UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James Van Nguyen

Plaintiff,

vs.

Patricia Foley, in her individual and official capacity, Jody Alholinna, in her individual and official capacity, Nancy Martin in her individual and official capacity, Charles R. Vig in his individual and official capacity, Keith B. Anderson, in his individual and official capacity, Rebecca Crooks-Stratton, in her individual and official capacity, and
Cole W. Miller, in his individual and official capacity,

Defendants.

Civil No. 0:21-cv-00991 (ECT-TNL)

REPLY OF DEFENDANTS FOLEY, MARTIN, VIG, ANDERSON, CROOKS-STRATTON, AND MILLER TO PLAINTIFF'S MEMORANDUM OF LAW IN RESPONSE TO MOTION TO DISMISS

INTRODUCTION

Although Nguyen's claims fail for a variety of reasons, as a threshold jurisdictional question, his claims should be dismissed based on sovereign immunity. Nguyen's claims should also be dismissed for failure to exhaust tribal remedies, as time barred, or for failure to state a claim.

Nguyen's opposition responds to only ***some*** of the Community Defendants' dispositive arguments. To evade arguments, Nguyen includes new factual assertions in his opposition—many of which contradict the allegations in the Amended Complaint ("Compl."). The Court should not consider such new assertions. *Fischer v. Minneapolis Pub. Schs.*, 792 F.3d 985, 990 n.4 (8th Cir. 2015) ("[I]t is axiomatic that [a] complaint may not be amended by the briefs in opposition to a motion to dismiss.").

ARGUMENT

I. SOVEREIGN IMMUNITY BARS NGUYEN'S CLAIMS

The Community Defendants, who Nguyen alleges more than 18 times[1] acted on the Community's behalf, share the Community's inherent sovereign immunity as to all official-capacity claims against them. *Lewis v. Clarke*, 137 S.Ct. 1285, 1291 (2017). An *Ex Parte Young* claim for prospective, injunctive relief may proceed against them nonetheless if they are currently violating federal law. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014); *NSP v. Prairie Island Indian Cmm'ty.*, 991 F.2d 458, 460 (8th Cir. 1993). However, the Community Defendants are not violating federal law

[1] (Compl. ¶¶6-12, 32, 34, 39, 47-48, 126, 168-169, 172, 180, 191-193).

and, regardless, cannot remedy Nguyen's only requests for prospective, injunctive relief: a habeas writ and "declaration vacating the order of the SMSC Tribal Court holding A.J.N. as a Ward of the Court." (Compl. at 46).

That leaves Nguyen's "individual-capacity" claims. The Parties agree that whether those claims proceed turns on the question of whether the Community is the real party in interest—which depends on whether judgment would legally fall on the Community, interfere with public administration, or restrain the Community from acting or compel it to act. (Cmm'ty Br. 15; Opp. 6-7). It is obvious that the Community is the real party in interest, and Nguyen effectively admits it.

Nguyen claims the case "is about ensuring that individual actors within the Community system cannot use ***tribal mechanisms***" to influence litigation. (Opp. 7 (emphasis added)). He states, "Nguyen's requested relief all relates to restoring his rights as a father and receiving compensation for needing to litigate for years when his rights should never have been terminated in the first place." (*Id.*).[2] And he asks the Court to compel the Community Defendants to vacate governmental (Tribal Court) actions and seeks compensation for past governmental actions.

Nguyen attempts to distinguish *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), which supports dismissal of claims against the Business Council, by

[2] Nguyen argues that the no-trespass notices "effectively prohibits [him] from seeing his daughter" by keeping him off reservation. (Opp. 15). Nguyen's filings belie this argument. Exhibit C to the Opposition, an August 10, 2020 Tribal Appellate Court opinion, states that Gustafson (who Nguyen alleges lives off-reservation) has custody of A.N., and sets a visitation schedule permitting Nguyen to see A.N. (Opp., Ex. C at 4-9).

stating that he is not challenging the Community's right to refuse access to non-members. (Opp. 7). But Nguyen asserts claims against Business Council members based solely on their no-trespass notices. (Compl. ¶¶158, 172, 195, 203). The unsuccessful plaintiff in *Hardin* sought the same. 779 F.2d at 478.

The Community is the real party in interest, and Nguyen's "individual-capacity" claims should be dismissed based on sovereign immunity.

