STATE OF MAINE
PENOBSCOT, ss

SUPERIOR COURT
Location: BANGOR
DOCKET NO.: CV-19-21

JOHN MOYANT

V.

REGINA PETIT AND
THE PASSAMAQUODDY TRIBE

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Passamaquoddy Tribe and Regina Petit (the "Defendants" or the "Tribe" and "Ms. Petit") hereby oppose the Plaintiff's Motion for Preliminary Injunction.

INTRODUCTION

With nothing more than an affidavit that is rank hearsay, the Plaintiff asks this Court to issue the "extraordinary remedy"[1] of a preliminary injunction against the Tribe and Ms. Petit, asserting that they must be stopped "from transferring rights to possession or use of the property that is the subject of this lawsuit." The motion is groundless.

As more fully set forth below, (1) the Plaintiff faces no irreparable harm; (2) he cannot show likelihood of success on the merits because (a) as the Defendants' pending motion to dismiss shows, the Court lacks subject matter jurisdiction to proceed to the merits and, in any event, the Court must stay this case to afford the exhaustion of tribal remedies and, (b) the Plaintiff's case would fail on the merits were the Court to reach them; and (3) such an injunction would be contrary to the public interest reflected in myriad federal statutes that protect tribal communities from unauthorized encroachments such as that perpetrated by the Plaintiff.

[1] *Saga Commc'ns of New England, Inc. v. Voornas*, 2000 ME 156, ¶ 19, 756 A.2d 954, 962 (citations and quotations omitted).

ARGUMENT

I. THE PLAINTIFF DOES NOT FACE IRREPARABLE HARM.

The sole factual support for the Plaintiff's claim that he needs a preliminary injunction to protect his asserted interest in this case (an alleged property right to a camp situated on Passamaquoddy Indian Territory) is his affidavit purporting to state what an unidentified "seasonal camper" told him about what Regina Petit allegedly said to that individual. The Plaintiff attests:

> In September 2019, I received a telephone call from a seasonal camper on Junior Lake in Passamaquoddy Territory with whom I have been acquainted for several years. This person told me that Regina Petit had visited and stated she was selling the right to use the property for a lump sum. She stated she did not want to take back a mortgage and the Tribe would need to approve the transfer.

By failing to identify "the property," this statement lacks any foundation. But even if the requisite foundation were present, it is inadmissible hearsay. *See* M. R. Evid. 801-802. Thus, the Plaintiff's assertion of irreparable harm is entirely vacant: there is no factual basis to support it.

The real facts, moreover, show that the Plaintiff faces no irreparable harm because Ms. Petit has no intent to transfer the subject property and has taken no steps whatsoever to do so.

The declarant that the Plaintiff fails to identify in his affidavit is Donald Moore. Mr. Moore testifies as follows:

> Several months ago, Regina Petit told me she was interested in selling her camps on Junior Lake because they are too burdensome to maintain. I mentioned this in a phone conversation I had with John Moyant. *More recently, Regina Petit told me that she is not interested in selling the camps because it is too complicated, and I have no knowledge of any facts that would suggest that such a sale is imminent.*

Affidavit of Donald Moore, attached hereto as Exhibit A (emphasis added). Ms. Petit further testifies:

> To the extent that the reference to "the property" in [the Plaintiff's] Affidavit is meant to refer to the camp and/or related leasehold property or any structures on that property that

is the subject of Mr. Moyant's complaint in this matter, *I have no intention to sell that property or any "right to use"[] it and have taken no steps whatsoever to do so.*

Affidavit of Regina Petit, attached hereto as Exhibit B (emphasis added).

In short, there is no factual dispute about the matter: the Plaintiff faces no irreparable harm at all. There is no threat to his asserted interests in this case. Ms. Petit is not selling the property at issue.

II. THE PLAINTIFF CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS.

A. This Case Presents An Internal Tribal Matter Within the Sole Jurisdiction of the Passamaquoddy Tribe To Resolve, Barring The Requested Injunction and Any Consideration of the Merits.

