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

BURREL JONES	§	
	§	
	§	CIVIL ACTION 9:20-cv-00063
	§	
VS.	§	
	§	
	§	
ALABAMA-COUSHATTA TRIBE OF	§	
TEXAS AND NASKILA GAMING	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

1. Plaintiff, Burrel Jones, (hereinafter "Plaintiff") comes in opposition to the Alabama-Coushatta Tribe of Texas and Naskila Gaming's (hereinafter "Defendants") Supplemental Motion to Dismiss and would respectfully request that this Court deny Defendants' motion.

SUMMARY OF THE ARGUMENT

2. Plaintiff respectfully requests that the Court deny Defendants' Supplemental Motion to Dismiss because (1) Plaintiff's declaratory-judgment claim is a viable cause of action, and (2) Plaintiff has Article III standing to bring his declaratory-judgment action.

BACKGROUND

3. This case arises out of an incident that occurred on or about October 19, 2019 in which Plaintiff fell down a staircase at Defendants' Naskila Gaming casino and suffered severe injuries, including an open displaced right humeral fracture. Dkt. No. 12. ¶ 20. Then, when Plaintiff attempted to seek redress for his injuries through the Alabama-Coushatta Tribe of Texas (hereinafter "The Tribe"), Plaintiff's counsel was told by the Tribe's deputy administrator that the Tribe "had sovereignty" and that there was no way to seek any remedy for his injuries. *Id*. at ¶ 24.

This denial of the existence of a remedy-seeking mechanism for Plaintiff by the Tribe's administrator, along with the fact that the Tribe had no information about a tribal court on its website, led counsel for Plaintiff to conclude that the Tribe's tribal court was either dysfunctional or non-existent. *Id*. at ¶¶ 22, 24.

4. Defendants have twice attempted to move to dismiss Plaintiff's complaint on the basis, among others, that Plaintiff is supposedly barred from bringing a claim for declaratory relief against Defendants. Despite the fact that this Court has twice rejected Defendants' argument on that basis, Defendants now make a third attempt to have Plaintiff's declaratory judgment action dismissed for new reasons. However, even though Defendants' arguments have evolved, the law has not. The fact remains that pursuant to well-established Fifth Circuit precedent, the Tribe is not immune from Plaintiff's declaratory judgment action. Consequently, Plaintiff requests that the Court once again deny Defendants' motion to dismiss Plaintiff's declaratory-judgment claims.

ARGUMENTS AND AUTHORITIES

A. Plaintiff's Declaratory-Judgment Action Is A Viable Cause of Action Pursuant to Fifth-Circuit Precedent

Tribal Immunity Does Not Apply to Declaratory Judgment Actions in the Fifth Circuit.

5. Plaintiff's declaratory-judgment claim stands on its own as an independent, viable cause of action against Defendants per well-settled, binding case law. As the Fifth Circuit has reiterated in multiple cases, Indian tribes are not immune from suits for declaratory relief despite Defendants repeated and mistaken assertions to the contrary. *See Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001); *TTEA v. Ysleta del Sur Pueblo*, 181 F. 3d 676, 680 (5th Cir. 1999). As the Tribe admitted in its first Motion to Dismiss, the *TTEA* Court acknowledged that "'actions seeking declaratory and injunctive relief' could proceed" against the Indian tribe in that case. Dkt. No. 9, p. 11. Thus, the Tribe has

previously acknowledged during the course of this litigation what well-established case law already elucidates: Defendants are not able to hide behind the shield of sovereign immunity to protect itself from declaratory-relief suits such as the one brought against it by Plaintiff in federal court.

6. Defendants are now trying to write their own additional narrow caveat into the Fifth Circuit's longstanding proposition that tribes are not immune from declaratory-judgment actions. The Tribe now claims that declaratory suits can only move forward "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." Dkt. No. 30, p. 5. However, neither *Comstock* nor *TTEA* limit permissible declaratory-judgment claims against tribes to those that seek to straighten out the rights of parties to a contract pursuant to federal regulations. This extra condition invented by Defendants does not accurately reflect the Fifth Circuit precedential case law on this matter and should be disregarded. The precedent is much broader than Defendants make it out to be. The fact of the matter is that it is well-settled that, broadly speaking, tribes are not immune from declaratory-judgment claims in the Fifth Circuit.

Defendants Supporting Case Law Is Non-Binding and Inapplicable to the Present Case.

7. Now, in Defendants' latest effort to have Plaintiff's declaratory-judgment claim dismissed, Defendants attempt to use inapplicable, non-binding case law to argue that Plaintiff's declaratory-judgment action is somehow invalid and that the Court should therefore dismiss it.

8. Defendants point to *Scritchfield v. Mut. Of Omaha Ins. Co.*, 341 F. Supp. 2d 675 (E.D. Tex. 2004), in which the Court dismissed a request for declaratory relief. However, *Scritchfield*, a breach-of contract case, is distinguishable from the present case. The reason the *Scritchfield* Court rejected the declaratory-judgment in that case was because the *Scritchfield* plaintiffs had

an alternate adequate remedy available to them, which was their breach-of-contract claim. *Scritchfield*, 341 F. Supp. 2d at 682. Because the plaintiffs already had an adequate remedy available to them through their contract claim, the Court declined to grant the redundant declaratory relief sought.

