UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

NANTICOKE LENNI-LENAPE TRIBAL NATION,

Plaintiff,

v.

ROBERT LOUGY, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendant.

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Civil Action No:
1:15-cv-05645 (RMB/JS)

Return Date: June 20, 2016

Oral Argument Requested

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and 12(b)(6)

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POINT I

THE ELEVENTH AMENDMENT BARS THIS ACTION.

Plaintiff's brief ("Pb") acknowledges that this suit is barred by the Eleventh Amendment unless it falls within the Ex parte Young exception. Pb6. But the opposing brief fails to show why this case does not squarely fall within two limitations on the application of Ex parte Young: (1) The doctrine does not apply when a suit is only nominally against an individual state officer and the state is the real, substantial party in interest (see, e.g., MCI Telecomm. Corp v. Bell Atl.-Pa., 271 F. 3d 491, 506 (3d Cir. 2001)) and (2) Young also does not apply if the suit seeks retroactive relief. See Edelman v. Jordan, 415 U.S. 651, 667-68 (1974).

The Plaintiff claims that the State is not the real party in interest because the suit is focused on the Acting Attorney General who is "claiming to act as officers of the State…[,who] commit acts of wrong and injury to the rights and property of the plaintiff." (Pb11) (quoting New Jersey Educ. Ass'n v. New Jersey, 2012 U.S. Dist. LEXIS 28683, No. 11-5024, at *29-30 (D.N.J. Mar. 5, 2012)). But the facts averred in the Amended Complaint belie this assertion of federal jurisdiction. See Gibbs v. Buck, 307 U.S. 66 (1939).

Viewed in its totality, this case falls into the other class of cases identified in New Jersey Educ. Ass'n, in which Ex parte Young does not apply -- "where the suit is brought against the

officers of the State, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate…." New Jersey Educ. Ass'n v. New Jersey, supra, 2012 U.S. Dist. LEXIS 28683, No. 11-5024, at *28 (quoted at Pb11).

The Amended Complaint focuses on the State itself as it seeks a declaration "that the Tribe has been officially recognized as an American Indian tribe by the State of New Jersey" (*ad damnum* clause)(emphasis added). Although other requests for relief are literally directed only at the Acting Attorney General, it is clear from the totality of the pleading that all the relief sought, including an order enjoining the defendant from denying, repudiating or impairing its claimed status as an officially recognized tribe and estopping defendant from denying or repudiating that status, is necessarily directed at all New Jersey government representatives. Indeed, the most prominent alleged repudiation of the Tribe's "recognition" in the Amended Complaint was uttered by an employee of the State Commission on American Affairs, rather than a representative of the Attorney General's Office. (Amend. Compl. ¶ 38).

Plaintiff's claims are also effectively against the State itself because Plaintiff seeks to compel specific performance of the State's claimed previous commitments (first allegedly enunciated in 1982) to recognize Plaintiff as an American Indian

tribe. The analogy to the New Jersey Educ. Ass'n decision is appropriate even though our case does not strictly involve a contract. As in New Jersey Educ. Ass'n, the decision to recognize an American Indian tribe, or to deny or rescind a prior recognition, is within the State's role in its political capacity.[1] The State should not be haled into federal court for such a claim.

The Amended Complaint also impermissibly seeks retroactive relief. Contrary to Plaintiff's position (Pb9), Plaintiff does not merely seek to enjoin the Defendant on a prospective basis from denying or impairing the Tribe's claimed status as a recognized tribe. The Amended Complaint alleges that the Defendant denied state recognition as early as 2001. (Amend. Compl. ¶ 49). Thus, the Plaintiff seeks to reinstate the status quo by restoring the State's recognition of the Tribe that supposedly existed years before the Defendant's challenged communications began in 2001.

Finally, the Court's hypothetical (in which an attorney general prospectively disavowed statutory recognition of the Tribe) is distinguishable from this case for two reasons beyond the manner in which the State created the alleged protected interest. First, in the hypothetical, the Attorney General is the injunction's only needed target. Here, the relief sought is effectively against all

[1] A state's decision to recognize a tribe (or rescind that position) also involves "a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state." MCI Telecom Corp., supra, 271 F.3d at 508. For this additional reason, the case is barred under the Eleventh Amendment.

state government representatives and seeks an order enjoining all such persons from denying or repudiating the Tribe's alleged status as a recognized tribe. Second, in our case, as opposed to the hypothetical, the Tribe seeks restoration of the status quo supposedly existing years before Defendant's challenged communications. Thus, the Eleventh Amendment bars this suit.

POINT II

PLAINTIFF'S SECOND AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE THE ISSUES PRESENTED ARE NONJUSTICIABLE POLITICAL QUESTIONS.

