UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FORT INDEPENDENCE INDIAN COMMUNITY, a federally-recognized tribe,

Plaintiffs,

v.

STATE OF CALIFORNIA; ARNOLD SCHWARZENEGGER, Governor of the State of California; JERRY BROWN, Attorney General of the State of California,

Defendants

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NO. CIV. S-08-432 LKK/KJM

O R D E R

This case arises from a dispute involving class III gaming compact negotiations between the State of California and plaintiff Fort Independence Indian Community, a federally recognized Indian tribe located in Inyo County, California. Plaintiff alleges that as a condition of entering into a Tribal-State compact, the State demanded that the Tribe pay a certain percentage of its gaming revenue to the State and that the Tribe cease participation in the Revenue Sharing Trust Fund (RSTF). Plaintiff argues that these

demands constitute an unlawful tax, fee, or other assessment on gaming operations and are therefore impermissible subjects for negotiation under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 et seq. In addition, plaintiff alleges that the state violated the Equal Protection Clauses of the United States and California Constitutions by treating the Tribe differently than the Yurok Tribe located in Humboldt County, California. Plaintiff has brought suit against the State of California, Governor Arnold Schwarzenegger, and Attorney General Jerry Brown seeking declaratory and injunctive relief. Pending before the court is defendants' motion for judgment on the pleadings. For the reasons explained below, the court denies the motion with respect to the IGRA claim but grants the motion with respect to the equal protection claims and to defendant Attorney General Jerry Brown.

I. Background

A. Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act was enacted in 1988 "as a means of generating tribal government revenue" and to "promote tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2701. IGRA distinguishes between three classes of gaming and provides for different forms of regulation for each class.[1] Only class III gaming -- at issue in this action

[1] Class I gaming includes "social games" for minor prizes or "traditional forms of Indian gaming." 25 U.S.C. § 2703(6). Class II gaming includes bingo and similar games and card games allowed by the state. 25 U.S.C. § 2703(7). Class III gaming includes "all forms of gaming that are not class I gaming or class II gaming," 25 U.S.C. § 2703(8), including traditional casino games such as

-- requires a compact that is negotiated between a tribe and a state, and is subject to federal approval. 25 U.S.C. § 2710(d).

In order to conduct class III gaming, the tribe must first request that the state enter into negotiations for such a compact. 25 U.S.C. § 2710(d)(3)(A). Upon receipt of the request, the state must "negotiate with the Indian tribe in good faith to enter into such a compact." Id. Among the permissible subjects of negotiations is "taxation by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(c)(iii). States may attempt to negotiate for issues not expressly enumerated in IGRA; but they may not require tribes to negotiate for any such issue.

Of particular relevance here, IGRA prohibits a state from conditioning negotiations and execution of a Tribal-State compact upon the tribe's payment of a tax, fee, or other assessment. 25 U.S.C. § 2710(d)(4) ("[N]othing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, or other assessment from an Indian tribe . . . to engage in class III activity. No State may refuse to enter into [] negotiations . . . based upon the lack of [such] authority.").

B. Compact Negotiations with Fort Independence Indian Community

Plaintiff is a federally-recognized Indian tribe located in Inyo County, California. Compl. ¶ 9. It does not currently have a gaming compact with the State of California. Compl. ¶ 31. As

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slot machines, roulette, and blackjack.

a non-gaming tribe, however, plaintiff has received annual contributions of $1.1 million dollars from the Revenue Sharing Trust Fund. Compl. ¶ 28. The RSTF receives funds from tribes that have a Tribal-State compact and operate more than 350 gaming devices; it then redistributes such funds to non-compact tribes. Compl. ¶ 26. The RSTF was created as part of the 1999 compacts, which, in conjunction with the passage of Proposition 1A, created gaming compacts with approximately sixty tribes.[2] Compl. ¶ 24. Non-compact tribes are considered third-party beneficiaries of the 1999 compacts. Compl. ¶ 31.

