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' REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS

Plaintiff's Response [DE 31] offers no substantive rebuttal to the arguments raised in Defendants' Supplemental Motion to Dismiss (the "Motion") [DE 30]. Instead, the Response tries to distinguish the Motion's cases on their facts while refusing to engage with their legal propositions, which are fatal to Plaintiff's claim for declaratory relief. The Response does not actually contest that Defendants have sovereign immunity; that Defendants' sovereign immunity has not been abrogated or waived for tort claims; that sovereign immunity renders all tort claims nonredressable in that circumstance; that Plaintiff's declaratory claim in substance seeks only to vindicate an alleged right to proceed on a tort claim; that Indian tribes are not subject to the First Amendment; and that the doctrine of sovereign immunity does not violate the right to petition.

The Response nonetheless asks the Court to adopt an approach that is unsupported by law or logic: that Plaintiff be allowed to seek a declaration that he can assert a premises-liability claim against Defendants, even if that tort claim is barred by tribal sovereign immunity (as the Court already has concluded). *See* Resp. ¶ 15. Defendants have immunity from suit in such circumstances. For that reason and the other bases for dismissal raised by Defendants' motions to dismiss, Defendants respectfully ask the Court to dismiss Plaintiff's claims in their entirety.

ARGUMENT

Although the Response frames Plaintiff's declaratory-relief claim as necessary to preserve Plaintiff's right to petition a court for redress, it repeatedly admits that the actual remedy sought by Plaintiff through that claim is a declaration that tribal sovereign immunity does not bar his premises-liability claim. *See, e.g.*, Resp. ¶ 15 ("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."). Because Defendants indisputably are immune from such tort claims and not subject to the First Amendment, Plaintiff's declaratory-relief claim inevitably fails, whether analyzed through the lens of tribal sovereign immunity, subject-matter jurisdiction, or pleading sufficiency.

I. Defendants' Arguments Comport with *TTEA* and *Comstock*.

The Motion relies on case law fully consistent with that conclusion. Defendants acknowledge that the Fifth Circuit held that tribal sovereign immunity did not foreclose certain claims in *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). But neither case announced a per se rule that every claim denominated as one for declaratory, equitable, or injunctive relief can proceed against an Indian tribe. After reaffirming that tribal sovereign immunity applies to tort claims, both cases analyzed the substance of the relevant non-tort claims and made context-specific rulings. Notably, and overlooked by the Response, *TTEA* ultimately affirmed the dismissal of the non-tort claims asserted against the tribe in that case for lack of subject-matter jurisdiction (declaratory and breach-of-contract claims) and failure to state a claim (injunction claim)—conclusions that the Fifth Circuit expressly characterized as "flowing from principles of tribal sovereign immunity." 181 F.3d at 685.

Plaintiff's declaratory-relief claim does not implicate the fundamental "distinction" that the Fifth Circuit drew between declaratory-relief claims and "damages claim[s]" for purposes of tribal sovereign immunity: tort and declaratory claims seek different forms of relief. *See TTEA*, 181 F.3d at 680 ("This difference matters."). Where the declaratory-relief claims in *TTEA* and *Comstock* addressed the application of federal statutes and the jurisdiction of a tribal court, Plaintiff's claim seeks only a declaration that Plaintiff can sue the Tribe for tort damages. *See, e.g.*, Resp. ¶ 9 (arguing that the Tribe's alleged lack of a tribal court means that Plaintiff will have nowhere "to adjudicate Plaintiff's injury claims" if his declaratory-relief claim fails). As such, Plaintiff's declaratory-relief claim is indistinguishable from a tort claim.

That is what makes Plaintiff's case different from *TTEA* and *Comstock*. Defendants are not "trying to write their own narrow caveat into [a] longstanding proposition," Resp. ¶ 6, they are applying the sovereign-immunity principles articulated in those cases to the circumstances presented by Plaintiff's unique, duplicative claim for declaratory relief. Those principles instruct that Indian tribes have immunity from tort claims—and a tort claim is the only object of Plaintiff's claim for declaratory relief. Tribal sovereign immunity applies to a claim for declaratory relief that is identical to a claim for tort damages.

II. Regardless, Plaintiff Lacks Standing to Assert His Declaratory-Relief Claim.

Leaving aside that tribal sovereign immunity bars a claim for declaratory relief to bring a tort claim, the Response cannot salvage Plaintiff's declaratory-relief claim by pointing to *TTEA* and *Comstock*. The "absence of immunity does not ensure jurisdiction." *TTEA*, 181 F.3d at 681; *see also id.* at 681–85 (conducting jurisdictional analysis); *Comstock*, 261 F.3d at 572–75 (same). And here, subject-matter jurisdiction does not exist because Plaintiff has no injury that can be redressed via his claim for declaratory relief.

The Response's arguments establish as much. The Response insists that "Plaintiff suffered an 'injury in fact' when the Tribe denied him the ability to bring a claim in a tribal court[.]" Resp. ¶ 15. But it is the Tribe's sovereign immunity—not the status of its court—that forecloses Plaintiff from obtaining relief on his tort claim in any court, as the Response concedes. *Id.* ("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." (emphasis added)).

