

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

GLORIA MENDOZA, ANTHONY CHAVEZ,
MARIA GALLEGOS, individually and on behalf
of all other similarly situated Plaintiffs,

Plaintiffs,

v.

Case No. 1:19-CV-00991-SCY-KK

FIRST SANTA FE INSURANCE SERVICES, INC. n/k/a
HUB INTERNATIONAL INSURANCE SERVICES, INC.,
HUDSON INSURANCE and ALLIANT SPECIALTY
INSURANCE SERVICES, INC. d/b/a TRIBAL FIRST,

Defendants.

**RESPONSE TO HUDSON INSURANCE AND TRIBAL FIRST'S
MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

COME NOW the Plaintiffs, Gloria Mendoza, Anthony Chavez and Maria Gallegos, individually and on behalf of all other similarly situated Plaintiffs, and hereby file this *Response to Defendant Hudson Insurance and Tribal First's Motion to Dismiss* and in support therefor, state as follows.

BACKGROUND

Plaintiffs' claims are premised on tortious actions/inactions by all Defendants occurring at various times and places which did not involve a federal enclave as asserted by Defendants Hudson Insurance and Tribal First. None of the named Defendants are located on a federal enclave. Defendant First Santa Fe Services was a New Mexico Corporation at all times material to this action. Defendants Hudson Insurance and Tribal First are corporations formed in Delaware and California

respectively. Counts one through five of Plaintiffs' First Amended Complaint are premised on state law claims for violation of the New Mexico Unfair Practices Act, breach of contract, breach of covenant of good faith and fair dealing and civil conspiracy. In support of these state law-based claims, Plaintiffs provided legal and factual grounds detailing the actions/inactions taken by each Defendant which caused the resulting harms. Additionally, Plaintiffs attached five exhibits to support the claims alleged which included copies of a certificate of liability insurance, the policy of insurance and various letters of denial of workers' compensation claims.

The misconduct complained of in Plaintiffs' First Amended Complaint regarding Defendant First Santa Fe Insurance includes misleading Plaintiffs into believing that insurance for valid claims existed when, in reality, sovereign immunity was always going to be raised by Defendants Hudson Insurance and Tribal First to deny such claims. The misconduct complained of regarding Defendants Hudson Insurance and Tribal First involves, in part, knowingly making false or misleading statements to Plaintiffs in denying their claims, intentionally and negligently failing to investigate Plaintiffs' claims as required under the terms of the contract. Plaintiffs further allege that Defendants Hudson Insurance and Tribal First engaged in a civil conspiracy to avoid payment of Plaintiffs' claims as third party beneficiaries of the insurance policy for economic gain by knowingly/willfully making inaccurate statements of material facts tending to deceive or mislead or by knowingly taking unconscionable advantage of the ignorance of Plaintiffs to a grossly unfair degree while conducting insurance sales transactions and administering insurance claims.

None of the above conduct of the Defendants occurred on a "federal enclave" or within the Pueblo of Isleta. The harms complained of did not arise out of or in the course of employment on

a federal enclave, but instead arose after each Plaintiff had been injured at work and independent from that employment. None of the claims asserted are premised on the validity or interpretation of the insurance contract. Rather, the claims asserted are based on substantive tort law and the place of the wrong is to be considered the place where harm occurred. The place where the harms occurred is New Mexico where each Plaintiff resides, and not within the Pueblo of Isleta or any federal enclave.

LEGAL STANDARD

When considering a motion to dismiss pursuant to Rule 12(b)(6), this Court must accept as true all well-pled factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor. *Smith v. United States*, 561 F.3d 1090, 1097 (10th Cir. 2009), *cert. denied*, 130 S.Ct. 1142 (2010). To survive a motion to dismiss, Plaintiffs' First Amended Complaint must contain sufficient factual detail to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). While the Court must take all of the factual allegations in the complaint as true, "a plaintiff armed with nothing more than conclusions" cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 679.

Here, Plaintiffs' not only pled sufficient factual content to support the claims asserted but also attached supporting documentary evidence to prove those claims. Plaintiffs' First Amended Complaint contains facts and evidence that goes beyond a formulaic recitation of the elements of the causes of action asserted and should not be dismissed based on any failure to state a claim upon which relief may be granted. Plaintiffs' First Amended Complaint does not contain any facts or

evidence that harms complained of occurred on a federal enclave and should not be dismissed based on the federal enclave doctrine.

