

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CIVIL ACTION NO.: 19-cv-62591 – BLOOM/Valle

EGLISE BAPTISTE BETHANIE DE
FT. LAUDERDALE, INC., a Florida
Not-For-Profit Corporation, BERTHONY
AURELUS, YCHELINDE BRUTUS,
MARIANA BELIZAIRE, JARMUTH CHARLES,
QUESNER CHARLES, ELISENA CHARLOT,
ROSENA CELESTIN, SERAPHIN D'HAITI,
MAX DEMOSTHENE, MARIE DEMOSTHENE,
CLAIRE VALERIE DESTIN, ROSELIE
DOCTEUR, EMMANUEL DUVERNA,
MAX DUBOUIS, WISNICK ESTELAN,
MAJORIE ESTELAN, ALINE SUZAN
FRANCOIS, MADELENE PIERRE GEDILUS,
NEREUS GEDILUS, GESLER ILSENAT,
MICHAEL ISEMAR, JEAN ISMAEL, JULIANNA
ISMAEL, BEZANA JEAN-BAPTISTE, GERTHA
JEAN-BAPTISTE, IRMA JEUDY, FLORENCE
JOLY, ERTA JOSEPH, HORAT JOSEPH, JOSETTE
JOSEPH, JULIA LAFRANCE, EPHISELLA MENAR,
GEORGE MENAR, MISELA MERONVIL, ESAIE
MICHEL, GERTHA MICHEL, ROSITA
MILHOMME, NICOLS MOISE, LUTHANE MOISE,
LOUISE MUNNINGS, EMILE NOEL, FLORENCE
NOEL, ZIUS NOEL, DUMARSAIS PARFAIT,
HERTHA PARFAIT, CLAUDETTE PIERRE,
HERMANIE PIERRE, JEAN LOUIS PIERRELUS,
FENELON PROSPER, BONIFACE PETIT-BEAU,
BARCELOT PETIT-BEAU, LYDIEUNIE PETIT-
BEAU, VERDELINE PETIT-BEAU, KELDY
DENITA PIERRE, LINES PIERRE, LAVITA
PIERRE, ANEILA PIERRE-LOUIS, FANA RACINE,
MIRLANDE RACINE, JACKSON ROBERSON,
SOLANGE ROBERSON, ALIANE SAINTIL,
LUCKERNE SAINTIL, HERMANTILDE
SAINTIL, MARIE SANTIL, JEAN SOLVILIEN,
MUREGNE ST.-LOUIS, ANDY SAINT-REMY,
ACCELINE SAINT-REMY, LEONNE SAINT-
REMY, JOSEPH SYLVIAN, BIENNE TANIS,
LUCIA TANIS, ITONY TELUSNORD, MARIE
ANGELET TELUSNORD, DIENIVA THERVIL,
And LUDIE THERVIL,

Plaintiffs,

vs.

THE SEMINOLE TRIBE OF FLORIDA and
AIDA AUGUSTE,

Defendants.

**DEFENDANT SEMINOLE TRIBE OF FLORIDA’S MOTION TO DISMISS
PLAINTIFFS’ FIRST AMENDED COMPLAINT FOR
LACK OF SUBJECT MATTER JURISDICTION**

Defendant, THE SEMINOLE TRIBE OF FLORIDA, by and through the undersigned counsel, hereby moves, pursuant to Rule 12(b)(1)¹ of the Federal Rules of Civil Procedure, for an order dismissing the claims set forth in Plaintiffs’ First Amended Complaint (“hereinafter “Amended Complaint”) [D.E. 21] with prejudice for lack of subject matter jurisdiction. As grounds for this motion, the Seminole Tribe of Florida states as follows:

I. BACKGROUND

Plaintiffs, EGLISE BAPTISTE BETHANIE DE FT. LAUDERDALE, INC., a Florida Not-for-Profit Corporation, and ANDY SAINT-REMY, originally filed a Complaint against the Seminole Tribe of Florida and Defendant, AIDA AUGUSTE (“Auguste”). [D.E. 1]. An Amended Complaint was subsequently filed on December 1, 2019 which now names approximately seventy-six (76) new Plaintiffs who were not originally named in the Complaint. [D.E. 21]. Plaintiffs’ Amended Complaint now purports to allege that on or about September 29, 2019, Eglise Baptiste had its weekly church service when six (6) individuals who wore Seminole Police Department (SPD) uniforms “traveled from SemTribe’s reservation in two vehicles, one

¹ The Seminole Tribe of Florida has additional dismissal arguments pursuant to Rule 12, and respectfully reserve those arguments until the fundamental issue of jurisdiction has been resolved. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1241 n.4 (11th Cir. 1999) (“Because of its jurisdictional nature, we must consider the Tribe’s claim of sovereign immunity before reaching the issue of failure to state a claim.”).

of them an SPD marked squad car” and conducted the following activities: “(a) entered the Church Property, (b) disabled the Church Property’s surveillance cameras; (c) expelled from the Church Property all the worshipers who opposed Auguste, (d) changed the locks to the doors of the religious structure located on the Church Property, (e) seized the business records of Eglise Baptiste and (f) locked the gates to the Church Property.” [D.E. 21, ¶ 10]. Plaintiffs now, individually, bring causes of action against the Seminole Tribe of Florida under 18 U.S.C. § 248(c)(1) (Counts 1 & 4–80), while only Plaintiff, Eglise Baptiste, brings the causes of action for Interference With Business Relationships (Count 2) and Trespass (Count 3) against only the Seminole Tribe of Florida.

As Plaintiffs acknowledge in the Amended Complaint, the Seminole Tribe of Florida is a federally recognized Indian tribe, which “owns and maintains a reservation in Hollywood, Florida.” [D.E. 21, ¶ 3]. Further, the Seminole Tribe of Florida is governed by a Tribal Council and SPD is a government agency of the Seminole Tribe of Florida. [D.E. 21, ¶ 3]. Despite the precedent establishing that the doctrine of tribal sovereign immunity is applicable to the Seminole Tribe of Florida, as discussed more fully below, Plaintiffs contend that

[t]he judicial doctrine of tribal sovereign immunity does not insulate SemTribe from the claims which Plaintiffs have asserted against SemTribe in this civil action because: (a) the actions of SemTribe’s police officers took place more than eleven (11) miles away from SemTribe’s Hollywood, Florida, reservation; (b) prior to September 29, 2019, Plaintiffs had not had an opportunity to negotiate with SemTribe for a waiver of SemTribe’s tribal sovereign immunity; and (c) other than this civil action, Plaintiffs have no means by which to secure monetary compensation for SemTribe’s infringements of Plaintiffs’ rights under Federal and Florida law.

Based upon the matters set forth herein, any action arising against the Seminole Tribe of Florida must be dismissed for lack of subject matter jurisdiction, as the Seminole Tribe of Florida is immune from the instant lawsuit under the doctrine of tribal sovereign immunity. Accordingly,

Plaintiffs' Amended Complaint brought against the Seminole Tribe of Florida fails as a matter of law, and is subject to dismissal with prejudice.

II. STANDARD OF REVIEW

The challenge under a Rule 12(b)(1) motion is to the actual existence of subject matter jurisdiction, rather than to the mere sufficiency of the allegations in the complaint. *Melbourne v. Augmar Montilla Int'l, Inc.*, No. 03-Civ-62200, 2004 WL 1767740, at *1 (S.D. Fla.) (citing *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987)). The pleading's allegations are then merely evidence on the issue and not controlling. *Id.* The plaintiff must prove the actual existence of subject matter jurisdiction regardless of the allegations. *Id.* The Eleventh Circuit has explained:

[W]hen a defendant properly challenges subject matter jurisdiction under Rule 12(b)(1) the district court is free to independently weigh facts, and 'may proceed as it never could under Rule 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction-its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional issue.'