II. NGUYEN FAILED TO EXHAUST HIS TRIBAL COURT REMEDIES

Nguyen does not dispute that he must exhaust Tribal Court remedies before filing (1) a challenge to the Tribal Court's jurisdiction to declare A.N. a ward of the Tribal Court, (2) an Indian Civil Rights Act ("ICRA") claim, and (3) tort claims related to Tribal Court processes. (Opp. 9-10). Instead, he argues that he exhausted his Tribal Court remedies, citing Exhibit C to his Opposition. (Opp. 9). Exhibit C is a Tribal Appellate Court decision from his divorce proceeding regarding parenting times, exchange locations, and Nguyen's address. (*Id.* at 2). Exhibit C ***is not*** a decision on any of the three claims above, nor does it have anything to do with the child welfare proceeding at the center of Nguyen's allegations.

The exhaustion doctrine provides the tribal court "the first opportunity to evaluate the factual and legal bases for the challenge. . . [to] allow[] a full record to be developed in the Tribal Court . . . ." *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). The tribal court does not have that opportunity unless claims are presented to it, which Nguyen failed to do. *See Colombe v. Rosebud Sioux Tribe*, 747

F.3d 1020, 1024 (8th Cir. 2014) (dismissing claim for failure to exhaust because plaintiff did not "adequately raise[] the jurisdictional question").

Because Nguyen has not exhausted his Tribal Court remedies, the Court should not consider Nguyen's challenge to the Tribal Court's power to make A.N. a ward (regardless of which claim he ties it to), ICRA claims, or tort claims. Instead, the Court should dismiss Counts Three, Five, and Six for failure to exhaust.

III. NGUYEN CANNOT STATE A SECTION 1983 CLAIM

Nguyen's inability to plead that the Community Defendants acted under color of state law—a requirement stated in every case he cites on the subject (Opp. 12)—dooms his Section 1983 claims. Nguyen's conclusory assertion that the Community Defendants acted under a state policy of transferring custody cases to tribal courts is insufficient. (Compl. ¶137; Opp. 13). Nguyen fails to allege the transfer of any case from state court to Tribal Court—making the policy irrelevant—rather, he alleges that ***Foley*** initiated the child welfare proceeding. (*See* Cmm'ty Br. 20-21 and Compl. ¶47).

The Community Defendants acted under tribal law, pursuing tribal-member child welfare proceedings or, in the case of the Business Council, excluding a non-member from the reservation. (Compl. ¶48 (Foley initiated child welfare proceeding "on behalf of the SMSC Family and Children Services Department"), ¶172 (Vig, Anderson, Crooks-Stratton, and Miller sent no-trespass notices "acting on behalf of the SMSC Business Council")). As persons acting under tribal law, they are not subject to Section 1983 claims. (Cmm'ty Br. 19-20); *see also Wells v. Philbrick*, 486 F. Supp. 807, 809 (D.S.D.

1980) ("[I]t has been repeatedly held that actions taken under tribal law do not give rise to a §1983 suit.").

Nguyen's admission that neither the Constitution nor its Amendments apply to tribal actors also dooms his Section 1983 claims. (Opp. 13). Nguyen argues that his claim is sustainable because the Community Defendants acted outside of their authority, *id.* 14, but that would not make them subject to otherwise inapplicable constitutional constraints. His argument appears to either suggest that the Community Defendants were acting under ***no*** governmental authority, which forecloses a Section 1983 claim, or to repeat his meritless argument that the Community Defendants were acting under state law.

IV. NGUYEN FAILS TO STATE A CLAIM UNDER ICRA

Nguyen concedes that ICRA permits only habeas relief in federal court. (Opp. 18). The only such relief that Nguyen seeks is a "writ of habeas corpus to regain custody of A.J.N." (Compl. at 46).

Nguyen fails to respond to the Community Defendants' argument that he has not sued anyone who can present A.N., which requires dismissal. *See Wells*, 486 F.Supp. at 809 (dismissing ICRA habeas claim because "any order directed to any of the named respondents would be utterly lacking in effect, since without custody of the children, they would be unable to produce them before this Court"). Nguyen also does not respond to the Community Defendants' arguments that no search-and-seizure or equal-protection violation is alleged either. (Cmm'ty Br. 28). Instead, he spends his brief arguing that he alleged a "detention" under ICRA.

Nguyen claims he alleged "detention" based on (1) the no-trespass notices and (2) the child custody order entered in the parents' divorce. (Opp. 17-19). He's wrong.

First, Nguyen fails to request any habeas relief related to the no-trespass notices—making them irrelevant to the ICRA claim. A habeas petition concerning Nguyen's potential detention based on the notices would have to request relief related to those notices (like modification or withdrawal), which Nguyen does not request. Instead, he seeks to use his alleged detention to bootstrap his challenge to a custody order in Tribal Court in a separate divorce proceeding.