In our moving brief ("Db"), we argued that the issue of potential "recognition" of the Nation by New Jersey, including the standards for potential rescission of recognition, poses political questions entrusted to the Legislature. (Db 24-29). In response, Plaintiff argues that our reliance on the 2002 American Indian recognition statute, N.J.S.A. 52:16A-56(g), is misplaced because the Nation was in fact "recognized" some twenty years earlier through the 1982 legislative Concurrent Resolution and, second, that the 2002 statute is not retroactive. (Pb 14).

Plaintiff's position has several flaws. First, the Concurrent Resolution does not have the force and effect of law. Further, the express terms of that resolution did not formally recognize the Tribe. Rather, it is clear from the use of the terminology "designate", that the recognition was only in the limited cognitive sense of marking, signifying or identifying the Plaintiff. The

Concurrent Resolution is not a formal acknowledgement by the Legislature that the Nation is an authentic sovereign government.

Moreover, even if the resolution were some form of recognition, the Amended Complaint acknowledges that the "recognition" was impaired, if not rescinded, by the Division of Gaming Enforcement's 2001 letter. Thus, we are still left with the issues of whether the State validly rescinded the claimed earlier official recognition of the Nation and what standards should be applied when revaluating or rescinding such recognition. These are matters within the Legislature's province. (Db 28-29).

Plaintiff's brief cites various cases it claims support justiciability. (See Pb 14-15). All are readily distinguishable. First, Plaintiff cites an unpublished Connecticut decision, Amalgamated Indus., Inc. v. Historic E. Pequot Tribe, No. X03 CV 03 4000287, 2005 WL 1358964 (Conn. Super. Ct. May 2, 2005). That case involved Indian tribes, recognized by the State of Connecticut. The tribes were sued for breach of contract by a company attempting to assist the tribes in obtaining federal recognition, for which an application was pending. The tribes argued that sovereign immunity and the political question doctrine barred the suit. The court rejected the political question defense, ruling that the tribe's unquestioned state recognition was sufficient to support the sovereign immunity defense. Our case, in which the question of state recognition is at issue, is very different.

The other cases Plaintiff cites (see Pb 15), with one exception, all concern tribal recognition under federal law. See Robinson v. Salazar, 838 F. Supp. 2d 1006, 1027-1029 (E.D. Cal. 2012) (court evaluated tribe's status under federal law); Gristede's Foods v. Unkechauge Nation, 660 F.Supp. 2d 442, 469 (E.D.N.Y. 2009)(court empowered to decide tribal status under federal law); New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 491-93 (E.D.N.Y. 2005)(in suit challenging state-recognized tribe's ability to develop land for a casino, court evaluated the tribe's status under federal common law); Narragansett Tribe of Indians v. Southern Rhode Island Land, 418 F. Supp. 798,813-15 (D.R.I. 1976)(court could determine tribe's status under federal law in suit under the federal Indian Non-Intercourse Act). The issue of the Tribe's recognition under federal common law is obviously not raised in this case.[2]

Turning to the Baker v. Carr, 369 U.S. 186, 198 (1962) factors, our moving brief demonstrated that at least four of the six factors apply.[3] First, there is a lack of judicially

[2] The final case cited by Plaintiff, Schaghticoke Tribal Nation v. Harrison, 264 Conn. 829 (2003), involved a trespass suit brought by a state recognized tribe with a federal recognition petition pending. The court merely held that the pending federal action did not deprive the state court of the ability to decide whether a party has standing to sue on behalf of a state recognized tribe. 264 Conn. at 836-837.

[3] The Tribe erroneously tries to fit our case within the proposition enunciated in Baker v. Carr itself that "where tribal status is concerned, a court 'will not stand impotent before an

discoverable and manageable standards for resolving the case. Despite Plaintiff's position (Pb 17), for the reasons previously stated, this case does not merely raise the issue of confirming earlier state recognition. There are no statutory or regulatory standards for recognition of American Indian tribes by New Jersey or for possible reevaluation or rescission of such status.

Second, in the absence of prescribed criteria for state recognition, the case raises initial policy determinations reserved to the Legislature. The mere fact that Plaintiff asserts various constitutional violations does not change this. As noted in our moving brief, the Legislature has actively considered, but not passed, over the last several years statutes officially recognizing the Tribe. Plaintiff attempts to defuse the key significance of these proposed bills by relying on paragraph 30n of its Amended Complaint. (Db18). That paragraph alleges that in 2007, the State's Committee of Native American Community Affairs recommended that further action (such as legislation) be taken to reaffirm earlier recognition of the Tribe. The Court should disregard this

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obvious instance of a manifestly unauthorized exercise of power.'" (Pb16) (quoting Baker v. Carr, 369 U.S. at 217). The Baker court used that language (after first observing that Congress, not courts, controls relations with Indian tribes) when noting that courts can intervene if the U.S. Congress inappropriately labels a group as an Indian community when it is not. 369 U.S. at 215-17. Our case obviously does not present this issue.

allegation given that the proposed legislative efforts began in 2002, five years before the Committee's recommendations.