Morrison v. Amway Corp., 323 F.3d 920, 925 (11th Cir. 2003) (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). Because subject-matter jurisdiction focuses on the court's power to hear the claim, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. U.S.*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003).

B. MEMORANDUM OF LAW

i. Tribal Sovereign Immunity

This Court lacks subject matter jurisdiction over Plaintiffs' claims against the Seminole Tribe of Florida based upon the doctrine of tribal sovereign immunity; therefore, dismissal is

warranted under Rule 12(b)(1). *Thomas v. U.S. Postal Serv.*, 364 Fed. Appx. 600, 601 n.3 (11th Cir. 2010). As a sovereign Indian tribe, the Seminole Tribe of Florida, as well as any of its subordinate governmental units, its police officers or any other employees or agents, are entitled to sovereign immunity. *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1285 (11th Cir. 2001). Tribal sovereign immunity is a jurisdictional issue, and one that should be addressed at the outset of a matter. *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224, 1228 (11th Cir. 2012).

Section 16 of the *Indian Reorganization Act of 1934*, as amended, 25 U.S.C. § 5123, establishes the right of an Indian tribe to organize for the common welfare of its members by adopting a constitution and bylaws in accordance with the provisions of the Act. By adoption of its Constitution, the Seminole Tribe of Florida became a fully recognized Indian tribe under the laws of the United States. A true and correct copy of the operative Amended Constitution and Bylaws of the Seminole Tribe of Florida is attached hereto and incorporated herein as **Exhibit “A.”**²

The United States Supreme Court has recognized that Indian tribes “retain their original natural rights” that were vested in them, as sovereign governmental entities existing long before the genesis of the United States. *Fla. Paraplegic Assoc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999). The principle of tribal sovereign immunity from suit is a well-established doctrine. *U.S. v. U.S. Fidelity Guar. Co.*, 309 U.S. 506, 512 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509-10 (1991); *Kiowa Tribe of Okla. v. Mfr. Techs., Inc.*, 523 U.S. 751, 754-55 (1998); *Houghtaling v. Seminole Tribe of Fla.*, 611 So. 2d

² While the Court is limited in its review to the well-pled allegations in the Complaint on facial attacks to subject matter jurisdiction, when, as in the present matter, there is also a factual attack, the Court may consider matters and documents outside the pleadings, such as affidavits. *Lawrence*, 919 F.2d at 1529; *Mastro v. Seminole Tribe of Fla.*, 2013 WL 3350567, *2 (M.D. Fla. 2013).

1235, 1239 (Fla. 1993). The doctrine of tribal sovereign immunity is essential to guard against the unwarranted exercise of state and federal jurisdiction over tribal affairs, which would impinge on tribal self-government.

Tribal sovereign immunity does not derive from an act of Congress, but rather is one of the inherent powers of limited sovereignty which has never been extinguished. *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1498 (D.C. Cir. 1997). In *United States Fidelity Guaranty Company*, 309 U.S. at 512, the United States Supreme Court held that "Indian nations are exempt from suit without Congressional authorization." As noted in *Kiowa, supra*, and its numerous predecessors, including, *Bank of Okla. v. Muscogee Creek Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992), "the basic law of sovereign immunity for Indian Tribes is clear: suits against Indian Tribes by third parties are barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation." *See also State of Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1241 (11th Cir. 1999).

As previously noted, a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *See also Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (expressing an Indian tribe's unquestionable right to sovereign immunity absent an express waiver thereof). Further, it is well-established by the Eleventh Circuit that absent a clear and unequivocal waiver of sovereign immunity by either the Indian Tribe or Congress, the doctrine of tribal sovereign immunity applies and any claims against the Indian Tribe are barred. *See Furry*, 685 F.3d at 1226.

