IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DELBERT ALLMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 2:11CV24-WKW
	)	
CREEK CASINO WETUMPKA and POARCH BAND OF CREEK INDIANS,	)	
	)	
	)	
Defendants.	)	

ORDER and RECOMMENDATION OF THE MAGISTRATE JUDGE

Plaintiff Delbert Allman has filed a motion to proceed *in forma pauperis* in this action (Doc. # 2). It is

ORDERED that the motion is GRANTED. However, upon its review of the complaint, the court concludes that dismissal of this action is appropriate under 28 U.S.C. § 1915(e)(2)(B).[1]

Plaintiff, proceeding *pro se*, brings claims against the Creek Casino in Wetumpka, Alabama (also designated in the complaint as the Riverside Entertainment Center) and the Poarch Band of Creek Indians ("the Tribe"). He contends that the defendants violated his constitutional rights by barring him from the casino. Plaintiff alleges:

> In March 2010, manager of Riverside Casino advised me, I was barred from property because my ex-wife, an employee of affiliated Tallapoosa Ent. Ctr. accused me of harassment, a charge on which I was subsequently arrested. On

[1] The statute provides, in pertinent part: "[T]he court shall dismiss the case at any time if the court determines that . . . the action or appeal– (i) is frivolous or malicious, (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

> 9-16-2010 Judge Goggans of the Elmore Co. District Court dismissed the case. I then wrote a letter to Poarch Creek Indians in Atmore, asking that I be re[]instated to enter Riverside Ent. Ctr. after case was dismissed. I have not heard back from them and have exhausted all remedies of which I am aware. As a legal citizen of the County & State, I feel like I have the right to enter a federal reservation open to the public.

(Complaint, ¶ 5). He seeks "a nominal punitive judgement" and reinstatement of his "privile[]ge to visit Riverside Ent. Ctr (Creek Casino Wetumpka)." (Id., ¶ 6).

The Poarch Band of Creek Indians is a federally recognized Indian tribal entity. See 25 U.S.C. § 479a-1; 75 Fed. Reg. 60810-01 (Oct. 1, 2010); 74 Fed. Reg. 40218-02 (Aug. 11, 2009).

> "'Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'" Florida v. Seminole Tribe, 181 F.3d 1237, 1241 (11th Cir. 1999)(quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978)). Thus, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1988). Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought. See, *e.g.*, id. at 760, 118 S.Ct. at 1705 (barring suit for money damages); Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1127 (11th Cir. 1999)(barring suit for injunctive relief).

Freemanville Water System, Inc. v. Poarch Band of Creek Indians, 563 F.3d 1205 (11th Cir. 2009). Where tribal sovereign immunity has not been waived by the tribe or abrogated by Congress as to claims brought before the court, the court lacks subject matter jurisdiction to entertain the claims. See Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282, 1292 (11th Cir. 2001)("[T]he tribe's sovereign immunity deprives the district court of subject matter

jurisdiction over [plaintiff's] claims."). Sovereign immunity extends to a tribe's commercial activity; it is not limited to non-commercial governmental activity. See Kiowa Tribe, 523 U.S. at 758.

Plaintiff's apparent contention is that the Tribe may not lawfully exclude him from its casino on the basis of a complaint of harassment by its employee (plaintiff's ex-wife), since the criminal charge against plaintiff was dismissed. Plaintiff does not identify the constitutional provision under which he seeks relief.[2] Construing his *pro se* complaint broadly, the court treats plaintiff's claim that the defendants violated his constitutional rights as one premised on the due process clause of the United States Constitution.[3] However, even if the complaint presents a federal question, this court lacks jurisdiction to entertain plaintiff's claim against the Tribe. See Freemanville Water System, *supra*. There is no "express and unequivocal" language in the due process clause of the Constitution which abrogates tribal sovereign immunity. See U.S. Const. Amend. V; Florida Paraplegic Association, 166 F.3d at 1130 (observing that Indian tribes' natural rights as sovereigns

[2] Plaintiff's factual allegations are set forth on a form complaint which states, in paragraph 5, "State the facts on which you base your allegation that your *constitutional rights have been violated*." (Complaint, ¶ 5)(emphasis added).

