DOCKET NO. KNL-CV17-6030617-S	:	SUPERIOR COURT
JOHN DRABIK AND ANCIENT HIGHWAY TOWERS, LLC	:	J.D. OF NEW LONDON
v.	:	AT NEW LONDON
ELAINE THOMAS	:	MAY 31, 2022

DEFENDANT'S REPLY TO PLAINTIFF'S OBJECTION TO MOTION TO DISMISS

Defendant hereby replies to Plaintiffs' Objection to Defendant's March 8, 2022, Motion to Dismiss (Docket # 125.00).[1]

1. Plaintiffs' Request for Leave to Amend Complaint Is Not Before the Court.

Plaintiffs assert that their Request for Leave to Amend their complaint, filed March 7, 2022, Docket # 123.00, (the "Request") should be decided before the court considers the Motion to Dismiss. Pl. Objection at 2. That issue is not before the Court on the Defendant's Motion to Dismiss.

Even if the Request is considered, it should be rejected. The Court must determine whether it has jurisdiction before deciding whether to grant the Request. Defendant has objected to the Request, Docket #124.00, citing *Fennelly* v. *Norton*, 103 Conn. App. 125, 136–37, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007). ([O]nce the issue of subject matter jurisdiction is raised, it must

[1] Plaintiffs' objection was filed outside the time limits set forth in the Connecticut Rules of Procedure. The date for filing a timely objection pursuant to Practice Book § 10-31(a) was April 9, 2022. Plaintiffs' objection was filed April 25, 2022, the date this matter was originally scheduled for argument on short calendar. Plaintiffs did not move for an enlargement of time to file their objection. Defendant recognizes that "[d]espite the language of Practice Book § 10-31[a], most courts have exercised discretion to address the merits of a motion to dismiss and to waive the ... requirement when an opposing memorandum was untimely." *Simon v. Within Reason CT, LLC*, No. FSTCV186037451S, 2019 WL 1399470, at *4 (Conn. Super. Ct. Feb. 11, 2019). *But see Rebecca Kirpas V. The Griffin Hospital, Et Al.* No. AANCV-21 -604-4504-S, 2022 WL 1154169, at *2 (Conn. Super. Ct. Apr. 7, 2022)("Exercising its discretion to do so, this court declines to consider the plaintiff's untimely filings and shall limit its consideration of the hospital's motion to dismiss to the merits of the motion.") Absent a showing of good cause for the untimely filing here, the Court should limit its consideration to the Defendant's Motion and the supporting documents and memorandum..

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be *immediately* acted upon by the court. . . ."). Only if the Court finds that it has jurisdiction over the matter should it decide whether to grant or deny the Request.

2. The Mohegan Tribe is the "Real Party in Interest."

Plaintiffs assert that, because they now contend that Defendant acted outside the scope of her employment, they may seek to recover against Ms. Thomas individually "because the real party in interest is the individual Defendant Elaine Thomas."

In *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017), the U.S Supreme Court considered the "real party in interest" issue in the context of tribal sovereign immunity and wrote:

> "This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which "will not require action by the sovereign or disturb the sovereign's property." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). We are cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.

Lewis v. Clarke, 137 S. Ct. at 1291–92.

Referring to the Connecticut Supreme Court's view, the *Clarke* decision noted:

> "In ruling that Clarke was immune from this suit solely because he was acting within the scope of his employment, the court extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. See, *e.g.*, *Graham*, 473 U.S., at 167–168, 105 S.Ct. 3099. The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity. Accordingly, under established sovereign immunity principles, the Gaming Authority's immunity does not, in these circumstances, bar suit against Clarke.

Id.

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Under *Clarke*, the question is not simply whether the agent of a tribal entity acted within or outside the scope of employment, but whether the tribal agent is engaged in an official capacity.

The Connecticut Supreme Court has recently articulated a test for individual versus official capacity claims.

> "The general bar against [official capacity] claims ... does not mean that tribal officials are immunized from [individual capacity] suits *arising out of* actions they took in their official capacities .... Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, *because* the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." (Citation omitted; emphasis altered.) *Native American Distributing* v. *Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). Generally, individual or "[personal capacity] suits seek to impose personal liability [on] a government official for [wrongful] actions [that] he takes under color of ... law" and in the course of his official duties. *Kentucky* v. *Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). "By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself: they generally represent [merely] another way of pleading an action against an entity of which an officer is an agent." (Internal quotation marks omitted.) *Pistor* v. *Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015), quoting *Kentucky* v. *Graham*, supra, at 165–66, 105 S. Ct. 3099; see *Pistor* v. *Garcia*, supra, at 1112 (focusing on plaintiffs' suit against individual tribal officers rather than against tribe's treasury).
>
> "To identify the real, substantial party in interest, one factor that the court examines is the substance of the claims stated in the complaint, positing inquiries such as ... [whether] the actions of the state officials [were] taken to further personal interests distinct from the [s]tate's interests .... Other factors include ... whether the unlawful actions of the officials were tied inextricably to their official duties, whether the burden of the relief would be borne by the sovereign if the official had authorized the relief at the outset, whether a judgment would be institutional and official in character so as to operate against the sovereign, and whether the official's actions were ultra vires." (Citation omitted; internal quotation marks omitted.) *Solomon* v. *American Web Loan*, supra, 375 F. Supp. 3d at 661.

Great Plains Lending, LLC v. Dep't of Banking, 339 Conn. 112, 146–47, 259 A.3d 1128, 1151 (2021).

The limousine driver in *Clarke* had no official duties to perform other than to drive a limousine. He was not an official of the Tribe or of its Gaming Authority. He did not have, nor did he exercise, any powers on behalf of his employer. The litigation over his involvement in the accident did not require

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evidence from the sovereign entity that employed him. Liability for the motor vehicle accident could be established solely on the basis of facts available at the scene; in essence, whatever facts were necessary to establish liability could be gleaned from the police report. Further, he was operating the limousine subject to the motor vehicle laws of the state, and to the extent he exercised any discretion in operating the vehicle, such discretion was narrowly limited by the strictures of those motor vehicle laws.

By contrast, the claims against Ms. Thomas derive entirely from her official duties. It was her Tribal Historic Preservation office through which she received and responded to the TCNS notice as the Deputy Tribal Historic Preservation Officer ("DTHPO). The TCNS notice was an official communication from the FCC sent to the THPO pursuant to federal law. The DTHPO visited the site with her supervisor, the Tribal Historic Preservation Officer, to perform functions authorized by the National Historic Preservation Act. 54 U.S.C.A. § 306108 (the "NHPA").[2] Both officials were acting on behalf of the Tribe and performing their official duties. The DTHPO exercised the powers of her office in drafting and transmitting the TCNS response. The communication was an official act and it was done in the name of the Tribe.[3] The Defendant had, and exercised, discretion in the performance of her official duties pursuant to the NHPA. It was given credence by the recipient because it was done as an official act on behalf of the Tribe[4].

