

**UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF OKLAHOMA**

KALYN FREE,)	Civil Action No. 18 CV 181 CVE JFJ
Plaintiff,)	
)	
v.)	
)	
KEVIN W. DELLINGER & JUDGE GREGORY H. BIGLER,))	
Defendants.)	

**BRIEF IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT
FOR FAILURE TO EXHAUST TRIBAL REMEDIES**

Comes now the Defendant, Kevin W. Dellinger, and hereby moves this Court for an Order, pursuant to Fed. R. Civ. P. 12(b)(1), dismissing Plaintiff’s Complaint on the grounds that Plaintiff has failed to exhaust her Tribal remedies. In support of this Motion, Defendant would show this Court as follows:

1. On August 16, 2017, Defendant, Stephen Bruner, was charged by the Muscogee (Creek) Nation (“MCN”) way of multi-count felonies with one count of Possession of Unlicensed Gambling Device in violation of MCNCA Title 21 §11-103 and one count of Gambling Premises in violation of MCNCA Title 21 §11-104 (attached hereto as Exhibit “1”) in Case No. CRF-2017-42 of the Muscogee (Creek) Nation District Court (“Criminal Case”).
2. On August 16, 2017, MCN also filed its Complaint for Emergency Ex-Parte Temporary Restraining Order, Preliminary and Permanent Injunctive Relief and Declaratory Judgment seeking to prohibit Defendant Bruner from also taking further action from establishing gaming operations upon property located upon the historical reservation lands of the MCN,

located in Broken Arrow, Oklahoma, and held by Defendant Bruner (the “Bruner Parcel”) (“Civil Case”). (Complaint for Emergency Ex-Parte Temporary Restraining, Preliminary and Permanent Injunctive Relief and Declaratory Judgment (CV-2017-129GB) in the District Court of the Muscogee (Creek) Nation, Okmulgee District, is attached hereto as **Exhibit “2”**). MCN’s Complaint for the Temporary Restraining Order, Preliminary and Permanent Injunctive Relief and Declaratory Judgment is very carefully limited solely to enjoining the further development of a falsely licensed gaming project on the Bruner Parcel. More specifically, MCN’s Complaint seeks only to restrain Bruner from continued development of the property in furtherance of illegal gaming activities, injunctive and declaratory relief, in order to preserve and protect the sovereignty of the MCN over its historical reservation land.

3. On August 17, 2017, Defendant Bruner made his initial appearance in the Criminal Case before MCN District Court with his attorney and was given a copy of the information (Docket Sheet, attached hereto as Exhibit “3”).
4. On November 8, 2017, Plaintiff, Kalyn Free, was served with process with MCN’s Amended Complaint (Plaintiff’s Motion for Preliminary Injunction and Brief in Support filed herein, Dkt. No. 3, Page 11), which added her as a party defendant to the MCN Civil Case.
5. On November 15, 2017, MCN moved to stay the proceedings in the civil action on the basis that Defendant Bruner had inextricably intertwined MCN’s criminal rules and civil rules of discovery in an attempt to use MCN’s civil case as an avenue to obtain impermissible discovery in MCN’s criminal case against Defendant Bruner (Motion to Stay Proceedings and Request for Expedited Hearing attached hereto as Exhibit “4”).

6. The Tribal Court set MCN's Motion to Stay Proceedings and Request for Expedited Hearing for hearing on **November 28, 2017, at 2:30 P.M.** which occurred on that date and time (Order Setting Hearing attached hereto as Exhibit "5").
7. **After the Tribal Court's hearing** on MCN's Motion to Stay Discovery, Plaintiff filed her two-page Motion to Dismiss and Brief in Support on **November 28, 2017, at 3:27 P.M.** (Motion to Dismiss and Brief in Support, attached hereto as Exhibit "6").
8. On December 11, 2017, the Tribal Court issued its Order Granting Plaintiff's Motion to Stay Proceedings (Order attached hereto as Exhibit "7"). Plaintiff has not at any time since requested a hearing on her Motion to Dismiss, nor has she requested leave from the Stay in order to conduct discovery or further litigate her Motion to Dismiss in Tribal Court.
9. On February 22, 2018, Plaintiff filed her Application to Assume Original Jurisdiction and Petition for Writ of Prohibition and Mandamus with MCN's Supreme Court (Free's Application is attached hereto as Exhibit "8"). Without any ruling upon the Tribal Court personal or subject matter jurisdiction with respect to the injunctive and declaratory relief sought by MCN, MCN's Supreme Court denied Petitioner (Plaintiff's) Application, concluding in pertinent part:

The Oklahoma Supreme Court has consistently held that assumption of original jurisdiction by that Court requires a showing that the issue(s) concern the public interest and that an element of urgency, or a need for an early decision, is present. Additionally, the Oklahoma Supreme Court has held that the likelihood of additional costs and/or time to litigate the matter through a lower court does not justify a bypass directly to the Supreme Court. These holdings are consistent with Muscogee (Creek) Nation, Supreme Court precedent. Petitioner must exhaust all legal avenues before the Muscogee (Creek) Nation District Court prior to utilizing the Nation's Appellate Court system. (emphasis added) (footnotes omitted).

Order Denying Petitioner's Application, attached hereto as Exhibit "9".

10. Despite the very clear directive from MCN's Supreme Court, Plaintiff has taken no further action in Tribal Court.

Argument and Authorities

PLAINTIFF HAS FAILED TO EXHAUST HER TRIBAL COURT REMEDIES.

