UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-3735

James Van Nguyen,

Appellant,

v.

Patricia Foley, in her individual and official capacity, et al.,

Appellees.

No. 21-3821

James Van Nguyen,

Appellee,

v.

Patricia Foley, in her individual and official capacity, et al.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
THE HONORABLE ERIC C. TOSTRUD, JUDGE

REPLY BRIEF OF COMMUNITY DEFENDANTS/APPELLANTS IN APPEAL NO. 21-3821

Richard A. Duncan (#192983)
Joshua T. Peterson (#0397319)
FAEGRE DRINKER BIDDLE
& REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
612-766-7000
richard.duncan@faegredrinker.com
josh.peterson@faegredrinker.com

Attorneys for Appellants Patricia Foley, Nancy Martin, Charles R. Vig, Keith B. Anderson, Rebecca Crooks-Stratton, and Cole W. Miller in Appeal No. 21-3821

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INTRODUCTION

James Nguyen's response/reply brief filed on July 25, 2022 ("Nguyen Reply Brief" or "Reply Brief") is filled with more unalleged, irrelevant "facts," to add to the ones he included in his opening brief. These new allegations cannot be considered as the Court reviews the district court's dismissal of Nguyen's complaint and the grounds for that dismissal. Nguyen's newly asserted facts would not save his claims anyway.

Nguyen has also failed to address the Community Defendants'[1] proposed test to ascertain whether the Community is the real party in interest on his claims for purposes of sovereign immunity, the reasons for the proposal, or the application of the test to the Business Council Defendants or the Department Defendants. Instead, he has copied-and-pasted the district court's decision and reasoning into his brief and explained why he thinks Community *governmental* actions were unfair to him.

In the end, many, if not most, of Nguyen's arguments in his Reply Brief further confirm that the Community and its governmental entities are the real parties in interest in this case. Accordingly, the Community Defendants respectfully request that the Court reverse the district court's determination that

[1] The Community Defendants are using the same defined terms that were used in their opening/response brief filed on April 21, 2022 ("Community Defs' Br.").

they do not share the Community's sovereign immunity with respect to Nguyen's (nominally) individual-capacity claims.

ARGUMENT

I. NGUYEN'S INTRODUCTION IS LITTERED WITH MORE UNFOUNDED, UNALLEGED, AND IRRELEVANT FACTS

Nguyen's introduction to his Reply Brief confirms the Community Defendants' argument that this case has nothing to do with alleged individual-capacity tortfeasors. Instead of addressing relevant personal conduct by the individuals that he has sued or responding to the Community Defendants' arguments in this case, Nguyen has littered his introduction with allegations about A.N.'s mother (she is not a party to this suit); the Tribal Court's decisions and actions related to A.N., A.N.'s mother, and Nguyen (neither the Tribal Court nor A.N. are parties to this suit); and the Community (also not a party to this suit).[2] (*E.g.*, Nguyen Reply Brief at 3 ("[T]he respective tribal-member parent of A.N. ha[s], at times, been found to be unfit to parent[.]"); *id.* at 4-5, and *id.* at 6 ("The tribal court reprimands Nguyen for having a different opinion as to where A.N. should attend school[.]")). Nguyen's failure to identify actionable conduct from individual Community Defendants is a theme of this case and means that all of his

[2] Nguyen is wrong that there is "no dispute as to any of the facts that have been presented by Nguyen." (Nguyen Reply Brief at 4). The Community Defendants

(continued on next page)

claims—both official capacity and personal capacity—fail to overcome the Community's sovereign immunity.

