UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
CIVIL DIVISION

Montie Spivey, *Plaintiff*, v. Chitimacha Tribe of Louisiana, et al., *Defendants*.	Case No. 21-CV-02257-RRS-CBW Judge: Robert R. Summerhays Magistrate Judge: Carol B. Whitehurst **Reply Memorandum of Law in Support of Defendants' Motion to Dismiss**

I. INTRODUCTION

In his Opposition, Spivey only offers conclusory assertions and allegations undermined by well-established law that not only fail to establish this Court's jurisdiction, but also fail establish the fundamental elements of any cause of action. As a result, the Court should promptly dismiss Spivey's Complaint against the Defendants Chitimacha Tribe of Louisiana ("Tribe"), the Cypress Bayou Casino Hotel ("CBCH"), and current and former members of the Tribe's governing body, the Chitimacha Tribal Council ("Tribal Council Defendants").

II. ARGUMENT

A. The Compact Does Not Waive Sovereign Immunity as to Spivey's Claims.

Spivey makes three arguments that the Tribe waived sovereign immunity as to his claims: (1) that the Compact is an implied waiver of immunity; (2) that the concurrent criminal jurisdiction of the Tribe and State waives the Tribe's immunity for civil claims; and, (3) that the Compact waives immunity for claims covered by insurance. Each argument fails.

First, Spivey asserts that certain Compact provisions "impl[y] that sovereign immunity is waived." Opp'n at 6. Blackletter law dictates that a waiver of tribal sovereign immunity cannot be implied or inferred, but must be "unequivocally expressed." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). This fundamental principle disposes of Spivey's entire argument relative

to immunity, as nothing in the Compact expressly authorizes Spivey (or any employee) to bring actions under federal and state law against the Defendants in federal court. To find otherwise, the Court must make the very inferences or implications that federal case law prohibits.

Second, Spivey asserts that "[c]learly, the provisions of the compact that allow for concurrent criminal jurisdiction and enforcement are a waiver of sovereign immunity." Opp'n at 6. The existence of concurrent criminal jurisdiction does not waive sovereign immunity in a civil case. *Bonnette v. Tunica-Biloxi Indians*, 873 So. 2d 1, 6-7 (La. App. 3 Cir. 2003). The Tribe's decision to authorize the state's exercise of criminal jurisdiction at CBCH is not an "unequivocally expressed" waiver that authorizes any person to bring civil claims against the Tribe or its officials in any jurisdiction. *Bay Mills Indian Cmty.*, 572 U.S. at 790.

Third, Spivey alleges that "[i]n the compact, the state required the tribe to acquire insurance for any liabilities, and those insurance policies must contain exclusions that do not allow the insurer to assert sovereign immunity as a defense to liability." Opp'n at 6-7. From this, Spivey concludes that "seemingly, for any of plaintiff's claims that are covered by a liability policy held by the Tribe, it would seem that sovereign immunity would not apply to those claims." *Id*. Clearly, Spivey doubts the merits of his argument, as he couches it in a double subjective. His doubts are well-placed: the Compact cannot both "seemingly" and "unequivocally" waive the Tribe's immunity. Moreover, Louisiana's appellate courts examined provisions in the Tunica-Biloxi Indian Tribe's Compact with Louisiana that are nearly identical to those that Spivey relies on here and held that those provisions do not waive sovereign immunity. *Bonnette*, 873 So. 2d at 7-8 (immunity bars employees' suit in state court notwithstanding Compact requirement that insurance policies prohibit the defense of immunity as to liability); *see also Ortega v. Tunica*, 865 So.2d 985, 996 (La. App. 3 Cir. 2004) (same as to Compact provision requiring worker's compensation insurance).

Spivey's interpretation of the "seeming" effect of insurance coverage requirements in the Compact is contradicted by the document's plain terms. Compact Sections 10(A)(4)(a) and (b) address the Tribe's obligations to carry insurance, but do not prohibit or limit the assertion of immunity. Compact Section 10(A)(4)(c) provides that "[t]he gaming management company and all other entities contracting with the Tribe shall maintain such policies of comprehensive general liability and workers' compensation insurance." The next subsection, 10(A)(4)(d), provides that:

> Each such policy of insurance shall contain, or be deemed to contain, an exclusion that the insurer or the insured shall not be entitled to make any claim of sovereign immunity in defense of liability, but shall be liable, including court costs and attorneys' fees incurred by the State, for its insured, as through the insured were a Louisiana domiciliary, as well as a provision requiring immediate notice to the State and the Tribe of any change in coverage or default or delay in payment of premium or other occurrence which threatens the continuity or amount of coverage.

