UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DAVID HUMP, and KAREN HUMP, Individually, and d/b/a BEAR COAT BISON, f/k/a Bear Coat Bison LLC, Defendants.	3:19-CV03020-RAL **UNITED STATES' SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The United States files this Supplemental Reply Brief in response to Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Docket (DE) 19.

ARGUMENT AND AUTHORITIES

A. COURT DEADLINES PROMOTE JUDICIAL EFFICIENCY

Courts issue scheduling orders. Fed. R. Civ. P. 16(b). Deadlines established in a scheduling order may be modified only for good cause. Fed. R. Civ. P. 16(b)(4); Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 716 (8th Cir. 2008) ("Rule 16(b)'s good-cause standard governs when a party seeks leave to amend a pleading outside of the time period established by a scheduling order."); Popoalii v. Corr. Med. Servs., 512 F.3d 488, 497 (8th Cir. 2008) ("If a

party files for leave to amend outside of the court's scheduling order, the party must show good cause to modify the schedule.").

Regarding motions for summary judgment, District of South Dakota Local Rule 7.1(B), provides, in relevant part:

> On or before 21 calendar days after service of a motion and brief, unless otherwise specifically ordered by the court, all opposing parties must serve and file a responsive brief containing opposing legal arguments and authorities in support thereof. The movant may file a reply brief within 14 calendar days after service of the responsive brief.

D. S.D. Civ. LR 7.1(B). In accordance with Rule 16, the Local Rule promotes the interests of justice, economy and judicial efficiency.

Presumably, Defendants know the rules. They previously moved for an extension of time to file a responsive pleading to the United States' Motion for Summary Judgment. *See* DE 13. The Court accommodated Defendants request, giving them until November 19, 2020, to file their response. DE 14. Defendants failed to receive permission in advance to file a response after November 19, 2020. In any case, Defendants filed a tardy response on November 20, 2020. DE 15-16. Now, long after their deadline to do so has passed and after the United States has filed a reply to their response, Defendants file a memorandum opposing summary judgment. DE 19. Defendants' entire response is untimely, and they have failed to show good cause justifying the late filing. If litigants are permitted to respond piecemeal,

such as Defendants did here, or to have unrestricted time to respond, the court system would be unmanageable.

Defendants' disrespect of the Court's ordered deadlines is unacceptable. Consequently, disregarding Defendants' response is proportionate to their choice to disregard the Court and its rules. See Chrysler Corp. v. Carey, 186 F.3d 1016, 1022 (8th Cir. 1999) (holding that striking a party's pleadings under Rule 37 is within the range of appropriate sanctions when a party demonstrates "blatant disregard of the Court's orders and the discovery rules." (citations omitted); Lindstedt v. City of Granby, 238 F.3d 933, 937 (8th Cir. 2000) (affirming the dismissal of the action as a sanction for "intentional disregard" of the "straightforward and relatively simply" discovery requirements); Avionic Co. v. Gen. Dynamics Corp., 957 F.2d 555, 558 (8th Cir. 1992) (stating "the selection of a proper sanction, including dismissal, is entrusted to the sound discretion of the district court.").

Even if the Defendants' opposition to the United States' motion for summary judgment is not disregarded, it lacks merit.

B. MERITS OF DEFENDANTS' RESPONSE

Defendants assert that the United States has failed to exhaust available remedies in Tribal Court. The United States argues that failure to exhaust is an affirmative defense which Defendants failed to raise in their answer or prove. Moreover, exhaustion does not apply to the United States which brings this action pursuant to 28 U.S.C. § 1345. This foreclosure action, involving

Indian trust land, does not involve tribal-related activities and does not require tribal exhaustion.

1. A Failure To Raise an Affirmative Defense Waives the Defense

Failure to exhaust is an affirmative defense. Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007). The Eighth Circuit requires that Defendants plead and have the burden of proving failure to exhaust. Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam); *accord* Perez v. Wisconsin Dep't of Corr., 182 F.3d 532, 536 (7th Cir. 1999) (Defendants may waive or forfeit reliance). Moreover, a lack of exhaustion does not deprive federal courts of subject matter jurisdiction. Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991); Nerness, 401 F.3d at 876.

In this case, Defendants' Answer fails to plead a failure to exhaust as a defense. DE 3. Defendants now attempt to assert new or massaged theories in response to the United States' motion for summary judgment. Defendants have not given fair notice in order for the United States to reasonably respond. Even if they had properly raised it, their insistence that exhaustion requires dismissal is futile. Exhaustion does not apply to the United States which brings this action pursuant to 28 U.S.C. § 1345.