ARGUMENT

1. Nothing in the cases cited by Defendants establishes that the Pueblo of Isleta is a federal enclave.

Plaintiffs first challenge Defendants' conclusory claim that the Pueblo of Isleta is a "federal enclave" based on the cases cited in the *Motion to Dismiss*. [Doc. 6, p. 1] In *Allison v. Boeing Laser Technical Services*, "Jimmie Allison's causes of action arose from conduct on Kirtland Airforce Base, a federal enclave established in 1954." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012). There is no question that military bases are federal enclaves. It is not so clear that Isleta Pueblo is a federal enclave, however. The fact that "Pueblo of Isleta's reservation stands within the lands conveyed to the United States under the Treaty of Guadalupe Hidalgo" does not convince the undersigned that Isleta qualifies as a federal enclave now. [Doc. 6, p. 3] Other than referring to the Treaty of Guadalupe Hidalgo, Defendants fail to cite history specific to Isleta Pueblo or any property deed or map that positively establishes that Isleta Pueblo is now a federal enclave. The places described in *Boeing Laser Tech. Servs.* that clearly qualify as federal enclaves include Forts, Magazines, Arsenals, Dockyards and other needful buildings and it is noteworthy that this list does not mention Indian Pueblos specifically. *Boeing Laser Tech. Servs.*, 689 F.3d at 1236. Unlike the plaintiff in *Boeing Laser Tech. Servs.*, Plaintiffs dispute that the Pueblo of Isleta is a federal enclave now.

Next in support of the statement that the Pueblo of Isleta is a federal enclave, Defendants cite to the following two cases: *United States v. Abeyta* and *United States for & on Behalf of Santa Ana Indian Pueblo v. University of New Mexico*. [Doc. 6, p. 3] However, neither of these cases mention the phrase “federal enclave” and again do not establish that the Pueblo of Isleta specifically is considered a federal enclave.

Abeyta states that Isleta Pueblo “stands within the lands conveyed to the United States under the Treaty of Guadalupe Hidalgo” but does not positively state that such land is a federal enclave now. *Abeyta*, 632 F.Supp. at 1303. Similarly, there is no mention of Santa Ana Pueblo being a federal enclave in *University of New Mexico*. Importantly, this case indicates that the “Pueblos own their property in fee simple.” *University of New Mexico*, 731 F.2d at 706. If the Pueblos own their property in fee simple, it is not entirely clear that Congress “acquired” or “purchased” such property so as to create a federal enclave.

2. The incidents that give rise to Plaintiffs’ claims did not occur on the Pueblo of Isleta.

Even if the Pueblo of Isleta is considered to be a federal enclave and for the federal enclave doctrine to apply, Defendants must then establish that the personal injury action filed by Plaintiffs arose from incidents occurring *in* a federal enclave. *See Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034, (10th Cir. 1998) (holding that personal injury actions which arise from incidents occurring *in* federal enclaves may be removed to federal district court as part of federal question jurisdiction). Cases cited by Defendants and addressing the federal enclave doctrine uniformly involve wrongs occurring *on* the federal enclave property. For example, in *Boeing Laser Tech. Servs.* the causes of action arose from conduct *on* Kirtland Air Force Base. *Boeing Laser Tech. Servs.*, 689 F.3d at 1235.

The plaintiff's claims resulted from his termination by Boeing, a federal contractor located **on Kirtland Air Force Base**. *Boeing Laser Tech. Servs.*, 689 F.3d at 1236. In *Abeyta*, defendant killed a golden eagle for religious purposes **upon and within the exterior boundaries of Isleta Pueblo** and was wrongly charged with violating the Eagle Protections Act. In *University of New Mexico*, Santa Ana Pueblo sued the University of New Mexico for trespass and sought ejectment of defendants from **land that was allegedly federally protected tribal land**. *University of New Mexico*, 731 F.2d at 794. Again, the subject of the suit involved conduct *on* tribal land. Similarly, it was concluded that the federal enclave doctrine applied to state discrimination claims "when plaintiffs work and are harmed **on the federal enclave**" in *Kennicott v. Sandia Corp.*, 314 F.Supp. 3d 1142, at 1168 (D.N.M. 2018).

