UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,
Plaintiff,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,
v.

STATE OF NEW YORK, et al.,
Defendants.

Civil Action Nos. 82-CV-783 Main Case (LEK/TWD)

THE ST. REGIS MOHAWK TRIBE, by THE ST. REGIS MOHAWK TRIBAL COUNCIL and THE PEOPLE OF THE LONGHOUSE AT AKWESASNE, by THE MOHAWK NATION COUNCIL OF CHIEFS,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,
Defendants.

CONSOLIDATED WITH: Civil Action Nos. 89-CV-114 and 89-CV-829

(LEK/TWD)

UNITED STATES' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The United States submits the following Reply in support of its Motion for Summary Judgment ("Motion") (Dkt. No. 771). The Reply responds to arguments asserted by the State of New York ("New York" or "NY") in its Memorandum of Law in opposition to the United States' Motion (Dkt. 788), [1] as well as an Affidavit filed by Alan R. Peterman (Dkt. 789). New York made the deliberate choice to: (1) not address any of the substantive legal issues raised in the United States' Motion; and (2) not submit *any* documents or other evidence to demonstrate that there are any genuine issues of material fact that need to be resolved by this Court. Instead, New York makes two specious arguments. First, New York contends that the United States' Motion seeks "to adjudicate issues not relevant to this litigation" and that resolution of these issues would not have "any material impact on the outcome of the litigation." NY Mem. Law at 8. Second, New York argues that it needs to engage in discovery and that the United States' Motion is "premature." NY Mem. Law at 10-13. Both of these arguments, for the reasons explained below, are wrong.

I. The Issues Raised in the United States' Motion are Relevant

New York contends that it is not relevant whether there are genuine issues of fact or law as to whether the elements of the United States' Non-Intercourse Act ("NIA") claim have been met. NY Mem. Law at 8. This is a stunningly absurd argument. Whether the NIA elements have been met is the heart of this case. In addition, the United States' Motion requests this court to rule on the merits on New York's affirmative defenses of abandonment, release, and extinguishment and its counterclaims of diminishment, disestablishment, and quiet title.[2] If granted, the Motion takes care of every claim, counterclaim, or defense

[1] New York filed a joint Memorandum of Law with various Municipal Defendants in opposition to the Motions for Summary Judgment filed by the United States and the Tribal Plaintiffs. At this stage of the litigation, due to various rulings of the court, the United States' claims are limited to only one defendant: New York. Thus, this Reply refers to arguments asserted by "New York," even though the arguments were also presented by the Municipal Defendants. The joint Memorandum of Law filed by New York and the Municipal Defendants is referred to here as the "NY Mem. Law."

[2] New York contends that whether the 1796 Reservation has been disestablished or diminished is not relevant because, in its 2013 decision denying New York's motion for judgment on the pleadings, this Court

remaining in this case, except one. The United States' Motion is unquestionably relevant; it addresses almost the entire case regarding liability.

New York's position focuses on the fact that its affirmative defense of laches (based on *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)) is a "complete defense" on liability. NY Mem. Law at 9. New York incorrectly assumes that motions for summary judgment must dispose of all issues regarding liability. Rule 56(a) and the courts interpreting it clearly say otherwise. Rule 56(a), referring to motions for summary judgement "or *partial* summary judgment," states that "a party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. Proc. 56 (a). The text is unambiguous. The Rule states that a court "shall" grant partial summary judgment if the movant shows there are no genuine issues of material fact as to the claims or defenses (or portions thereof) raised in the motion.

In *Castle v. United States*, 1:15-CV-0197 (GTS/TWD), 2017 WL 6459514 at *16, n.23 (N.D.N.Y. Dec.18, 2017), Judge Suddaby expressly held that a motion for summary judgment does not have to be dispositive on all liability issues. The court stated that, "while it is somewhat unusual for a plaintiff to seek summary judgment on only some of the elements of his or her claim, it is permissible under the Federal Rules of Civil Procedure," *citing to In re Monahan Ford Corp. of Flushing*, 390 B.R. 493, 501 (E.D.N.Y. 2008) ("Although ultimate judgment cannot be awarded unless all elements are established, nothing prevents the court, under Rule 56(a), from awarding summary judgment on the first two elements of the claim"). Although there are federal cases, including ones from the New York, which have held in the past that a motion for summary judgment must be entirely dispositive as to liability on a claim, *see, e.g.*, *Securities and*

"assumed" the Hogansburg Triangle was within the 1796 Reservation boundary but that "nevertheless" the Court focused on the laches issue and did not deem it necessary to rule on the status of the Reservation. NY Mem. Law at 8. The Court focused on the motion before it—whether to grant judgment on the pleadings based on laches. The Court did not address other issues because they were not before it, not based on a legal determination that the status of the Reservation is not relevant to the case.

