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

BURREL JONES, *Plaintiff*, v. ALABAMA-COUSHATTA TRIBE OF TEXAS AND NASKILA GAMING, *Defendants.*	§ § § § § § § § § § §	No. 9:20-CV-63

DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS

Indian tribes like the Alabama-Coushatta Tribe of Texas (the "Tribe") have the "common-law immunity from suit traditionally enjoyed by sovereign powers." Rpt. & Rec. ("R&R) at 3 (collecting cases) [DE 25]. The R&R accordingly concludes that tribal sovereign immunity forecloses Plaintiff's premises-liability claim as a matter of law. *Id.* at 4–6. The R&R also recommends, however, that Plaintiff be permitted to proceed on his declaratory-relief claim, which seeks declarations (1) that applying sovereign immunity here violates his constitutional right to petition and (2) that Plaintiff "is not barred by sovereign immunity from bringing his premises liability claim in federal or state court." *Id.* at 4 & n.2.

Defendants respectfully file this supplemental motion to dismiss at the Court's request, *see* Order [DE 28], and ask the Court to also dismiss with prejudice Plaintiff's claim for declaratory relief. Whether it suffers from a standing issue under Rule 12(b)(1) or a pleading defect under Rule 12(b)(6), that claim cannot proceed because it seeks only to vindicate Plaintiff's alleged right to bring the tort claim that the Court has recognized is barred by sovereign immunity. Because the Tribe is immune from tort claims, Plaintiff has suffered no injury that can be vindicated by declaration, and his declaratory-relief claim cannot proceed against the Tribe in any court.

BACKGROUND

Defendants included a full background of this case in their Motion to Dismiss (at 2–5) [DE 18]. Relevant here, the Tribe operates Naskila Gaming ("Naskila"), an electronic bingo facility on its reservation. Plaintiff alleges that he was injured in a fall at Naskila's entrance and subsequently was told that Defendants "'had sovereignty,' and that there was no way to seek remedy for Plaintiff's injuries in tribal court." First Am. Compl. ("FAC") ¶¶ 16–24 [DE 12]. Plaintiff ultimately concluded that the Tribe's "court was either dysfunctional or non-existent," *id.* ¶ 24, and filed this lawsuit. Beyond damages, Plaintiff seeks declarations that (1) the Tribe's sovereign immunity "violates Plaintiff's right to petition under the First Amendment of the U.S. Constitution due to the lack of an active Alabama-Coushatta tribal court in which Plaintiff can bring his premises liability claim"; and (2) Plaintiff is not barred by sovereign immunity from bringing his premises-liability claim in federal or state court. *Id.* ¶¶ 37, 44.

LEGAL STANDARD

Under Rule 12(b)(1), if a court cannot remedy a party's alleged injuries, there is no Article III case or controversy to support federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568–71 (1992). 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). Under Rule 12(b)(6), a complaint may proceed only where a plaintiff pleads "sufficient factual matter . . . to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Facial plausibility exists when allegations set forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

ARGUMENT

Plaintiff's fundamental alleged injury comes from a slip-and-fall at Naskila. But tribal sovereign immunity precludes any claim for damages on that injury. Plaintiff's only other alleged injury—serving as the basis for his declaratory claim—is an inability to petition in court under the First Amendment because of the combination of sovereign immunity and the supposed lack of a tribal court.

That claim cannot proceed for at least two reasons. First, with his premises-liability claim barred as a matter of law by sovereign immunity, Plaintiff has no independent and viable declaratory claim. Second, Plaintiff's declaratory-relief claim does not satisfy Article III standing. Because Plaintiff's tort claim indisputably is barred by tribal sovereign immunity, it serves no purpose to permit Plaintiff to seek a declaration that he may sue Defendants for that claim.

I. Plaintiff Does Not Offer An Independent (Or Viable) Declaratory Claim.

Plaintiff concedes that the Tribe has immunity, FAC ¶¶ 4, 6, 29, but seeks to circumvent it by arguing that the Court has jurisdiction over a declaratory claim that, in turn, supplies supplemental jurisdiction for a tort claim. Plaintiff thus asks the Court to find, even if it lacks jurisdiction over his tort claim, that he may obtain a declaration that he can bring the tort claim. That approach does not correctly reflect the law on sovereign immunity or declaratory claims. Plaintiff's "declaratory" claim should be recognized for what it really is: an attempt to salvage jurisdiction for his barred tort claim. *See* Mot. to Dismiss at 12.

This Court previously has recognized that "no real controversy exists" when a plaintiff "would get nothing from a declaratory judgement that they would not get from prevailing on their [coercive] claims." *Scritchfield v. Mut. of Omaha Ins. Co.*, 341 F. Supp. 2d 675, 682 (E.D. Tex. 2004) (dismissing request for declaratory judgment). That is true here. Plaintiff's declaratory claim seeks only a declaration that he may bring his tort claim. As the Second Circuit reiterated

just last month, declaratory claims that are the "functional equivalent" of a claim for money do not abrogate tribal sovereign immunity. *See Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, – F.3d –, 2020 WL 6253332, at *1 (2d Cir. 2020). In applying that rule, the Second Circuit notably acknowledged precedent that refused to extend a certain exception to sovereign immunity "to lawsuits against a foreign sovereign that . . . arise out of a slip-and-fall injury occurring on the foreign sovereign's land." *Id.* at *7 (citing *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200 (2007)).

