STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
APPEAL NO: 2022AP937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

Appeal from the Circuit Court for Menominee County,
Case No. 2018-CV-0007
The Honorable Katherine Sloma, Presiding

SUPPLEMENTAL BRIEF OF DEFENDANTS-RESPONDENTS GUY KESHENA AND THE MENOMINEE INDIAN TRIBE OF WISCONSIN

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INTRODUCTION

Defendants-Respondents file this Supplemental Brief in response to the Court's Order entered July 9, 2024.

This case has changed fundamentally since it was filed by Plaintiff-Appellant Legend Lake Property Owners Association, Inc. ("LLPOA"). LLPOA sued to enforce transfer provisions in the Restrictive Covenants, and to prevent the transfer of properties to the United States in trust for Defendant-Respondent Menominee Indian Tribe of Wisconsin ("Tribe"). Now that the United States District Court has upheld the transfer of the properties to the United States in trust for Tribe, LLPOA has abandoned its claims in this Court that certain Restrictive Covenants bar transfers. Instead, LLPOA seeks in this Court, for the first time, to enforce supposed non-transfer restrictions. In fact, however, some of the supposed non-transfer provisions relied upon by LLPOA are transfer provisions, and were considered by the court in *Legend Lake Prop. Owners Ass'n Inc. v. United States Dep't of the Interior*, No. 23-C-480, 2024 WL 449287 (E.D. Wis. Feb. 6, 2024), when it held that "the MRA conflicts with and preempts the Association's restrictive covenants that purport to bar the trust acquisitions." *Id*. at *5.

LLPOA's claims fail first, because they are barred by the Tribe's sovereign immunity. Second, because the United States now owns the properties, it is an indispensable party to this action and, further, its sovereign immunity bars the suit. In addition, 28 U.S.C. § 1360 does not apply on the Menominee Reservation, and so this Court lacks jurisdiction to hear this case. If this Court did have jurisdiction, it should hold that the supposed non-

transfer provisions are either preempted or are not before the Court in this case.

DISCUSSION

I. DEFENDANTS-APPELLANTS' RESPONSE TO LLPOA'S POSITION REGARDING SUPPOSED "NON-TRANSFER" RESTRICTIVE COVENANTS

LLPOA now takes the position, for the first time, that this appeal is "limited to the non-transfer specific portions [of the Restrictive Covenants]." LLPOA Supp. Br. 4. LLPOA asserts that "[t]he transfer specific portion of the Restrictive Covenants were not directly addressed in this appeal," *id*. at 3 n. 3, but in fact this appeal, and the case before the Circuit Court, concerned transfer-specific covenants. *See* Compl. ¶ 15 [R.1:11]; Opening Br. of Pl.-App. LLPOA 18-19 (same). LLPOA also states, however, somewhat contradictorily, that it "is not abandoning or conceding any of its arguments relating to the issue of enforceability of the transfer specific portion of the Restrictive Covenants." LLPOA Supp. Br. at 3 n. 1.

After ambiguously stating its position in response to this Court's question, LLPOA then identifies, or misidentifies, various provisions of the Restrictive Covenants as "non-transfer portions of the Restrictive Covenants," when they are in fact provisions restricting transfer. LLPOA Supp. Br. 4. LLPOA does this by quoting portions of paragraph 1.B of the Restrictive Covenants, omitting the introductory language that shows that this is a covenant restricting transfers. The paragraph states:

> B. Without the express written consent of the Association, which to be effective must be duly voted upon and approved by the Association's membership by amendment to the bylaws, no owner of any interest in the Subject Real Estate (or any part thereof) shall transfer any interest in the Subject Real Estate to any individual, entity …, organization, or sovereign

> or dependent sovereign nation, or during the period of ownership take any action, the result of which could or would-
>
> …
>
> (3) remove the Subject Real Estate (or any part thereof) from the zoning authority and general municipal jurisdiction of Menominee County, Wisconsin,
>
> (4) remove the Subject Real Estate (or any part thereof) from the general municipal jurisdiction of the State of Wisconsin, to include administrative regulations duly adopted, and/or
>
> (5) remove the Subject Real Estate (or any part thereof) from the obligations and/or restrictions imposed on the Subject Real Estate (or any part thereof) by the duly adopted by bylaws and resolutions of the Association, to include, without limitation, the obligation to pay all dues and assessments properly levied by the Association.

Res. Cov. ¶1.B [*see* Appellant's Brief at 18-19].[1]

These are clearly covenants restricting certain transfers. In this Court, and in the Circuit Court, LLPOA previously characterized them as such. *See* Compl. ¶¶ 15 ("Article 1 of the Restrictive Covenants contain certain restrictions on transfer …," citing Article 1, B-E of the covenants); Opening Br. of Pl.-App. LLPOA 18-19 (same).

