SAINT REGIS MOHAWK TRIBAL COURT

IN AND FOR THE SAINT REGIS MOHAWK TRIBE

Hattie Renee Hart,	)	Case No.: 16 CIV 00004
Plaintiff,	)	
v.	)	**ORDER**
Saint Regis Mohawk Tribe **Chief Eric Thompson** **Chief Beverly Cook** **Chief Ronald LaFrance,**	)	
Defendants.	)	

This matter was commenced by the filing of a *pro se* complaint on May 3, 2016, upon which a summons was issued May 3, 2016. Said complaint alleges that plaintiff was denied her right to vote by defendants' failure to place a Referendum before the tribal members with respect to the expenditure for a capital contribution to Te wa' tha ho'n:ni Corporation, (hereinafter "TWTH") the "for profit" or economic development entity that oversees and administers the Saint Regis Mohawk Tribe's (hereinafter called SRMT or the Tribe) revenue-generating operations. Thereafter on May 6, 2016, plaintiff, again *pro se,* filed a request for a preliminary injunction prohibiting the Tribe from "spending any revenue belonging to the SRMT and its entities, ..."

Marsha K. Schmidt, Esq., defendants' attorney, filed a notice of appearance on their behalf on May 23, 2016. Defendants also filed on May 23, 2016, two separate

notices of motions: one to dismiss the complaint for lack of sufficient service; the other for failure to state a cause of action for which relief can be granted, for lack of an applicable waiver of sovereign immunity, and for lack of subject matter jurisdiction, together with a memorandum of law and opposition to plaintiff's May 6, 2016, request for a preliminary injunction.

On May 31, 2016, plaintiff "requested" a "preliminary injunction" seeking suspension of the three defendant Tribal Chiefs, without pay, alleging "Embezzlement and Theft from Tribal Organization." Plaintiff, at this point, continued to appear *pro se*.

On June 10, 2016, plaintiff filed "plaintiffs' (*sic*) motion to stay the complaint and motion to stay the preliminary injunction" wherein plaintiff asks the Court to "stay my complaint" and "stay" the order of removal requested previously; she requests the "removal of tribal council"; she requests the "stopping of spending tribal funds"; she asks the Court to "review the Investigation done by the Ethics Officer"; and she asks the Court to "void the TCR 2016-01 [the Tribal Council Resolution that approved a capital contribution for Te wa' tha ho'n:ni Corporation], and to return three million five hundred thousand dollars ($3,500,000.00) (hereinafter $3.5 million) to the tribal funds, and to identify the person or persons who allegedly received five hundred thousand dollars ($500,000.00) of those funds. However, despite the title given to the document by plaintiff, it appears to not be a motion to stay anything, but an answer to the defendants' motion to dismiss and a reiteration of plaintiff's demands for relief in her

complaint and in her request seeking suspension or removal of the three defendant Tribal Chiefs.

On June 20, 2016, defendants filed a response to plaintiff's "various pleadings filed."

Subsequently on August 30, 2016, the parties appeared before the Court for a status conference. At that time, plaintiff appeared with counsel, Lillian Anderson-Duffy, Esq., and defendants appeared by their counsel, Marsha K. Schmidt, Esq. Plaintiff was granted leave to file an amended complaint which was subsequently filed, together with plaintiff's opposition to defendants' motion to dismiss, on September 20, 2016. Plaintiff in her amended complaint sets out six separate causes of action, and in addition, adds several defendants: Saint Regis Mohawk Tribal Council; Te wa' tha ho'n:ni Corporation; Mark Martin as Ethics Officer of SRMT; and she also names each of the original three Tribal Chief defendants individually as well as in each's capacity as Tribal Chief.