"Each [] policy of insurance" addressed in section 10(A)(4)(d) are those required to be in place under the preceding paragraph, 10(A)(4)(c), *i.e.*, the policies of "[t]he gaming management company and all other entities contracting with the Tribe." Section 10(A)(4)(d) prohibits private companies and their insurers (and not the Tribe) from attempting to assert sovereign immunity as a barrier to payment under the applicable policies the Tribe is required to hold.

The plain terms of Section 10(A)(4)(d), especially when read in context with other Compact provisions, confirm that it does not apply to the Tribe. First, Section 10(A)(4)(d) does not refer specifically to the Tribe as an insured, whereas all other Compact provisions referring to the Tribe do so specifically, including those provisions relating to the Tribe's obligation to maintain insurance. *See* Compact § 10(A)(4)(a), (b). Second, the text of section 10(A)(4)(d) would not make sense if applied to the Tribe. Section 10(A)(4)(d) requires the insured to provide "immediate notice to the State **and the Tribe** of any change in coverage or default or delay in payment of premium or other occurrence which threatens the continuity or amount of coverage."

(Emphasis added). If this provision related to insurance policies held by the Tribe, then there would be no need to specify that the Tribe provide notice to itself.

Finally, even if Section 10(A)(4)(d) is read to apply to the Tribe, the provision is not a waiver as to Spivey's claims. By its plain terms, Section 10(A)(4)(d) requires the insurance policies to which it applies to include an exclusion preventing the insurer or insured from asserting sovereign immunity so that the insurer "shall be liable . . . for its insured". In other words, Section 10(A)(4)(d) simply prohibits an insurer or insured from asserting sovereign immunity as a defense to liability *under the policy*, thereby assuring the State that a plaintiff can recover damages fixed by a final judgement (i.e., that there are assets subject to recourse). It does not, however, do what would be necessary to waive immunity as to Spivey's claims: expressly and unequivocally authorize a jurisdiction to decide a dispute and issue a final judgment that may (or may not) be covered by a policy.[1] *Bonnette*, 873 So. 2d at 7-8; *see also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418–20, 121 S. Ct. 1589 (2001) (contract terms that specified the applicable forum, law, and nature of disputes established waiver).

Indeed, the Court cannot accept Spivey's interpretation of Section 10(A)(4)(d)—that the prohibition on asserting immunity as a defense to liability under the terms of a policy is itself an expansive waiver of immunity authorizing any forum to hear a claim that may be covered under an insurance policy—because it conflicts with the plain language of the Compact. Section 10(A)(6)

[1] Notably, while the Compact does not waive immunity as to Spivey's claims, it does specify a forum and procedure for the resolution of certain types of disputes. *See* Compact § 14. And to the extent it applies to the Tribe, Section 10(A)(4)(d) ensures that a claim of sovereign immunity does not bar recovery of damages under an applicable insurance policy that are determined pursuant to those dispute resolution procedures. Further, there are other avenues for securing a waiver, including entering into contract with the Tribe on terms that include a clear waiver that authorizes a jurisdiction to hear specified causes of action. Again, to the extent it applies to the Tribe, Section 10(A)(4)(d) ensures that a claim of sovereign immunity does not bar recovery of damages under an applicable insurance policy that are determined by that jurisdiction.

provides that "[t]he Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to [tort] claims by virtue of any provision of the Compact." If Spivey's interpretation is correct, then the "seeming" waiver effectuated under Section 10(A)(4)(d) for tort claims covered by the Tribe's general liability policy is in direct conflict with the express reservation of immunity in Section 10(A)(6) for those exact same tort claims. *Bonnette*, 873 So. 2d at 7-8. It would be illogical for the Tribe to both waive and preserve immunity for the exact same claims.

Because Spivey has failed to identify an express and unequivocal waiver of immunity as to any of the Defendants, this Court should dismiss the Complaint with prejudice.

B. The Claims Against the Tribal Council Defendants Are Official Capacity Claims.

Spivey asserts that "[w]hen the Court determines 'in the first instance' whether the claims are individual or official capacity claims, it will find that these are in fact personal claims." Opp'n at 7-8. Spivey offers no meaningful explanation for this assertion. Spivey's allegations relate solely to the decisions that the Tribal Council Defendants made as a Council on the Tribe's behalf. Spivey refers to the Tribal Council Defendants collectively as "the Chitimacha Tribal Council," "the Council," "the council," "the council members," or "the Tribal Council Members." The allegedly wrongful actions are solely the actions of the Council as a "governing body." Compl. ¶¶ 6, 17-18. Spivey does not rebut or deny *any* of these arguments. For these reasons alone, Spivey's claims against the Tribal Council Defendants are quintessential official capacity claims in which "[t]he real party in interest is the government entity, not the named official." *Lewis*, 137 S. Ct. at 1291.

