

EXHIBIT P

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CAYUGA NATION CIVIL COURT
CAYUGA NATION

Cayuga Nation Tribal Court

CAYUGA NATION

By and through its lawful governing body,
the Cayuga Nation Council

vs.

DECISION AND ORDER

Index No.: ~~84~~-24-002

CV

**DARREN KETTLE AND “JOHN DOE” and “MARY
DOE”**

(said names being fictitious, it being the intention of the
Petitioner to designate any and all occupants, tenants, persons
or corporations, if any, residing in the premises).
3016 E. Bayard Street, Seneca Falls, New York 13148

Respondents

FAHEY, J. Presiding;

This is an action brought by the Cayuga Nation pursuant to Article 7 entitled Cayuga Nation Real Property Actions and Proceedings Law to recover real property occupied by the Respondent Darren Kettle et al. at 3016 E. Bayard St., Seneca Falls, New York and for a money judgment representing the value of the unlawful use and occupancy of the premises.

The Notice of Petition to recover the real property was filed in this Court on January 19, 2024. An affidavit of service was filed in this Court on February 6, 2024. The affidavit of service attested that service was made on the Respondent pursuant to Section 735 of the Nation's Real Property Actions and Proceedings Law by leaving a copy of the Notice and Petition in a conspicuous part of the property sought to be recovered and by mailing to the Respondent on that same date.

This matter was calendared in this Court on February 21, 2024, at which time there was no appearance by the Respondent and a judgment by default was entered.

On February 25, 2024 a Notice of Appearance and a Verified Answer and a Counterclaim was filed on behalf of the Respondent by attorney Michael A Benson Esq.

On February 26, 2024 the Respondent filed a motion to vacate the default judgment that had been filed in this Court on February 21, 2024. In the affirmation supporting the motion to vacate the default judgment, Respondent's counsel contended that the Cayuga Nation's Rules of Civil Procedure specifically allowed the Respondent to file an Answer within 20 days of service and that "nail and mail service" is not authorized by Rule Two. He further contends that Rule Three (d) provides an additional three days to answer where services are accomplished by mail ." (Respondent's Affirmation, paragraphs 6 and 7)

On March 4, 2024 the Respondent filed a Supplemental Affirmation in support of a Motion to Vacate the Default Judgment. The motion urges the Court to vacate the default judgment upon the ground that compliance with the time requirements set forth in section 733 and 735 of the Real Property Action and Proceedings Law, before the Petition could be heard, were not met.

Counsel for the Nation maintains that the Respondent had actual notice of the proceedings scheduled in this Court on February 21, 2024, by virtue of being in possession of the Notice of Petition setting forth that date when it was left at Respondent premises on February 6, 2024 and had sufficient time to appear and answer on that date. Indeed, Respondent's counsel concedes that the Respondent was served with copies of the Notice of Petition and Verified Petition on February 10, 2024. (Respondent's Affirmation paragraph 4)

Section 733 of the Real Property Action and Proceedings Law mandating time of service, recites that;

“The notice of petition and petition shall be served at least ten days and not more than seventeen days before the time at which the petition is noticed to be heard”

In the instant case service was made, according to the affidavit of service on February 6, 2024, fifteen days prior to the date on which the petition was noticed to be heard, February 21, 2024 which is within the time limits set forth in Section 733.

While counsel for the Nation may be accurate in his observation that the Respondent had notice of the February 21, 2024 Court proceedings set forth on the Notice of Petition, and had 11 days in which he could have answered, section 735 of the Cayuga Nation Real Property Action and Proceedings Law providing for the manner of service, filing, and when service is complete, is explicit in the requirements for service in these actions.

Section 735 provides;

“Service of the notice of petition and petition shall be made within 30 days of filing of the same by personally delivering them to the Respondent; or by delivering and leaving personally with a person of suitable age and discretion who resides or is him or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; or if admittance cannot be obtained and such person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises; and in addition, within three days after such delivering to said suitable person or such affixing or placement, by mailing to the Respondent both by registered or certified mail and by regular first class mail.

Service under any of the foregoing methods shall be complete five days after the filing of an affidavit of service.” (emphasis added)

In the case at bar, the Affidavit of Service was filed in this Court on February, 9, 2024 and, pursuant to this Section, service could not be completed until February, 14, 2024. Clearly, the Court proceedings of February 21, 2024, in which the default judgment was granted, were premature and the judgment must be vacated.