[3] The court can discern no other constitutional right potentially implicated by plaintiff's factual allegations. Plaintiff does not invoke 42 U.S.C. § 1983 as a basis for his claim, nor could he. He alleges action (or inaction) by the tribe and its casino, not "state" action. See Chapoose v. Hodel, 831 F.2d 931, 934 (10th Cir. 1987). Further, plaintiff does not allege that his claim arises under the "constitutional rights" provision of the Indian Civil Rights Act, 25 U.S.C. § 1302. The Supreme Court has made clear that Congress did not abrogate tribal sovereign immunity as to claims under § 1302. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

vested in them before the genesis of the United States (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832)) and stating that federal abrogation of tribal sovereign immunity must be "'unequivocally expressed'" (quoting Santa Clara Pueblo, 436 U.S. at 58)). The complaint includes no factual allegations suggesting a waiver of sovereign immunity by the Poarch Band. See Ishler v. Internal Revenue, 237 Fed. Appx. 394, 398 (11th Cir. 2007)("[T]he plaintiff bears the burden of establishing subject matter jurisdiction . . . and, thus, must prove an explicit waiver of immunity."); Taylor v. Alabama Intertribal Council, 261 F.3d 1032, 1035 n. 4 (11th Cir. 2001), *cert. denied*, 535 U.S. 1066 (2002)(finding that the issue of waiver had "no bearing on the . . . case," because – even where the issue of tribal sovereign immunity was not raised by the defendant or litigated before the district court (id. at 1034 n. 3) – there was "no indication in the record that [the intertribal council defendant] ha[d] waived its immunity").[4]

[4] The claims in this case do not arise from a written agreement which might include a provision waiving tribal sovereign immunity, such as those considered by the district courts in Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, 2011 WL 1303163 (S.D. Fla. Mar. 31, 2011), and Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 803 F. Supp. 401 (S.D. Fla. 1992), *reversed,* 999 F.2d 503 (11th Cir. 1993). Additionally, there is no Class III gaming compact with the State of Alabama in which the Tribe might have waived its sovereign immunity as to claims arising from operation of its casinos. Cf. Alabama v. United States, 630 F. Supp.2d 1320 (S.D. Ala. 2008)(describing failure of compact negotiations between the Tribe and the State of Alabama). The Tribe emphasizes its sovereignty in the first section of its Tribal Code, and expressly states that its sovereign immunity is not waived by any provision in the Tribal Code or its amendments. Poarch Band of Creek Indians Tribal Code, § 1-1-1. Despite this non-waiver language, the Tribal Code does include a limited waiver of sovereign immunity for "tort" claims brought by patrons of the Tribe's gaming facilities. However, even assuming that a federal constitutional deprivation is a "tort" for purposes of the Poarch Band of Creek Indians Tort Claims Act, the waiver is limited to claims seeking compensatory damages. It does not extend to claims brought in federal court, to claims for punitive damages, or to claims seeking remedies beyond the scope of those identified in the act. (See id., §§ 29-1-4, 29-2-3, 29-1-3(c), 29-2-4(b)).

Plaintiff has sued both the casino and the Tribe. The court concludes that the Tribe's sovereign immunity extends to the Casino for two reasons. First, it appears from the face of the complaint that plaintiff himself acknowledges the Tribe's ownership and control over the casino. He alleges that the "Poarch Creek Indians in Atmore" failed to respond to his request that he "be re-instated to enter Riverside Ent. Ctr." (Complaint, ¶ 5). In the style of his complaint, plaintiff designates both "Creek Casino Wetumpka" and "Poarch Band of Creek Indians" as being located at the same address. (Complaint, ¶ 1). Second, the Tribal Code provides that "the Tribe shall have the sole proprietary interest in and responsibility for the conduct of all gaming activities on the Reservation[,]" and, further, that revenue from its gaming establishments provides funds for, *inter alia*, "Tribal operations or programs," "[e]conomic development," and "[t]he general welfare of the Tribe and its members." Poarch Band of Creek Indians Tribal Code, § 20-1-1(c), (d). Under these circumstances, plaintiff's claims against the Creek Casino Wetumpka are also barred by tribal sovereign immunity.[5] See Freemanville Water System, Inc. v. Poarch Band of Creek Indians, 2008 WL 80644 (S.D. Ala. Jan. 7, 2008), *affirmed*, 563 F.3d 1205 (11th Cir. 2009)(granting motion to dismiss filed by Poarch Band of Creek Indians, Creek Indian Enterprises, and P.C.I. Gaming on the

