IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:20-cv-00214-MR

LORA KAY OXENDINE-TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MEMORANDUM OF**
	)	**DECISION AND ORDER**
EASTERN BAND OF CHEROKEE INDIANS,	)	
	)	
	)	
Defendant.	)	
_____	)	

THIS MATTER is before the Court on initial review of Plaintiff's Amended Complaint [Doc. 4] and the Plaintiff's Application to Proceed in District Court without Prepaying Fees or Costs [Doc. 2].

I. STANDARD OF REVIEW

Because the Plaintiff, who is proceeding *pro se*, seeks to proceed in *forma pauperis*, the Court must examine the pleadings to determine whether this Court has jurisdiction and to ensure that the action is not frivolous or malicious and states a claim upon which relief can be granted. See 28 U.S.C. § 1915(e)(2)(B)(i) and (ii); see also Michau v. Charleston Cty., S.C., 434 F.3d 725, 728 (4th Cir. 2006) (noting that § 1915(e) "governs IFP filings in addition to complaints filed by prisoners"). A complaint is deemed frivolous

"where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). The Fourth Circuit has offered the following guidance to a court tasked with determining whether a complaint is frivolous under § 1915(e):

> The district court need not look beyond the complaint's allegations in making such a determination. It must, however, hold the *pro se* complaint to less stringent standards than pleadings drafted by attorneys and must read the complaint liberally. Trial courts, however, are granted broad discretion in determining whether a suit is frivolous or malicious.

White v. White, 886 F.2d 721, 722-23 (4th Cir. 1989). While the complaint must be construed liberally, the Court may "pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless," including such claims that describe "fantastic or delusional scenarios." Neitzke, 490 U.S. at 327-28.

Rule 8 of the Federal Rules of Civil Procedure provides that "[a] pleading states a claim for relief must contain (1) a short and plain statement of the grounds for the court's jurisdiction . . . [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1), (2). A complaint fails to state a claim where it offers merely "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement."

See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007) (internal quotation marks omitted)).

II. BACKGROUND

Construing the allegations of the Amended Complaint liberally, the Plaintiff appears to assert claims against the Defendant under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-04, 25 U.S.C. § 373, and the Fourth and Fourteenth Amendments to the United States Constitution. [Doc. 4 at 3]. While the Plaintiff's allegations are difficult to discern, the Amended Complaint appears to allege that the Defendant took land from the Plaintiff that she was to have received pursuant to her deceased husband's "Last Will and Testament/Probate." [Id. at 5]. The Amended Complaint seeks $120,000,000 in damages. [Id. at 4].

III. DISCUSSION

At the outset, the Court notes that the Plaintiff bears the burden of proving that subject matter jurisdiction exists. See Richmond, Frederickburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). The Court generally lacks jurisdiction over suits against Indian tribes because "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Oklahoma v. Manuf. Techs., Inc., 523 U.S. 751, 754 (1998). Because "the Eastern Band of

Cherokee Indians is an Indian tribe within the meaning of the Constitution and laws of the United States[,]" Toineeta v. Andrus, 503 F. Supp. 605, 608 (W.D.N.C. 1980), the Court does not have jurisdiction "absent either an explicit waiver of immunity or express authorization of the suit by Congress." Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y, 163 F.3d 1150, 1153 (10th Cir. 1998) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)). To relinquish its immunity, a tribe's waiver must be "clear[,]" Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991), and "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (citation omitted).

Because the Plaintiff does not allege that the Defendant has waived its tribal sovereign immunity, the Plaintiff must show that Congress has authorized suit against the Defendant. The Plaintiff does not, however, cite to any statutory authority that authorizes her suit against the Defendant. Accordingly, the Court will review the authorities upon which the Plaintiff bases her claims to determine if any provide Congressional authorization for suits against Indian tribes.