On September 30, 2016, the original four defendants filed their reply to plaintiff's opposition to defendants' motion to dismiss, motion to strike allegations from the complaint as moot, and affidavit of Dale T. White, Esq., General Counsel for the SRMT, together with a motion to dismiss the amended complaint. Defendants' motion to dismiss the amended complaint did not contain a return date, but indicated it would be heard at a "hearing on a date to be set by the Court." On October 18, 2016, the Court

received from plaintiff's counsel a "second amended complaint". On October 20, 2016, the Court received a letter from counsel for the original defendants alleging that the amended complaint and the second amended complaint have not been properly served upon all named defendants, and that the second amended complaint should not have been filed while the motion to dismiss the first amended complaint is pending.

By Order dated November 4, 2016, this Court denied plaintiff's request for a preliminary injunction prohibiting SRMT from spending its revenues; it denied plaintiff's request for a preliminary injunction suspending without pay, or removing, the three Tribal Chiefs; it dismised the amended complaint as against the added defendants, Saint Regis Mohawk Tribal Council, Te wa' tha ho'n:ni Corporation, and Mark Martin, Ethics Officer for SRMT; and it gave plaintiff until November 18, 2016 to respond to defendants' motion to strike allegations from the amended complaint as moot and to dismiss the complaint as to the original four defendants.

Plaintiff, on November 18, 2016, filed with the Court plaintiff's response to defendants' motion to dismiss, and plaintiff's affidavit in opposition. On November 30, 2016, the Court received original affidavits of Joseph Bowen-Brewer, Special Projects Analyst with SRMT, and Christopher Thompson, Economic Development Director for the Tribe, which affidavits were also attached to defendants' reply to the plaintiff's response to motion to dismiss received from defendants' counsel on December 2, 2016.

Of significance is Exhibit A (a CD recording of the May 14, 2016, monthly Tribal meeting) provided with, and made a part of, plaintiff's affidavit in opposition to

defendants' motion to dismiss received by the Court on November 18, 2016. The Court has reviewed same and has compared it to the affidavits of Dale White, Esq., and Christopher P. Thompson. Plaintiff in her affidavit in opposition, reiterating the allegations of her complaint, argues that the Tribe is "leveraging" the remaining monies or financing the soybean project at issue here, in effect putting forth Tribal funds "on behalf of the partners who were not contributing any cash." She alleges perjury on the part of Mr. White and Mr. Thompson in their aforesaid affidavits. The crux of plaintiff's argument is that the Tribal Chiefs have violated Tribal Law in not providing for a public referendum for the investment made in the Soyway project, made through the Tribe's corporation, Mohawk Soy, which investment is now fixed at two million dollars ($2,000,000.00) (hereinafter $2 million.)[1] Plaintiff's original complaint addressed the alleged investment of $3.5 million made through Mohawk Soy, which exceeds the threshold sum of two million five hundred thousand one dollars ($2,500,001.00) requiring a public referendum for such "expenditure." Defendants argue first that a referendum was *never* required because the transfer of funds from the Tribal general fund to TWTH was a capital contribution for future investment, not an expenditure. Defendants further argue that, were it an expenditure, plaintiff's claim is now moot because the transfer of funds which serves as the basis of plaintiff's complaint has been

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[1] Although plaintiff has alleged that the Tribe's investment will be Twelve Million Dollars ($12,000,000.00) it is clear from the Tribe's presentation and the affidavit of Christopher P. Thompson dated November 30, 2016, that while the Tribe's original investment was to be Three Million Five hundred Thousand Dollars ($3,500,000.00), that amount has been reduced to Two Million Dollars ($2,000,000.00).

amended; that the investment does not reach the threshold which would require a referendum because funds have been returned to the Tribe, and the investment is now fixed at $2 million. Defendants argue that a case may become moot by a change in facts or an action of a party, and that, therefore, any judicial determination in this case would have no practical effect upon the outcome of this case because of the change in circumstances. There would no longer be a real controversy based upon the principle that "courts should decline to decide issues which, by virtue of valid and recognizable supervening circumstances, have lost their controversial vitality."[2]