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[2] The NHPA authorizes and requires agencies such as the FCC to take into account the effect of an undertaking, such as cell tower construction, that requires licensure. "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking." 54 U.S.C.A. § 306108.

[3] See Complaint ¶ 10. "On or about July 1, 2015, AT&T received through the TCNS a reply *from the Mohegan Indian Tribe* in response to its proposed Tower on the Subject Drabik Property at Ancient Highway (the "Response").

[4] The gravamen of Plaintiff's Complaint is that AT&T terminated its cell tower construction plans because of the Tribe's objection. If Elaine Thomas acted in her individual capacity it is highly unlikely that AT&T would have made a decision to abandon the Drabik site.

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Furthermore, the records concerning her visit and her response to the TCNS are records that belong to the Tribe. In their Comity argument (addressed below), Plaintiffs claim they were denied due process because their sole discovery request, addressed to Ms. Thomas, was denied by the Tribal Court. This claim points to the fallacy of the "personal capacity" contention: the records Plaintiffs sought by way of subpoena in the Tribal Court identified Ms. Thomas in her official capacity and served her at her Tribal offices. The records of the TCNS communications were maintained by the THPO. See copy of subpoena, attached as **Exhibit H,** directed to Elaine Thomas at 13 Crow Hill Road, Uncasville. Those THPO records, including email correspondence with an AT&T consultant concerning the visit to the proposed cell tower construction site are, and always were, official Tribal records. They are not and never were Ms. Thomas's personal and private records. They would not be hers to produce in discovery. The claims nominally against Ms. Thomas are substantively against her office.

Nor is there any claim that Ms. Thomas acted out of some personal interest or gained in any way personally from the response to the FCC. That her actions were taken both in the name of the Tribe and for the benefit of the Tribe cannot seriously be disputed. Plaintiffs' Complaint explicitly recognizes that the Response transmitted by Ms. Thomas as DTHPO was a communication by and on behalf of the Tribe: *see* Complaint Paragraph 27, referring to "the *Mohegan Indian Tribe's* claim that there are historically and culturally significant features on a nearby parcel." (emphasis supplied).

Further, Ms. Thomas's actions as DTHPO were not *ultra vires.* As is apparent from the Mohegan Tribal Court decisions, the Tribe has had ample opportunity to disavow or distance itself from her FCC response. Instead, the Tribe has fully supported her response.

As to the "inextricable relationship" factor, the Appellate Court decision in *Drabik v. Thomas,* 184 Conn.App.238, stated explicitly: "The allegations against Thomas and Quinn *are inextricably tied to the Tribal Council and, more specifically, to the Mohegan Tribal Historic Preservation Office.*" *Drabik v. Thomas* at 245–49(emphasis added). If they were inextricably tied then, they are inextricably

tied now—a mere change in pleading does not extricate Ms. Thomas's actions from her office.

The "burden of relief" factor also favors dismissal.

> "The general bar against [official capacity] claims ... does not mean that tribal officials are immunized from [individual capacity] suits *arising out of* actions they took in their official capacities .... Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, *because* the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe."

Great Plains Lending, supra, 339 Conn. at 146.

It is readily apparent that Plaintiffs' claims are asserted against Elaine Thomas *because of* the powers she possessed in her official capacity. It is undisputed that she prepared and transmitted the FCC response in an official capacity on behalf of the Tribe. To the extent that Plaintiffs sought relief, it could *only* have been granted in an official capacity. Paragraph 24 of the Complaint illustrates this: Plaintiffs claim they called and wrote her "to discuss her findings and to set up a site walk so that she could 'identify the stone groupings' and other properties of traditional religious and cultural significant to the Mohegan Tribe and have them evaluated by an archeologist." These allegations confirm that Plaintiffs wanted her to act as a Tribal official – the only manner in which she could afford relief to the Plaintiffs. Imagine, if you will, that Plaintiffs called Ms. Thomas at home and asked her, privately, to alter her official response to the FCC. Her agreement to do so would have been a gross act of disloyalty to the Tribe warranting her immediate dismissal from her post.

Plaintiffs argue that their allegations that Defendant falsely reported the existence of stone groupings takes this case outside the protection of the Tribe's immunity. But the underlying and irrefutable factual underpinning is that the actions taken by Ms. Thomas were all in her capacity as Deputy Tribal Historic Preservation Officer. Even if Plaintiffs' claim is credited for purposes of the Motion, the alleged false statement became the statement of the Tribe. It was, and remains, the Tribe's

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position with respect to the existence and the significance of stone groupings, whether or not that position is erroneous. Thus, the real party in interest is the Tribe, and the claims must be dismissed.

3. Comity Requires Dismissal.

Plaintiffs argue that comity should not serve as the basis for dismissal because the Tribal Court did not provide a trial on the merits.

First, as Defendant argued in her memorandum, the *Drumm* court stated squarely that after the tribal court has completed its adjudication, the question is whether the tribal court "*exceeded* its jurisdiction." "[I]f it is determined that the tribal court did not exceed its jurisdiction, the tribal court's determinations on the merits will receive no review." *Drumm v. Brown*, supra, 245 Conn. at 675–76. Plaintiffs make no argument that the Tribal Court *exceeded* its jurisdiction. Plaintiffs voluntarily submitted to the MTC jurisdiction and the MTC exercised personal and subject matter jurisdiction over the parties.

The Tribal Courts' determination that the TCNS response to the FCC was privileged does not mean that comity should not be extended. The Tribal Court afforded Plaintiffs every opportunity to assert their claims. The parties engaged in extensive litigation in which Plaintiffs were given multiple opportunities to amend their claims, and they took advantage of those opportunities. Although the litigation privilege barred recovery on the claims based on the TNCNS Response, Plaintiffs were not barred from pursuing their trespass claim, and they did not test other potential claims.

Plaintiffs contend that they were deprived by the Tribal Courts of the opportunity to conduct discovery. In support, Plaintiffs attach a copy of the Tribal Court's August 12, 2016, Order granting Defendants' Motion to Quash a subpoena for records and for the deposition of Ms. Thomas. *See* **Exhibit A** to Plaintiff's Objection. But that Order expressly stated that it was only stayed "pending further order of this Court."

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The MTC record (*see* MTC Docket, attached to Defendant's Motion as **Exhibit F**) lists the Order; thereafter, the MTC docket reflects that four years later, in February, 2020, a Re-Notice of Deposition and Subpoena was withdrawn by the Plaintiffs. MTC Docket # 152.[5] No further discovery is reflected in the docket until after the remand for proceedings on the trespass count. Although Plaintiffs were initially stymied in their effort to take the deposition of Elaine Thomas and obtain records from her office through subpoena, nothing precluded Plaintiffs from making further and alternate efforts at discovery at the trial court level before taking their appeal. For example, Plaintiffs never served Defendants with any written discovery pursuant to the Mohegan Rules of Civil Procedure. *See* https://www.mohegan.nsn.us/docs/default-source/default-document-library/rules-of-civil-procedure-6-15-20.pdf?sfvrsn=b553762c_0. MRCP Chapter 7, Section 28(b)(1) provides: "Unless the Court orders otherwise, the frequency of use of any discovery under this chapter is not limited." Plaintiffs were not precluded from making additional discovery requests. Their claim that the Tribal Court "actively prevented the Plaintiffs from conducting discovery . . ." is without merit. Plaintiffs simply didn't bother to pursue further discovery.

