

POKAGON BAND OF POTAWATOMI INDIANS

TRIBAL COURT

MARSHA HALFORD,
Plaintiff

Case No: 14-2709-CV
14-2710-CV
14-2711-CV

-vs-

FOUR WINDS CASINO, and

HON. DAVID M. PETERSON

CHRISTINE GUIMOND, in her official
capacity, and

BARRY RHODES, in his official capacity,

Defendants

Joni M. Fixel (P56712)
Attorney for Plaintiff
Fixel Law Offices, PLLC
4084 Okemos Road, Suite B
Okemos, Michigan 48864
(517) 332-3390
jfixel@fixellawoffices.com

Tobin H. Dust (P36741)
Humphreys, Campbell, Dust & Humphreys, PC
Attorneys for Defendants
5090 State Street, Bldg A, Suite One
Saginaw, Michigan 48603
(989) 792-2552
tdust@hcdh-law.com

OPINION AND ORDER

INTRODUCTION

A. Procedure

On or about May 6, 2014, Plaintiff, Marsha Halford (“Halford”) filed a Summons and Complaint against Christine Guimond in Case No. 14-2709 and Four Winds Casinos¹ in Case No. 14-2710, and Barry Rhodes in Case No. 14-2711. All the cases are essentially based on the same facts, involving the same law, and have therefore been joined by

¹It was agreed by both Plaintiff and Defendants at the oral argument on the Motion for Summary Disposition that the proper party defendant in place of the Four Winds Casinos would be the Pokagon Gaming Authority, d/b/a Four Winds Casino Resort, which is an unincorporated governmental instrumentality of the Pokagon Band of Potawatomi Indians, a sovereign, federally recognized Indian Tribe.

agreement of the parties in their pleadings and during oral argument. The Defendants in each case are collectively referred to as “Defendants” in this Opinion.

On or about June 11, 2014, the Defendants filed a Motion for Summary Disposition, the Defendants having elected to file the motion pursuant to MCR 2.111 rather than file an answer to the Complaint. In addition to the motion, the Defendants also filed their supporting brief.

On or about July 18, 2014, Halford filed her Brief in Opposition to Defendants’ Motion to Dismiss. On or about July 21, 2014, Defendants filed their Reply Brief to Halford’s Answer to Defendants’ Motion for Summary Disposition. Thereafter, on September 25, 2014, oral arguments were held.

B. Pleadings

Halford’s Complaint claims she was employed in various capacities at the Defendant Authority from approximately April of 2008 until June of 2011 (¶7 of Complaint). Count One of her Complaint alleges disparate treatment in violation of the Pokagon Band of Potawatomi Indians Civil Rights Ordinance by discriminating against her by virtue of her gender and sexual orientation. In Count Two Halford claims Defendant Rhodes and Defendant Guimond both intentionally interfered with her business relationship with the Defendant Authority.

Defendants all assert Halford’s claim is barred by sovereign immunity and fails to state a claim upon which relief can be granted. Further, Defendants Guimond and Rhodes also assert the Tort Claims Ordinance does not provide for a “tortious interference with a business relationship” cause of action.

Defendants' Motion for Summary Disposition is brought pursuant to MCR 2.116(C)(7) (sovereign immunity) and MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted). In essence, Defendants argue that the Court must dismiss Plaintiff's lawsuit because Defendant Authority, and the individual Defendants, are agents or instrumentalities of the Pokagon Band of Potawatomi Indians, a federally recognized Indian Tribe, which is immune from unconsented suit and therefore, the Court lacks subject matter jurisdiction. The Court has studied and analyzed the pleadings, including the Complaint, motions and supporting briefs, opposing briefs and reply, and heard oral arguments in Open Court.

After considering the matter in its entirety and the arguments made by both parties, the Court grants Defendants' Motion for Summary Disposition.

ADOPTED LAW

Since the current Tribal law does not address motions for summary disposition nor the applicable substantive law, according to the Tribal Court Code (10-21-2002), the Tribal Court must look to the rules of practice and procedure and substantive law of Michigan (see Section 7.B and 8 of the Pokagon Band of Potawatomi Indians Tribal Court Code and Section 11 of the Tort Claims Ordinance).