9. In contrast to *Scritchfield*, Defendants in the case at bar seek to have Plaintiff's premises-liability tort claim dismissed, leaving Plaintiff without the kind of adequate, alternate remedy that the *Scritchfield* plaintiffs had. If Defendants are successful in convincing this Court's judge to adapt the magistrate judge's recommendation to dismiss the tort case, Plaintiff will be left with a single remedy, which will only be possible through Plaintiff's declaratory action. Plaintiff would have no "other adequate remedies" as the *Scritchfield* plaintiffs did that would make Plaintiff's declaratory action superfluous. In this case, there is a real controversy that exists in as to whether Plaintiff's right to petition under the First Amendment of the U.S. Constitution is being violated by the Restoration Act when a tribe such as the Tribe in this case has no tribal court to adjudicate Plaintiff's injury claims.

10. Defendants also make a comparison between this case and a Second-Circuit case to support its latest Motion to Dismiss. Yet *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 2020 WL 6253332 (2d Cir. 2020) is wholly inapposite to the case at bar. *Cayuga* dealt with whether tribes could be subject to "legal actions that challenged the sovereign's rights" to immovable property outside the sovereign's territory. *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 2020 WL 6253332 at *1 (2d Cir. 2020). This so-called "immovable property" exception was the basis for the *Cayuga* plaintiff's slip-and-fall claim. While the *Cayuga* Court rejected the idea that the immovable property exception to immunity applies to tort claims, such an exception has nothing to do with the present case. Plaintiff does not now, nor has he ever claimed that Defendants can

be sued in tort due to the immovable property exception. The Court's decision in that case has no relevance to the case at bar.

11. Finally, Defendants misapply the holding of a Tenth Circuit case, *Hoffmeister v. United Student Aid Funds*, 818 F. App'x 802, 806 (10th Cir. 2020), to argue that Plaintiff cannot seek declaratory relief regarding a violation of his First Amendment rights. However, in reaching its decision, *Hoffmeister* cites to and relies on another Tenth Circuit case, *Christensen v. Ward*, 916 F.2d 1462, 1473 (10th Cir. 1990), which was a case regarding immunity provided under 28 U.S.C. 2679(b)(1), also known as the Reform Act. The Reform Act prevents employees of the United States government from being suit in common-law tort for acts performed in the scope of their official capacities. *Hoffmeister*, in citing to *Christensen*, held that "the doctrine of sovereign immunity, as embodied **in the common law and Reform Act**, is constitutional" (emphasis added). *See Hoffmeister*, 818 F. App'x 802, at 806.

12. The present case is completely distinguishable from *Hoffmeiester* and *Christensen*, both non-binding cases on this court, as the case at bar does not involve claims of immunity by the U.S. government pursuant to the Reform Act, nor does it seek to question whether claims of governmental immunity under the Reform Act are constitutional. This case seeks a declaration of the Plaintiff's First Amendment right to bring suit under the Restoration Act when the tribe refuses to adjudicate his claims in a tribal court. Because of the substantial distinctions between the claims made in these Tenth Circuit cases and the claims made in the case at bar, this Court is under no obligation to follow that precedent.

13. Simply put, the precedential case law that is binding on this Court from the Fifth Circuit holds that Defendants are not immune from declaratory-judgment actions. As Defendants admitted in their first Motion to Dismiss, "[t]he Declaratory Judgment Act…overcomes

sovereign immunity…where…the declaration sought involves the plaintiff's rights." Dkt. No. 9, p. 5. The relief Plaintiff seeks is viable and presents a real controversy as to whether Plaintiff's constitutional rights are being violated by the Restoration Act and the tribe's lack of a functioning tribal court that can hear Plaintiff's tort claims. Plaintiff's right to seek this declaratory relief is clearly established in case law and Defendant's latest attempt to have it dismissed should be denied yet again by this Court.

B. Plaintiff Has Article III Standing to Bring His Declaratory-Judgment Action

14. Defendants are mistaken in their curious assertion that Plaintiff lacks Article III standing to bring his declaratory-judgment action. The Supreme Court long ago defined the elements of Article III standing: (1) the plaintiff suffered an "injury in fact,"; (2) there is a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S 555, 560-61 (1992).

15. In this case, Plaintiff easily meets the three elements with regard to his declaratory action alone. Plaintiff suffered an "injury in fact" when the Tribe denied him the ability to bring a claim in a tribal court, which the Tribe appears to not have. Because there was no tribal court for Plaintiff to file suit in, and because the Tribe claimed it was immune from suit, Plaintiff is left with severe injuries without any way to seek redress for them. Finally, if the Court granted Plaintiff the declaratory relief he seeks, Plaintiff would be given the opportunity to finally seek justice in court for the unreasonably dangerous condition for which Defendants are liable. Defendants contention that Plaintiff has no standing to bring a declaratory-judgment action, especially in light of the Fifth Circuit's precedent declining to apply sovereign immunity to declaratory-judgment claims, is completely without merit.

CONCLUSION

16. For the foregoing reasons, Plaintiff respectfully requests that this Court deny in its entirety the Tribe's Supplemental Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record herein in accordance with the Federal Rules of Civil Procedure on November 30, 2020.

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