

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ONEIDA NATION OF NEW YORK,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 6:10-CV-1071
)	(DNH/ATB)
DAVID A. PATERSON, et al.,)	
)	
Defendants.)	
_____)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S
MOTION FOR AN ORDER DISMISSING THIS ACTION
WITHOUT PREJUDICE PURSUANT TO FED. R. CIV. P. 41(a)(2)**

Plaintiff Oneida Nation, by counsel, submits this memorandum in support of its motion for an order dismissing this action without prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

Plaintiff filed this action on September 7, 2010 and promptly sought, under Fed. R. Civ. P. 65, a temporary restraining order and a preliminary injunction as against Defendants’ enforcement of certain state statutes and regulations with respect to taxation of cigarettes sold to Indian tribes and their members. Aug. 19, 2011 Declaration of Michael R. Smith (“Smith Decl.”), at Ex. A (complaint) and Ex. C (docket sheet). The Court issued the interlocutory relief Plaintiff had requested, and Defendants appealed. *Id.*, at Ex. C (docket sheet).

On May 9, 2011, the United States Court of Appeals for the Second Circuit reviewed this Court’s interlocutory order granting a preliminary injunction and issued a decision. *Oneida Nation v. Cuomo*, 645 F.3d 154 (2d Cir. 2011); Smith Decl. at Ex. D (opinion). The Second Circuit “vacated” this Court’s interlocutory orders and “remanded for further proceedings

consistent with this opinion.” 645 F.3d at 176; Smith Decl., at Ex. D (opinion). Because the only orders on review in the Second Circuit concerned interlocutory injunctive relief, and not a final merits adjudication, the Second Circuit resolved only Plaintiff’s entitlement to interlocutory injunctive relief and did not make a final merits determination. As the Second Circuit summarized its decision:

Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims that (1) the precollection scheme impermissibly imposes a direct tax on tribal retailers, or alternatively, imposes an undue and unnecessary economic burden on tribal retailers; and (2) the coupon and prior approval systems interfere with their rights of self-government and rights to purchase cigarettes free from state taxation. The Northern District committed legal error in determining that both of these arguments were likely to succeed, and thus abused its discretion in granting the Oneida Nation’s motion for preliminary injunction.

645 F.3d at 175-76; Smith Decl., at Ex. D (opinion).

Neither before nor after the Second Circuit’s decision have Defendants filed a Rule 12 motion to dismiss, a Rule 56 motion for summary judgment, or any other motion calling for an adjudication of Plaintiff’s claims on the merits.

In its August 2, 2011 order, this Court noted that Defendants have not filed a motion to dismiss and noted also that Plaintiff has taken no action since the Second Circuit’s May 9th decision. Smith Decl., at Ex. E (order).

In the absence of a preliminary injunction as against Defendants’ enforcement of state laws concerning sales by wholesalers and other entities of cigarettes to Indian tribes and their members, Plaintiff is no longer purchasing cigarettes from wholesalers or other entities. Smith Decl. ¶ 4. In these circumstances, and in view of this Court’s August 2nd order, Plaintiff’s counsel inquired of Defendants’ counsel whether Defendants would agree to dismissal of this

action without prejudice. *Id.* ¶ 6. Defendants would not agree to dismissal of the action without prejudice. *Id.* ¶ 7. Instead, they proposed dismissal with prejudice as to all claims resolved by the Second Circuit, and dismissal without prejudice as to other claims. *Id.* Defendants' proposal appears to be an effort to convert the Second Circuit's determination of likelihood of success in the preliminary injunction context into a final merits adjudication. Consequently, Plaintiff has filed its motion requesting an order dismissing this action without prejudice.

Regarding "Voluntary Dismissal," Rule 41(a) provides, as relevant here:

[A]n action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Fed. R. Civ. P. 41(a)(2). Thus, granting voluntary dismissal is discretionary with the Court, in the absence of a pending counterclaim (and there is no counterclaim in this case), and dismissal without prejudice is the default position.

Dismissal without prejudice is allowed unless such dismissal will prejudice a defendant. *D'Alto v. Dahon Cal., Inc.*, 100 F.3d 281, 283 (2d Cir. 1996). Prejudice does not include the possibility of later litigation, although there is no reason to believe that such litigation will occur here. "[S]tarting a litigation all over again does not constitute legal prejudice." *Id.* If there is prejudice, it generally is found in the following five factors: delay by plaintiff in moving to dismiss; undue vexatiousness on plaintiff's part; the progress that has occurred in the litigation, including defendant's effort and expense in preparing to try the case; whether future litigation would duplicate expenses defendant already has made; and the adequacy of plaintiff's reasons for dismissing. *Id.*; see *Catanzano v. Wing*, 277 F.3d 99, 110 (2d Cir. 2001) (reversing, as an

abuse of discretion, denial of voluntary dismissal without prejudice where there was no prejudice to defendants because, among other things, plaintiffs did not seek “to harass or annoy” by dismissing and sought “to facilitate an end to the litigation” without the “preclusive effects of the district court’s ruling”).

There is no prejudice to Defendants in dismissing this action without prejudice. The case has involved only preliminary injunction litigation. It has not involved discovery of any kind; defendants have not filed merits-related motions; no trial is scheduled. The Second Circuit’s resolution of the preliminary injunction issues has meant that Defendants’ enforcement of state tax laws and regulations is fully up and running, and that Plaintiff no longer is purchasing cigarettes from wholesalers or other supplier entities. As a consequence, there is no pending dispute, and no reason to bear additional time and expense to develop a fuller factual record or to finally litigate legal issues to which that record would relate. Even if future litigation were to occur, it would not require duplication of time and expense previously invested in this action. Virtually all of that time and expense was devoted to argument concerning the law that should be applied to the parties’ dispute, and the Second Circuit has clarified that law.

No party has filed any motion or taken any step to indicate that it wants this litigation to continue or that Plaintiff should be required to continue it. It would be unfair to Plaintiff to dismiss this action, or any claim in it, with prejudice, as the parties, this Court and the Second Circuit have addressed only the standard preliminary injunction question concerning likelihood of success on the merits.

Thus, dismissal of this action without prejudice will not prejudice Defendants, and dismissal with prejudice would be unfair to Plaintiff. The Court should exercise its discretion to enter an order dismissing this action without prejudice.

Respectfully submitted,

/s/ Peter D. Carmen

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