UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CURTIS TEMPLE, CIV. 15-5062 JLV

Plaintiff,

v. **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

LAWRENCE ROBERTS, Assistant Secretary of Indian Affairs, Et Al.,

Defendants.

PRELIMINARY STATEMENT

Defendants have filed a motion for partial dismissal of this proceeding and memorandum in support of the relief requested. Plaintiff opposes the defendants' motion and responds as follows.

LEGAL STANDARD

On a motion to dismiss under Rule 12 (b) (6), the court presumes that all well-pleaded allegations are true, resolves all reasonable doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party. Ashcroft v. 556 U.S. 662, 678 (2009). No claims should be dismissed merely because the trial judge disbelieves the allegations or feels that recovery is remote or unlikely. Bell Atlantic v. Twombly, 550 U.S. 544, 555-556 (2007). Neither detailed factual allegations nor evidentiary level factual showings are required of pleaders, and pleaders enjoy the benefit of imagination. Bissessur v. Indiana Univ. Bd. Of Trustees, 581 F3d 599, 702-603 (7th Cir. 2009). A pleading must contain enough

information to give defendants fair notice of both the claims and the grounds. Tellabs, Inc. v. 551 U.S. 308, 319 (2007). A pleader's allegations must be factual (not conclusory) and suggestive (not nuetral). Bell Atlantic, supra. A claim is factually plausible when it alleges sufficient factual content to permit the reasonable inference that the defendant is liable for unlawful conduct, thus giving rise to a reasonably founded hope that the discovery process will reveal relevant evidence to support the claims. Ashcraft, supra; Bell Atlantic, supra. Factual allegations can support a claim under any potential theory, not solely on the pleader's chosen legal theory. Johnson v. City of Shelby, 135 S.Ct. 346, 346-347 (2014). The burden of showing the pleader has failed to state a claim lies with the moving party. Raymond v. Avectus Healthcare Sols., LLC, 859 381, 383 (6th Cir. 2017). A failure to oppose a motion to dismiss is not sufficient; the court must independently assess the challenged pleading. Goldberg v. Danaher, 599 F3d 181, 181-184 (2nd Cir. 2010). And plaintiffs are not required to anticipate nor plead around affirmative defenses. Whether a complaint states a claim is not dependont on whether the defendant has a defense. U.S. v. Northern Trust Co., 372 F3d 886, 888 (7th Cir. 2004). Even where affirmative defenses appear, a complaint should not be dismissed unless the facts conclusively demonstrate the defense. Parungao v. Cmty. Health System, 858 F3d 452, 457 (7th Cir. 2017).

ARGUMENT

I. Failure to Exhaust Administrative Remedies

Defendants claim that plaintiff has failed to exhaust required administrative remedies. That is not the case. First, there are two separate proceedings pending and ongoing before the Interior Board of Indian Appeals (IBIA). One is Temple v. Great Plains Regional Director, 16-

061, and another in Temple v. Great Plains Regional Director, 16-999. Second, defendants ask this Court to make a legal conclusion that it has no authority to make at this point in this litigation. The IBIA is the forum in which both of the above proceedings are pending and ongoing. It is only the IBIA that has the authority to make a decision on whether or not certain claims have or have not been exhausted. Thus, the Court should decline to make any decision on exhaustion of administrative remedies until decisions in both of the above cases have been determined and then determine this issue by motion for summary judgment after discovery has been completed. Wright v. North Carolina, 787 F23 256, 263 (4th Cir. 2015) (claims best assessed after further factual development).

Exhaustion is not a strict jurisdictional requirement but a flexible concept which must be tailored to the circumstances of the case. South Dakota v. Andrus, 614 F2d 1190 (8th Cir. 1990); Vculek v. Yeutter, 754 F. Supp. 154 (D.N.D. 1990). Where an appeal would be futile and little more than a formality, exhaustion is not required. Monsoon v. Drug Enforcement Agency, 522 F.Supp. 2d 1188 (D.N.D 2007), aff'd 598 F2d 952 (8th Cir. 2008). If there is no provision for administrative appeal or review of certain claims, exhaustion is not required. Moreover, no exhaustion is required where a colorable constitutional claim has been made, irreparable injury shown, and the purpose of exhaustion would not be served, Fort Berthold Land and Livestock Ass'n. v. Anderson, 361 F.Supp.2d 1045 (N.D. 2005), or where administrative remedies are inadequate. And exhaustion is not required where monetary damages are being claimed. Middlebrooks v. U.S., 8 F. Supp. 3d 1169, 1174 (D.S.D. 2014).

A. Claims that have Yet to be Exhausted

Defendants claim, without specificity, that plaintiff has made certain claims before the

agency has had the opportunity to rule or allow the administrative process to conclude and therefore this Court has no jurisdiction to adjudicate those matters. It is inconsistent for defendant to ask the Court to summarily dismiss the action for failure to exhaust without a final decision of the IBIA but on the other hand asking the Court to postpone any decision until the administrative process has been completed.

