UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION,

Plaintiff,

v.

Civil Action No.:
5:17-CV-1035 (GTS/ATB)

MELVIN L. PHILLIPS, SR., and
MELVIN L. PHILLIPS, SR./ORCHARD
PARTY TRUST

Defendants.

PLAINTIFF ONEIDA INDIAN NATION'S MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM

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The counterclaim filed by Melvin Phillips and his trust[1] seeks a judgment establishing that the Oneida Indian Nation does not own the 19.6-acre tract in issue and that Phillips' trust acquired the 19.6 acres through a quitclaim from Phillips. Phillips' opposition to dismissal of the counterclaim does not argue that Philips ever owned the 19.6 acres. It argues that Nation members who often are referred to as Orchard Party or Marble Hill Oneidas acquired the Oneida Nation's Indian title to the 19.6 acres – and that Phillips somehow conveyed it to a state law trust. Phillips' opposition, however, does not dispute the controlling legal rules or identify facts that could possibly state a claim for relief under those rules.

As a preliminary matter, we emphasize that this case is not about "dispossession" of anyone from the 19.6 acres, although Phillips' opposition vaguely refers to dispossession. For good reason, Phillips' opposition provides no fact suggesting an effort to dispossess; nor do Phillips' answer and counterclaim allege that there is a residence on the 19.6 acres or that the Nation has tried to move any Nation member or anyone else off of the surrounding land. The Nation's complaint and Phillips' counterclaim concern only the 19.6 acres of Nation land – not the other land that Phillips quitclaimed to his trust, land he claims to have acquired previously by purchase from a non-Indian or by inheritance. Phillips agrees that the Nation never ceded or conveyed the 19.6 acres. The Nation would not be litigating over the 19.6 acres if Phillips had not put the 19.6 acres of tribal land into a trust benefitting Phillips and his heirs. The Nation seeks only to preserve its right to hold the 19.6 acres as tribal land, for the benefit of all its members, including Phillips and others who identify as Orchard Party/Marble Hill Oneidas.[2]

[1]In this reply memorandum, "Phillips" refers to Phillips and his trust, collectively, or to Phillips individually, depending on context.

[2]The quitclaim deed and trust are attached to this reply memorandum as Exhibit A.

A. Phillips' Opposition Does Not Dispute the Legal Rules on which the Nation's Motion to Dismiss Is Based and Concedes or Does Not Dispute the Relevant Facts.

Phillips affirmatively admits in the answer and counterclaim, Nation Mem. at 2, and does not dispute in the opposition to dismissal, that the 19.6 acres is a part of the land recognized by the United States in the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), as the "reservation" and "property" of the Oneida Nation, which held Indian title to the land. Phillips' opposition also does not dispute the controlling legal rule set forth at pages 6-7 and 17 of the Nation's memorandum in support of dismissal: Where an Indian tribe holds land by Indian title that is recognized by federal treaty and acknowledged to be part of the tribe's reservation, only a federal law or treaty can extinguish that title. Nor does Phillips dispute the related legal rule that tribal land is held by the tribe indivisibly and collectively for all members and, thus, that tribal members do not acquire rights in tribal land by living on it. Nation Mem. at 9-10. Finally, Phillips does not dispute precedent holding that federal common law and the Nonintercourse Act protect only the rights of Indian tribes with respect to Indian title. Nation Mem. at 6-7.[3]

Phillips' opposition relies on a federal treaty, the 1838 Treaty of Buffalo Creek, which we address in the next section. But Phillips' invocation of the treaty is purely theoretical because Phillips' concessions make it impossible that the Nation conveyed title in the treaty to the 19.6 acres or that Orchard Party Oneidas were a tribe that could acquire treaty title. Phillips' answer and counterclaim admit that the land was not ceded by the Nation, Nation Mem. at 2, and Phillips' opposition does not argue to the contrary. It is nonsense for Phillips to admit that the

[3]Phillips implies that the affidavit of Sharon Blackwell, a Department of the Interior employee, undermines the legal authority conditioning federal protection of Indian title on status as an Indian tribe. The Blackwell affidavit, filed in Oneida land claim litigation, does not say that a group of Oneidas that is not an Indian tribe can hold land by Indian title. It addressed a challenge to participation in the litigation by the Oneida of the Thames, an Indian tribe recognized by Canada. The affidavit is neutral about whether a Canadian tribe, not recognized by the United States, could assert rights in the land claim litigation, The district court deemed it sufficient that two federally-recognized tribes were co-plaintiffs. *Oneida Indian Nation v. State of New York*, 194 F. Supp.2d 104, 119 (N.D.N.Y. 2002). Phillips, of course, does not claim that Orchard Party Oneidas are an Indian tribe at all.