The Amended Tribal Constitution of the Seminole Tribe of Florida expressly prohibits the Tribal Council from delegating any of its constitutional authority in the absence of a tribal ordinance or resolution duly enacted by the Tribal Council sitting in legal session. In fact,

Article V, Section 9(a) of the Amended Tribal Constitution forbids delegation of any of the authorities contained in the Amended Constitution to tribal officials or others *except* by Tribal ordinance or resolution. Thus, in order for any contract or waiver of tribal rights to be valid, effective, and binding upon the Seminole Tribe of Florida as a sovereign government, the Tribal Council's approval of the waiver would need to be embodied in an ordinance or resolution duly enacted by the Tribal Council sitting in legal session. A true and correct copy of the Seminole Tribal Sovereign Immunity Ordinance C-01-95 is attached hereto and incorporated herein as **Exhibit "B."**

ii. Application of Tribal Sovereign Immunity

Here, Plaintiffs' allege that the Seminole Tribe of Florida's conduct effectively waived the Seminole Tribe of Florida's tribal sovereign immunity. [D.E. 21, ¶¶ 10-11]. Plaintiffs' Amended Complaint, however, is facially devoid of any allegation that the Seminole Tribe of Florida expressly and unequivocally waived its sovereign immunity for any of the causes of action asserted against it.

As to the statutory violations alleged in Counts 1 and 4-80, there has been no express waiver of tribal sovereign immunity within 18 U.S.C. § 248 or any of the other relevant sections. Consequently, the Seminole Tribe of Florida should be afforded sovereign immunity from these claims. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir. 2001) (dismissing a 1983 statutory claim against the defendant on the grounds of tribal sovereign immunity); *Florida Paraplegic, Ass'n, Inc.*, 166 F.3d at 1134 (holding that the trial court should have dismissed an action predicated on a violation of the ADA due to tribal sovereign immunity).

The same analysis applies for Counts 2 and 3, which invoke claims sounding in tort. The Seminole Tribe of Florida has not waived, expressly and unequivocally or otherwise, it's

tribal sovereign immunity for actions related to trespass and tortious interference. *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993) (holding that tribal sovereign immunity barred claims for trespass); *Western Casinos, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828 (Cal. 2d Dist. Ct. App. 1999) (claims for tortious interference and abuse of process against tribal council members and attorneys for tribe barred on tribal sovereign immunity grounds).

While Congress has not abrogated the Seminole Tribe of Florida's sovereign immunity in relation to the claims in this suit, neither has the Seminole Tribe of Florida done so through a resolution or an ordinance by the Seminole Tribe of Florida Tribal Council sitting in legal session. A true and correct copy of the Affidavit in Support of Defendant, Seminole Tribe of Florida's, Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Subject Matter Jurisdiction is attached hereto and incorporated herein as **Exhibit "C."** In the Affidavit of LaVonne Rose, who is an enrolled member of the Seminole Tribe of Florida and Secretary of the Tribal Council of the Seminole Tribe of Florida, Ms. Rose expressly confirmed that "[a]t no time, and under no circumstances, has the Seminole Tribe of Florida consented to suit on any claim asserted by Plaintiff[s], nor has any waiver of tribal sovereign immunity respecting such claim[s] asserted by Plaintiff[s] ever been approved by Tribal Council of the Seminole Tribe of Florida in legal session, as constitutionally required." See **Exhibit "C."**

Further, the fact that the alleged incident occurred "more than eleven (11) miles from SemTribe's Hollywood, Florida, preservation" is immaterial. The Supreme Court upheld "a long line of precedents, concluding that 'the doctrine of tribal immunity'—without any exceptions for commercial or off-reservation conduct—is settled law and controls this case." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). The Eleventh Circuit has already established that tribal sovereign immunity applies in the instance of a private tort claim

on or off reservation for commercial or government functions absent any waiver either by the Indian tribe or Congress. *See Furry*, 685 F. 3d at 1226 & 1228.