Further, plaintiff argues that capital "expenditure" and capital "investment" are the same thing. The Court disagrees. An expense is considered to be a capital "expenditure" when there is an "outlay of funds to acquire or improve a fixed asset." Black's Law Dictionary (Ninth Edition). A capital "investment" is an allocation of money (or sometimes another resource) to acquire assets in the expectation of some benefit in the future, in other words, to produce revenue. Black's Law Dictionary (Ninth Edition). As an aside, plaintiff further does not seem to understand the term "leverage." Plaintiff further argues mootness does not lie in this action because if the Court were to find plaintiff's claim is moot inasmuch as the funds have been returned to the Tribe, the Tribal Chiefs would be free to spend Tribal moneys in small increments over time, the total of which would surpass the threshold amount requiring a referendum. The Court finds that plaintiff's opposition to defendants' original motion to dismiss the case as

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[2] 1A C.J.S. Actions Sections 76 and 77.

moot, received September 20, 2016, contains unsubstantiated allegations and inuendo that appear to have no basis in fact and at times don't make sense.

As stated previously, plaintiff filed an amended complaint on September 20, 2016. By its Order of November 7, 2016, the Court dismissed the amended complaint as against defendants, Saint Regis Mohawk Tribal Council, Te wa' tha ho'n:ni Corporation, and Mark Martin, Ethics Officer for SRMT. Plaintiff in her amended complaint set forth six causes of action. She alleges a violation of her due process rights under Indian Civil Rights Act, 25 U.S.C. Section 1302(8). She seeks: (1) to have Tribal Resolution 2016-01 declared null and void; (2) a permanent injunction enjoining the SRMT from pursuing the soybean project until it provides "complete disclosure of the said project's financial, business and realty matters to the Mohawk community"; (3) a return of $3.5 million to the general fund of the Tribe; (4) a direction by the Court that the Ethics officer convene an Ethics Commission to hear said Ethics Complaint with regard to the Tribal Chiefs' unethical and illegal conduct . . .; (5) the convening of an Ethics Commission to "investigate, hear and determine whether [the three Tribal chiefs] . . . acted unethically and if so, to impose an appropriate sanction or penalty"; and (6) the production by the defendants of a full accounting . . . regarding the soybean project and payment of Tribal monies."

Defendants argue that the amended complaint should be dismissed on the grounds that the action is moot, and further that, in any event, this Court lacks

jurisdiction on sovereign immunity grounds, for lack of standing and for failure to state a cause of action.

As required in determining a motion to dismiss, the Court has interpreted the various claims in the light most favorable to the plaintiff. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S., 41`, 47 (1957). However, it requires "more than labels and conclusions". *Papasan v. Allain,* 478 U.S. 265 (1986). As defendants have set out, while a complaint need not provide all details of an allegation, it "must be enough to raise a right to relief above the speculative level . . . ." It "must contain something more than . . . a statement that creates a suspicion [of] a legally cognizable right of action . . . ." *Bell Atlantic Corp. v. Twobly,* 550 U.S. 544, 555 (2007); *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506 (2002). It must be "plausible" on its face. *Bell Atlantic* at 570. Plaintiff does not address this standard in her response to defendants' motion to dismiss. In all of her allegations, plaintiff has set forth unsubstantiated allegations and innuendo[3] that appear to have no basis in fact, at least no facts shown to the Court.

The Court will address the various causes of action set out in the amended complaint. This Court has already dismissed the amended complaint as to defendants,

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[3] E.g., alleging rumors apparently on facebook, alleging nepotism, secret meetings, presentation to the community of purposely "murky" details of the venture, [cloaking] the soy project in "complete secrecy" and shielding themselves "from accountability to the Mohawk Community," among other things, including "dishonesty and unethical conduct" of the Tribal Chiefs.

SRMT Council, TWTH, and Mark Martin, SRMT Ethics officer. The amended complaint added two new causes of action (fourth and fifth causes of action) with respect to Mr. Martin, the SRMT Ethics officer's, decision to not refer an ethics complaint filed by one Ruth Bell, who is not a party to this action, on April 13, 2016, to the SRMT Ethics Commission. Under SRMT Ethics Ordinance, the Ethics officer is given the discretion to investigate a complaint and determine whether the Ethics commission has jurisdiction and whether a complaint should be referred to the Commission. SRMT Ethics Ordinance Section VIII(H)(2) and (3).[4] There is no provision in the SRMT Ethics Ordinance which would grant the Court jurisdiction to review the decision of the Ethics officer[5] nor to refer any matter to the Ethics Commission directly. Therefore the fourth and fifth causes of action set forth in plaintiff's amended complaint must be dismissed.