Second, even if the notices were relevant to Nguyen's claim, the cases he cites do not support his habeas claim. Detention was not an issue in *Penn v. U.S.*, 335 F.3d 786 (8th Cir. 2003). Further, in *Penn*, the petitioner, a non-Indian who owned property within the tribe's reservation, obtained withdrawal of the exclusion order through tribal remedies. *Id.* at 788-90. Nguyen, in contrast, does not live on the Community's reservation, and has not exhausted his tribal remedies. (Compl. ¶15).

Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d. Cir. 1996), is also distinguishable. *Poodry* involved tribal members who were summarily convicted of treason, stripped of tribal membership, and banished from the reservation. *Id.* at 876. The petitioners sought habeas relief related to the banishment orders. *Id.* If the federal court did not intervene, "the petitioners ha[d] no remedy whatsoever." *Id.* Under those circumstances, the Second Circuit determined that the tribal-member banishment orders constituted detention under ICRA. *Id.* In contrast, Nguyen is not seeking habeas relief related to the no-trespass notices, does not reside on the reservation, is a non-Indian, and

can be on the reservation for court hearings and appointments. (Compl. Ex. B). His alleged circumstances do not support an ICRA claim.

Third, as to a habeas challenge to the child custody order in the divorce proceeding, Nguyen cites *Dement v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989). There, the Eighth Circuit distinguished *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 510 (1982), see Cmm'ty Br. 25-26, to find federal jurisdiction over a father's ICRA claim after a tribe refused to recognize a preexisting state court custody decree and forbade the father from coming near the children. *Dement*, 874 F.2d at 515. The plaintiff in *Dement* also sued the tribal judge who issued the custody order. *Id.* Under those specific circumstances, ***none of which is present here***, the Eighth Circuit decided that *Lehman* did not preclude federal jurisdiction but ordered the father to exhaust tribal remedies before litigating a federal action. *Id.* Here, it is more appropriate for the Court to follow *Lehman* and the general weight of authority, see Cmm'ty Br. 25-26, and *Poodry*, 85 F.3d at 887, 892 (limiting *DeMent* to its jurisdictional holding), and hold that a child custody order fails to satisfy the detention requirement of habeas.

Finally, the Community never took custody of A.N. or ordered custody ***in the 2014-2015 child welfare proceeding***, deferring to a custody order from Scott County. (Compl., Ex. G at 25). Therefore, Nguyen's custody-related claims—which pertain to A.N.'s status as a ward of the Tribal Court in the child welfare proceeding—have no "detention" hook to permit a habeas petition.

V. NGUYEN FAILS TO STATE A CLAIM UNDER THE SCA

To avoid the uniform case law precluding secondary liability under the Stored Communications Act ("SCA") (*Id.* 19-20), Nguyen feigns uncertainty about who directly accessed his e-mails, claiming he needs discovery. (Nguyen Opp. 19). But that uncertainty is absent from the Amended Complaint, which states that Gustafson "illegally obtained private, confidential and privileged communications between Mr. Nguyen and his attorney," and that Foley benefited from ***Gustafson's*** practice. (Compl. ¶¶52, 180). Because Foley cannot be secondarily liable, the SCA claim must be dismissed.

Alternatively, Nguyen's SCA claim is time barred. Nguyen does not argue that he timely brought his SCA claim. Instead, Nguyen argues that the Court should consider the claim based on the doctrine of equitable tolling. (Opp. 20-21). Under that doctrine, Nguyen must plead facts establishing "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Burns v. Prudden*, 588 F.3d 1148, 1150 (8th Cir. 2009); *Hofland v. Schlumberger Tech. Corp.*, 2018 WL 2011916, *5 (D.N.D. April 30, 2018) ("Equitable tolling is a sparingly invoked doctrine. [It] is appropriate only when the circumstances that cause a party to miss a filing deadline are out of his hands." (quotations omitted)). Nguyen pleads no attempt to pursue a timely SCA claim. Nor has he pleaded that anything prevented him from bringing this claim in 2015, when he discovered Gustafson allegedly accessed his e-mails.

VI. NGUYEN'S STATE-LAW CLAIMS SHOULD BE DISMISSED

If the Court dismisses Nguyen's federal claims, it should decline to exercise jurisdiction over Nguyen's state-law tort claims. Those claims should also be dismissed

as untimely because he fails to plead facts supporting equitable tolling. Nguyen makes his remaining arguments in support of his tort claims without citation to the Complaint or case law. They fail to overcome the Community Defendants' arguments in their opening brief.

CONCLUSION

The Court should dismiss Nguyen's Complaint.

Dated: July 7, 2021

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