

DOCKET NO.: KNL-CV-20-5021343-S : SUPERIOR COURT
JOHN A. COLEBUT, ET AL. : J.D. OF NEW LONDON
v. : AT NEW LONDON
RODNEY A. BUTLER, ET AL. : JULY 27, 2020

PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby object to defendants' motion for summary judgment as the Indian Civil Rights Act, 25 U.S.C. 1301-1303 gives this Honorable Court jurisdiction over the case.

FACTS

By complaint dated January 29, 2020 plaintiffs brought an action against certain individuals that were members of the tribal Council of the Mashantucket Pequot Tribal Nation, various other individual tribal members who were councilmembers, a defendant who was a finance officer for the tribal nation, a defendant who was the apparent high bidder at the foreclosure auction of plaintiff John Anthony Colebut ordered by the tribal court, a defendant was a former lead counsel and successor counsel for the tribal nation. Complaint, par.1-7.

Plaintiffs alleged that the mission statement for the Mashantucket Pequot Tribal Nation set forth on its website is to:

promote spirituality, strong family values, education, social stability, independent economic independence, in the well – being of tribal members, employees, and guests in a healthy and supportive environment.

The ultimate goal is to protect and advance the sovereign rights of the tribal nation in order to build and preserve a cultural, social, and, an economic foundation that can never be undermined or destroyed.

Id., par .8

John Anthony Colebut, a tribal elder, was the owner of a house on tribal land in which he, his spouse, co-plaintiff Karen Colebut and their minor daughter lived. John Anthony Colebut suffered a decline in income in 2014. Id., par. 9-11.

There was a hearing in the Tribal Court concerning in which defendant John Anthony Colebut and tribal member Tina Friedman were seeking to have their lender, Santander Bank, reduce their mortgages so that both John Anthony Colebut and Tina Friedman could save their respective residences. Plaintiff alleges that Santander Bank agreed to certain reductions. Id, par.12.

An attorney represented both of the tribal members. After the hearing, plaintiffs were told repeatedly told that there was a program of the Tribal Nation that permitted the Tribal Nation to take over the loans and that the plaintiffs were next in line for the program. Despite continued representation over the next two years, the Tribal Nation never took over John Anthony Colebut's loan. Id., par. 13-14.

Plaintiffs learned years later that the chairman and treasurer of the Tribal Nation

authorized the finance officer to transfer funds out of an account to buy tribal member Tina Friedman's loan secretly from Santander Bank and then claimed that there was no money in the account and that there was never any such program. Id., par.14.

Around the same time the tribal nation assisted a different tribal member to secure two loans to save a second home in disregard of the tribal housing laws that prohibited tribal nation being in second position house. Id., par.15.

The tribal nation purchased all of the other elders homes, but did not purchase plaintiff John Anthony Colebut's home even though he's a tribal elder. Id., par. 16.

John Anthony Colebut became aware of direct housing financing from the USDA, filed an application and complied with pre conditions to the financing. A closing was scheduled, but on the date of the closing, the Tribal Nation through legal counsel refused to allow plaintiff Karen Colebut to be listed on the assignment on the basis that she was not tribal member and also did not allow the plaintiffs' daughter to be substituted instead despite a tribal resolution would allow the minor child to be put on the assignment. These issues were only raised on the day of the closing and caused the closing to be canceled and the USDA financing commitment to be withdrawn. Id., par.17-18

Thereafter the Tribal Court ordered a foreclosure sale to take place, despite John Anthony Colebut presenting a letter from a lender stating that a loan was in underwriting prior to the auction. Defendant Potter was successful bidder. Id. par. 21.

Defendant Cluff, who was responsible for the housing programs and policies did

not assist the plaintiffs despite having the ability to do so and in violation of the Tribal Nation's mission statement, resolutions and housing programs, causing plaintiffs and their minor child to lose their home, which caused emotional distress in John Anthony Colebut, a tribal elder, his spouse and his minor child in harm's way for not living in their home and on their ancestral. *Id.*, par. 23.

As a result of the loss of their home, plaintiffs lost possessions when they and their child were removed from the house causing plaintiffs and the minor child to go to therapy for depression and anxiety. *Id.*, par. 25.

The actions and omissions complained of set forth in the complaint were known to, and acquiesced by the defendant tribal Council members and violated the tribal nation's mission statement, law, laws, regulations, policies, programs with results of singling out plaintiff and the minor child for unequal treatment denying them due process and intentionally inflicting emotional distress. *Id.*, par 26.

STANDARD OF REVIEW

A motion to dismiss does not test the sufficiency of the cause of action. *Egri v. Foisie*, 83 Conn. App. 243, 247, 848 A.2d 1266, 1269, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004). The difference between a motion to dismiss wherein the plaintiff cannot state a cause of action and a motion to strike is that a failure to state a cause of action is a motion to strike. *Id.* A motion to dismiss does not seek to introduce facts outside the

record, but does admits well pleaded facts, the complaint being construed most favorably to the plaintiff. *Dugay v. Hopkins*, 191 Conn. 222, 227, 464 A.2d 45, 49 (1983).

Sovereign immunity implicates subject matter jurisdiction and is properly raised in a motion to dismiss. *Ruisi v. O'Sullivan*, 132 Conn. App. 1, 30 A.3d 14 (2011).