Spivey suggests that he is "merely seeking redress for damages" against the Tribal Council Defendants, and that "[t]here is no sense in which a judgment against the four individual defendants would necessarily operate against the tribe." Opp'n at 7. First off, the Complaint belies this this claim. Spivey sued the Tribe, CBCH, and the Tribal Council Defendants solely for the decisions they made as a Council. That Spivey seeks a judgment from the Tribe and its assets is

self-evident. Even if this thin assertion is true, however, the question of whether "the real party in interest is the government entity" does not turn solely on whether the sovereign pays damages:

> The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, **or interfere with public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.**

Dugan v. Rank, 372 U.S. 609, 620 (1963) (internal citations omitted) (emphasis added).

Unlike the claim in *Lewis*, brought solely against a limousine driver for off-reservation conduct, Spivey's claims attack the very core of the Tribe's governmental functions. To grant the relief Spivey requests, this Court must adjudicate the deliberations of the Tribe's highest-ranked elected officials acting as the Tribe's governing body, and then penalize those officials for fulfilling their legal obligations under the Compact and federal law to protect the integrity and safety of CBCH's operations. A judgment in this case would have debilitating effects on the internal deliberations that the Tribe's governing body must perform daily. Because the judgment Spivey requests would "interfere with public administration" and "restrain the Government from acting, or compel it to act," the "real party in interest" is the Tribe. *Dugan*, 372 U.S. at 620.

C. Spivey Fails to State a Claim Against Any Defendant.

Spivey does not rebut the Defendants' overarching argument that his allegations fail the most basic function of a complaint: alleging that the defendants did something that resulted in an injury to the plaintiff. *Iqbal*, 556 U.S. at 678; *Lewis v. Thaler*, 389 Fed. Appx. 330, 331 (5th Cir. 2010) (plaintiff's "failure to allege that he suffered an actual injury is fatal to his [§ 1983] claim" under the *Iqbal* standard). Spivey only alleges acts by third parties not named as defendants, and only alleges harm—arrest and the loss of an unidentified license—that was not, and could not, be caused or remedied by Defendants. Complaint ¶¶ 17, 19-20.

1. Spivey's allegations are not adequate to state a claim under § 1983.

The Court enjoys three separate bases for dismissing Spivey's § 1983 claim. First, the Tribe and its officials are not "persons" under § 1983, and therefore cannot be named as defendants in a § 1983 action. *See, e.g., Hester v. Redwood Cty.*, 885 F. Supp.2d 934, 948 (D. Minn. 2012) (*citing Inyo Cty. v. Paiute-Shoshone Indians*, 538 U.S. 701, 708-09 (2003)). Second, Spivey failed to allege the fundamental element of a § 1983 claim, that a Defendant deprived him of a right secured by the Constitution or the laws of the United States. *Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 609 (5th Cir. 2001). Third, Spivey does not allege that any Defendant acted under color of state law. *Cornish v. Correctional Services Corp.*, 402 F.3d 545, 549-51 (5th Cir. 2005).

While each of these is sufficient to require dismissal, Spivey attempts—and fails—to rebut only one narrow aspect of Defendants' argument: that he did not allege that any Defendant acted under color of state law. Spivey argues that a private citizen can be liable under § 1983 based on allegations that "the citizen conspired with or acted in concert with state actors," in which case the "[t]he plaintiff must allege: 1) an agreement between the private and public defendants to commit an illegal act and 2) a deprivation of constitutional rights." Opp'n at 11. Spivey's Complaint alleges no such agreement, and he does not allege one in his brief. He only offers conclusory assertions, for example, that "[c]learly, plaintiff's arrest and subsequent prosecution . . . is the product of a conspiracy," which must be rejected for purposes of assessing the adequacy of the Complaint. *Id.*

2. Spivey's allegations are not adequate to state a claim under § 1985.

In their opening brief, Defendants clarify that, while Spivey purports to bring a claim under § 1985, the Complaint does nothing more than refer to the statute. Not much has changed. Spivey does not attempt to explain how his claim relates to his holding public office (required under § 1985(1)), hindrance of state court proceedings (required under § 1985(2)), or going "in disguise on the highway or on the premises of another" (required under § 1985(3)). Further, he does nothing

to explain how his Complaint—based solely on the actions of the Council—has alleged the required conspiracy, given that a governing body cannot conspire with itself. *Chambliss v. Foote*, 562 F.2d 1015, 1015 (5th Cir. 1977), *aff'g*, 421 F.Supp. 12, 15 (E.D. La. 1976).

