

**POKAGON BAND OF POTAWATOMI INDIANS
TRIBAL COURT**

H. TIMOTHY FENDERBOSCH,

Plaintiff,

v.

Case No. 08-201-CV

POKAGON BAND OF POTAWATOMI
INDIANS TRIBAL COUNCIL and

*Ruling on Defendants' Motion
For Summary Disposition*

POKAGON BAND OF POTAWATOMI
INDIANS,

Defendants.

RULING ON DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION:

This matter is based upon a *Complaint* filed on January 14, 2008 by Plaintiff against Defendants. In short, the *Complaint* alleges that Defendants deprived Plaintiff of property without due process of law by denying him the severance pay that was part of an employment contract between the parties. Plaintiff asks this Court to: (1) award payment of salary for two weeks, for failure to give reasonable notice of intent to terminate the contract; (2) enforce the severance provision of the contract; (3) award interest; (4) award reimbursement of attorney fees and other costs; and (5) grant other relief as the Court deems equitable and appropriate.

Defendants filed their *Answer To Complaint* on February 02, 2008. The answer asserts that this Court lacks subject matter jurisdiction over the suit and personal

jurisdiction over the Defendants based upon tribal sovereign immunity. Furthermore, it is asserted that this Court lacks the authority to grant the relief requested. Thus, Defendants ask for a dismissal and an award of their costs.

A *Scheduling Conference* was conducted by this Court on March 04, 2008 at which time a briefing schedule on Defendants' affirmative defenses was set to move this matter forward. The oral argument on Defendants' request for summary disposition and dismissal was held on June 10, 2008.

The threshold issue presented to the Court in this matter is whether the Tribal Court has jurisdiction, i.e. the authority and/or power, to hear Plaintiff's suit and award the relief requested.

II. CASE ANALYSIS AND REASONING:

A. Summary Disposition Standards:

Defendants' Memorandum of Law in Support of Motion for Summary Disposition clearly and concisely lays out the universally-accepted legal standards and the test for granting summary disposition. The current Tribal Court rules do not address motions for summary disposition. Therefore, the Court must look to the rules of practice and evidence in effect in the courts of the State of Michigan. See Pokagon Band Tribal Court Code, Section 7(B). Those are the standards and the test utilized by this Court. Those **standards** are as follows: (1) for motions under MCR 2.116(C)(7), which tests whether a claim is barred because of immunity, the Court must consider all documentary evidence filed or submitted by the parties; and (2) for motions under MCR 2.116(C)(8), the Court must accept all well-pleaded factual allegations as true and construe in a light most favorable to the non-moving party. See Glancy v. Roseville, 457 Mich. 580, 583; 577 N.W. 2d 897 (1998) and *Davis v. City of Detroit*, 269 Mich.

App. 376, 378, 711 N.W. 2nd 462, 464 (Mich. App., 2005). The **test** is whether the alleged claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

B. Application of the Standards and the Test:

(1) The Arguments:

Defendants argue that tribal sovereign immunity protects them against this suit. Article XVIII, Section 1 of the Pokagon Band Constitution provides that “[t]he Pokagon Band, as a sovereign Indian Nation, is immune from suit in all forums except to the extent that immunity is expressly waived as provided in this Article.” Defendants point out that only the express limitations on absolute protection involve suits by members for declaratory or injunctive relief. Defendants argue that Plaintiff is seeking damages for the alleged breach of contract.

Plaintiff argues that the contract gives him a property right of which he cannot be deprived without due process of law. He points out that Article XVI of the same Tribal Constitution contains a prohibition against the deprivation of the property of any person without due process. Furthermore, he argues that the severance pay that was agreed to by the parties is property. Defendants argue that the contract is not property and therefore the due process mandates of the Tribal Constitution are not implicated. Both parties point out that tribal law has not addressed what is a property right.

Additionally, Plaintiff argues that Article XX of the Tribal Constitution provides protection against the impairment of any contract. He further argues that the action of Tribal Council to deny him the agreed upon severance pay is an impairment of his contract.

(2) Application of Summary Disposition Test:

The test restated is "whether the alleged claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." Application of this test leads this Court to grant *Defendants' Motion for Summary Disposition* based upon the following analysis:

(a) Tribal Sovereign Immunity Under Federal Law

In regard to lawsuits against Indian tribes for money damages, the inherent sovereign immunity of Indian tribes is well-established and has been long recognized in the law. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). The United States Supreme Court has consistently held that Indian tribal governments have sovereign immunity unless such immunity has been **expressly waived** by either Congress or the particular tribal government. See *Santa Clara*, supra, p.58. It is federal law which provides the parameters for tribal sovereign immunity. Also, see *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700 (1998).

