

01-02-14 P02:23 IN

Betty Sanchez

IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, et al.,

Plaintiffs,

v.

ROBERT KELLY, et al.,

Defendants.

NO. 2013-CI-CL-005

MOTION FOR ORDER TO SHOW
CAUSE RE: CONTEMPT

I. FACTS

On December 9, 2013, Plaintiffs filed a Motion for Temporary Restraining Order ("TRO") to restrain Defendants, sued in their official capacities, from taking acts in furtherance of an unconstitutional and illegal Resolution. Specifically, Plaintiffs argued (1) that Resolution No. 13-171 provided "Christmas Support" benefits to numerous similarly situated Nooksacks, but denied Plaintiffs these same benefits merely because they were "subject to pending disenrollment proceedings," in violation of the Equal Protection provisions of the of the Nooksack Constitution, and (2) that Resolution No. 13-171 deprived all Nooksacks that are "subject to pending disenrollment proceedings" from receipt of "Christmas Support" benefits without notice, a hearing, or an opportunity to be heard, and therefore violated Article IX of the Nooksack Constitution. *See generally* Motion for Temporary Restraining Order. Plaintiffs requested, in

1 other words, that *if* public benefits were to be issued by the Nooksack Tribal government, in any
2 form at all, that they be included as beneficiaries.¹

3 A hearing was held on the TRO Motion on December 11, 2013, where Defendants offered
4 no defense on the constitutionality of the Resolution, but instead made only a jurisdictional
5 deficiency argument. On December 12, 2013, this Court issued an Order “reserving ruling on the
6 Motion for Temporary Restraining Order” until the “initial process” requirements of N.T.C. §
7 10.05.040 had been met and the six days of lag-time between initial filing and consideration of
8 the motion required by N.T.C. § 10.05.050 had elapsed.² Order on Motion for Temporary
9 Restraining Order and Scheduling, at 2-3.

10 On December 18, 2013, the Court held a second hearing on Plaintiffs’ Motion for TRO,
11 and that same day the Court issued an Order granting said motion. *See generally* Order Granting
12 On Motion for Temporary Restraining Order (“Order”). The Order enjoined Defendants “from
13 treating the proposed disenrollees differently from other tribal members with respect to the
14 Christmas Support distribution.” *Id.* at 13. The Court correctly held that it could not “order
15 specific relief requiring the expenditure of tribal funds,” but held that *if* Defendants chose to issue
16 Christmas Support checks in the face of the Order, that Plaintiffs be included in the class of

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18 ¹ Notably, Plaintiffs did not petition the Court to sanction the distribution of Christmas Support checks or request that
19 it order Defendants to distribute any monies to Plaintiffs. Plaintiffs simply requested that the Court issue a TRO
20 “ordering that Defendants refrain from acting in furtherance of Resolution No. 13-171” because it is unconstitutional.
21 Motion for Temporary Restraining Order, at 8; *see also* Plaintiffs’ Brief in Support of Temporary Restraining Order
22 Relief, at 7 (“[T]he Court must fashion relief that severs the unconstitutional portion of Resolution No. 13-171 out of
the Resolution, and enjoins Defendants from acting in furtherance of that portion of the Resolution.”). Indeed, the
distribution of any “hard dollars,” which include “revenues generated from the Tribe’s Nooksack River Casino and
Northwood Casino,” exposes the Tribe to significant fines and other sanctions from the National Indian Gaming
Commission. Declaration of Michelle Roberts (“Roberts Decl.”), at 2; 25 U.S.C. § 2713(a)(1); *see also generally*
U.S. v. Santee Sioux Tribe of Nebraska, 135 F.3d 558 (8th Cir. 1998); NIGC NOV-09-37 (Sept. 1, 2009) (civil
enforcement action for tribe’s Christmas “economic stimulus” distribution without a BIA-approved RAP).

23 ² Plaintiffs continue to object to N.T.C. § 10.05.050’s application to Temporary Restraining Orders, especially given
24 the outcome here, *i.e.*, Defendants purposefully and hastily acted unconstitutionally during the lag-time required of
N.T.C. § 10.05.050 in order to avoid the Court’s TRO. *See* Order, at 12 (noting that Defendants likely “rushed the
checks in order to avoid” a ruling on Plaintiffs’ motion); Declaration of Leah Zapata (“Zapata Decl.”), at ¶6 (“I heard
on December 11 that the Tribal Court was going to issue some form of ruling by the end of that day, but I know that
the checks were rushed off to the post office before that could happen.”).

1 recipients. *Id.* at 13; *see also id.* at 8 (“[W]hen the tribal government chooses to provide
2 [Christmas S]upport to tribal members, it’s axiomatic that they do so in accordance with the
3 ‘equal treatment’ discussed in the Nooksack Tribal Constitution . . .”).

4 On December 19, and again on December 20, 2013, counsel for Plaintiffs wrote to counsel
5 for Defendants:

6 Could you please let us know what your client’s plan of action is as it relates to
7 th[e] order? Are your clients going to continue to issue checks to all Nooksacks,
including our clients? Or have they stopped issuing checks altogether?

