

17-3588

IN THE UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

JOHN LAAKE a/k/a WINTER LAAKE

Plaintiff-Appellant,

v.

TURNING STONE RESORT CASINO,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE TURNING STONE RESORT CASINO

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JURISDICTIONAL STATEMENT

Defendant-Appellee Turning Stone Resort Casino (“TSRC”) respectfully disagrees with Plaintiff-Appellant Laake’s (“Laake”) Jurisdictional Statement as set forth in his brief on appeal. For the reasons set forth below and set forth by the district court in its decision and order, the district court did not have subject matter jurisdiction over Laake’s claims in this case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

TSRC respectfully disagrees with Laake’s Statement of the Issues Presented for Review as set forth in his brief on appeal. The district court did not “grant judgment as a matter of law” in favor of TSRC, nor did it find that TSRC “was not liable for the damages of” Laake. Rather, the district court dismissed Laake’s claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), under the doctrine of tribal sovereign immunity.

As such, the only issue presented for review is whether the district court erred in dismissing Laake’s claims for lack of subject matter jurisdiction.

STATEMENT OF THE CASE

As the district court found, the following facts are undisputed. See Appendix, at pp. A-81 – 83 (district court’s statement of undisputed facts). TSRC is a wholly owned government instrumentality of the Oneida Indian Nation (the “Nation”). The Nation is a federally recognized Indian tribe. See 82 FR 4915, 4917.

Beginning on September 30, 2016, TSRC hosted a multi-day event called “Scare-a-Con: Horror & Pop Culture Fan Convention”. The Scare-a-Con event is a horror and science fiction gathering that is open to the general public upon purchase of an admission ticket. TSRC contracted with a production company, JoHaw Productions, LLC, which produced the Scare-a-Con event by, *inter alia*, contracting with vendors for the event. Under the terms of the contract between JoHaw and TSRC, JoHaw agreed

that no actions of a paranormal nature will be performed at TSRC, during the event, in hotel rooms, or in/on other TSRC property, and shall ensure that each exhibitor, entertainer, and celebrity that will be onsite and whose exhibit or appearance relates to paranormal activities will only display material, take photographs, sign autographs, and participate in question and answer sessions and will not demonstrate the use of any materials or perform any actions of a paranormal nature while at TSRC.

Laake contracted with JoHaw to purchase a vendor booth for the Scare-a-Con event that would extend from September 30 through October 2, 2016. On September 30, Laake set up his vendor booth at the event and conducted tarot card

readings, occult readings, and other demonstrations. On October 1, TSRC staff approached Laake and told him that his conduct was improper and would need to stop. TSRC staff also told Laake that if he continued the prohibited conduct, he would be required to leave the premises. After some protest, Laake complied with staff's instructions and refrained from engaging in the prohibited conduct for the rest of the day. Laake returned to the Scare-a-Con event on the next day, October 2, and was again told by TSRC staff that he could not engage in the prohibited conduct on TSRC premises. Laake complied with this requirement for the day of October 2.

Laake later filed the immediate action *pro se* in the U.S. District Court for the Northern District of New York on March 2, 2017, asserting claims for the deprivation of his constitutional rights under the First and Fourteenth Amendments, and common law tort claims for infliction of emotional distress and defamation. Laake's complaint sought \$10 million in damages.

TSRC moved to dismiss all of Laake's claims pursuant to Fed. R. Civ. P. 12(b)(1), under the doctrine of tribal sovereign immunity, and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. On October 25, 2017, the district court entered a Decision & Order granting TSRC's motion to dismiss under Rule 12(b)(1), finding that TSRC was entitled to tribal sovereign immunity in the instant action. Accordingly, the district court held that

it lacked subject matter jurisdiction over this matter. *See* Appendix, at pp. A-84. Because the district court granted the Rule 12(b)(1) portion of TSRC's motion to dismiss, it did not address the Rule 12(b)(6) portion of the motion. *See* Appendix, at pp. A-85. Laake timely filed his notice of appeal to this Court.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(1), "accepting all factual allegations in the complaint as true." *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 65 (2d Cir. 2012). A federal district court must dismiss a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate it. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

SUMMARY OF THE ARGUMENT

The district court correctly dismissed the complaint in this matter for lack of subject matter jurisdiction under the doctrine of tribal sovereign immunity. In doing so, the district court correctly applied the binding Supreme Court precedent established in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed 2d 106 (1978)), that the Indian Civil Rights Act provides no private right of action against a tribe or tribal officials. In his brief on appeal, Laake has not raised

any legal argument that would tend to demonstrate that the precedent established in *Santa Clara Pueblo* is not binding on this Court or on the district court, or that the district court erred in any other aspect of its holding. Accordingly, the judgment of the district court dismissing Laake's complaint for lack of subject matter jurisdiction should be affirmed.

ARGUMENT

The district court correctly dismissed Laake's complaint for lack of subject matter jurisdiction under the doctrine of tribal sovereign immunity. Courts do not have subject matter jurisdiction to determine claims that are barred by tribal sovereign immunity. *See, e.g., World Touch Gaming, Inc. v. Massena Mgt.* 117 F.2d 271 (N.D.N.Y. 2000) (dismissal under Rule 12(b)(1) based upon tribal sovereign immunity). "As a matter of federal common law, an Indian tribe enjoys sovereign immunity from suit except where 'Congress has authorized the suit or the tribe has waived its immunity.'" *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 84 (2d Cir. 2001)(citing *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 759 (1998)).