Plaintiffs also contend that the denial of discovery "means that there was no due process for the Plaintiffs such that the Mohegan proceedings were not fundamentally fair to the Plaintiffs." Pl. Obj. at 8. That is absurd. The Tribal court merely made an interim order. It is not a denial of due process where the court heard arguments on a motion to quash and merely stayed the particular discovery requested pending further order. Plaintiffs were never prohibited from making multiple requests; the Mohegan Rules of Civil Procedure clearly permit discovery, just as they permit objections and protective

[5] The Re-Notice was issued after the Plaintiffs appealed to the Council of Elders; Plaintiffs apparently recognized the procedural invalidity of a discovery request in that context.

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orders; and the "no due process" argument is manifestly refuted by the extensive record of the Tribal court docket.

Having introduced this alleged lack of due process issue, however, Plaintiffs must acknowledge that the discovery they sought only serves to undermine their "personal capacity" claims. Plaintiffs' August 4, 2016 *Subpoena Duces Tecum* issued in the Tribal Court, attached hereto as **Exhibit H,** is directed to Elaine Thomas at her Tribal Offices at 13 Crow Hill Road, Uncasville. The Schedule A attached to the Subpoena called upon her to produce notes, files, photographs, and phone logs related to the Tower Construction Notification System Notification ID # 125589. All those records were in the Tribal Historic Preservation Office; and just as with any official records, they were not her personal and private records. They were the records of the THPO. (Indeed, when the matter was remanded for adjudication of the trespass count, Plaintiffs requested and Defendants produced certain Tribal HPO records. *See* **Exhibit D,** Transcript of Deposition of Elaine Thomas, Pp .18-20, with references to emails between Ms. Thomas and Nicole Castro.[6]) Plaintiffs were not denied all discovery in the MTC, and they had ample due process.

Plaintiffs also contend that comity should not be applied because the Council of Elders ultimately decided the Response-based claims. Plaintiff assert (without any supporting evidence) that none of the members of the Council of Elders was a lawyer at the time of the COE decision. It's unclear whether Plaintiffs contend that only lawyers could make reasoned decisions, but there is no citation to precedent for the proposition that comity may not be applied to adjudications by non-lawyers.

Plaintiffs also claim that the Council of Elders is the very party that the plaintiffs were suing in Tribal Court. That is demonstrably false. Plaintiffs sued Ms. Thomas, her boss James Quinn, and the

[6] Since those are official records of the MTHPO, Defendant has not attached them to the deposition transcript.

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Tribal Council, which has a separate legal role from the Council of Elders. *See* Mohegan Constitution, Articles IX and X.[7]

As to Plaintiffs' reliance upon a dissenting opinion in *Drumm v. Brown*, 245 Conn. 657, 716 A.2d 50, 64 (1998), Defendant refers the Court to the comprehensive Tribal Court decisions that are cited in and attached to the Motion to Dismiss as Exhibits A, B, and C. Those decisions demonstrate that the Plaintiffs had ample opportunities to litigate their claims.

Plaintiffs also argue that the Council of Elders decision articulated a rule that is inconsistent with the Connecticut common law. But comity does not require that the law of a foreign jurisdiction be consistent with Connecticut law. Further, our Supreme Court has recently affirmed and extended the litigation privilege doctrine even to claims that a Defendant had a "business practice of filing false discovery responses." *Dorfman v. Smith*, 342 Conn. 582, 620, 271 A.3d 53, 79 (2022). *Dorfman* and the dissenting opinion of Justice Ecker extensively explore the public policy considerations that underlie the litigation privilege doctrine; the opinion demonstrates the force of the privilege even in the face of alleged bad faith litigation practices.

As to the Plaintiffs' arguments about the TCNS response and the NHPA Section 106 process, those issues were extensively litigated in the Tribal Courts. The Tribal Courts did not find the arguments persuasive. This Court should not re-open those arguments to give Plaintiffs a second crack at the issue.

Plaintiffs' penultimate argument is that the MTC lacks jurisdiction "over non-Tribal members concerning actions occurring outside the Mohegan Reservation," Pl. Obj. at 12. Defendant notes that Plaintiffs initiated their action in the Tribal Courts, which exercised personal and subject-matter jurisdiction pursuant to Mohegan law. It is not as if Ms. Thomas haled the Plaintiffs into the Mohegan

[7] The Mohegan Constitution is on line at: https://library.municode.com/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws?nodeId=PTICO.

courts; in that case, Plaintiffs could presumably argue that the Tribal Court lacked personal jurisdiction. But that's not what happened. Plaintiffs initiated their claims in the Tribal Court and articulated claims that fell within the scope of the Mohegan Torts Ordinance.

Citing provisions of the Torts Code, Plaintiffs also argue that the Tribal Court lacked jurisdiction over claims against Ms. Thomas in her personal capacity. Plaintiffs miss the point: the Torts Code waives sovereign immunity for claims against the Tribe and against individual Tribal employees acting within the scope of employment. It does not preclude "personal capacity" claims against individuals who have no immunity. See **Attachment 1,** *Lubrano v. Brennan Beer Gorman Architects, LLP*, No. GDCA-T-07-501, 2008 WL 5479063 (Mohegan Gaming C.A. May 2, 2008)(Mohegan Torts Code has no applicability to tort claims against non-tribal defendants, so that Torts Code limitations period did not apply to bar such claims).[8]

Moreover, the Tribal Court litigation named Ms. Thomas and James Quinn as individual defendants. Plaintiffs made numerous (false) allegations against Ms. Thomas, just as they have done in this Court. Plaintiffs never specifically asserted individual- or personal-capacity claims against Ms. Thomas or against Mr. Quinn, at least not in those words; and such claims would have been defended for the same reasons articulated here, i.e., that she acted in an official capacity and is not subject to personal capacity claims. That Plaintiffs never directly made personal capacity claims in Tribal Court does not mean they could not have done so. Plaintiffs had the opportunity to make such claims, but chose not to assert them. Since the Tribal courts were not called upon to decide that issue, Plaintiffs cannot reasonably argue that individual capacity claims were barred.

[8] The opinion is available in Westlaw under Tribal decisions. Defendant attaches a copy of the decision for the convenience of the Court.

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Plaintiffs conclude with the curious assertion that "It would be imprudent for this court to defer its jurisdiction in favor of another court when the other court has no subject matter jurisdiction to resolve the trespass claim. Since the tribal court lacks jurisdiction over an alleged trespass in East Lyme, the Defendant's Motion to Dismiss should be denied."

