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.	§	
	§	CAB
ALABAMA-COUSHATTA TRIBE	§	
OF TEXAS ET AL.	§	
	§	

REPORT AND RECOMMENDATION GRANTING DEFENDANTS' SUPPLEMENTAL 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. Defendants, Alabama-Coushatta Tribe of Texas ("the Tribe") and Naskila Gaming ("the Casino"), have jointly filed their Supplemental Motion to Dismiss Plaintiff's First Amended Complaint. (Doc. #30). After considering the motion and arguments from the parties, the undersigned recommends granting the supplemental 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 a second Motion to Dismiss for Lack of Jurisdiction on July 31, 2020. (Doc. #18). The undersigned issued a report and recommendation ("Report") on that motion on October 19, 2020. (Doc. #25). In their objections to the Report, Defendants raised multiple issues for the first time. The undersigned

subsequently ordered them to file a supplemental motion to dismiss (Doc. #28), which they did on November 16, 2020 (Doc. #30). Discovery in the case is stayed until the court decides the pending motions 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.

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

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 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

In the Report on Defendants' motion to dismiss for lack of jurisdiction, the undersigned recommended that because the Fifth Circuit recognizes an exception to sovereign immunity when the plaintiff asserts a declaratory judgment action, the District Court should deny Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Doc. #18) as to Jones's claim for declaratory relief. The report additionally recommended that because the Tribe has not waived its sovereign immunity for the premises liability claim, the District Court should grant Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Doc. #18) as to Jones's premises liability claim.

In their objections to the Report and supplemental motion to dismiss, Defendants argue that Jones does not offer an independent or viable declaratory claim and that there is no Article III jurisdiction for Jones's declaratory claims. (Doc. #30). Since Jones asks for two distinct declaratory claims, each will be discussed in turn.

A. Declaration One

The first declaration Jones seeks is that 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. (Doc. #12, at 15). Effectively, Jones is asking the court to declare tribal immunity unconstitutional, at least when the right to petition is involved. Even though the Fifth Circuit recognizes an exception to sovereign immunity when the plaintiff asserts a declaratory judgment action, the court still must have the power to grant the specific declaratory relief being asked for in the case. *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); *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000) (the district court must determine whether it has the authority to grant the declaratory relief).

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)). And although the Supreme Court has expressed reservations about the overarching rule, it has declined to carve out exceptions to tribal immunity and defers to Congress to abrogate immunity. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). To abrogate such immunity, Congress must unequivocally express that purpose. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Jones fails to cite any case or other authority that suggests Congress has abrogated tribal immunity in the right to petition context. Therefore, Jones's reliance on his First Amendment right to petition the government for a redress of grievances does not achieve a waiver of sovereign immunity. Without a waiver or express abrogation by Congress, the Tribe retains its immunity and it cannot be forced to litigate Jones's claim. *See Hoffmeister v. United Student Aid Funds, Inc.*, 818 F. App'x 802, 806 (10th Cir. 2020) ("sovereign immunity is not foreclosed by either the Declaration of Independence or the constitutional right to petition for redress of grievances") (citing *Christensen v. Ward*, 916 F.2d 1462, 1471–73 (10th Cir. 1990)).[2]

Additionally, even if Jones could somehow overcome the Tribe's immunity, his right to petition has not been violated. The right to petition gives the right to bring a case in court. It does not provide a right to succeed in the case. Just because he cannot obtain relief in this suit due to sovereign immunity does not mean his right to petition was abrogated. His right to petition was satisfied when he filed this lawsuit. Thus, Defendants' sovereign immunity does not violate Jones's right to petition under the First Amendment of the U.S. Constitution. *See Bowman v. Niagara Mach. & Tool Works, Inc.*, 832 F.2d 1052, 1055 (7th Cir. 1987) (holding that the plaintiff could

[2] Jones points out that Defendants rely on nonbinding cases like *Hoffmeister* and *Christensen* to support their position. However, Jones does not cite to any case, binding or non-binding, to support his claims that there is an exception to sovereign immunity in the right to petition context or that his right to petition was violated. In the absence of any other case law, the court is inclined to follow the reasoning of non-binding cases.

not claim that he had been denied access to the court simply because he could not bring a particular cause of action because "[s]uch an approach confuses 'access' with 'success,' and [plaintiff was] not constitutionally entitled to the latter").

In sum, the court does not disagree with Jones's assertion that in general, the Fifth Circuit recognizes an exception to sovereign immunity when the plaintiff asserts a declaratory judgment action. *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). But because there has been no waiver or exception to tribal immunity in the right to petition context, he cannot bring this specific claim for declaratory relief.

B. Declaration Two

The second declaration Jones seeks is that he is not barred by sovereign immunity from bringing his premises liability claim in federal or state court. (Doc. #12, at 15). However, as discussed in the Report, his premises liability claim is barred by sovereign immunity. This court cannot issue a declaration that is contrary to established law. *See Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000) (the district court must determine whether it has the authority to grant the declaratory relief in the case presented). Thus, this declaratory claim should be dismissed.

V. RECOMMENDATION

Because there has been no waiver or exception to tribal immunity in the right to petition context, and because the court cannot issue a declaration contrary to established law, the undersigned United States Magistrate Judge recommends that the District Court **GRANT** Defendants' Supplemental Motion to Dismiss Plaintiff's First Amended Complaint (Doc. #30) and that the case be dismissed in its entirety.

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 9th day of December, 2020.

Zack Hawthorn
United States Magistrate Judge