

St. Regis Mohawk Tribal Court

St. Regis Mohawk Tribal Council,)	
Appellant)	
)	
)	Motion for Joinder,
)	Motion for Default Judgment,
)	Motion for Dismissal
-V-)	
)	
John Bero,)	DECISION AND ORDER
Appellee)	
)	Case No.: 14-LND-0006
)	

Factual and Procedural History

Agnes J. Bero and Solomon Garrow entered into a purchase agreement (Articles of Agreement) on May 2, 1962 for what is now known as Lot # 85 on the St. Regis Mohawk Indian Reservation. The property consisted of approximately 1 acre and included a home. A Tribal Use and Occupancy Deed was never issued to Agnes J. Bero for Lot # 85.

On December 12, 2012, Agnes J. Bero requested a Tribal Use and Occupancy Deed be issued to Appellee John Bero, her son, for Lot # 85, which was issued by the Tribal Clerk. On January 22, 2013, Carol Jacobs and Leroy Bero, also children of Agnes J. Bero, sent a letter to the St. Regis Mohawk Tribal Council requesting the land be transferred back to all three siblings, arguing the property had been bought with their trust money and for all three of the siblings. On March 26, 2013, a SRMT Use and Occupancy Deed was issued by the Tribe granting Agnes J. Bero a life estate and transferring the ownership of Lot #85 to Carol Jacobs, Leroy Bero and Appellee.

The Appellee filed a Land Dispute Complaint with the Land Dispute Tribunal (LDT) against the St. Regis Mohawk Tribe (Appellant) on February 19, 2014. The Appellant requested a dismissal arguing the LDT did not have jurisdiction over Appellant due to sovereign immunity and that a correction of a deed was not reviewable under the Land Dispute Resolution Ordinance (LDRO). The LDT declined to dismiss the Appellant as a party. The LDT issued a decision on October 24, 2014, and found the 1962 Articles of Agreement was a valid “Bill of Sale” and that the Appellant erred in rescinding the Appellee’s December 12, 2012 Use and Occupancy Deed. The LDT ordered the Tribal Clerk to rescind the Use and Occupancy Deed of March 26, 2013 and to reinstate the Use and Occupancy Deed dated December 12, 2012 and that the Deed must include a life estate for Agnes J. Bero.

On November 26, 2014, the Appellant filed an appeal with the St. Regis Mohawk Tribal Court pursuant to the Land Dispute Resolution Ordinance (LDRO) § XV, which was served on Appellee’s attorney on December 1, 2014. Lorraine White filed an appearance on behalf of Appellee John Bero on December 10, 2014, which was served on Appellant on December 8, 2014.

Appellant filed a Motion to Join Necessary Parties on December 23, 2014 and did not request oral arguments. A copy of the Motion to Join Necessary Parties was served on Appellee's attorney on December 23, 2014. Appellant also filed a Motion for Default Judgment on February 12, 2015, waiving oral argument again, and Appellee was served the same day. Included within the Motion for Default Judgment was a request to dismiss the LDT's decision due to lack of subject matter jurisdiction over the Appellant. Appellee filed an affidavit in reply to Appellant's motions on February 20, 2015, which was served on the Appellant on February 18, 2015.

On July 17, 2015 a status conference was held. A briefing schedule and hearing date was set to address the sovereign immunity issue, which is at the heart of the request to dismiss the LDT's decision. Appellant filed its brief on August 25, 2015 and Appellee filed a response brief on September 18, 2015. A hearing was held on October 23, 2015.

Motion for Joinder

Appellant moves this Court to apply Rule 19 of the Federal Rules of Civil Procedure and join Leroy Bero and Carol Jacobs, Appellee's siblings, as necessary parties. Appellant requests the Court apply Federal Joinder Rule 19 as there is not a joinder rule within the St. Regis Mohawk Tribe's Rules of Civil Procedure. The Appellant argues that Carol Jacobs and Leroy Bero have an interest in the property in dispute, have been directly impacted by the Tribunal's decision, and will be directly impacted by this Court's decision. Appellant further urges that it is fair and just to join Leroy and Carol Bero as necessary parties in order to protect their interests.