Exchange Commission v. Thrasher, 152 F. Supp.2d 291, 296 (S D.N.Y. 2001), these cases were decided before 2010, when Rule 56 was amended. These amendments include the language in Rule 56 expressly allowing motions for summary judgment to be "partial" only and to focus on claims or "parts" of a claim. Pre-2010 case law holding that motions for summary judgment must be entirely dispositive are, therefore, no longer good law. *See Isovolta Inc. v. ProTrans Int'l, Inc*., 780 F.Supp.2d 776, 779 (S.D. Ind. 2011) (pre-2010 cases holding that motions for summary judgment must be dispositive on a claim are based on outdated law); *Servicios Especiales al Comercio Exterior v. Johnson Controls, Inc*, 791 F. Supp.2d 626, 631-32 (E.D. WI. 2011) (purpose of 2010 amendment permitting partial summary judgment was "issues narrowing," motions need not be entirely dispositive; cases to the contrary based on pre-2010 rule are outdated).

New York also contends that "as prior rulings in this case make clear, however, the Court's focus is on the threshold question of *Sherrill's* applicability." NY Mem. Law at 9. New York's argument is disingenuous. This Court "focused" on the so-called *Sherrill* laches defense in its 2013 ruling because New York based its motion for judgment on the pleadings on that particular defense. The Court denied the motion. In doing so, the Court never stated that the only issue that is "relevant" in the case, even after dismissal of New York's motion, is the *Sherrill* defense and that nothing else matters.[3]

II. **New York Does Not Contest Any of the Legal Arguments Asserted by the United States**.

New York contends that the United States' Motion should not be granted because it is premature and that discovery is needed before the Court rules on the Motion. That contention is addressed below in Section III of this Reply. Before addressing the "need for discovery" issue, it is important to note that New York does

[3] New York argues that if its laches defense is ultimately deemed to be valid, there is no reason to look at whether the United States can show that it satisfies the elements of its NIA claim. Although that is correct, it is also correct that if this Court were to find either that the elements of the United States' NIA claim are not met, or that one of New York's other defenses is valid, this Court would not need to reach the laches defense. New York cites to no authority to support what appears to be its argument—that this Court may consider only one particular defense and nothing else until that that issue is decided. To the contrary, Rule 56 (a) expressly allows litigants to file partial summary judgment motions on specific claims, parts of claims, or defenses, and a court "shall" grant such motions if there are no genuine issues of fact.

not contest any of the United States' legal arguments. By its inaction, New York in effect concedes that the United States' legal positions are correct. *Rusyniak v. Gensini*, No. 5:07–CV–0279 (GTS/GHL), 2009 WL 3672105 at *1, n.1 (N.D.N.Y. Oct. 30, 2009) (citing multiple cases holding that when a non-movant party fails to address a legal argument set forth in a motion for summary judgment, such party is deemed to have consented to the movant's position).

In its Memorandum of Law, the United States asserted that: (1) it has standing, as the trustee of the Indian beneficiaries of the 1796 Treaty, to brings its claims against New York, United States' Revised Memorandum of Law (Dkt.773-1) ("US Rev. Mem. Law") at 7-10[4]; (2) this Court has rejected New York's "State title" argument (i.e. that the lands are not Indian lands under the NIA because New York holds the underlying fee) id. at 11-13; (3) federal consent or "ratification" of transactions purporting to alienate Indian land must be by treaty or a specific, explicit act of Congress, id. at 13-15, 17-19; (4) the language of the 1796 Treaty is unambiguous and creates a permanent right to the St. Regis Indians to use the reserved lands, id. at 22-24; (5) the texts of the 1832 Menominee Treaty and the 1838 Buffalo Creek Treaty (including Supplemental Article) are unambiguous and neither Treaty indicates the requisite clear intent to disestablish the 1796 St. Regis Reservation, id. at 29-33; (6) to the extent extra textual sources are relevant, contemporaneous documents support the United States' interpretation of the Treaties at issue, id. at 28-34, 34-35; (7) the Second Circuit's decision in *Oneida v. City of Sherrill*, 337 F.2d 139 (2d. Cir. (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 214 (2005), is dispositive on the disestablishment issue, US Rev. Mem. Law at 35-37; (8) an Indian reservation can only be diminished by an act of Congress (or federal treaty) and New York's diminishment counterclaim is legally defective because New York relies on the "treaties" between