Nation never ceded the land and then argue that the treaty shows that the Nation lost title to the land. Similarly, Phillips admitted in the answer and counterclaim that Orchard Party Oneidas are Nation members, Nation Mem. at 2, and the opposition does not veer from that admission, Opp. at 4-5. It is also nonsense to admit that Orchard Party Oneidas are a part of the Nation, not an Indian tribe, and then argue that they acquired the Nation's tribal rights in land.[4]

The governing legal rules – when applied to the undisputed facts that the Nation never ceded the 19.6 acres and that Orchard Party Oneida are part of the Nation, not an Indian tribe – compel the conclusions that Orchard Party Oneidas could not have acquired Indian title to the Nation's land, that Phillips could not have conveyed any such title to his state law trust, and that the counterclaim thus fails to state a claim upon which relief can be granted.[5]

B. The Treaty of Buffalo Creek Cannot Save the Counterclaim.

Although Phillips' opposition mentions the Treaty of Buffalo Creek, 7 Stat 550 (Jan. 15, 1838), it never alleges that the Nation ceded or otherwise conveyed land to Orchard Party Oneidas in the treaty. Instead, with telling indirection, the opposition argues that Article 13 of the treaty "recognized" Orchard Party title or "identified" its interest in land – never suggesting a prior federal treaty or statute that conveyed the title. Opp. at 1 & 5.[6]

[4]Phillips' opposition also does not dispute that judges in this district likewise have held that Orchard Party (also called Marble Hill) Oneidas are a part of the Nation, not a separate Indian tribe, and that the Departments of Interior and Justice have determined the same thing. *See* Nation Mem. at 13-15. Indeed, the opposition does not dispute that Phillips is a Nation member and that he lives on unceded Nation land, or that Phillips previously swore or pleaded that both those facts are true. *See* Nation Mem. at 10-11.

[5]Phillips' opposition does not cite even one case in support of Phillips' arguments regarding Orchard Party title or any legal principle that could support such a title. The cases listed in the opposition's Table of Cases all concern other matters – the summary judgment standard, *Sherrill*'s equitable considerations, and sovereign immunity. The absence of authority regarding alleged Orchard Party title is not surprising because Phillips does not dispute the controlling legal principles here concerning tribal land and tribal status.

[6]The Treaty of Buffalo Creek is attached to this reply as Exhibit B.

The Treaty of Buffalo Creek did not recognize a division of the Oneida Nation in New York into separate tribes on the Nation's reservation in New York, or divide the Nation's reservation. The treaty was made collectively with the "Oneidas." Although Article 13 refers to payments to certain chiefs of the First Christian Party and the Orchard Party of Oneidas, those chiefs signed the treaty, with others, as representatives of a single Oneida tribe, in textual parallel with the other tribal parties to the treaty, such as the Cayugas, Onondagas and Mohawks. The central bargain in the treaty was relinquishment (under Article 1) of land in Wisconsin in exchange (under Article 2) for land in Kansas – "for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroraras, Oneidas, St. Regis, Stockbridge, Munsees, and Brothertowns residing in the State of New York." Article 5 likewise addressed the location of lands in Kansas for "[t]he Oneidas" collectively. The census of Oneidas in the treaty lists 620 "Oneidas, New York," treating Oneidas in New York as one tribe. *Id.* The Nation's assent to the amended treaty confirms that the treaty was made by and with the Oneida Nation, not Oneida sub-groups. In that assent, Orchard Party and First and Second Christian Party chiefs all signed as chiefs of the Nation, meeting as a unified Nation in the Nation's council house.

> We the undersigned *chiefs of the Oneida tribe of New York Indians* do hereby give our free and voluntary assent to the foregoing treaty as amend by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to *our said tribe in council assembled*. Dated August 9th 1838 *at the Oneida Council House*.

Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838) (emphasis added). Article 13 thus envisioned that the Oneidas would sell the Nation's lands to the State; it did not split up land among different Oneida groups.

