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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Rolling Frito-Lay Sales LP, Plaintiff, vs. Rebecca Stover; David Montiel dba On-Auk-Mor Trade Center; Auk Mor; Salt River Pima-Maricopa Indian Community Court, Defendants.	CV 11-1361-PHX-FJM **ORDER**

The court has before it defendant Stover's motion to dismiss for lack of jurisdiction (doc. 13), plaintiff's combined response to Stover's motion to dismiss and Stover's cross motion for summary judgment (doc. 21), and Stover's reply to plaintiff's combined response to the motion to dismiss and Stover's cross motion for summary judgment (doc. 22). We also have before us plaintiff's motion for summary judgment (doc. 7), Stover's response and cross-motion for summary judgment (doc. 14), and plaintiff's reply (doc. 18). Next, we have plaintiff's motion to strike Stover's response to plaintiff's statement of facts in support of its motion for summary judgment (doc. 17), and Stover's notice of errata and motion to amend her response to plaintiff's statement of facts (doc. 20). Finally, we have defendants Montiel and the On-Auk-Mor Trade Center's motion to dismiss for lack of jurisdiction (doc. 23), plaintiff's response (doc. 24), and Montiel and On-Auk-Mor's reply (doc. 25). It does not

appear that the Salt River Pima-Maricopa Indian Community Court has been served, and it has not appeared in these proceedings.

I. Background

The facts are undisputed. The On-Auk-Mor Trade Center ("On-Auk-Mor") is owned by defendant Montiel and located on the Salt River Pima-Maricopa Indian Reservation. Montiel is a tribal member. Plaintiff, a non-Indian limited partnership, provides products to On-Auk-Mor for sale. Defendant Rebecca Stover, a non-Indian, visited On-Auk-Mor, slipped on one of plaintiff's boxes, fell, and was injured.

Stover filed an action in the Superior Court of Arizona in Maricopa County against plaintiff, Montiel, and On-Auk-Mor on May 14, 2010. In August 2010, the Superior Court dismissed all claims against Montiel and On-Auk-Mor because, as tribal members, they were not subject to state jurisdiction. Much later, in April 2011, the Superior Court dismissed Stover's claim against plaintiff without prejudice for lack of prosecution. It is unclear why Stover abandoned her claim against plaintiff in a court which clearly had jurisdiction. Stover brought an action in tribal court against plaintiff, where only special tribal advocates are permitted to appear.

Plaintiff filed this action, seeking, among other things, to enjoin Stover from proceeding against plaintiff in tribal court.

II. Stover's Motion to Dismiss

Stover moves to dismiss for lack of jurisdiction and contends that the tribe has jurisdiction over her claims against plaintiff. She also contends that principles of comity require us to dismiss or abstain because of the action in tribal court. Plaintiff contends that the tribal court has no jurisdiction over an action brought by a non-Indian against a non-Indian. Plaintiff also contends that the issue is clear enough such that exhaustion is not required.

"[W]hether a tribal court has adjudicative authority over nonmembers is a federal question." Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 554 U.S. 316,

324, 128 S. Ct. 2709, 2716 (2008). Thus, it is plain that we have subject matter jurisdiction under 28 U.S.C. § 1331. Whether we should exercise that jurisdiction at this time is dependent upon the clarity of the underlying claim and whether tribal exhaustion would serve a purpose other than delay. Nevada v. Hicks, 533 U.S. 353, 369, 121 S. Ct. 2304, 2315 (2001). If it is clear that the tribal court has no jurisdiction, exhaustion would serve no purpose other than delay. Id. See also Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14, 117 S. Ct. 1404, 1416 n.14 (1997) ("when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.") (Internal citation omitted). Thus, in order to determine whether plaintiff must first litigate its federal question in tribal court, we must examine the merits. If it is plain that the tribal court is without jurisdiction, plaintiff will be subjected to needless delay and expense for no countervailing purpose. Plaintiff claims the federal right to be free of tribal jurisdiction. It would be anomalous indeed to require plaintiff to first suffer the loss of the very right for which it seeks protection (to be free of tribal jurisdiction) before affording an opportunity to protect its right.

To this day, the Supreme Court has "never held that a tribal court had jurisdiction over a nonmember defendant." Hicks, 533 U.S. at 358 n.2, 121 S. Ct. at 2309 n.2. This speaks volumes. We begin with Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011 (1978), which held that a tribal court has no criminal jurisdiction over a non-Indian because that would be inconsistent with the tribe's status. The Court stated that the tribe's assertion of authority over a non-Indian ignored the fact that there exists within the United States but two sovereigns: the United States and the states. Id. at 211, 98 S. Ct. at 1022. And, in the companion case of United States v. Wheeler, 435 U.S. 313, 98 S. Ct.1079 (1978), the Court acknowledged that the self-governing powers of tribes "involve only the relations among members of a tribe" and that divestiture of sovereignty has occurred with respect to "the relations between an Indian tribe and nonmembers of the tribe. " Id. at 326, 98 S. Ct. at 1087-88 (emphasis added).