In the motion and affirmation filed on February 26, 2024 counsel for the Respondent contends that Rule Two of the Cayuga Nation Rules of Civil Procedure provides 20 days for the Respondent to answer in this action and that “nail and mail” service is not authorized. Counsel further contends that rule

Three (d) of the Nation's Civil Practice Law and Rules authorizes service by mail and adds three days for the Respondent to answer. Counsel for the Nation contends that the Cayuga Nation Rules of Civil Procedure do not govern this proceeding.

In support of his argument that the Nation's Rules of Civil Procedure apply, Respondent's Counsel cites Rule 1((a) of the Rules at paragraph 14 of his Supplemental Affirmation;

"these rules shall govern the procedure in the ...[c]ourt of the Cayuga Nation in all actions, suits and Proceedings of a civil nature, and in any other special Proceedings."

Counsel, however omitted the prefatory language of this Section which recites "Except as otherwise provided by law..."¹

Applying the doctrine of *lex specialis*, it is clear that Respondent's counsel misapprehends the applicability of the Nation's Rules of Civil Procedure to this proceeding. An examination of the various sections of Article 7 summary proceedings to recover possession of real property set forth in the Cayuga Nation Real Property Actions and Proceedings Law clearly demonstrate that proceedings under this Article are prescribed independently of the Cayuga Nation Rules of Civil Procedure. The provisions of Sections 733 and 735 concerning time of service and manner of service discussed above, are at variance with Rules Two and Three of the Cayuga Nation Rules of Civil Procedure. Likewise Section 743 of Article 7, that allows an answer to be made orally or in writing, is at variance with Rules Five and Six of the Nations Rules of Civil Procedure which require defenses and counterclaims to be set forth in writing. Indeed, while Section 743 allows for an answer to be made orally and on the return date of the petition to recover real property, it makes no provision for counterclaims unrelated to the underlying action in the proceeding. In this case the doctrine of *lex specialis* is applicable.

¹ Cayuga Nation Rules of Civil Procedure Rule 1(a).

The Respondent contends that this proceeding was initiated in violation of a stay entered in New York State Supreme Court, Seneca County, of all enforcement proceedings in this action.

At the outset this Court notes that a stay entered in the New York State Supreme Court is not binding in proceedings in the Cayuga Nation Tribal Court since the Cayuga Nation is a sovereign, separate, apart and independent of New York State. Nevertheless, the Respondent urges that this Court recognize and abide by this stay entered in those actions as a matter of comity. Adopting this position would not be without considerable irony.

The stay of enforcement Proceedings in Cayuga Nation v. Darren Kettle Index No. 2021028 was entered on May 26, 2023 by Barry L. Porsch, Acting JSC. This followed a decision rendered by Justice Porsch in Cayuga Nation v. Dustin Parker et ano Index No. 20210519 on April 7, 2023, in which Justice Porsch declared

“... The Court finds that the Cayuga Nation civil Court has no legal authority to issue rulings against citizens whose property lies solely within Seneca County. Likewise, the Cayuga Nations so-called police force has no authority to enforce any ‘judgments’ upon individuals who do not reside in nor do not operate businesses, within Seneca County. Likewise, the Cayuga Nation’s so called police force has no authority to enforce any ‘judgments’ upon individuals who do not reside in, nor do not operate businesses within, sovereign national land recognized or held in trust by the United States government.” Cayuga Nation v. Dustin Parker et ano. Decision and Order Index No. 20210519.

Had Justice Porsch done the minimum in legal research, he would have learned that recognition of the current Cayuga Nation Government by the United States Department of the Interior had been affirmed in 2019 (see, *Cayuga Nation versus Bernhardt*, 374 F. Supp 3d 1(D.D.C.2019). Likewise, the Department of the Interior recognizes that the Cayuga Nation Police are the lawful authority within the boundaries of the Cayuga Nation Reservation. This position was affirmed by Darryl Lacounte, director, Bureau of Indian Affairs in a letter to Stuart Peenstra,

Chief of Police for the Town Seneca Falls Police Department on June 17, 2019 in which Mr. LaCounte wrote;

“Both federal and state Courts have ruled that the Cayuga Indian Nation reservation has not been diminished or disestablished. While the Tribe does not have lands in trust, all lands within the exterior boundaries of the reservation are considered Indian country under federal law. Therefore, the department’s position is that the Cayuga Indian Nation may enforce its own criminal laws against Indians within the boundaries of the reservation.”

