**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF NEW YORK**

ONEIDA INDIAN NATION,

Plaintiff,

v.

MELVIN L. PHILLIPS, SR. et al.,

Defendants.

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

# PLAINTIFF ONEIDA INDIAN NATION'S REPLY IN RESPONSE TO DEFENDANT'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Michael R. Smith
David A. Reiser
ZUCKERMAN SPAEDER LLP
1800 M Street NW
Washington DC 20036
(202) 778-1800
msmith@zuckerman.com
dreiser@zuckerman.com

and

Meghan Murphy Beakman
ONEIDA INDIAN NATION
5218 Patrick Road
Verona, NY 13478
(315) 361-8687
mmbeakman@oneida-nation.org

*Attorneys for Plaintiff Oneida Indian Nation*

**TABLE OF CONTENTS**

The Nation moved for judgment on the pleadings declaring that Defendant Phillips and his trust do not own the disputed 19.6 acres of land. Doc. 1 at 11 (prayer in complaint). The Nation is entitled to that judgment as a matter of law – not by resolution of disputed facts but based on (1) undisputed substantive legal rules and (2) Defendants' own admissions.

The controlling substantive legal rules and Defendants' admissions were set forth in the Nation's moving papers, Doc. 32-1, but Defendants' opposition failed to address them or their impact here, Doc. 37. Nor have Defendants acknowledged that the Court, in dismissing their counterclaim for a judgment declaring that they own the 19.6 acres, concluded as a matter of law that they do not – applying the controlling law and admissions that also entitle the Nation to judgment declaring Defendants' lack of ownership. Avoiding all of that, Defendants' opposition spends its first 16 pages on the standard governing motions for judgment on the pleadings, despite the parties' agreement on the operative standard, and the following 6 pages suggesting pointless discovery about 200 years of history – such as that "the parties and this Court could certainly learn more about the history of the 19.6 acres through discovery." Doc. 37 at 18.

There is no discovery that could be material under the legal rules governing the Nation's claim for a declaration that Defendants do not own the 19.6 acres. Defendants do not dispute that those legal rules are that tribal land cannot be validly conveyed unless approved by a federal statute or treaty and that tribal members do not acquire tribal land by living on it. And Defendants admit that the 19.6 acres lie within the Oneida Nation reservation recognized by the 1794 Treaty of Canandaigua; that the State of New York never obtained the land from the Nation; and that so-called Orchard Party Oneidas are a part of the Nation and have always lived on the land. In these circumstances, it follows as a matter of law that the Nation is entitled to judgment that Defendant Phillips and his trust do not own the 19.6 acres.

**A. The Parties Agree that the Standard for Granting Judgment on the Pleadings Under Rule 12(c) Is that There Is No Dispute of Material Fact and that the Movant Is Entitled to Judgment as a Matter of Law.**

The first 16 pages of Defendants' opposition address a supposed dispute about the Rule 12(c) standard for granting judgment. But we agree with the standard offered by Defendants: A movant must demonstrate "that the disputed factual issues raised by the Answer are either immaterial or too implausible to ever be supported by discovery," Doc. 37, at 3, and is "entitled to judgment on the pleadings only if it has been established that 'no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law,'" Doc. 37 at 8 (citations omitted). The Nation set forth the same standard in its papers. "[P]laintiff is entitled to judgment on the pleadings only if it has established that there remains no material issue of fact to be resolved and that it is entitled to judgment as a matter of law." Doc. 32-1 at 2.

**B. Defendants' Admissions and the Controlling Legal Rules Entitle the Nation to Judgment as a Matter of Law. There Is No Factual Dispute that Could Alter that Outcome.**

As a matter of law the 19.6 acres cannot belong to Defendants, given their admissions and the controlling federal law on extinguishment of tribal land rights. As succinctly stated in the Nation's moving papers, and *not disputed* in Defendants' opposition:

> Defendants admit that "the property at issue in this case was part of the original Oneida reservation" acknowledged in the Treaty of Canandaigua. ECF 17 at ¶60; *see* 7 Stat. 44 (Nov. 11, 1794). They admit that the 19.6 acre tract was "wholly within Lot 3" and was never conveyed to the State at all – with or without federal approval. *Id.* at ¶¶16 & 17. Thus, the Nation's possessory rights are governed by the rules "that Indian title is a matter of federal law and can be extinguished only with federal consent." ECF 30 at 16 (quoting *Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 670 (1974)); *see* ECF 24-2 (quoting Cohen's Handbook of Federal Indian Law § 15.04[2] at 1002 (2012 ed.)).