When the State of New York, Madison County and Oneida County similarly argued that the Treaty of Buffalo Creek recognized land rights in Oneida factions such as the Orchard Party or the First Christian Party, Judge Kahn rejected that construction of the treaty, holding that the treaty was not made with Oneida "factions" but "treated the Oneidas as one Nation." *Oneida Indian Nation v. State of New York*, 194 F. Supp.2d 104, 119 (N.D.N.Y. 2002). The Nation highlighted Judge Kahn's construction of the treaty. Nation. Mem. at 8. Phillips' opposition does not mention it but inexplicably asserts that "[t]he effect of the Buffalo Creek Treaty on OIN title has never been adjudicated." Opp. at 6 n.2. Not only is that assertion inconsistent with Judge Kahn's decision, but also with Second Circuit decisions. In *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443-44 (2d Cir. 2011), and *Oneida Indian Nation v. Madison County*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), the Second Circuit reaffirmed its prior holding in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 165 (2d Cir. 2003), that the Treaty of Buffalo Creek did not affect the Nation's property and reservation rights. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215 n.9 (2005) (declining to review Second Circuit's holding regarding the Treaty of Buffalo Creek).[7]

[7]Phillips' opposition refers to the June 25, 1842 state treaty by which the Orchard Party sold land to the State after the 1838 Treaty of Buffalo Creek but does not claim that the 1842 state treaty gave the Orchard Party title to the 19.6 acres. Opp. at 5-6. As the Nation demonstrated, Nation Mem. at 16-17, and not disputed in Phillips' opposition, the relevant land was *reserved* from the cession (conveyance) of land in the 1842 treaty. Indeed, Phillips alleged in counterclaim paragraph 64 that the 19.6 acres are part of the land that "was reserved" from cession, and "admits" in paragraph 16 of the answer that "the 19.6 acres that are the subject of this action are wholly within Lot 3 and were never conveyed as part of the June 25, 1842 treaty." Reservation of the land from cession meant that the Nation retained ownership of the land. Moreover, as to the reserved land, the treaty did not change existing rights in that land, providing that the treaty left the Orchard Party Oneida with their rights as Nation members living on Oneida land, and no more. Nation Mem. at 16; *see also* Nation Mem. at 14-15 & 17, which shows that Phillips and the Orchard Party previously alleged that the Nation retained its property rights in the land subject to the June 25, 1842 treaty (even the land that was sold) and that Judge Kahn denied Orchard Party intervention in the Oneida land claim to sue on the 1842 treaty and other such treaties selling land to New York.

C. Phillips' Reliance on Jurisdiction over State Law Claims to Protect Ownership by a State Law Trust Is Inconsistent With a Claim of Indian Title.

Phillips' opposition argues at some length that there is federal jurisdiction to adjudicate Phillips' counterclaim. Opp. at 3-4. The Nation never argued otherwise (putting aside sovereign immunity issues). The Nation argued that the Phillips' invocation of federal jurisdiction only under 28 U.S.C. § 1367, which provides federal jurisdiction to hear state claims related to the federal claim asserted by the Nation, and not independent federal jurisdiction under 28 U.S.C. § 1331 to determine the counterclaim, is inconsistent with the counterclaim's claim of Indian title, which can arise only under federal law and is the only possible basis for claiming possession of unceded tribal reservation land. Phillips' opposition does not address that point.

The opposition likewise does not deal with the inconsistency involved in asserting the title of Phillips' state law trust to the 19.6 acres based on the supposed Indian title of Orchard Party Oneidas. If Orchard Party Oneidas had Indian title to the 19.6 acres, there was no reason for Phillips to make a state law conveyance to a state law trust. And he could not lawfully do so.

The Nonintercourse Act, 25 U.S.C. § 177, provides that "[n]o . . . grant . . . or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity," unless federally approved. Phillips argues that his quitclaim did not violate the Act because title was in and remained with the Orchard Party. Opp. at 8. But the Orchard Party did not quitclaim the land to the trust; the *trust* is not the Orchard Party or even an Indian tribe; and the Orchard Party is not the trust beneficiary. Phillips' quitclaimed land he claimed to "exclusively own[]," to a trust over which the Orchard Party has no control, subject to a trust instrument that gives potentially perpetual property rights to Phillips and his heirs. Mem. at 3-4 & 21. Even when an actual Indian tribe (not an individual like

Phillips) deeded land to members in similar circumstances, the Department of the Interior and the Ninth Circuit had no trouble declaring a violation of the Nonintercourse Act. *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 908-09 (9th Cir. 2014).

