NOT FOR PRINTED PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BURREL JONES	§	
	§	CASE NO. 9:20-CV-63-RC-ZJH
v.	§	
	§	
ALABAMA-COUSHATTA TRIBE	§	
OF TEXAS ET AL.	§	
	§	

REPORT AND RECOMMENDATION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

This case is assigned to the Honorable Ron Clark, United States District Judge, and referred to the undersigned United States Magistrate Judge for pretrial management. The Defendants, Alabama-Coushatta Tribe of Texas ("the Tribe") and Naskila Gaming ("the Casino"), have jointly filed their Motion to Dismiss Plaintiff's First Amended Complaint. (Doc. #18). After considering the motion and arguments from the parties, the undersigned recommends granting in part and denying in part the motion to dismiss.

I. PROCEDURAL HISTORY

Plaintiff Burrel Jones filed this case on April 9, 2020, against Defendants Alabama-Coushatta Tribe of Texas and Naskila Gaming, asserting a declaratory judgment action and a premises liability claim. (Doc. #1). After Defendants filed a Motion to Dismiss for Lack of Jurisdiction (Doc. #9), Jones filed an amended complaint. (Doc. #12). Defendants filed the pending Motion to Dismiss for Lack of Jurisdiction on July 31, 2020. (Doc. #18). Discovery in the case is stayed until the court decides the pending motion to dismiss.

II. FACTUAL BACKGROUND[1]

Jones alleges that he visited the Casino in October 2019 and was injured in a fall from the staircase at the facility's entrance. (Doc. #12, at 5). The Casino is located on tribal lands of the Tribe. *Id.* at 1. Jones also alleges that after his insurance claim against Defendants' insurer was denied, he communicated with various individuals about filing a lawsuit in tribal court and was told that the Tribe "was not subject to suit in the tribal court." *Id.* at 6–7. After seeking more information, he could not find the tribal court's website and was told by the Tribe's Deputy Administrator that "both the Casino and the Tribe 'had sovereignty,' and that there was no way to seek remedy for Plaintiff's injuries in tribal court." *Id.* at 7. Jones ultimately concluded that the Tribe's "court was either dysfunctional or non-existent." *Id.* This left him "without an operational tribal court in which to adjudicate his premises liability claim and, therefore, no mechanism for obtaining relief." *Id.* at 8. He then filed this suit in federal court. (Doc. #1).

Jones asserts a premises liability claim seeking damages for his injuries and a declaratory relief action seeking declarations that (1) the Restoration Act, or in the alternative, the provisions of it that grant the Tribe sovereign immunity, violates his right to petition under the First Amendment of the U.S. Constitution due to the lack of an active tribal court in which he can bring his premises liability claim and is therefore unconstitutional; and (2) that he is not barred by sovereign immunity from bringing his premises liability claim in federal or state court. *Id.* at 11.

III. LEGAL STANDARD

The party invoking federal jurisdiction bears the burden to show standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). If a court cannot remedy a party's alleged injuries, there is no Article III case or controversy to support federal jurisdiction. *Id.* at 568–71. A federal

[1] These facts are alleged in Jones's First Amended Complaint. (Doc. #12).

court must dismiss a case for lack of subject-matter jurisdiction if it lacks statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). To that end, "sovereign immunity is not merely a defense on the merits—it is jurisdictional in nature. If sovereign immunity exists, then the court lacks both personal and subject-matter jurisdiction to hear the case and must enter an order of dismissal." *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985). Without an independent basis of federal subject-matter jurisdiction, a court cannot exercise supplemental jurisdiction over state-law claims. *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 221–22 (5th Cir. 2012).

IV. ANALYSIS

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512–513 (1940); *Puyallup Tribe, Inc. v. Wash. Dept. of Game*, 433 U.S. 165, 172–173 (1977). Without congressional authorization, the Indian Nations are exempt from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978). It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

The Defendants' motion should be granted in part and denied in part. The Tribe has not waived its sovereign immunity as to the premises liability claim and thus, that claim should be dismissed. However, the Fifth Circuit recognizes an exception to sovereign immunity when the plaintiff asserts a declaratory judgment claim.

A. Declaratory Judgment and Declaratory Relief Action

While the Supreme Court held in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.* that "as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity," the Fifth Circuit distinguishes actions for damages like the one in *Kiowa* from those for injunctive or declaratory relief. 523 U.S. 751, 754 (1998); *see Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 572 (5th Cir. 2001); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999). In *Comstock*, two oil companies sought declaratory relief against the tribe. *Comstock*, 261 F.3d, at 572. The Fifth Circuit, interpreting *TTEA*, ultimately held that the tribe was not entitled to sovereign immunity against the oil companies' claims for equitable relief.