In July 2004, plaintiff requested that the State of California enter into negotiations with it for the formation of a Tribal-State Compact. Compl. ¶ 32. Throughout the negotiations, the State has allegedly conditioned the acceptance of a Tribal-State Compact upon plaintiff's agreement to pay a percentage of its gaming revenues to the State and to cease its participation in the RSTF, despite plaintiff's agreement to operate less than 350 gaming devices. Compl. ¶¶ 34-36.

Plaintiff objected to the revenue sharing on the grounds that it would constitute a tax, fee, or other assessment under IGRA. Compl. ¶ 40. In addition, plaintiff refused to cease participation in the RSTF on the grounds that as a would-be operator of less than

[2] Pursuant to Proposition 1A, amending the California Constitution, the Governor is authorized to negotiate and conclude compacts, subject to legislative ratification, that allow Indian tribes to conduct and operate slot machines, lottery games, and banked and percentage card games on Indian lands. Compl. ¶ 22.

350 gaming devices, it would still be legally entitled to the RSTF payment. Id. Plaintiff also noted that the State allowed other tribes to receive RSTF payments while operating 350 gaming devices or less. Compl. ¶ 30. In particular, the State allegedly negotiated a compact with the Yurok Tribe that allowed the tribe to operate ninety-nine gaming devices and to continue as an RSTF participant. Compl. ¶ 44.

Defendants have also filed a request for judicial notice regarding two pieces of correspondence, which they argue estop plaintiff's IGRA claim. First, in a letter purportedly sent from the Tribe to the Governor on July 21, 2004, in which plaintiff was said to agree "with the Governor's belief that Indian Tribes should provide compensation to the state in recognition of the unique privilege and benefit that gaming provides." Req. for Judicial Notice, Ex. 1. The next sentence of the letter then noted, "[w]e estimate that the approximately 80 gaming devices the Tribe is seeking would generate a win per day of $80 per machine." Id. Second, the Governor's Office purportedly responded on September 3, 2004 by agreeing "to meet with the Tribe in accordance with [the Tribe's] representations." Req. for Judicial Notice, Ex. 2. On the basis of these letters, defendants argue that plaintiff initially agreed to revenue sharing.

II. Standard

A motion for judgment on the pleadings may be brought "[a] fter the pleadings are closed but within such time as to not delay the trial." Fed. R. Civ. P. 12(c). All allegations of fact by the

party opposing a motion for judgment on the pleadings are accepted as true. Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir.1984). A "dismissal on the pleadings for failure to state a claim is proper only if 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.'" Id. (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1368, at 690 (1969)); see also McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988).

When a Rule 12(c) motion is used to raise the defense of failure to state a claim, the motion is subject to the same test as a motion under Rule 12(b)(6). McGlinchy, 845 F.2d at 810; Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1989). Thus, the court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. See Retail Clerks Int'L Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). The plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. See id.; see also Wheeldin v. Wheeler, 373 U.S. 647, 648 (1963) (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court may not dismiss the complaint if there is a reasonably founded hope that the plaintiff may show a set of facts consistent with the allegations. Bell Atlantic Corp. v. Twombly, -- U.S. --,

127 S. Ct. 1955, 1967-69 (2007). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the . . . laws in ways that have not been alleged." Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). The complaint must allege sufficient facts to provide " 'fair notice' of the nature of the claim [and] also 'grounds' upon which the claim rests." Bell Atlantic Corp., 127 S. Ct. at 1965 n.3.

III. Analysis

A. IGRA Claim

First, defendants move to dismiss plaintiff's IGRA claim, which alleges that the State has acted in bad faith by conditioning the Tribal-State Compact upon plaintiff's payment of a portion of its future gaming revenue to the State and discontinuation of the receipt of RSTF payments.