This Court has federal question jurisdiction as alleged in the second amended complaint at ¶ 2, especially where a controversy involves the alleged violation of rights arising out of the federal constitution or federal statutes. Mark v. Groff, 521 F2d 1376 (9th Cir. 1975). A non-frivolous claim of right or remedy under a federal statute or regulation is sufficient to invoke federal question jurisdiction. Auto Owners Ins Co. v. Spirit Lake Tribal Court, 495 F3d 1017 (8th Cir. 2007).

1. Challenge to BIA's Interpretation of "Public Sale"

Defendants claim that the plaintiff should have to exhaust the meaning of the term "public sale." See amended complaint at ¶ 46. Garner, Black's Law Dictionary, Ninth Edition, at 1455 defines a "public sale" as "a sale after public notice, such as an auction or sheriff's sale; specif., a sale to which the public has been invited by advertisement to appear and bid at auction for the items to be sold." Emphasis added. There is no dispute in this case that there never was a public auction. There is no ground for interpretation. Exhaustion is not required by the regulations or statutes in this case. Plaintiff's cattle were not sold at public sale so as to decrease the amount of monies that defendants are claiming as costs and penalties in this case. This claim is property before the Court.

2. Survey issues

Defendants raise two issues here. First, they claim that the BIA has no obligation either by a survey or other objective means to separate plaintiff's trust land from trust land owned by others so that he could fence and utilize his own (not permitted) land to graze his own cattle and to utilize improvements he placed on said land. The BIA has a trust responsibility to account separately for each owner's trust land. See Mitchell v. U.S., 443 U.S. 206 (1983); Cobell v. Salazar, 573 F3d 808 (D.C. Cir. 2009). Plaintiff is under no obligation under the law and defendants do not seem to argue that exhaustion is required of this claim. Second, defendant's claim that their unlawful inclusion of plaintiff's own land in units allocated to other persons as part of the Range Management Program, depriving him of the use of land to graze his own livestock, is barred by the tribal exhaustion requirement and law of the case. It is the BIA who send out and seek landowner's consent to have their individually owned land placed in range units. The Tribe has nothing to do with the administration of that Program. Plaintiff gave no consent or permission to have his individually owned land placed in range units. He needed the land for his own use since he had been unlawfully deprived of units 169 and 501. This claim by plaintiff is not required to be exhausted and the Court has independent jurisdiction to determine this claim and plaintiff's damages.

B. Failure to Timely Exhaust Administrative Remedies under 43 CFR 4.314 Results in Lack of Jurisdiction.

First, plaintiff has addressed defendants' claim of failure to exhaust earlier in this memorandum and will not repeat those arguments again. Stated summarily, there are two appeals pending before the IBIA and so defendants are in no position to argue that there has been failure to exhaust. That is a decision that can only be made in the first instance by the IBIA.

1. September 28, 2016 Letter with Appeal Rights

Plaintiff received a letter from the BIA on August 21, 2015, advising him that his cattle were impounded on August 21, 2015, and that he owed the BIA $274,402.46. Plaintiff appealed this decision on September 3, 2015. The appeal was denied on March 14, 2016, and the denial advised the plaintiff that he could appeal to the IBIA. He appealed to the IBIA on April 11, 2016. That appeal is currently pending before the IBIA.

2. January 3, 2017, Letter with Appeal Rights

Plaintiff received a letter from the IBIA on June 24, 2016, advising that his cattle were impounded on June 21, 2016, and that he was required to pay damages and costs to redeem them. Plaintiff appealed this decision on June 27, 2016. The appeal was denied on July 18, 2016, and the denial advised the plaintiff that he could appeal to the IBIA. He appealed to the IBIA on August 15, 2016.

Defendants, in both 1 and 2 above, argue that plaintiff's appeals were not subject to administrative appeal. First, the denials being appealed both advised plaintiff that he could appeal the denials, which he did and the appeals are pending. Second, defendants argue that once notice of trespass, impoundment, and claim for damages were made, plaintiff could not appeal until the BIA decided to issue final notices of assessments on September 28, 2016, and January 3, 2017, substantially similar to the ones already appealed on April 11, 2016, and August 15, 2016, pursuant to the directive of the BIA in those letters that the denials could be appealed.

The applicable regulations state nothing specific about the time for appeal. See 25 CFR 166.800 through 166.819. No authority is cited by defendants for their view of what can be appealed and when. It must be presumed that if the BIA advised plaintiff it could appeal, they

would be bound by the appeal. Moreover, an aggrieved party is not precluded from administratively appealing even if the BIA written denial fails to state anything about appealing. Plaintiff had already appealed the impoundment, sale, and claimed damages and penalties in on April 11, 2016, and August 15, 2016. Compare United States Rule of Appellate Procedure, Rule 4 (a) (2) (notice of appeal filed after a decision or order but before final judgment is treated as being filed on date of final judgment).

