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;
Letitia JAMES, in her 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.

DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE HUGH B. SCOTT

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PRELIMINARY STATEMENT

The Defendants, Andrew Cuomo, Letitia James, Paul A. Karas, Thomas P. DiNapoli, and the New York State Thruway Authority, submit this response to the plaintiff's Objections (ECF No. 32) to the Report and Recommendation ("R&R") of Magistrate Judge Hugh B. Scott, recommending that the Defendants' Motion to Dismiss be granted (ECF No. 29). For the reasons that follow the Plaintiff's objections should be overruled and the R&R adopted in its entirety.

This case was commenced on April 11, 2018, by the filing of the Complaint (ECF No. 1). The Complaint concerns an easement that the State of New York obtained from the Plaintiff for 300 acres of land, over which the Thruway Authority constructed a section of the New York State Thruway, as part of the federal interstate highway system. The Plaintiff alleges that this easement was invalid *ab initio* due to the failure of the State to obtain certain approvals from the Secretary of the Interior, alleged to be required by Federal law. The validity of this very easement was the subject, *inter alia*, of a prior suit brought by the Plaintiff in 1993, against various defendants, including the State of New York, the Governor of the State of New York (in both his individual and official capacities), the Thruway Authority, and the Commissioner of the New York Department of Transportation (also in his individual and official capacities) (ECF No 23-1, Ex. A ¶¶ 7, 11, and 14). That aspect of the prior law suit was resolved by the Second Circuit Court of Appeals, which ruled that the State of New York was an indispensable party to that suit, because it owns the right of way, which was purchased from the Plaintiff. Seneca Nation of Indians v New York, 383 F.3d 45, 48 - 49 (2d Cir. 2004). The Second Circuit further ruled that New York's Eleventh Amendment immunity prohibit its being sued in Federal Court and dismissed the Plaintiff's claims as to the Thruway easement. Id.

The Complaint in the case at bar lists three claims. The first is for an injunction "requiring that the Defendants (except the Comptroller) obtain a valid easement" for the portion of the Thruway that runs across Seneca lands. In the alternative, the Plaintiff seeks "an order enjoining the Defendants (except for the Comptroller) from collecting tolls" for that portion of the Thruway. The second claim seeks an injunction requiring that the Comptroller "segregate and hold in escrow" future tolls which are attributable to that portion of the Thruway. The third claim requests judgment declaring that the current easement is invalid, and directing "that some of the funds being collected by the Thruway and being deposited with the Comptroller on a continuing basis" are in violation of Federal Law.

On June 5, 2018, the Defendants moved to dismiss the Complaint on several grounds, including issue preclusion, Eleventh Amendment Immunity, and Latches (ECF No. 16). On December 19, 2018, Judge Scott issued the R&R, recommending that the Motion to Dismiss be granted, finding the 2004 decision of the Second Circuit to be binding on the Plaintiff, and that the State of New York, as owner of the easement, is a necessary party without whom the case could not go forward. Further, since the State did not waive its immunity to suit in Federal Court, the case must be dismissed for failure to join a necessary party under Fed. R. Civ. P. Rule 19.

Plaintiff has now filed Objections to the R&R, asking this Court to reject the recommendation of the R&R to dismiss the Complaint on the ground of issue preclusion (ECF No. 32, pg. 1). It further asks this Court to find that the R&R improperly declined to accept as true all of the well plead factual allegations (and favorable inferences therefrom) as required on a motion to dismiss, and its finding that the Nation had failed to adequately plead claims seeking

prospective relief for ongoing violations of federal law under Ex parte Young, 209 U.S. 123, 160 (1908). Id. The Court should reject these objections.

ARGUMENT

Point I

PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION DO NOT COMPLY WITH THE COURT'S LOCAL RULES AND SHOULD BE DISMISSED

Local Rule 72(b) requires that objections to a Magistrate Judge's R&R "specifically identify the portions of the proposed findings and recommendation to which objection is made and the basis for each objection, and shall be supported by legal authority." L.R.Civ.P. 72(b). This Court has explained that "[t]he purpose of the Federal Magistrates Act is 'to increase the overall efficiency of the federal judiciary.' Local Rule 72 promotes this goal by requiring parties to identify for the district court those parts of a report and recommendation that might be incorrect. As a consequence, '[f]ailure to abide by the Local Rule[ ]" 72 is 'reason enough to dismiss [Plaintiff's] objections.'" Mineweaser v. City of North Tonawanda, 2016 WL 3279574, 1 (W.D.N.Y.) (quoting Camardo v. General Motors Hourly-Rate Employees Pension Plan, 806 F. Supp. 380, 382 (W.D.N.Y. 1992)). See also Galvin v. Kelly, 79 F. Supp. 2d 265, 267 (W.D.N.Y. 2000) (failure to comply with the requirements of Local Rule 72 justifies dismissal of objections).

