UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

LESLIE ROMERO, Plaintiff, V. WOUNDED KNEE, LLC d/b/a SIOUX-PREME WOOD PRODUCTS, a South Dakota limited liability company, WOUNDED KNEE COMMUNITY DEVELOPMENT CORPORATION, a South Dakota corporation, and MARK ST. PIERRE, Defendants.	)	Case No. 5:16-cv-05024-JLV **REPLY REGARDING PLAINTIFF'S MOTION TO STRIKE, MOTION TO DEEM REQUESTS FOR ADMISSIONS ADMITTED, MOTION FOR DAMAGES HEARING DATE, AND MOTION FOR SANCTIONS**

COMES NOW Plaintiff, Leslie Romero, by and through her attorney of record, Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, LLP, and submits this Reply Regarding Plaintiff's Motion to Strike, Motion to Deem Requests for Admissions Admitted, Motion for Damages Hearing Date, and Motion for Sanctions (Doc. 58). This reply brief replies to Defendant Wounded Knee Community Development Corporation's ("WKDCD") response brief (Doc. 62).

A. WKCDC's failure to respond to the Plaintiff's requests for admission results in those being deemed admitted.

First, in Doc. 59, pages 9-11, Plaintiff requested the Court deem Plaintiff's requests for admission admitted. Plaintiff cited Fed. R. Civ. P. 36(a)(3) and supporting case law, and established that WKDCD failed to respond or object in any way to Plaintiff's requests for admission. WKCDC's only response to this issue was one paragraph at the top of page 4 of Doc. 62. WKCDC cited no Rule or legal authority, and made no legal argument as to why it should be excused for refusing to answer or object to the requests for admission. WKCDC also gave no factual reason why it failed or refused to object or respond. WKCDC merely asserted that it made no admissions. The Court should deem Plaintiff's requests for admission admitted.

B. WKCDC's failure to respond to the Plaintiff's discovery requests results in all objections being waived.

Next, Plaintiff argued, on pages 9-11 of Doc. 59, that WKCDC has waived any objections it may have had to responding to all Plaintiff's discovery requests, as WKDCD made no objections within 30 days or at any time. Plaintiff cited Fed. R. Civ. P. 33(b)(4) as well as authority indicating such a waiver can only be excused by a finding of good cause by the court. WKCDC failed to respond to this issue in any way. WKCDC put forth no good cause as to why it did not object within 30 days to any discovery requests, and neither put forth good cause as to why it did not object *before* 30 days as agreed upon at the meet-and-confer. The Court should find that WKCDC waived any and all objections to Plaintiff's discovery requests.

C. Sanctions are appropriate as WKCDC has willfully disobeyed this Court's Order requiring the parties to undergo discovery on the issues of tribal court exhaustion and tribal sovereign immunity.

Third, Plaintiff argued that sanctions are appropriate as WKCDC willfully disobeyed the Court's Scheduling Order (Doc. 54) to undergo discovery on the two targeted issues of tribal court exhaustion and tribal sovereign immunity. Plaintiff argued that Fed. R. Civ. P. 37 applies, cited supportive case law, and demonstrated how the elements to impose sanctions under Rule 37 were met.

WKCDC responded in one paragraph at the bottom of page 4, Doc. 62. Instead of addressing Rule 37 or any of the case law or argument Plaintiff put forth, WKCDC instead discussed Fed. R. Civ. P. 16(f) – a rule Plaintiff did not address in its initial brief. Rule 16 governs pretrial conferences, scheduling, and management of a case. Under Rule 16, the sanctions available (including those listed in Rule 37(b)(2)(A)(ii)-(vii)) are allowed when a party or its attorney 1) fail to appear at a scheduling or other pretrial conference; 2) is substantially unprepared to participate—or does not participate in good faith—in the conference; or 3) fails to obey a scheduling or other pretrial order.

WKCDC simply brings forth additional grounds for which it can be sanctioned under another Rule. WKCDC failed to obey the Court's scheduling order, and therefore sanctions are available under Rule 16(f)(C) also. WKCDC made no attempt to argue it should not be sanctioned under Rule 37. The Court should grant the sanctions Plaintiffs requested under either or both Rule 37 and Rule 16(f)(C).

Plaintiff also requested the Court hold WKCDC in contempt, as argued on pages 16-17, for violating a court order. WKCDC made no argument in response. The Court should also find WKCHC in contempt.

Plaintiff also requested attorney's fees under Rule 37(b)(2)(C). The Rule requires a court to order the disobedient party to pay attorney's fees "unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). WKCDC made no argument that its failure was substantially justified or would be unjust. The Court should grant Plaintiff her expenses for having to drive to Rapid City the afternoon before the damages hearing, only to have WKCDC file an 11th-hour motion which postponed the hearing. WKCDC should also pay Plaintiff's attorney's fees as indicated in its initial brief, and allow Plaintiff to file a fee petition to substantiate those fees and expenses.

D. WKCDC's argument regarding Rule 12(f)

On the first page of its brief, WKCDC states that "Plaintiff cites to Fed. R. Civ. P. 12(f) as authority to strike . . ." Doc. 62. Plaintiff never once cited to Rule 12. Plaintiff requested the two motions to dismiss be struck pursuant to Rule 37.[1] Rule 12(f) is irrelevant to the issues in the motions discussed in Doc. 59 and WKCDC's discussion of it is entirely off base here.