The only aspect of Defendants' argument that Spivey attempts to rebut is that commercial and personal animus, which is all that Spivey alleges, is not sufficient to support a claim under § 1985. Spivey argues that Defendants' actions "were clearly actions motivated by a discriminatory animus based on his position within the Tribe, his position with Cypress Bayou Casino, and his association with O'Neil Darden." Opp'n at 13. This conclusory allegation does not meet the requirement that the alleged deprivation of rights was motivated by racial or otherwise class-based invidiously discriminatory animus. *United Broth. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 837 (1983); *Knowlton v. Shaw*, 704 F.3d 1, 11 (1st Cir. 2013).

3. Spivey has not, and cannot, state a claim for malicious prosecution.

Spivey's Complaint does not include a claim for malicious prosecution, and he does not adequately allege such a claim in his response brief. A fundamental element of a malicious prosecution claim is "[t]he commencement or continuance of an original criminal or civil judicial proceeding." *Suarez v. DeRosier*, 241 So. 3d 1086, 1091 (La. App. 3 Cir. 2018). Spivey does not allege that any judicial proceeding was commenced, and the district attorney's evaluation of potential criminal charges is not a judicial proceeding. A second element of a malicious prosecution claim is that the defendant was a party in the initial proceeding. *McClanahan v. McClanahan*, 27 So. 3d 862, 864 (La. App. 5 Cir. 2009) (dismissing companies from a malicious prosecution action because they were not a part of the underlying action). Spivey does not allege any initial proceeding, and thus cannot allege that Defendants were parties to such a proceeding.

4. Spivey's allegations are not adequate to state a claim for negligence.

As to negligence, Spivey asserts that "every person has a duty to refrain from negligently reporting actions as crimes when they clearly were not." Opp'n at 15. Even if this is true, Spivey does not adequately allege that Defendants violated such a duty or caused harm to Spivey because he fails to identify any facts to support his assertion that Defendants "negligently report[ed] actions as crimes." *Id*. In fact, this assertion contradicts Spivey's allegation that Defendants referred the matter to the District Attorney for consideration, which is not the same as reporting a crime. Spivey also identifies no facts to support his assertion that the matter referred to the District Attorney was "clearly" not a crime. *Id*. To the contrary, as alleged in the Complaint, Spivey was arrested by the state police for felony theft, and two prosecuting authorities spent substantial time assessing whether those charges were appropriate. These allegations raise legitimate questions as to the legality of his actions and are inconsistent with the claim that his actions "clearly were not" crimes.

5. Louisiana's statute of limitations bars all of Spivey's claims.

Spivey's argument that his claim was commenced within the one-year limitations period is based entirely on the incorrect premise that he pled a malicious prosecution claim that accrued when he "received a letter on July 30, 2020 informing him that the 16th JDC for the Parish of St. Mary was not going to indict him and no further charges would be sought." Opp'n at 10. Spivey assumes that the limitations period for all of his claims runs from that date. *Id*. at 10-11.

There are two fundamental flaws in this argument. First, Spivey did not, and cannot, allege a malicious prosecution claim. Second, the alleged injury that is the basis for his § 1983, § 1985, and negligence claims began in 2016, when he was arrested, the matter was referred to the District Attorney, and, as Spivey puts it, the threat of prosecution "linger[ed]" for years and a key license was suspended. Compl. ¶ 20. Spivey does not contest that these events occurred more than one year before he filed his Complaint. Therefore, all of Spivey's claims are time barred.

6. The Court should dismiss with prejudice because amendment is futile.

The Court should decline follow the procedural roadmap Spivey suggests to keep his claims alive after dismissal. First, if the Court dismisses the §§ 1983 and 1985 claims for failure to state a claim, the baseline rule is to dismiss the pendent state law claims—and there is no reason to depart from this rule. *Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585-86 (5th Cir. 1992). Second, Spivey argues that he "could plead such [adequate] claims if granted leave to amend his petition." Opp'n at 16. Yet, Spivey failed to identify any additional factual allegation establishing that he has stated a claim or a basis for jurisdiction. Because Spivey has alleged his best case and the defects in the Complaint are incurable, amendment would be futile. *Hart v. Beyer Corp.*, 199 F.3d 239, 248 (5th Cir. 2000). Consequently, if the Court dismisses under Rule 12(b)(6), dismissal with prejudice is appropriate. *See Jones v. Greninger*, 188 F.3d 322, 327 (5th Cir. 1999); *LaCroix v. Marshall Cnty.*, 409 Fed. App'x 794, 802 (5th Cir. 2011).

III. CONCLUSION

For the reasons provided by the Defendants, the Court must dismiss the Complaint.

Respectfully submitted,

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