

**St. Regis Mohawk Tribal Court**

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<b>Sylvain Shank,</b>	)	
<b>Plaintiff</b>	)	<b>DECISION AND ORDER</b>
	)	
-V-	)	<b>Case No.: 11-CIV-00009</b>
	)	
<b>Curtis/Louise Thompson,</b>	)	
<b>Respondent(s)</b>	)	

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**Procedural History**

Sylvain Shank, on behalf of himself, filed a civil complaint in St. Regis Mohawk Tribal Court on November 1<sup>st</sup>, 2011, against Curtis and Louise Thompson for breach of contract, restoration of medical expenses, loss of days four (4) of work, and pain and suffering, seeking monetary relief in the amount of \$29,700 plus court fees, and filing fees.<sup>1</sup> A proof of service was filed with the Court on December 1<sup>st</sup>, 2011 showing that the complaint and civil summons was served upon the Respondents in accordance with the St. Regis Mohawk Tribe Rules of Civil Procedure (hereinafter SRMT Rules Civ. Pro).<sup>2</sup>

On December 20<sup>th</sup>, 2011 a Notice of Appearance was filed with the Court by Ms. Lorraine White, stating that she would be representing Mr. Curtis and Ms. Louise Thompson (Respondents) in the matter at bar.<sup>3</sup> A request for an extension of 30 days to file an answer/counterclaim with the Court by the Respondents was submitted the same day.<sup>4</sup> The Court granted the request for a 30 day extension on December 28<sup>th</sup>, 2011 making the deadline for the Respondents to answer the complaint and summons January 20<sup>th</sup>, 2012.<sup>5</sup>

The Respondents' answer/counterclaim was filed with the Court on January 18<sup>th</sup>, 2012 in compliance with the new deadline set by the Court. A proof of service was filed on the same day showing that the Respondents' answer/counterclaim was served upon the Plaintiff.<sup>6</sup>

On May 9<sup>th</sup>, 2012 an initial appearance was held in St. Regis Mohawk Tribal Court in this matter. The Plaintiff, Mr. Sylvain Shank, did not appear.

A Pre-Trial Conference was held in St. Regis Mohawk Tribal Court on June 5<sup>th</sup>, 2012 in the matter at bar, with all parties in attendance.

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<sup>1</sup> Complaint November 1<sup>st</sup>, 2011.  
<sup>2</sup> SRMT Rules of Civ. Pro IX [Rule 6] (C).  
<sup>3</sup> December 20<sup>th</sup>, 2011 Notice of Appearance by Lorraine White.  
<sup>4</sup> Request for extension December 20<sup>th</sup>, 2011.  
<sup>5</sup> Request for extension to answer December 28<sup>th</sup>, 2011.  
<sup>6</sup> Proof of Service January 18<sup>th</sup>, 2012.

A request for an extension to answer the Respondents' answer/counterclaim was made by the Plaintiff on June 25<sup>th</sup>, 2012.<sup>7</sup> The Plaintiff's request for an extension was granted on July 9<sup>th</sup>, 2012 with a new deadline of July 24<sup>th</sup>, 2012.<sup>8</sup>

The Plaintiff submitted a revised complaint to the Court on July 24<sup>th</sup>, 2012. The Plaintiff amended his original complaint and sought \$15,270 for breach of contract, \$2,500 for hospital expenses, \$20,000 for loss of twenty (20) days of work, and \$30,000 for pain and suffering.<sup>9</sup>

An amended answer/counterclaim was filed with the Court on August 14<sup>th</sup>, 2012.<sup>10</sup> A proof of service was filed with the Court on the same day showing that the amended answer/counterclaim was served upon the Plaintiff via certified mail/return receipt.<sup>11</sup>

On July 20<sup>th</sup>, 2015 a notice of pre-trial conference was sent to both parties in this matter via certified mail/return receipt by this Court, with a pre-trial conference date scheduled for September 23<sup>rd</sup>, 2015 in St. Regis Mohawk Tribal Court.<sup>12</sup> On September 23<sup>rd</sup>, 2015, the Plaintiff did not appear. The notice sent to him on July 20<sup>th</sup>, 2015 was returned to the Court not deliverable and unable to be forwarded. At the pre-trial the Respondents moved through their attorney to dismiss their counter-claims. The motion was granted and the counter-claims were dismissed by the Court.

A motion to dismiss for failure to prosecute was filed with the Court by the Respondents on September 25<sup>th</sup>, 2015.<sup>13</sup> An affidavit of service by mail was filed with the Court on the same day showing that the motion to dismiss was served upon the Plaintiff at the last known address for him that either the Court or the Respondents' Counsel had.<sup>14</sup>

### **Analysis**

In considering the Respondents' motion to dismiss this action for failure to prosecute citing the Fed. R. Civ. P. 41(b), the Court must make a careful examination as this is a case of 'first impression' for the Court.

The St. Regis Mohawk Tribal Court was formed following a referendum vote of the St. Regis Mohawk Indian Reservation community on June 4<sup>th</sup>, 2005.<sup>15</sup> Following the referendum vote calling for the formation of a Tribal Court, the Court was tasked with the authority to, "Interpret, construe and apply the laws and regulations of the Tribe."<sup>16</sup>

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<sup>7</sup> Request for Extension to Respond to Respondents Answer/Counterclaim June 25<sup>th</sup>, 2012.

<sup>8</sup> Request for Extension Grant July 9<sup>th</sup>, 2012.

<sup>9</sup> Revised Complaint July 23<sup>rd</sup>, 2012.

