

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE
MICHAEL LATHAM, PRESIDING JUDGE

Garrett Whiting, Judge Pro-Tempore

By: Kelley Cox, Judicial Administrative Assistant

CHRISTI EL-MELIGI, et. al., Plaintiffs, v. NAVAJO HEALTH FOUNDATION-SAGE MEMORIAL HOSPITAL, INC., an Arizona Corporation, et. al., Defendants.	Case No. CV2021-183 Date: June 20, 2022
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UNDER ADVISEMENT ORDER

Posture

Defendants (“Sage”), through counsel, made a special appearance in this case “without waiving its sovereign immunity from suit and for the sole purpose[] of contesting jurisdiction.” Sage filed a Motion to Dismiss (“MTD”) seeking to have Plaintiffs’ Complaint dismissed under ¹ for lack of subject matter jurisdiction¹⁰⁶. Plaintiffs filed a Response and Sage filed a Reply. The Court held oral argument on the MTD and the matter was taken under advisement.

Issue

The single issue addressed in the MTD and to be decided by the Court is whether or not Sage is a subordinate economic organization, which is considered an arm of the Navajo Nation. If yes, then Sage shares the tribe’s sovereign immunity. If Sage does have sovereign immunity, then the MTD must be granted.

Law

In Arizona, tribes’ subordinate economic organizations possess sovereign immunity from suit if, when assessed collectively, a preponderance of six factors weighs in favor of immunity as set forth by the Arizona Supreme Court in Hwal’Bay Ba: J Enterprises, Inc. v. Jantzen, 248 Ariz. 98, 104 (2020) (“Hwal’Bay”). The six factors identified by the Court in Hwal’Bay are: (1) the entity’s creation and business form, (2) the entity’s purpose, (3) the business relationship between the tribe and the entity, (4) the tribe’s intent to share immunity with the entity, (5) the financial relationship between the entity and the tribe, and (6) whether immunizing the entity furthers federal policies underlying sovereign immunity. Id. at 104–06. Sage has the burden of proving by a preponderance of the evidence that it is a subordinate economic organization and, therefore, arm of the Navajo Nation, and is covered by the Nation’s sovereign immunity. Id. at 102.

Analysis

One of Sage's first arguments is that "Sage's right to sovereign immunity has, as a matter of law, already been decided. In E.E.O.C. v. Navajo Health Found.-Sage Mem'l Hosp., Inc ("E.E.O.C."), the federal district court concluded that Sage has sovereign immunity "as an arm of a sovereign Indian tribe." No. CV 06-2125-PCT-DGC, 2007 WL 2683825 (D. Ariz. Sept. 7, 2007) at 2." Sage's Proposed Conclusions of Law ("CoL") at 3 (parenthetical added).

This Court will first address the persuasive authority of the E.E.O.C. decision:

The specific question before the Court in E.E.O.C. was whether Sage had the sovereign immunity of an Indian tribe in an employment matter brought by the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000.e et seq. The holding was issued in 2007. The Court in E.E.O.C. identified a few important factors and findings that it used to decide the question before it: (1) The "Court must keep in mind the...settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." E.E.O.C. at 1. (2) The Court found that "Sage...is controlled by a federally recognized Indian tribe, the Navajo Nation." Id. at 2. The Court went on to support this finding by noting Sage's formation by eight Navajo Nation Chapters and the board of directors of Sage being comprised of one representative from each of the eight chapters. Id. The Court concluded that this arrangement showed "sufficient control over the hospital to render it a tribal entity for purposes of Title VII." Id. After analyzing the issue in light of federal circuit court precedents, the Court concluded that Sage was an entity entitled to the exemption in Title VII and dismissed the case for lack of subject matter jurisdiction².

The Court in E.E.O.C. specifically addressed and distinguished two points that run counter to finding sovereign immunity applies: (1) Sage's incorporation as a nonprofit corporation under Arizona law. The court analyzed some federal caselaw on point and found that fact unpersuasive. (2) Sage's hospital facilities being located on "reservation land owned by a private entity." Id. at 3. The Court found this fact not relevant. In the instant case, both of these factual issues must be viewed in light of the Hwal'Bay decision.