Defendants rely principally upon In re Indian Gaming Related Cases, 331 F.3d 1094, 1110-15 (9th Cir. 2003). There, the compact offered by the state permitted the operation of slot machines and house banked blackjack in exchange for the tribes' agreement to contributed to the RSTF. Id. at 1103-05. The tribes brought suit, arguing that the contributions went beyond the amounts necessary to compensate the State for the cost of regulating gaming and therefore constituted a tax under IGRA. Id. at 1110-11. The Ninth Circuit rejected this claim, finding

that the State had not engaged in bad faith by conditioning the compact upon the RSTF provision. Id. at 1111.

Crucially, however, the Ninth Circuit reached this conclusion because the state had offered "meaningful concessions in return for fee demands." Id. at 1112. The State had no obligation to enter into negotiations concerning most forms of class III gaming,[3] nor did it have an obligation to amend its constitution to grant a monopoly to tribal gaming establishments. Id. Under these circumstances, the court found that the State had not exercised "authority to impose a[] tax, fee, charge, or other assessment" under 25 U.S.C. § 2710(d)(4). It further cautioned: "We do not hold that the State could have, *without offering anything in return*, taken the position that it would conclude a Tribal-State compact with [the Tribe] only if the tribe agreed to pay into the RSTF." Id. at 1112 (emphasis in original).

The Ninth Circuit further noted that "[d]epending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to 'impose' a fee, and therefore amount to bad faith on the part of a State." Id. Accordingly, courts must consider the totality of the circumstances when undertaking the "fact-specific" good faith inquiry required by IGRA. Id.

[3] See Rumsey Indian Racheria of Wintun Indians v. Wilson, 63 F.3d 1250, 1258 (9th Cir. 1994) ("IGRA does not require a state to negotiate over one form of Class III gaming simply because it has legalized another, albeit similar form of gaming.").

Here, drawing all reasonable inferences in favor of plaintiff, the complaint alleges that the State's demands exceed those that are permitted to compensate it for the regulation of gaming under IGRA. See Compl. ¶ 19 (noting permissible subjects of negotiation under 25 U.S.C. § 2710(d)(3)(C)); Compl. ¶ 38 (alleging that the State demanded provisions that constituted a tax, fee, charge, or other assessment). Indeed, plaintiff alleges that it proposed terms that would have indirectly compensated the State for costs associated with regulation by paying for infrastructure development and mitigation costs to the local government. Compl. ¶ 36.

Significantly, the complaint does not allege any "meaningful concessions in return for fee demands" offered by the state. In re Indian Gaming Related Cases, 331 F.3d at 1112. Because the court must accept plaintiff's allegations as true for purposes of a motion for judgment on the pleadings, dismissal at this stage would be inappropriate.

In addition, defendants argue that plaintiff should be equitably estopped from claiming that the State acted in bad fath because, when it requested compact negotiations, the Tribe purportedly agreed to compensate the State for the "privilege and benefit" of gaming. Defs.' Req. for Judicial Notice, Ex. 1. The parties dispute whether this statement, made in a letter sent from the Tribe to the Governor on July 21, 2004, is subject to judicial notice. Assuming that the letter is subject to judicial notice, however, the statement does not necessarily

evince an intention on the part of the Tribe to revenue share with the State or to forego its RSTF payments. Instead, the statement could also be interpreted as referring to the state's right to defray costs associated with the regulation of gaming under § 2710(d)(4) of IGRA.[4]

In order to fully evaluate defendants' claim for equitable estoppel, the court must consider the totality of the circumstances, which it cannot do in the current posture. For example, the letter states that the Tribe "agrees with the Governor's belief that Indian tribes should provide compensation to the state in recognition of the unique privilege and benefit that gaming provides." The Governor's belief, and any shared understanding between the parties as to that belief, is outside the scope of the pleadings, and cannot be ascertained based upon the limited materials submitted by defendants in their request for judicial notice. Similarly, defendants' assertion that "[t]he Plaintiff knew that Governor Schwarzenegger was negotiating compacts that included revenue sharing provisions and invited the State to negotiate on the basis" is a factual issue that cannot be resolved on the pleadings. See Kosakow v. New Rochelle Radiology Ass'n, 274 F.3d 706, 725 (2d Cir. 2001)

[4] That said, the next sentence of the letter reported the estimated earnings from gaming per day. It is not clear why this estimate would be relevant to the State's regulation costs. Instead, it appears more consistent with defendants' argument, that the Tribe envisioned the possibility of revenue sharing. Whatever the effect of that statement, however, it seems clear that resolution of that ambiguity on a motion for judgment on the pleadings is inappropriate.