Plaintiff could not have been injured by the alleged lack of a functioning tribal court. Resp. ¶¶ 9, 15. The Response identifies no authority that gives Plaintiff a right to proceed in tribal court or that would mandate that Plaintiff assert his claims only in tribal court. Plaintiff has not been denied a forum for any petition—as demonstrated by his filing and prosecution of this case in this Court—he simply cannot obtain relief, for the myriad reasons advanced by Defendants. *See* Mot. to Dismiss at 7–12 [DE 18]; Reply at 2–3 [DE 21].

Plaintiff, in any case, does not really seek redress in the form of access a tribal forum. Rather, the Response identifies Plaintiff's declaratory claim as the mechanism through which he can "seek justice in court for the unreasonably dangerous condition" he attributes to Defendants—not as a vehicle to vindicate his right to petition. Resp. ¶ 15. Because tribal sovereign immunity prevents Plaintiff from asserting a premises-liability claim against Defendants, a court can provide him no redress by allowing him to proceed on a claim seeking a declaration that he can bring a premises-liability claim.

Plaintiff thus lacks standing to assert his theory of declaratory relief for at least two reasons. First, Plaintiff has suffered no cognizable injury, as his right to petition cannot be violated by a sovereign not subject to the First Amendment, and he is not harmed by the inability to assert a

foreclosed claim (in tribal or any other court). And second, Plaintiff has no redressable injury, as he cannot assert a tort claim against Defendants to recover for his slip-and-fall injuries. Plaintiff's declaratory-relief claim fails for want of jurisdiction, and it should be dismissed.

III. The Response Misunderstands the Import of *Hoffmeister*, *Scritchfield*, and *Cayuga*.

The Court need go no further to dismiss Plaintiff's claim for declaratory relief. Defendants, however, briefly address the Response's parsing of *Hoffmeister v. United Student Aid Funds*, 818 F. App'x 802 (10th Cir. 2020), *Cayuga Indian Nation v. Seneca County*, 978 F.3d 829 (2d Cir. 2020), and *Scritchfield v. Mutual of Omaha Insurance Co.*, 341 F. Supp. 2d 675 (E.D. Tex. 2004).

The Response dismisses *Hoffmeister* because that case ostensibly only "involved claims of immunity by the U.S. government pursuant to the Reform Act." Resp. ¶ 12. But that is no rebuttal to the proposition for which Defendants cited *Hoffmeister*: that "sovereign immunity is not foreclosed by either the Declaration of Independence or the constitutional right to petition for redress of grievances." 818 F. App'x at 806. As the Fifth Circuit explained in *TTEA*, moreover, the "federal common law doctrine of tribal sovereign immunity" and the "now-constitutionalized doctrine of state sovereign immunity" are largely the same. 181 F.3d at 680. The portion of *Hoffmeister* quoted by the Response belies the interpretation that the Response asks the Court to draw here. It states that "'the doctrine of sovereign immunity, **as embodied in the common law and Reform Act**, is constitutional.'" Resp. ¶ 11 (emphasis original) (citation omitted). Defendants' reliance on *Hoffmeister* comports entirely with this language; the common-law doctrine of sovereign immunity includes tribal sovereign immunity, and thus the application of tribal sovereign immunity does not violate the right to petition.

The Response also misreads the Motion's use of *Cayuga* and *Scritchfield*. Defendants do not ask the Court to rely on those cases because they are directly on point or factually similar to

this case. The Motion cited both as part of its argument that courts look to the substance of non-tort claims. The Response does not truly disagree with that point. Like Defendants, the Response reads *Scritchfield* as a case where the Court dismissed a "redundant" claim for declaratory relief. Resp. ¶ 8. And here, Plaintiff's declaratory-relief claim—seeking a declaration that Plaintiff can assert a tort claim against Defendants—is duplicative of the tort claim that Plaintiff already has asserted.

Similarly, the Motion cited *Cayuga* not because the immovable-property exception has some application here—it does not—but because *Cayuga* observed that tribal sovereign immunity bars claims that are the "functional equivalent" of claims for money. *See* 978 F.3d at 831. *Cayuga* also cited Supreme Court precedent recognizing the general rule that sovereign immunity applies "to lawsuits against a foreign sovereign that . . . arise out of a slip-and-fall injury occurring on the foreign sovereign's land." *Id.* at 837 (citing *Permanent Mission of India v. City of N.Y.*, 551 U.S. 193, 200 (2007)). Plaintiff's declaratory-relief claim violates both of these rules. It seeks a declaration that Plaintiff can, in effect, sue the Tribe (a sovereign) to recover money for his slip-and-fall injury that occurred on the Tribe's reservation.

CONCLUSION

The Response cannot obscure that Plaintiff's declaratory-relief claim is, at bottom, an attempt to resurrect Plaintiff's barred tort claim. The Response identifies no other outcome that Plaintiff hopes to achieve through his declaratory-relief claim. It should therefore meet the same end as Plaintiff's tort claim. Defendants respectfully ask 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 the Supplemental Motion, and (3) to recommend that this case be dismissed with prejudice.

Dated: December 7, 2020

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Reply in Support of Supplemental Motion to Dismiss* was served upon all counsel of record through the Court's CM/ECF system on December 7, 2020.

/s/ Justin R. Chapa
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