UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION, a federally recognized Indian tribe,

Plaintiff,

vs. 18-cv-00429-LJV

Andrew CUOMO, in his official capacity as Governor of New York;
Eric T. SCHNEIDERMAN, in his official capacity as New York State Attorney General;
Paul A. KARAS, in his official capacity as Acting Commissioner of the New York State Department of Transportation;
Thomas P. DiNAPOLI, in his official capacity as Comptroller of the State of New York; and
The New York State Thruway Authority,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants submit this Memorandum of Law as a reply to Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss (ECF No. 22) and in further support of their Motion to Dismiss (ECF No. 16).

Argument

Point I

PLAINTIFF IS BOUND BY THE SECOND CIRCUIT'S DECISION IN *SENECA NATION OF INDIANS v. NEW YORK*

In their initial motion papers, Defendants outlined why Plaintiff remains bound by the Second Circuit's decision in Seneca Nation of Indians v New York, 383 F.3d 45 (2d Cir. 2004). That decision upheld this Court's decision in Seneca Nation of Indians v New York, Civ. No. 93-cv-688 (W.D.N.Y.), in which this Court ruled that the State of New York was a necessary party to any suit pertaining to the Thruway easement. As Plaintiff concedes, the "Nation previously litigated, and this Court and the Second Circuit previously decided, only the State's Eleventh Amendment immunity and whether the Nation's claim should be dismissed under Rule 19." P's MOL pg. 10. In response to the substance of the instant motion, Plaintiff argues that it is not bound by either *res judicata* or collateral estoppel on this issue. In doing so, Plaintiff argues that for *res judicata* to apply, there must be privity of all parties, asserting that since some of the current Defendants were not named in the prior suit, there is no privity, and therefore, no preclusion based on *res judicata*. Plaintiff also asserts that neither *res judicata* nor collateral estoppel bind it in this action, since failure to join a necessary party is not a dismissal on the merits. Plaintiff further asserts that Defendants are required to bring a formal motion under Fed. R. Civ. P. 12(b)(7), despite the fact that such a motion was brought, and won, over a decade ago. Finally, Plaintiff asserts that by suing Defendants Cuomo, Underwood, and Karas, they have

now corrected the deficiencies of the prior suit. The Court should reject these arguments.

The Plaintiff is simply incorrect in its assertion that, for *res judicata* to apply, all of the parties to the instant action must have been parties to the prior action. In support of this argument, Plaintiff cites to, and accurately quotes, Pike v Freeman, 266 F3d 78 (2d Cir 2001), in which the court stated that for *res judicata* to apply, the party asserting it must show, *inter alia*, that the previous action involved the same parties or those in privity with them. Id. at 91. Plaintiff asserts that this means that the parties must be identical in both the instant and the previous case. That is not the case. The court in Pike cited, as authority, Monahan v NY City Dept. of Corr., 214 F.3d 275, 284-285 (2d Cir 2000), as noted by Plaintiff. The court in Monahan opined that when a defendant asserts *res judicata* against a plaintiff, the defendant must show that "the previous action involved **the plaintiffs** or those in privity with them". Id. (emphasis added). The Court in Monahan cited to Allen v. McCurry, 449 U.S. 90, 94 (1980), where the Supreme Court held that *res judicata* "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Id. *at* 94. There is no assertion or implication in this case law that all the parties must be identical, only that the party against which *res judicata* is asserted must be the same or in privity.

As to the issue of dismissal on the merits, Plaintiff is correct that dismissal for failure to join a necessary party is not a judgment on the merits, but it is preclusive on that one issue. As stated by the First Circuit, discussing a Massachusetts statute very similar to Fed. R. Civ. P. 41(b), the "modern view" is "that issue preclusion does not depend on an earlier adjudication of the substance of the underlying claim; even adjudications such as dismissal for lack of jurisdiction or failure to join an indispensable party, which are expressly denominated by Rule 41(b) as not being 'on the merits,' are entitled to issue preclusive effect." Pisnoy v Ahmed (In re

Sonus Networks, Inc.), 499 F3d 47, 59 (1st Cir 2007); See also Adson5th, Inc. v Bluefin Media, Inc., 2017 Westlaw 298455, *16, n 9 (W.D.N.Y.). Since such a dismissal is without prejudice, the plaintiff may bring a new action if it cures the earlier infirmity. However, the Plaintiff in this case has failed to cure the infirmity. Plaintiff has yet to join a necessary party, that being the State of New York. Suing the Governor and other the individual Defendants in their official capacities does not cure this infirmity since State officials sued in their official capacity are not the State for Eleventh Amendment purposes.[1] Since Plaintiff has failed to correct the fatal flaw of its earlier suit, the absence of the State of New York as a party, the Complaint must be dismissed.