Although the Plaintiff purports to bring a claim under the ICRA,[1] that law "neither served as a waiver of tribal sovereign immunity nor impliedly provided for a civil cause of action in federal courts . . . ." Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 886 (2d Cir. 1996) (citing Santa Clara Pueblo, 436 U.S. at 59). As such, the ICRA does "not establish a federal civil cause of action against a tribe or its officers, . . . except in cases in which the relief sought could properly be cast as a writ of habeas corpus." Id. at 884. Because this action cannot be properly cast as a writ of habeas corpus, the Court lacks subject matter jurisdiction over the Plaintiff's claims under the ICRA.[2]

Likewise, the Court lacks subject matter jurisdiction over the Plaintiff's claim under 25 U.S.C. § 373. "Congress can direct a statute to govern actions of Indian tribes, but Congress must also expressly abrogate an Indian tribe's sovereign immunity for enforcement suits." Pub. Serv. Co. of New Mexico v. Approximately 15.49 Acres of Land in McKinley Cty., New Mexico, 155 F. Supp. 3d 1151, 1167 (D.N.M. 2015) (citing Santa Clara Pueblo, 436

[1] Among other things, Title I of the ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search[es] and seizures" or "take any private property for a public use without just compensation[.]" 25 U.S.C. § 1302.

[2] When seeking relief that cannot be cast as a writ of habeas corpus, "Tribal forums are available to vindicate rights created by the ICRA[.]" Santa Clara Pueblo, 436 U.S. at 65.

U.S. at 59), aff'd sub nom. Pub. Serv. Co. of New Mexico v. Barboan, 857 F.3d 1101 (10th Cir. 2017). Although Congress passed 25 U.S.C. § 373 to require federal approval for probate distributions of Indian money and property, nothing in that statute expressly abrogates the Defendant's tribal sovereign immunity or allows claims against Indian tribes. As such, even if the Plaintiff were to be able to make a claim under 25 U.S.C. § 373,[3] the Court lacks subject matter jurisdiction over that claim.

The Plaintiff also fails to state a claim under the Fourth and Fourteenth Amendments. "Because Indian tribes are neither states nor part of the federal government, the Bill of Rights and the Fourteenth Amendment generally do not apply to them." Deardorff v. Lummi Indian Nation, 95 F.3d 1157 (9th Cir. 1996). As such, the Plaintiff cannot bring a claim based on a Fourth or Fourteenth Amendment violation against an Indian tribe like the Defendant. Oviatt v. Reynolds, 733 F. App'x 929, 933 (10th Cir. 2018) (dismissing Fourth Amendment claim against an Indian tribe "because the Fourth Amendment does not bind Indian tribes."); R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983) (dismissing §1983

[3] The Court questions whether the Plaintiff can even present a cause of action under 25 U.S.C. § 373. The Plaintiff does not present any allegations regarding the federal approval of an Indian will, and it does not appear that her allegations are in any way related to such an approval. Instead, the Plaintiff seems to base her claim on actions taken by the Defendant after the transfer of property was effectuated. Section 373 does not appear to create a cause of action for those circumstances.

claim based on a Fourteenth Amendment violation against an Indian tribe because "Indian tribes are separate and distinct sovereignties and are not constrained by the provisions of the [F]ourteenth [A]mendment."); see also Santa Clara Pueblo, 436 U.S. at 56 (stating that Indian "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). Accordingly, the Plaintiff's claims under the Fourth and Fourteenth Amendments fail to state a claim against the Defendant.[4]

Upon review of the Plaintiff's Application to Proceed in District Court without Prepaying Fees or Costs, the Court finds that she is unable to make prepayment of the required fees and costs and therefore the Application should be allowed. The Court concludes, however, that the allegations set forth in the Plaintiff's Amended Complaint fail to state a cognizable claim upon which relief may be granted. When a Court determines upon a § 1915(e) review that a complaint is factually or legally baseless, the Court must dismiss the case. See Neitzke, 490 U.S. at 328; White, 886 F.2d at 724. It is the intent of Congress that such dismissals occur prior to service

[4] In addition to demonstrating the absence of subject matter jurisdiction, the Plaintiff's Amended Complaint brings into question whether the statute of limitations has expired as to any claim the Plaintiff could possibly have had. Plaintiff asserts that the actions giving rise to her claims occurred some six years ago. [Doc. 4 at 7]. Plaintiff offers no explanation for how this would not be a bar to any claim on the merits.

of the complaint on defendants. Cochran v. Morris, 73 F.3d 1310, 1315 (4th Cir. 1996). As such, the Court will dismiss this civil action.

O R D E R

IT IS, THEREFORE, ORDERED that the Plaintiff's Application to Proceed in District Court without Prepaying Fees or Costs [Doc. 2] is **ALLOWED**.

IT IS FURTHER ORDERED that the Plaintiff's Amended Complaint [Doc. 4] is **DISMISSED** pursuant to 28 U.S.C. § 1915(e).

IT IS SO ORDERED.

Signed: September 14, 2020

Martin Reidinger
Chief United States District Judge