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Court of Indian Offenses
Trial Division
FILED
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MIAMI AGENCY

COURT OF INDIAN OFFENSES FOR THE MIAMI AGENCY MAR 11 2020

MIAMI, OKLAHOMA

Time Recorded 1:30 PM
Court Clerk C. B. [Signature]

TONY HOLDEN and DAVID
QUALLS,

Plaintiffs,

v.

Case No. CIV-19-M09

EMMETT N. ELLIS, MARCEL
WALTHER, and JONAS RABEL, in
their official capacities,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court hereby memorializes its findings of fact and conclusions of law supporting its decision granting Defendants' June 21, 2019 Amended Motion to Dismiss the Complaint filed by Plaintiffs herein. The Court's Findings of Fact are based on Plaintiffs' allegations, undisputed procedural history, and the proceedings herein on Defendants' motion to dismiss which the Court heard on November 14, 2019 as well as the record from *Qualls and Holden v. Mathews et al.*; CIV-18-M08 (CIA Miami) involving the same parties and many of the same issues. Both sides attached and relied upon extrinsic materials in support of their respective positions on Defendants' jurisdictional motion, and since the issues presented are jurisdictional the Court has relied upon such extrinsic materials to the extent they show undisputed facts and has ruled accordingly. References to

such supporting extrinsic materials submitted to the Court are sometimes supplied herein.

FINDINGS OF FACT

1. Plaintiffs formerly held privileged gaming licenses for gaming activities of the Peoria Tribe of Indians of Oklahoma, a federally recognized Indian tribal government (the "Tribe").

2. Plaintiffs are members of Direct Enterprise Development, LLC ("Direct") and furnished gaming management services through their business entity Direct. From 2007 to 2018, Direct managed the Tribe's Buffalo Run Casino ("Casino"), through the actions and control of the Plaintiffs, acting as "Primary Management Officials" within the meaning of the Tribe's Gaming Law §1.2(s)).

3. Neither of the Plaintiffs is a member of the Tribe.

4. Under § 5.1 of the Tribe's Gaming Law, each of the Plaintiffs were required to obtain a privileged gaming license when they began their business relationship with the Tribe.

5. Defendants Emmett N. Ellis, Marcel Walther and Jonas Rabel in their official capacities are members of the Peoria Tribal Gaming Commission ("Commission" or "Commissioners," as appropriate), a tribal agency. The Commissioners are a three-member administrative agency responsible for making decisions as to, *inter alia*, entitlement, fines, suspension, and revocation of the Tribe's privileged gaming licenses.

6. The Tribe's privileged gaming licenses to Plaintiffs, first issued in 2007, were valid for a two-year period (Tribe's Gaming Law § 8.4(a)), so every two years the Commission renewed Plaintiffs' licenses until this controversy arose. The most recent renewal for Plaintiff Qualls occurred on September 12, 2017, and for Plaintiff Holden on September 20, 2017. Both of Plaintiffs' licenses were set to expire on October 8, 2019.

7. On September 28, 2017, the National Indian Gaming Commission ("NIGC") sent a letter to the Tribe expressing concerns regarding a new proposed management contract between the Tribe and Direct. The NIGC stated that it had commenced an investigation which included, among other things, issues over whether Direct had engaged in questionable and illegal accounting practices from 2008 to 2017 that resulted in an overpayment of more than \$2 million (\$2,000,000.00) to Direct from funds that should have been paid by them to the Tribe.

8. On February 22, 2018, the NIGC sent a letter to Peoria Tribal Chief John Froman that informed the Tribe that the NIGC had opened a formal investigation into "possible undue influence and possible misuse of the net gaming revenue mandate of the IGRA, NIGC regulations, and the Peoria Tribe's gaming ordinance." (See Letter From NIGC dated February 22, 2018, attached as MTD Exhibits #6.)

9. Shortly after NIGC sent the above referenced letters, the Tribe held elections resulting in a new Chief, new Business Committee members, and several new Commission appointments.

10. Subsequently, the Commission's Executive Director, pursuant to her responsibilities under the Gaming Law, sent letters to the Plaintiffs on September 24, 2018, informing them that the Commission had temporarily suspended their gaming licenses on suitability and eligibility grounds, pending a prompt due process hearing before the Commission which was scheduled for October 4, 2018.