Plaintiff's cause is not aided by two Fifth Circuit cases where tribal sovereign immunity did not preclude claims seeking equitable relief: *Comstock Oil & Gas Inc. v. Alabama & Coushatta Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001) and *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999). *Comstock* and *TTEA* do not hold that all claims denominated as ones for "declaratory relief" may abrogate tribal sovereign immunity. It matters what the plaintiff seeks. *See, e.g.*, *Cayuga*, 2020 WL 6253332, at *1. And here, Plaintiff's declaratory-relief claim—grounded in the idea that Plaintiff must be able to bring a tort claim against Defendants—functionally dovetails with Plaintiff's premises-liability claim.

Separately, the analysis for jurisdiction of a declaratory action also considers whether the defendant could have brought a coercive claim to enforce its rights. *See Comstock*, 261 F.3d at 573 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 (1983)). For instance, in *Comstock*, companies with whom the Tribe had mineral leases sought a declaration as to the status of the tribal court because it would affect the status of those leases in the future for both parties. *Id.* at 569. Similarly, in *TTEA*, the plaintiff sought a declaration concerning the applicability of a federal statute to a contract it had with the Indian tribe. 181 F.3d at 679–80.

Comstock and *TTEA* support allowing declaratory suits to proceed against Indian tribes in limited circumstances involving claims for prospective relief or where a declaration is necessary to determine the rights of parties under contracts subject to a comprehensive federal regulatory scheme. *See Comstock*, 261 F.3d at 573–74. Neither of those circumstances exists here. There is no reciprocal right of Defendants at issue for a coercive claim (i.e., Defendants have not attempted to bring Plaintiff into its tribal court or argued that Plaintiff's claims may proceed only in tribal court), and the only prospective relief that Plaintiff seeks is the ability to assert a tort claim that is barred by sovereign immunity. *See* Mot. to Dismiss at 5–6.

As set forth in Defendants' Motion to Dismiss and Reply [DE 21], moreover, there are multiple independent reasons for rejecting Plaintiff's First Amendment theory as a matter of law, including that the First Amendment does not apply to Indian tribes. *See* Mot. to Dismiss at 7–12; Reply at 2–3. As the Tenth Circuit has observed, "sovereign immunity is not foreclosed by either the Declaration of Independence or the constitutional right to petition for redress of grievances." *Hoffmeister v. United Student Aid Funds*, 818 F. App'x 802, 806 (10th Cir. 2020). To hold otherwise would allow any plaintiff with a foreclosed tort claim to avoid sovereign immunity by recasting the claim as one for declaratory relief under the First Amendment, subjecting sovereigns to the very litigation that immunity is meant to foreclose.

Plaintiff has yet to identify—despite multiple opportunities to do so—any source that supplies an express and unequivocal abrogation or waiver of Defendants' sovereign immunity for private tort claims like Plaintiff's. *See Santa Clara Pueblo v. Martinez*, 426 U.S. 49, 58 (1978); R&R at 6. Plaintiff's theory of declaratory relief has no legal support, as Plaintiff implicitly conceded by offering no rebuttal to these points in his response to Defendants' prior Motion to Dismiss. *See* Reply at 2. Defendants respectfully ask the Court to dismiss it with prejudice.

II. There Is No Article III Jurisdiction For Plaintiff's Declaratory Claim.

Regardless, Plaintiff lacks standing to bring his declaratory claim. Plaintiff relies on the alleged lack of a tribal court to seek a declaration that his First Amendment right to petition is being infringed. But the application of sovereign immunity here—as in every case in which the doctrine applies—means that Plaintiff cannot petition for tort damages against Defendants in any court. That Plaintiff's declaratory claim raises a foreclosed question of law establishes that he has suffered no particularized injury and that no court can provide him redress.[1] *See Lujan*, 504 U.S. at 560–61 (Standing requires "an 'injury in fact'" that can be "redressed by a favorable decision."); *Scritchfield*, 341 F. Supp. 2d at 682 (dismissing declaratory claim where it would provide "no actual relief").

Finally, because Plaintiff cannot obtain the damages he seeks from Defendants, his theory of the case invites the Court to issue an improper advisory opinion. Although the Declaratory Judgment Act does not depend on further relief being sought immediately, a declaration must have some legal effect moving forward. 28 U.S.C. § 22.1(a). That is why an "actual controversy" must exist, and the court must consider whether it has the authority to grant the declaratory relief. *See Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). Here, the declaration Plaintiff seeks is the ability to bring a tort claim indisputably barred by sovereign immunity. *See TTEA*, 181 F.3d at 680–81. Such a "declaration" would constitute an improper advisory opinion because it can never have future affect. *See Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 604 (5th Cir. 2004) (A ruling that has "no effect on the rights of the parties" is an "advisory opinion.").

[1] Although not legally relevant, the Tribe does have a well-functioning tribal court, *see* Mot. to Dismiss at 11 n.4 & Exs. B–E, and Plaintiff provided no evidence to the contrary.

CONCLUSION

The Tribe respectfully asks the Court (1) to adhere to the R&R's recommendation to dismiss Plaintiff's premises-liability claim, (2) to recommend the dismissal of Plaintiff's declaratory-relief claim consistent with Defendants' Motion to Dismiss and this Supplemental Motion, and (3) to recommend that this case be dismissed with prejudice in its entirety.

Dated: November 16, 2020

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Supplemental Motion to Dismiss* was served upon all counsel of record through the Court's CM/ECF system on November 16, 2020:

/s/ Justin R. Chapa
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