IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

GLORIA MENDOZA, *et al*.,

Plaintiffs, **Case No. 1:19-cv-00991-SCY-KK**

v.

FIRST SANTA FE INSURANCE SERVICES, INC., *et al*.,

Defendants.

HUDSON INSURANCE AND TRIBAL FIRST'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

INTRODUCTION

Because Congress has exclusive jurisdiction over federal enclaves, this Court has original jurisdiction over this action under 28 U.S.C. § 1331. Yet rather than address the federal enclave law set forth in Defendants' Notice of Removal, Plaintiffs' Motion to Remand argues the merits of their claims and relies on legal arguments that do not apply to federal enclave jurisdiction. Because the Court has federal enclave jurisdiction over Plaintiffs' claims as pled in the Amended Complaint, remand would be improper.

ARGUMENT

I. Federal Law Applies to the Claims Raised by the Plaintiffs.

This Court has jurisdiction in this case under the federal enclave doctrine, and because the Complaint raises issues of federal law. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002); *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976).[1]

[1] *United States for & on Behalf of Santa Ana Pueblo v. Univ. of New Mexico,* 731 F.2d 703, 706 (10th Cir. 1984) (jurisdiction and control of Pueblo lands lies exclusively with the United States Congress).

As to the applicability of federal law, Plaintiffs argue that Plaintiffs' right to relief requested in the First Amended Complaint do not depend on resolution of a substantial question of federal law because section 52-l-4(C) of the Workers' Compensation Act requires Defendants to be primarily and directly liable to Plaintiffs, irrespective of whether Isleta Pueblo may be entitled to claim sovereign immunity to the underlying workers' compensation claim. Pls.' Mot. to Remand, ECF No. 10 at 3. But Plaintiffs fail to inform the Court that this very issue is pending before this Court in *Isleta Resort & Casino v. Judge Woodard*, No. 1:19-CV-00607-SCY-JFR (D.N.M. 2019) *w*hich has been stayed by the Court pending resolution of this and other issues in M*endoza*. *Mendoza v. Isleta Resort and Casino*, 419 P.3d 1256 (N.M. Ct. App. 2018), *cert. granted*, 2018-NMCERT-___ (N.M. May 25, 2018) (No. S-1-SC-37034).

And as to federal enclave jurisdiction, Plaintiffs' Motion conspicuously ignores the doctrine altogether, and does not address controlling law confirming that federal enclaves are places "within which the United States has exclusive jurisdiction." *Akin v. Ashland Chemical Co.,* 156 F.3d 1030, 1034 (10th Cir. 1998); *and see Benavidez v. Sandia National Labs*., 212 F. Supp. 3d 1039, 1092 (D.N.M. 2016)(where events in a case occur within a federal enclave the "entire lawsuit may be removed to federal court pursuant to federal question jurisdiction."). Indeed, a word search of the Motion to Remand confirms that the word "enclave" is mentioned only once, in a single sentence arguing that "the harm complained of by Plaintiffs did not occur on the Pueblo of Isleta or a federal enclave as suggested by Defendants." Pls.' Mot. to Remand at 10. Instead of addressing the federal enclave doctrine, Plaintiffs' Motion raises multiple arguments as to what they perceive to be the merits of their case, unsupported allegations that Defendants "purposely injected" sovereign immunity in "every proceeding to date to avoid legal responsibilities," and claims that Defendants have attempted "to artificially create the need for

federal court jurisdiction." Pls.' Mot. to Remand at 10. All of these arguments are irrelevant to this Court's jurisdiction under the federal enclave doctrine. A party cannot artificially create federal jurisdiction, which in any event the averments in the Amended Complaint confirm exists in this case. Plaintiffs allege harm that arose as a result of their employment on a federal enclave, and arise out of a contract for workers' compensation benefits which the contracting parties entered into pursuant to a Class III gaming compact adopted by the State of New Mexico and the Pueblo of Isleta under the federal Indian Gaming Regulatory Act. As this Court has confirmed: "once a state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law," which is an "exception to the well-pleaded complaint rule." *Sandia National Labs*., 212 F. Supp. 3d at 1054 (removal affirmed because statutory and federal enclave preemption). And although the claims admittedly arise out of the contract, Plaintiffs claim that Defendants invoke section 1331 jurisdiction "based solely on the workers' compensation insurance contract" is false (Pls.' Mot. to Remand at 10), as established in the notice of removal: "This Court has original jurisdiction over this action arising under 28 U.S.C. § 1331 as this case is a civil action arising under the Constitution, laws, or treaties of the United States, and because federal courts retain jurisdiction over federal enclaves, in which Congress has the power to exercise exclusive jurisdiction." Notice of Removal, ECF No. 1 at 1.

Similarly, Plaintiffs' argument that Defendants are "injecting a federal issue by inserting Isleta Pueblo/sovereign immunity into the case and thereby attempting to create a federal issue which does not exist" is false. Pls.' Mot. to Remand at 11. Plaintiffs themselves conceded federal question jurisdiction by alleging Plaintiffs were injured while in the course and scope of their employment at Isleta Resort & Casino on the Pueblo of Isleta, a federal enclave. Pls.' Am.