Contrary to Justice Porsch’s belief, both the Cayuga Nation Tribal Court and the Cayuga Nation Tribal Police have lawful authority to adjudicate and enforce proceedings resulting in judgments against Native Americans who occupy property within the boundaries of the Cayuga Nation Reservation.

In urging this Court to honor the stay imposed by Justice Porsch, the Respondent cites a portion of Rule 37 of the Nation’s Civil Procedure Law which provides for comity recognition of final judgments or stays of another court of competent jurisdiction. Section 5.5 of the Nation’s Judiciary Law titled full faith and credit or comity also provides;

“the trial Court shall give full faith and credit to the orders and judgments of the Courts of other Nations, states and local governments...”

Both of these sections, however, forbid comity being extended to orders, judgments or stays rendered by a court which declines, refuses, or does not recognize the orders and judgments of the tribal court. Even without this prohibition being enshrined in both sections, this Court, as a matter of discretion, would not have granted comity to the stay entered in New York State Supreme Court, Seneca County, by Justice Porsch in light of the decision in Cayuga Nation versus Dustin Parker et Ano. Index No 20210519 previously discussed herein.

RESPONDENT'S COUNTERCLAIMS

the Petitioner has moved to dismiss the Respondent's affirmative defense and counterclaim which allege that the Petitioner has withheld periodic distribution payments from the Respondent, (Respondent's Answer and Counterclaim, paragraphs 23-30) alleging that they are barred from being asserted by Sovereign Immunity.

Respondent contends that Sovereign Immunity is inapplicable because the claims sound in recoupment, citing Cayuga Nation v. Parker 2023 WL 130852 (NDNY 2023).

In that case Judge Sannes noted that;

"[A] counterclaim sounding in recoupment must arise out of the transaction that grounds the main action and must request only a set off of damages not affirmative recovery, *Oneida Indian Nation of New York v. New York* 194 F.S. 2d 104,136 (NDNY 2002 ("*Oneida*") quoting *Forma*, 42 F.3d at 765) 'whatever the theory, the equitable doctrine permits the defendant to assert a claim in order to reduce or eliminate the amount of damages recoverable by the plaintiff so long as the claim arises from the same contract, transaction or occurrence as plaintiffs claim' *United States v. Livecci* 605 F. Supp. 2d 437 , 450 (WDNY 2009) aff'd 711 F. 3d 345 (2d Cir 2013) citing *United States v. Green*, 33 F. Supp 2d 203, 233 (WDNY 1998).

Moreover, she went on to observe that;

"The Second Circuit has 'construed the transaction or occurrence standard liberally:

'In determining whether a claim arises out of the transaction... That is the subject matter of the opposing party's claim this circuit generally has taken a broad view not requiring an absolute identity of factual backgrounds.... But only a logical relationship between them. This approach looks to the logical relationship between the claim and the counterclaim, and attempts to determine whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all of the issues be resolved in one lawsuit. *Cabiri v. Govt of Republic of Ghana*, 165 F. 3d 193, 197 (2d Cir. 1999)(quoting *United States v. Aquavella*, 615 F. 2d 12, 22 (2d Cir. 1979).'"

In deciding that recoupment was an appropriate exception to the doctrine of Sovereign Immunity, Judge Sannes concluded that the claims asserted by the defendant of conversion and

trespass to its business, which was also the subject of the plaintiffs claim for investment of racketeering income under the RICO Act, were so factually intertwined so as to survive the plaintiff's motion to dismiss.

In the instant case, the Respondent seeks to recover periodic distribution payments allegedly wrongfully withheld from him, that are not "logically connected to," or "arise from the same contract, transaction or occurrence as [petitioner's] claim" and have no relationship to nor the subject of the rental arrangement he entered with the Petitioner that is the subject of this action. Therefore, the counter claim is barred by the Petitioner's Sovereign Immunity.

Accordingly; the default judgment entered on February 21, 2024 is vacated; the Affirmative Defense is stricken and the Counterclaim is dismissed because it is barred by the Nation's interposition of Sovereign Immunity.

The action is restored to the court's calendar for further proceedings consistent with this decision.

THE FOREGOING CONSTITUTES THE DECISION AND ORDER OF THE THIS COURT.

April 3, 2024


Cayuga Nation Tribal Court Judge