Finally, the fact that “prior to September 29, 2019, Plaintiffs had not had an opportunity to negotiate with SemTribe for waiver of SemTribe’s tribal sovereign immunity” is irrelevant. As mentioned above, only Congress or the Seminole Tribe of Florida through its Tribal Council sitting in legal session may waive the Seminole Tribe of Florida’s tribal sovereign immunity. Consequently, there has been no clear, express, and unequivocal waiver of the Seminole Tribe of Florida’s sovereign immunity as to the entire Amended Complaint, and Plaintiffs’ Amended Complaint should be dismissed with prejudice as to the Seminole Tribe of Florida.

iii. Plaintiffs May Seek Legal Recourse Against Other Individuals.

Plaintiffs' allegations that the instant action is their only means to secure a remedy from the conduct arising from the September 29, 2019 incident are unfounded. [D.E. 21 ¶ 11]; *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 n.8 & 782 (2014) (finding that the plaintiff had “many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges” and the Court analyzed the various mechanisms in which the plaintiff could have sought other remedies). Despite Plaintiffs’ contentions otherwise, Plaintiffs have alternative remedies against the real parties in interest and have taken such legal action.³ As such, the “special justification” argument that Plaintiffs attempt to create is belied by their own actions in seeking redress from the individuals allegedly involved, and the case should be dismissed.

III. CONCLUSION

Based upon the aforementioned reasons, the Seminole Tribe of Florida, which is a federally recognized Indian Tribe, is immune from the instant lawsuit pursuant to the doctrine of

³ *Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Aida Auguste et al.*, in the Circuit Court of the 17th Judicial Circuit in and for Broward County Florida, Case No. CACE-19-19270.

tribal sovereign immunity. Neither the Seminole Tribe of Florida, nor any Act of Congress has waived the Seminole Tribe of Florida's immunity for any of the claims alleged in Plaintiffs' Amended Complaint. Accordingly, Plaintiffs' Amended Complaint should be dismissed. The Seminole Tribe of Florida further seeks recovery of all attorney's fees, expenses and costs incurred in defending this action pursuant to Seminole Tribal Sovereign Immunity Ordinance C-01-95.

IV. CERTIFICATE OF CONFERRAL

Pursuant to Local Rule 7.1(a)(3), undersigned counsel for the movant has conferred with Plaintiffs' counsel on December _____, 2019, via _____ in a good faith effort to resolve the issues raised in the Motion and has been unable to do so.

Dated: December _____, 2019

Respectfully submitted,

/s/ Mark D. Schellhase

MARK D. SCHELLHASE, ESQ.

Florida Bar No: 57103

Email: mark.schellhase@gray-robinson.com

EMILY L. PINELESS, ESQ.

Florida Bar No: 115569

Email: emily.pineless@gray-robinson.com

GRAYROBINSON, P.A.

225 NE Mizner Boulevard, Suite 500

Telephone: 561-368-3808

Facsimile: 561-368-4008

Attorneys for Defendant, Seminole Tribe of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was filed with the Clerk of the Court using CM/ECF. I further certify that I mailed the foregoing document and the Notice of Electronic Filing by e-mail to the following on: Lawrence R. Metsch, Esq., Attorney for Plaintiffs, 20801 Biscayne Blvd., Ste. 300, Aventura, FL 33180-1423 (l.metsch@metsch.com) and Mark C. Johnson, Esq. & Abdul-Sumi Dalal, Attorney for Defendant, Aida Auguste, Johnson | Dalal, 111 N. Pine Island Road, Suite 103, Plantation, Florida 33324 (MJ@JohnsonDalal.com; Info@JohnsonDalal.com; JT@JohnsonDaLal.com; Service@JohnsonDaLal.com) this 13th day of December, 2019.

Respectfully submitted,

GRAYROBINSON, P.A.
225 NE Mizner Boulevard
Suite 500
Boca Raton, Florida 33432
Telephone: 561-368-3808
Facsimile: 561-368-4008

/s/ Mark D. Schelhase

Mark D. Schelhase, Esq.

Florida Bar No.: 57103

Primary email: mark.schelhase@gray-robinson.com

Secondary email: ingrid.reichel@gray-robinson.com