The trespass count was found legally viable by the Tribal Courts. Plaintiffs chose to withdraw that count on the eve of trial. There was no determination that the Tribal Court lacked jurisdiction over the alleged trespass. Again, Plaintiffs' argument lacks merit.

4. Conclusion.

All of the *Great Plains Lending* factors favor a determination that the Tribe is the real party in interest in this case. As such, Plaintiffs' claims are barred by the doctrine of sovereign immunity and must be dismissed. Alternatively, if this Court finds that it has jurisdiction over Plaintiffs' claims, it should nevertheless dismiss them under the principles of comity.

Respectfully submitted
DEFENDANT,
ELAINE THOMAS

By: */s/ Andrew L. Houlding, Esq.*

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CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been sent via electronic mail and/or mailed via first-class, postage prepaid, U.S. mail, this 31st day of May 2022 to the following counsel of record:

Eric J. Garofano, Esq.
Conway, Londregan, Sheehan & Monaco, P.C.
28 Huntington Street
New London, CT 06320
Egarofano@clsmlaw.com

By: */s/ Andrew L. Houlding, Esq.*
ANDREW L. HOULDING, ESQ.
UPDIKE, KELLY & SPELLACY, P.C.

Exhibit H

DOCKET NO. CV-16-0105	:	**MOHEGAN TRIBAL COURT**
JOHN DRABIK AND ANCIENT HIGHWAY TOWERS, LLC	:	
V.	:	
THE MOHEGAN TRIBE OF INDIANS OF CONNECTICUT, ET. AL	:	**AUGUST 4, 2016**

SUBPOENA DUCES TECUM

TO: Elaine Thomas
13 Crow Hill Road
Uncasville, CT 06382

You are hereby commanded to appear at the law offices of Conway, Londregan, Sheehan & Monaco, P.C. 38 Huntington Street, New London, Connecticut, 17th day of August, 2016, at 11:00 a.m., then and there to testify what you know in a certain cause therein pending, wherein John Drabik and Ancient Highway Towers, LLC are the Plaintiffs and The Mohegan Tribe Of Indians Of Connecticut, Tribal Council Of The Mohegan Tribe Of Indians Of Connecticut, Elaine Thomas and James Quinn are the Defendants. The deposition will be recorded by stenotype machine or tape recording with multi-track tape.

AND YOU ARE FURTHER COMMANDED TO BRING AND HAVE WITH YOU at the same time and place the documents set forth in **Schedule A** attached hereto.

HEREOF FAIL NOT, UNDER PENALTY OF THE LAW IN THAT CASE PROVIDED.

Dated at New London, Connecticut this 4th day of August, 2016. To any proper officer to serve and return.

Eric J. Garofano
Attorney-Spokesperson

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SCHEDULE A

1. Any and all *non-privileged* notes, correspondence, memoranda, email messages or other digital or electronic Records, or any other Documents that refer, reflect or relate to the subject matter of this lawsuit including but not limited to stone groupings or stone outcroppings referenced in your Tower Construction Notification System (TCNS) Notification ID # 125589.

2. A complete copy of your file relating to this case including information and documents utilized in your notice Tower Construction Notification System (TCNS) Notification ID # 125589.

3. Any and all photographs that refer, reflect or relate to the subject matter of this lawsuit including but not limited to stone groupings or stone outcroppings referenced in your Tower Construction Notification System (TCNS) Notification ID # 125589.

4. Any and all phone logs regarding *non-privileged* discussion about that refer, reflect or relate to the subject matter of this lawsuit including but not limited to stone groupings or stone outcroppings referenced in your Tower Construction Notification System (TCNS) Notification ID # 125589.

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CERTIFICATION

I hereby certify that the foregoing was mailed postage prepaid, to the following counsel of record this 4th day of August, 2016.

Andrew L. Houlding
Updike, Kelly & Spellacy
265 Church Street
New Haven, CT 06510

With a copy to:

Shea & Driscoll, LLC
30 Pepperbox Road
Waterford, CT 06385

Eric J. Garofano
Commissioner of the Superior Court

Attachment 1

7 Am. Tribal Law 369, 1 G.D.A.P. 48
Mohegan Gaming Disputes Court of Appeals.

Joseph LUBRANO, et al
v.
BRENNAN BEER GORMAN ARCHITECTS, LLP, et al.

No. GDCA–T–07–501.
|
May 2, 2008.

Synopsis

Background: Tribal Gaming Authority employee who fell from casino roof during the course of his employment brought action under the Mohegan Torts Code against nontribal entities, including an engineering firm as well as entities responsible for the installation of mechanical systems in the relevant section of the casino, seeking damages for catastrophic injuries. Tribal Gaming Authority intervened as plaintiff. One set of defendants moved for summary judgment on the basis of Connecticut statute of repose. The Gaming Disputes Trial Court denied the motion, 7 Am. Tribal Law 392, 2007 WL 5969360, and after appeal and remand, the Gaming Disputes Trial Court, 7 Am. Tribal Law 398, 2007 WL 5969366, determined that the Mohegan Torts Code did apply to the nontribal defendants. Another defendant, the engineering firm, sought dismissal on the basis that it was not named in the suit within limitations period. The Gaming Disputes Trial Court, Wilson, J., 7 Am. Tribal Law 407, 2007 WL 5971743, granted the dismissal, while maintaining that the Mohegan Torts Code applied. Employee appealed.

Holdings: The Mohegan Gaming Disputes Court of Appeals, Guernsey, C.J., held that:

the version of the Mohegan Torts Code in effect at time of employee's injuries did not permit recovery for injuries from nontribal entities, and employee's tort claims were subject to Connecticut statutes of limitations, and

the current version of the Mohegan Torts Code had no applicability to tort claims against nontribal entities.

Reversed and remanded.

*370 *Summary by the Court.*

In a case brought against only non-Tribal Defendants by an employee of the MTGA who suffered catastrophic injuries as a result of a fall that occurred in the Race Book section of the Casino, the Gaming Disputes Trial Court had previously held that the provisions of the Mohegan Torts Code governed tort claims against non-Tribal defendants. On appeal to the Gaming Disputes Court of Appeals, the Appellate Court examined the history of and the various enactments and amendments to the Torts Code, commencing with the relevant provisions of the Tribal—State Gaming Compact, and held that the Torts Code was specifically enacted to fulfill the requirements of the Compact for the handling of injury claims against the Mohegan Tribal Gaming Authority (MTGA). The Appellate Court held that the Tribal Council was clear in its intention that the Torts Code had no applicability to tort claims against non-Tribal entities, and reversed the decision of the Trial Court.

Attorneys and Law Firms

Mary M. Puhlick, Esq., Michael J. Cartier, Esq., Michael J. Quinn, Esq. (Pro Hoc Vice), for Plaintiff's.

