UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION, Plaintiff, v. MELVIN L. PHILLIPS, SR., individually and as trustee, and MELVIN L. PHILLIPS, SR. / ORCHARD PARTY TRUST, Defendants.	Civil Case No. 5:17-cv-1035 (GTS/ATB) **ORAL ARGUMENT REQUESTED**

DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Defendants Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr. / Orchard Party Trust (together, "Defendants"), by and through undersigned counsel, hereby submit this Sur-Reply in Opposition to Plaintiff's Motion for Judgment on the Pleadings.

PROCEDURAL HISTORY

On November 26, 2018, Plaintiff filed a Motion for Judgment on the Pleadings. ("Opening Brief," ECF No. 32). Defendants filed a Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings on January 14, 2019. ("Opposition Brief," ECF No. 37). On January 28, 2019, Plaintiff filed its Reply to Defendants' Opposition Brief. ("Reply Brief," ECF No. 38). Defendants subsequently filed a Motion to Strike a portion of the Reply Brief, alleging that Plaintiff impermissibly raised new arguments for the first time in its Reply Brief. ("Motion to Strike," ECF. No. 39). On June 11, 2019, the Court granted Defendants leave to file the instant Sur-Reply. ("MTS Order," ECF No. 41).

LEGAL STANDARD

In a motion for judgment on the pleadings, "the movant bears the burden of establishing 'that no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law.'" *Multimedia Plus, Inc. v. Playerlync, LLC*, 198 F. Supp. 3d 264, 267 (S.D.N.Y. 2016), *aff'd*, 695 F. App'x 577 (Fed. Cir. 2017). "A court may grant a Rule 12(b)(6) [or 12(c)] motion . . . only 'when it appears beyond doubt that the [non-movant] can prove no set of facts in support of his claim which would entitle him to relief.'" *Rolon v. Henneman*, 389 F. Supp. 2d 517, 518 (S.D.N.Y. 2005), *aff'd*, 517 F.3d 140 (2d Cir. 2008). "In evaluating a Rule 12(c) motion, the court must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party." *In the Matter of the Trusteeships Created by Tropic CDO I Ltd.*, 92 F. Supp. 3d 163, 171 (S.D.N.Y. 2015). Additionally, "[a] material issue

of fact that will prevent a motion under Rule 12(c) from being successful may be framed by an express conflict on a particular point between the parties' respective pleadings" or "from defendant pleading new matter and affirmative defenses in his answer." *Saratoga Harness Racing, Inc. v. Veneglia*, 1997 WL 135946, at *2 n.5 (N.D.N.Y. Mar. 18, 1997).

ARGUMENT

Plaintiff's Opening Brief and Reply Brief fail to carry the high burden of showing that Plaintiff is entitled to judgment on the pleadings. Firstly, Plaintiff has not and cannot show that Defendants' affirmative defenses fail as a matter of law. Secondly, Defendants' denials and affirmative defenses raise disputes of material fact that cannot be resolved before discovery, precluding judgment on the pleadings. Accordingly, the Court should deny Plaintiff's Motion.

I. Plaintiff Has Failed to Carry its Burden to Show That Defendants' Affirmative Defenses Fail as a Matter of Law

Plaintiff's Opening Brief, despite insisting Plaintiff was entitled to judgment, failed to address—or even mention—any of Defendants' affirmative defenses. Defendants pointed out Plaintiff's failure to address—or even mention—their affirmative defenses in the Opposition Brief, explaining that "if [a] defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." (Opposition Brief at 9). In Reply, Plaintiff argued that it had previously addressed Defendants' affirmative defenses in the Opening Brief by stating that "nothing in Defendants' Answer stands in the way of a judgment," (Reply Brief at 6; *see also* "Letter Opposing Motion to Strike" at 2, ECF No. 40), despite lacking any arguments regarding the merits of any affirmative defense.[1]

[1] In its letter opposing Defendants' Motion to Strike, Plaintiff even attempted to argue that this bare assertion should be considered to have substantively challenged each affirmative defense. (Letter Opposing Motion to Strike at 2).