STANDARD OF REVIEW

Motions filed pursuant to MCR 2.116(C)(7) do not test the merits of the claim but rather certain defenses that may eliminate the need for a trial. When reviewing a motion under MCR 2.116(C)(7), courts accept as true the plaintiff's well pled allegations and

construe them in the light most favorable to the plaintiff. *DMI Design and Manufacturing, Inc. v ADAC Plastics, Inc.*, 165 Mich App 205, 208-209 (1987).

It is well settled law that a court may grant a motion for summary disposition pursuant to MCR 2.116(C)(8) when, based on the sufficiency of the pleadings, the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Wade v. Dept. of Corrections*, 439 Mich 158, 163 (1992).

A motion for summary disposition brought under MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. *Maiden v Rozwood*, 461 Mich 109 at 119. Summary disposition should be granted under MCR 2.116(C)(8) if the court determines that the defendant has no legal duty to the plaintiff. *Levendoski v Geisenhaver*, 375 Mich 225 (1965).

ANALYSIS

The motion seeks dismissal of this lawsuit under MCR 2.116(C)(7) because the Pokagon Band of Potawatomi Indians is a federally recognized Indian Tribe and, therefore, it asserts, immunity from unconsented lawsuits. Defendants further argue that the Pokagon Band of Potawatomi Indians has not waived its sovereign immunity and Congress has not abrogated its sovereign immunity for this tort claim. Therefore, Defendants assert the Court lacks subject matter jurisdiction over the lawsuit.

The Supreme Court confirmed in 1991 that Indian Tribes, exercise inherent sovereign authority over their members and their territory. Suits against Indian Tribes are thus barred by sovereign immunity absent a clear waiver by the Tribe or congressional

abrogation. *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe*, 498 US at 509. An Indian Tribe's immunity from suit "is a necessary corollary to Indian sovereignty and self governance." *Three Affiliated Tribes v Wold Engineering*, 476 US 877, 890 (1985).

"Tribal sovereign immunity may extend to subdivisions of a Tribe, including those engaged in economic activities, provided the relationship between the Tribe and the entity is sufficiently close to properly permit the entity to share in the Tribe's immunity." *Breakthrough Mgmt Group, Inc v Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010), cert. dismissed; see also *Native American Distributor v Seneca-Cayuga Tobacco Co*, 546 F.3d 1288, 1292 (10th Cir. 2008) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation").

A waiver of a Tribe's immunity by Congress or by the Tribe must be "unequivocally expressed" and will not be inferred. *Santa Clara Pueblo v Martinez*, 436 US 49 (1978).

Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by motion pursuant to MCR 2.116(C)(7). "Indian Tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v Martinez*, 436 US 49, 58 (1978). As a consequence, suits against Tribes are barred unless: (1) the Tribe unequivocally expresses a waiver; or (2) Congress abrogates the Tribe's immunity. See *id* explaining that without congressional authorization, the Indian nations are exempt from suit and "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed".

This Court takes judicial notice that the U.S. Department of Interior recognizes the Pokagon Band of Potawatomi Indians as an Indian Tribe. Therefore, well settled Supreme Court precedent immunizes the Pokagon Band of Potawatomi Indians from suit. See *Kiowa Tribe of Oklahoma v Mfg. Tech, Inc.*, 523 US 751, 754-56 (1998) (stating that “the doctrine of Tribal immunity is settled law and controls this case”).

The Plaintiff brings her action against the Defendants under the Pokagon Band of Potawatomi Indians Civil Rights Ordinance, Section 2. K. which provides in pertinent part:

The Pokagon Band of Potawatomi Indians (the “Band”), in exercise of self government shall not:

K. discriminate against any person on the basis of sex, age (because they are elderly), physical disability or sexual orientation.

The Pokagon Band of Potawatomi Indians waiver of sovereign immunity is contained at Section 3 which provides in pertinent part:

The Pokagon Band of Potawatomi Indians Tribal Court (the “Tribal Court”) shall have jurisdiction over claims for violations of the provisions of Section 2 brought against the Band, its Tribal Council, its governmental agencies, or its governmental officials for declaratory or injunctive relief.