Frank G. Usseglio, Esq., Richard J. Kenny, Esq. for Defendant's Lehr Associates Consulting Engineers, LLP.

Opinion

GUERNSEY, Chief Justice.

The Plaintiffs have appealed the decision of the Gaming Disputes Trial Court, Wilson, J., granting the Motion to Dismiss filed by the Defendant Lehr Associates Consulting Engineers, LLP[1] on grounds that the instant action was not timely filed under Mohegan Torts Code,[2] and that the Gaming Disputes Court is therefore without jurisdiction pursuant to the Tort Code's statute of limitations, MTC § 3–246. Because we hold that the Mohegan Torts Code has no applicability to tort ***371** claims against non-Tribal entities, we reverse and remand for further proceedings.

Procedural History

By complaint filed with the Gaming Disputes Trial Court on March 9, 2005, the Plaintiffs commenced suit against six non-Tribal Defendants, seeking damages for catastrophic injuries suffered by the Plaintiff Joseph Lubrano, an employee of the "Mohegan Sun",[3] on June 15, 2004 as the result of a fall in the "Race Book" section of Mohegan Sun Casino during the course of his employment. Neither the Mohegan Tribe nor the Mohegan Tribal Gaming Authority (MTGA) is named as a Defendant, and the only involvement of any Tribal entity in this case is that of the MTGA as an intervening Plaintiff seeking to recover worker's compensation benefits paid to or on behalf of Mr. Lubrano.

The original complaint, although not specifying the law to be applied, contained the perplexing allegation that "[p]ursuant to Section 3 of the Mohegan Torts Code, Ordinance 2001–07, the Mohegan Tribal Gaming Authority has jurisdiction over this action."[4] The ad damnum claimed "[f]air, just and reasonable damages", and the Statement of Claim asserted that "[t]he plaintiffs claim damages to the maximum extent allowed pursuant to the Mohegan Tort Code or other applicable tort law."[5] The involvement of the Mohegan Torts Code, which had never before been held to apply to tort claims against non-Tribal entities, took on a life of its own commencing with a Motion for Summary Judgment filed by the Defendants The Tucker Company, Tucker Mechanical, and Emcor Group, Inc. (collectively hereinafter "Tucker Mechanical") asserting that Mohegan Tribal Law was silent on the issue of a statute of repose, and therefore the action was time-barred under Conn. Gen.Stat. § 52–584.[6] The motion asserted that it was undisputed that Tucker Mechanical substantially completed its work on the Race Book section in September, 1998, and that there is no allegation that Tucker Mechanical served as architect, professional engineer, or land surveyor, thus avoiding the seven year statute of limitations set forth in Conn. Gen.Stat. § 52–584a. In response, the Plaintiffs asserted that MTO 95–4 "demands" the application of MTO 2001–07 (and its statute of limitations, under which a cause of action accrues when the injury is sustained) when the Connecticut General Statutes are in conflict with Mohegan Tribal Law,[7] thus begging the question of whether any such conflict exists, given that MTO 2001–07 had never before been held to have any applicability to tort claims against non-Tribal entities.

***372** In its decision denying Tucker Mechanical's Motion for Summary Judgment, the Gaming Disputes Trial Court, noting that the case was brought under the Mohegan Torts Code, assumed the applicability of the Torts Code for purposes of Tucker Mechanical's motion,[8] and went on to hold that the applicable law to be applied by the Gaming Disputes Court pursuant to MTO 95–4 was not the Connecticut statute of limitations, Conn. Gen.Stat. § 52–584, but rather the time limitations imposed under the Mohegan Torts Code, MTC § 3–246(a). In the context of this case, the difference was significant: whereas Conn. Gen.Stat. § 52–584, contains a statute of repose, MTC § 3–246(a) does not.[9] Accordingly, the Motion for Summary Judgment was denied and Tucker Mechanical appealed.[10]

In view of the seriousness of the issues presented, both to the numerous parties to the instant

case and to the development of Mohegan Law, pursuant to Rule 1(b) of the Gaming Disputes Court Rules of Appellate Procedure and Section 60–05 of the Connecticut Rules of Appellate Procedure, on June 27, 2007 this Court ordered that the matter be remanded to the Trial Court for articulation as to "[w]hether the Mohegan Torts Code has any applicability to tort claims brought against non-Tribal entities." In reaffirming its holding that the Mohegan Torts Code was applicable to the instant action against non-Tribal entities, the Gaming Disputes Trial Court first looked to the Mohegan Torts Code definition of "Mohegan Tribal Entity", finding no allegation that any of the Defendants were within this definition. The Trial Court next determined that the Gaming Disputes Court had jurisdiction over the non-Tribal entities pursuant to the Ordinance Establishing the Gaming Disputes Court, MTO 95–4, now MTC § 3–21 *et seq.,* succinctly and accurately analyzing the issue under Article XIII of the Constitution of the Mohegan Tribe of Indians.

The Trial Court then examined the provisions of MTC § 3–52, Sources of Tribal Law, emphasizing that Mohegan Tribal Ordinances are "primary". Turning to the Mohegan Torts Code, the Court observed that the purpose of the Code is set forth as follows:

> **Sec. 3–244. Purpose.**
> The Mohegan Tribe of Indians of Connecticut, a federally-recognized sovereign Indian tribal nation occupying the Mohegan Reservation on land held in trust by the Unites States in Uncasville, Connecticut, *intends this Code to govern the adjudication of torts from actions of The Mohegan Tribe of Indians of Connecticut and from actions of the Mohegan Tribal Gaming Authority,* and their subordinate entities and their respective authorized officials, agents, employees and representatives while engaged within ***373** the scope of their authority or employment on behalf of such entities, wherever located. (emphasis added)[11]

In the view of the Trial Court, because this statement of purpose does not *exclude* application of the Torts Code to entities nowhere mentioned in the statement of purpose[12], and for other reasons hereinafter discussed in detail, including the Trial Court's respect for the direction to the Gaming Disputes Court to develop the Tribe's common law "to achieve stability, clarity, equity, commercial reasonableness, and fidelity to any applicable Mohegan Tribal ordinances or regulations," MTC § 3–54, the Trial Court held that the provisions of the Mohegan Torts Code govern tort actions against non-Tribal entities.

The Instant Appeal

The jurisdiction of the Gaming Disputes Court over the non-Tribal parties to this action (except to the extent that subject matter jurisdiction may be impacted by the statute of limitations in the Torts Code) has not been questioned. As the legislative history to the Mohegan Nation of Connecticut Land Claims Settlement Act of 1994 states:

> The Mohegan Indian Nation will retain exclusive civil jurisdiction within the boundaries of its reservation, and will have concurrent criminal jurisdiction, on tribal lands and over tribal members, with the State of Connecticut. Under this legislation, the Mohegan Indian Nation retains all its sovereign rights as a Federally recognized Indian tribe.

