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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GRANT CHARLES, in his official capacity as attorney for Roosevelt City, Utah, Plaintiff v. UTE INDIAN TRIBE OF THE UINTAH and OURAY RESERVATION; BUSINESS COMMITTEE FOR THE UTE TRIBE OF THE UINTAH and OURAY RESERVATION; TRIBAL COURT FOR THE UTE TRIBE OF THE UINTAH and OURAY RESERVATION; WILLIAM L. REYNOLDS in his official capacity as Chief Judge of the Ute Tribal Court, and RICHITA HACKFORD, Defendants	MOTION TO DISMISS FOR LACK OF JURISDICTION Civil Case No. 2:17-cv-00321-DN District JudgeDavid Nuffer

COMES NOW, Defendants the Ute Indian Tribe of the Uintah and Ouray Reservation, the Business Committee of the Uintah and Ouray Reservation, the Tribal Court of the Uintah and Ouray Reservation, and the Honorable Judge Reynolds, (hereinafter, collectively, the "Tribal Defendants") and files this Motion to Dismiss this matter as moot, and Memorandum in Support thereof.

I. RELIEF SOUGHT AND GROUNDS FOR MOTION

Tribal Defendants request that the claims against them be dismissed with prejudice. The judicial proceedings in Ute Tribal Court which underlie the present matter have been dismissed. As a result, there is no longer a case or controversy before this Court. Accordingly, the Court lacks jurisdiction over the Complaint under Article III of the *United States Constitution*.

II. STATEMENT OF FACTS AND PROCEDURAL POSTURE

Tribal Defendants set forth the facts in this matter in their first Motion to Dismiss and Memorandum in Support Thereof, filed on May 19, 2017. Tribal Defendants incorporate by reference the facts set forth in their May 19 pleading into the present pleading.

To supplement the facts incorporated above, on June 5, 2017, the Tribal Court dismissed Richita Hackford's Complaint on two grounds: 1) failure to state a claim upon which relief can be granted, and 2) lack of jurisdiction over non-Indian defendants Allred and Charles. *Hackford v. Clark Allred and Grant Charles*, Order Dismissing Action, CV-16-257, Ute Indian Tribal Court (June 5, 2017). Regarding the former, the Tribal Court found that a party "has no right of recovery against an opposing attorney from conduct engaged in as part that attorney's duties in representing his client." *Id*. at 3. On this basis, the Tribal Court concluded that "[t]he claim that an attorney can be sued for no more than advising his or her client cannot be sustained." *Id*. Regarding the latter,

the Tribal Court found that the "inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe" in the absence of the two exceptions set forth by the U.S. Supreme Court in *Montana v. United States*, 450 U.S. 544, 565-66 (1978). *Id*. at 3-4. Having found that Hackford failed to allege facts supporting either of these two exceptions, the Tribal Court concluded that it did not have jurisdiction over the non-Indian defendants. The Tribal Court's Order is attached hereto as **Exhibit A**.

III. ARGUMENT

Plaintiff's claims do not meet the minimum standard for justiciability under Article III of the *United States Constitution*. The Complaint in this matter alleges one claim.[1] It asks this Court to grant declaratory and injunctive relief regarding a claim which Richita Hackford filed against multiple defendants, only one of whom alleges in this Court to have been acting in his official capacity as a Utah county or municipal officer. Plaintiff's claims, as they pertain specifically to the complaint filed by Richita Hackford, have been rendered moot. Further, Plaintiff lacks standing to seek prospective relief where the injury suffered is merely conjectural and hypothetical. Thus, the Tribal Court's dismissal of Richita Hackford's complaint eliminated any justiciable case or controversy under Article III, and Plaintiff's Complaint must be dismissed for lack of jurisdiction.

The Tenth Circuit recently dismissed a matter with facts strikingly similar to those underlying the current matter, finding that the plaintiff's claims were not justiciable under Article

[1] The complaint additionally alleges a second claim, conditioned upon this Court determining that the Tribe's Court has jurisdiction. Because that claim was frivolous to begin with, was only stated under a condition which now cannot occur, and because the claim is also moot for the same reasons the only direct claim is moot, the alternative claim must be dismissed also.

