UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CURTIS EDWARDS and VICTORIA EDWARDS,

Plaintiffs

-against- Docket No. 2:17-cv-05869-JMA-SIL

FOXWOODS RESORT CASINO; MASHANTUCKET PEQUOT TRIBAL NATION; MASHANTUCKET PEQUOT TRIBAL POLICE DEPARTMENT; JOHN DOE, being the Security Agent employed by Foxwoods Resort Casino and the individual who detained Plaintiff Curtis Edwards and POLICE OFFICERS JOHN DOES 1-10 and JANE DOES 1-10, MASHANTUCKET PEQUOT TRIBAL POLICE DEPARTMENT, being the individuals who detained and arrested Plaintiff, Curtis Edwards,

Defendants

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DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

As set forth in the Defendants' motion to dismiss and supporting brief, this Court lacks personal and subject matter jurisdiction over the claims alleged by the Plaintiffs for several reasons. The Plaintiffs fail to offer any response to the Defendants' argument that there is no subject matter jurisdiction under 28 U.S.C. §§ 1332 or 1343, *see* Doc.9-1 at 6-9, and their responses to the Defendants' remaining arguments are fatally flawed. Their claims therefore should be dismissed in their entirety. To the extent that the Plaintiffs seek leave to amend to add claims against the Mashantucket Pequot Gaming Enterprise, those claims would suffer the same jurisdictional shortcomings as the existing complaint. Leave to amend therefore should be denied as futile.

I. The Defendants have not waived their sovereign immunity from the Plaintiffs' claims in federal court.

The Plaintiffs' argument that the Mashantucket Pequot Tribal Nation has waived its sovereign immunity from the claims at issue misunderstands or mischaracterizes the limited scope of the Nation's immunity waiver. The Mashantucket Pequot Tribal Nation has waived its immunity and the immunity of the Mashantucket Pequot Gaming Enterprise under tribal law for tort claims brought in the Mashantucket Pequot Tribal Court. *See* Title 4 Mashantucket Pequot Tribal Laws ("M.P.T.L.")[1] ch. 1, §3(b); Title 12 M.P.T.L. ch. 1, §1(b). Those waivers are limited to claims brought in the Tribal Court and expressly do not apply to claims brought in state and federal courts. *See* Title 4 M.P.T.L. ch. 1, §3(b); Title 12 M.P.T.L. ch. 1, §1(b). The resolution referenced in the Plaintiffs' opposition, which is now codified as Title 4 M.P.T.L., waives immunity in the Mashantucket Pequot Tribal Court, only. *See* 4 M.P.T.L. Leg. History. It is settled law that limited waivers of tribal sovereign immunity must be strictly construed and their limitations strictly enforced. *See, e.g.*, *Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982) ("When consent to be sued is given, the terms of the consent establish the bounds of the court's discretion."); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.*, 966 F. Supp. 2d 876, 882-83 (D. Ariz. 2013) ("Waivers of sovereign immunity must be strictly construed and not enlarged beyond what the express language requires." (internal quot. & cit. omitted)); *Garcia v. Akwesasne Hous. Auth*, 268 F. 3d 76, 86 2nd Cir. 2001) ("[A] tribe may voluntarily subject itself to suit by issues a 'clear' waiver. *C&L Enters. v. Citizen Bank Potawatomi Indian Tribe*, 149 L. Ed. 2d 623, 121 S. Ct.

[1] The Mashantucket Pequot Tribal Laws are published by West Publishing, available on Westlaw and maintained on the Tribal Law website at www.mptnlaw.com..

1589, 1594 (2001).) The limited waiver of tribal sovereign immunity set forth in the M.P.T.L. does not apply to this action, and the Plaintiffs' claims must be dismissed for that reason.[2]

II. The Complaint does not raise a federal question under 28 U.S.C. § 1331.

As explained in the Defendants' initial brief, Doc. 9-1 at 5-6, the Plaintiffs have failed to allege any claims raising a federal question within the meaning of 28 U.S.C. § 1331. In response to this argument, the Plaintiffs baldly state that they have raised federal questions because they putatively assert "constitutional claims … against the casino security agents and the police officers, not the tribe" and that these claims ostensibly fall within the scope of the Tribal Nation's Sovereign Immunity Waiver Ordinance.[3] *See* Doc. 11 at 6. The Plaintiffs are incorrect.

As an initial matter, the Plaintiffs appear to conflate two separate and distinct—but equally fatal and insurmountable—barriers to their claims. Whether the Defendants have waived their sovereign immunity is irrelevant to the question of whether the Plaintiffs have stated claims raising a federal question under § 1331. In order to avoid dismissal, the Plaintiffs would have to establish both a federal jurisdictional basis and a waiver of tribal sovereign immunity. They can do neither.