Finally, in a band-aid attempt to repair the fatal flaws of its Motion, Plaintiff tried for the first time to actually address Defendants' affirmative defenses in the Reply Brief. However, Plaintiff's attempt to address the defenses fails to correct Plaintiff's error or satisfy Plaintiff's burden. Plaintiff's Reply Brief cites almost no case law. Moreover, Plaintiff's cursory responses to the defenses include misstatements of law, of fact, and of Defendants' arguments.

Plaintiff repeatedly attempts to improperly shift its burden to Defendants by arguing that Defendants' Opposition Brief failed to "explain" or "sustain" the affirmative defenses. (Reply Brief at 7–10). But Defendants were not required to "explain" or "sustain" their affirmative defenses that Plaintiff had neglected to even challenge when the Opposition Brief was filed. Instead, Plaintiff, as the movant, has the burden to show that Defendants' affirmative defenses fail. *See Multimedia Plus, Inc.*, 198 F. Supp. 3d at 264 ("[i]n a motion for judgment on the pleadings pursuant to Rule 12(c), the movant bears the burden of establishing . . . 'that [it] is entitled to judgment as a matter of law.'"). Critically, Plaintiff offers no case law supporting its attempt to reverse the burdens of a 12(c) motion.

Defendants will address their affirmative defenses below and demonstrate that Plaintiff has not shown that they fail as a matter of law. Because even a single surviving affirmative defense would bar Plaintiff's motion, and many of Plaintiff's attacks are trivial, the Court should deny Plaintiff's motion and allow the case to proceed through its normal course to discovery.

A. Failure to Join an Indispensable Party

Defendants asserted Plaintiff's failure to join an indispensable party as an affirmative defense in the Answer, identifying the United States, the State of New York, Oneida County, and the Town of Vernon. ("Answer," ECF No. 17 at ¶ 41). Plaintiff contends that this affirmative defense fails because it "must be made before pleading." (Reply Brief at 7). However, Plaintiff has fallen into a common—but stark—misreading of the law, which courts routinely correct.

The Federal Rules of Civil Procedure permit a party to raise the failure to join a necessary party "in any pleading allowed or ordered under Rule 7(a)," including an answer to a complaint. Fed. R. Civ. P. 12(h)(2)(A); Fed. R. Civ. P. 7(a)(2); *see also Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 219 (S.D.N.Y. 2000) (explaining that it "is not a threshold defense that must be asserted at the pleading stage."). Accordingly, Plaintiff's argument is misplaced and must fail because Defendants correctly pled the defense at the appropriate time, in the Answer.

Plaintiff's only other arguments are variations on the incorrect assertion that Defendant had not so identified any other party in the Answer, but Plaintiff fails to explain why it believes these parties can be omitted. Plaintiff's incorrect statement of the law and failure to articulate its position certainly cannot carry Plaintiff's burden to show that the defense is either improper or fails as a matter of law. The Court should deny Plaintiff's Motion.

B. Release, Accord, and Satisfaction

In the Answer, Defendants asserted that (1) "OIN's claims are barred by release;" and (2) "OIN's claims are barred by accord and satisfaction." (Answer at ¶¶ 45–46). Defendants also discussed the significance of the Buffalo Creek Treaty of 1838 to tribal rights in the 19.6 acres in the Answer and Opposition Brief. (Answer at ¶¶ 14, 25; Opposition Brief at 20–21). The Buffalo Creek Treaty of 1838 was a federally authorized treaty between the United States and the chiefs of the Orchard Party that authorized the Orchard Party to "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." 1838 Treaty of Buffalo Creek, 7 Stat. 550 Article 13. The Treaty thus extinguished Plaintiff's rights in the 19.6 acres and recognized Defendants' proprietary interest in the land.

