SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

TREVOR MACLEOD, ET AL.,
Plaintiffs/Appellants
v.
Case No. APP-21-01

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS;
AARON PAYMENT, CHAIRPERSON
Defendants/Appellees

BEFORE: BIRON, CORBIERE, DIETZ, FELEPPA, AND JUMP, Appellate Judges.

Decided: December 6, 2022

OPINION & ORDER

Biron, Chief Appellate Judge, who is joined by Appellate Judges Dietz, Corbiere, Jump and Feleppa.

For the reasons set forth below, the December 22, 2020 *Order Granting the Defendant's Motion to Dismiss* is AFFIRMED.

FACTS AND PROCEDURAL HISTORY

On July 21, 2020, the Sault Ste. Marie Tribe of Chippewa Indians ("Tribe") created a Disaster Relief Program ("Program") and authorized money to fund that program to alleviate the financial burdens brought about by the COVID-19 using Coronavirus Aid, Relief and Economic Security (CARES) Act funds.[1] Appellee Brief, p. 2. Specifically, the program authorized payment of $1,000 in tribal funds for each qualifying member living in the Tribe's Service Area[2]. (December 22, 2020 *Order Granting the Defendant's Motion to Dismiss* (*"Order"*) p.7. To qualify for payment, members had to (1) reside in the Tribe's seven county service area and (2) provide proof of financial hardship caused by COVID-19.[3] Applications for the program were due by September 4, 2020.

On September 3, 2020, the Appellant, a group of enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians living outside of the Tribe's Service Area, sued the Tribe and the Tribal Chairperson, by and through Mr. Phil Bellfy, a lay advocate, in the Sault Tribe Court seeking relief from the Court **for the sole purpose** of allowing them to apply for a payment under the Program. (*Order*, p. 1.) The Complaint was served on the Tribe and the Tribal Chairperson on September

[1] 116 P.L. 136, 134 Stat. 281 (Mar. 27, 2020). A portion of the CARES Act, known as the "Coronavirus Relief Fund," allocated $150 billion to "States, Tribal governments, and units of local government…."
[2] https://www.saulttribe.com/about-us/service-area
[3] Resolution 2020-168 entitled "Approving COVID-19 Disaster [sic] Relief Program" dated July 21, 2020

28, 2020. (*Id.).* The Tribe moved to dismiss the Complaint advancing arguments of mootness, lack of jurisdiction and failure to state a claim upon which relief court be granted. *Id*. at 2. After full briefing, the Tribal Court granted the Appellee's motion to dismiss finding the Tribe was entitled to immunity from suit and that the Tribal Court lacked jurisdiction over the lawsuit. *Order*, generally.

On January 19, 2021, the Appellant timely filed a *Notice of Appeal ("Notice"*) in connection with Tribal Court Case No. GCV-20-01 and the Tribal Court's December 22, 2020 *Order Granting Defendant's Motion to Dismiss*.

Briefing in this matter was complete on April 1, 2021 and oral argument was held on May 7, 2021.

JURISDICTION & STANDARD OF REVIEW

Jurisdiction is a threshold matter that must be determined before proceeding to the merits of any case.

Chapter 82 "establishe[s] the procedures by which appeals are taken . . . ." Tribal Code Section 82.101. Chapter 82 of the Sault Tribe Code controls this decision. STC §§ 82.109 - 82.111, 82.117 and 82.125 clearly sets forth the jurisdiction and scope of matters that are properly before this Court. STC § 82.109 states:

> The Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tribal Court as provided in this Chapter.

STC § 82.111 limits those matters to:

(1) [A] final judgment or order of the Tribal Court; or
(2) [A]n order denying appellant's request for refusal; or
(3) [A]n order affecting a substantial right and which determines the action and prevents a judgment from which an appeal might be made.

STC § 82.125, further limits the review of this Court and provides the guideposts under which review is authorized under Tribal law as follows:

(1) Unless a miscarriage of justice would result, the Court of Appeals will not consider issues that were not raised before the Tribal Court.

(2) An issue raised before the Tribal Court, but not argued either by brief or orally, shall not be reviewed by the Court of Appeals.

(3) No issue which is moot at the time of argument shall be decided by the Court of Appeals unless it is capable of repetition yet likely to evade appellate review, due to its nature.

(4) Facts which are not in the [Tribal Court] record shall not be presented in any manner to the Court of Appeals, and if presented, shall not be considered by [the] Court [of Appeals].