ARGUMENT

The factual allegations when taken in the light most favorable to plaintiffs paint a picture of the tribal authorities failing to protect the tribal elder and the non-tribal member plaintiffs in the due process and equal protection of the law. The complaint references that there are tribal laws, procedures and programs and mission statement that were ignored and that favoritism in the application programs, failed commitments to provided assistance under existing tribal programs, unequal application of programs and outright misrepresentation that programs did not exist. All of which resulted in the denial and loss of the tribal elder, plaintiff, John Anthony Colebut's assignment of a tract of tribal land on which he had built a house in which he, co-plaintiff and their minor child resided.

The mission statement is set forth in the Complaint, *Id.*, par. 8. The tribal housing program is located on the website at CCC along with the tribal civil rights/equal

protection ordinance.

Defense counsel was correct in pointing out that the sovereign immunity of the tribal nation will not be litigated in state or federal court unless there is an act of Congress or a waiver. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-789 (2014).

The federal statute, the Indian Civil Rights Act, 25 U.S.C. 1301-1303 ("ICRA") (copy attached), ensures protection of basic constitutional rights to tribal members and non-tribal nonmembers. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, *cert denied*, 519 U.S. 1041 (1966). The Act prohibits tribal governments from violating the civil rights of individual members of a tribe. *Thompson v. State of N.Y.*, 487 F.Supp. 212 (N.D.N.Y., 1975). The purpose of the Act was to protect tribal members from arbitrary tribal action. *Crowe v. Eastern band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. (N.C.) 1974). *See also, Wilson v. Marchington*, 934 F.Supp. 187 (D.Mont. 1996). Arbitrary action in general by government officials is prohibited by concepts of due process of law. *Loncassion v. Leekity*, 334 F.Supp. 370 (D.C.N.M. 1971).

This law was intended to create a substantive of body of law, not co-equal, but patterned in on the Bill of Rights to extricate individual tribal members from decisions holding that a controversy between the member and his tribal government was internal and by implication the Act had waived whatever immunity Native American tribes had in

such areas. *Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation*, 484 F.2d 200 (9th Cir. (Wash.) 1973). See Also, *Stands Over Bull v. Bureau of Indian Affairs*, 442 F.Supp. 360 (D.C.Mont. 1977) *app. dismissed*, 578 F.2d 799. *Dry Creek Lodge, Inc. v. U.S.*, 515 F.2d 926 (10th Cir. (Wyo.) 1975).

Protection guaranteed by the Act is available to nonmembers as well as tribal members. *Thompson*, 487 F.Supp. 212 (N.D.N.Y. 1975). *Basil Cool Enterprises, Inc. v. St. Regis Mohawk Tribe*, 914 F.Supp. 839, *affirmed*, 117 F.3d 61 (2d Cir. 1996). *Hickey v. Crow Creek Housing Authority*, 379 F.Supp. 1002 (D.C.S.D. 1974)

In addition, Johnson stands for the proposition that a tribal member's interest in continued possession and use of the member's assignment of track on the reservation comes within the due process protection of the 14th amendment of the Constitution. *Id.*

The allegations in the complaint that the defendants acted inconsistent with the tribal nation's policies and programs, to the extent of denying that certain programs existed while at the same time using the programs to help other tribal members takes the actions of the defendants outside their duties and therefore sovereign immunity does not protect the defendants. *Shenandoah v. Halbritter*, 275 F.Supp.2d 279 (N.D.N.Y. 2003).

CONCLUSION

Based on the foregoing, the court has jurisdiction over the claims in this case under the ICRA as the allegations, taken most favorably to plaintiffs, show violations of due process and equal protection of the rights of both John Anthony Colebut a tribal elder and his spouse Karen Colebut a nonmember by the various defendants who acted outside their authorities in failing to follow tribal laws, procedures and programs and mission statement, in acting with favoritism in the application of tribal programs, in failing to follow through on commitments to provided assistance under existing tribal programs, in unequally apply of such programs and in out rightly misrepresenting that programs did not exist while providing assistance under the program to others. All of which resulted in the denial and loss of the tribal elder, plaintiff, John Anthony Colebut's assignment of a tract of tribal land on which he had built a house in which he, co-plaintiff and their minor child resided.

Respectfully submitted

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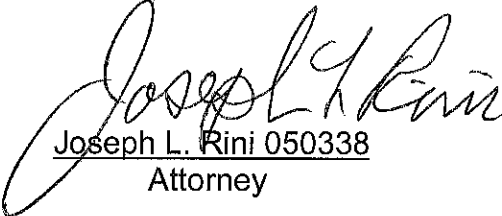
Certification

I hereby certify that a copy of the foregoing was emailed or mailed, postage prepaid this 27th day of July, 2020 to all counsel; and pro se parties of record as follows:

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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1301

§ 1301. Definitions

Currentness

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

CREDIT(S)

(Pub.L. 90-284, Title II, § 201, Apr. 11, 1968, 82 Stat. 77; Pub.L. 101-511, Title VIII, § 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892.)

25 U.S.C.A. § 1301, 25 USCA § 1301
Current through P.L. 116-149.

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Proposed Legislation

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1302

§ 1302. Constitutional rights

Effective: July 29, 2010
Currentness

(a) In general

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

CREDIT(S)

(Pub.L. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77; Pub.L. 99-570, Title IV, § 4217, Oct. 27, 1986, 100 Stat. 3207-146; Pub.L. 111-211, Title II, § 234(a), July 29, 2010, 124 Stat. 2279.)

25 U.S.C.A. § 1302, 25 USCA § 1302
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United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1303

§ 1303. Habeas corpus

Currentness

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

CREDIT(S)

(Pub.L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

25 U.S.C.A. § 1303, 25 USCA § 1303

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