Nguyen also includes several "facts" in his introduction that are not supported by allegations in his complaint. (R. Doc. 4). Nguyen starts his introduction with an apparent attempt to criticize the Tribal Court's custody decision in the divorce proceeding and the Tribal Court's determination in the child welfare proceeding to make A.N. a ward of the Tribal Court. Nguyen asserts that he is a fit parent for A.N. and that A.N.'s mother is not. (Nguyen Reply Brief at 3). Neither allegation is contained in the complaint.[3] Further, A.N. was never removed from the parents' custody due to any Tribal Court determination that one or both of the parents were unfit to parent. Instead, in the 2015 child custody proceeding, the Tribal Court deferred to a prior custody order entered by Scott County District Court; and in the later divorce proceeding, A.N.'s mother was awarded custody of A.N. due to Nguyen's inability or unwillingness to follow the Tribal Court's orders. (R. Doc. 25-1, at 142).

(continued from previous page)

filed a motion to dismiss in lieu of answering Nguyen's complaint and have not admitted any facts alleged by him.

[3] Nguyen's allegation concerning a conservatorship proceeding is also nowhere in the complaint. (Nguyen Reply Brief at 3-4).

Nguyen spends much of the rest of his introduction attempting to justify his failure to follow Tribal Court orders, cast doubt on the Tribal Court custody decision in the divorce, and in general relitigate his divorce proceeding in federal court. (Nguyen Reply Brief at 5-6). These allegations are not in his complaint, are irrelevant, and again demonstrate that Nguyen's claims are centered on his criticism of actions taken by tribal institutions, such as the Tribal Court, not individuals acting in a personal capacity.

II. THIS COURT CAN RELY ONLY ON THE RECORD BEFORE THE DISTRICT COURT WHEN IT DECIDED THE MOTIONS TO DISMISS

Citing Eighth Circuit Rule of Appellate Procedure 30A(a)(2), Nguyen mistakenly argues that this Court can rely on any document filed in the district court when deciding an appeal from the district court's decision to dismiss his complaint. Nguyen is conflating the record that the Court has access to during review with what the Court can rely on in deciding these appeals.

To determine whether the district court correctly dismissed Nguyen's complaint, and the basis for that dismissal, the Court must rely on the record that was before the district court when it made the decision to dismiss Nguyen's claims. That record includes the allegations in the complaint, documents attached to the complaint or necessarily embraced by it, and matters subject to judicial notice. *Podraza v. Whiting*, 790 F.3d 828, 833 (8th Cir. 2015). Parties are not permitted, as

Nguyen has attempted here, to supplement the district court record after an appeal has been filed with unsubstantiated exhibits—supposedly filed to support an application to proceed in forma pauperis—to alter the fate of a dismissed complaint.

III. ALL OF NGUYEN'S CLAIMS AGAINST THE COMMUNITY DEFENDANTS SHOULD HAVE BEEN DISMISSED BASED ON THE COMMUNITY'S SOVEREIGN IMMUNITY

On appeal, the Community Defendants proposed in their opening brief that this Court adopt a test for determining the real party in interest for purposes of identifying whether an individual shares a sovereign entity's immunity that is consistent with Supreme Court precedent and the majority of the courts that have addressed the issue since the Supreme Court decided *Lewis v. Clarke* in 2017. 137 S.Ct. 1285 (2017); (*see* Community Defs' Br. at 29-44). Nguyen has not responded to that proposal or the reasons put forth by the Community Defendants in support of it.

Moreover, none of Nguyen's arguments takes away from, or addresses head on, the Community Defendants' arguments about why the Community and its instrumentalities are the real parties in interest, not the Business Council Defendants or the Department Defendants. Indeed, the opposite is true for the Business Council Defendants: Nguyen's arguments in his Reply Brief clarify that his claims about the Business Council's actions are directed at the Community and

its instrumentalities, making them the real parties in interest. As for the Department Defendants, Nguyen makes no argument at all for why those two government employees are the real parties in interest.