Appellee presents only procedural challenges to the Motion for Joinder. Appellee argues improper service and form due to the lack of an affidavit of service, attorney's affirmation and that the Notice of Motion did not include a return date, and as a result the Motion should be dismissed.

This Court has ruled previously that the LDRO procedures shall apply for the actual filing of an appeal of a LDT decision and that the SRMT Rules of Civil Procedure shall be used as guidelines for all other subsequent proceedings of the appeal under the LDRO.¹ Thus, the SRMT Rules of Civil Procedure shall apply to this matter before the Court.

Rule 13 of the SRMT Rules of Civil Procedure require "the moving party shall notify other parties of the nature and basis of the motion and the hearing time at least ten (10) days before the motion is presented in Court, so the responding party has a chance to plan a response."² The motion must be served upon the party in compliance with Rule 1 of the SRMT Rules of Civil Procedure. The Motion for Joinder at bar was served on the Appellee on December 23, 2014. Service was made upon Appellee's Counsel, as required by Rule 13B and done through the mail, as allowed by Rule 1b. Thus service was proper.

¹ *Ralph David v. St. Regis Mohawk Tribe*, 14-LND-00003 (April 2, 2015) 3-5.

² SRMT Rules of Civil Procedure, Rule 13 B.

Appellee argues that the form of the service was improper as it did not include an affidavit of service, attorney's affirmation, and that it did not include a return date. Appellant included an affidavit of service with its filing with the Court. Rule 13 requires that the moving party shall notify the parties of "the hearing time at least ten days before the motion is presented to the Court."³ Appellant's letter to the Court, and cc'd to Appellee's counsel, which accompanied the Motion states the Appellant was not requesting oral argument on the Motion for Joinder. As a result, there was no hearing date for the Appellant to provide notification to the Appellee. Thus, Appellee's procedural objections to the Motion for the Joinder are overruled.

The Court now considers Appellant's request to join Carol Jacobs and Leroy Bero as necessary parties pursuant to Rule 19 of the Federal Rules of Civil Procedure. The SRMT Civil Code provides the Court with choice of law and gives direction as to which laws have preference. "Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe," are to be applied which include in this case the SRMT Civil Code (Civil Code), SRMT Rules of Civil Procedure (SRMT Rules) and the LDRO. As noted previously, this Court has previously ruled that the SRMT Rules apply to appeals from an LDT decision which are past the filing of the notice of the appeal stage.

The first question is whether the Court can apply the Federal Rules of Civil Procedure. The Civil Code states that the Court may apply the Federal Rules of Civil Procedure "when not otherwise in conflict with a specific rule adopted by the Tribal Court or Tribal Council."⁴ Moreover, the Court has authority to "modify, set or direct any specific rule or procedure for individual cases as the Court deems appropriate."⁵

The SRMT Rules are silent regarding joinder of a necessary party. This Court has previously applied Rule 19 of the Federal Rules of Procedure in *Ralph David v. The Saint Regis Mohawk Tribe*, 14-LND-00003 (April 2, 2015). Given that the SRMT Rules are silent as to joinder, that the Civil Code allows application of the Federal Rules of Civil Procedure, and that this Court has previously applied Rule 19, this Court will apply Rule 19.

The next question the Court must address is whether Carol Jacobs and Leroy Bero fall within Rule 19's definition of necessary parties. Rule 19 of the Federal Rules of Civil Procedure states:

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

³ SRMT Rules of Civil Procedure, Rule 13 B.

⁴ SRMT Civ. Code § VI. A.

⁵ SRMT Civ. Code § VI. A.; *See also* Jackson v. Baker/Roundpoint, 11-LND-00006/11-CIV-00006; Oakes v. Oakes, 11-LND-00008.