III. In *Board of Education for the Gallup-McKinley County Schools v. Henderson*, U.S. App. LEXIS 10749 (10th Cir. June 19, 2017) (hereinafter *Henderson*), the plaintiff school district had fired defendant Henderson as principle of the high school located within the Navajo Nation. Henderson then filed a charge with the Office of Navajo Labor Relations ("ONLR"). Upon dismissals from the ONLR and, subsequently, the Navajo Nation Labor Commission ("NNLC") for failure to meet applicable threshold for timeliness, Henderson appealed to the Navajo Nation Supreme Court ("NNSC"). The NNSC found that it had subject matter jurisdiction over Henderson's claims, but affirmed the NNLC's dismissal on the basis of timeliness.

Despite the Tribal Court's dismissal, the plaintiff school district filed a complaint in federal district court requesting 1) declaratory judgment that the Navajo Nation lacks jurisdiction over the plaintiff's employment decisions, and 2) injunctive relief barring Navajo agencies and courts from prosecuting future claims against the plaintiff. *Bd. of Education for the Gallup-McKinley County Schools v. Henderson*, No. 1:15-CV-00604-KG-WPL (D. N.M. Dec. 16, 2015). The district court dismissed the plaintiff's complaint, finding that any conceivable threat of the Navajo Nation exercising jurisdiction over the plaintiff in the future did not rise to the level of a "concrete and particularized injury" necessary to give rise to Article III standing. *Id*.

The Tenth Circuit reviewed the district court's decision de novo and affirmed the dismissal. The Tenth Circuit found that the plaintiff's victory before the NNSC "terminated the legal controversy." *Henderson* at *7. The Tenth Circuit went on to find that the "conjectural and hypothetical possibility that Navajo courts will assert jurisdiction over the school district in the future cannot give rise to standing." *Id*.

The matter addressed by the Tenth Circuit in *Henderson* is analogous to the matter at hand. Like the plaintiff in *Henderson*, Plaintiff in the present matter is attempting to challenge the Tribal Court's jurisdiction over him where there is no longer pending action against him in the Tribal Court. Accordingly, Plaintiff has no cognizable injury under Article III and lacks standing to continue to prosecute his claims.

The Tribal Defendants acknowledge that the claims at issue in *Henderson* were based on any future assertion of jurisdiction by the Navajo Nation over the plaintiff, while the claims in the present matter only expressly pertain to Richita Hackford's claims. However, this distinction only bolsters the Tribal Defendants' argument that Plaintiff's claims do not meet the requirements for Article III justiciability. If the pled threat *any* future assertion of jurisdiction, including but not limited to jurisdiction over claims filed by Henderson, presented nothing more than a hypothetical, conjectural injury, then it stands to reason that the pled claims in the current matter limited to the assertion of jurisdiction under specific circumstances cannot give rise to cognizable injury under Article III either. Moreover, to the extent Plaintiff's claims are limited to those specific claims filed by Richita Hackford, Plaintiff's claims were rendered moot upon the Tribal Court's dismissal of those claims. Therefore, this distinction between the claims in *Henderson* and the claims in the present matter further compels dismissal of the present matter pursuant to Article III.

Another distinction which strengthens the Tribal Defendants' request is the basis for dismissal in the two respective Tribal Court actions. The Tribal Court in *Henderson* found that it possessed subject matter jurisdiction over Henderson's claims; yet, the Tenth Circuit still found that the threat of the Navajo Nation's future assertion of jurisdiction did not meet the minimum requirements under Article III. Here, the Tribal Court dismissed Hackford's complaint, in part, on

the basis that it did *not* have jurisdiction over the non-Indian defendants. If the threat of tribal court jurisdiction does not give rise to an Article III injury where the tribal court has determined that it possesses jurisdiction over the plaintiff, it would be illogical to conclude that the threat of tribal court jurisdiction gives rise to an Article III injury where the Tribal Court has concluded that it lacks jurisdiction over the plaintiff. Thus, the circumstances in the present matter compel dismissal to an even greater extent than in *Henderson*.