The sixth cause of action in plaintiff's amended complaint specifically requests the Court to order a full accounting by defendants "of any and all records of Defendants' actions and financial business and legal activites regarding the soybean project and payment of Tribal monies." The Court has no such power; in other words, the Court lacks jurisdiction to do so. As for the allegation of a violation of the Indian Gaming

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[4] Ms. Bell apparently filed a "complaint" against the SRMT Chiefs, Ronald LaFrance , Beverly Cook and Eric Thompson, which Mr. Martin determined to be three separate complaints, one of which pertained to the activities and actions of TWTH which are the subject of this case. He found that since TWTH is a federally-chartered Tribal Business Corporation under BIA Section 17 (25 U.S.C. Section 477), the SRMT Ethics Ordinance which specifically applies to three Chiefs, three Sub-Chiefs and the Tribal Clerk, does not pertain to the TWTH Board of Directors; therefore, the complaint of Ms. Bell falls outside the jurisdiction of the Ethics Ordinance. (Decision of Mark Martin, SRMT Ethics Officer, dated May 11, 2016.)

[5] SRMT Ethics Ordinance Section X provides for appeals by only an elected official against whom there has been a finding of a violation of the Ethics Ordinance. Any such appeal is heard by an Ethics Commission formed specifically for the purpose of hearing the appeal.

Regulatory Act (IGRA) plaintiff sets out no specific violations, but merely makes a conclusory allegation thereby failing to state any claim upon which relief can be granted. *Papasan v. Allain, supra*; *Bell Atlantic, supra.* The sixth cause of action must be dismissed.

The first, second and third causes of action in plaintiff's complaint, while seeking different relief for each cause of action, all allege a violation of plaintiff's due process rights under the Indian Civil Rights Act, (ICRA) 25 U.S.C. Section 1302(8) and are all based on plaintiff's claim that the SRMT Tribal Procedures Act (TPA) requires the Tribe to hold a referendum to make an investment with "complete disclosure" to the Tribal community for every transaction it makes. That is a misunderstanding of the TPA. The TPA sets out those times when the Tribal Council is required to seek community input. As plaintiff argues, the Tribal Council must call a referendum for a "non-budgeted, non-emergency expenditure" (emphasis added) of Tribal general funds in excess of $2,500,001.00. TPA Section VI(B)(2)(f). Plaintiff seems to also allege that Tribal Council acted improperly in creating TWTH, its economic entity, but the TPA specifically allows for that (TPA Section IV(C)(4)) as well as grants Council the power to establish corporations for profit, such as Mohawk Soy, to issue bonds and borrow money and to negotiate contracts. TPA Sections IV(C)(10)(11) and (12). Plaintiff has set forth several allegations (more like accusations) of wrongdoing on the part of Tribal Council without any proven basis in fact.

The second cause of action in plaintiff's amended complaint requests a permanent injunction enjoining the Tribe and Tribal Council from "spending any monies on [the soybean] project until . . . defendants provide complete disclosure of the project's financial, business and realty matters" to the Mohawk community. There is no requirement in the TPA or elsewhere set out by plaintiff or known to the Court that requires such "disclosure" as alleged by the plaintiff. For this Court to issue such an injunction would be to say the Court is empowered to oversee all actions by Tribal Council which is untrue. It has no jurisdiction to do so. It would impair Tribal Council's ability to act on behalf of the SRMT. The second cause of action must be dismissed.

