

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

LESLIE ROMERO,)	
)	
Plaintiff,)	Case No. 5-16-cv-05024-JLV
)	
V.)	
)	
WOUNDED KNEE, LLC dba SIOUX-PREME)	
WOOD PRODUCTS, a South Dakota limited)	
liability company, WOUNDED KNEE)	
COMMUNITY DEVELOPMENT)	
CORPORATION, a South Dakota corporation,)	
)	
Defendants.)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

PRELIMINARY STATEMENT

Defendant Wounded Knee Community Development Corporation (WKCDC) submits this Memorandum of Law in Support of the Motion to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) based upon Defendant's sovereign immunity privilege. Fed. R. Civ. P. 12(b)(1) provides that a party may assert a defense of lack of subject-matter jurisdiction by Motion. The Court issued a Scheduling Order¹ for discovery however, as of the date below discovery has not occurred.

ARGUMENT AND AUTHORITIES

Defendant Wounded Knee Community Development Corporation is Immune from Suit under the Doctrine of Tribal Sovereign Immunity.

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The U.S. Supreme Court has consistently held that a tribal government enjoys sovereign immunity from suit and cannot be sued unless the tribal government waives its immunity and consents to the suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

In *American Indian Agricultural Credit Consortium, Inc., Appellee, v. Standing Rock Sioux Tribe, Standing Rock Sioux Tribal Council, Chairman of the Standing Rock Sioux Credit Committee, Appellants*, 780 F.2d 1374 (8th Cir. 1985) the Court referenced the U.S. Supreme Court's holding in *Santa Clara Pueblo v. Martinez*² which "reaffirmed the long-standing rule that a waiver of the sovereign immunity from suit traditionally enjoyed by Indian tribes 'cannot be implied but must be unequivocally expressed.'³" The Court concluded that "nothing short of an express waiver satisfies the Santa Clara Pueblo standard."

In *Equal Employment Opportunity Commission v. Fond Du Lac Heavy Equipment and Construction Co., Inc., and Fond Du Lac Band of Lake Superior Chippewa*, 986 F.2d 246 (8th Cir. 1993), the Court observed that the facts in the case was an employment dispute and strictly an internal tribal matter. The Defendant tribal construction company was owned by the Defendant Tribe. "The dispute is between an Indian applicant and an Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation. Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe." Further, the Court stated that tribal

² *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)

³ *Id.* at 58, 98 S. Ct. at 1677.

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employment matters at “the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe’s self-government”⁴

As outlined in WKCDC prior brief in the above-captioned matter,⁵ the U.S. Department of Agriculture designated the Oglala Sioux Tribe a Round II Empowerment Zone⁶ for economic stabilization of the Oglala Sioux tribal members. To carry out the goals of the designated empowerment zone, the Oglala Sioux Tribe created the tribal chartered organization Oglala Oyate Woitanacan (OOW) Empowerment Zone which Board included one member from each of the nine district community task forces. When the empowerment zone designation period ended and the tribe’s agreement with U.S. Department of Agriculture expired, the Wounded Knee Task Force became the Wounded Knee District Community Development Corporation and all Wounded District Knee Task Force equipment and assets became the property of Wounded Knee Community Development Corporation. The mission goals of the original Wounded Knee Task Force remain the same under the Wounded Knee Community Development Corporation.

The Articles of Incorporation of the Wounded Knee District Community Development Corporation⁷ outline the status of the tribal corporation at Article III as follows:

“3.1 The Corporation is a legal entity of the WOUNDED KNEE DISTRICT COMMUNITY DEVELOPMENT CORPORATION a federal recognized American Indian Tribe, with a distinct and separate existence from that of the Tribe and is created by and for the WOUNDED KNEE DISTRICT, a

⁴ Id. at 59. “Even in matters involving commercial and domestic relations, we have recognized that ‘subject[ing] a dispute arising on the reservation among reservation Indians’ to a forum other than their own may undermine the authority of the tribal court and ‘infringe on the right of the Indians to govern themselves.’” (emphasis added and citations omitted)

⁵ Document 42 Filed 09/28/17 Page 1 of 10 Page ID #: 144

⁶ The Oglala Sioux Tribe was designated a Round II Empowerment Zone under the Department of Agriculture in 2000 in order to combat extreme poverty, unemployment and general economic distress on the Pine Ridge Indian Reservation through federal various tax incentives and other federal program incentives. The Round II Empowerment Zone designation and program expired in 2010.

⁷ Articles of Incorporation were amended on February 02, 2011 to change the name of Wounded Knee District Community Development Corporation to Wounded Knee Community Development Corporation. The Articles have not yet been revised to reflect the change in the corporation’s name.

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constitutionally recognized political district of the OGLALA SIOUX TRIBE, Pine Ridge Indian Reservation, SD.

3.2 The Corporation is vested with the sovereign immunity of the Tribe. The WOUNDED KNEE DISTRICT – COMMUNITY DEVELOPMENT CORPORATION expressly reserves all its inherent sovereign rights, privileges, and immunities as a federally recognized Indian tribe with respect to the creation, existence and activities of the Corporation, including the Tribe's immunity from suit in any Court. Nothing in this Ordinance and Charter shall be deemed to be a waiver of sovereign immunity from suit by the Tribe, or of any officer, official, employee or agent of the Tribe, or to be a consent of the Tribe, either express or implied, to the jurisdiction of the United States, or of any state, or of any other government, with regard to the business or affairs of the Corporation, or of the WOUNDED KNEE DISTRICT – COMMUNITY DEVELOPMENT CORPORATION, or to any cause of action, case or controversy.

3.3 The Corporation, acting by and through its Board of Directors, may waive sovereign immunity only as applicable to the Corporation. Any waiver of sovereign immunity shall be effective only upon written resolution, on advice of counsel, and may not be general in nature, but shall be specific and limited, as applicable to duration, grantee, transaction, property or funds, court jurisdiction and or law to be applied.