Third, the Court should decline to adjudicate this case because it would express a lack of respect for the Legislative branch. Again, this case does not merely involve confirming earlier "recognition" of the Tribe by the State. The case raises recognition and rescission issues that are allocated to the Legislature. Finally, there would be the strong potential for "embarrassment from multifarious pronouncements by various departments on one question," if the Court were to act here (particularly due to several failed efforts to pass legislation). In sum, this matter should be dismissed under the political question doctrine.

POINT III

PLAINTIFF HAS NOT SET FORTH A COGNIZABLE DUE PROCESS CLAIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Substantive Due Process

The Nation's opposing brief acknowledges, as it must, that in order to state a claim of a substantive due process violation, the plaintiff must allege deprivation of a fundamental right by government conduct that "shocks the conscience." (See Pb 23). Plaintiff cannot meet either element.

First, the Amended Complaint does not allege violation of a fundamental right or liberty, such as those catalogued in

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); (see Db 31, 33). Rather, the Amended Complaint vaguely asserts that the Tribe has a fundamental property and liberty interest "in its identity and its status as an American Indian tribe." (Amend. Compl. ¶ 62). Plaintiff fails to cite authority identifying this vague right as a recognized fundamental right or liberty.

Nor can the Amended Complaint provide the required precision by tying this asserted fundamental right to the purported State actions. The Amended Complaint asserts that the State's alleged repudiation of the Nation's tribal status infringed on its fundamental rights. (Amend. Compl. ¶ 64). But as demonstrated in our opening brief, the State does not have any procedures, standards or requirements for the "recognition" or continued recognition of American Indian tribes (other than that the Legislature must pass a formal statute recognizing a tribe). Thus, the right to be free from any purported repudiation of state recognition does not fall within the narrow list of this country's deeply-rooted fundamental rights and liberties.

In addition, Plaintiff claims "a fundamental protected interest in self-determination and freedom of association," (Amend. Compl. ¶ 63), and newly relies upon the "constitutional protection of group relationships" enumerated in Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984). (Pb23). In Roberts, the Supreme Court noted that it had "referred to constitutionally protected 'freedom of

association' in two distinct senses." Id. at 617. In one line of cases, the Court had "concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion," and, in a second line of decisions, the Court had "recognized a right to associate for the purpose of . . . activities protected by the First Amendment . . . ." Id. at 618.

The first line of freedom of association cases obviously does not apply here. Likewise, the Defendant has failed to describe the freedom of expressive association at stake. The Amended Complaint also does not allege that the Defendant has tried "to interfere with the internal organization or affairs of the group," that he has forced the group "to accept members it does not desire," or that he "has attempted to require disclosure of the fact of membership in a group seeking anonymity." Roberts, supra, 468 U.S. at 623.

The Amended Complaint also does not plausibly allege government conduct that "shocks the conscience." The opposing brief focuses on paragraphs in the Amended Complaint alleging that the Defendant, supposedly acting through the Division of Gaming Enforcement, inappropriately opined that the State in fact had not recognized the Tribe as an authentic American Indian tribe. (Pb 25). An opinion on the legal status of a purported American Indian tribe, which we submit is legally accurate, simply does not fall into the narrow category of egregious actions that could shock

the conscience. The substantive due process claim should therefore be dismissed.

B. Procedural Due Process

As noted in Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991), there are two basic elements to a procedural due process claim: "a plaintiff [must prove] that a person acting under color of state law deprived [him] of a protected interest [and] that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process." Plaintiff's Amended Complaint does not satisfy the protected property interest requirement. "'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Ibid. (quoting Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)). That entitlement is created by an "independent source," such as state law. Baraka v. McGreevey, 481 F.3d 187, 205 (3d Cir. 2007).

Plaintiff argues that it has a "property interest, protected under state law, in protecting and preserving its tribal identity and in its recognition by New Jersey as an official American Indian tribe . . . ." (Amend. Compl. ¶ 57). This claimed entitlement is supposedly based on the 1982 Concurrent Resolution, as well as "two

statutes, official declarations by state agencies . . . and conforming and substantiating state conduct. . . ." (Pb 21).