[4] The United States has authority under longstanding federal common law to enforce federal restraints on the alienation of Indian lands. *Heckman v. United States,* 224 U.S. 413, 433 (1912). US Rev. Mem. Law at 7-8.

itself and the St. Regis Indians and does not cite to any federal treaties or any acts of Congress, id. at 39; and (9) New York's Quiet Title defense has no legal basis; id. at 40. All of the above constitute legal arguments.[5]

New York fails to contest any of these legal arguments. On this ground alone, this Court should grant the United States' Motion, as the Motion is predicated almost exclusively on legal arguments. New York does not dispute the United States' position that the Treaties at issue are unambiguous. Nor are there any issues regarding the correct interpretation of the Treaties, as New York does not contest the United States' interpretations. The only non-legal issue raised in the United States' Motion is whether there are any acts of Congress that consented to or otherwise "ratified" the Land Transactions at issue. New York presented no evidence that such acts of Congress exist. New York, therefore, in effect concedes the legal issues and it fails to present evidence to show a genuine issue of fact regarding congressional ratification of the unlawful alienations. The United States' Motion is unrebutted.

III. New York Did Not Meet its Burden Under Rule 56(d) to Demonstrate, in an Affidavit, the Reasons Why it Needs to Engage in Discovery Before Responding to the United States' Motion;

New York contends that the United States' Motion is "premature" because New York needs to engage in discovery before responding to the Motion. NY Mem. Law at 10-13. In presenting this argument, New York cites to Federal Rule of Civil Procedure 56(d). But, as explained below, New York fails to meet the burdens imposed by Rule 56 (d). Mere allegations of the need for discovery are not enough. A non-movant must present an affidavit which must describe: (1) what facts are sought and how they are to be obtained; (2) how such facts are reasonably expected to raise a genuine issue of material fact; (3) what efforts the affiant

[5] Some of the legal arguments are based on interpretation of treaties. Judge McCurn recognized in this case the long established rule that "interpretation of treaty language is a question of law for a court to decide." *Canadian St. Regis Band of Mohawk Indians v. New York*, 278 F. Supp.2d 313, 345 (2003). Interpretations of treaties, although a legal issue, can involve consideration of extra textual sources and other facts, if the treaty is ambiguous. But that is not the case here. New York does not dispute the United States' position, US Rev. Mem. Law at 22-24, 29-33, that the Treaties at issue are unambiguous.

has made to obtain them; and (4) why the affiant's efforts were unsuccessful. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994).[6] *See also Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 422 (2d Cir. 1989). New York is correct that, due to various stays imposed by this court, discovery in this case is in its infancy. NY Mem. Law at 2. This does not relieve New York of its obligation to present a Rule 56(d) affidavit to explain why it needs to engage in discovery to respond to the United States' Motion.

The obligation to present a detailed Rule 56(d) affidavit applies to a motion for summary judgment filed at any stage of the case, even if a motion is filed before discovery has commenced. In *Gurary v. Winehouse,* 190 F.3d 37, 44 (2d Cir. 1999) the Second circuit held that the district court "plainly did not err in passing on the merits of the motions in the absence of any discovery" because the non-movant did not submit a 56 (f) affidavit demonstrating the need for discovery, and the failure to provide such affidavit was "fatal." *See also Haran v. Dow Jones and Co., Inc*., 216 F.3d 1072, at * 3 (2d Cir. 2000) (summary order) (citing to *Gurary*, holding that the district court "did not err in reaching the merits of the motion for summary judgment in the absence of any discovery" because failure to submit 56 (f) affidavit showing need for discovery was "fatal"); *DePaola v. City of New York*, 586 Fed. Appx. 70 (2d Cir. 2014) (summary order)(same).

In *Carpenter v. Mohawk Valley Community College*, 6:18-cv-1268 (GLS/TWD), 2020 WL 1915144 at *3 (N.D.N.Y. Apr. 20, 2020), Judge Sharpe ruled that, although motions for summary judgment should rarely be granted when no discovery has been conducted, it was nevertheless appropriate to reach the merits of the motion for partial summary judgment, even though "no discovery has been conducted. In fact, after

[6] The court in *Paddington,* and most of the other cases cited in this Section, refer to former Rule 56(f) and not the current Rule 56(d). Prior to amendments in 2010, Rule 56 (f) addressed the issue as to whether a non-movant was entitled to engage in discovery before responding to a motion for summary judgment. Those provisions were moved to section 56(d). The change was not substantive. *See, e.g., Gene Codes Forensics, Inc. v. City of New York*, 812 F. Supp. 2d 295, 304 n.8 (S.D.N.Y. 2011); Advisory Committee Notes to the 2010 amendments ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f)").