Compl. at ¶¶ 22, 23, 24; Pls.' Mot. to Remand at 1. There is no dispute that these Plaintiffs are or were employed on reservation lands of the Pueblo of Isleta through its tribally owned and operated casino. That casino operates pursuant to federal law, including a contractual agreement entered into by the Pueblo of Isleta with the state of New Mexico in compliance with federal law.[2]

Finally, Plaintiffs alleged various contract claims in the Amended Complaint and included the contract between the Pueblo of Isleta and Hudson Insurance as an exhibit to the Complaint. Pls.' Am. Compl. at 1, 4. Yet in their Motion to Remand, Plaintiffs now disavow that the contract is implicated by their Amended Complaint, and instead argue that "the claims are extra-contractual in nature, arising independent of and outside of the contract" and that "the state law claims asserted also do not arise 'out of the contract' of workers' compensation insurance-*but in spite of the insurance.*'" (emphasis in original) Pls.' Mot. to Remand at 7, 10. Plaintiffs' newfound desire to distance their claims from the underlying contract must be rejected.

II. Defendants' Notice of Removal is Valid.

Plaintiffs argue, but have not shown, that the Notice is defective allegedly because Defendants have not established proof of service on First Santa Fe Insurance Services, Inc. ("First Santa Fe"), and because the moving Defendants have not served the removal pleadings on that yet unserved defendant. Notably, Plaintiffs' reliance on unpublished case law from Kansas ignores controlling law from this jurisdiction establishing that Plaintiffs bear the burden of

[2] Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701 *et seq*. *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1262 (D.N.M. 2013)("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian country [and] IGRA [the Indian Gaming Regulatory Act] is a federal statute, the interpretation of which presents a federal question, suitable for determination in a federal court.")

establishing validity of service *Exec. Consulting, Inc., v. Kilmer*, 931 F. Supp. 2d 1139 (D.N.M. 2013), and that a removal notice is valid when all served defendants are included. *May v. Bd. of Cnty. Comm'rs for Cibola Cnty.*, 945 F. Supp. 2d 1277, 1301 (D.N.M. 2013) (only defendants who are "properly joined and served must join in or consent to the removal of the action.") *see also De La Rosa v. Reliable, Inc.*, 113 F. Supp. 3d 1135, 1156 (10th Cir. 2015)("defendants who have been properly joined and served must join in or consent to the removal action [...] defendants who have not been served, however, need not join in removal.") (internal citations omitted).

Plaintiffs cite to state law requirements for service in alleging that they have served First Santa Fe, arguing they effected service on October 18, 2019 before the case was removed to federal court. Response at 14. However, Rule 1-004(C)(2) NMRA, provides that "proof of service shall be made with reasonable diligence, and the original summons *with proof of service shall be filed with the court* in accordance with the provisions of Paragraph L of this rule." (emphasis added). Rule 1-004(L) requires that the party obtaining service of process "promptly file proof of service":

> Proof of service by mail or commercial courier service shall be established by filing with the court a certificate of service which shall include the date of delivery by the post office or commercial courier service and a copy of the defendant's signature receipt.

Likewise, Rule 4(l)(1) requires that "unless service is waived, proof of service must be made to the court." Fed. R. Civ. P. 4(l)(1).[3]

[3] Courts grant motions to dismiss where service of process requirements are not met, even where defendant has notice of the legal action. *Exec. Consulting, Inc. v. Kilmer*, 931 F. Supp. 2d 1139, 1140 (D.N.M. 2013).

Moreover, even if all defendants were properly served and proof of service was filed with the court, a procedural defect in a removal "does not warrant a remand to state court if subject matter jurisdiction existed at the time the district court entered judgment." *Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1080 (10th Cir. 1999). Thus, courts allow a defect in a notice of removal to be cured rather than remand to state court. *Zamora v. Wells Fargo Home. Mortg.*, 831 F. Supp. 2d 1284, 1291 (D.N.M. 2011) quoting *Jenkins v. MTGLQ Inv'rs*, 218 Fed.Appx. 719, 723 (10th Cir. 2007) (granting unopposed motion to amend notice of removal to properly allege jurisdictional facts). Even where a defendant fails to explain an unserved co-defendant's absence in a notice of removal, remand is not required. *Bd. of Cnty. Comm'rs for Cibola Cnty.*, 945 F. Supp. 2d at 1302 ("defendants do not have to account for every unserved defendant in the Notice of Removal to advance the purpose of the unanimity rule or even the requirements that the defendants must establish all of the requirements for removal.").

If Plaintiffs served First Santa Fe as claimed, they did not perfect service by filing the required proof with the court. As of December 4, 2019, there is no record of First Santa Fe being served. See Docket attached as exhibit A. The certified receipt attached as Exhibit 4 to Plaintiffs' Motion has a signature on it, but whether that person was authorized to accept service for First Santa Fe is unknown. And in any event, the receipt is not proof of service pursuant to Rule 1-004(L) NMRA or Federal Rule 4(l)(1). Notably, First Santa Fe has not filed an answer or entered an appearance.[4] Hudson Insurance and Tribal First are the only parties who answered the summons and complaint by filing a motion to dismiss in lieu of an answer.

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[4] Undersigned counsel spoke with First Santa Fe by telephone on October 24, 2019 and was told they had no record that they had been served in this litigation.

CONCLUSION

Plaintiffs failed to show that this claim does not arise under federal law or that the Notice is defective. Defendants' Notice of Removal is valid and removal is proper. Plaintiffs' Motion to Remand should be denied.

Dated: December 4, 2019

Respectfully Submitted,

/s/ Randolph H. Barnhouse

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Counsel for Defendants Tribal First and Hudson Insurance

CERTIFICATE OF SERVICE

I CERTIFY that on December 4, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

LeeAnn Ortiz, keeptaosfree@yahoo.com
Attorney for Plaintiffs

/s/ Dianna DH Kicking Woman
Dianna DH Kicking Woman