WHEREFORE, the Tribal Defendants respectfully request that this honorable Court dismiss the claims against them with prejudice pursuant to Article III of the *United States Constitution*.

Respectfully submitted this 6th day of October, 2017.

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Attorneys for Defendants Ute Indian Tribe and its Business Committee, Ute Court and its Judge, Hon. William L. Reynolds

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2017, I electronically filed the foregoing **MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF,** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Jesse C. Trentadue
Britton R. Butterfield
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, UT 84111
Attorneys for Plaintiff

and to be served by first-class U.S. Mail, postage prepaid, upon the following:

Richita Hackford
820 E. 300 N. (113-10)
Roosevelt, UT 84066
Defendant

/s/ Jeffrey S. Rasmussen

IN THE UTE TRIBAL COURT

UINTAH AND OURAY RESERVATION

STATE OF UTAH

RICHITA HACKFORD,

Plaintiff,

v.

CLARK ALLRED, Attorney for Moon Lake Electric Association, Inc., and GRANT CHARLES, Attorney for Roosevelt City Corporation,

Defendants.

Civil No. CV-16-257

ORDER DISMISSING ACTION

Plaintiff brings the present action against attorneys, Clark Allred and Grant Charles, alleging that Allred represented Moon Lake Electric Association advising the Association that it had jurisdiction to terminate electrical service to her residence on August 2, 2016. It is alleged that Grant Charles represented the City of Roosevelt and advised the City to send her notice that water would be shut off to by August 15, 2016, unless she paid amounts that were past due for water services. Plaintiff's electric and water bills were past due. It is not alleged that either Allred or Charles performed any disconnection services themselves, had any authority to terminate electrical or water service, nor is it alleged that either defendant represented plaintiff. Rather both attorneys are being sued, at most, for advice given to their clients. Defendants move to dismiss.

Over 100 years ago, the United States Supreme Court held that a third party, such as the plaintiff here, not in privity of contract with an attorney, such as Allred or Charles, could not maintain an action against that attorney absent fraud or collusion. Nation Savings Bank v. Ward,

100 U.S. 195, 198, 200, 202 (1879) (proof of employment and the want of reasonable care and skill are prequisites to the maintenance of the action; beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party; person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining the loss). See Schreiner v. Scotbille, 410 NW2d 679 (Iowa 1987); Guy v. Liederbach, 459 A2d 744 (Pa. 1983). Even meritless conduct is not actionable when it comes in the discharge of the attorney's duties in representing a party to a lawsuit. Guthrie v. Buckley, 246 F.Supp.2d 589, 590 (E.D. Texas 2003). There is no fraud or collusion alleged in this case.

It is the general rule that an attorney's liability is limited to some duty owed to a client. 7 Am Jur. 2d, Attorneys at Law, § 167, page 146. Where there is no attorney-client relationship, there can be no breach or dereliction of duty and therefore no liability. McGlone v. Lacey, 288 F.Supp. 662, 666 (D.S.D. 1968). Plaintiff here has no attorney-client relationship with either defendant Allred or Charles. Other jurisdictions have uniformly found an absence of duty and no liability in similar kinds of cases. E.g., Weigel v. Hardesty, 549 P2d 1335 (Colo. App. 1976); Carroll v. Kalar, 545 P2d 411 (1976); Brian v. Christensen, 35 Cal. App. 3d 377 (1973); Friedman v. Dozorc, 268 NW2d 673 (Mich. App. 1978). Some jurisdictions have framed the bar to maintaining an action against attorneys for action or conduct taken in the representation of a client as a litigation privilege. Taylor v. McNichols, 243 P.3d 642, 655 (Idaho 2010)(we find the litigation privilege shall be found to protect attorneys against civil actions which arise as a result of their conduct or communications in the representation of a client related to a judicial proceeding); Kahala Royal Corp. v. Goodskill Anderson Quinn & Stifel, 151 P.3d 732, 748-754 (Haw. 2007)(setting out litigation privilege in multiple jurisdictions). See also Restatement

