IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL NO. 1:20CV5

APRIL LEDFORD, Plaintiff, vs. EASTERN BAND OF CHEROKEE INDIANS, Defendant.	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

Pursuant to Local Rule 7.1(c), Defendant Eastern Band of Cherokee Indians ("Defendant" or "Defendant Tribe" herein) submits this brief in support of the Defendant's contemporaneously filed Motion to Dismiss. Plaintiffs' amended claims fail for the reasons stated herein.

PLAINTIFF'S ALLEGATIONS AND RELEVANT BACKGROUND

Plaintiff is a not a member of the Defendant Tribe and is the surviving spouse of deceased tribal member, Bill Ledford. Plaintiff claims to be the rightful owner of a life estate in Mr. Ledford's former home, which they had shared before he passed. Plaintiff claims that the Defendant Tribe (particularly the Tribal Council), by invalidating a provision of Mr. Ledford's will and evicting her from the property in question, has deprived her of private property for public use without just compensation, in violation of the Indian Civil Rights Act, 25 U.S.C.§ 1302(a)(5) ("ICRA" herein). Defendant filed a Motion to Dismiss on January 31, 2020 (Document No. 7), to which the Plaintiff responded with an "Answer to Defendant's Motion to Dismiss" on February 28, 2020 (Document No. 12). Three days later, on March 2, 2020, Plaintiff filed an Amended Complaint (Document No. 13), which the Court allowed and which prompted the Court to dismiss

Defendant's Motion to Dismiss as moot, without prejudice to the Defendant filing a renewed Motion to Dismiss addressing Plaintiff's Amended Complaint (Document No. 14).

STANDARD OF REVIEW

On a motion to dismiss pursuant to Rule 12(b)(6), the standard of review is that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Ashcroft v. Iqbal, 556 U.S. 662, 678, (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557, 127 S.Ct. 1955, 1966 (2007)).

As for Rule 12(b)(1),

> When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff. In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. The district court should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.

Majeed v. North Carolina, No. 5:18-CV-86-BR, 2019 WL 1781410, at *1–2 (E.D.N.C. Apr. 23, 2019) (quoting Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768–69 (4th Cir. 1991)).

ARGUMENT

I. THE INDIAN CIVIL RIGHTS ACT DOES NOT PROVIDE SUBJECT MATTER JURISDICTION FOR PLAINTIFF'S CLAIM.

Plaintiff's Amended Complaint states that the federal question subject matter jurisdiction in this matter comes from the ICRA, particularly § 1302(a)(5). However, it is settled law that the ICRA, in and of itself, provides only one remedy: habeas corpus. The U.S. Supreme Court has stated,

> Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that **Congress' failure to provide remedies other than habeas corpus was a deliberate one**. . . . Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, . . . but it would also impose serious financial burdens on already "financially disadvantaged" tribes.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61-64, (1978) (holding that despite the wording of §1302, the ICRA provides only habeas corpus as a remedy) (emphasis added). Therefore, Plaintiff's pleading, as a matter of law, fails to state sufficient subject matter jurisdiction and fails to state a claim upon which relief can be granted. In other words, the ICRA does not provide an individual right of action against federally recognized tribes for just compensation of takings. See also, Alvin J. Ziontz, In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act, 20 S.D. L. Rev. 1, 18 (1975) ("'This bill does not provide the federal courts to review all decisions of the Indian courts. In fact, provision for federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. The only provision in this bill that provides for federal court interference is writ of habeas corpus, and that probably exists as law now, although I am not quite certain.' Sen. Sam Ervin speaking at

Hearing before the subcommittee on Constitutional Rights of the Senate Committee of the Judiciary, Amendment to the Indian Bill of Rights, 91st cong., 1st Sess. 19 (1969).")

II. PLAINTIFF HAS FAILED TO EXHAUST TRIBAL REMEDIES.

While the Defendant Tribe contends the lack of subject matter jurisdiction and the failure to state a claim under the ICRA is dispositive, there are additional grounds to dismiss Plaintiff's Amended Complaint under Rule 12 (b)(6), including her failure to allege exhaustion of Tribal remedies. The Defendant Tribe has a statutory scheme, under Cherokee Code Sec. 117-40, by which anyone whose personal property interests will be directly and adversely affected by a decision of Tribal Council can "protest" that decision. Tribal Council operates as a legislative tribunal in such circumstances, including Tribal impeachments and Sec. 117-40 protest hearings. See In re Saunooke, No. CSC-18-01, 2018 WL (Dec. 19, 2018) ("Appellant had authority under Tribal common and customary law to practice law before the Tribal Council and the Election Board.")