Here, like in *Comstock*, Jones has asserted a claim for declaratory relief. (Doc. #17, at 10–11). Defendants have presented no reason why the declaratory relief exception laid out in *TTEA* and *Comstock* should not apply here. In their reply in support of the motion to dismiss, they admit that the Tribe has sovereign immunity from an award of damages only. (Doc. #21, at 1). Thus, *Comstock* applies here and the Tribe is not entitled to sovereign immunity against Jones's claim for declaratory relief.[2]

B. Premises Liability Claim

Generally, when federal district courts have original jurisdiction over a civil action, they have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of

[2] The precise declaratory relief sought by Jones is (1) the Restoration Act, or in the alternative, the provisions of it that grant the Tribe sovereign immunity, violates his right to petition under the First Amendment of the U.S. Constitution due to the lack of an active tribal court in which he can bring his premises liability claim and is therefore unconstitutional; and (2) that he is not barred by sovereign immunity from bringing his premises liability claim in federal or state court. The undersigned questions the legal plausibility of each claim. However, the Tribe has not specifically moved to dismiss the injunctive relief claims under Federal Rule of Civil Procedure 12(b)(6) or any other grounds.

the United States Constitution. 28 U.S.C. § 1367(a). However, the court cannot exercise supplemental jurisdiction over a claim that is barred by sovereign immunity. *See Watson v. Texas*, 261 F.3d 436, 440 n.5 (5th Cir. 2001).

Jones cites to *Wilkes v. PCI Gaming Authority* to support his claim that the Tribe's sovereign immunity should be waived in the interest of justice. 287 So.3d 330. There, the Alabama Supreme Court held that doctrine of tribal sovereign immunity did not apply to shield an Indian tribe from tort claims brought by non-tribal plaintiffs. *Id.* at 335.

The court does not find *Wilkes* to be persuasive and declines to follow it. It is well settled that claims for damages against Indian tribes are barred by sovereign immunity. *See TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680–81 (5th Cir. 1999) ("[T]he district court correctly dismissed the damages claim based on sovereign immunity[.]"); *Tribal Smokeshop v. Ala.-Coushatta Tribes*, 72 F. Supp. 2d 717, 720 (E.D. Tex. 1999) (tribe had sovereign immunity from claims for monetary damages); *Elliott v. Capital Int'l Bank & Tr.*, 870 F. Supp. 733, 735 (E.D. Tex. 1994) (dismissing plaintiff's claim because of tribal sovereign immunity even though it may leave him with no relief). Several other circuits have addressed the issue of tribal sovereign immunity for tort claims and have found that it applies. *See Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 (9th Cir. 2016) (plaintiffs' claims for fraud in the inducement, material misrepresentation, and promissory estoppel were tort claims barred by tribal sovereign immunity); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (affirming dismissal of plaintiff's negligence claims against tribe under doctrine of tribal sovereign immunity); *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota*, 50 F.3d 560, 561 (8th Cir. 1995) (affirming dismissal of counterclaims sounding in tort to which the Tribe did not waive its sovereign immunity).

The only court to cite *Wilkes* has declined to follow it. *Oertwich v. Traditional Vill. of Togiak*, 413 F. Supp. 3d 963, 968 (D. Alaska 2019). *Wilkes*, an Alabama Supreme Court decision that has never been cited by any circuit court, is not enough for this court to override both Fifth Circuit case law dismissing damages claims based on tribal sovereign immunity or the case law from other circuits upholding sovereign immunity for claims sounding in tort. Additionally, Jones has not alleged nor provided any evidence of an express waiver of sovereign immunity by the Tribe. Thus, Jones's premises liability claim is barred by sovereign immunity and should be dismissed.

V. RECOMMENDATION

Because the Fifth Circuit recognizes an exception to sovereign immunity when the plaintiff asserts a declaratory judgment action, the undersigned United States Magistrate Judge recommends that the District Court **DENY** Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Doc. #18) as to Jones's claim for declaratory relief. Additionally, because the Tribe has not waived its sovereign immunity for the premises liability claim, the undersigned United States Magistrate Judge recommends that the District Court **GRANT** Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Doc. #18) as to Jones's premises liability claim.

VI. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c), each party to this action has the right to file objections to this report and recommendation. Objections to this report must (1) be in writing, (2) specifically identify those findings or recommendations to which the party objects, (3) be served and filed within fourteen days after being served with a copy of this report; and (4) be no more than eight pages in length. *See* 28 U.S.C. § 636(b)(1)(c); FED R. CIV. P. 72(b)(2); LOCAL RULE CV-72(c). A

party who objects to this report is entitled to a de novo determination by the United States District Judge of those proposed findings and recommendations to which a specific objection is timely made. See 28 U.S.C. § 636(b)(1)(c); FED R. CIV. P. 72(b)(3).

A party's failure to file specific, written objections to the proposed findings of fact and conclusions of law contained in this report, within fourteen days of being served with a copy of this report, bars that party from: (1) entitlement to de novo review by the United States District Judge of the findings of fact and conclusions of law, *see Rodriguez v. Bowen*, 857 F.2d 275, 276–77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of any such findings of fact and conclusions of law accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996).

SIGNED this 19th day of October, 2020.

Zack Hawthorn
United States Magistrate Judge