In short, LLPOA continues to press its case that some provisions of the Restrictive Covenants prohibiting transfers can be applied to the Tribe notwithstanding the Menominee Restoration Act ("MRA"), and despite the decision of the United State District Court in *Legend Lake Prop. Owners*

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[1] LLPOA no longer seeks to enforce the provision barring transfers that would:

> (1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls of Menominee County, Wisconsin,
>
> (2) diminish or eliminate the payment of real estate taxes duly levied or assessed against the Subject Real Estate (or any part thereof)….

Rest. Cov. ¶ 1.B(1)&(2).

Ass'n. Inc., 2024 WL 449287, which held that "the MRA conflicts with and preempts the Association's restrictive covenants that purport to bar the trust acquisitions." *Id*. at *5. In so holding, the Court cited some of the restrictions LLPOA now relies upon as non-transfer provisions. *Id*. at *5 (discussing restrictions relating to removal of property from zoning authority and state jurisdiction). LLPOA has not shown why the federal court decision (which it did not appeal) does not bar it, under the doctrines of claim preclusion and issue preclusion, from relitigating whether provisions of the Restrictive Covenants that would prevent transfer of the properties to the United States in trust for the Tribe under the MRA are preempted.

II. IF THIS APPEAL IS LIMITED TO "NON-TRANSFER" PROVISIONS OF THE COVEVANTS, SOVEREIGN IMMUNITY AND PREEMPTION CONTINUE TO APPLY

A. Sovereign Immunity Bars this Case

This action is barred by the Tribe's sovereign immunity, for the reasons stated in Defendant-Appellees' brief. LLPOA does not assert that the trust acquisitions by United States or the federal court's decision changes the analysis of that issue in any way.

LLPOA raises a related issue not directly called for by the Court's Order concerning the sovereign immunity of the United States. LLPOA Supp. Br. at 3 n. 1. LLPOA's position that the United States' sovereign immunity does not bar the suit is not only erroneous, it represents a change in position by LLPOA. In its appeal to the Interior Board of Indian Appeals ("IBIA") challenging the decision of the Bureau of Indian Affairs to acquire

the properties in trust for the Tribe, LLPOA filed a motion to stay the appeal pending the decision of the Circuit Court in this case, stating:

> Upon conveyance of the parcels at issue into federal trust, the United States would become an indispensable party to the Menominee County Circuit Court action since the United States would be the title owner of the parcels. The sovereign immunity of the United States would bar its joinder to the State Court proceedings.

Exhibit A attached hereto at 4-5. LLPOA further noted that in the Circuit Court, it had amended its complaint to eliminate a property—Lot 60—that had already been acquired in trust for the Tribe in order to avoid dismissal for failure to join the United States. *Id*. at 5 n. 4 ("The Menominee County Circuit Court found that the United States was not an indispensable party as to the 33 lots subject to the determinations which await transfer, but that it was an indispensable party as to Lot 60 which has already been transferred into federal trust."). *See* Order Denying Defense Motion to Dismiss, [R.25:2], Document 25 (03-25-2019) at 2-3 (Court would find United States to be indispensable party if Lot 60 not removed from case).

In the federal case brought by LLPOA, the United States took the position that its sovereign immunity would bar the claims the LLPOA is now trying to assert, stating:

> Second, to the extent Plaintiff seeks to litigate and enforce restrictive covenants outside the scope of the BIA's decision and the IBIA appeal, those claims are barred by the Quiet Title Act, 28 U.S.C. §§ 1346(f) and 2409a (the "QTA"). The QTA "provide[s] the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983) (footnote omitted). Although the QTA provides a limited waiver of sovereign immunity to adjudicate disputed title to real property in which the United States claims an interest, the waiver "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409. As a practical matter, this exclusion operates "to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *United States v.*

> *Mottaz*, 476 U.S. 834, 842 (1986). Because the United States holds title to the land over which Plaintiff now seeks to assert additional restrictive covenants, Plaintiff could proceed against the United States only through a suit under the QTA but cannot here because of the exception for "trust or restricted Indian lands."

Exhibit B attached hereto at 12.

B. Any Supposed "Non-Transfer" Provisions of the Covenants Are Preempted, or Are Not Before This Court

The Restrictive Covenants are pre-empted by the Menominee Restoration Act ("MRA") for the reasons stated in Defendants-Appellees' Brief. *See also Legend Lake Prop. Owners Ass'n Inc.*, 2024 WL 449287 at *5. To the extent LLPOA now seeks a ruling that supposed "non-transfer" provisions are enforceable notwithstanding the MRA, several of those provisions are in fact transfer provisions. *See supra* at 2-3.