Pending before the Court is the *Defendants' Motion to Dismiss for Want of Subject Matter Jurisdiction or for the Exhaustion of Tribal Remedies*. As set forth in that motion, the Plaintiff's fundamental claims in this case, all grounded in asserted rights to a residence and related leasehold interest within Passamaquoddy Indian Territory, are "internal tribal matters" and, therefore, within the sole jurisdiction of the Passamaquoddy Tribe to resolve. (Indeed, as set forth in the Defendants' pending *Motion to Stay Discovery*, the Defendants have sovereign immunity from suit for such claims.) Obviously, if the Court lacks subject matter jurisdiction, it cannot proceed further with the case. Stated another way, the Plaintiff cannot show likelihood of success on the merits, for the merits are not for this Court to reach.

B. Because This Case Must Be Dismissed Or Stayed Under the Tribal Exhaustion Doctrine, The Plaintiff Cannot Establish Any Likelihood of Success on the Merits.

As further set forth in the *Defendants' Motion to Dismiss*, even if there were concurrent state court jurisdiction over this case, the well-established tribal exhaustion doctrine requires the Court to stay this action, or dismiss without prejudice, while the Plaintiff exhausts his remedies within the Passamaquoddy Tribal Court. The same principles obviously warrant deferring to the

tribal court on any request for a preliminary injunction and, for that reason, the merits are not properly before the Court.

* * *

The Defendants incorporate by reference herein the arguments set out in their pending *Motion to Dismiss*.

C. Even If The Court Had Subject Matter Jurisdiction And Did Not Follow The Tribal Exhaustion Doctrine, The Plaintiff Could Not Establish Likelihood Of Success On The Merits.

Count I of the Complaint, a claim that the Plaintiff can recover as an alleged "intended beneficiary" for an alleged breach by the Defendants of a lease for property on Passamaquoddy Indian Territory, *see Complaint* at 2-3, fails because such an alleged leasehold interest would be void (a) under 25 U.S.C. § 415, forbidding the leasing of such property without federal or tribal approval; (b) under the laws of the Passamaquoddy Tribe, forbidding the leasing of such property to non-Indians; and (c) by the terms of the lease itself, forbidding any transfers of the lease without the approval of the Tribe. *See Defendants' Motion to Dismiss* at 5-7 and 13-14 and exhibits cited therein, incorporated by reference herein.

Counts II and III of the Complaint, asserting claims of tort for alleged fraud and conversion, would be barred for failure to comply with the Maine Tort Claims Act ("MTCA") and by sovereign immunity. *See* 30 M.R.SA. § 6206 (if a case is not otherwise outside of the court's jurisdiction as an internal tribal matter, the Tribe and its employees are only subject to suit in accord with the MTCA and have the immunities afforded to municipalities and their employees).

The Plaintiff has admitted that he failed to serve the requisite notice of claim under the MTCA. *See Plaintiff's Response to First Request for Admissions and Second Set of*

Interrogatories, attached hereto as Exhibit C. This is fatal to his asserted tort claims. 14 M.R.S. § 8107(4). In any event, compliance with this MTCA notice requirement would only allow the Plaintiff to proceed with certain enumerated claims set out in the MTCA; governments and their employees retain sovereign immunity from suit for all other claims. *Maynard v. Comm'r of Corr.*, 681 A.2d 19, 23 (Me.1996). Asserted claims for fraud and conversion are not included with the exceptions to sovereign immunity afforded by that Act. 14 M.R.S. § 8104-A. Thus, the Plaintiff would be barred from bringing counts II and III even if he had served the notice of claim.