Local Rule 72's specificity requirement is also meant to force the objecting party to focus on the part or parts of the R&R that it legitimately has objections to and to not allow the party to simply ask the District Court judge to wade through all of the arguments made on the motion. Thus:

> It is improper for an objecting party to attempt to relitigate the entire content of the hearing before the Magistrate Judge by submitting papers to a district court

> which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge. Clearly, parties are not to be afforded a "second bite at the apple" when they file objections to a Report and Recommendation, as the "goal of the federal statute providing for the assignment of cases to magistrates is to 'increas[e] the overall efficiency of the federal judiciary.' " McCarthy v. Manson, 554 F.Supp. 1275, 1286 (D.Conn.1982), aff'd, 714 F.2d 234 (2d Cir.1983) (quoting Nettles v. Wainwright, 677 F.2d 404, 410 (Former 5th Cir.1982) (en banc)) (footnote omitted). "The purpose of the Federal Magistrates Act is to relieve courts of unnecessary work." Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir.1980). There is no increase in efficiency, and much extra work, when a party attempts to relitigate every argument which it presented to the Magistrate Judge.

Camarado, 806 F. Supp. at 382.

In the instant case, the Plaintiff's Objections to Magistrate Judge Scott's R&R are primarily a rehashing of all of the arguments Plaintiff made in opposition to Defendants' Motion to Dismiss. Central to the Magistrate Judge's conclusion that Plaintiff's action is barred by issue preclusion was his conclusion that, after reviewing the archived file of the 1993 case and the Second Circuit opinion, the following issues had been definitively resolved:

> 1) The Thruway Easement exists, and the documentation establishing it appears to be at least facially valid. The Court infers that the Second Circuit would not have wasted its time discerning ownership of the easement if the related documentation did not have the necessary signatures and at least appear to be in order.
>
> 2) The State of New York owns the Thruway Easement.
>
> 3) Any attack on the validity of the Thruway Easement is an attack on its owner's rights, meaning that the State of New York must have an opportunity to appear and to defend its rights.
>
> 4) Since the United States either has not been asked to intervene or has declined to intervene on behalf of the Seneca Nation, the State of New York cannot appear here because of sovereign immunity.

R&R at 15-16. Based on these definitely resolved issues, the Magistrate Judge concluded that "… every argument about ongoing violations or about directing state officials under Ex parte

Young ultimately comes back to these four points." Id. at 16. Yet, nowhere in Plaintiff's twenty-five pages of Objections does it challenge the notion that the four above cited issues have been definitively resolved or what that means to the viability of its lawsuit. Instead, the only place it even references the central findings of the R&R is in the "Background" portion of its Objections, where it argues that the Magistrate Judge "neither distinguished nor cited the Nation's proffered authority establishing that a Rule 19 failure to join an indispensable, immune party may be cured by suing the state officials responsible for the ongoing federal-law violation under Ex parte Young." (ECF No. 32, pg. 8). With that, Plaintiff is off to the races attempting to relitigate every argument presented to the Magistrate Judge, including those made regarding whether the Complaint seeks prospective injunctive relief, whether there is an ongoing violation of federal law, and whether Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) applies to this case, none of which were even addressed by the Magistrate Judge in the R&R. While Plaintiff may be correct that a Rule 19 failure to join an indispensable, immune party can be cured by suing state officials in their official capacity for prospective injunctive relief, that argument ignores the central ruling in the R&R that it cannot be done in this case because of the various preclusive issues that were resolved as a result of the 1993 litigation. If Plaintiff had wanted to cure this infirmity in its case, it should have done so in the 1993 litigation. Having already litigated the four issues cited by the Magistrate Judge, it is precluded from doing so again in this case, and should not be permitted what would essentially be a third bite at the apple on its Objections to the R&R.

To the extent that the Court entertains those arguments in the Objections that were not addressed in the R&R, Defendants rely on their arguments in support of the Motion to Dismiss (ECF Nos. 16 and 23). The remainder of this brief is limited to addressing the issues discussed both in the R&R and the Plaintiff's Objections.

Point II

THE REPORT AND RECOMMENDATION CORRECTLY CONCLUDES THAT THIS SUIT IS BARRED BY ISSUE PRECLUSION

With regard to the issue that the R&R did address, the Plaintiff argues in its Objections that issue preclusion is not proper since, it claims, the instant suit is against different defendants, for different relief, under a different legal theory than the prior law suit concerning the Thruway easement (ECF No. 32, pg. 7 and 9). This argument can be rejected out of hand. Initially, it is undisputed that the Governor, the Commissioner of the Department of Transportation, and the Thruway Authority were all sued in the prior case (ECF No. 23-1, Ex. A ¶¶ 7, 11, and 14). To the extent that the Plaintiff maintains that the only defendants named in the specific claim regarding Thruway easement were the Thruway Authority and the State, that is of no moment since it is clear evidence that the Plaintiff could have named them on that claim. Issue preclusion applies not only to those claims that were actually litigated, but also to those claims that the party could have made in a prior proceeding. East Coast Novelty Co., Inc. v. City of New York, 781 F.Supp. 999, 1005 (S.D.N.Y., 1992); Grant v United Fedn. of Teachers, 2014 US Dist. LEXIS 32616, at *14 - 15 (E.D.N.Y., 2014); PPC Broadband, Inc. v Corning Gilbert, Inc., 2013 US Dist. LEXIS 165480, at *3 - 4 (N.D.N.Y. 2013); and Cameron v Church, 253 F Supp 2d 611, 619 (S.D.N.Y. 2003). The same is true for Plaintiff's claim that the instant case presents novel theories that the Second Circuit did not consider. Under this argument, the Plaintiff could continue to sue, and lose, and bring yet more cases, every time a new theory of liability is thought of. This is simply not the state of the law and issue preclusion applies to any claims that "were or could have been raised." Id. See also Greenwich Life Settlements, Inc. v Viasource Funding Group, LLC, 742 F Supp. 2d 446, 453 (S.D.N.Y. 2010).