11. At the October 4, 2018 hearing, Plaintiffs' counsel expressed concerns about the Commission's failure to give Plaintiffs adequate notice of the claims being made against them. In response to this objection, the Commission continued the hearing until November 29, 2018, to provide the Plaintiffs with more detailed notice of the reasons for their suspension, and to allow the Plaintiffs time to gather evidence and witnesses to support their position.

12. On November 1, 2018, Plaintiffs filed a Complaint in this Court captioned *David J. Qualls and Tony Holden v. Tonya R. Mathews, Emmett N. Ellis, Marcel Walther, and Jonas Rabel, in their official capacities*, CIV-18-M08. That same day Plaintiffs filed an ex parte Motion for Temporary Restraining Order ("TRO") to halt the continuance of the Commission's revocation hearing. The Court granted the ex parte motion on Nov. 15, 2018.

13. This Court heard oral arguments on Plaintiffs' Motion for TRO on December 4, 2018, and ultimately denied such relief, thus permitting the Commission to continue with its revocation hearing. The Commission conducted Plaintiffs' revocation hearings on January 31, 2019.

14. On March 13, 2019, the Commission entered a preliminary order setting forth its findings and provisional remedies, conditioned on the future actions of Plaintiffs and pending its future final order (the "Preliminary Order"). Specifically, the Commission found that Plaintiffs had knowingly utilized a disapproved accounting method that resulted in their receipt of \$2 million dollars in excess management fees. Rather than revoke Plaintiffs' privileged gaming licenses, the Commission's Preliminary Order furnished Plaintiffs the opportunity to pay a fine in the amount of \$2,067,561 within 60 days to remedy their misconduct and avoid revocation of their licenses. The Commissioner's Preliminary Order stated that if Plaintiffs did not pay the fine in full within 60 days from the date of its Preliminary Order, the Commission would issue an order permanently revoke Plaintiffs' licenses. Order at 4.

15. On April 12, 2019, Plaintiffs filed this suit with the Court, wherein they alleged that the Commission violated the Indian Civil Rights Act ("ICRA") and further sought judicial review of the Commission's Preliminary Order pursuant to Tribal Gaming Ordinance § 17.3. In their Complaint, Plaintiffs requested that this Court "enter its order preliminarily enjoining Defendants from enforcing their Decision of March 13, 2019, and its judgment permanently

enjoining the Defendants from enforcing their Decision of March 13, 2019, and providing transmittal of that Decision to the NIGC.” Complaint at 21.

16. Tribe has implemented the protections of ICRA in its Constitution, Const., Art, XVIII, but it has only guaranteed those protections to the members of the Tribe: “The protections guaranteed by the Indian Civil Rights Act of 1968 (82 Stat. 77), as amended, shall apply to all members of the Peoria Tribe.”

17. Plaintiffs did not comply with the conditions of the Preliminary Order to pay the fine amount within 60 days (or at all). On May 14, 2019, the Commission issued and filed a final order revoking Plaintiffs’ Licenses (the “Final Order”). Plaintiffs never filed any action within 30 days (or at all) pursuant to the Tribe’s Gaming Ordinance, §17.3, to challenge the Commission’s Final Order.

CONCLUSIONS OF LAW

1. Once jurisdiction has been challenged, as it has been here, Plaintiffs have the burden to demonstrate jurisdiction over the subject matter. *E.g.*, *Johnson v. Harrah’s Kansas Casino Corp.*, Case No. 04-4142-JAR, 2006 WL 463138, at *1 (D. Kan. Feb. 23, 2006). Plaintiffs have not satisfied that burden, in two respects: (i) they have failed to overcome Defendants’ contention that the controversy is now moot for failure of Plaintiffs to seek review of the Final Order; and (ii) they have failed to show that the Commissioners are not protected by the Tribe’s sovereign immunity.

A. Mootness and Timeliness

2. The only action Plaintiffs have filed pursuant to Section 17.3 of the Tribe's Gaming Ordinance is this lawsuit, commenced on April 12, 2019, wherein Plaintiffs seek review of the Commission's March 13, 2019 Preliminary Order.