H.R. Rep. 03–676 at 10–11.[13] Given the contractual relationship between the Mohegan Tribe (through the MTGA) and the non-Tribal parties, as well as the direct relationship between the on-Reservation conduct of the parties and the health and welfare of the Tribe, the exercise of civil jurisdiction over the non-Tribal parties[14] ***374** lies well within the inherent sovereignty of the Tribe. *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), *reh. den.* 452 U.S. 911, 101 S.Ct. 3042, 69 L.Ed.2d 414.

Unlike Tucker Mechanical, which argued for the application of the Connecticut statute of limitations,[15] the Appellee in the instant case, Lehr Associated Consulting Engineers, LLP (hereinafter "Lehr") moved for summary judgment on grounds that the action against it was not timely filed under MTC § 3–246, and argued in favor of the application of the Mohegan Torts Code to the instant action. As the Trial Court noted, both the Plaintiffs and Lehr, in their briefs and arguments, assumed the applicability of the Mohegan Torts Code. Consistent with its decision on the Tucker Mechanical motion, the Trial Court held that the Tort Code's time limitations were controlling, and that the action against Lehr was not timely filed.[16]

The Plaintiffs have appealed the granting of Lehr's Motion to Dismiss.[17] At oral argument, counsel for the Plaintiffs declined to take a position as to whether the Mohegan Torts Code was controlling, whereas counsel for Lehr argued strongly that it was.

Discussion

The Mohegan Tribe—State of Connecticut Gaming Compact (hereafter "Tribal—State Gaming Compact"), entered into by and between the Mohegan Tribe of Indians and the State of Connecticut, executed on May 17, 1994 and approved by the Department of the Interior on December 5, 1994, contained the following requirement for the handling of tort claims arising out of injuries to patrons:

> (g) *Tort remedies for patrons.* The Tribe shall establish, prior to the commencement of class III gaming, reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities. The ***375** Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by virtue of any provision of this Compact, but may adopt a remedial system analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate following consultation with the State gaming agency.

Tribal—State Gaming Compact, Sec. 3(g).

Although the Mohegan Tribe declined to follow the example of the Claims Commissioner for the State of Connecticut, as suggested by the Tribal—State Gaming Compact, the direction to establish "reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities" led to the enactment of MTO 96–2, "An Ordinance Establishing the Mohegan Torts Code". The clear intention of both the Tribal—State Gaming Compact and MTO 96–2 was to provide a mechanism for the assertion of claims otherwise barred by the sovereign immunity of the Mohegan Tribe.[18] This was accomplished by the limited waiver of sovereign immunity contained in MTO 96–2 § 3.[19] The application of Connecticut law to tort claims against the MTGA was also established by MTO 96–2 § 11, which provided that "any claim brought under this ordinance shall be determined by the Gaming Disputes Court in accordance with Tribal Ordinance 95–7/20–1."[20]

In March, 1998, the Mohegan Torts Code was amended by the passage of MTO 98–1, which maintained the focus of the original Torts Code as a limited waiver of sovereign immunity for damage claims for injuries proximately caused by the negligence of the MTGA, the condition of property of the MTGA, and negligent acts or omissions of tribal security officers. MTO 98–1 § 3(c). The version of the Mohegan Torts Code at issue in the instant case, enacted as MTO 2001–07 (effective August 15, 2001), contained a substantial revision to the Code, extending the limited waiver of sovereign immunity to "persons with tort claims arising in, on or upon the Gaming Facilities"[21] but clearly provided that its purpose was to carry out the mandate of the Tribal—State Compact relating to the providing of procedures for disposing of tort claims by patrons:

> ***SECTION 4: PURPOSE***
>
> ***376** B. The Mohegan Tribe and the State of Connecticut entered into a Gaming Compact dated April 25, 1994. The Gaming Compact provides, among other things, that the Mohegan Tribe shall establish reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities.
>
> C. Pursuant to the aforementioned provision of the Gaming Compact, the Mohegan Tribe and the MTGA have adopted and hereby amend procedures applicable to tort claims, as defined in this Code, that may arise in connection with any gaming activities or with any associated hotel, resort or entertainment facilities operated or controlled by the MTGA located on the Mohegan Reservation as more fully defined hereinafter. This Code applies to any and all tort claims arising on the Mohegan Reservation *that may be brought against the MTGA and its employees,* by patrons, invitees, guests and other persons who have a valid and legitimate reason to be on the Reservation or within the Mohegan Tribe's gaming, hotel, resort or entertainment facilities.
>
> D. This Code is expressly intended by the Mohegan Tribe and the MTGA to constitute the exclusive means of adjudication of claims brought against the MTGA and its employees, by patrons, invitees, guests and other persons and the Mohegan Tribe and the MTGA expressly withhold their consent to suit in any forum other than the Gaming Disputes Court

established pursuant to Mohegan Tribal Ordinance 95–4 for such actions.

MTO 2001–07 § 4 (emphasis added).

That the purpose of the Torts Code was to comply with the mandate of the Tribal—State Gaming Compact is further emphasized by the language of Resolution No.2001–10 of the Management Board of the Mohegan Tribal Gaming Authority adopting MTO 2001–07, the preamble of which provided:

WHEREAS, the Mohegan Tribe and the State of Connecticut entered into a Gaming Compact dated April 25, 1994 which provides, among other things, that the Mohegan Tribe shall establish reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities ...

If there were any doubt as to the purpose of the Torts Code, the 2005 revision made it crystal clear that the Mohegan Tribe intended the Torts Code "to govern the adjudication of torts from actions of the Mohegan Tribe of Indians of Connecticut and from actions of the Mohegan Tribal Gaming Authority, and their subordinate entities and their respective authorized officials, agents, employees and representatives ..." MTO 2005–02 § 4.

Central to the Trial Court's analysis of the applicability of the Torts Code to claims against non-Tribal defendants is its interpretation of the provisions of MTC § 3–248, which sets forth the procedure for the assertion of tort claims under the Torts Ordinance, as establishing two separate, distinct categories of disputes that may be filed in the Gaming Disputes Court:

Section 3–248. Procedure.

(a) Any person who, wherever located, sustains an injury as defined in this Code that arises from or out of the Gaming Facilities or that is allegedly caused directly or indirectly by acts or omissions of the MTGA (or its authorized representatives), and who seeks recovery from the MTGA for such alleged injury, may file a Complaint with the Gaming Disputes Trial Court, together with the required filing fee, pursuant to ***377** the Rules of Procedure of the Gaming Disputes Court.

MTC § 3–248(a).

This language, however, does not appear in MTO 2001–07, but was rather introduced by the 2005 revision enacted by MTO 2005–02. The operative language of MTO 2001–07, controlling in this case, is even more direct and clear:

Section 8: Procedure.

A. Any person who sustains an injury as defined in this Code and who seeks to recover for said injury from the MTGA shall file a Complaint with the Gaming Disputes Trial Court,

together with the required filing fee.

