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, et al.,

Plaintiffs,

vs.

THE SEMINOLE TRIBE OF FLORIDA and AIDA AUGUSTE,

Defendants.
_____/

DEFENDANT, SEMINOLE TRIBE OF FLORIDA'S, REPLY IN SUPPORT OF ITS 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, respectfully submits this Reply in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Subject Matter Jurisdiction, and states as follows:

I. INTRODUCTION

Plaintiffs' unsupported arguments that the Seminole Tribe of Florida is not entitled to sovereign immunity for the conduct alleged in the First Amendment Complaint are without merit. For the reasons set forth below, 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' First Amended Complaint brought against the Seminole Tribe of Florida fails as a matter of law, and is subject to dismissal with prejudice.

II. ARGUMENTS

A. The Doctrine Of Tribal Sovereign Immunity Applies To Plaintiffs Civil Causes of Action Brought Against The Seminole Tribe of Florida.

Plaintiffs provide no support for their new legal theory that the doctrine of tribal sovereign immunity does not exist because their causes of action were brought under 18 U.S.C. § 248, a federal statute with criminal penalties. [D.E. 31]. Not only did Plaintiffs fail to provide any case law to support their new legal theory, they cannot because the law is unmistakably clear that the instant matter is a civil case where the doctrine of tribal sovereign immunity applies.

First, the federal statute promulgates that a private individual may bring a *civil* action pursuant to 18 U.S.C. § 248(c)(1), as a private individual cannot initiate a criminal claim. *See Cuyler v. Scriven*, 6:11-CV-00087-MEF, 2011 WL 861709, at *3 (M.D. Fla. Mar. 9, 2011) (citing several cases for the proposition that dismissal of a private claim under 18 U.S.C. § 242 is appropriate because a private plaintiff has no authority to initiate a federal criminal prosecution). Further, it is evident from the text of 18 U.S.C. § 248 that Congress did not waive sovereign immunity, as there is no clear, express, and unequivocal language for any such waiver. The binding precedent in this jurisdiction establishes that, absent a clear, express, and unequivocal waiver of an Indian tribe's sovereign immunity by either Congress or the Indian tribe, an Indian tribe is immune from suit based on the doctrine of tribal sovereign immunity. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (stating that "as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1226, 1232 (11th Cir. 2012) (holding that "[t]he Supreme Court has made clear that a suit against an Indian tribe is barred unless the tribe has clearly waived its immunity or Congress has expressly and unequivocally abrogated that immunity" and acknowledging that "our precedents make clear, a tribe may retain

its immunity form suit even where its conduct is governed by state or federal law"); *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242-43 (11th Cir. 1999) (stating that "Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and that ambiguities in federal laws implicating Indian rights must be resolved in the Indian's favor"); *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999) (finding that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act"). As such, the doctrine of tribal sovereign immunity remains the law of the land, and is applicable to the instant civil action. *See Kiowa Tribe of Okla.*, 523 U.S. at 752 (holding that the United State Supreme Court "decline[d] to revisit our case law and choose to defer to Congress"); *Furry*, 685 F.3d at 1237.

Second, the Seminole Tribe of Florida has not waived its tribal sovereign immunity for the instant action, as established in its affidavit attached to the Motion to Dismiss. *See* [D.E. 28-3]. Since the Seminole Tribe of Florida lodged a "factual attack"[1] on Plaintiffs' First Amended Complaint, Plaintiffs had the burden to rebut subject matter jurisdiction, and failed to do so. *Desporte-Bryan v. Bank of Am.*, 147 F. Supp. 2d 1356, 1360 (S.D. Fla. 2001) (stating "[p]laintiff bears the burden of proving the existence of subject matter jurisdiction"); *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353, 360 (Fla. 2d DCA 2005) (granting a motion to dismiss that relied on affidavits demonstrating that the Seminole Tribe of Florida had not expressly waived sovereign immunity). In their Response, not only did Plaintiffs fail to address the legal issue presented in the Seminole Tribe of Florida's Motion to Dismiss, but they also failed to rebut the affidavit in support

[1] When making a "factual attack," there is "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 jurisdictional claims." *Desporte-Bryan*, 147 F. Supp. 2d at 1360.

of dismissal based on lack of subject matter jurisdiction.

Accordingly, Plaintiffs new legal theory that the doctrine of tribal sovereign immunity does not apply to a cause of action brought under 18 U.S.C. § 248 is unfounded, as language of 18 U.S.C. § 248 is clear that *civil* remedies are available to a private individual. Further, there has been no clear, express, and unequivocal waiver of the Seminole Tribe of Florida's tribal sovereign immunity by neither Congress, nor the Seminole Tribe of Florida. Based on the aforementioned reasons, Plaintiff's First Amended Complaint should be dismissed as to the Seminole Tribe of Florida with prejudice for lack of subject matter jurisdiction.

B. Tribal Sovereign Immunity Exists Despite The Alleged Conduct Occurring Off-Reservation.

Plaintiffs' First Amended Complaint purports to bring causes of action against the Seminole Tribe of Florida based on off-reservation non-commercial conduct. *See* [D.E. 21, 31]. Plaintiffs primarily argue that the doctrine of tribal sovereign immunity "does not extend to off-reservation conduct" involving criminal conduct, and relies on case law that is both non-binding and distinguishable from the instant matter. [D.E. 31].