The only federal law cited by the Plaintiffs as a potential jurisdictional basis for their claims is "the Fourth Amendment." Compl., ¶¶ 34, 42. But, as set forth in the Tribal Nation's initial motion, the Fourth Amendment to the U.S. Constitution is not applicable to Indian tribes and tribal officials, so it necessarily fails to provide a basis for federal question jurisdiction in

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[2] Had the Plaintiffs timely brought a claim in the Mashantucket Pequot Tribal Court, the immunity waiver that they cite would have applied to that action. They elected to forego that remedy.

[3] By contending only that their Second, Third, Fourth, and Sixth Causes of Action raise federal constitutional claims, *see* Doc. 11 at 6, the Plaintiffs effectively concede that their remaining claims do not, as argued in the Plaintiffs' initial motion. *See* Doc. 9-1 at 5-6. Moreover, to the extent that the Plaintiffs now disclaim any constitutional claims against the Tribal Nation and its enterprises, that provides a further basis for the dismissal of those claims against those defendants. *See* Doc. 11 at 6 ("Plaintiffs' constitutional claims are against the casino security agents and the police officers, not the tribe.").

this case.[4] *See* Doc. 9-1 at 5-6. The Plaintiffs' opposition makes no attempt to address this case law or the Fourth Amendment's inapplicability to tribal governments and officials, and their mere insistence that they "sufficiently raise[] issues of racial profiling and constitutional violations," Doc. 11 at 6, does not suffice to establish federal question jurisdiction.

III. Amendment would be futile and should be denied.

At the conclusion of their opposition brief, the Plaintiffs request leave to amend their complaint to add the Mashantucket Pequot Gaming Enterprise as a defendant and "to further allege the casino's contact with the plaintiffs in the state of New York." Doc. 11 at 7. Because (1) this Court would lack jurisdiction over any claims against the Mashantucket Pequot Gaming Enterprise (MPGE) for the same reasons that it lacks jurisdiction over the existing Defendants and (2) all of the Plaintiffs' claims would be subject to dismissal based on tribal sovereign immunity and lack of subject matter jurisdiction even if the Plaintiffs could establish personal jurisdiction over the Mashantucket Pequot Gaming Enterprise, the motion for leave to amend should be denied as futile.

"When leave to amend would be futile, that is a sufficient reason to deny" it. *Yaba v. Cadwalader, Wickersham & Taft*, 931 F. Supp. 271, 274 (S.D.N.Y. 1996) (citing *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995)); *In re Alcon S'holder Litig.*, 719 F. Supp. 2d 280, 283 (S.D.N.Y. 2010) (denying leave to amend because the court's "analysis would not change, and leave to amend would thus be futile"). This is such a case.

[4] Though Plaintiffs do not raise the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (ICRA), even had they, it would not help their cause. ICRA makes applicable to tribal governments a number of the substantive rights provided by the Constitution; however, it does not provide a federal right of action to remedy alleged violations of those rights outside of habeas corpus relief. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 88 (2d Cir. 2001); *Shenandoah v. U.S. Dep't of the Interior*, 159 F.3d 708, 713 (2d Cir. 1998). So Plaintiffs civil claims cannot possibly fall within ICRA's ambit.

To the extent that the Plaintiffs seek leave to amend to add the MPGE as a defendant, all of the jurisdictional arguments supporting dismissal of claims against the existing Defendants apply with equal force to MPGE. The Plaintiffs still would have failed to establish this Court's jurisdiction under 28 U.S.C. §§ 1332 or 1343. There still would be no federal question jurisdiction under § 1331. And because MPGE is a wholly owned and operated arm of the Tribal Nation responsible for carrying out the Nation's gaming activity, claims against MPGE would be subject to dismissal on the basis of tribal sovereign immunity to the same extent as claims against the Tribal Nation itself. *See, e.g.*, *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Bassett v. Museum and Research Ctr., Inc.*, 204, F.3d at 357-358, *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328 (D. Conn. 2001) ("[T]he Gaming Enterprise is entitled to the same tribal sovereign immunity that protects the Tribe itself."); *see also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287-88 (11th Cir. 2015) ("[W]e agree with our sister circuits that have concluded that an entity that functions as an arm of a tribe shares in the tribe's immunity."); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) ("The Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity."). Adding MPGE as a defendant would accomplish nothing.

Any effort to amend the Complaint to allege additional contacts with the State of New York—presumably in an effort to establish personal jurisdiction over the Defendants—would likewise be futile. Even assuming, *arguendo*, that the Plaintiffs could establish personal jurisdiction over any defendants, personal jurisdiction is immaterial in the absence of subject matter jurisdiction and in the face of tribal sovereign immunity. The Plaintiffs' proposed amendments are therefore futile, and their request for leave to amend should be denied.

Dated: June 19, 2018

Respectfully submitted,

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