[5] Even if the casino were not entitled to sovereign immunity, plaintiff's claim against the casino would, nevertheless be subject to dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B). The casino either is an arm of the sovereign or it is not. If it is, it is entitled to tribal sovereign immunity. If it is not, it is a non-governmental entity against which plaintiff may not maintain a claim for violation of his federal constitutional rights. Cf. Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001)(declining to imply a Bivens-type remedy against a private corporation, which operated a halfway-house under contract to the federal Bureau of Prisons, for alleged constitutional violations).

basis of sovereign immunity as to all defendants, where the latter two defendants were "wholly owned by the Tribe and chartered under its tribal laws"); see also Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006), *cert. denied*, 549 U.S. 1231 (2007)(citing a "principal purpose[]" of the Indian Gaming Regulatory Act as insuring that the tribe is the primary beneficiary of the gaming operation and stating, "In light of the purposes for which the tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit.").

In the alternative, even if tribal sovereign immunity did not deprive this court of jurisdiction, this action would nevertheless be subject to dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), as plaintiff fails to state a claim of a federal constitutional violation upon which relief may be granted.

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in Talton v. Mayes, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896), [the Supreme Court] held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed by the tribes." Id. at 384, 16 S.Ct. at 989. In ensuing years, the lower federal courts have extended the holding of Talton to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.

Santa Clara Pueblo, 436 U.S. at 56. While Congress has enacted statutory provisions applicable to tribal entities and officers which are similar in many respects to those set forth in the Bill of Rights, the Fifth Amendment does not apply directly to tribal governmental conduct. See Nevada v. Hicks, 533 U.S. 353, 383 (2001)(Souter, J., concurring)("It has

been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes."); Gallegos v. Jicarilla Apache Nation, 97 Fed. Appx. 806, 812 (10th Cir. 2003), *cert. denied*, 542 U.S. 938 (2004)(finding that a non-Indian tribal police officer challenging his termination failed to state a claim under 42 U.S.C. §1985(3) against tribal officials because the predicate violations upon which he relied – *i.e.*, of his "constitutional equal protection and due process rights" – were based on "provisions of the United States Constitution [that] do not constrain tribes and their officials")(citing Santa Clara Pueblo, 436 U.S. at 56-57); Suarez v. Confederated Tribes & Bands of Yakima, 996 F.2d 1227, 19193 WL 210717 (9th Cir. 1993)(unpublished opinion)("By their express terms, the Fifth and Fourteenth Amendments place limitations only on state and federal authority, and not on other sovereign governments such as the Yakima Nation."). Accordingly, in the present action, plaintiff fails to state a Fifth Amendment due process claim upon which relief may be granted.[6]

Finally – even if the Tribe's sovereign immunity did not deprive this court of jurisdiction and, and even if plaintiff's claims could be construed as arising under the Indian Civil Rights Act or under Tribal law (including Alabama state law causes of action

[6] As noted above, plaintiff alleges a violation of his "constitutional rights." (Complaint, ¶ 5). He does not allege that defendants have violated his rights under the Indian Civil Rights Act, 25 U.S.C. § 1302.