Plaintiff's sole argument is that Defendants' release and accord and satisfaction defenses fail because "Defendants' Answer does not identify such a [federal] statute or treaty" affecting

tribal rights in the land at issue.[2] (Reply Brief at 8). This is false. Defendants identified the Buffalo Creek Treaty of 1838, which is a treaty or convention within the meaning of the Trade and Intercourse Act, 25 U.S.C. § 177, as a basis for the arrangements the Orchard Party made with New York for the 19.6 acres and other Orchard Party land in the 1842 Treaty with New York. Plaintiff has made no other argument regarding the release and accord and satisfaction defenses. (*See* Reply Brief at 8). Accordingly, Plaintiff has failed to carry its burden to show that Defendants' defenses fail as a matter of law, and the Court should deny Plaintiff's Motion.

C. Failure to State a Claim

Defendants' Answer asserts the affirmative defense of failure to state a claim. (Answer at ¶ 52). Plaintiff argues that Defendants' failure to state a claim defense fails because "Fed. R. Civ. P. 12(b) required Defendants, before answering, to move to dismiss." (Reply Brief at 9). Plaintiff has again misunderstood the law. Rule 12(h)(2) states that a "failure to state a claim" defense "may be made in any pleading permitted . . . or by motion for judgment on the pleadings, or at the trial on the merits.'" *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). Courts within this district have held that "[t]he language of Fed. R. Civ. P. 12(b)(6) can be used on a motion to dismiss or as an affirmative defense, at the pleader's option" and "it is well settled that the failure-to-state-a-claim defense is a perfectly appropriate affirmative defense to include in the answer." *Saratoga*, 1997 WL 135946, at *7.

[2] Plaintiff criticizes Defendants because "the opposition does not mention or discuss release or accord and satisfaction." (Reply Brief at 8). The purpose of the Opposition Brief was not to discuss at length the underlying legal theories of the affirmative defenses, but to respond to Plaintiff's bare-bones Opening Brief, which never mentioned affirmative defenses at all. Rather than discuss specifics from Defendants' Answer, Plaintiff's Opening Brief contained only four pages of argument and focused almost exclusively on the Court's Order dismissing the Counterclaim, which had not referred to the affirmative defenses. Plaintiff cannot carry its burden by failing to address key points of contention and then attacking Defendants for not responding to Plaintiff's unspoken positions.

Plaintiff's only other argument is that "Defendants' opposition to judgment does not say a thing about this defense." (Reply Brief at 9). However, Plaintiff's mischaracterization of the law and its attempt to shift the burden to Defendants fails to show how Defendants' affirmative defense fails, and for this motion it is the Plaintiff who carries the burden to show that every asserted defense fails, not Defendants' to show that they succeed.

Moreover, even on motions to strike, the affirmative defense of failure to state a claim has been called "invulnerable." *S.E.C. v. Toomey*, 866 F. Supp. 719, 723 (S.D.N.Y. 1992) (holding "there is no prejudicial harm to plaintiff and the [failure to state a claim] defense need not be stricken" and "[o]ther courts have likewise found that the failure-to-state-a-claim defense is 'invulnerable as against the [12(f)] motion'"). Some courts have even recognized that "[d]efendants' inclusion of denials and affirmative defenses in their answers themselves militate against the propriety of judgment on the pleadings." *Saratoga*, 1997 WL 135946, at *2 n.5.

Furthermore, Defendants explained the strength of this defense in the Opposition Brief. (Opposition Brief at 9–10 (citing *Aros v. United Rentals, Inc.*, 2011 U.S. Dist. LEXIS 125870, *12 (D.C. Conn. Oct. 31, 2011) (the defense is "invulnerable" and defendants need not "identify the factual deficiency alleged" to sufficiently plead)). As Plaintiff did not respond to Defendants' recitation of this case law, the Court should take the strength of this defense as undisputed. By mischaracterizing or simply misunderstanding the law and failing to address Defendants' arguments, Plaintiff has failed to meet the already high burden of demonstrating this defense fails as a matter of law. Accordingly, the Court should deny Plaintiff's Motion.