The third cause of action seeks an order in mandamus for the "return of $3.5 million dollars to the General Fund and/or any other fund from which the monies were taken" on the ground that a referendum was required. Assuming arguendo for the purpose of this cause of action that a referendum was required in this instance, and that the transfer of funds was an "expenditure" over two million five hundred thousand one dollars ($2,500,001.00), sufficient proof has been provided to the Court that one million five hundred thousand dollars ($1,500,000.00) has been returned to the general fund of the Tribe, making plaintiff's request moot. The third cause of action fails to state a claim for which relief can be granted and must be dismissed.

Plaintiff's first cause of action seeks a declaratory judgment against defendants, declaring Tribal Resolution 2016-01 null and void. While four of six of plaintiff's causes of action allege a violation of ICRA Section 1302(8), the others have been addressed on

other bases that exist because the Court felt it necessary. The amended complaint could have been addressed on only the issue of sovereign immunity. Congress enacted the Indian Civil Rights Act, 25 U.S.C. Sections 1301-1341 (ICRA) in 1968, enacting exceptions to tribal immunity in certain circumstances. ICRA makes certain rights set out in the U. S. Constitution Bill of Rights applicable to, and binding on, Indian Tribal governments. However, the Supreme Court has held as a matter of law that an Indian Tribe is subject to suit only where Congress has specifically legislated, or where the Tribe has waived its own immunity. The Court emphasized that there is no distinction between whether a Tribe engages in governmental or commercial activity or where the activity takes place. Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc., 523 U.S. 751 (1998.)

SRMT Civil Code, Section IV(A-F) addresses the issue of sovereign immunity of both the Tribe and its officers. Defendants assert the defense of sovereign immunity. Plaintiff argues defendants cannot hide behind sovereign immunity, and she claims that sovereign immunity is meant to protect Tribal officials and the SRMT from "those outside of the Reserve," not from "their own people . . . " because, she argues, defendants acted *ultra vires* (beyond their legal authority.) SRMT Tribal officers are immune from suit for acts taken within the scope of their official capacity which would include voting on and adopting a Tribal Council resolution or making a ruling regarding an ethics violation. "The officers . . . of the St. Regis Mohawk Tribe are immune from suit for acts or omission within the scope of their official capacity and for acts or

omissions which such officers . . . reasonably believed to be within their official capacity." SRMT Civil Code Section IV(B).

If there is no applicable waiver of sovereign immunity, this Court lacks subject matter jurisdiction over any ICRA claim against the Tribe or its officers. There is no waiver for claims against officers with respect to the actions complained of here. "Tribal sovereign immunity is hereby found and stated to be an essential element of self-determination and self-government, and as such will be waived [by the SRMT] Council only under such circumstances as the [SRMT] Council finds to be in the interests of the Tribe . . . Any such specific waivers of sovereign immunity . . . must be clear, explicit and in writing; any such waivers shall be interpreted narrowly and limited to the explicit terms of the waivers . . . ." SRMT Civil Code Section IV(D). There is no waiver for claims against officers alleged to be violations of ICRA. "The Mohawk Tribe does not assert sovereign immunity against claims for equitable relief brought in Mohawk Court . . . under the federal Indian Civil Rights Act, **but such claims may not be brought against individual Indians or officers** . . . ." SRMT Civil Code Section IV(F) (emphasis added.) Plaintiff may then argue that defendant, SRMT, has waived its claim of sovereign immunity under ICRA with regard to this claim filed in Mohawk Court. However, plaintiff has failed to set out any valid cause of action under ICRA against the Tribe itself. ICRA Section 1302(a)(8) provides that "No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law". Plaintiff

claims she was denied her due process of law by reason of the Tribe's failure to hold a referendum as set out hereinbefore. The Court disagrees. The allegations of plaintiff are first, not based in fact; secondly, the Court has found that under SRMT law a referendum was not required. Based upon the foregoing, the first cause of action, as with all other causes of action set forth by plaintiff must be dismissed.

NOW, THEREFORE, based upon the foregoing, it is

ORDERED that defendants' motion is granted; and it is further

ORDERED that plaintiff's amended complaint in all respects be, and the same hereby is, **DISMISSED.**

Entered by my hand this 28th day of December, 2016.

Barbara R. Potter

HON. BARBARA R. POTTER
Associate Judge