<sup>10</sup> Amended Answer/Counterclaim August 14<sup>th</sup>, 2012.

<sup>11</sup> Proof of Service August 14<sup>th</sup>, 2012.

<sup>12</sup> July 20<sup>th</sup>, 2015 Notice of Pre-Trial Conference.

<sup>13</sup> Motion to dismiss for failure to prosecute September 25<sup>th</sup>, 2015.

<sup>14</sup> Affidavit of Service by Mail September 25<sup>th</sup>, 2015.

<sup>15</sup> SRMT TCR 2005-54 July 6<sup>th</sup>, 2005.

<sup>16</sup> SRMT Tribal Court and Judiciary Code VI (1).

The Respondents, through their attorney, have requested that the Court dismiss the complaint filed by the Plaintiff on November 1<sup>st</sup>, 2011 citing Fed. R. Civ. P. 41(b), which states, “If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.”<sup>17</sup>

In considering the request for dismissal by the Respondent via Fed. R. Civ. P. 41(b) for lack of prosecution, the Court must decide whether or not the Federal Rules of Civil Procedure are applicable in the matter at bar for such a request to be granted.

Applicability of laws is covered in the SRMT Civil Code, which lays in a hierarchal fashion, laws to be applied by the Court. In fact, the SRMT Civil Code states:

“A. Civil disputes over which the Tribal Court has jurisdiction shall be decided by the Court in accordance with and by applying the following principles of law in the priority and precedence in which the principles of law are first identified below (higher priority and precedence being accorded those identified earliest in the list, so that in the event of inconsistency or conflict between principles of law, the principle of law identified earlier in the list shall be relied upon as the controlling principle for deciding the dispute):

1. Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country (with great weight given at all times to principles of the United States Constitution and federal Indian law which recognize Indian sovereignty, self-determination, and self-government, which render many federal and state laws inapplicable to federal Indian Country, which provide for a federal trust responsibility to Indian tribes, and which provide rules of legal interpretation favorable to Indian tribes).”<sup>18</sup>

The Mohawk written codes that apply in this matter are the SRMT Civil Code and the Rules of Civil Procedure. The SRMT Civil Code states:

“The Tribal Court is hereby further empowered with the inherent judicial authority which is necessary and proper to decide civil disputes over which it has jurisdiction (except as otherwise limited in this Code, is limited by the scope of its jurisdiction, and as limited by Tribal sovereign immunity).”<sup>19</sup>

The SRMT Rules of Civil Procedure further provide that:

“The Tribal Court may apply interpretation of like provisions in the Federal Rules of Civil Procedure in construing these rules. The Tribal Court may authorize special, as well as annotated editions of these Rules of Civil

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<sup>17</sup> Fed. R. Civ. P. 41(b).

<sup>18</sup> SRMT Civil Code V (A) (1).

<sup>19</sup> SRMT Civil Code VII (A).

Procedure, together with any requirement for citations of practice before the Tribal Courts.”<sup>20</sup>

Although SRMT law cited above does not specifically address the dismissal of a civil action/complaint filed with the Court for failure to prosecute, it is clear to the Court that a party has the right to request a body of law or rule that is not part of SRMT law can be applied to an action that they are a party to (upon request to the Court) **AND** that the Court has inherent judicial authority to resolve civil disputes. The Court must then determine if the requested action can be applied as a matter of law by the Tribal Court.

In the matter at bar the Respondents motion to dismiss for failure to prosecute citing Fed. R. Civ. P. 41(b) states that, “The history of this case presents a pattern of “inaction” and “dilatatoriness” on the part of the Plaintiff.” *See*, Motion to Dismiss September 25<sup>th</sup>, 2015. The Court in retracing the history of this case notes that the original complaint was filed nearly 4 years ago.

The record also reflects that the Plaintiff did not appear for two separate pre-trial conferences, repeated attempts to contact Mr. Shank at the phone number he provided to the Court when he filed his complaint proved fruitless. Multiple attempts to contact Mr. Shank via mail to the address he provided to the Court have been futile. The record before the Court shows that Mr. Shank has made no attempts to contact the Court in any form for nearly 4 years. With no evidence that Mr. Shank wishes to pursue his claim in Tribal Court, and with no viable means of contacting the Plaintiff, the Court agrees that there is a clear and identifiable lack of prosecution on the part of the Plaintiff, Mr. Sylvain Shank.

This Court finds that the request by the Respondent to apply Fed. R. Civ. P. 41(b) in this matter is clearly within the authority of the Tribal Court as the SRMT Civil Code and the SRMT Rules of Civil Procedure clearly provide that the Tribal Court is vested with the authority to apply the Federal Rules of Civil Procedure when requested, particularly if the rule that is being requested to be applied is not covered in SRMT Tribal law.<sup>21</sup> Moreover, the Court has inherent judicial authority to decide civil disputes, which includes the power to dismiss a case without prejudice when a plaintiff fails to prosecute his case.

### **Conclusion**

Therefore, due to the failure to prosecute this matter by the Plaintiff, Mr. Sylvain Shank, the St. Regis Mohawk Tribal Court orders that the complaint in this matter be dismissed **WITHOUT** prejudice in accordance with the application of Fed. R. Civ. P. 41(b).

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<sup>20</sup> SRMT Rules of Civil Procedure XXV [Rule 22].

<sup>21</sup> *See*, SRMT Civil Code VI (A).

Signed by my hand this 9<sup>th</sup> day of November 2015



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Carrie Garrow, Associate Judge St. Regis Mohawk Tribal Court