(Third) of the Law Governing Lawyers, § 572 (2) (A lawyer representing a client in a civil proceeding...is not liable to a non-client for wrongful use of civil proceedings...if the lawyer acts primarily to help the client obtain a proper adjudication of the client's claim in that proceeding).

Courts have held that a party to a lawsuit has no right of recovery against an opposing attorney arising from conduct engaged in as part of that attorney's duties in representing his client. "Under this rule, the dispositive question is whether the attorney's conduct was part of the discharge of his duties in representing a party... . Even meritless conduct is not actionable when it comes in the discharge of the attorney's dues in representing a party." Bradt v. West, 892 SW 2d 56, 73 (Tex. App. 1994). See Lewis v. American Exploration Co., 4 F.Supp.2d 673, 677, 679 (S.D. Texas 1998) (litigation privilege).

Plaintiff has failed to state a claim against Allred and Charles. The claim that an attorney can be sued for no more than advising his or her client cannot be sustained. Christiansen v. West Branch Cmty. Sch. Dist., 674 F3d 927, 9038 (8th Cir. 2012); Friedman v. Dozorc, 268 NW2d 673, 677 (Mich. App. 1978) (failure to state claim against attorney); Guthrie v. Buckley, 246 F.Supp. 2d 589, 591 (E.D. Texas 2003)(failure to state claim under Federal Rules of Civil Procedure 12 (b) (6) suit against attorney).

Even if a claim for relief was set forth against Allred or Charles, which for reasons set forth above there has not been, they are both non-Indians. Under Montana v. United States, 450 U.S. 544, 565-566 (1978), the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe subject to two exceptions. The first exception is where the tribe regulates, "through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members" or over conduct of non-Indians

"when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

There has been no allegation that either Allred or Charles has entered into any kind of consensual relationship with the tribe or its members in the case before the Court or that unless the case was heard by this Court the conduct of defendants would have any effect on the political integrity, economic security, or the health or welfare of the Tribe. Advising a client doing business on the reservation is not entering into a consensual relationship with either the tribe or a member. It is not alleged that either Allred or Charles had any consensual relationship with plaintiff. No physical act by either Allred or Charles on the reservation is alleged and Charles in his complaint in Charles v. Ute Indian Tribe in the United States District Court, District of Utah, 17-CV-00321, states that he has no authority to make any order regarding water service. Indeed it would be next to impossible to hinge any consensual relationship on oral advice given to a client, especially where, as in this case, there has been no claim for relief pled against either defendant. Compare Otoe-Missouria Tribe v. New York Department of Finance, 769 F3d 105, 114-119 (2nd Cir. 2014)(The ambiguity of internet loans and cooperative campaigns). See Macarthur v. San Juan County, 497 F3d 1057 (10th Cir. 2007). There are no facts or argument asserted that unless jurisdiction is assumed the political integrity, economic security, or the health or welfare of the tribe will be threatened.

On a motion to dismiss because of the lack of subject matter jurisdiction, the plaintiff has the burden of establishing jurisdiction by a preponderance of the evidence. Thomson v. Gaskill, 315 U.S. 442, 446 (1942); Superior MRI Servs., Inc. v. Alliance Healthcare Servs., Inc., 778 F3d 502, 504 (5th Cir. 2014). Plaintiff has not established any basis for subject matter jurisdiction

over either Allred or Charles.

For all the above reasons, the claim against defendants Allred and Charles in this case must be dismissed.

Dated June 5, 2017.

BY THE COURT:

Terry L. Pechota
Special Judge, Ute Tribal Court

ATTEST:

Clerk of Courts

(Seal)