MTO 2007–01 § 8(A).

The requirement in this earlier, controlling provision that any person seeking to recover under the Torts Code have *both:* 1) sustained an injury as defined in the Code; and 2) seek to recover from the MTGA is beyond question. As for the Trial Court's conclusion that, under Section 3–248(a), the bringing of a claim for an injury "that arises from or out of the Gaming Facilities" does not require that the injured party seek to recover from the MTGA for such alleged injury, we cannot agree. Not only would such an interpretation constitute a major departure from the historical function of the Torts Code, but the same is also grammatically indefensible. The modifying phrase "and who seeks recovery from the MTGA for such alleged injury" clearly modifies the compound clause "that arises from or out of the Gaming Facilities or that is allegedly caused directly or indirectly by acts or omissions of the MTGA (or its authorized representatives)"; given that this is a compound clause (rather than two independent clauses), there is simply no basis for interpreting the modifying phrase as applying only to the first clause. We hold that the 2005 revision to the Torts Code did not alter the dual requirements of an injury as defined in the Code and a claim against the MTGA.

The Trial Court was correct, however, in noting that the provisions of MTC § 3–250(d), that "limitations upon recovery against the sovereign tribal entities and representatives as set forth herein shall not apply to limit recovery against a defendant that is not a Mohegan Tribal Entity or its authorized representative", are unnecessary if the Torts Code does not apply to claims against non-Tribal defendants. Once again, this provision, however, does not appear in MTO 2001–07 but rather was added by the 2005 revision, MTO 2005–02. Nevertheless, its purpose is readily understood in the context of tort litigation in the Gaming Disputes Court, where it is not at all unusual to find the MTGA and non-Tribal entities as co-defendants. This section merely reinforces that different law applies to claims arising out of the same transaction depending on whether the defendant is a Tribal or non-Tribal entity (that is, whether cloaked with sovereign immunity or not).

The Trial Court correctly noted that one of the mandates imposed on the Gaming Disputes Court is to "strive to achieve stability, clarity, equity, commercial reasonableness, and fidelity to any applicable Mohegan Tribal ordinances or regulations". MTC § 3–54. Nevertheless, we are unable to identify any intention on the part of Mohegan Tribal Ordinances or regulations to treat non-Tribal entities the same as Tribal entities cloaked with sovereign immunity. In litigation in the Gaming Disputes Court, for example, actions against the Mohegan Tribe or the Mohegan Tribal Gaming Authority are subject to very different rules than those against non-Tribal entities:

Sec. 3–132. [General Rules.]

***378** (a) In any action otherwise authorized against The Mohegan Tribe or its subdivisions, the following modifications to the rules or procedures set forth in this Article shall apply:

(1) The periods of time specified for civil cases or appeals of a civil nature in which an answer, reply, or other pleading or response of any kind due from The Tribe shall be required shall be double the period otherwise specified.

(2) The Mohegan Tribe or Tribal Gaming Authority when a party to a civil action shall not be liable for the payment of the costs, expenses, or attorney's fees of the opposing party.
(3) The Mohegan Tribe or Tribal Gaming Authority when a party to a civil action shall not be required to post security by bond or otherwise for any purpose.
(4) No action otherwise authorized may be instituted against The Mohegan Tribe or Tribal Gaming Authority unless there is filed with the complaint a cash or written bond or undertaking with at least two (2) sufficient sureties subject to the jurisdiction of the Court in the amount of $500.00, conditioned for the payment of such costs, charges, and reasonable attorney's fees to be fixed by the Court as may be awarded against the plaintiff in said action, should the plaintiff not prevail in such action.
MTC § 3–131.

Furthermore, there is the overriding concern that the adoption of the Torts Code as controlling in tort actions against non-Tribal entities would result in the stripping away of rights that patrons and others have against other patrons and non-Tribal entities, without the Tribal Council having enacted legislation evidencing any intention to do so. For instance, a patron injured in an assault by another patron, under State law would have a three year statute of limitations for the bringing of an action for damages; a patron injured in the parking lot by the negligent driving of another patron would have two years. To reduce all such statutes of limitation to the period of time in which an action can be filed against the MTGA is not only inconsistent with the admittedly disparate treatment of Tribal and non-Tribal entities, but also would intrude upon the legislative authority of the Tribal Council.[22] This we decline to do.

We hold that the Mohegan Torts Code has been, and continues to be, a limited waiver of sovereign immunity allowing the advancing of tort claims against the MTGA (and, in current form, against the Mohegan Tribe in non-gaming situations) in accordance with the mandate of the Tribal—State Gaming Compact, and that it has no applicability to tort claims against non-Tribal entities. Accordingly, tort claims against the non-Tribal defendants in the instant case remain subject to State law statutes of limitations.[23]

***379** The decision of the Gaming Disputes Trial Court granting Lehr's Motion for Summary Judgment and/or Motion to Dismiss is reversed, and the case remanded for further proceedings consistent with this opinion.

All Citations

7 Am. Tribal Law 369, 1 G.D.A.P. 48

Footnotes

1 The Plaintiffs' original complaint dated March 9, 2005 mistakenly named as a Defendant "Frank Lehr Associates". By motion dated June 16, 2005, the Plaintiffs gave notice of this misjoinder, and were allowed to add Lehr Associates Consulting Engineers, LLP as a party Defendant, subsequently withdrawing the complaint against the original Lehr firm and setting the stage for an

extended legal debate as to whether G.D.C.P. § 13 and Conn. Gen.Stat. § 52–593 permit the bringing of an action outside the time limitations of MTO 2001–07. In light of our holding that the provisions of the Mohegan Torts Code have no applicability to tort claims against non-Tribal defendants, we need not address this issue.

2 The version of the Mohegan Torts Code in effect at the time of the accrual of Plaintiffs' cause of action was MTO 2001–07, amended as of June 22, 2005 by MTO 2005–02, and again amended by Res.2007–09 as of February 2, 2007. The present codification of the Mohegan Tribe Code cites the Mohegan Torts Code as MTC § 3–241, *et seq.*

3 Although designated in the complaint as an employee of the Mohegan Sun, the proper designation of the employer is the Mohegan Tribal Gaming Authority.

4 Plaintiffs' Complaint, March 9, 2005, Paragraph 1. The Mohegan Tribal Gaming Authority, obviously, has no jurisdiction over the Gaming Disputes Court or claims filed therein.

5 The Revised Complaint dated June 16, 2005 repeated these allegations.

6 Conn. Gen.Stat. § 52–584, applicable to actions based on "negligence, misconduct or malpractice", provides that no such action "shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of ..."

7 That Connecticut General Statutes in conflict with Mohegan Tribal Law are not incorporated pursuant to MTO 95–4 is a basic principle of Mohegan Tribal Law. *MacLean v., Office of the Director of Regulation,* 1 G.D.A.P. 20 (2004).