Doc. 32-1 at 5. Not only is the Nation's legal argument undisputed by Defendants, but it tracks the Court's prior ruling that Defendants "admit the land was Plaintiff's . . . and do not allege that

Plaintiff ever ceded rights to the land or that the federal government gave its consent to such a transaction. . . ."). Doc 30 at 17. The Court also adopted the Nation's argument that undisputed legal rules and Defendants' admissions "compel the conclusion that the Orchard Party Oneida *could not have acquired* Indian title to Plaintiff's land." Doc. 30 at 8-9 & 16 (emphasis added).

Moreover, Defendants now have conceded in their opposition to judgment that "there is no claim today that the Orchard Party is a separate tribe from Plaintiff's Oneida Indian Nation" and strain to clarify that they never meant to offer a "suggestion that Defendants claimed separate tribal status" or were a "breakaway" tribe. Doc. 37 at 19. The concession confirms that the Orchard Party cannot be a successor tribe that acquired tribal land rights under the federal Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), or otherwise. Relatedly, as compelled by the treaty's text, this Court recognized in its prior counterclaim dismissal order that the treaty was not made with "factions" but "treated the Oneidas as one Nation," Doc. 30 at 17 & n.8 (quoting from *Oneida Indian Nation v. State of New York*, 194 F. Supp.2d 104, 119 (N.D.N.Y. 2002)). Defendants' concession also means that the continuous Orchard Party presence that they allege can give them no land rights, as "tribal members do not acquire rights in tribal land by living on it." Doc. 30 at 8-9 & 16 (Court's dismissal order accepting this argument); *accord* Cohen's Handbook of Federal Indian Law § 15.02 at 996 (2012 ed.). Defendants' concession that they are part of and not distinct from the Nation thus defeats or makes irrelevant as a matter of law all the arguments that they reprise in footnote 11 on page 20 of their opposition.[1]

[1]Defendants' concession follows from admissions in their Answer that Phillips is Oneida and that "Orchard Party Oneidas" he claims to represent are members of the Nation and participate in its government. Doc. 17 at ¶¶8 & 22. Further, the Nation's memorandum in support of judgment on the pleadings incorporated prior briefing demonstrating as a matter of law that there is no separate Oneida tribe in New York, Doc. 32-1 at 4 & n.2, and the Court's counterclaim dismissal order accepted this argument and the Nation's other arguments, Doc. 30 at 16.

As noted in the Nation's moving papers seeking entry of judgment, the Court has dismissed as a matter of law Defendants' claim to own the disputed 19.6 acres – the defense their Answer tries to establish. Doc. 32-1 at 6. In dismissing, the Court detailed each of the Nation's legal arguments and accepted each one as a basis for dismissal. *See* Doc. 30 at 16 (order). Those arguments compel judgment now on the Nation's complaint. They show the failure of Defendants' ownership defense as a matter of law. Doc. 32-1 at 6 (adopting each argument previously accepted by Court); Fed. R. Civ. P. 10(c) (incorporation by reference).

Defendants argue that the Court merely determined Defendants' counterclaim to be too factually spare to affirmatively plead ownership of the 19.6 acres and that, based on different Rule 12(b) and Rule 12(c) standards, the outcome should be different when assessing the legal impact of the denials and affirmative defenses in their Answer. But the Court's prior decision was based on the application of legal rules to facts not in dispute, not on pleading standards. Moreover, even if the Court had never made a decision in this case, those same legal rules and undisputed facts would resolve Defendants' defenses involving their purported ownership of the 19.6 acres. That purported ownership is insupportable as a matter of law.[2]

Defendants' request for discovery fails because it is not plausible that there are facts which, if proven, could establish Defendant's ownership defense. In the next section, we address each of Defendants' affirmative defenses. Now, more generally, we point out that the discovery discussion in Defendants' opposition to judgment is very general and does not identify facts in