defendants filed their motions, the Rule 16 conference was adjourned without a date." The court held that the non-movant did not meet its burden to show the need for discovery, as he "did not offer a single reason, in his opposition briefs or otherwise, for why discovery is necessary to defeat defendants' motions for partial summary judgment." *Id*. at * 3 (citations omitted). *Nelson v. Deming*, 140 F. Supp. 3d 248, 257 (W.D. N. Y. 2015) ("summary judgment may be granted notwithstanding the absence of discovery").

The purpose of a Rule 56(d) affidavit is to present *details* so the court can assess the legitimacy of the non-movants' discovery contention. Merely alleging a need for discovery, without providing details to support such a contention, is not enough. *Paddington Partners*, 34 F.3d at 1138; *Concourse Rehabilitation & Nursing Center Inc. v. Whalen*, 249 F.3d 136, 146 n.3 (2d Cir. 2001) (failure to file a Rule 56(f) affidavit "is fatal" to non-movant's request for discovery under 54(f); *Gurary*, 190 F.3d at 44 (same); *Haran*, 216 F.2d at *3 (same); *Feingold v. Hankin*, 91 Fed. Appx. 176, 178 (2d Cir. 2004) (summary order).

Defendants fail to comply with any of the Rule 56(d) requirements, and that is fatal to their argument. The Alan Peterman Affidavit does not address *any* of the four factors mandated by the Second Circuit. The Affidavit makes general statements that there is a need to "develop a factual record," but it fails to state: the kind of information needed; where that information is likely to be located; what actions New York of the Municipal Defendants have taken to gather relevant information; or why such efforts to secure documents were unsuccessful. The Affidavit entirely ignores the requirements imposed by Rule 54(d) and Second Circuit precedent. New York failed to file the requisite Rule 54(d) affidavit.[7]

The need for discovery should not be analyzed in a vacuum. The claims or defenses at issue in United States' Motion set the context for determining the need for discovery. The United States' Motion seeks a ruling that there are no issues of fact or law regarding the elements of its NIA claim. An NIA claim has four

[7] New York's Memorandum of Law similarly fails to provide any details regarding New York's efforts to locate documents relevant to this case. In any event, Rule 56(d) requires an *affidavit* and unexplained references in a memorandum of law to a need for discovery are not sufficient. *Concourse*, 249 F.3d at 146, n.3.

elements. US Rev. Mem. Law at 1-2. The first and fourth elements of an NIA claim relate to standing to bring the claim. This is a legal issue, as the United States argues that federal common law establishes its standing as a matter of law. Id. at 7-10. New York does not dispute the United States' legal position. There is no need for discovery. As to the second element of an NIA claim, whether the parcels of land at issue are Indian lands, New York does not contest the United States' legal argument that the text of the 1796 Treaty is unambiguous and reserves lands for Indians and that New York's "State title" argument was without legal merit. US Mem. Law at 11-12. There is no need for further discovery. As to the third NIA element, whether the United States consented to the Land Transactions, New York does not contest the United States' legal argument that consent must be by statute or treaty. To address the consent issue, New York needed to determine if an act of Congress exists that ratified the Land Transactions. That is a matter of searching federal statutes, which are available to the public. There is no need for discovery.

The United States Motion also seeks rulings on New York's affirmative defenses of abandonment, relinquishment, and release, U.S. Rev. Mem. Law at 19-28, as well as New York's counterclaims of disestablishment, diminishment, and quiet title, id. at 28-40. The United States' arguments are predicated on language in specific Treaties: the 1796 Treaty; the 1832 Menominee Treaty; and the 1838 Buffalo Creek Treaty (including Supplemental Article). Id. at 22-23, 29-33. The United States argues that these Treaties are not ambiguous and that extra textual sources are therefore not relevant. Id. at 21 and 38, citing to *McGirt v. Oklahoma,* 140 S. Ct. 2542, 2469 (2020) ("there is no need to consult extra textual sources when the meaning of a statute's terms is clear"). New York fails to contest the United States' arguments. Thus, only the text of the Treaties are relevant. No discovery is needed.

IV. To the Extent Factual Information is Needed to Respond to the United States' Motion, Information is Publicly Available.