The Plaintiff is also incorrect in its assertion that claims splitting only applies to concurrent law suits, as opposed to suits brought one after the other. "The doctrine of *res judicata*, or claim preclusion, holds that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" Monahan, 214 F.3d at 284-285 (quoting Allen, 449 U.S. at 94 (1980); Clearly, Plaintiff could have sued the Attorney General and Comptroller in their official capacities back in 1993, when it filed Seneca Nation of Indians v New York (W.D.N.Y. Case No. 93-cv-688). It did sue the Governor and Commissioner of the Department of Transportation.

The Plaintiff is also incorrect when it argues that Defendants have failed to properly assert and move on a defense of failure to join a necessary party. Defendants have proven that Plaintiff litigated, and lost, this issue in the prior lawsuit. As shown above, Plaintiff is bound by

[1] It is also worth noting that both the Governor and Transportation Commissioner of the State of New York actually were defendants in the prior case, in their official and personal capacity (See ¶¶ 7, 11, and 14 of the Second Amended Complaint from that action, attached as exhibit A to the declaration of George Michael Zimmermann, submitted herewith). This did not prevent the Second Circuit from dismissing the plaintiff's claims regarding their Thruway in its entirety.

this ruling and precluded from litigating the issue anew. Requiring the Defendants to bring an entirely new motion on the issue of whether the State of New York is an indispensable party would be the height of absurdity.

Point II

PLAINTIFF'S COMPLAINT DOES NOT ALLEGE AN ONGOING VIOLATION OF FEDERAL LAW NOR DOES IT SEEK RELIEF PROPERLY CHARACTERIZED AS PROSPECTIVE

It is well settled that "[i]n determining whether the doctrine of Ex Parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 645 (2002) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment). On this, the parties herein agree. However, the inquiry is not so straightforward in a case such as this, where the Plaintiff seeks to circumvent the State's Eleventh Amendment sovereign immunity by trying to squeeze a claim based on an alleged past violation of federal law into the Ex Parte Young exception. See Edelman v. Jordan, 415 U.S. 651, 667 (1974) ("[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex Parte Young will not in many instances be that between day and night."). Nevertheless, a close examination of the facts alleged and the relief sought in the Complaint demonstrates that Plaintiff's claims are clearly barred by the State's Eleventh Amendment sovereign immunity.

A. Plaintiff Does Not Allege An Ongoing Violation Of Federal Law

Federal "…courts have not read Ex parte Young expansively. A plaintiff properly invokes the Ex parte Young exception only when state officials are 'actively violating federal

law or imminently threatening acts that the plaintiff challenges as unconstitutional.'" HealthNow v. New York, 739 F.Supp.2d 286, 294 (W.D.N.Y. 2010) (quoting Goodspeed Airport, LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n, 632 F.Supp.2d 185, 188 (D.Conn.2009)) (internal citations omitted). Thus, for example, in Knight v. State of New York, 443 F2d 415 (2d Cir. 1971), the Second Circuit held that a Plaintiff seeking to challenge the appropriation of his land by the Commissioner of Transportation for construction of a highway was barred by the State's Eleventh Amendment immunity because title to the land vested in the State upon its filing of the necessary appropriation documents and, therefore, the relief sought would require the State to take affirmative action to remedy the complained of conduct. Similarly, in National RR Passenger Corp. v. McDonald, 978 F. Supp.2d 215 (S.D.N.Y. 2013), the Southern District, relying on Knight, held that the plaintiff's claim against the Commissioner of Transportation was barred by the State's Eleventh Amendment immunity because it did not allege on ongoing violation where title to property taken by eminent domain had already vested.

In the instant case, Plaintiff argues that its Complaint does allege an ongoing violation of federal law because of the Defendants continued operation of the Thruway without a valid easement is a continuing violation of various federal statutes and regulations, and the SNI's treaty rights. However, the gravamen of Plaintiff's complaint with respect to an alleged violation of federal law is that the State of New York, not these Defendants, violated federal law whenit obtained the Thruway easement without first obtaining the consent of the Secretary of the Interior, as required by various federal statutes and regulation existent at the time. From this original transgression springs forth the Plaintiff's allegation that the State does not have a valid easement, but that moment in time has long since passed. Thus, the Defendants are not actively violating federal; it is only the State of New York that is alleged to have done so in the past.

