv-62140-RNS, D.E. 105] granted the motion and entered a final judgment in favor of the Defendant. [Case No. 0:12-cv-62140-RNS, D.E. 110 and 111]

(2) the decision was rendered by a court of competent jurisdiction

There can be no argument that this court and the Eleventh Circuit Court of Appeals are courts of competent jurisdiction over this claim.

(3) the parties are identical in both suits

Again, there can be no dispute that the Plaintiff herein is the same Seminole Tribe of Florida. As well, the Defendant in both cases (although different individuals) was the Executive Director of the Florida Department of Revenue in his official capacity.

(4) the same cause of action is involved in both cases

The claims brought by the Tribe in this case are the same as in the previous litigation. In Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1503 (11th Cir. 1990), the Eleventh Circuit outlined the analysis of this element of claim preclusion as follows:

> The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." *I.A. Durbin,* 793 F.2d at 1549 (citations and footnote omitted). In other words, a court "must look to the factual issues to be resolved [in the second cause of action], and compare them with the issues explored in" the first cause of action. *S.E.L. Maduro v. M/V Antonio De Gastaneta,* 833 F.2d 1477, 1482 (11th Cir.1987); *see also Ruple v. City of Vermillion, S.D.,* 714 F.2d 860, 861 (8th Cir.1983), *cert. denied,* 465 U.S. 1029, 104 S.Ct. 1290, 79 L.Ed.2d 692 (1984): "It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are

> really the same 'claim' or 'cause of action' for purposes of res judicata.

This case and the previous litigation easily pass all of these tests. The primary right and duty are the same in both cases – the right of the state to collect this tax from the utilities for payments from the Tribe for power used on the reservation for the specified purposes. The factual issues are the same – whether federal laws pervasively regulate the Tribe to the extent that imposition of the tax *on the utility companies* is preempted. And the cases both arise from the same nucleus of operative fact.

The only difference is a distinction without a difference. In the previous case, the Tribe asserted preemption based on the three functions – essential government services, gaming, and leasing -- as exemplified by three statutes, the ISDEAA, IGRA and IRA. In this case, the Tribe expands its statutory citations to a long laundry list of federal statutes addressing mostly if not exclusively those three functions. Pleading the same claim but with more specificity does not make it a different claim. "*Res judicata* applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact." *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990) (barring subsequent challenges to flying Confederate flag above Alabama capitol based on additional legal theories); *see also Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306, 1309 (11th Cir. 2006) (res judicata barred subsequent case

involving "different legal theories through which to challenge the reasonableness of the charges"); *Hodges v. Publix Super Markets, Inc.*, 372 F. App'x 74, 76 (11th Cir. 2010) ("A party may not split his causes of action into part to bring claims based on different legal theories at different times.")

To the extent this court sees the claim as somehow different from the previous one, the claims in this case undoubtedly could have been raised in the previous litigation. "[R]es judicata bars subsequent litigation of a previously adjudicated cause of action, including those claims and defenses that could have been, but were not, raised in the earlier proceeding." United States v. Beane, 841 F.3d 1273, 1285 (11th Cir. 2016)

> Plaintiffs generally must bring all claims arising out of a common set of facts in a single lawsuit, and federal district courts have discretion to enforce that requirement as necessary "to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *Stone v. Department of Aviation,* 453 F.3d 1271, 1278 (C.A.10 2006) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common-law rule of claim preclusion prohibiting the splitting of actions"). See also 18 C. Wright et al., Federal Practice and Procedure § 4406, p. 40 (2d ed.2002, Supp.2011) (discussing "principles of 'claim splitting' that are similar to claim preclusion, but that do not require prior judgment"). Thus, if an aggrieved employee goes to a district court with claims that would duplicate the fact-finding or legal analysis of a separate Board proceeding, the district court would be free to dismiss the case.

Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2147 (2012) (Alito dissenting).

In response to this motion, the Tribe will undoubtedly point to limiting language in the opinion of the Eleventh Circuit and the trial court's Order on Remand [Case No. 0:12-cv-62140-RNS, D.E. 110] and Final Judgment. [Case No. 0:12-cv-62140-RNS, D.E. 111] However, that language is immaterial to the issue of claim preclusion. The trial court's judgment is final, *not* "without prejudice," and nothing in those papers would serve to allow the Tribe to avoid the rules of res judicata (claim preclusion). The proper remedy for an adverse order would have been for the Tribe to appeal the trial court's entry of judgment – but it did not. All of the elements of claim preclusion are present in this case and therefore the Tribe is now precluded from ***re***litigating the issue of whether federal law preempts the Florida gross receipts tax, as applied to and paid by Florida utilities, for electricity utilized on the Seminole's reservations.

Plaintiff's complaint should be dismissed with prejudice.

Respectfully submitted this 13th day of January, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on January 13, 2017 to:

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