[2]Defendants argument that the Court's ruling concerned only the insufficiency of detail in the counterclaim is largely based on their citations to pages 11-13 (which comprise Section II(A)) of the Court's prior order. *E.g.*, Doc. 37 at 3-5 (opposition). But that part of the Court's order (Doc. 30) re-stated black letter legal principles generally governing Rule 12(b)(6) motions; it did not constitute any comment on Defendants' pleading; and the Court's analysis that actually focused on Defendants' pleading followed at pages 16-18 of the order. Indeed, the same very general black-letter statement of Rule 12(b)(6) standards, with the same footnote, is included verbatim in many of the Court's opinions, *prior* to analyzing the contours of the particular case before the Court. *E.g.*, *Thomas v. City of Troy*, 293 F. Supp.3d 282, 291-93 (N.D.N.Y. 2018).

the Nation's possession that could be obtained via discovery and that could be *material* – i.e., could sustain any defense that is viable in light of the controlling legal rules and Defendants' admissions. "An issue of fact is deemed to be material if the outcome of the case might be altered by the resolution of the issue one way rather than another." Wright & Miller, 5C Fed'l Practice & Procedure § 1368 at 251 (2004).

When Defendants' actually bother to describe the discovery they might seek, it is plain that it does not concern any material fact. They suggest discovery "regarding issues such as the original ownership of the land at the time of the 1794 Treaty of Canandaigua," and the "status of the Oneida tribe and any subdivisions" at the time of that treaty, Doc. 37 at 18 & 21, but such discovery would not be material to the interpretation of a treaty with text clearly stating: "the United States acknowledge the lands reserved to the Oneida . . . . and called their reservation[], to be their property." 7 Stat. 44 (Nov. 11, 1794).

Defendants also suggest discovery into "transfers of the land," Doc. 37 at 18, but no transfer is alleged; they admit that the land was not transferred to the State; and so their ownership cannot be based on a transfer by the Nation. Doc 17 at ¶¶12 (admitting "that the State never obtained the 19.6 acres at issue"), 16 (admitting that the 19.6 acres "were never conveyed as part of the June 25, 1842 treaty") & 64 (land at issue was part of "unpurchased Lot 2" in 1842 treaty). Defendants also do not identify the federal statute or treaty that would be required to validate any theoretical transfer. 25 U.S.C. § 177; *County of Oneida*, *supra*; *see* note 4, *infra*.

Defendants further suggest that discovery into "Defendants' own possession of the land" and the Nation's consequent "lack of possession and usage" might show abandonment by the Nation, Doc. 37 at 18, but those would not support the defense. Because Defendants concede

that they are part of the Nation, evidence of the continuous Orchard Party presence on the land that Defendants allege, Doc. 17 at ¶¶ 2, 3, 4, 12, 13, 19, only establishes that Nation members have lived on the land – tribal occupancy, the opposite of tribal abandonment. Moreover, tribal members do not acquire rights in tribal land by living on it. Doc. 30, at 8-9 & 16 (Court's dismissal order accepting this argument); *accord* Cohen's Handbook § 15.02 at 996.

Finally, Defendants suggest discovery concerning the 1838 federal Treaty of Buffalo Creek, an 1842 state treaty, and the historical treatment of Orchard Party Oneidas. Defendants do not say how such discovery could matter. For the reasons given above, the federal treaty was not made with Orchard Party Oneidas, but with the Nation to which they concededly belong; no state treaty could affect the Nation's federal land rights; and the historical treatment of Orchard Party Oneidas is not relevant because they are not a separate tribe, but part of the Nation.

**C. Defendants' Affirmative Defenses Fail as a Matter of Law.**

Defendants argue that the mere assertion of an affirmative defense requires discovery and is a bar to judgment. That is not so when defenses fail as a matter of law. As we previously argued concerning the entirety of Defendants' answer, including its checklist of affirmative defenses, "nothing in Defendants' Answer stands in the way of a judgment." Doc. 32-1 at 6.

Defendants' Answer simply names 14 boilerplate legal defenses. Although it pleads facts purportedly establishing Defendants' ownership of the 19.6 acres in issue, those facts, even if true, could not sustain the defenses. And Defendants' opposition to judgment is bereft of facts – even facts that hypothetically might be found through discovery – that could make any listed defense legally viable in light of controlling federal law and undisputed facts. *See* 5C Wright & Miller § 1368 at 243 (factual allegations are taken as true but conclusions of law are not).