Moreover, it is beyond question that at the moment the closing on the easement took place and it was filed in the Clerk's Office, Plaintiff conveyed a property interest in the easement to the State. To be sure, Plaintiff is now challenging the validity of that property interest, but it has not yet been extinguished. Accordingly, the reasoning of Knight and McDonald, supra, control and there is thus no ongoing violation alleged.

B. Plaintiff Does Not Seek Relief Properly Characterized As Prospective

In opposition to the motion, Plaintiff's argue that the Supreme Court's decision in Papasan v. Allain, 478 U.S. 295 (1986), forecloses Defendants argument that the nature of the relief sought is retrospective. Papasan, rather than foreclose Defendants' argument, actually highlights the fact that the relief Plaintiff seeks is retrospective in nature. In Papasan, school children and local school officials sued the State of Mississippi challenging the state's distribution of public school land funds. The plaintiffs' alleged that the state's past sale of certain school lands and unwise investment of the proceeds had abrogated the state's trust obligation to hold those lands for the benefit of the districts schoolchildren in perpetuity. Based on these allegations, the plaintiffs sought various forms of relief for breach of the trust and for denial of due process. The Court ruled that the Eleventh Amendment did not bar the plaintiffs' equal protection claim because the complaint alleged "…a present disparity in the distribution of the benefits from [state law]" and that "the essence of the equal protection allegation was in the present disparity and not the past actions of the state." Id. at 282. However, the Court ruled that the plaintiffs' claims based on an alleged past breach of trust were barred by the state's Eleventh Amendment immunity. Those claims sought a declaration that the state legislation implementing the past sale of lands was void and unenforceable, and as relief the establishment of a fund by the state in a suitable amount to be held in held in perpetual trust for the benefit of plaintiffs; or, in

the alternative, making available to plaintiffs land of the same value as the land sold in the past. The Court reasoned that the plaintiffs' requested relief for the officials' breach of their continuing obligation to comply with the trust payment obligations was "in substance the award, as continuing income rather than as a lump sum, of an accrued monetary liability." Id. at 280–81 (citations, emphasis omitted).

Like the plaintiffs in Papasan, the Plaintiff here seeks relief that, although labeled injunctive and prospective, is more akin to damages for a past wrong. Essentially, what the Plaintiff is seeking here is for the Court to order Defendants to renegotiate the terms an easement entered into sixty-four years ago that they view as monetarily inequitable as an award, in continuing income rather than a lump sum, to compensate them for an accrued monetary liability.

Another aspect of the relief that Plaintiff seeks that makes it improper is that it seeks relief that the Defendants do not have authority to give them. The Ex parte Young "exception to sovereign immunity only authorizes suits against officials with the authority to provide the requested relief." Siani v. State Univ. of N.Y. at Farmingdale, 7 F.Supp.3d 304, 317 (E.D.N.Y. 2014). While the Court could order the Defendants to seek to renegotiate the terms of the easement, whether those terms would "… equitably compensate the Nation pro rata for the future use of its lands…" (Complaint ¶4), would be up to Plaintiff, and would be subject to approval by the legislature.

Point III

COEUR D'ALENE IS CONTROLLING IN THIS CASE

Plaintiff attempts to minimize the fatal impact that the Supreme Court's ruling in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), has on its claims in this case by isolating it

factually to submerged lands and arguing that its impact was limited by the Court's subsequent decision in Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland, 535 U.S. 635 (2002). That Coeur d'Alene is still good law is evidenced by the fact that the Second Circuit relied on it in Western Mohegan Tribe and Nation v. Orange County, 395 F.3d 18 (2nd Cir. 2004), which was decided two years after Verizon. The only effect that Verizon had on Coeur d'Alene was that it put to rest the majority opinion's aberrational framework for applying Ex Parte Young (i.e. "a careful balancing and accommodation of state interests" using a "case-by-case balancing approach." Coeur d'Alene, 521 U.S. at 293).

To the contrary, the reasoning behind Coeur d'Alene is still vital in Eleventh Amendment jurisprudence. In order for the reasoning of Coeur d'Alene to apply an action must challenge a state's property interest in land and seek to intrude on the states special sovereignty interests. In Coeur d'Alene Idaho's special sovereignty interests was control over and regulation of submerged lands. In Western Monegan Tribe it was also the state's regulatory jurisdiction over the contested land. In this case, it is the State's ability to regulate its public thoroughfares and traffic thereon. See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523 (1959) ("The power of the State to regulate the use of its highways is broad and pervasive."); Hutley v.N.Y.S. Thruway Authority, 139 Misc.2d 868, 869 (N.Y. Ct. Cl. 1988) ("The regulation of public thoroughfares and traffic thereon… is a governmental function which is the exclusive province of the sovereign.").