Plaintiffs cite to a Northern District of California opinion that is distinguishable from the instant action, as it pertains to a case involving plaintiffs' accessibility to an off-reservation tribal-owned and operated hotel. *See Hollynn D'Lil v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, C 01-1638 TEH, 2002 WL 33942761, at *1 (N.D. Cal. Mar. 11, 2002). The court ultimately held that the Indian tribe was not entitled to sovereign immunity for non-contractual off-reservation conduct and, in so holding, found that *Kiowa* provides an "ambiguous reach of the holding." *Id.* at *8. The Eleventh Circuit, however, disagrees with the decision in *Hollynn*, and continues to rely on the *Kiowa* opinion for the purpose that tribal sovereign immunity applies for off-reservation conduct. *See Furry*, 685 F.3d at 1236 (confirming the "Supreme Court's

straightforward doctrinal statement, repeatedly reiterated in the holdings of this Circuit, that an Indian tribe is subject to suit in state or federal court '*only where* Congress has authorized the suit or the tribe has waived its immunity'", and finding that the Indian tribe was entitled to sovereign immunity for a tortious act that occurred off-reservation).

Further, Plaintiffs' continue to rely on a Supreme Court decision that specifically held that the baseline position is one of tribal immunity. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Rather than address the clear precedence espoused in the *Bay Mills* case, Plaintiffs rely on a footnote that is inapplicable to the instant matter, and a dissent that has no precedential value. The *Bay Mills* decision makes clear that the Court's "decision reaffirmed 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.'" *Id.* at 798. In fact, the *Bay Mills* Court reviewed the actions Congress has taken in response to the *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.* decision, and found that Congress specifically **did not** waive sovereign immunity for tort claims. *Id.* at 802 (finding that Congress drafted legislation that "broadly abrogated tribal immunity for most torts," yet did not adopt that legislation).

Plaintiffs' reliance on the *Bay Mills'* footnote, as well as the other cases from the Alabama Supreme Court cited by Plaintiff also appear misplaced, as there is binding precedent in this jurisdiction establishing that tribal sovereign immunity is appropriate in the instant matter. *See* [D.E. 31]. The Eleventh Circuit has held that tribal sovereign immunity applies in the instance of a private tort claim, in this Circuit, on or off reservation, for commercial or government functions, absent any waiver by either the Seminole Tribe of Florida or Congress. *See Furry*, 685 F.3d at 1226. Just as the Supreme Court in *Bay Mills* deferred to Congress regarding the applicability of the doctrine of tribal sovereign immunity, so did the Eleventh Circuit when it affirmed this Court's

finding and held that the Indian tribe was protected by sovereign immunity in the private tort action. *Id.* at 1229, 1237. Consequently, Plaintiffs argument in reliance on cases from the Alabama Supreme Court that it "had not had an opportunity to negotiate with SemTribe for a waiver of SemTribe's tribal sovereign immunity" is immaterial in this jurisdiction, as there is binding precedent which establishes that, absent a clear and express waiver from the Indian tribe or Congress, the tribal sovereign immunity is applicable and the court lacks subject matter jurisdiction over the Indian tribe. The fact that Alabama may have abrogated certain aspects of tribal immunity does not change the clear dictate of the Supreme Court that immunity "is a matter of federal law and is not subject to diminution by the states." *Bay Mills Indian Cmty.*, 572 U.S. at 789 (quoting *Kiowa*, 523 U.S. at 752).

Accordingly, based on the binding case law in this Circuit and the Supreme Court, the Seminole Tribe of Florida is immune from suit based on the doctrine of tribal sovereign immunity, as neither the Seminole Tribe of Florida nor Congress waived the Seminole Tribal of Florida's immunity for the instant action, and, therefore, this Court lacks subject matter jurisdiction.

C. 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 equally unfounded; the case law on which Plaintiffs rely supports the opposite conclusion. In *Bay Mills*, the Court acknowledged 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 by which the plaintiff could have sought other remedies. *Bay Mills Indian Cmty.*, 572 U.S. at 782, 799 n.8. Here, Plaintiffs have alternative

remedies against the real parties in interest, and they have taken such legal action.[2] As such, it is evident that Plaintiffs may seek redress from other individuals allegedly involved to secure "monetary compensation," and the case should be dismissed against the Seminole Tribe of Florida.

III. CONCLUSION

Based upon the aforementioned reasons, the Seminole Tribe of Florida, which is a federally recognized Indian Tribe, is immune from the instant civil lawsuit pursuant to the doctrine of 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' First Amended Complaint. Accordingly, Plaintiffs' First Amended Complaint should be dismissed against the Seminole Tribe of Florida with prejudice. 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.

Respectfully submitted,

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[2] *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. Further, Plaintiffs currently seek leave to file a Second Amended Complaint in this case which proposes that seventeen (17) new defendants be named in this action. *See* [D.E. 25, 25-1].

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 sent 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 23rd day of December, 2019.

Respectfully submitted,

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