("Whether equitable estoppel applies in a given case is ultimately a question of fact."). Accordingly, the court denies the motion for judgment on the pleadings with respect to plaintiff's IGRA claim.

B. Equal Protection Claim

Defendants also move for dismissal of plaintiff's equal protection claim, arguing that a tribe is not a "person" under § 1983 for purposes of an equal protection claim. Defendants rely principally upon Inyo County v. Paiute-Shoshone Indians of the Bishop Community, 538 U.S. 701 (2003). There, a tribe challenged the county's authority to seize casino employee records as part of a welfare fraud investigation. The Tribe sought relief under § 1983, claiming that the county had violated its Fourth and Fourteenth Amendment rights and its right to self-government. The Supreme Court rejected the claim, holding that the Tribe was not a "person" for purposes of § 1983 -- not based upon a "bare analysis" of the term "person" -- but based upon the "legislative environment" in which the word appears. Id. at 711. Specifically, it held that the tribe's assertion of sovereign immunity did not fall within § 1983's purpose of securing private rights against government encroachment. Id. at 712; cf. id. at 714 (Stevens, J., concurring) ("the Tribe rests its case entirely on its claim that, as a sovereign, it should be accorded a special immunity that private casinos do not enjoy").

Here the plaintiff seeks through its equal protection claim

to enforce a right that only exists by virtue of its status as a sovereign. The complaint alleges that other tribes are given "special privileges and/or immunities" that are denied to the plaintiff with regard to the operation of gaming by the respective tribe. Compl. ¶¶ 63, 64. This asserted interest only exists by the plaintiff's status as a sovereign or, put differently, as an entity able to negotiate and secure agreements with the defendants regarding gaming. See Inyo County, 538 U.S. at 711 (it was "only by virtue of the Tribe's asserted 'sovereign' status" that its equal protection rights have been allegedly violated). Like the Tribe in Inyo County, plaintiff here asserts that it possesses a constitutionally protected interest, but that interest is one that a similarly situated private party would not enjoy. See id. Accordingly, the court finds that the right asserted by the Tribe is not a private right that falls within the scope of § 1983. The court therefore grants the motion for judgment on the pleadings with respect to plaintiff's equal protection claim.[5]

C. Suit Against the Attorney General

Finally, defendants argue the Attorney General is an improper defendant to this suit, because it is the Governor, rather than the Attorney General, who represents the State in

[5] Defendants also argue that the statutory remedy afforded by IGRA should be exclusive, see Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73-74 (1996) (declining to permit a separate IGRA enforcement action through Ex Parte Young), but Seminole Tribe did not confront the equal protection issues present here.

class III gaming compact negotiations. Cal. Const., art. IV, § 19(f) ("the Governor is authorized to negotiate and conclude compacts"). Plaintiff responds that it is possible that the Governor delegated this authority to the Attorney General. See, e.g., Westly v. Superior Court, 125 Cal. App. 4th 907, 909 (2004). The complaint, however, does not contain any such allegation.[6] In addition, to the extent that the Attorney General provided legal advice to the Governor, whose conduct in turn gave rise to the causes of action, any injury suffered by plaintiffs may be redressed through the Governor. Accordingly, the court grants the motion as it pertains to the Attorney General.

IV. Conclusion

For the reasons set forth above, the court GRANTS IN PART and DENIES IN PART the motion for judgment on the pleadings. Defendant Jerry Brown is DISMISSED from this action.

IT IS SO ORDERED.

DATED: September 10, 2008.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

[6] To the extent that plaintiff wishes to amend its complaint, it must first demonstrate good cause, as noted in the court's scheduling order.