This basic framework is not limited to criminal jurisdiction. The Court expressly quoted and relied on Oliphant and Wheeler in addressing the civil regulatory power of a tribe over non-Indians in Montana v. United States, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257 (1981). The Court specifically stated that "[t]hough Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565, 101 S.Ct. at 1258. The Court then acknowledged two exceptions: "some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," (1) "who enter consensual relationships with the tribe or its members" or (2) whose conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." Id. at 565-66, 101 S. Ct. at 1258 (emphasis added).

Relying on Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F. 3d 802 (9th Cir. 2011), Stover contends that the presumption against tribal jurisdiction and the Montana exceptions apply only to fee patented land within the boundaries of a reservation. But this contention cannot be squared with the Court's post-Montana decisions. In Strate, the Court described Montana as "the pathmarking case concerning tribal civil authority over nonmembers." 520 U.S. at 445, 117 S.Ct. at 1409. It could hardly be pathmarking if it did not apply to tribal land within a reservation. And in Hicks, the Court stated that "Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in Montana which we have called the 'pathmarking case' on the subject." 533 U.S. at 358, 121 S. Ct. at 2309 (internal citations omitted). The Court expressly rejected the contention that because Hicks's home was on tribal land Montana was distinguishable. 533 U.S. at 359, 121 S. Ct. at 2310 (citation omitted). Indeed, the Court read the use of the word "reservation" in Montana to imply "that the general rule of Montana applies to both Indian and non-Indian land." Id. at 359-60, 121 S. Ct. at 2310.

The Court's most recent pronouncement leaves no ambiguity. The Court said that

"tribes do not, as a general matter, possess authority over non-Indians who come within their borders," Plains, 554 U.S. at 328, 128 S. Ct. at 2718, and that "the general rule [of Montana and Oliphant] restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." Id. at 328, 128 S. Ct. at 2719 (emphasis added). If there were any doubt about this, the Court then relied on Montana's general proposition to state that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" Id. at 330, 128 S. Ct. at 2720. Nor can a tribe's adjudicative jurisdiction exceed its legislative jurisdiction. Id. Unless words are infinitely elastic, one cannot limit Montana to the activities of non-Indians on fee patented land. This is so because, as the Court noted, subjecting non-Indians to the jurisdiction of a tribal court without their consent would subject them to an entity outside the Constitution. Id. at 337, 128 S. Ct. at 2724. Government with the consent of the governed is everything in America.

To the extent that the *per curiam* opinion in Water Wheel departs from Supreme Court jurisprudence in the area of Federal Indian Law, we are constrained by the Supremacy Clause, Art. VI, and Article III ("one supreme Court") to follow the Supreme Court. See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535, 103 S. Ct. 1343, 1344 (1983). We thus apply Montana to this case. Ironically, even if Montana did not apply to reservation land, we would fall back on Oliphant and Wheeler to conclude that there is no tribal court jurisdiction over non-Indians on reservation land. See Frederick J. Martone, Of Power and Purpose, 54 Notre Dame L. Rev. 829, 836-38 (1979) (reviewing the application of Oliphant and Wheeler in the civil context, concluding that these cases establish that Indian tribes lack jurisdiction over non-Indians).

It is undisputed that plaintiff is a non-Indian limited partnership, and that Stover's injuries occurred on the reservation. We are therefore presented with the classic Montana query. Beginning with the presumption that the tribal court lacks jurisdiction over a non-Indian's actions, we assess whether either of Montana's exceptions apply.

The first Montana exception approves tribal regulation "through taxation, licensing, or other means" over a non-Indian's activities when the non-Indian has entered into a "consensual relationship[] with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 450 U.S. at 565, 101 S. Ct. at 1258. Plaintiff acknowledges that it agreed to and did deliver its products to the On-Auk-Mor for sale. Although the exact nature of the relationship is unclear, we conclude that a consensual relationship as defined in Montana is present between plaintiff and On-Auk-Mor, whether or not a written contract exists. According to Stover, the existence of the consensual relationship is all that is needed for the first Montana exception to apply. We disagree. There is no consensual relationship between plaintiff and Stover.

The justifications for tribal jurisdiction must be considered when assessing whether jurisdiction exists. This is because a tribal court's power is limited to that which is needed to (1) protect self-government, and (2) "control internal relations." Id. at 564, 101 S. Ct. at 1258. The Montana exceptions emerge from the justifications for recognizing tribal power.

> Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations. The regulations we have approved under Montana all flow directly from these limited sovereign interests.