Point IV

THE ACTION SHOULD BE DISMISSED FOR FAILURE TO TIMELY COMMENCE IT

In their initial motion papers, Defendants showed that Plaintiff has rested on whatever claim it has to challenge the propriety of the lease which it granted to the State of New York

back in October of 1954. As a result, Defendants and the State of New York have been prejudiced and the Complaint should be dismissed pursuant to the doctrine of laches. In response to that motion, Plaintiff argues that the defense of laches is an affirmative defense that cannot be asserted in a Motion to Dismiss, and that Plaintiff was not required to refute a laches defense in the Complaint. Plaintiff also assert that laches does not apply in Indian land claim cases[2]. Plaintiff further points out that some of the cases cited by Defendants in their Memorandum of Law involve delays longer than the sixty some odd years of delay at issue in this case. Finally, plaintiff asserts that the Complaint does not contain the prejudice (or "disruption") evident in those cases. These arguments cannot defeat the instant motion.

Defendants acknowledged in their moving papers that the meritorious assertion of an affirmative defense in a Fed. R. Civ. P. 12 motion is rare. However, there are cases where it can be brought "if the defense appears on the face of the complaint". See Pani v Empire Blue Cross Blue Shield, 152 F3d 67, 74 (2d Cir 1998). This is one of those cases. The Complaint shows both a lack of Plaintiff's diligence and prejudice to Defendants, especially to the New York State Thruway. The Complaint itself alleges the importance of the highway infrastructure that has been erected within the three mile long, three-hundred acre easement granted by plaintiff to the State[3]. Complaint ¶¶ 15, 30, 36, and 38. It also alleges the gathering of tolls by the Thruway and the motorists who "continuously" use and rely on the highway connecting Buffalo, New York, to the State of Pennsylvania, all of which would be disrupted by the instant action. Id. The

[2] Plaintiff also asserts that "state-law time bars" are also inapplicable to Indian land claims, something that defendants never asserted. MOL pgs. 16 – 20; and P's MOL pg. 20.

[3] Plaintiff makes the erroneous argument that since all facts alleged in a Complaint are taken to be true on a Motion to Dismiss, Defendants are conceding the illegitimacy of the lease in question. This is not the case, of course, since the legitimacy of the lease is a question of law and Defendants are not bound by conclusions of law asserted in the Complaint. Ashcroft v. Iqbal, 556 U.S. 662, 677-79 (2009).

Complaint even describes the Thruway as being a part of the national "unprecedented, large-scale highway construction" which was occurring in the 1950's. Complaint ¶ 24. In addition, the Court can take judicial notice of the size, importance, and expense of the highway infrastructure which has been constructed on the easement section of the Thruway, which is visible to the naked eye. Federal Rule of Evidence 201; see also Cayuga Indian Nation v Cuomo, 1999 US Dist LEXIS 10579, at 97-98 (NDNY 1999) ("Putting aside costs, rerouting the Thruway would have almost unthinkable consequences in terms of intrastate and interstate commerce."). Plaintiff points to the decision of the court in Canadian St. Regis Band of Mohawk Indians v. New York, 2013 U.S. Dist. LEXIS 112860 (N.D.N.Y. not to apply laches to a claim regarding a power-line right of way; however, a power-line right away is not the same as an interstate highway. Further, while Plaintiff may not be required to refute an affirmative defense in their Complaint, it is also not required to plead with novelistic detail the facts of the case. That it did, and that a laches defense can be proven by those facts, is not the fault of Defendants.

Whether or not the defense of laches can be applied to claims brought pursuant to the Non-Intercourse Act (25 USCS § 177) regarding liability, it is clear that laches is available to "bar long-dormant claims for equitable relief." City of Sherrill v Oneida Indian Nation, 544 US 197, 217 (2005) (citing Badger v. Badger, 69 U.S. 87 (1865)). This is especially important here, since, as discussed above, if equitable remedies are unavailable to Plaintiff due to latches, the official capacity claims against the individual defendants under Ex. Parte Young are meritless. Equitable laches is a defense available in the instant action, and the facts alleged in the Complaint are sufficient for the Court to grant dismissal based on that defense.

CONCLUSION

Defendants are entitled to a judgment dismissing the Complaint in its entirety.

DATED: Buffalo, New York
September 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2018, I electronically filed the forgoing Memorandum of Law and declaration of George Michael Zimmermann, in this matter, with the Clerk of the District Court using its CM/ECF system and thereby provided service on the following CM/ECF participant:

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