D. Acquiescence and Estoppel

Defendants' Answer raises the affirmative defense of acquiescence and estoppel. (Answer at ¶ 53). Plaintiff argues that this affirmative defense fails because "there is no claim today that the Orchard Party is a separate tribe from Plaintiff's Oneida Indian Nation . . . ."

(Reply Brief at 9).[3] The proprietary interests of the Defendants in the 19.6 acres do not rely on independent sovereignty from the Oneida Indian Nation. Simply put, this is a property rights case regarding rights that were conveyed by the Oneida tribe to the Orchard Party in the federal Buffalo Creek Treaty—this is not a sovereignty case between two tribes, and Plaintiff's repeated refrain regarding sovereignty simply does not address the crux of this case. Further proceedings are warranted to understand the factual basis underlying Defendants' affirmative defense. Accordingly, Plaintiff has not carried its burden and cannot show that "no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law.'" *See Multimedia Plus, Inc.*, 198 F. Supp. 3d at 267. The Court should deny Plaintiff's Motion.

E. Abandonment

Defendants have asserted the defense of abandonment, alleging that Plaintiff ceded its rights to the 19.6 acres. (Answer at ¶ 51). Plaintiff argues that Defendants' abandonment defense fails because "Defendants 'do not allege that Plaintiff ever ceded rights to the land or that the federal government gave its consent to such a transaction . . . .'" (Reply Brief at 10). Although Plaintiff relies on the Court's previous Order dismissing the Counterclaim, that Order was only about the allegations of the Counterclaim, not Defendants' general denials and affirmative defenses asserted in the rest of the Answer,[4] where Defendants *did* allege that Plaintiff ceded its rights to the land. (Answer at ¶ 51).

[3] Plaintiff insists that the Court's previous ruling dismissing the Counterclaim was an acceptance of each and every statement by Plaintiff in its Motion to Dismiss the Counterclaim, and heavily relies on this assumption in its motion for judgment. Defendants disagree with this overbroad reading of the Court's order and believe that Plaintiff must still carry the (higher) burden on *this* motion.

[4] As previously argued, the Court's decision to dismiss the counterclaim "indicated only that the counterclaim was deemed to lack sufficient 'factual allegations' to make the counterclaim as drafted more than 'speculative' under *Iqbal* and *Twombly*. The Court's decision, however, . . . [did] not imply a determination that Defendants 'can prove no set of facts in support' of their counterclaim . . . ." (Opposition Brief at 4). Plaintiff has not defended its attempts to improperly stretch the holding of the Court's order in this way, but has continued to do so in the Reply Brief.

Additionally, Plaintiff novelly relies on Defendants' own continuous possession of the 19.6 acres to support *Plaintiff's* continuity of occupation. (Reply Brief at 10). However, Plaintiff's theory fails to consider discontinuities between the historical Oneida tribe and the modern Oneida Indian Nation, which undermine Plaintiff's claims of continuous possession of the land[5]—a subject for which discovery is critical. Moreover, courts in this district have held that the abandonment defense in Indian land disputes may raise material issues of fact requiring further discovery. *See Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 127 (N.D.N.Y. 2002) ("[t]his issue requires further discovery and a thorough statutory and treaty interpretation."). Accordingly, Plaintiff cannot show at this early stage that Defendants' abandonment defense fails as a matter of law. The Court should deny Plaintiff's Motion.