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).

Federal recognition of the Pokagon Band of Potawatomi Indians was affirmed by the United States Congress on September 21, 1994. See P.L. 103-323, Section 2. The statute **expressly provides** that “*all Federal laws of general application to Indians and Indian tribes ...shall apply ...to the Band and its members.*”

(b) Tribal Sovereign Immunity Under Tribal Law

Having found that Congress has not waived tribal sovereign immunity, the threshold issue identified at the outset becomes narrower. It is whether the Tribe itself has waived its immunity to allow the present suit.

The inherent sovereign immunity of Indians tribes recognized by federal law is also recognized by tribal law. See *Pokagon Band Tribal Constitution, Article XVIII, Tribal Court Code, Section 3(A)(1)(c)* and *Tort Claims Ordinance, Section 4*. These laws require **express written** waivers of sovereign immunity. See *Drake v. Pokagon Band of Potawatomi Indians and Tribal Council*, Consolidated Cases No. 04-001-CV and No. 04-005-CV (2004). Without an express waiver the Band, its officials and employees, and/or subordinate entities or enterprises cannot be sued.

(c) Application of Instant Facts to the Law

The difficulty of this case, in viewing the pleadings in the light most favorable to Plaintiff, is that Plaintiff **may** not have been treated fairly. There are indications that such was the case. However, they are **only indications** as the facts have not been established. Application of the law of sovereign immunity will deny Plaintiff the opportunity to be heard and to make his arguments.

Although justice may be “in the eye of the beholder”, there can be

no doubt that justice is and has been a basic human struggle throughout history. It is striking how "law" has been used by those in power to suppress others. The post-contact history of American Indians stands as a strong testament for that proposition.

"Great nations, like great men, should keep their word." See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), quoting Justice Black in dissent. American Indians have suffered greatly at the hands of a dominant power that did not keep its treaty-making words to them. Plaintiff says Defendants did not keep their word. In fact, Plaintiff complains that Defendants did not keep their written promises to him, *i.e.* the written contract. Defendants argue that they did keep their word. However, the truth will not be revealed in public because of the protections of sovereign immunity. The Court can't help but wonder how the *Seven Grandfathers* would judge the actions/inactions of the principal actors in this matter. Would they demand as a matter of cultural traditions that one treat others as he or she would have them treat him or her?

In an attempt to avoid the sovereign immunity bar, Plaintiff argues that Defendants have deprived him of property without due process. However, Plaintiff does not cite a single case for the proposition that the contract gives rise to a property right. That means Plaintiff would have this court do what no other court has done. Many courts in many different jurisdictions in many cases throughout modern jurisprudence have not done what is asked of this Court. This Court has diligently researched the law itself in an attempt to provide Plaintiff "his day in court" if he is entitled

to it, couldn't find any case law either, and has come to the legal conclusion that contracts create "personal interests" not "property rights". See Stoebeuck, *The Law of Property*, 3rd Ed., p. 4 specifically providing the example of "*the interest in performance of promises made by the other party to a contract*" as a 'personal' interest in contradistinction to a property right.

Plaintiff argues that Tribal Council's actions amount to an "impairment" of his contract in violation of a constitutional protection against impairment of contracts. See *Pokagon Band Tribal Constitution*, Article XX. He argues that the availability of his judicial remedies was affected by the actions of Tribal Council. Defendants argue that Plaintiff never did have a judicial remedy because the Court never had any authority to hear his claims anyway due to its immunity. It is clear to the Court, as a matter of logic, that Tribal Council cannot take away something from Plaintiff that he does not possess. Since Plaintiff never did have a judicial remedy available to him, the actions of Tribal Council were not an impairment of his contract.

It is unfortunate for Plaintiff that he did not bargain for a waiver of sovereign immunity. Given position and length of employment with the Band, he had to have known of the protections provided by law, the important public policy considerations implicated and how to protect "the benefits of his bargain".

III. CONCLUSION AND HOLDING:

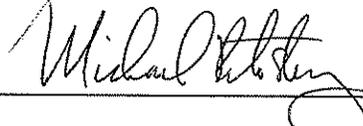
Plaintiff fails in his contract claims because there is no waiver of sovereign

immunity in the contract or elsewhere. Plaintiff's due process claims fail because there was no deprivation of a property right. Lastly, there was no impairment of his contract because he never did have a judicial remedy.

IV. ORDER:

FOR ALL OF THE FOREGOING, THIS COURT GRANTS DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION AND DISMISSES PLAINTIFF'S CLAIMS.

August 13, 2008



MICHAEL PETOSKEY
CHIEF JUDGE