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The joinder issue in *David* is nearly identical to the one before the Court. In *David* the Tribe was also requesting the joinder of David's sister and husband, arguing they were necessary parties as they had interests in the real property in dispute. The Court found that David's sister and brother-in-law, and an additional brother not included in the Tribe's motion, were necessary parties because the Court could not grant complete relief among the existing parties; they appeared to claim an interest in land in dispute; and that disposing of the action in their absence would impair and impede their ability to protect their interests in the land in dispute.⁶ The Court granted joinder under Federal Rule 19 "because of the potential consequence of failing to join certain parties under the facts of the case."⁷

In the case at bar, all interested parties, Carol Jacobs, Leroy Bero, AND Agnes J. Bero are tribal members and their joinder will not deprive the Court of subject matter jurisdiction. The record demonstrates that Carol Jacobs, Leroy Bero, AND Agnes Bero have an interest in the subject of the action and that disposing of the case in their absence will impede their ability to protect their interests. Carol Jacobs and Leroy Bero state that the property was originally bought for all three siblings and could not be given to only the Appellee by the Tribe. Deciding whether the Appellee has sole interest in the property without their presence will impede or impair whatever right they may have. Agnes J. Bero did not wish to appear before the LDT, but she has an interest in the land as she resided on the property since 1962. The Court cannot deprive her of due process and impede her right to defend that interest. Thus, as in *David*, the Court will apply Rule 19 of the Federal Rules of Procedure because SRMT Tribal Law is silent on joinder and because of the potential consequences of impairing parties' interest in the land in dispute and grant the joinder of all necessary parties, which includes Carol Jacobs, Leroy Bero, and Agnes J. Bero. Moreover, the joinder of Carol Jacobs, Leroy Bero, AND Agnes Bero, the Court cannot accord "complete relief among the existing parties."⁸

Motion for Default Judgment

Appellant filed a Motion for Default Judgment on February 12, 2015 with service upon Appellee's attorney on the same day. Appellant requested a default judgment, arguing that the Notice of Appeal was served upon Appellee on December 2, 2014 and although Appellee's Counsel filed her appearance on December 8, 2014, no Answer was served within the time

⁶ *Ralph David v. St. Regis Mohawk Tribe*, 14-LND-0003 (July 24, 2015) 7.

⁷ *Id.* at 6.

⁸ Fed. R. Civ. P. Rule 19(A).

allowed by Tribal Law. Thus a default judgment should be entered against the Appellant pursuant to Rule 8 of the SRMT Rules.

Appellee's argues that the SRMT Rules and the LDRO do not define or give guidance to the filing requirements for an Appeal of LDT decisions and as a result the Appellee has not committed default. Appellee argues again that Appellant failed to file the motion in a legally admissible content.

As to the Motion's content, the Court notes that it was properly served and that again in the Appellant's letter to the Court submitting the motion, which was cc'd to Appellee's counsel, the Appellant did not request oral argument on the motion. Thus, there was no hearing date for the Appellant to provide notification to the Appellee. Thus, Appellee's procedural objections to the Motion for Default Judgment are overruled.

The Court has also previously addressed this issue in *Ralph David v. St. Regis Mohawk Tribe*, 14-LND-00003 (April 2, 2015). In *David*, the Court stated "it is appropriate to rely upon the SRMT Rules of Civil Procedure, (and the Civil Code), to provide procedural guidelines for all "post-filing" proceedings on appeals to the Tribal Court from the land dispute decision of the Tribal Council or the LDT."⁹

The filing at issue in this case is the notice of the appeal and is not a post-filing proceeding. The LDRO contains a procedure for filing the notice of appeal and governs this issue. As a result, Rule 6A of the SRMT Rules does not apply. The LDRO does not contain a requirement that appellees must file an answer. Thus, Appellee was not required to file an answer and her notice of appearance was sufficient. As Rule 6A, which requires Appellee to file an answer, does not apply, the Appellant's Motion for Default Judgment is dismissed.

Motion to Dismiss the LDT Decision

Within the Appellant's Motion for Default Judgment, the Appellant requested the Court to dismiss the Land Dispute Tribunal's decision for lack of subject matter jurisdiction over the Appellant. As noted above both parties filed briefs and gave oral arguments on this issue.