Eleventh Amendment (¶40), Defendants' first affirmative defense. Defendants' Answer and Counterclaim pleads many facts but none sustains an Eleventh Amendment defense. The Eleventh Amendment limits federal jurisdiction over states and cannot possibly be relevant here. Defendants' opposition to judgment does not address this defense.

Failure to join an indispensable party (¶41). Fed. R. Civ. P. 12(b) provides that this defense "must be made before pleading." Defendants did not do that, and, following a pattern, have not bothered to explain the defense in their opposition to judgment. Further, the Answer contains nothing to indicate that there is another claimant to the 19.6 acres in issue here. *Cf.* Fed. R. Civ. P. 19(a)(1)(B) (joinder of person claiming interest). Although Defendants' Answer refers to an 1842 state treaty, Defendants Answer' admits "that the State never possessed the 19.6 acres at issue in this case." Doc. 17 at ¶12. And Defendants' mirror-image counterclaim did not join any other party because none claims the disputed 19.6 acres.

Statute of limitations (¶42). There is no applicable federal statute of limitations for tribal enforcement of federally protected land rights, and "the borrowing of a state limitations period in these cases would be inconsistent with federal policy." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 241 (1985). Further, a statute of limitations defense has no meaning except in relation to a particular statute.[3] Defendants' Answer does not identify one, and their opposition to entry of judgment does not try to sustain a limitations defense to this action, begun about two years after Defendants filed the challenged deed and trust documents in the county land records. *See* Doc. 1-5 at 1 (date-stamped recording page for trust instrument).

[3]Defendants cite CPLR § 212(a), Doc. 37 at 18, but it is not a statute of limitations, and, as explained by the Supreme Court in *County of Oneida*, no CPLR provision can trump federal law protecting tribal land rights.

Collateral estoppel (¶43) and res judicata (¶44). Just as a limitations defense depends on a particular statute, these two defenses depend on a particular judgment. The Answer identifies none, and the opposition to judgment shares that failure.

Release (¶45) and accord and satisfaction (¶46). These two defenses fail as a matter of law because only a federal statute or treaty can affect tribal land rights. 25 U.S.C. § 177; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); ECF 30 at 16-17 (this Court's decision recognizing legal rule). Defendants' Answer does not identify such a statute or treaty, and the opposition does not mention or discuss release or accord and satisfaction.

Congressional act (¶47). Defendants' Answer does not identify an Act of Congress that could affect the Nation's right to judgment, and the opposition does not mention the defense. Discovery is not needed to find public statutes or treaties.

Laches (¶48). Defendants' Answer does not assert prejudice from the timing of suit some two years after they filed trust and deed papers. Their opposition does not mention laches. They cannot invoke "laches" as the term was used in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), to refer to the disruptive effect of disturbing fee titles to land occupied for generations by non-Indians in reliance on the validity of 200-year-old state land transactions. *See* ¶12 (admitting "that the State never obtained the 19.6 acres at issue in this case"); ¶17 (admitting that the tract was never conveyed to the State in the 1842 treaty). Defendants assert only rights based on occupancy by members of the Nation on tribal land, and Defendant Phillips had to manufacture and file a quitclaim deed in the county records because no prior title or chain of titles to never-conveyed Oneida land existed. *See* Doc. 32-1 at 6 n.3 (Nation's moving papers

further explaining legal inapplicability of *Cayuga*-type equitable defense); Doc. 30 at 11, 16 (Court's description and acceptance of Nation's legal argument as to equitable defenses).

Impossibility (¶49). Defendants' Answer provides no reason why it could be impossible for the Court to declare the invalidity of the challenged 2015 trust and deed and that Defendant Phillips and his trust do not own the disputed 19.6 acres. The Nation does not seek to evict anyone. The opposition to judgment does not address the impossibility defense.

Nonjusticiability (¶50). Nothing in the Answer and Counterclaim elucidates this defense, and the opposition to judgment is silent about it. Tribal claims to preserve federal protection of tribal lands are plainly justiciable. *County of Oneida*, *supra*.