The Community Defendants' proposed real-party-in-interest test is supported by decisions of the majority of courts that have addressed the issue, including the Supreme Court, and balances the factors courts use in assessing who the real party in interest is in claims involving government elected officials and senior administrators. Because, under that test, the Community and its instrumentalities are the real parties in interest for all of Nguyen's claims, the Court should reverse the district court's decision that the Community Defendants do not share the Community's sovereign immunity from Nguyen's (nominally) individual-capacity claims, just as they do with regard to his official capacity claims.

A. Nguyen Has Failed to Respond to the Community Defendants' Proposed Real Party in Interest Test on Appeal

In their cross-appeal, the Community Defendants argue that the Court should adopt a test for determining the real party in interest based on tests adopted by the Fourth and Seventh Circuit Courts of Appeals *after* the Supreme Court issued its decision in *Lewis v. Clarke*, 137 S.Ct. 1285 (2017). The Community Defendants put forth reasons for adopting such a test, including that (1) it is consistent with earlier Supreme Court precedent that was reaffirmed in *Lewis*—unlike the district

court's approach;[4] (2) the majority of circuit courts that have dealt with this issue post-*Lewis* have adopted a similar test;[5] (3) the approach adopted and applied by the district court would collapse the distinction between genuine and nominal personal-capacity suits—contrary to seventy-five years of Supreme Court precedent distinguishing between the two; (4) the district court's approach would allow plaintiffs to avoid tribal sovereign immunity through artful pleading, which the Supreme Court in *Lewis* expressly disclaimed; and (5) the test proposed by the

[4] According to the district court, "the Community Defendants are the real parties in interest with respect to Nguyen's individual-capacity claims. Nguyen seeks monetary relief from the Community Defendants in their personal capacities, not a judgment that will operate against the tribe." *Nguyen v. Foley*, 2021 WL 4993412, at*6 (D. Minn. Oct. 27, 2021). The district court rejected the Community Defendants' argument that it should apply the more complete analysis that they propose to this Court. (R. Doc. 24 at 13-17).

[5] In the time since the Community Defendants filed their opening brief, a federal district court in Wisconsin has dismissed nominally individual-capacity claims against a tribal leader and managers of a tribal health clinic based on the clinic's sovereign immunity, relying on two of the same post-*Lewis* appellate cases that underpin the Community Defendants' proposed real party in interest test, *Cunningham v. Lester*, 990 F.3d 361 (4th Cir. 2021), and *Genskow v. Prevost*, 825 F. App'x 388 (7th Cir. 2020). *See Mestek v. Lac Courte Oreilles Community Health Center*, 2022 WL 1568881, *6 (W.D. Wis. May 18, 2022). In dismissing the individual capacity claims, the *Mestek* court noted that the allegations of the complaint "make plain that [plaintiff's] claims for relief from the individual defendants are all essentially claims against [the clinic], as she consistently refers to the individual defendants granting relief in their official capacities." *Id*. Nguyen's complaint and his Reply Brief contain analogous allegations against the Community Defendants, similarly undercutting his claims. *See infra* at Part III.B.

Community Defendants is consistent with this Court's decisions—while the district court's is not. (Community Defs' Br. at 29-44).

Nguyen has failed to respond to these arguments. Instead, he has merely copied-and-pasted the district court's reasoning into his brief and stated that under the limited test applied by the district court, the Community Defendants are not immune to suit because Nguyen "seeks monetary relief from the Community Defendants in their personal capacities." (Nguyen Reply Brief at 11). For the reasons stated above and in the Community Defendants' opening brief, the Court should reject the district court's reasoning, adopt the test proposed by the Community Defendants, and reverse the district court's decision that the Community Defendants do not share the Community's immunity from suit as to Nguyen's purportedly personal-capacity claims.

B. The Business Council Defendants Are Immune from Suit

Nguyen's first response to the Community Defendants' arguments showing why the Business Council Defendants are not the real parties in interest is nothing more than a recital of his complaints about the impact to him of the no trespass notices issued by the Business Council. He argues that the notices "prove that Nguyen was forced to fight for years in a tribunal that publicly and explicitly viewed him as a 'threat to the health, safety and welfare of the Community.'" (Nguyen Reply Brief at 9). Arguments about the impact of the Business Council's

collective action as a governmental executive body on Nguyen have no bearing on whether the Business Council Defendants are the real parties in interest on any of his claims under any of the real party in interest tests (including that applied by the district court).