E. WKCDC's Section I regarding Plaintiff's Motion to Strike

[1] "Because the requisite elements have been met necessary to impose sanctions pursuant to Rule 37, the Plaintiff requests this Court, in addition to the relief sought previously in the brief, strike the Defendant's Motion for Relief from Default Judgment (Doc. No. 41) as well as the recently filed Motion to Dismiss (Doc. No. 55)." Doc. 59 p. 15.

While largely ignoring the substance of Plaintiff's motions, WKCDC makes a one-sentence argument that its assertion of sovereign immunity contained in its Motion to Dismiss is based upon well-settled case law on tribal sovereignty. WKCDC sites three cases that merely hold tribes have sovereign immunity. WKCDC once again ignores the case law that indicates a court must consider factors to determine whether an agency is, in fact, and arm of the tribe in the first place. *See J.L. Ward Assocs. V. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163 (D. S.D. 2012). As the *J.L. Ward* case indicates, a tribe's sovereign immunity *may* extend to a tribal entity or agency. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000). ". . . the Eighth Circuit considered the critical issue of entitlement to sovereign immunity that the organizations served as 'arms of the tribe' and were established by tribal councils pursuant to the councils' powers of self-government." *J.L. Ward* at 1170; *citing Hagen* at 1043, *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998); and *Weeks Constr. Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-671 (8th Cir. 1986). Court have used multiple factors such as those laid out in *Wright v. Prairie Chicken*, 1998 S.D. 46, ¶ 10, to determine whether an agency or entity is, in fact, and arm of the tribe.

For the Court to determine whether WKCDC is in fact an arm of the Tribe, it must consider a number of facts not before the Court. Plaintiff propounded discovery requests to WKCDC which directly speak to the factors indicated in *Wright v. Prairie Chicken* and similar factors utilized by courts in similar cases. WKCDC refuses to answer such discovery, likely because the factual responses would corroborate WKCDC's answer to the EEOC in this case– that it is *not* an arm of the Tribe. The Court cannot consider those factors without the facts. Should the Court deem WKCDC's answers to Plaintiff's requests for admission admitted, Plaintiff easily establishes the relevant factors for a finding that WKCDC is not an arm of the Tribe. Whether the immunity factors are met should be briefed (if at all) at a later date and not

herein, after the Court issues a ruling on the pending discovery motions, as the Court has previously ruled.

WKCDC cited no authority whatsoever that it need not answer or object to discovery, despite this Court's order, because it has (while in default) asserted sovereign immunity. WKCDC did submit some evidence to the Court with its briefs. Because WKCDC disclosed some information relevant to the immunity determination, it has explicitly and unequivocally waived sovereign immunity for the limited purpose of determining whether the tribal entity is an arm of the Tribe. *Cash Advance & Preferred Cash Loans v. Colo. ex rel. Suthers,* 242 P.3d 1099, 1115 (Colo. 2010)(a tribal entity's voluntary disclosure of some information functions as a limited waiver of its sovereign immunity with respect to all information). WKCDC made no objections that any of Plaintiff's discovery requests were not tailored to immunity and tribal court exhaustion, and have therefore waived any such objections.

F. WKCDC's Section II regarding Discovery: Exhaustion of Tribal Remedies

Instead of providing relevant responses to Plaintiff's motions, WKCDC spent over a page of its brief discussing exhaustion of tribal remedies. Doc. 62, p. 2-3. A blatant omission from WKCDC's discussion was any authority indicating that WKCDC is excused from abiding by a court order and providing discovery on tribal remedy exhaustion. Plaintiff *did* in fact exhaust her tribal remedies. WKCDC refuse to admit or deny that Plaintiff did so, or do any other discovery about the same, to avoid the answer it already knows – Plaintiff *did* exhaust her tribal remedies and her case is properly before this Court. Contrary to WKCDC's assertions, Plaintiff *did* her due diligence leading to the Oglala Sioux Tribe's Attorney General's determination (as well as the determination of every other relevant branch of the Oglala Sioux Tribe) that Plaintiff can only proceed on her claims in federal court. This issue could have been thoroughly briefed, complete with supporting factual discovery, had WKCDC bothered to undergo any discovery on the issue.

G. Oglala Sioux Ordinance

In the final section of WKCDC's brief, it claims that Plaintiff's counsel was "unable to locate the Oglala Sioux Tribe Ordinance on Sovereign Immunity", so WKCDC's counsel delivered OST Ordinance No. 15-16. As has been too often the case, WKCDC misrepresents the situation.

WKCDC, in Doc. 56 page 4-6, cited to "OST Ordinance 07-25", allegedly adopted by the OST Tribal Council on July 30, 2007. WKCDC alleged that Ordinance 07-25 enacted Part 3-Tribal Entities Code to Chapter 44 of the OST Business Code at § 44-3-1.01. WKCDC went on to cite to § 44-3-1.01(3) and (4), § 44-3-1.03, § 44-3-1.04(a) and (b), and § 44-3-1.06(a) and (b). Because there appeared to be no such ordinance or code so enacted, and the OST tribal court indicated it did not exist, Plaintiff's counsel asked WKCDC's counsel for a copy of the same. WKCDC's counsel had already agreed to supply any tribal authority it relied upon in this case. As previously briefed, WKCDC ignored the request for the ordinance. On February 7, 2018, WKCDC disclosed Ordinance *15-16*, *not* Ordinance 07-25 cited in the brief as indicated above. WKCDC also failed to supply Ordinance 07-25 to the Court. Ordinance 15-16 merely indicates the Tribe has sovereign immunity, but in no way aids the determination of whether WKCDC is an arm of the Tribe.

Dated: March 19th, 2018.

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