

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN :  
 :  
 v. : C.A. No. 13-185S  
 :  
 NARRAGANSETT INDIAN :  
 TRIBE :

**MEMORANDUM AND ORDER**

Plaintiff Douglas Luckerman is an attorney who previously represented Defendant Narragansett Indian Tribe. In 2013, Plaintiff sued the Tribe in State Court for breach of contract, alleging that the Tribe failed to fully compensate him for his legal services. The Tribe removed the case to this Court and moved to dismiss arguing that (1) it is immune from suit under the doctrine of Tribal Sovereign Immunity; (2) the dispute is within the exclusive jurisdiction of its Tribal Court; and (3) Plaintiff failed to exhaust Tribal Court remedies. (Document No. 8-1 at pp. 2-3). On August 29, 2013, Chief Judge Smith denied the Tribe’s Motion to Dismiss. (Document No. 16). He held that the Tribe had expressly waived its sovereign immunity in its 2003 and 2007 agreements with Plaintiff. Id. at p. 5. However, he also concluded that the Tribal Court had “at least a colorable claim” of Tribal jurisdiction over this suit and deferred to it to conduct the jurisdictional analysis “in the first instance” “subject to review by this Court.” Id. at pp. 11-13. Accordingly, he exercised his discretion to stay this action pending Tribal exhaustion.<sup>1</sup> Id. at pp. 13-14.

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<sup>1</sup> Chief Judge Smith made clear in his decision that “[s]hould the tribal court assert jurisdiction and adjudicate the merits of the case, Plaintiff may return to this Court for review of the jurisdictional issues.” (Document No. 16 at p. 14).

## Discussion

Plaintiff now moves to vacate the stay. (Document No. 45). He argues that “[i]t has now become clear that the Tribe does not have a properly constituted and functioning tribal court, and that its representations to the contrary were made in bad faith.” Id. at p. 1. He asks that this Court vacate the stay and, after appropriate briefing and argument, address the Tribe’s contention that Plaintiff’s claims are within the exclusive jurisdiction of the Tribal Court. Id. The Tribe objects and points to the activities of the Tribal Court as evidence that it is properly constituted and functioning. (Document No. 49).

While the stay was entered over three years ago, some of the delay in this matter is attributable to the Tribe’s unsuccessful interlocutory appeal to the First Circuit Court of Appeals. The Tribe filed its Notice of Appeal on January 17, 2014. (Document No. 24). The Appeal was dismissed for lack of jurisdiction on May 29, 2015. (Document No. 38). On February 28, 2014, Judge Dowdell of the Tribal Court granted, in a five-page Memorandum, the Tribe’s request to stay Tribal Court proceedings pending outcome of the appeal. (Document No. 46-8 at pp. 3-7). On June 25, 2015, Judge Dowdell issued a one-page Order granting Plaintiff’s Motion to Vacate the stay due to the dismissal of the Tribe’s appeal. (Document No. 46-10 at p. 2). She also called for suggested dates from the parties to hold a conference.<sup>2</sup> Id. Ultimately, a briefing schedule was established and, in October of 2015, the parties submitted briefs to Judge Dowdell on the issue of Tribal Court jurisdiction. (Document No. 46 at p. 8). Judge Dowdell acknowledged receipt on October 30, 2015. Id. On December 2, 2015, Plaintiff submitted a supplemental filing to bring a recent Seventh Circuit

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<sup>2</sup> On April 4, 2014, Judge Dowdell held an initial conference with counsel to discuss “housekeeping and procedural matters.” (Document No. 46 at p. 7).

decision to Judge Dowdell's attention. Id. at p. 9. On January 26, 2016, Plaintiff's counsel wrote to Judge Dowdell on the status of the matter. (Document No. 46-11). The Tribal Court did not respond to the writing and, to date, has not held any further proceedings or issued any rulings on this matter. However, on July 21, 2016, the Tribal Court issued a Preliminary Injunction in an unrelated case and scheduled a court hearing for August 17, 2016. (Document No. 49-6).

In Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985), the Supreme Court enumerated three exceptions to the so-called tribal exhaustion doctrine. It recognized, inter alia, that tribal exhaustion is not required "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." Id.

Plaintiff here contends that it should be excused from exhaustion as futile because the Tribe does not have a properly constituted or functioning Tribal Court.<sup>3</sup> Plaintiff has not presently made a sufficient showing of futility to warrant vacating the stay. As noted by Judge Smith in his 2013 ruling, the Tribal exhaustion doctrine is rooted in principles of tribal autonomy and comity. (Document No. 16 at pp. 7-8). When boiled down, Plaintiff's argument is primarily based on the Tribal Court's several-month delay in ruling on the issue of tribal jurisdiction. However, it has been held that "[d]elay alone is not ordinarily sufficient to show that pursuing tribal remedies is futile." Johnson v. Gila River Indian Cmty., 174 F.3d 1032, 1036 (9<sup>th</sup> Cir. 1999). See also Basil Cook Enter., Inc. v. St. Regis Mohawk Tribe, 26 F. Supp. 2d 446, (N.D.N.Y. 1998) (rejecting attempt to

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<sup>3</sup> Plaintiff relies in part on an Affidavit of the Tribe's Chief Sachem Matthew Thomas dated December 2, 2014. (Document No. 46-15 at p. 5-6). Plaintiff contends that Chief Thomas "advised the appellate arm of the Bureau of Indian Affairs...that the Tribe's court had been 'suspended.'" (Document No. 46 at p. 5). Plaintiff neglects to point out that the indication of suspension was qualified by the statement "except for a singular and unrelated issue" which presumably refers to this pending matter.

divest Tribal Court of jurisdiction as a non-functioning entity in part because the Tribal Court had rendered decisions in two separate matters within the last six months).

While an extreme and inordinate delay in adjudication may ultimately support a futility argument, we are not there yet. The issue of tribal jurisdiction is complex and likely not frequently litigated in a Tribal Court. Further, the Supreme Court in Nat'l Farmers held that the Tribal Court must determine the scope of its jurisdiction in light of federal law and must conduct "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 855-856. Moreover, Chief Judge Smith cautioned that "[t]he care with which the tribal court conducts its jurisdictional analysis as well as the conclusions reached are, of course, subject to [his] review." (Document No. 16 at p. 13) (emphasis added).<sup>4</sup> Thus, it is not surprising that the Tribal Court took the matter under advisement and has not rushed to judgment on the issue.

### **Conclusion**

For the foregoing reasons, Plaintiff's Motion to Vacate Stay (Document No. 45) is DENIED without prejudice.

SO ORDERED

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
September 30, 2016

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<sup>4</sup> When the issue of tribal exhaustion was litigated before Chief Judge Smith in 2013, it does not appear that Plaintiff claimed that the Tribe did not have a properly constituted and functioning Tribal Court or sought discovery on that issue.