Plains, 554 U.S. at 335, 128 S. Ct. at 2723. Also important to the analysis is the notion of consent. Non-Indian defendants, after all, are often United States citizens. See United States v. Lara, 541 U.S. 193, 212, 124 S. Ct. 1628, 1640 (2004) (Kennedy, J., concurring); see also Duro v. Reina, 495 U.S. 676, 692-94, 110 S. Ct. 2053, 2063-64 (1990) (superceded by statute on other grounds). These defendants do not lose their citizenship or renounce its protections simply by stepping foot on an Indian reservation. Non-Indians, by virtue of their non-member status, do not play any role in tribal government and "have no say" in tribal laws and regulations. Plains, 554 U.S. at 337, 128 S. Ct. at 2724. "Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented,

either expressly or by his actions." Id. But consent alone is not enough. "Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." Id.

In Plains, the Court noted that a non-Indian defendant bank might have reasonably thought that its commercial dealings with an Indian company "could trigger tribal authority to regulate those transactions." Id. at 338, 128 S. Ct. at 2725. But Plains held there was "no reason" that the bank should have thought that its business dealings would permit the tribe to regulate the sale of bank-owned land. Id. Here, Stover's tort claim is unrelated to plaintiff's consensual relationship with a tribe member to deliver items for sale to a tribal store. There is no reason why a non-Indian company should reasonably have expected its delivery of food to an Indian store would subject it to a negligence suit by a non-Indian plaintiff governed not by United States law, but by tribal laws and procedures. To find otherwise would expand tribal power over non-members beyond its recognized limits of that necessary to preserve self-governance and control of internal relations.

Stover next argues that Montana's second exception applies. Tribal jurisdiction exists when a non-Indian's conduct on reservation land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 566, 101 S. Ct. at 1258. The non-Indian's conduct must not only injure the tribe, "it must 'imperil the subsistence' of the tribal community." Plains, 554 U.S. at 341, 128 S. Ct. at 2726 (citation omitted). One commentator suggested that the assertion of tribal jurisdiction would have to be "necessary to avert catastrophic consequences" in order for the second exception to apply. Id. (citation omitted).

Stover argues that negligent conduct in leaving a box on the floor has a direct effect on the political integrity of the Salt River Pima-Maricopa Tribe. According to Stover, "[t]he Tribe's political integrity is threatened when a United States court undercuts the jurisdiction and power of the Tribal Court system." Reply to Mot. to Dismiss at 5-6. But this argument reflects an erroneous understanding of Indian Law and an unwillingness to accept the

limitations imposed on tribal jurisdiction. An injury to a non-Indian caused by another non-Indian cannot conceivably be called catastrophic for tribal self-government. To the contrary, it does not affect the tribe at all.

Stover's argument that plaintiff's negligence affected the health and welfare of every tribe member is equally incredible. Stover has not alleged that the errant box injured anyone other than herself. And she has not alleged that plaintiff's mishandling of the box is part of a pattern of negligent conduct on tribal land. Instead, an isolated instance of a non-Indian's negligence that injured a non-Indian cannot seriously be said to imperil the health and welfare of the tribe.

In sum, it is clear that Stover's allegations against plaintiff do not fall under either of the two Montana exceptions. Because we hold that tribal jurisdiction is clearly lacking and exhaustion would merely cause delay, plaintiff was not required to exhaust tribal court remedies. Comity does not require deference to a court which has no jurisdiction. Stover's motion to dismiss is denied.

III. Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment on its requested injunctive and declaratory relief. In addition, plaintiff moves to strike Stover's responses to plaintiff's statement of facts, arguing that Stover failed to comply with LRCiv 56.1(b). Stover moves to amend her statement of facts, pointing out that plaintiff itself failed to comply with LRCiv 56.1(b) in responding to Stover's statement of facts filed in support of her motion for summary judgment. We note that both parties failed to comply with various aspects of LRCiv 56.1 in their summary judgment briefings, including failing to reference specific admissible portions of the record that support a fact and failing to support assertions in their memoranda of law with citations to the specific paragraph in the statement of facts on which the parties relied. Despite this non-compliance, the material facts are undisputed. Plaintiff's motion to strike is denied and Stover's motion to amend her statement of facts is granted.

We turn to plaintiff's request for injunctive relief from the pending tribal court

litigation. A party is entitled to permanent injunctive relief if it can show (1) an irreparable injury; (2) an inadequate remedy at law to compensate the injury; (3) an injunction is warranted after balancing the hardships between the parties; and (4) the public interest would not be harmed by granting the injunction. eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839 (2006). Stover does not dispute plaintiff's argument that it has met all requirements for injunctive relief, but relies instead on her contention that the tribal court has jurisdiction over her claim against plaintiff.