Nguyen next draws an analogy between the Business Council's notices and hypothetical no-trespass notices issued by St. Louis County to an individual litigating a divorce proceeding in St. Louis County District Court, claiming that it would be unfair for the litigant to have to proceed. (*Id.* at 9-10). Under Nguyen's analogy, as in this case, the hypothetical litigant's complaint would be directed at the actions of a governmental entity (St. Louis County), not individual tortfeasors. When a governmental entity with sovereign immunity is the focus of a claim, and hence is also the real party in interest, the claim must be dismissed absent a valid waiver of that immunity.

Nguyen then turns to an argument that it is "plausible, given the past relationship between individual members of the Business Council and Nguyen, that those Appellees would have used their power and station for the improper motive of ensuring that Nguyen found no success in his tribal court endeavors." (Nguyen Reply Brief at 10). Nguyen also claims that the Business Council Defendants were acting in their own individual capacities and outside of the scope of their authority

"to deprive Nguyen of his rights."[6] (*Id.*). These allegations, like many of Nguyen's allegations, are not found in his complaint, which contains no allegations of personal animus or action against him by the present or former Business Council members he sued. The allegations therefore do nothing to save his claims from dismissal based on the sovereign immunity of the Community.

Assuming *arguendo* that Nguyen did make such allegations in his complaint, they do not meet the *Twombly/Iqbal* standard that requires more than pleading bare, conclusory allegations to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). Nguyen's new allegations contain no information about (1) what past relationships he is referring to; (2) which Business Council Defendant took actions based on those relationships; (3) what actions each individual defendant allegedly took; or (4) how they took action outside the scope of their authority. With no detail whatsoever, Nguyen's new allegations in his Reply Brief would still fail to state a claim.

Separately, and for the first time in his Reply Brief, Nguyen argues that Business Council Chairman Keith Anderson should "rescind from [the

[6] The Court should reject Nguyen's other argument from this paragraph in his Brief, that discovery will show acts taken by the Business Council Defendants in their individual capacity, "to intimidate and harass [] Nguyen and his supporters." (Nguyen Reply Brief at 10). Because this case was dismissed at the motion to dismiss stage, Nguyen cannot rely on an argument that discovery will show what conduct by the Community Defendants was taken in an individual capacity. He must plausibly plead such conduct. He has not.

Community's] agreement" with the state of Minnesota (the 2007 Tribal/State Agreement, *see* Community Defs' Br. at 20-22). (Nguyen Reply Brief at 8). Because Nguyen concedes that the Tribal Court had jurisdiction over the 2015 child welfare proceeding and because Nguyen did not allege that there was a competing state court proceeding (there was not), rescission of the 2007 Tribal/State Agreement would have no impact on this case nor on Nguyen's situation. (Nguyen Reply Brief at 8; Community Defs' Br. at 20-22). Nevertheless, Chairman Anderson in his individual capacity is powerless to effect rescission of the 2007 Tribal/State Agreement. Chairman Anderson (at the time the Community's Secretary/Treasurer) signed that agreement on behalf of Stanley Crooks, a former chairman, and the Community.[7] Chairman Anderson does not have the unilateral power, in his individual capacity, to rescind it. The Community, as a federally recognized tribe, would have to take that action. Nguyen's focus on appeal on the 2007 Tribal/State Agreement and the Community's actions related to that agreement further demonstrate that the Business Council Defendants are not the real parties in interest on the nominally individual claims—the Community and its governmental instrumentalities are the real parties in interest.