Appellant makes two arguments. Appellant first argues that the LDT lacked subject matter jurisdiction as the LDRO specifies that challenges to an issuance of a deed by Tribal Council must be filed with the Tribal Court, not the LDT, and only in the limited instances of allegations of fraud, deceit, coercion and duress.¹⁰ The Court has also found that error is another ground for review of an SRMT Use and Occupancy Deed.¹¹ Appellant further argues that even if the LDT possessed subject matter jurisdiction, the Tribe never waived its sovereign immunity

⁹ *Ralph David v. St. Regis Mohawk Tribe*, 14-LND-00003 (April 2, 2015), 4-5.

¹⁰ LDRO § XV.C.1.

¹¹ *Hathaway v Thomas*, 12-LND-00007; *Roundpoint v Chubb*, 11-LND-00010.

from suit for any claim before the tribunal. Appellant notes the Tribe's waiver of sovereign immunity applies only to the Tribal Court.

Appellee argues that the jurisdictional defect lies with the Tribal Council's exercise of wrongful jurisdiction when they accepted Carol Jacobs and Leroy Bero's challenge to the Appellee's deed. Appellee requests the Court review this initial threshold question prior to addressing the sovereign immunity question. However, Appellee also argues that the LDT was correct in exercising jurisdiction over the Tribe as there are no provisions within the LDRO identifying who may or may not be named as a Respondent and the LDT is not a judicial forum requiring a waiver of sovereign immunity. Finally, Appellee notes that the Tribe did give a waiver in the form of the October 9, 2013 Memorandum, signed by Chiefs Ron Lafrance Jr. and Paul Thompson, notifying Appellee of the Tribal Council's decision. The Memorandum stated that if there was any dispute with their decision that the dispute was to be filed with the LDT.

The Court must begin with the question of sovereign immunity, given that this case is an appeal from the LDT. The first issue in an appeal is typically whether the lower body had jurisdiction, before proceeding to whether the lower body made a legally correct decision. In this case, the jurisdictional issue is whether the LDT had jurisdiction over the Appellant. If the Appellee had initially filed his case with the Court as an appeal of the Tribal Council's decision to change Appellee's deed, the Court could properly first take up issue of whether the Council possessed jurisdiction to change the deed. However, the Appellee took his case to the LDT, making this an appeal of an LDT decision. As a result, the Court must first address the LDT's jurisdiction.

Tribal governments possess inherent sovereignty which is not derived from the federal government and have the right to extend this sovereign immunity to Tribal officials and employees.¹² Any waivers of this immunity must be specific and "must be clear, explicit and in writing."¹³ Moreover, the Court must interpret the waivers "narrowly and limited to the explicit terms of the waiver; and any such waivers shall not by implication or interpretation be extended in any manner or fashion beyond their narrow, explicit terms."¹⁴

The waiver of sovereign immunity central to this case is found in the LDRO. The LDRO's provision on sovereign immunity states:

The Tribal Council agrees to a limited waiver of its immunity solely for the Tribal Court to review decisions the Tribal Council rendered on land disputes under the standards set forth herein. Otherwise, nothing in this Ordinance is tended nor shall be construed as any other waiver of the sovereign immunity of the St. Regis Mohawk Tribe from suit in State, Federal or Tribal Court against the St. Regis

¹² *Wood v. Terrance*, 11 CIV-00019, 8.

¹³ SRMT Civ. Code § IV.D.

¹⁴ *Id.*

Mohawk Tribe, any Tribal entity or any official acting in his or her official capacity.¹⁵

This is a clear, narrow, and explicit waiver of sovereign immunity, limited solely to the Tribal Court for review of its decisions. Within this waiver, the Tribe very specifically never waives its sovereign immunity before the LDT and empowers the LDT to hear a suit against the Tribe. The Court in *Ralph David v. St. Regis Mohawk Tribe*, again dealt with this very issue and found that the limited waiver of sovereign immunity extended solely to the Tribal Court and not to the LDT.