Failure to state a claim (¶52). Fed. R. Civ. P. 12(b) required Defendants, before answering, to move to dismiss. Instead, they answered and admitted that the 19.6 acres were within the Oneida Nation's Treaty of Canandaigua reservation and were not thereafter conveyed to the State. Defendants' opposition to judgment does not say a thing about this defense.

Acquiescence and estoppel (¶53). Defendants' opposition to judgment does not mention these defenses. Although the Answer alleges that Orchard Party Oneidas always lived on the 19.6 acres, as a matter of law those facts cannot sustain the defenses. Defendants concede that "there is no claim today that the Orchard Party is a separate tribe from Plaintiff's Oneida Indian Nation," ECF 37 at 19, and so Oneida member residence establishes actual tribal possession of the land. In dismissing Defendant's counterclaim, the Court accepted the Nation's argument that "tribal land is held by the tribe indivisibly and collective for all members and, thus, that tribal members do not acquire rights in tribal land by living on it." Doc. 30, at 8-9 & 16; *accord* Cohen's Handbook of Federal Indian Law § 15.02 at 996 (2012 ed.). And it is undisputed that

the Nation sued two years after Defendants filed the challenged deed and trust and so as a matter of law cannot be said to have acquiesced in the filing. Finally, a tribe's possessory interest in land protected by a federal treaty cannot be extinguished without federal approval. 25 U.S.C. § 177; *County of Oneida*, *supra* at 670; ECF 30 at 5, 16.

The only affirmative defense Defendants bother to mention in the opposition to judgment is abandonment (¶51) based on a "lack of usage or possession" by the Nation and "Defendants' own possession of the land." Doc. 37 at 18. But Defendants admit that the relevant land has been continuously occupied by "generations of Orchard Party Oneida descendants." ¶4; *accord* ¶¶11-12 & 19). Defendants' additional concession that Orchard Party Oneidas are a part of and not broken away from the Nation necessarily means that Orchard Party possession of land establishes Nation possession. Moreover, it is a rule of law that tribal members (or a group of them) cannot acquire tribal land by living on it (see preceding paragraph). Defendants have never offered any legal authority to dispute this intuitive legal principle.[4]

[4]Defendants' opposition contains a confusing discussion about whether Defendants allege that the Nation "ceded" land or deny the absence of a cession. Doc. 37 at 17. Defendants cannot allege a cession or deny the absence of one because they have admitted that they are not a separate tribe distinct from the Nation and have vigorously alleged that they have continuously occupied the relevant land. Doc. 37 at ¶¶11-12. Defendants' allegations of continuous possession are the core of their defense – and completely contrary to any idea of a Nation cession – because they mean that Nation members have always been on the land. That is why Defendants cannot identify an actual cession and why the Answer, Doc. 17 at ¶12, admits that the State – to which any cession would have been made – never obtained the land. *See Oneida Indian Nation v. New York*, 860 F.2d 1145, 1159-60 (2d Cir. 1988) (New York held right of preemption, exclusive right to acquire Oneida land). The Court correctly ruled in its counterclaim dismissal order that Defendants "do not allege that Plaintiff ever ceded rights to the land or that the federal government gave its consent to such a transaction. . . ." Doc 30 at 17. Moreover, Defendants do not identify a Congressional Act authorizing a conveyance, and so no cession could have been valid, as explained in the text.

Date: January 28, 2018

Respectfully submitted,

*/s/ Michael R. Smith*
Michael R. Smith
David A. Reiser
ZUCKERMAN SPAEDER LLP
1800 M Street NW
Washington DC 20036
(202) 778-1800
msmith@zuckerman.com
dreiser@zuckerman.com

and

*/s/ Meghan Murphy Beakman*
Meghan Murphy Beakman
ONEIDA INDIAN NATION
5218 Patrick Road
Verona, NY 13478
(315) 361-8687
mmbeakman@oneida-nation.org

*Attorneys for Plaintiff Oneida Indian Nation*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused the foregoing reply in response to opposition to motion for judgment on pleadings to be filed using the CM/ECF System on January 28, 2019, which will send electronic notice to all counsel of record in this case.

/s/ *Michael R. Smith*
Michael R. Smith