We conclude that all four requirements for permanent injunctive relief are met. Plaintiff will continue to suffer irreparable harm if forced to litigate in tribal court. If Stover's action against plaintiff proceeds in tribal court, plaintiff will be subjected to litigation in a forum which does not have jurisdiction. Plaintiff will be required to present its jurisdictional challenge at the tribal trial court level and possibly in appellate tribal proceedings, and must retain specific tribal advocates to litigate. Plaintiff will be forced to engage in potentially lengthy litigation, all to defend itself in a forum that lacks jurisdiction. Plaintiff would then be required to bring another action in federal court, presenting the same arguments it has already made here. Although plaintiff did not specifically address the inadequacy of its remedy at law, we note that a damages action against Stover for suing plaintiff in tribal court is not only inadequate, it is likely unavailable. Third, the balance of hardships tips in plaintiff's favor. Granting an injunction will not prevent Stover from pressing her claim against plaintiff in courts of competent jurisdiction. It will not prevent Stover from continuing to prosecute her case against Montiel and On-Auk-Mor in tribal court. It will simply remove plaintiff's burden of defending itself in an improper forum. Finally, the public interest is not advanced by having a court that lacks jurisdiction determine a party's legal rights. We therefore grant plaintiff's request for injunctive relief against Stover.

Plaintiff seeks a declaration that (1) Stover's tort action against plaintiff be adjudicated in this court; (2) Stover's claims against plaintiff are barred by res judicata; and (3) Stover's

claims against plaintiff are barred by the two-year statute of limitations pursuant to A.R.S. § 12-542. Under the Declaratory Judgment Act, a district court has discretion to decide whether to maintain jurisdiction over a declaratory action. See 28 U.S.C. § 2201(a); Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1107 (9th Cir. 2011). Having adjudicated the one federal question in this case - whether the tribal court has jurisdiction over Stover's claim - we are left with plaintiff's request for declaratory relief concerning a state-law negligence claim. We exercise our discretion and decline to maintain jurisdiction over the declaratory action. State courts are the best place to adjudicate state law claims against non-Indian parties.

IV. Stover's Cross-Motion for Summary Judgment

Stover's cross-motion duplicates her motion to dismiss. Because we have already concluded that the tribal court lacks jurisdiction over Stover's tort action against plaintiff, Stover's cross-motion for summary judgment is denied.

V. Montiel and On-Auk-Mor's Motion to Dismiss

Montiel and On-Auk-Mor move for dismissal for lack of personal and subject matter jurisdiction. They argue that because Montiel is a tribe member and owns the On-Auk-Mor (where Stover was injured), the tribal court has jurisdiction over them. We agree that the tribal court is the proper forum for Stover to assert her tort claims against Montiel and On-Auk-Mor. See Plains, 554 U.S. at 327-28, 128 S. Ct. at 2718-19 (discussing tribal authority to govern its own members' conduct). Thus, there is no reason for these defendants to be present in this action, which is limited to plaintiff's objections to Stover's claims against plaintiff in tribal court. Accordingly, we grant Montiel and On-Auk-Mor's motion to dismiss.

VI. Salt River Pima-Maricopa Indian Community Court

There is no evidence that the Salt River Pima-Maricopa Indian Community Court has been served. Under Rule 4(m), Fed. R. Civ. P., a defendant must be served within 120 days after the complaint is filed. This action was filed on July 8, 2011. The deadline for service has passed and plaintiff has neither moved for an extension nor shown good cause for the

failure to serve. We therefore dismiss the Salt River Pima-Maricopa Indian Community Court from this action.

VII. Conclusion

IT IS ORDERED DISMISSING defendant Salt River Pima-Maricopa Indian Community Court without prejudice.

IT IS ORDERED DENYING Stover's motion to dismiss for lack of jurisdiction (doc. 13).

IT IS ORDERED DENYING plaintiff's motion to strike (doc. 17).

IT IS ORDERED GRANTING Stover's motion to amend her statement of facts (doc. 20).

IT IS ORDERED DENYING Stover's cross-motion for summary judgment (doc. 14).

IT IS ORDERED GRANTING Montiel and On-Auk-Mor Trading Center's motion to dismiss for lack of personal and subject matter jurisdiction (doc. 23).

IT IS ORDERED GRANTING IN PART AND DENYING IN PART plaintiff's motion for summary judgment (doc. 7). Plaintiff's request for injunctive relief is **GRANTED**. **IT IS ORDERED** that, except for voluntarily dismissing her complaint, Rebecca Stover is permanently enjoined from prosecuting, taking action, or conducting any proceedings against Rolling Frito-Lay Sales L.P. in tribal court, including Salt River Pima-Maricopa Community Court Action C-11-0012. Plaintiff's requests for declaratory relief are **DENIED** without prejudice.

Because we decline to exercise jurisdiction over plaintiff's declaratory action, this case is at an end. The Clerk shall enter judgment.

DATED this 26th day of January, 2012.

Frederick J. Martone

Frederick J. Martone
United States District Judge