Count IV of the Complaint asserts a claim for unjust enrichment. *See* Complaint at 3. That claim would likewise be barred by the fundamental principle that a party cannot leverage the equitable remedy of unjust enrichment as an alternative to a contract remedy when the contract claim would be barred as a matter of public policy. *E.g., Eng v. Cummings, McClorey, Davis & Acho, PLC*, 611 F.3d 428, 436 (8th Cir. 2010) (claims based on an agreement that is void as against public policy are "unenforceable both in law and equity"; applying Missouri law); *Berrey v. Inv. Funding LLC*, 2015 WL 5093622, at *9 (D. Ariz. Aug. 31, 2015) ("Arizona cases have rejected unjust enrichment claims based on contracts that are illegal or that violate public policy"); *In re Marriage of Johnston*, 275 P.3d 931 (Kan. Ct. App. 2012) (same; applying Kansas law); *Weinbach v. Orthodontic Centers of Colorado, Inc.*, 2007 WL 2786426, at *7 (D. Colo. Sept. 24, 2007) (same; applying Colorado law); *Tankanow v. Rivera*, 2007 WL 1983001, at *7 (Mass. Super. May 2, 2007) (same; applying Massachusetts law). *See generally* Am. Law Inst., *Restatement of the Law of Contracts*, § 369 ("contracts against public policy are generally unenforceable by any remedy").

As fully set out in the Defendants' pending *Motion to Dismiss,* since the earliest days of the Nation (and even before the Revolutionary War) leases or sales of tribal property to nontribal citizens have been void if not approved by the federal government. The sorry history of theft and graft perpetrated upon Indian peoples and their property interests by nontribal citizens serves, by itself, as the fundamental support for these longstanding laws. *See Motion to Dismiss* at 3-7 and 13, incorporated herein by reference (citing 25 U.S.C. § 177, which renders leases for tribal property void if not approved by the federal government and subjects individuals who attempt to do so to a fine of $1,000; 25 U.S.C. § 415, also rendering such leases void if not approved by the federal government).

The public policy undergirding this longstanding prohibition against such encroachment is perhaps best exemplified by 25 U.S.C. § 180, which today provides:

> Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000. *The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands.*

25 U.S.C. § 180 (emphasis added). That Congress has seen fit to empower the Executive to call upon military troops to remove from Passamaquoddy Indian Territory persons, like the Plaintiff, who claim to make settlements on tribal lands shows in no uncertain terms that public policy bars his attempted claim for unjust enrichment to recover from the Tribe and Ms. Petit. This is a claim for asserted value for what can only be described as an *unlawful* settlement.

Thus, as in the case of the Plaintiff's breach of contract and tort claims, his unjust enrichment claims would be barred were the Court to turn to the merits.

IV. The Requested Preliminary Injunction Would Violate Public Policy and Harm the Interests of Passamaquoddy Tribe.

For the very reasons that would bar the Plaintiff's claim for unjust enrichment and therefore establish that the Plaintiff cannot show likelihood of success on the merits on that claim, the requested preliminary injunction would be against public policy. As just stated, the Plaintiff seeks to recover for an unlawful settlement, one prohibited by federal and tribal law and by the very lease he claims under. To grant a requested injunction in his favor against the weight of authority showing that his very actions are unlawful would be against public policy.

And that public policy is in place to *protect* the Passamaquoddy Tribe from encroachments upon the very lands and resources that define it. *See Defendants' Motion to Dismiss* at 14-15. Thus, it follows that such an injunction would harm the interests of the Tribe.

CONCLUSION

For all of the above reasons and those set forth in the Defendants pending *Motion to Dismiss,* the Plaintiff's motion should be denied.

Dated at Portland, Maine this 8th day of January, 2020.

Kaighn Smith, Jr. Esq., Bar No. 3301
Michael-Corey F. Hinton, Esq., Bar No. 6125
Attorneys for Defendants Regina Petit and the Passamaquoddy Tribe

DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, ME 04101
(207) 772-1941
ksmith@dwmlaw.com
mchinton@dwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, the foregoing was served (together with attached Exhibits A, B, and C) upon the Plaintiff by placing a copy of the same in the United States Mail, postage prepaid, and addressed to Plaintiff's counsel of record, Eric G. Woodbury, P.O. Box 1355, Bucksport, ME 04416 and Bronson Stephens, P.O. Box 817, Bucksport, ME. 04416, and by sending the same via email this day to woodburylawllc@gmail.com and bronson@fortknoxlaw.us.

Kaighn Smith Jr.