

**POKAGON BAND OF POTAWATOMI INDIANS
TRIBAL COURT**

ROBERT E. SODERBURG,

Plaintiff,

v.

Case No. 07-150-CV

POKAGON BAND OF POTAWATOMI
INDIANS TRIBAL COUNCIL;

*Ruling on Defendants' Motion
For Summary Disposition*

POKAGON BAND OF POTAWATOMI
INDIANS;

TRUDY LOEDING, Individually; and

TOM WESAW, JR., Individually,

Defendants.

RULING ON DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION:

This matter is based upon a *Complaint* filed on November 01, 2007 by Plaintiff against Defendants. In short, the *Complaint* alleges that Defendants breached their contract with him, deprived him of property without due process of law, and that his termination is void because two (2) of the Tribal Council members voting to terminate his employment should have not voted because they each had a conflict of interest.

Plaintiff filed an *Amended Complaint* on January 28, 2008 which contains two (2) counts: tortious interference with contract and breach of contract. Plaintiff asks this Court to award compensation loss due to termination of the contract, to enforce the

severance provision of the contract, to award interest, to award reimbursement of attorney fees and other costs, and to grant other relief as the Court deems equitable and appropriate.

Defendants filed their *Amended Answer To Amended Complaint* on February 28, 2008. In short, the answer asserts that this Court lacks subject matter jurisdiction over the suit and personal jurisdiction over the Defendants based upon tribal sovereign immunity, the Court lacks jurisdiction over the Individual Defendants because they are both elected officials of the Band acting within the scope of their authority, and that the Court should abstain from hearing claims with regard to ethics violations because such matters are reserved to the Tribal Council and the Ethics Board under the Tribal Constitution.

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 any of Plaintiff's claims and award the relief requested.

II. CASE ANALYSIS AND REASONING:

A. Breach of Contract Claims:

In relation to the breach of contract claims, this matter is legally indistinguishable from *Fenderbosch v. Pokagon Band of Potawatomi Indians*, Case No. 08-201-CV, except as it relates to the two named individual Tribal Council member Defendants. Therefore, this portion of the case analysis and reasoning is virtually the same as that case, except as it relates to those two Defendants.

1. 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.*

2. Application of the Standards and the Test:

(a) 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.

(b) 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:

(1) 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.*”

(2) 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.

(3) 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 against all Defendants.

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?

Plaintiff argues that the two named individual Tribal Council member Defendants had a conflict of interest. However, it is clear that tribal officials are protected by tribal sovereign immunity **unless they act outside the scope of their authority**. Reading the pleadings and related documents in a light most favorable to the Plaintiff, the primary allegation is that the two individual Tribal Council member Defendants voted to terminate Plaintiff’s employment. Voting is what elected representatives do. Whether each should have abstained from voting in this matter is considered below under the analysis of the second count.

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 Stoebuck, *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.** “*What distinguishes ‘property’ from ‘personal’ interests is that ‘property’ interests...*” generally “*...relate to ‘things’...*” (in this instance, the contract) and are “*...protected by the law against an indefinitely large number of persons (‘the world’)*”. However, a contract runs only between a very limited number of parties. Therefore, it is a personal interest and not one of property.

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 his 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”.

B. Tortious Interference With Contract Claims:

Plaintiff claims that the two named individual Tribal Council member Defendants

should not have voted in the Tribal Council action to terminate his employment because each had a conflict of interest. He alleges that Tribal Council member, Trudy Loeding, had repeatedly harassed him, attempted to coerce, and threatened to “get” him in her efforts to protect the employment of her niece who was under his supervision. Plaintiff was the Director of the Department of Housing, Planning and Development which includes the facilities cleaning division of Tribal Maintenance. In addition, Plaintiff alleges that Tribal Council member, Tom Wesaw Jr., had a conflict of interest also. Plaintiff states that the Housing Department was doing work done on the Tribal Council member’s home. Plaintiff alleges that Tom Wesaw Jr., was upset that “the assessment of his home did not include a new roof.” Plaintiff further alleges that Tribal Council member Wesaw made it clear that he wanted a new roof. Thus, Plaintiff argues that both of the above Tribal Council members had a conflict of interest, should have not voted in any action involving his termination, and that their failure to abstain resulted in governmental action which should not have occurred due to lack of a quorum. Furthermore, Plaintiff complains that the governmental action occurred without any notice to him, no opportunity to hear the reasons used to justify the action, and no opportunity to be heard or defend. To Plaintiff these are matters of basic fairness and, in fact, matters that he thought were promised to him by virtue of his employment contract.

Defendants argue that conflict of interest and other matters of ethics are reserved for Tribal Council and Ethics Board consideration. Defendants further argue that the exclusive reservation under the Tribal Constitution precludes the courts of the Tribe from exercising jurisdiction over ethics matters.

The Tribal Constitution expressly mandates that the Tribal Council establish, by legislation, a Code of Ethics to govern the conduct and activities of Tribal Council members. *See Pokagon Band Const.*, Art. XVII, Sec. 3. Among other things, the mandate includes a duty to establish an “Ethics Board” and define instances involving

conflict of interest such as would require Tribal Council members to abstain from voting. Tribal Council has not yet adopted the Code of Ethics.

Plaintiff would have this Court look to the standards involving conflict of interest in the *Finance Board Ordinance*. Defendants argue that the *Ordinance* only applies to the actions of the Finance Board and that "it would be incorrect and improper to read the determination of conflict of interest as provided in the Finance Board Ordinance and apply it to the actions of Tribal Council".

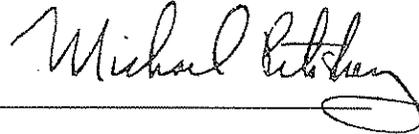
This Court agrees with the arguments of Defendants because it is clear that the People of the Band, through their adoption of the Tribal Constitution, delegated the policing power relative to ethics violations to Tribal Council and a yet to be established Ethics Board. Although, in the infancy of the Band as a federally-reaffirmed tribal government, an Ethics Code has not yet been adopted nor an Ethics Board yet been established, it is clear, under the Tribal Constitution, that allegations that ethics standards have been violated should be raised with Tribal Council.

III. CONCLUSION AND HOLDING:

Plaintiff fails in his contract claims because there is no waiver of sovereign immunity in the contract or elsewhere. Thus, the Court does not have jurisdiction. Furthermore, the Court does not have the power to grant the relief requested. Plaintiff's due process claims fail because there was no deprivation of a property right. Plaintiff's impairment of his contract claim fails because he never did have a judicial remedy. Plaintiff's claims against the two named individual Tribal Council member Defendants fail due to the tribal sovereign immunity protections which extend to Tribal officials.

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

September 23, 2008

A handwritten signature in cursive script, reading "Michael Petoskey", written over a horizontal line.

MICHAEL PETOSKEY
CHIEF JUDGE