8 Memorandum of Decision, April 12, 2007, fn.1.

9 Conn. Gen.Stat. § 52–584 contains both a statute of limitations for actions sounding in negligence of two years from the date the injury is sustained or discovered or in the exercise of reasonable care should have been discovered, and a statute of repose, providing that "no such action may be brought more than three years from the date of the act or omission complained of ..." As will be discussed more fully, MTC § 3–246(a) does not contain a statute of repose, and the applicable period (then 270 days) begins to run on the date the injury is sustained. In this case, where years elapsed between the "act or omission complained of" and the injury to the Plaintiff, under Conn. Gen.Stat. § 52–584 the action would be time-barred, but not under MTC § 3–246(a).

10 Tucker Mechanical later argued that it had actually filed a Notice of Intent to Appeal, thus avoiding the prohibition against appealing the denial of a motion for summary judgment. *Breen v. Phelps,* 186 Conn. 86, 90, 439 A.2d 1066 (1982).

11 This language, quoted by the Trial Court, was actually introduced by the revision of the Torts Code effective June 22, 2005, MTO 2005–02 § 4, and is therefore not part of the Torts Code applicable to this case. The statement of purpose in MTO 2001–07 is set forth elsewhere in this opinion.

12 At oral argument counsel for Lehr introduced for the first time the argument that "their subordinate entities" could be read to include non-tribal entities. There is no apparent support for this position, which contrasts with the customary usage of the term in Mohegan ordinances. For example, the Mohegan Tribal Discriminatory Employment Practices Ordinance defines "Mohegan Tribe or Tribe" as the Mohegan Tribe "and its entities, agencies and instrumentalities, including but not limited to Limited Liability Companies." MTC § 4–23.

13 This language also appears in the Senate Report, S. Rep. 103–339, but does not appear in the actual Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, enacted as Public Law 103–377.

14 As for the exercise by this Court of civil jurisdiction over non-Indians, the provisions of MTO 95–4, enacted pursuant to Article XIII of the Constitution of the Mohegan Tribe of Indians, provides as follows:

> Sec. 3–71. Personal Jurisdiction.
> (a) Personal jurisdiction of the Gaming Disputes Court shall be as follows:
> (1) As used in these jurisdictional provisions, the word "person" shall be as defined in the General Statutes of Connecticut.
> (2) Subject to any contrary provisions, exceptions or limitations contained in Mohegan Tribal or federal law, the courts established by this Article shall have civil jurisdiction over the following persons:
> i. Any person residing, located, or present within The Mohegan Reservation; or
> ii. Any person who transacts, conducts, or performs any business or activity within or affecting The Mohegan Reservation, either in person or by an agent or representative for any civil cause of action arising out of that transaction, conduct, business, or

activity; or
iii. Any person who owns, uses or possesses any property, including any lease, or sublease, within The Mohegan Reservation; or
iv. Any person who engages in negligent or tortious conduct within The Mohegan Reservation either in person or by an agent or representative; or
v. Any person who initiates or files with the Trial Court any civil cause of action, whether in person or through an attorney, for any counterclaim, cross-claim, or any other affirmative pleading for relief which may be asserted within that same action; or
vi. Any person entering upon the Reservation for the purpose of participating in lawful gaming activities, which entry and participation is deemed to be consent to the exercise of jurisdiction by The Tribe over such persons in any civil action to enforce obligations arising from any transaction which arises within the Reservation.
(3) The foregoing bases of jurisdiction are not exclusive.
(Ord. No. 95–4, § 400, 7–20–1995)

15 Inasmuch as there was no allegation that Tucker Mechanical served as an architect or professional engineer, it was not concerned with the extended seven year statute of limitations contained in Conn. Gen.Stat. § 52–584a, but rather would benefit from the statute of repose contained in Conn. Gen.Stat. § 52–584. Lehr Associates Consulting Engineers, LLP, on the other hand, arguably would be subject to § 52–584a if state law were applicable.

16 The Trial Court rejected the Plaintiffs' argument that G.D.C.P. § 13 and Conn. Gen.Stat. § 52–593 would save the action against Lehr, based on the bringing of a timely action against the wrong Defendant. Once again, in view of our holding that the Mohegan Torts Code has no applicability to tort claims against non-Tribal entities, we need not address this issue.

17 Lehr's Motion was entitled "Motion for Summary Judgment and/or Motion to Dismiss"; in light of the Trial Court's view of the applicability of the Mohegan Torts Code, it concluded that it was without jurisdiction, and granted the Motion to Dismiss.

18 There would be no need for Sec. 3(g) if the claim was against a non-Tribal entity without sovereign immunity.

19 Section 3(b) required that the Mohegan Tribal Gaming Authority (MTGA) be sued solely in the Mohegan Tribal Gaming Disputes Court. Section 3(c) waived the sovereign immunity of the MTGA for instances involving injuries proximately caused by the negligent acts or omissions of the MTGA, the condition of any property of the MTGA provided it was in a "dangerous condition", and the negligent acts or omissions of tribal security officers. Section 4 established limitations on awards. "Dangerous Condition", as defined in MTO 96–2, relates solely to conditions "proximately caused by the negligent acts or omissions of the Mohegan Tribal Gaming Authority in constructing or maintaining such facility." MTO 96–2 § 2(g). There is no suggestion that the negligent acts of non-Tribal entities are in any way governed by the ordinance.

20 The actual reference was intended to be to Resolution 95–7/20–01, which adopted the Ordinance more commonly known as MTO 95–4; this Ordinance, together with Article XIII of the Constitution of the Mohegan Tribe of Indians, established the Gaming Disputes Court.

21 As noted, the previous versions of the Torts Code did not apply to torts generally, but rather only to negligent acts or omissions of the MTGA, tribal security officers, and dangerous conditions of MTGA property.

22 "All legislative and executive powers of The Mohegan Tribe not granted to The Council of Elders shall be vested in The Tribal Council and shall be exercised in accordance with this Constitution and laws of the United States applicable to Indian tribes ..." Constitution of the Mohegan Tribe of Indians of Connecticut, Article IX, Section I. For Gaming matters, "all governmental and proprietary powers of The Mohegan Tribe" ... "shall be exercised by The Tribal Gaming Authority ..." Constitution of the Mohegan Tribe of Indians of Connecticut, Article XIII, Section I. It is for this reason that ordinances related to Gaming are both passed by the Tribal Council and approved by the Management Board of the MTGA.

23 This is in contrast to time limitations contained in a limited waiver of sovereign immunity, which uniformly have been held to be jurisdictional and non-waivable. *Long v. Mohegan Tribal Gaming Authority,* 1 G.D.R. 5, 8 (1997); *Jenkins v. Mashantucket Pequot Gaming Enterprise,* 1 Mash.Rep. 9, 1 Mash. 7 (1993). Given that no defendant is cloaked with sovereign immunity, a State law statute of limitations defense does not invoke the jurisdiction of the Gaming Disputes Court, and should be treated as a special defense.

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