(5) An issue concerning newly discovered material evidence which could not, with reasonable care, have been produced at the trial or hearing, shall not be considered by the Court of Appeals until a decision concerning the evidence is made by the Tribal Court.

Neither party appears to allege that the tribal court made a factual error. The issues before this Court are strictly issues of law, and as such are reviewed *de novo*. STC § 82.124(5). "A matter which is within the discretion of the Tribal Court shall be sustained if it is reflected in the record that the Tribal Court exercised its discretionary authority; applied the appropriate legal standard to the facts; and did not abuse its discretion." *In the Matter of JK,* APP-06-02, p.5 (January 9, 2009). A matter committed to the discretion of the Tribal Court shall not be subject to the judgment of the Court of Appeals. STC § 82.124 (8).

DISCUSSION

Appellees argues that sovereign immunity protects them from this suit. (*Appellee's Brief*). In doing so, Appellees assert that neither Congress nor the Tribe have waived the Tribe's sovereign immunity as it related to the claims in the Appellant's complaint. *(Id.*). The Appellee further argues that this Court does not possess jurisdiction to hear this matter and that disputes between the Tribe and its members are to be resolved outside of the judicial system unless the Tribe expressly and unequivocally consents to judicial resolution of the dispute. *(Id.*). This Court need not address Appellee's other arguments as sovereign immunity acts as a total bar to Appellant's claims.

Appellant argues that the Appellees are not immune from suit where the constitutional rights of tribal members have been denied – namely equal protection of the Tribe's laws and due process as set forth in Article VIII of the Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians as it applies to the COVID Relief Application process established pursuant to Resolution 2020-168.[4] (*Appellant's Brief*)The Appellant further argues that the matter is properly before the Sault Ste. Marie Tribal Court as Chapter 44 applies only to commercial transactions and has no applicability in a complaint between a member and a decision of the Board of Directors. *(Id.* at 3). In making these arguments, Appellant offers as a basis for his arguments, provisions of a **draft and unratified proposed** version of the Tribe's Constitution as support for his arguments. *(Id.* at 2-4). This Court notes that such authority is different than what was advanced in the Tribal Court and declines to consider Appellants new arguments further.[5]

While the Constitution and Bylaws of the Sault Ste Marie Tribe of Chippewa Indians does not reference sovereign immunity within its four corners, tribal sovereign immunity is a

[4] Sault Tribe Constitution, Article VIII states "[a]ll members of the Sault Ste. Marie Tribe of Chippewa Indians shall be accorded equal protection of the law under this constitution. No member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress [of][sic] grievances, and due process of law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of an Indian entity in the exercise of its powers of self-government shall apply to members of the tribe.

[5] This Court takes its role of applying and interpreting the Constitution and the laws of the Tribe seriously – we are not at liberty to select laws upon a whim because they more closely align with our thoughts, and neither is the Appellant. Indeed, such careless misrepresentations are just one example of why the Appellants lay advocate's privileges to practice before the Sault Ste. Marie Tribal Court were revoked on March 10, 2022.

long-standing cornerstone of tribal self-governance and self-determination. "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." (*Okla Tax Comm v Citizen Band of Potawatomi Indian Tribe*, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991); citing *Cherokee Nation v. Georgia*, 30 US 1, 13; 8 L Ed 25 (1831)). Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by other sovereign powers. (Slip op, p 1 (dissent), relying on *Santa Clara Pueblo v Martinez*, 436 US 49, 58; 98 S Ct 1670; 56 L Ed 2d 106 (1978); see also *Turner v US*, 248 US 354, 358; 39 S Ct 109; 63 L Ed 291 (1919); *US v US Fidelity & Guaranty Co*, 309 US 506, 512-13; 60 S Ct 653; 84 L Ed 894 (1940); *Puyallup Tribe, Inc v Wash Dep't of Game,* 433 US 165, 172-73; 97 S Ct 2616; 53 L Ed 2d 667 (1977)). This characteristic of tribal sovereignty is subject only to the superior and plenary control of Congress. (*US Fidelity*, 309 US at 512.). Thus, suits against Indian tribes are barred absent congressional abrogation or a clear waiver of sovereign immunity by the tribe. (*Santa Clara Pueblo,* 436 US at 58.)