Although sovereign immunity is explicitly waived by SRMT “solely for the Tribal Court to review any decisions the Tribal Council rendered on land disputes...” the Tribe’s sovereign immunity IS NOT explicitly waived for purpose of review of a Tribal Council decision by the SRMT LDT. The LDRO does not provide for a waiver of immunity before any entity other than the Tribal Court and sovereign power, (including immunity), remains intact unless rendered in unmistakable terms. *World Touch Gaming Inc. v Massena Management*, 117 F. Supp.2d271, citing *Merrion v Jicarilla Apache Tribe*, 455 US 130. Therefore, based on the Court’s review of the applicable law, specifically the SRMT Land Dispute Resolution Ordinance, we find that the explicit and limited waiver of the Tribe’s sovereign immunity does not extend to, or provide for a waiver of immunity before the SRMT LDT.¹⁶

As noted above, the Tribe has the authority to extend its sovereign immunity to officials and employees. The Court in *David* noted that the Tribe’s sovereign immunity is asserted to the fullest extent possible and includes its subordinate entities,¹⁷ such as the LDT.¹⁸ It would be an odd interpretation of the law for the Court to find that the same sovereign immunity which protects the LDT from suit, unless a specific waiver is given, does not protect the Tribe from suit before the LDT, unless a specific waiver is given. The LDRO contains no explicit and specific waiver of sovereign immunity to allow the Tribe to be named as a respondent before the LDT.

As to whether the October 9, 2013 Memorandum is a waiver, again the Court is bound by the Civil Code, which requires an explicit, specific waiver that must be interpreted narrowly. The October Memorandum signed by two chiefs is not such a waiver. The waivers of sovereign immunity contained in the Civil Code and LDRO are very specific, naming the limited instances when the Tribe is giving a waiver and when the waiver applies, namely before the Tribal Court. The Memorandum to Appellee merely reminds him that he has a right to appeal the Council’s decision. Despite the fact that it notes the appeal may be before the LDT, it contains no specific waiver of sovereign immunity similar to the language contained in the LDRO. The Court is

¹⁵ LDRO § XVII.

¹⁶ *Ralph David v. St. Regis Mohawk Tribe*, 14-LND-0003 (July 24, 2015) 14.

¹⁷ SRMT Civ. Code § IV(A).

¹⁸ *Ralph David v. St. Regis Mohawk Tribe*, 14-LND-0003 (July 24, 2015) 14.

required to find specific language for waivers of sovereign immunity and the October Memorandum does not contain that language.

The Court finds that the Tribe has given an explicit and narrow waiver of sovereign immunity in the LDRO. This waiver of sovereign immunity is only for the Tribal Court to review Tribal Council decisions on land disputes, not the LDT. Thus, the LDT did not have jurisdiction over the Appellant. The LDT's decision dated October 24, 2014 is vacated due to lack of jurisdiction and pursuant to LRDO § XV.B.2.

The LDRO requires that when the Court vacates a LDT decision, it must substitute its own.¹⁹ As discussed above, the LDRO contains a specific waiver of the Tribe's sovereign immunity before the Tribal Court.²⁰ Thus, with all parties properly joined in this case, the Court possesses jurisdiction to address the issues raised by Appellee regarding the Tribal Council's change to the Appellee's deed on March 26, 2013. A status hearing for all parties shall be scheduled to prepare for a hearing.

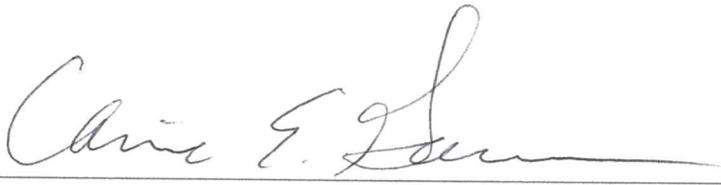
¹⁹ LDRO § XV.B.2.

²⁰ LDRO § XVII.

Order

1. Appellant's Motion for Joinder is granted and Carol Jacobs and Leroy Bero are joined as necessary parties.
2. Agnes J. Bero is joined as a necessary party.
3. Appellant's Motion for Default Judgment is dismissed.
4. The LDT's Decision dated October 24, 2014 is ORDRED vacated for lack of jurisdiction.
5. All further captions of this case shall be entitled: St. Regis Mohawk Tribe, Carol Jacobs, Leroy Bero, Agnes B. Bero, Appellants v. John Bero, Appellee
6. A status conference for all parties shall be scheduled.

Signed by my hand this 25th day of November 2015



Carrie Garrow, Associate Judge St. Regis Mohawk Tribal Court