But the 1982 Concurrent Resolution cannot confer any due process rights on Plaintiff. A Concurrent Resolution is not an act of legislation. General Assembly of New Jersey v. Byrne, 90 N.J. 376, 388-89 (1982) (relying on In re N.Y. Susquehanna & Western R.R. Co., 25 N.J. 343, 348 (1957)). It is well-settled that "a concurrent resolution is ordinarily an expression of sentiment or opinion, without legislative quality of any coercive or operative effect." Application of New York, S. & W. R. Co., 25 N.J. 343, 348-349 (1957). Plaintiff does not attempt to challenge this proposition. Furthermore, in his opinion, Judge Anklowitz correctly explained that the 1982 Concurrent Resolution "didn't follow the process of becoming a law," and, therefore, "very clearly, that resolution is not a law or statute." (T15:9-10; T8:13-14). Thus, because the Concurrent Resolution lacks the force of law, it cannot serve as Plaintiff's independent source under Baraka and does not entitle Plaintiff to any property interest or due process.

Moreover, even if the 1982 resolution were a valid source of law, it cannot confer official state recognition on the Tribe. The Concurrent Resolution's express language says nothing about official recognition. Rather, the Concurrent Resolution acknowledges the tribe by the name it wishes to be called, and provides such acknowledgment to allow the Tribe to qualify "for

appropriate federal funding for Indians." See Feinblatt Cert., Exhibit A.

Furthermore, alleged statements by various governmental officials and purportedly "substantiating state conduct" cannot confer official recognition. As Judge Anklowitz aptly noted,[4] "U.S. Senators and New Jersey Governors are free to say what they think the law is, but they are neither binding, nor a persuasive precedent . . . ." (T15:22-25).[5]

The Tribe also claims that it was recognized, *ipso facto*, via a 1992 law regarding birth records, N.J.S.A. 26:8-49, and by a 1995 law creating the Commission on American Indian Affairs, N.J.S.A. 52:16A-53. As Judge Anklowitz rightly explained, "N.J.S.A. 26:8-49 recognizes ethnic groups, but not tribal entities. Any question about that is resolved by N.J.S.A. 52:16A-56 which says how to become a tribe and that process has not been followed." (T15:15-18). He further stated that "the three named tribes are ethnic groups, but not all ethnic groups . . . are Indian tribes, recognizing . . . an ethnic group for vital statistic purposes is not the same thing as recognizing a tribe as an entity." (T11:9-

[4] While lower state court decisions are not controlling, Judge Anklowitz's well-reasoned opinion dismissing the Tribe's state court complaint is both compelling and instructive.

[5] For the same reason, the alleged recent representations by state agencies to the federal government that New Jersey has recognized three tribes are not binding. (Amend. Compl. ¶ 42). The purported statements cannot confer official recognition as an American Indian tribe by the State of New Jersey, which only can be accomplished by statute. N.J.S.A. 52:16A-56.

13). But the Tribe ignores this distinction and conflates the mere acknowledgement of the Tribe's existence as a group purporting to be an authentic tribe with official recognition of such a group as an authentic American Indian tribe under N.J.S.A. 52:16A-56.

In the same vein, N.J.S.A. 52:16A-53 acknowledges the Tribe's existence as an ethnic group for the purposes of allowing the group's participation in the Commission. But, on its face, N.J.S.A. 52:16A-53 does not confer official state recognition to the Tribe as an authentic American Indian Tribe – in fact, it does not even address this issue. Thus, the various sources upon which Plaintiff relies to assert its due process rights, all fail.[6] The procedural due process claim should therefore be dismissed.

POINT IV

PLAINTIFF HAS NOT SET FORTH A COGNIZABLE EQUAL PROTECTION CLAIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

To state an Equal Protection claim, Plaintiff must allege that it is a member of a protected class that was treated differently from members of a similarly situated class. Bradley v. U.S., 299 F.3d 197, 206 (3d Cir. 2002). Plaintiff's opposing brief concedes that the Amended Complaint does not allege the required disparate treatment. (Pb 26). The brief argues, however, that because

[6] Plaintiff's Amended Complaint also fails to allege what process might be due, even if plaintiff possessed a protected interest. See N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine, No. 09-683, 2010 U.S. Dist. LEXIS 66605, at *69 (D.N.J. June 30, 2010).

American Indian tribes are supposedly unique, they need not allege disparate treatment compared to similarly situated groups. (Pb 26-27). They rely on two Second Circuit cases for this proposition: Pyke v. Cuomo, 258 F. 3d 107 (2d Cir. 2001) and Brown v. Oneota, 221 F. 3d 329 (2d Cir. 1999). These two cases have not been adopted in the Third Circuit and should not be followed. The Third Circuit has adopted a related doctrine known as the class of one theory. To state a claim under this theory, "a plaintiff must allege that (1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006). Given the failure to allege treatment different from those similarly situated, the Equal Protection claim should be dismissed.

CONCLUSION

For the foregoing reasons, and those stated in the moving brief, the Second Amended Complaint should be dismissed in its entirety for lack of subject matter jurisdiction and failure to state a claim.

Respectfully submitted,
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Dated: June 13, 2016