It is well settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed.'" (*US v Testan*, 424 US 392, 399; 96 S Ct 948; 47 L Ed 2d 114 (1976); quoting, *US v King*, 395 US 1, 4; 89 S Ct 1501; 23 L Ed 2d 52 (1969)). Specifically pertaining to tribal immunity, the United States Supreme Court has held that immunity is a "core aspect" of sovereignty and necessary to "Indian sovereignty and self -governance." (Slip op, p 1 relying on *Kiowa Tribe of Okla v Mfg Technologies*, 523 US 751, 756; 118 S Ct 1700; 140 L Ed 2d 981 (1998); see also *Michigan v Bay Mills Indian Community*, 572 US 782; 132 S Ct 2024, 2030 (2014); Santa Clara Pueblo, 436 US at 58.). Immunity is so important to tribal self-governance that it can only be waived expressly and unequivocally. (*Id.*) "Santa Clara Pueblo firmly instructs that sovereign immunity cannot be waived by implication." (Slip op, p 3 (dissent)). "[E]quitable doctrines and judge-made rules such as ratification may not be employed to abrogate a sovereign's prerogative to determine how it will express a waiver of its immunity, as that power resides solely with the sovereign." (*Id*).

Whether a tribe has waived its sovereign immunity is a jurisdictional question which speaks to a court's authority to hear a case. This authority determination must be made regardless of case merits. **The particular facts do not matter**. (*See Puyallup Tribe v. Department of Game State of Washington*, 433 U.S. 165, 172-73 (1974); *Hagen v. Sisseton Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); and *Pan American v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989)). Tribal sovereign immunity is a necessary corollary to Indian sovereignty and self-governance. (*Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-16-01, pg. 4, decided July 14, 2016, quotations omitted). Tribal sovereign immunity applies both to claims for damages, as well as claims for injunctive and declaratory relief. (*Id.* at pg. 5, citing *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

Here, the Tribe strictly controls immunity waivers through language in Chapter 44 of the Sault Tribe Code and references thereto. (*See* Sault Tribe Code, Chapter 44 and Chapter 81.). Despite the inherent sovereign immunity discussed *supra*, the Tribe's choice to enact legislation setting forth how its immunity can be waived merely reinforces its importance to the Tribe and its self-governance. Indeed, in all areas in which the Sault Tribe Code allows for Tribal Court jurisdiction the Tribe has declared "the jurisdiction to be in the best interests of the Tribe and its members. Such waiver does not infringe upon tribal sovereignty, but instead is an affirmative

expression and exercise of such sovereignty." (Sault Tribe Code, Ch. 44, Section 44.102(6)). Chapter 44, Section 44.105 (a) of the Sault Tribe Code sets forth that the sovereign immunity of the Tribe may be waived (in relevant part):

> (a) by resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction and applicable law. Such waiver shall be strictly construed and shall be effective only to the extent expressly provided and shall be subject to any conditions or limitations set forth in the resolution…

Furthermore, the civil jurisdiction of the Sault Ste Marie Tribal Court pursuant to Chapter 81 is limited to only those cases in which a waiver of sovereign immunity meeting the requirements of Chapter 44, Section 44.105(a) when the suit is brought against the Tribe or a Tribal official, as is the case here. The Appellants have failed to produce such a resolution nor, according to record below, can they.

Appellant's arguments regarding the inapplicability of Chapter 44, specifically, Section 44.105(a)'s inapplicability to the case at hand also fail. As noted by the Tribal Court, "[u]nlike state, federal or some other tribal courts who are constitutionally separate from their legislative and executive branches, authority to hear such cases in our Tribe's Court must be granted via legislative action." (*Order* at 7, citations omitted). Like it or not, Chapter 81 of the Sault Tribe Code requires the Tribal Court to determine whether the jurisdictional requirements of Chapter 44.105(a) have been met when the Tribe or a Tribal official is a defendant in a matter. The inquiry stops on the "who" not advance to the "what". In other words, Chapter 81's broad grant of civil jurisdiction in a properly pled complaint against the Tribe or a Tribal official would also include evidence that a waiver exists in accordance with Chapter 44, Section 44.104(a) as required by the law. It is worth repeating that because of the Sault Tribe's governmental structure simply alleging a constitutional violation does not, by itself, permit the Tribal Court, or this Court, to hear the matter. (*Id.)* That is simply not the structure chosen for our government nor the status of our Tribal law.

ORDER

For the reasons specified above, the Tribal Court's December 22, 2020 *Order Granting the Defendant's Motion to Dismiss* is AFFIRMED.

IT IS SO ORDERED.