It is not the Pueblo of Isleta or Isleta Resort & Casino's employment practices on the federal enclave (if Isleta Pueblo is a federal enclave) that forms the basis for Plaintiffs' claims as was the case in *Benavidez v. Sandia Nat'l Labs*, 212 F.Supp.3d 1039 (D.N.M. 2016). It is the intentional and negligent practices by the non-tribal entity Defendants which occurred in New Mexico, not *on* a federal enclave, that forms the basis for Plaintiffs' claims as stated in the First Amended Complaint. Put simply, the harms suffered by Plaintiffs did not occur *on* a federal enclave or *at* their place of employment and, in some instances, occurred when they were no longer employed with Isleta Pueblo (Plaintiff Gloria Mendoza is the only Plaintiff that continues to work at Isleta Resort & Casino). Defendants fail to provide any evidence that establishes that harms complained of in Plaintiffs' First Amended Complaint occurred on any federal enclave and the motion to dismiss should be denied.

3. Because Plaintiffs' claims are based on tort principles, the substantive rights of the parties are governed by the law of the place where the wrongs occurred.

Plaintiffs also challenge Defendants' claim that the "incidents that give rise to this lawsuit occurred on the Pueblo of Isleta's Indian reservation, a federal enclave" because tort actions are governed based on the law where the wrongs occurred. [Doc. 6, p. 1] The harms complained of occurred in New Mexico where each Plaintiff resides, not on the Pueblo of Isleta.

Because Plaintiffs' claims are not barred by the federal enclave doctrine, the law of the state where the torts occurred is applied according to the rule of "*lex loci delicti commissi*." See *Abraham v. WPX Energy Prod., LLC*, 20 F.Supp.3d 1244, 1265 (D.N.M. 2014) (...if the underlying claim is categorized as a tort, "New Mexico courts follow the doctrine of *lex loci delicti commissi*—that is, the substantive rights of the parties are governed by the law of the place where the wrong occurred.") (quoting *Terrazas v. Garland & Loman, Inc.*, 140 N.M. at 296, 142 P.3d at 377). New Mexico defines the place of the wrong as the "state where the last event necessary to make an actor liable for an alleged tort takes place." See *Guidance Endodontics, LLC v. Dentsply International, Inc.*, 663 F.Supp.2d 1138, 1151 (D.N.M. 2009) (citing *Zamora v. Smalley*, 68 N.M. 45, 47, 358 P.2d 362, 363 (1961). "This location includes both the place where the acts occurred and where the legal consequences occur." *Dentsply International, Inc.*, 663 F.Supp.2d at 1151.

All of the acts complained of occurred in New Mexico and Plaintiffs, while residing in New Mexico, suffered the consequences of those acts. Plaintiffs' claims are premised on tortious actions/inactions by the Defendants which occurred outside the Pueblo of Isleta. Some of the harms complained of occurred when each Plaintiff received letters denying their claims for workers'

compensation benefits based on false and/or material misrepresentations of the law and facts. All of the harms complained of occurred outside the Pueblo of Isleta, not “on the Pueblo of Isleta’s Indian reservation” as contended by Defendants. [Doc. 6, p. 1] Additionally, the harms complained of occurred after the underlying work injuries occurred and were caused by the non-tribal entity Defendants which have no claim to “federal enclave” status.

Plaintiffs’ claims do not involve any challenge to the validity, nature or construction of the underlying workers’ compensation insurance policy. If so, then this Court would be obligated to apply the principle of “*lex loci contractus*”—the law of the place of contracting. Because none of the harms complained of occurred on a federal enclave, Plaintiffs are uncertain if Defendants Hudson Insurance and Tribal First are contending that the underlying contract of insurance dictates that all claims are contractual in nature as opposed to tortious in nature. Plaintiffs are also uncertain if Defendants Hudson Insurance and Tribal First are contending that the underlying contract of insurance is the basis for claiming that “incidents that give rise to this lawsuit occurred on the Pueblo of Isleta’s Indian reservation” because this is incorrect. To be clear, Plaintiffs’ claims are based on the independent actions/inactions of the non-tribal entity Defendants which occurred, not at the time of the work injuries but, well-after the dates of the injuries. Plaintiffs are not seeking damages related to the work injuries, but for harms subsequently occurring from entirely distinct events involving parties who are not located on or in any federal enclave.

WHEREFORE Plaintiffs respectfully request that this Court deny the *Motion to Dismiss* for all of the reasons stated herein and consider awarding costs and attorney’s fees associated herewith.

Respectfully submitted,

/s/ LeeAnn Ortiz

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I hereby certify that on November 12, 2019, I filed this document electronically and thereby caused all counsel of record to be served through the CM/ECF system.

/s/ LeeAnn Ortiz

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