As noted above, the Nation is a federally recognized Indian tribe. Numerous courts, including the district court in previous cases, have routinely recognized the Nation's immunity from suit under the doctrine of tribal sovereign immunity. *See,*

e.g., *Smith v. Oneida Employment Servs.*, No. 5:08-CV-151 FJS/GJD, 2009 WL 890614 (N.D.N.Y. Mar. 29, 2009)(Scullin, S.D.J.); *Frazier v. Turning Stone Casino*, 254 F. Supp.2d. 295, 305 (N.D.N.Y. 2003)(Scullin, C.J.); *Doe v. Oneida Indian Nation*, 717 N.Y.S.2d 417, 418 (3d Dept. 2000). The district court has also previously specifically recognized TSRC's immunity from suit as an instrumentality of the Nation. *See Frazier*, 254 F. Supp. 2d at 305.

Accordingly, the district court correctly dismissed Laake's complaint in this case under the doctrine of sovereign immunity. The district court's order held, in part:

Plaintiff [Laake] neither argues nor demonstrates that Congress abrogated the Nation's or TSRC's tribal immunity for the underlying suit or similar claims, or that either waived its tribal immunity. Instead, Plaintiff argues that Defendant's tribal immunity is superseded by the Indian Civil Rights Act of 1968 ("ICRA").

Section 1302 of ICRA restricts Indian Nations' powers of self-government from, *inter alia*, abridging the constitutional rights entitled to all United States citizens such as the freedom of speech, of the press, and the free exercise of religion. *See* 25 U.S.C. § 1302(a)(1). However, "ICRA provides no private right of action against a tribe or tribal officials and may only be enforced in tribal court or by means of a petition for habeas corpus in federal court." *Pitre v. Shenandoah*, 633 F. App'x 44, 45-46 (2d Cir. 2016)(citing *Santa Clara Pueblo*, 436 U.S. at 59-61, 71-72, 98 S. Ct. 1670 and *Shenandoah v. Halbritter*, 366 F.3d 89, 91-92 (2d Cir. 2004)); *see Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 713 (2d Cir. 1998)("Although Title I of ICRA lists a number of substantive rights afforded to individuals that serve to restrict the power of tribal governments, *see* 25 U.S.C. § 1302, Title I does not establish or imply a federal civil cause of action to remedy violations of § 1302."). Because the underlying action seeks monetary damages and is not a

habeas corpus petition, ICRA provides Plaintiff [Laake] no avenue for relief. *See Boozer v. Wilder*, 381 F.3d 931, 394 n. 2 (9th Cir. 2004)(In federal court, a habeas corpus petition “is the only avenue for relief from a violation of ICRA.”).

The Court finds that the Defendant [TSRC] is entitled to tribal sovereign immunity in the instant action. Accordingly, this Court lacks subject matter jurisdiction over this matter, *see Frazier*, 254 F. Supp. 2d at 305 (“Courts lack subject matter jurisdiction to determine claims barred by tribal sovereign immunity.”)(citing *Garcia*, 268 F.3d at 84), and the Rule 12(b)(1) portion of Defendant’s motion must be granted.

Appendix, at pp. A-84 – 85 (internal citations to the record in this case omitted).

Santa Clara Pueblo is a decision of the Supreme Court, and binding authority on this Court. In his brief, Laake has offered no legal support for his argument that this Court should decline to follow this binding precedent. Rather, he has cited to the dissent in *Santa Clara Pueblo* and to non-authoritative third party commentary, as well as to his own disagreement with the Supreme Court’s holding in that case. None of these provides a legal basis for this Court to disregard binding Supreme Court precedent that is directly applicable to the immediate case.

Laake’s has also asserted that *Santa Clara Pueblo* and other cases cited by TSRC and the district court as legal authority on the issue of tribal sovereign immunity are “not applicable” to the immediate case because they “are not pertaining to free speech or religious rights violations”. *See Appellant’s Br.*, at pp. 14 -15. TSRC maintains that each of the cases cited is relevant for the applicable points of law indicated in its initial memorandum of law in support of its motion to

dismiss (Appendix at pp. A-22 – 33) and for the applicable points of law indicated by the district court in its decision and order related to tribal sovereign immunity from suit.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the district court's decision and order, the decision of the district court dismissing the complaint in this case for lack of subject matter jurisdiction should be affirmed.

Dated: May 14, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Defendant-Appellant Turning Stone Resort Casino, certifies the following:

1. I hereby certify that this brief conforms to the type-volume limitations of Fed. R. App. P. Rule 32(a)(7) for a brief produced with a proportionally spaced font, because this brief contains 1,782 words, and is less than 30 pages long.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a plain, proportionally spaced typeface, size 14-point font, using Microsoft Word.

Date: May 14, 2018

By: /s/ **Pamela R. Starsia**

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2018, the foregoing Brief of Defendant-Appellee Turning Stone Resort Casino, was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit, by using the CM/ECF system. I certify that Plaintiff-Appellant John Laake is a registered *pro se* CM/ECF user, and that service will be accomplished by the CM/ECF system.

I certify that an additional copy of this brief was served by UPS or other overnight courier service upon the following:

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