Here, the Tribal Council can be called upon as a legislative tribunal for review of its previous decision. Plaintiff provided only conclusory allegations of any attempted review. Further, Plaintiff alleges that Cherokee Code Sec. 28, the chapter regarding Tribal inheritance, was invoked by the Tribal Council to illegally invalidate the will in question. As a matter of Tribal law, this should be left to the Tribal Court. See, Auto Owners Ins. Co. v. Saunooke, 54 F. Supp. 2d 585, 587 (W.D.N.C. 1999) (dismissing complaint due to lack of exhaustion of tribal remedies: "[o]bviously, this would be a construction of tribal law; indeed, it is hard to imagine an issue of greater construction of tribal law than the validity of its Code"). As the U.S. Supreme Court has said,

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.
> . . .
> Exhaustion of Tribal Court remedies, moreover, will encourage Tribal Courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856–57, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985); see also, Brown v. W. Sky Fin., LLC, 84 F. Supp. 3d 467, 477 (M.D.N.C. 2015) ("Where applicable, this prudential doctrine has force whether or not an action actually is pending in a tribal court. Moreover, the doctrine applies even though the contested claims are to be defined substantively by state or federal law.").

III. DEFENDANT HAS NOT WAIVED SOVEREIGN IMMUNITY AND PLAINTIFF HAS FAILED TO SUBSTNATIVELY PLEAD TO THE CONTRARY.

Additional grounds to dismiss Plaintiff's Amended Complaint under Rules 12(b)(1) and (6) are found in relation to the Defendant Tribe's sovereign immunity. Federal courts have found that the standard for finding "a waiver of tribal sovereign immunity is extremely difficult to satisfy." Smith v. Babbitt, 875 F. Supp. 1353, 1361 n.4 (D. Minn. 1995), cert. denied, 522 U.S. 807 (1997); see also, Meyers v. Oneida Tribe of Indians of Wisconsin, 836 F.3d 818, 826–27 (7th Cir. 2016) ("Meyers has lost sight of the real question in this sovereign immunity case — whether an Indian tribe can claim immunity from suit. The answer to this question must be 'yes' unless Congress has told us in no uncertain terms that it is 'no.' Any ambiguity must be resolved in favor of immunity. . .Congress' words must fit like a glove in their unequivocality. . .It must be said with 'perfect confidence' that Congress intended to abrogate sovereign immunity and 'imperfect confidence will not suffice.'").

Here, Plaintiff has pled waiver of sovereign immunity by grounding her claim in an act of Congress, specifically the ICRA. However, as discussed above, the ICRA does not waive sovereign immunity of tribes to suit and only provides the remedy of habeas corpus, which has no relevance here. The U.S. Supreme Court has held that,

> This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit'.
>
> . . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

Santa Clara Pueblo, at 58-59 (citations omitted).

Further, Tribal Council did not act beyond its authority or contrary to tribal law by revoking Defendant's life estate. Under Cherokee Code, it is the Tribal Council—not Tribal Courts—which holds the power of determining possessory interests of Tribal land. See, Cherokee Code, Sec. 47B-1 - Control of property ("The Tribal Council shall direct the management and control of all property, either real or personal belonging to the Eastern Band of Cherokee Indians."); Sec. 28-4 - Inheritance of Tribal possessory holdings ("(2) If the holder of the possessory right shall die and leave surviving a wife who is not a member of the Tribe, the surviving widow shall, at the option of the Tribal Council, be permitted to use and occupy the holding during her lifetime . . . but will not be recognized to have any possessory rights in the holding."). In this case, the Tribal Council—acting clearly within its statutory authority—opted not to permit the Plaintiff to have a life estate in Tribal property. Further, given the Tribal Council's overarching plenary control of possessory holdings, Plaintiff has failed to allege that they acted outside of then existing Tribal law. Plaintiff has failed to identify an actionable act of Congress that waives the Defendant's sovereign immunity to make such possessory holding decisions. Thus, Plaintiff has not reached the high

burden of pleading a waiver of sovereign immunity and her Amended Complaint, therefore, should be dismissed.

CONCLUSION

WHEREFORE, the Defendant Tribe requests that this Motion to Dismiss be granted, that Plaintiffs' claims be dismissed in their entirety, and that the Defendant Tribe be awarded such other and further relief as the Court may deem just and proper.

This 16th day of March, 2020.

/s/ Dale A. Curriden
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CERTIFICATE OF SERVICE

I certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to Plaintiff. I have also served a copy of the foregoing on Plaintiff by depositing same in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service and addressed as follows:

April Ledford
PO Box 2150
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THIS 16th day of March, 2020.

/s/ Dale A. Curriden
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