II. Material Facts are in Dispute That Require the Development of the Factual Record and an Examination of the Historical Context of Treaties Prior to Resolution

Defendants have pointed to a number of material facts in dispute, which Plaintiff has largely ignored or failed to meaningfully address. Moreover, courts within this district have held that a "material issue of fact that will prevent a motion under Rule 12(c) from being successful may be framed by an express conflict on a particular point between the parties' respective pleadings," and a material issue of fact "may also may result from defendant pleading new matter and affirmative defenses in his answer." *Saratoga Harness Racing, Inc.*, 1997 WL 135946, at *2 n.5. Defendants' factual theory of the case, general denials in the Answer, and affirmative defenses create material issues of fact that preclude judgment in Plaintiff's favor.

In the Answer, Defendants asserted that Plaintiff had abandoned its rights to the 19.6 acres at issue. (Answer at ¶ 51) ("OIN has abandoned any rights it may have to Orchard Party

[5] Defendants also note that New York requires possession for quiet title, and these "discontinuities" between Plaintiff and the historical Oneida therefore raise obstacles for Plaintiff, even apart from the affirmative defense.

Trust Lands"). Plaintiff's abandonment of the land in dispute is a point of disagreement between the parties that creates a material issue of fact precluding judgment in Plaintiff's favor. *See Oneida*, 194 F. Supp. 2d at 127 (holding that defendants' abandonment affirmative defense created "unresolved issues of fact"). This point of dispute between the parties requires further discovery. Digging deeper into Defendants' abandonment affirmative defense through discovery will show discontinuities between the historical Oneida tribe and the modern day Oneida Indian Nation, undermining Plaintiff's attempt to establish its own title to the land through Defendants' continuous possession. Moreover, further discovery will reveal Plaintiff's abandonment of the 19.6 acres under the Buffalo Creek Treaty of 1838.

Defendants' factual theory of the case creates additional material issues of fact that similarly preclude judgement in Plaintiff's favor. Defendants' position is that through the Buffalo Creek Treaty of 1838 and the June 25, 1842 Treaty with the State of New York, Defendants' Orchard Party ancestors obtained title to the 19.6 acres in dispute. First, through the Buffalo Creek Treaty of 1838, the United States recognized that the Orchard Party had a proprietary interest in the land and authorized the Orchard Party Chiefs to "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." 1838 Treaty of Buffalo Creek, 7 Stat. 550 Article 13. The Buffalo Creek Treaty extinguished the larger tribe's interest in the land in exchange for "the sum of two thousand dollars" and an agreement "to remove to their new homes in the Indian territory" in the Green Bay area. *See id.* Having extinguished the larger tribe's interest in the land, the United States gave the chiefs of the Orchard Party the task of making "satisfactory arrangements" with the State of New York for the purchase of the land in dispute. *See id*.

Through the June 25, 1842 Treaty with the State of New York, the Orchard Party chiefs sold several parcels of land surrounding the land in dispute to the state of New York but made arrangements with the State to remain on the 19.6 acres. The larger Oneida tribe removed to Wisconsin, having extinguished its interest in the land under the Treaty of Buffalo Creek. The Orchard Party members, who are ancestors to today's Defendants, chose not to remove to Wisconsin and remained on the 19.6 acres, having obtained their individual interest in the land pursuant to the June 25, 1842 Treaty. Plaintiff disputes these facts, creating material issues of fact that preclude judgment in Plaintiff's favor. Plaintiff cannot obtain a judgment when the above material facts are in dispute and when further discovery is necessary to develop the "full factual and historical record" before they can be resolved. *See Oneida*, 194 F. Supp. 2d at 142 (declining to dismiss an abandonment affirmative defense because the resolution of the matter required treaty interpretation and further declining to dismiss a disestablishment claim because the resolution of the claim required a full factual record).

Plaintiff has thus not carried its burden and is not entitled to judgement on the pleadings.

CONCLUSION

For the reasons stated above, the Court should deny Plaintiff's Motion for Judgment on the Pleadings, or in the alternative, the Court should permit Defendants an opportunity to amend the Answer to correct any deficiencies that the Court has identified.

June 26, 2019
Respectfully submitted:

/s/ *Eric N. Whitney*

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