The Tribal Court shall have jurisdiction to award only declaratory and injunctive relief (emphasis added) for claims brought under this ordinance, provided however, the Tribal Court may award a reasonable attorney fees and costs to a claimant.

In Plaintiff’s brief in opposition to Defendants motion, the Plaintiff asserts that the Defendants cannot claim sovereign immunity under 42 USC 2000-7(a) which states: (1) a state shall not be immune under the 11th Amendment of the Constitution of the United States from suit in Federal court for violation of Section 504 of the Rehabilitation Act of 1973 [29 USCA §794], Title IX of the Education Amendments of 1972 [20 USCA §1681, *et seq*], the Age Discrimination Act of 1975 [42 USCA §6101, *et seq*], VI of the Civil Rights

Act of 1964 [42 USCA §2000 d, *et seq*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

It should be further noted that immunity under 42 USC 2000-7(a) applies to “suit in federal court”. This Court is not a federal court.

The Defendant counters the above position because the Pokagon Band of Potawatomi Indians is not a state and under 2000 e(b) which provides in pertinent part:

(b) The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the government of the United States, an Indian Tribe...

Indian Tribes have the same general authority as other governments to create agencies for governmental and commercial purposes, and those entities enjoy the Tribe's immunity from suit unless waived by Congress or by the Tribe. *Hagen v Sisseton-Wahpeton Community College*, 205 F.3d 1040 (2000).

Therefore, based on the above, this Court finds that the Pokagon Band of Potawatomi Indians and its Pokagon Gaming Authority, and its employees are shielded by sovereign immunity which has not been waived except for declaratory or injunctive relief and are not subject to the exclusions from sovereign immunity under 42 USC 2007(a) because the Pokagon Band of Potawatomi Indians (and its agents, employees, and instrumentalities) are exempt from 42 USC 2007(a) by virtue of 42 USC 2000 e(b). For the above reasons, Plaintiff's claims are barred by sovereign immunity.

B. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

The Court, having found this matter is barred by sovereign immunity, need not rule on the Plaintiff's claim of tortious interference with a business relationship. Nevertheless, the Court feels compelled to comment on Count Two of Plaintiff's Complaint.

Although it does not appear the Plaintiff's claim in Count Two is brought under the Pokagon Band of Potawatomi Indians Tort Claim Ordinance, such a claim would fail. Section 4 of the Tort Claims Ordinance provides a limited waiver of sovereign immunity as follows:

As to all matters within the scope of this ordinance, the sovereign immunity of the Band shall continue in full force and effect except to the extent that is expressly waived by this ordinance.

B. The gaming enterprise may be used (sued) solely in the Pokagon Tribal Court. The Band does not waive the immunity of the gaming enterprise from suit in state or federal court, or for any claims not specifically described in subsection (C) below.

Therefore, the claims by the Plaintiff do not fall within the Tort Claims Ordinance because there was no claim of negligence in the performance of the Defendants' duty during or within the scope of their employment and is not the result of the property being in a dangerous condition as required in the Ordinance.

CONCLUSION

After the Court's reading of the pleadings of both parties and its research, this matter is barred by sovereign immunity and the Court finds there was not a tortious interference with a business relationship that is cognizable by this Court. Absent an unequivocal waiver by the Pokagon Band of Potawatomi Indians or any contrary legislative

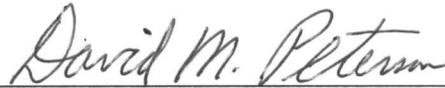
intent, the Court concludes that the doctrine of sovereign immunity bars the Plaintiff's suit. Therefore, the Court grants the Defendant's motion and dismisses this lawsuit.

ORDER

Based on the reasons set out above, the Court finds the Plaintiff's claims are barred by sovereign immunity and the Plaintiff has failed to state a claim upon which relief can be granted and all Defendants are entitled to an order of dismissal.

IT IS SO ORDERED.

Dated this 23rd day of October, 2014.



David M. Peterson, Tribal Judge