[7] https://www.mncourts.gov/documents/0/Public/Childrens_Justice_Initiative/TRIBAL_STATE_AGREEMENT_-_Combined.pdf at 37.

Moreover, contrary to Nguyen's suggestion on page 8 of his Reply Brief, the Community Defendants have not conceded that Nguyen requested rescission of the 2007 Tribal/State Agreement in his complaint, nor have they conceded that such a request is proper. The sentence he quotes to support this contention is a sentence from the Community Defendants' memorandum in support of their motion to dismiss that merely recites the two forms of prospective injunctive relief that Nguyen requested in his complaint: "(1) 'a writ of habeas corpus to regain custody of A.J.N.' under [the Indian Civil Rights Act] and (2) a 'declaration vacating the Order of the SMSC Tribal Court holding A.J.N. as a Ward of the Court.'"[8] (R. Doc. 24 at 13). Neither of those requests has anything to do with the 2007 Tribal/State Agreement; but, similar to a request for rescission of that agreement, they are two forms of relief that would require a tribal entity, the Tribal Court in this case, to take action—not the Community Defendants acting in their individual capacities.

Nguyen's new allegations on page 10 of his Reply Brief that a Tribal Court judge "refus[ed] to adhere to multiple appellate court rulings favoring the 'threatening' non-member, and instead forc[ed] that same person to pay a fine and write an apology letter" are also irrelevant to this case. However, Nguyen's

[8] As the Community Defendants argued in the district court, "the Community Defendants are powerless to effect such requests." (R. Doc. 24 at 13).

conflation of the Community Defendants with the (non-party) Tribal Court and Tribal Court judge is further proof that the Community and its governmental instrumentalities or agencies, which include the Tribal Court, are the real parties in interest. The Tribal Court, like other tribal government agencies, is immune from suit. *See Fort Yates School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 670-71 (8th Cir. 2015) (holding that a tribal court shares the tribe's immunity from suit).

C. The Department Defendants Are Immune from Suit

Nguyen fails to make a specific argument in his Reply Brief for affirmance of the district court's decision not to dismiss the individual claims against the Department Defendants on sovereign immunity grounds. In fact, he does not mention either Defendant Nancy Martin or Patricia Foley in his Reply Brief except for one assertion about Foley allegedly confirming that the allegations against Nguyen in the child welfare case were unfounded. (Nguyen Reply Brief at 4).

His only general response to the Community Defendants' argument that claims against Martin and Foley individually should be dismissed based on the Community's sovereign immunity is that he sued seven individuals "who were acting in part in their own individual capacities" and "acted improperly and outside their authority to deprive Nguyen of his rights." (Nguyen Reply Brief at 10). Again, these allegations were not in his complaint, are contrary to the allegations in

the complaint,[9] and are bare, conclusory allegations that would not have survived the motion to dismiss anyway.

CONCLUSION

For the foregoing reasons and those presented in their opening brief, the Community Defendants request that the Court reverse the district court's determination that sovereign immunity did not bar Nguyen's claims brought against the Community Defendants in an alleged individual capacity, as the applicable threshold basis for dismissal of the claims against them.

Dated: August 15, 2022

s/ Richard A. Duncan
Richard A. Duncan (#192983)
Joshua T. Peterson (#0397319)
Faegre Drinker Biddle & Reath LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
richard.duncan@faegredrinker.com
josh.peterson@faegredrinker.com
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

Attorneys for Appellants Patricia Foley, Nancy Martin, Charles R. Vig, Keith B. Anderson, Rebecca Crooks-Stratton, and Cole W. Miller in Appeal No. 21-3821

[9] Nguyen alleged that the Department Defendants acted "on behalf of the Tribal Government," "on behalf of the SMSC Family and Children Services Department," and in their "official capacity as an SMSC Child Welfare Officer." (R. Doc. 4, at ¶¶48, 168, 180; Community Defs' Br. at 13).

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Dated: August 15, 2022

s/ Richard A. Duncan

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