It is also not the case that the current case requests entirely different relief than the 1993 suit. The current suit requests a declaration that the Defendants "are violating Federal Law by not obtaining a valid easement" for the disputed section of the Thruway (ECF No. 1, Prayer for Relief, ¶ 3). The prior suit requested a declaration that the easement "is null and void" (ECF No. 23-1 Ex. A, Prayer for Relief ¶ 2 D). However, clever wordsmithing does not change the fact that the Plaintiff seeks now what it sought in 1993, a finding that the easement is invalid. Nor does it change the fact that the Second Circuit ruled that it could not obtain this relief in Federal Court without the presence of the easement's owner, the State of New York.

As to the issue of dismissal on the merits, Plaintiff is incorrect in asserting that dismissal for failure to join a necessary party does not have preclusive effect on that specific 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 F.3d 47, 59 (1st Cir. 2007). See also Adson5th, Inc. v Bluefin Media, Inc., 2017 WL 298455, at *16, n 9 (W.D.N.Y. 2017); New Phone Co. v NY City Dept. of Info. Tech. & Telecom., 2011 US Dist. LEXIS 146387, at *22 (E.D.N.Y. 2011). Any other interpretation would allow an unsuccessful plaintiff to repeatedly return to court, forcing defendants to recreate summary judgment motions, over and over again. In addition, issue preclusion does not require privity off all parties, only the party against which it is being asserted. See Grant, 2014 US Dist. LEXIS 32616, at *14 – 15; Greenwich Life Settlements, 742 F. Supp. 2d at 453. The long and the short of the matter is that the R&R correctly recommends

that the Plaintiff be prevented from relitigating a claim that was thoroughly litigated a decade and a half ago, including discovery and dispositive motions, resulting in opinions from a Magistrate Judge to the Second Circuit Court of Appeals, and a denial of *certiorari* to the Supreme Court.

Point III

THE REPORT AND RECOMMENDATION CORRECTLY DECLINES TO ACCEPT AS TRUE THE LEGAL CONCLUSIONS CONTAINED IN THE COMPLAINT

In its Objections, the Plaintiff correctly points out that, in deciding a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must consider all of the factual allegations as true for the purpose of the Motion (ECF No. 32, pg. 17); See also Ashcroft v. Iqbal 129 S.Ct. 1937, 1949 - 1950 (2009). In fact, the R&R does accept all of the Complaint's factual allegations as true. However, this does not extend to the validity of the challenged easement. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Id. at 1950 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). This very distinction was addressed in the R&R directly, where seven examples of legal conclusions couched as factual allegations regarding the validity of the easement were listed. R&R at 3. The Plaintiff's argument that the Complaint's assertions that the easement is void *ab initio* should be taken as fact is clearly incorrect. If the easement is somehow compromised, it is so as a matter of law, not fact. Put another way, the existence of the easement may be categorized as a factual assertion, the validity of the easement cannot. This is because the allegations in the Complaint that the easement is in violation of Federal Law, and therefore a nullity, is a legal conclusion not a factual one and the R&R was correct not treat it as fact. R&R at 3. In fact, by asking this Court to declare that the Defendants have not obtained a valid easement, Plaintiff is conceding that this is a legal issue.

See 28 USC § 2201 (a) (the court "…may declare the rights and other legal relations of any interested party seeking such a declaration… ."). See also ECF No. 1, Prayer for Relief, invoking 28 USC § 2201.

Finally, in furtherance of its argument, Plaintiff asserts that in her Report and Recommendation in the earlier case, Magistrate Judge Heckman "found" that New York had failed to follow Federal law in obtaining the easement (ECF No. 32, pg. 1). In fact, Magistrate Judge Heckman only recommended such a finding, a finding that was not adopted by the District Court. Seneca Nation of Indians, 383 F.3d at 46 – 47. This, therefore, has no bearing on the instant Motion.

In deciding this Motion the Court should not take the Complaint's legal conclusions as facts, since that is not the standard for resolving a Motion to Dismiss.

CONCLUSION

This Court should adopt the Report and Recommendation of Magistrate Judge Hugh B. Scott in its entirety and dismiss the Complaint.

DATED: Buffalo, New York
February 7, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, I electronically filed the forgoing, 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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