3. The Preliminary Order only provisionally suspended Plaintiffs' gaming licenses pending further conditions and events. The Commission did not permanently revoke Plaintiffs' licenses in its Preliminary Order. The Commission's Preliminary Order was interlocutory and provisional, leaving the Commission free to revise it at any time pending its issuance of the new, or modified final decision regarding the revocation of Plaintiffs' privileged gaming licenses. *Cf., DLB Energy Corp. v. Oklahoma Corp. Commn.*, 1991 OK 5, ¶17, 805 P.2d 657, 660 ("An interlocutory order is an order which is not 'final.' Whenever a tribunal's ruling does not culminate in a judgment, its decision is interlocutory.").

4. Once the Commission entered its Final Order on May 14, 2019, the terms of its Preliminary Order merged into the Commission's Final Order, and the Preliminary Order became moot. *Cf., Ashley Creek Phosphate Co. v. Chevron*, 315 F.3d 1245, 1262 (10th Cir. 2003) (a district court's interlocutory orders merge into its final orders and judgments on appeal); *Johnson v. Johnson*, 1983 OK 117, ¶18, 674 P.2d 539, 543 ("Obligations created by interlocutory orders pendent lite do not survive, but merge in, the final judgment.").

5. The Preliminary Order became moot once the Final Order was issued, and any complaint as to the terms of the final decision was required to be

made timely and in accordance with the Tribe's jurisdictional procedures for challenging that Final Order, under Section 17.3 of the Tribe's Gaming Ordinance. Plaintiffs made no such timely challenge within 30 days of that Order, and their time for doing so expired on June 13, 2019.

6. The Plaintiffs' challenge to the Preliminary Order has been mooted by the issuance of the Final Order, which Plaintiffs have not timely challenged. Accordingly, Plaintiffs action challenging the Preliminary Order should be dismissed as moot and non-justiciable.

B. Indian Civil Rights Act ("ICRA")

7. The Commissioners have also asserted the Tribe's sovereign immunity as a defense to Plaintiffs' ICRA claim against them.

8. A claim of sovereign immunity presents a threshold jurisdictional question for determination prior to considering any question on the merits. 25 C.F.R. §11.118(d).

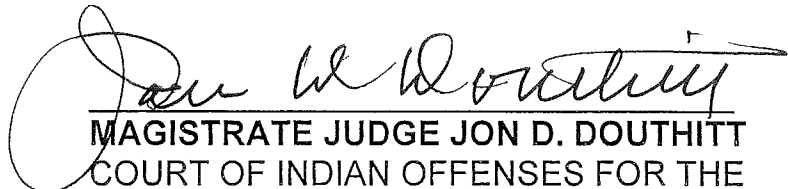
9. To bring a claim pursuant to ICRA, a party must show a waiver of sovereign immunity. The ICRA does not include an unequivocal expression of a waiver of sovereign immunity, and thus, "suits against . . . tribe[s] under the ICRA are barred by . . . sovereign immunity." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); see *Garman v. Fort Belknap Community Council*, 11 Indian L. Rptr. 6017 (Ft. Belknap Tr. Ct. 1984) (holding that ICRA does not waive sovereign immunity of Indian tribes, and applying holding to defendants, acting as tribal election board members, in the case).

10. Because the Tribe only guarantees the protections of ICRA to members of the Peoria Tribe, and because Plaintiffs are not members, the Tribe has not waived its sovereign immunity as to the Plaintiffs.

11. Without a waiver of sovereign immunity, Plaintiffs cannot seek relief under ICRA because ICRA does not provide a "private cause of action for injunctive and declaratory relief" against officials acting in their official capacities. *Santa Clara Pueblo*, 436 U.S. at 69; see also *Garman*, 11 INDIAN L. RPTR. at 6018.

12. Accordingly, for the above stated independent reasons, the Court concludes that Plaintiffs' action should be dismissed for lack of jurisdiction: (i) the controversy has become moot by the Commissioners' issuance of its Final Order from which Plaintiffs did not timely seek review, and (ii) the Commissioners enjoy sovereign immunity from the ICRA claims asserted by Plaintiffs, who are not tribal members, since the Tribe has not waived its sovereign immunity as to such claims.

Dated this 11th day of March, 2020.


MAGISTRATE JUDGE JON D. DOUTHITT
COURT OF INDIAN OFFENSES FOR THE
MIAMI AGENCY, MIAMI, OK