3.4 Any waiver of the Corporation's sovereign immunity is not intended to be nor shall it be construed as a waiver of the sovereign immunity of the Oglala Sioux Tribe – Wound Knee District, nor shall any such waiver create a liability of the part of the WOUNDED KNEE DISTRICT – COMMUNITY DEVELOPMENT CORPORATION for the debts or obligations of the Corporation. Any exercise of the Corporation's authority to sue or to be sued shall not be construed to operate as consent to suit by or against, or to attachment of assets of the WOUNDED KNEE DISTRICT – COMMUNITY DEVELOPMENT CORPORATION."

Defendant WKCDC as a tribal entity and arm of the Oglala Sioux (OST) tribal government and organized as a chartered corporation under the OST Constitution and Bylaws. WKCDC's sovereign immunity privilege is codified in the OST Business Code. As such, the tribe's immunity from suit extends to WKCDC.

OST Ordinance 07-25, adopted by the OST Tribal Counsel on July 30, 2007, enacted Part 3- Tribal Entities Code to Chapter 44 of the OST Business Code at §44-3-1.01 and provides:

"The provisions of this Part 3 ("Act") shall apply to each tribal entity formed

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under the laws and sovereign powers of the Tribe, whether before or after the passage of this Part.”

The purpose of the Act at §44-3-1.01(3) and (4) is

“to address the status of Tribal sovereign immunity with respect to tribal entities, as required by economic and governmental necessity” and “to provide for insulation of tribal economic entities from shifts of policy of tribal politics.

Defendant WKCDC is a “tribal entity” and classified as “OST entity” as defined in §44-3-1.03 as follows in relevant part:

A “tribal entity” includes any ... corporation ... formed by the Tribe by ... a District by the authorized governing body thereof pursuant to the authority of the Tribal Constitution and Bylaws for economic ... purposes.”

The Act differentiates tribal entities into two groups depending on the source of their formation. An “OST Entity” is defined as “a Tribal entity formed by the Tribal Council” while a “District Entity” is defined as “a Tribal entity formed by a District’s authorized governing body.” Defendant WKCDC is a District Entity formed by the governing body of the community District of Wounded Knee.

Under §44-3-1.04(a) an “OST entity created pursuant to the sovereign powers of the Tribe shall be deemed to be a subordinate arm of the government of the tribe and shall be entitled to all the privileges and immunities of the Tribe. §44-3-1.04(b) contains a similar provision for a district entity created pursuant to the sovereign powers of a District, (i.e., WKCDC).

44-3-1.06(a)(i) provides:

“An OST entity is clothed by federal law with all the privileges and immunities of the Tribe, except as specifically limited by the tribal entity charter, including sovereign immunity from suit in any state or federal court, or the tribal court (except pursuant to Section 44-3-1.04(c)⁸). Nothing in this Part 3 shall be deemed or construed to be a

⁸ OST Business Code §44-3-1.04(c) provides that “[t]he Tribal Court shall have jurisdiction to decide all questions with respect to the status of a tribal entity.” §44-3-1.04(c) is referred to as a

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waiver of sovereign immunity of an OST entity from suit or to be a consent of the OST entity or the Tribe, to the jurisdiction of the United States or of any state with regard to the business or affairs of the OST entity or to any cause of action, case or controversy.

§44-3-1.06(b)(i) provides that sovereign immunity may not be waived except by express resolution of the Tribal Council, and then only for specific and limited matters:

“Sovereign immunity of the OST entity may be waived only by express resolution of the Tribal Council. Waivers of sovereign immunity are disfavored and shall be granted only when necessary to secure a substantial advantage or benefit to the Tribe. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds, if any of the OST entity subject thereto. Neither the power to sue and be sued provided in the charter of the OST entity⁹, nor any express waiver of sovereign immunity by resolution of the Tribal Council shall be deemed a consent to the levy of any judgment, lien or attachment upon any property of the Tribe or any property of the OST entity other than property specifically pledged or assigned, or a consent to suit in respect to any land with the exterior boundaries of the Reservation or consent to the alienation, attachment or encumbrance of any such land.”

The above sections of the OST Business Code and the Articles of Incorporation of WKCDC defines and recognizes Defendant WKCDC as a tribal entity organized under the laws of the Oglala Sioux tribal government and by extension as an arm of tribal government enjoys the same the privileges and immunities afforded to the OST tribal government.

WKCDC and the OST Tribal Council must expressly waive its immunity from the above-captioned matter involving issues relating to tribal members working for a tribal business located on tribal land whose wages were paid by the Oglala Sioux Tribe. Both WKCDC and the OST Tribal Council must waive its immunity from suit and neither entity has done so in reference to the above-caption matter.

CONCLUSION

“Status Determination” and the only exception to OST sovereign immunity is a Status Determination in tribal court.

⁹ The power to sue and be sued provision is not found in the WKCDC Charter.

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Based upon the foregoing tribal sovereign immunity case law, the Oglala business code, WKCDC Articles of Incorporation as well as the undisputed facts that all parties are Oglala tribal members, the alleged conduct occurred entirely within the exterior boundaries of the OST confirms that jurisdiction lies squarely with of the OST Tribal Court and supports a dismissal of the Defendant WKCDC from this lawsuit. Therefore, Defendant WKCDC respectfully requests an Order dismissing WKCDC as a Defendant in this case.

Dated this 2nd day of January, 2018.

/s/ D. DuBray

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of September, 2017, a true and correct copy of the forgoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** was served using the Courts Case Management/Electronic Case Files (DM/ECF) system which upon information and belief will send e-mail notification of such filing to:

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