The Tribal Exhaustion Rule requires that **"Absent exceptional circumstances, Federal Courts typically should abstain from hearing cases that challenge Tribal Court jurisdiction until Tribal Court remedies, including Tribal Appellate review, are exhausted."** Thlopthlocco Tribal Town v. Stidham, 762 Fed. 3^d 1226, 1273 (10th Cir. 2014), quoting Crowe & Dunlevy, PC v. Stidham, 640 F.3d 1140 (10th Cir. 2011). The rule is based on strong policy interest recognizing tribal sovereignty including: **"1) furthering Congressional policy of supporting tribal self-government; 2) promoting the orderly administration of justice by allowing a full record to be developed in the Tribal Court; and 3) obtaining the benefit of tribal expertise if further review becomes necessary."** Thlopthlocco, at 1273, citing Kerr-McGee Corp. v. Farley, 115 Fed. 3d 1498, 1507 (10th Cir. 1997).

Because **"the existence and extent of Tribal Courts' jurisdiction will require a careful examination of tribal sovereignty [and] the extent to which that sovereignty has been altered, divested, or diminished...that examination should be conducted in the first instance in the Tribal Court itself."** National Farmer's Union Insurance Companies v. Crow Tribe, 471 U.S. 845, 855-56, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). **"That way, federal courts will have the benefit of a full factual record on the relevant issues and the benefit of the Tribal Court's expertise."** Id. at 856-57, 105 S. Ct. 2447.

Until Plaintiff's jurisdictional challenge is addressed in both MCN's District Court and then MCN's Appellate Review has been presented and is complete, Plaintiff has not exhausted her Tribal Court Remedies. See, Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L.Ed.2d 10 (1987) **"Respect for tribal legal institutions requires that they be given a full opportunity to consider the issues before them and to rectify any errors. The federal policy promoting tribal self government encompasses the development of the entire tribal court system, including appellate courts."** Id. at 16, 17 (Internal quotation marks omitted).

Due to Plaintiff's failure to exhaust her Tribal Court remedies, there is no meaningful record of any decision by the Muscogee (Creek) Nation District Court. With respect to the Appellate record, Plaintiff attaches only to her Complaint the Order from the Muscogee (Creek) Nation Supreme Court. (Original Plaintiff's Exhibit "2", attached hereto as Exhibit "9"). The Muscogee (Creek) Nation Supreme Court's Order instructs Plaintiff to properly exhaust her Tribal Court remedies before appealing her claims to the Muscogee (Creek) Nation's Supreme Court. The MCN's Supreme Court Order explains in pertinent part:

"The Oklahoma Supreme Court has consistently that assumption of original jurisdiction by that court requires a showing that the issue(s) concern the public interest and that an element of urgency, or a need for an early decision, is present. Additionally, the Oklahoma Supreme Court has held that the likelihood of additional cost and/or time to litigate the matter through a lower court does not justify by-pass directly to the Supreme Court. These holdings are consistent with the Muscogee (Creek) Nation, Supreme Court precedent. Petitioner must exhaust all legal avenues before the Muscogee (Creek) Nation District Court prior to utilizing the Nation's Appellate Court system." (footnotes omitted) (emphasis added).

Exhibit 9, Page 2.

Thus, on March 1, 2018, Plaintiff was provided clear direction to exhaust her “**legal avenues**” in the “**Muscogee (Creek) Nation District Court**” before seeking appellate review before the MCN Supreme Court.

Despite that direction, Plaintiff has elected to by-pass MCN’s Tribal Courts altogether and has filed this new action in this Federal Court. In support of her allegations, Plaintiff provides an “**AFFIDAVIT**”, Plaintiff’s Exhibit “3” to her Complaint, which contends, in part, that she has “**no right, title, or interest**” in the Bruner parcel. More importantly, Plaintiff’s Affidavit is not part of the Tribal Record and the litigants in Tribal Court have not had the opportunity to test the veracity of Plaintiff’s assertions contained therein nor conduct any discovery on that issue.

Finally, even a cursory review of MCN’s Amended Complaint filed in the Civil Case (Exhibit “2”) currently pending in Tribal Court reveals that the relief sought by MCN is narrowly tailored to prohibit Plaintiff, and others, from committing “**acts in furtherance of gaming upon the historical reservation lands of the MCN, and protecting such lands from illegal activities.**” By all accounts, the Bruner Parcel is within the restricted historical reservation land of the MCN. Through its Tribal Court Complaint, MCN simply seeks to protect its own sovereignty over said parcel and enforce its own licensing procedures, gaming laws and its gaming compact with the State of Oklahoma. Jurisdiction over the land in question is a matter solely within the province of the Muscogee (Creek) Nation and this Court should honor that sovereignty.

WHEREFORE, premises considered, Defendant Dellinger respectfully requests that this honorable Court dismiss this action, and award this Defendant and other or further relief as this Court deems just and proper.

Respectfully submitted,

s/Terry S. O'Donnell
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CERTIFICATE OF MAILING

I hereby certify that on the 20th day of April, 2018, , a true and correct copy of the foregoing Motion to Dismiss was filed using this Court's CM/ECF system, which will send a Notice of Electronic Filing (NEF) to the following:

James E. Frasier, Esq.
George Miles, Esq.
Steven R. Hickman
Frasier Frasier Hickman
1700 Southwest Blvd.
Tulsa, OK 74107

s/Terry S. O'Donnell