incorporated by the Tribal Code)[7,8] – this action would nevertheless be subject to dismissal under the "prudential rule" set forth in National Farmers Union Insurance Comapnies v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) which requires exhaustion of remedies in tribal court. Plaintiff alleges that he has "exhausted all remedies *of which [he is] aware*[,]" specifying that he sought relief from the tribe by writing a letter to the "Poarch Creek Indians in Atmore" requesting that he be permitted to enter the Riverside Entertainment Center. (Complaint, ¶ 5)(emphasis added). While plaintiff may not have been aware of its existence, the Tribe has a judicial system that includes a Tribal Court and an appellate court. The Tribal Court is empowered, according to the Tribal Code, to try "all civil causes of action and defenses thereto which are cognizable in the trial courts of the State of Alabama" and to exercise jurisdiction over "[a]ll persons . . . present with-in or upon reservation property" and all real and personal property located on or within the reservation. Poarch Band of Creek Indians Tribal Code, §§ 3-1-3, 4-1-1(a), 4-1-3, 4-1-4(a), 11-1-1. The Tribal Code further provides that where a defendant in a general civil action is "Indian," and the claim arose on "Indian country," the Tribal Court has exclusive jurisdiction. Id., § 4-1-5.

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[7] See Poarch Band of Creek Indians Tribal Code, § 11-1-1.

[8] In Nevada v. Hicks, 533 U.S. 353 (2001), the Court held that tribal courts of general jurisdiction lack authority to entertain federal claims under 42 U.S.C. § 1983. The Court reasoned that, while Article III of the U.S. Constitution "presume[s]" that "state courts could enforce federal law . . . [t]his historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts." Id. at 366-67. Thus, the exhaustion requirement is inapplicable to claims arising under federal law.

The claim that plaintiff asserts arose, according to the complaint, at the "Creek Casino Wetumpka," which plaintiff contends is on a "federal reservation open to the public." (Complaint, ¶¶ 3, 5). He sues only tribal defendants, and seeks an injunction requiring them to allow plaintiff to patronize the Wetumpka dining and entertainment facility, from which he was barred because of an allegation of harassment by plaintiff's ex-wife, an employee of the Tribe at another of its casinos.[9]

> When there is a "colorable question" as to whether a tribal court has subject matter jurisdiction over a civil action, a federal court should stay or dismiss the action so as to "permit a tribal court to determine in the first instance whether it has the power to exercise subject matter jurisdiction." This "tribal exhaustion doctrine" is not jurisdictional in nature, but rather is a matter of comity. The exhaustion rule is applicable regardless of whether an action is currently pending in tribal court.

Madewell v. Harrah's Cherokee Smokey Mountains Casino, 730 F. Supp. 2d 485 (W.D. N.C. 2010)(citations omitted); see also Ninigret Development Corp. v. Narragansett Indian Wetuomuch Housing Authority, 207 F.3d 21, 31 (1st Cir. 2000)("Where applicable, [the tribal exhaustion] prudential doctrine has force whether or not an action actually is pending in a tribal court."). The present action involves a commercial relationship between the Tribe's entertainment facility and its customer, and seeks to limit the Tribe's ability to deny the customer access to its commercial facility – located on Tribal land and operated in order to promote the economic welfare of the Tribe – due to an accusation of harassment by one of

[9] Plaintiff does not state whether he is an Indian member (or non-member) of the Tribe. From his allegation that he is entitled to enter a "reservation open to the public" (Complaint, ¶ 5), the court infers that he is not.

its employees. Thus, there is a "colorable question" of Tribal Court jurisdiction over plaintiff's claims in this case. See Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir.), *cert. denied* 547 U.S. 1209 (2006)("[W]here the nonmembers [of the Tribe] are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction." (emphasis in original)(citing Williams v. Lee, 358 U.S. 217 (1959)).

CONCLUSION

For the foregoing reasons, it is the RECOMMENDATION of the Magistrate Judge that plaintiffs' claims be DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B) because, due to the tribal sovereign immunity of the defendants, this court lacks subject matter jurisdiction over plaintiffs' claims.

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve a copy on the parties to this action. The parties are DIRECTED to file any objections to this Recommendation on or before June 6, 2011. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain

error or manifest injustice. Resolution Trust Co. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993); Henley v. Johnson, 885 F.2d 790, 794 (11th Cir. 1989).

DONE, this 23rd day of May, 2011.

/s/ Susan Russ Walker
SUSAN RUSS WALKER
CHIEF UNITED STATES MAGISTRATE JUDGE