Assuming *arguendo* that extra textual documents are relevant to the issues before the Court,[8] it is notable that the documents cited by the United States were all accessible to the public. The United States presented extra textual sources as an alternative argument only, as its position was that the Treaties at issue were not ambiguous and extra textual sources are not relevant. U.S. Rev. Mem. Law at 24, 34. The United States provided website addresses where the Treaties and historical documents relating to the negotiations of the Treaties were available. Dkt. 771-2 and 772-12.[9] New York did not explain where it searched for documents, and thus it is not known the extent to which New York even attempted to locate documents from publicly accessible sources.

The Second Circuit recognizes that if documents are available to the public, there is no need for discovery from an opposing party in litigation and thus Rule 56(d) does not provide relief to a non-movant. *Hudson River*, 891 F.2d at 422 ("Because official statements by definition would therefore have to have been matters of public record, the discovery plaintiffs sought would not reveal anything new requiring denial of summary judgment"); *Sage Realty Corp. v. Insurance Co. of North America*, 34 F.3d 124,128 (2d. Cir. 1994)

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[8]Although Judge McCurn, in denying motions to strike New York's abandonment, release and relinquishment defenses, held that the court could not resolve the interpretation of the Treaties at issue without an "adequately developed factual record," *Canadian St. Regis,* 278 F. Supp.2d at 345, 348, the court did not expressly rule on whether the Treaties at issue were ambiguous or not. In its Memorandum of Law, the United States cites to the Supreme Court's recent decision in *McGirt,* which holds that when the text is clear there is no need to consult extra textual sources. US Rev. Mem. of Law at 38, citing to *McGirt*, 140 S. Ct. at 2469. The United States explains why the Treaties at issue are not ambiguous. US Rev. Mem. Law at 22-24, 29-33. New York does not dispute the United States' arguments. Nor does New York dispute the United States' argument that extra textual sources are, therefore, not relevant. To the extent this Court nevertheless concludes extra textual sources are relevant in this case, development of a factual record does not necessarily require discovery, if (as here) documents related to the Treaties at issue can be located by other means (through public sources).

[9] To be clear, the United States is not contending that all documents relevant to the Treaties at issue are within the collections of the various public websites that the United States cites to in its Motion. Although these websites contain numerous documents, it may be the case that other documents could be found in other collections or sources. The burden here is on New York, as it was required under Rule 54 (d) to show, in an affidavit, that searching available sources was not enough and that it needs to submit specific discovery requests on the United States. New York did not meet its burden.

(court correctly denied a request for time to engage in discovery in context of Rule 56(f) because information was "publicly available").

In *Oneida Indian Nation of New York v. City of Sherrill, New York,* 145 F.Supp.2d 226, 256 (N.D.N.Y. 2001), *aff'd*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds*, 544 U. S. 214 (2005), Judge Hurd held that a request for more discovery under Rule 56(f) should be denied when the relevant documents were obtainable to the non-movant from public sources. The court noted that documents relating to whether the proprieties are within the 1794 Treaty boundaries are "part of the public record and thus readily available for Sherrill" and that "the Congressional Record is and has been available for Sherrill to determine if Congressional action regarding the Reservation has occurred." Id. at 256. *See also Players v. City of New York,* 371 F.Supp.2d 522, 530 (S.D.N.Y. 2005).

In its Memorandum of Law, New York asserts that it needs to "assemble the supporting facts" in this case. NY Mem. Law at 13. The Alan Peterman Affidavit similarly contends that Defendants have not had the "opportunity" to search for records. Dkt. 798, ¶33. New York's contention that it has not had the ability to investigate the facts of this case is not credible. The complaints in this case were filed in the early 1980s. New York was aware of the fact that issues in this case focus to a large part on specific Treaties, as New York cited to the Treaties at issue in its Answers in 2002 (Dkt. 225 at 13-14) and 2004 (Dkt. 317 at 9-10. New York, therefore, has had decades to "assemble the facts" regarding the Treaties. This includes searching for documents available to the public, or other sources not within the possession or control of the United States or other parties to the case. New York appears to argue that, in order to obtain information, it must serve requests for production on litigants. That is not correct. Simply stating that there has been little formal discovery, without explaining, in an affidavit, what efforts were made to locate pertinent documents, is insufficient to meet the burdens imposed by Rule 54(d).

CONCLUSION

For the reasons set forth above, the United States requests this Court to grant its Motion in its entirety.

Submitted on September 21, 2021 by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September 2021, I filed the foregoing UNITED STATES' REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT with the Clerk of this Court using its CM/ECF system, which will transmit the foregoing to all counsel of record

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