Defendant's claim that the action of the BIA was not ripe for review on April 11, 2016, and August 15, 2016, until another letter was sent out on September 28, 2016, and January 3, 2017, is wrong. An unauthorized and illegal impoundment is a deprivation of property right at the time of impoundment. The illegal assessment of damages, costs, and penalties adversely affects the person against whom the assessment is made because it determines the cost of redemption. See 25 CFR 166.810. And it is not required that the exact amount of costs and damages be determined before redemption is allowed, as shown by the present case when plaintiff redeemed his property by the payment of money but later was billed for an additional amount. The notices of impoundment and intent to sell from which the appeals were taken in this case set out the amount assessed. Defendants' final assessment deviated only sightly from the amounts claimed in the notices of impoundment and costs of redemption from which plaintiff appeals in this case. Another appeal was not required to be taken.

II. Motion to Strike/Dismiss Claims Previously Dismissed

A. Pre-Impoundment Claims Alleged in the Second Amended Complaint

Defendants' claim that certain portion of the amended complaint should be stricken. This includes those allegations at ¶¶ 12, 13, 15, 16, 17, 18, and 47.

Motions to strike are disfavored by the courts, Manning v. Boston Med. Ctr. Corp., 725 F3d 34, 59 (1st Cir. 2013), especially when litigation is delayed. Id. The same standards that apply to determinations of 12 (b) (6) motions apply to motions to strike. Petrie v. Electronic Game Card, Inc., 761 F3d 959, 965 (9th Cir. 2014). If disputed questions of fact or law remain or doubt remains as to the potential relevance of the contested allegations, the motion must be denied. Cheatham v. ADT Corp., 161 F.Supp. 3d 815, 834 (D. Ariz. 2016); Blake v. Batmasian, 318 FRD 698, 700-7001 (S.D. Fla. 2017).

Plaintiff's claims that are within the exclusive authority of the BIA that do not pertain to trespass, impoundment, or collection of costs and penalties are not matters that are either required to be determined by the Tribe or be exhausted as required by the previous order in this case and consequently should not be stricken.

Plaintiff has previously addressed above the allegation that his land was improperly included in the Tribal Range Management Program as set forth in ¶¶ 12, 15, 17, and 47. Indeed, the form required to be signed by plaintiff is BIA form 5-5525. This is not a tribal form and there is nothing in the regulations giving the Tribe any authority in the matter. Without this form being signed, the BIA has no authority to include plaintiff's lands in any range unit that the Tribe might establish. The BIA included plaintiff's land in range units 169 and 501 without any approval or consent by the plaintiff. Plaintiff was damaged because he could not utilize his own lands to graze his own livestock, nor could not utilize the improvements placed on his own land.

Plaintiff as alleged in ¶ 13 had been granted certain range units after public bidding (not on allocation) for over 30 years. He was awarded the units again, but then the decision was reversed and units were awarded to others. As set forth in ¶ 16, he was required to be given 180

days notice of any such decision. He was not given the required notice by the BIA and he was damaged by the failure. The responsibility for giving such notice was the BIA, not the Tribe.

The above claims, as contended by defendants, should not be stricken from the complaint in this case.

B. Redemption Amounts/BIA's Calculation of Damages Alleged Again in the Second Amended Complaint

The matter raised in this section are on appeal to the IBIA. For the reasons stated previously the defendants' position that these claims have not been exhausted is without merit.

III. Lack of Jurisdiction over Negligence Assertions or Claims for Money Damages

Plaintiff in his prayer for relief asks for judgment for value of the cattle impounded and amounts paid for redemption. This prayer is a component of equitable relief and cannot be construed as money damages. See Pollard v. E.I Dupont, 532 U.S. 843 (2000); Williams v. Pharmacia, Inc., 137 F3d 944 (7th Cir. 1998); Avitia v. Metropolitan Club, 49 F3d 1219, 1232 (7th Cir. 1995) (substitute).

IV. Dismissal of Parties and Substitution of Agency

If the Court finds that defendants' point under this section has merit, plaintiff moves to amend his complaint to add that he is suing the individuals in both their official and individual capacities. That plaintiff was suing in both capacities is made clear by the prayer for relief which asks for judgment for the value of the cattle impounded and amounts paid for redemption. Moreover, as stated above, plaintiff's claim for money judgment can be viewed as equitable relief. A motion to amend should be freely granted unless the Court determines that any pleading deficiency cannot be overcome or that an amendment would be futile or inequitable. Loreley

Fin. No. 3 v. Wells Fargo Sec., 797 F3d 160, 191 (2nd Cir. 2015); Estate of Lagano v. Bergen County Prosecutor's Office, 769 F3d 850, 861 (3rd Cir. 2014); Ostrzenski v. Siegel, 177 F3d 245, 252-253 (4th Cir. 1999); Yagman v. Garcietti, 852 F3d 859, 867 (9th Cir. 2017).

CONCLUSION

For all the above reasons, defendants' motion to dismiss should be denied.

Dated: January 7, 2019.

/S/ Terry L. Pechota
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CERTIFICATE OF SERVICE

I certify that on the above date I caused to be served by electronic transmission a copy of the foregoing memorandum upon Meghan Roche, AUSA.

/S/ Terry L. Pechota
Terry L. Pechota