Sage is obviously correct that the United States District Court in Arizona previously ruled that Sage has sovereign immunity in its E.E.O.C. case. This Court's inquiry does not end there for at least two reasons: First, although the holdings of the federal district courts can be persuasive, particularly when deciding extremely similar issues as they relate to the actual party in this matter, they are not binding in the face of more recent and detailed precedent from the Arizona Supreme Court. The Arizona Supreme Court's Hwal'Bay holding "identif[ies] and adopt[s] six non-exclusive factors to examine in deciding whether an entity is a subordinate economic organization of a tribe, entitling it to share in the tribe's sovereign immunity." Hwal'Bay at 102. This Court is required to apply this mandatory authority and cannot just accept the federal district court's prior

finding.

In addition, Sage argues that it possesses sovereign immunity as a subordinate economic organization of the Navajo Nation because Hwal'Bay's six factors, when assessed collectively, weigh in favor of immunity. Sage's CoL at 3. This Court will apply the facts before it to the factors provided by the Arizona Supreme Court.

Plaintiffs argue that Hwal'Bay's six factors do control the analysis and that application of those factors to the facts of this case lead to the conclusion that Sage is not a subordinate economic organization of the Navajo Nation and, therefore, does not qualify for the protection of the Nation's sovereign immunity. Plaintiffs distinguish the findings of the E.E.O.C. case and argue that changes at Sage since the time of that decision should lead this Court to conclude that Sage does not possess sovereign immunity.

The facts that must be applied to Hwal'Bay's six factor test are not in dispute for the purposes of this MTD. The Court has reviewed and considered all the filings of the parties and the arguments of the parties made at oral argument. In the Court's discretion, the Court FINDS the following:

- (1) Sage is organized as an Arizona non-profit 501(c)(3) corporation and therefore cannot make distributions to its members or generate profits.
- (2) Sage functions to deliver essential governmental health care services primarily to members of the Navajo Nation in the Ganado service area.
- (3) The Navajo Nation does not directly own or operate Sage. The hospital, clinics, and other buildings where Sage operates in Ganado, Arizona are wholly owned by the Presbytery of Grand Canyon and are located on land that is and has been owned by the Presbyterian Church since 1920. Sage is contained entirely within Navajo Nation lands.
- (4) Eight local Navajo Nation chapters that comprise the Ganado service area are served by Sage. Each chapter authorizes Sage to carry out a comprehensive healthcare program on its behalf and under the purview of the Directors, who are nominated by the chapters and selected by the Sage Board. Sage is managed by a Board of Directors comprised entirely of Navajo Nation citizens.
- (5) Razaghi Healthcare provided management services to Sage from 2008 until 2018.
- (6) Plaintiffs were originally employed by Razaghi Healthcare, but later directly hired as employees of Sage in September of 2018.
- (7) The Navajo Nation has authorized Sage to carry out a portion of its Indian Health Service ("IHS") programs, functions, services, and activities and to receive a portion of the Navajo Nation's "tribal shares" of funding as a "tribal organization" under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. 93-638 (1975), 25 U.S.C. § 5301 et seq.
- (8) The purposes of the ISDEAA contract that Sage entered pursuant to the Navajo Nation's authorization include "to carry out a meaningful self-determination policy" and "to maintain and improve the health of the Navajo Tribal members consistent with and as required by the Federal Government's historical and

unique legal relationship to Indian People, including the Navajo Nation....”
Contract § 2, Defendant’s Ex. C at 2.

- (9) Sage has historically received and continues to rely on funding primarily through its ISDEAA contracts with the IHS to provide health services to Native Americans.

In the Court’s discretion, the Court makes the following conclusions by applying the facts to Hwal’Bay’s six factor test:

(1) The entity’s creation and business form

Although Sage’s incorporation itself could “weigh[] heavily’ against finding it is a subordinate economic organization,” Sage’s real-world operation as a non-profit 501(c)(3) corporation could weigh for finding it a subordinate economic organization. Hwal’Bay at 105. Sage was originally founded as Navajo Nation Health Foundation, Inc., is managed by an entirely Navajo Board of Directors, receives its primary funding through ISDEAA contracts with the IHS, and provides essential governmental health care services to citizens of the Navajo Nation pursuant to those contracts. This factor is neutral.