In addition, LLPOA seeks to enforce paragraph 1.D of the covenants, which requires "[a]n owner of an interest in the Subject Real Estate … [to] comply with any and all municipal and Association laws, rules, regulations and obligations as set forth in the foregoing restrictions…." Rest. Cov. ¶ 1.D. To the extent LLPOA now seeks an order that the properties are subject to all "municipal" rules and regulations, such covenant would be pre-empted by the MRA, which restored the Tribe as a federally-recognized tribe and "reinstated all rights and privileges of the tribe … under any Federal treaty, statute, or otherwise," P.L. 93-197, § 3 (b), 87 Stat. 770, and provided for the transfer of lands to the United States in trust for the Tribe, to be part of the Menominee Reservation. *Id*. § 6(b)&(c). The acquisition of lands by the United States in trust for a tribe "reestablish[es] [tribal] sovereign authority"

over lands. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005). As the Wisconsin Supreme Court has noted, "The state's general jurisdiction [over the Menominee Reservation] took effect in 1961 when title to the property within the Menominee Reservation passed from the United States to the Menominee tribal corporation. The state's jurisdiction ended, however, when Congress passed the Menominee Restoration Act." *State v. Webster*, 114 Wis. 2d 418, 436, 338 N.W.2d 474, 483 (1983). *See also* 66 Op. Att'y Gen. WI 116 (April 7, 1977) ("Congress intended [in the MRA] to restore to the Tribe the full rights of tribal self government which the Tribe enjoyed prior to the passage of the Menominee Termination Act, including the fundamental right to govern its internal affairs within the same territory that constituted the Reservation prior to termination.").

"Land held by the federal government in trust for Indians 'is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or, (3) state criminal and civil jurisdiction [over Indians], unless the tribe consents to such jurisdiction.'" *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 561 (2d Cir. 2016) (quoting *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 85–86 (2d Cir. 2000)); *see also Webster*, 114 Wis. 2d at 437, 338 N.W.2d at 483 (state had no jurisdiction to charge traffic offenses against Menominee tribal members on state highway within Menominee Reservation: "state jurisdiction in this case would interfere with tribal self-government and impair a right granted or reserved by federal law.") (internal quotation omitted). The provisions in the Restrictive Covenants are preempted insofar as they would subject the properties to general jurisdiction of the state and local governments.

To the extent LLPOA now seeks a declaration that it can enforce its own rules and regulations against the property owners, it did not put forth any evidence in the Circuit Court as to what those rules and regulations are, and did not address those rules and regulations in its briefs before this Court. It did not do so for the simple reason that until the federal district court ruling, which LLPOA failed to appeal, it brought this case for the purpose of obtaining an order that the Restrictive Covenants barred certain transfers of the properties. In the Circuit Court, LLPOA did not allege or demonstrate any particular or actual dispute as to such rules and regulations, and there is therefore no justiciable controversy presented as to such rules. *Emerging Energies, LLP v. Manitowoc Cnty.*, 2009 WI App 56, ¶ 19, 317 Wis. 2d 731, 768 N.W.2d 63 (declaratory judgment action requires justiciable controversy, including ripeness).

III. 28 U.S.C. § 1360 DOES NOT APPLY TO THE MENOMINEE TRIBE

LLPOA's Supplemental Brief assumes that that 28 U.S.C. § 1360 applies to the Menominee Reservation because it states that it applies to "All Indian country within the State [of Wisconsin]." In fact, 28 U.S.C. § 1360 (often referred to as "Public Law 280") does not apply within the Menominee Reservation. A state may retrocede its jurisdiction over Indian country lands, 28 U.S.C. § 1323, and Wisconsin did retrocede jurisdiction over the Menominee Reservation. *See Panzer v. Doyle*, 2004 WI 52, ¶12 n.6, 271 Wis. 2d 295, 680 N.W.2d 666 (PL 280 does not apply to the Menominee Tribe due to "retrocession of jurisdiction by the State of Wisconsin."); 66 Op. Att'y Gen. WI 116 (April 7, 1977).

LLPOA's reliance on 28 U.S.C. 1360 for jurisdiction in this case, LLPOA Supp. Br. at 10, is therefore erroneous. Further, because the lands are within Menominee Reservation, MRA § 6 (c), state court jurisdiction is lacking. *Williams v. Lee,* 358 U.S. 217, 223 (1959) (state court had no jurisdiction over an action by non-Indian seller to collect debt owed by defendant tribal members for debts arising on reservation; exercise of state court jurisdiction would infringe on right of Indians to govern themselves)*; Sanapaw v. Smith*, 113 Wis. 2d 232, 240, 335 N.W.2d 425, 429 (Ct. App. 1983) ("These cases suggest that, absent a federal grant of jurisdiction under Public Law 280 or 25 U.S.C. § 1322(a), and tribal consent to state jurisdiction under 25 U.S.C. § 1322(a), state court jurisdiction over an incident arising within 'Indian country' and involving enrolled tribal members who reside on a reservation is federally preempted."). Nothing in the MRA authorizes a suit against the Tribe. Nothing in the MRA authorizes state court jurisdiction over matters related to Reservation lands.

Respectfully submitted this 13th day of August, 2024.

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CERTIFICATION

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,500 words. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2024, I personally caused copies of the Supplemental Brief Of Defendants-Respondents Guy Keshena and The Menominee Indian Tribe of Wisconsin, to be served on counsel via the court's e-filing system.

Dated this 14th day of August, 2024.

Electronically Signed by Kurt M. Carlson

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