2. Exhaustion in Tribal Court

"The tribal exhaustion doctrine is based on a 'policy of supporting tribal self-government and self-determination,' and it is prudential, rather than jurisdictional." Gaming World International, Ltd. v. White Earth Band of Chippewa, 317 F.3d 840, 849 (8th Cir. 2003) (citations omitted); *See also* Sims v. Apfel, 530 U.S. 103, n.1, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000) (a judicially-imposed exhaustion requirement is non-jurisdictional).

Citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987), Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), and Auto-Owners Ins. Co. v. Tribal Court of Spirt Lake Indian Reservation, 495 F.3d 1017, 1021 (8th Cir. 2007), Defendants argue that the Court should dismiss this foreclosure proceedings because the United States has failed to exhaust tribal court remedies. DE 19, ¶¶ 3-6. This argument lacks merit.

In Iowa Mut. Ins. Co., an insurer sought a declaration that it had no duty to defend or indemnify the insured and asserted federal jurisdiction under 28 U.S.C. § 1331[1] (federal question). Iowa Mut. Ins. Co., 480 U.S. at 11. In National Farmers Union, a Tribal Court had entered a default judgment against a school district for injuries suffered by an Indian child on school

[1] 28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

property. The school district and its insurer sought injunctive relief in District Court, also invoking § 1331 as the basis for federal jurisdiction. National Farmers Union, 471 U.S. at 2450. In Auto-Owners, the Eighth Circuit held that the District Court lacked jurisdiction under § 1331 and that an unincorporated tribal education board was part of the Tribe, thus not a citizen of any state for purposes of 28 U.SC. § 1332.[2] None of the cases cited by Defendants, involve a dispute between a tribal member and the United States and all involve issues of jurisdiction under 28 U.S.C. §§ 1331, 1332, or both. Neither basis for jurisdiction is implicated here. It is also significant to note that none of the cases cited by Defendants require exhaustion in a foreclosure action brought by the United States against a tribal member.

The dispute here is between the United States and Defendants over a debt secured by a mortgage. Unlike the cases cited by Defendants, the United States relies on 28 U.S.C. § 1345, which provides as follows:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Defendants do not allege or prove that the Tribe has a direct connection to the debt owed to the United States. Nor does it involve policy implications.

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[2] 28 U.S.C. § 1332 provides: "The district courts shall have original jurisdiction of all civil actions where the matter" is between citizens of different States.

Indeed, in a similar foreclosure action, a North Dakota District Court found that the action does not involve tribal-related activities and does not require tribal exhaustion. United States v. Am. Horse, 352 F. Supp. 2d 984, 990 (D.N.D. 2005). This court held similarly in United States v. Vanderwalker, No. CIV 10-3008-RAL, 2010 WL 5140476, at *3 (D.S.D. Dec. 10, 2010), holding there that "this is not an instance where either tribal self-government or self-determination is implicated. Instead, this is a dispute between the United States and individuals [.] The Government was not required to exhaust tribal remedies before bringing this action in federal court." Id.

This Court clearly has subject matter jurisdiction under § 1345 and the Tribe has no direct interest. Thus, contrary to Defendants assertions, the United States is not required to exhaust tribal remedies.

3. Regarding an Indian Owner As Having Unrestricted Fee Simple Title, Does Not Convert Trust Property To Non-Trust Property.

Citing 25 U.S.C. § 5135,[3] Defendants contend that for purposes of foreclosure, "Indian trust land shall be regarded as non-trust real property." DE 19, p. 5. This tenuous attempt to invoke tribal court jurisdiction lacks logic, and consequently lacks merit. Clearly, regarding an Indian owner "as vested with unrestricted fee simple title", does not expressly delegate

[3] 25 U.S.C. § 5135 provides, in part: "For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land."

jurisdiction to tribal courts. The language of the statute simply states that Indian land may be used as collateral for a secured loan, subject to foreclosure pursuant to the terms of the parties' agreement. By enacting a statute that promotes economic development, Congress has not granted exclusive jurisdiction over these special foreclosure matters to tribal courts. Moreover, incorporating the substantive law of the tribe or state where the land is located, is not a delegation of jurisdiction. Thus, contrary to Defendants assertions, the real property remains trust land until such time as "conveyance of the land pursuant to the [foreclosure] proceeding shall divest the United States of title to the land." § 5135.

CONCLUSION

Disregarding Defendants' untimely response in Opposition to Summary Judgment is warranted in this case. Moreover, the Defendants disagreement and unsupported assertion of disputed material fact does not preclude summary judgment in this case. For the reasons stated here and in its briefs previously filed in support of summary judgment, the United States requests that the Court enter summary judgment against the Defendants, joint and several, in the amount certain of $1,211,782.16, which is the principal and interest due on the defaulted note. SUMF 20. The United States also requests a decree of sale as to the mortgaged real property. DE 1.

Dated this 18th day of December, 2020.

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