To be clear, the point is not that the quitclaim violated the Nonintercourse Act for the reason that there is an Orchard Party tribe with Indian title to the 19.6 acres. The point is that making the quitclaim was inconsistent with any idea that the Orchard Party held protected Indian title. The quitclaim actually violated the Act because the Nation did and does hold such title. That means that the quitclaim is of "no validity in law or equity" and that the counterclaim does not state a claim upon which relief can be granted.

D. Phillips Challenged, But Did Not Appeal, the Settlement Confirming Continued Nation Title to the Land.

Phillips argues that he was not a party to the Nation's historic settlement and thus is entitled to attack it by counterclaim. Opp. at 7. But he does not dispute that he filed an objection to the settlement on the ground that it eliminated the Orchard Party land rights asserted here as to the 19.6 acres, lost on that objection, and chose not to appeal. *See* Nation Mem. at 18-21. The point is that Philips litigated the Orchard Party objection to the settlement to finality, not that he was a party to the settlement itself. He is not now entitled to collaterally attack the settlement.[8]

Even if Phillips had not already lost his challenge to the settlement, Judge Kahn's order approved it and incorporated its terms, including section VII(E), which requires that third parties must file challenges in *State of New York v. Jewell*, No. 6:08-cv-644, in which the approval order was entered. Nation Mem. at 19. Phillips counters that the counterclaim does not challenge the settlement, but that is wrong in light of the actual allegations contained in the counterclaim and

[8]The approved settlement is attached to this reply as Exhibit C. Judge Kahn's approval order is Exhibit D.

in light of the relief it seeks. *First*, counterclaim paragraphs 69-72 allege that the settlement "incorrectly" defined the "Marble Hill tract" so as to include the 19.6 acres as land "retained by the Nation." *See* Settlement § II(G) (defining "Marble Hill tract") (Exhibit C hereto). The point of the counterclaim is to establish that the settlement is, indeed, incorrect because the 19.6 acres is not the Nation's land. *Second*, counterclaim paragraphs 69-72 admit that Phillips, after the "incorrect[]" settlement, "acted to conserve" the 19.6-acres by quitclaiming them to Phillips' trust. Because the quitclaim and trust were executed to thwart the settlement, the counterclaim's effort to establish the trust's title to the 19.6 acres is a challenge to the settlement. *Third*, the counterclaim would establish that the 19.6 acres is not "Nation Land" under the settlement, which in section II(L) defines "Nation Land" as land within the "Marble Hill tract" that is "possessed" by the Nation. Phillips responds only that the Nation does not "possess[]" the land, Opp. at 7, but the Nation possesses the 19.6 acres if it holds Indian title to the land.

E. The *Sherrill* and *Cayuga* Decisions Do Not Apply to Land Never Conveyed to the State or Anyone Else.

Phillips suggests that equitable considerations applied by the Supreme Court in *Sherrill*, as further applied by the Second Circuit in *Cayuga*, entitle Phillips' trust to a declaration that it validly holds the 19.6 acres. Opp. at 2, 4 & 7. Those decisions were based on reliance interests created by cessions of Oneida land to non-Indians – cessions that had appeared to extinguish Indian title and to support a chain of recorded state titles and state governance and taxation over a very long time, notwithstanding the cessions' actual legal invalidity. It is undisputed here (and a necessary element of Phillips' counterclaim) that the 19.6 acres were never ceded. Phillips cannot claim reliance on a cession or on a chain of recorded titles. *Sherrill*'s equitable principles cannot be applied to transfer ownership of tribal land to tribal members who live on it.

F. The Counterclaim Seeking Affirmative Relief against the Nation Must Be Dismissed Because It Is Barred by Tribal Sovereign Immunity, and So the Court Is Without Jurisdiction to Adjudicate the Counterclaim.

Phillips' opposition attempts to distinguish the Nation's tribal sovereign immunity cases, but unpersuasively. Opp. at 8-9; Nation Mem. at 23. Those cases require dismissal. Dismissal of the counterclaim on sovereign immunity grounds does not mean that Phillips cannot defend against the Nation's complaint and resist the relief the Nation will seek in a motion for summary judgement. It means only that Phillips is not entitled to seek independent, affirmative relief against the Nation. As for the *Upper Skagit* immovable property case now pending in the Supreme Court, Opp. at 9-11, there is no decision and no way to know whether it might or might not affect the sovereign immunity issue in this case. Controlling Second Circuit authority holds tribal sovereign immunity applicable to litigation regarding real property. *Cayuga Indian Nation v. Seneca County*, 761 F.3d 218 (2d Cir. 2014).

G. Conclusion

The counterclaim should be dismissed.

Respectfully submitted,

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