(2) The entity’s purpose

Sage’s purpose is to provide essential health services to the Navajo Nation and its people in the Ganado service area. Pursuant to its ISDEAA contract, Sage carries out essential government functions and provides health care services that would otherwise be provided by the Navajo Nation or the federal government. All revenue generated must be used for healthcare purposes under the ISDEAA contract, as required by federal law. 25 U.S.C. § 5325(m). This factor weighs in favor of Sage.

(3) The business relationship between the tribe and the entity

The Navajo Nation through its eight chapters have indirect control over Sage as Directors are nominated for the Board by chapters and from among chapter members. Sage’s Directors are all Chapter members and enrolled members of the Navajo Nation. The Navajo Nation and member chapters have authorized Sage to enter into ISDEAA contracts on their behalf—contracts that only tribes and tribal entities may enter. This tribal authorization is required by the ISDEAA, and it can be revoked by either the Nation or the chapters at any time. 25 U.S.C. § 5304(l). This factor weighs in favor of Sage.

(4) The tribe’s intent to share immunity with the entity

Sage’s ISDEAA Contract, authorized by the Navajo Nation and its chapters, may be indicative of intent to share immunity. See 25 U.S.C. § 5381(b); see also 25 U.S.C. § 5304(l) (defining “tribal organization” as a tribe or group of tribes for Title I of the ISDEAA). No formal statement of the Navajo Nation, one way or the other, has been

noted by either party. This factor is neutral.

(5) The financial relationship between the entity and the tribe

Although not a direct financial relationship, Sage receives through its ISDEAA agreement IHS funds that belong to the Navajo Nation. These funds allow Sage to continue operations and provide governmental health care services to tribal members. Because judgments against Sage would be paid from these funds or through insurance policies purchased with these funds, enforcement of a judgment against Sage could impact Navajo Nation funds intended for essential government services. This factor weighs in favor of Sage.

(6) Whether immunizing the entity furthers federal policies underlying sovereign immunity

Recognizing sovereign immunity for Sage furthers several federal policies underlying that doctrine, including: “[p]rotection of tribal assets, preservation of tribal cultural autonomy, preservation of tribal self-determination...” Dixon v. Picopa Const. Co., 160 Ariz. 251, 258 (1989). Recognizing sovereign immunity for Sage does not further “promotion of commercial dealings between Indians and non-Indians.” Id. The Navajo Nation’s authorization for Sage to enter ISDEAA contracts was an exercise of self-determination by the Navajo Nation and its member chapters, as contemplated by federal law and policy. Allowing suits to proceed without proper deference to immunization could threaten delivery of vital governmental services and, ultimately, tribal self-determination of the Navajo Nation and its members. This factor weighs in favor of Sage.

The Court weighs most heavily, under the circumstances of this particular case and as urged by the Supreme Court in Hwal’Bay, factor 2 and factor 6. Sage’s purpose and the interest of the policies underlying sovereign immunity heavily support a finding of sovereign immunity in this case. Collectively, application of the non-exclusive Hwal’Bay factors to the facts on hand demonstrate that Sage is a subordinate economic organization of the Navajo Nation and is an arm of the Navajo Nation for the purposes of delivering essential healthcare to the Ganado region. As such, Sage has sovereign immunity from suit, depriving this court of jurisdiction to hear this case, and necessitating dismissal of Plaintiffs’ claims.

For the foregoing reasons, **Sage’s Motion to Dismiss is granted.**

It is therefore **ORDERED dismissing Plaintiff’s Complaint with prejudice.**

Dated: _____

Garrett Whiting - Judge Pro-Tem

Copies to:

Jeffrey Dollins [em]

Tod Schleier

¹ The Court notes that Sage did not plead Rule 12.b.2 regarding personal jurisdiction. Neither Plaintiffs nor Sage addressed the distinction. Because the parties did not brief nor address the distinction, the Court will proceed with its Order without further addressing that issue. It may be worthwhile to note, though, that the decision later referenced in this Order as E.E.O.C., was based upon a Motion to Dismiss under Federal Rule of Civil Procedure 12.b.1 (subject matter jurisdiction), while the Hwal'Bay opinion was based on a Rule 12.b.2 (personal jurisdiction) claim. The Court will note without deciding that this decision – whether to grant or deny the Motion to Dismiss based on sovereign immunity – would have the same end result for the parties, regardless of which subsection of Rule 12.b it was based upon.

² See footnote 1.