8 We will assume the latter -- that your clients have stopped issuing checks
9 altogether -- but please let us know by close of business today if this assumption
is wrong.

10 Second Declaration of Ryan D. Dreveskracht, Ex. A.

11 These inquiries were not answered; and for deliberate reason.³ Simultaneously — also on
12 December 19 and 20 — Defendants were directing staff of the Nooksack Accounting Department
13 to print, issue and mail approximately 20 new Christmas Support checks to Tribal members who
14 were not targeted for disenrollment. *See generally* Zapata Decl. At the very same time,
15 Defendants directed the Accounting Department to *not* issue any checks to Plaintiffs. *Id.* at ¶10
16 (“On December 19 and 20, [Accounting Department staff] did not issue any Christmas support
17 checks to any member of the Nooksack 306.”); Second Declaration of Nooksack Tribal
18 Councilwoman Michelle Joan Roberts (“Second Roberts Decl.”), at ¶ 3 (“[N]o member of the
19 Nooksack 306 has received a Christmas support distribution this holiday season . . .”).

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23 ³ Had Defendants informed Plaintiffs of their plan to continue to distribute Christmas Support checks, in violation of
24 the Court’s Order, Plaintiffs would have undoubtedly filed the instant motion, or another Motion for Temporary
Restraining Order, much sooner. Defendants’ tactics of avoiding this Court’s rulings has apparently become routine.
See e.g. Order, at 12; Zapata Decl., at ¶6.

1 **II. ARGUMENT**

2 **A. This Court Has Inherent Power And Authority To Hold Appellees/Defendants In**
3 **Contempt.**

4 “Unlike most areas of law, where a legislature defines both the sanctionable conduct and
5 the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible
6 for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct.” *United*
7 *Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994). This “power to impose . . .
8 submission to [the Court’s] lawful mandates,” *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821), is
9 “inherent” and is “necessary to the exercise” of a court’s jurisdiction. *Bagwell*, 512 U.S. at 831
10 (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)); *see also generally T.S. v. Tulalip*
11 *Tribes*, No. TUL-CV-ET-2012-0478 (Tulalip Tribal Ct. Apr. 9, 2013) (using the tribal court’s
12 inherent contempt authority to hold the Tribe in contempt and issuing attorney’s fees as a
13 sanction, in the face of a sovereign immunity assertion). Because this “power to punish for
14 contempt is inherent[,] it goes beyond the power given to judges by statute.” Laura Hunter Dietz,
15 *et al.*, *Effect of Constitutions and Statutes*, 17 Am. Jur. 2d Contempt § 30 (2d ed., 2013) (citing
16 *U.S. v. Neal*, 101 F.3d 993 (4th Cir. 1996); *U.S. v. Giannattasio*, 979 F.2d 98 (7th Cir. 1992);
17 *Johnson v. Johnson*, 37 S.W.3d 186 (Ark. 2000)); *see also In re Stopp*, 2 Am. Tribal Law 38, 38
18 (Cherokee Ct. App. Nov. 1, 2000) (tribal courts have “inherent powers to punish for contempt to
19 maintain dignity and authority”); *In re Wabindato*, No. 99-200-02, 1999 WL 34996414, at *1
20 (Little River Ct. App. June 16, 1999) (“The power of the courts to punish for contempt is
21 inherent. The source of this power is the duty of the court to preserve its own effectiveness.”)
(citations omitted).

22 Accordingly, sovereign immunity affords Defendants no protection here. *T.S.*, No. TUL-
23 CV-ET-2012-0478; *see also Aqua Bar & Lounge, Inc. v. U. S. Dept. of Treasury Internal Revenue*
24 *Service*, 539 F.2d 935, 942 (3rd Cir. 1976); *U.S. v. Ray*, 273 F.Supp.2d 1160, 1167 (D. Mont.

1 2003) (holding that the “argument is that sovereign immunity prevents this Court from doing
2 anything to enforce [its] Order . . . eviscerates the independence of the judiciary to manage
3 assigned cases. The . . . argument makes little sense”).

4 This Court has power and authority to hold Defendants in contempt of the Order that it
5 issued on December 18, 2013. Here, as described below, because Defendants are in direct
6 violation of that *Order*, the use of the Court’s inherent contempt power is clearly warranted.

7 **B. Appellees/Defendants Are In Contempt of Court.**

8 “To prove civil contempt the court must find that (1) a valid court order existed, (2) the
9 [non-moving party] had knowledge of the order, and (3) the [non-moving party] disobeyed the
10 order.” *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 552 (3d Cir.
11 2003) (citation omitted). Once the movant makes a *prima facie* showing “that the contemnors
12 violated a specific and definite order of the court[, t]he burden then shifts to the contemnors to
13 demonstrate why they were unable to comply.” *FTC v. Affordable Media, LLC*, 179 F.3d 1228,
14 1239 (9th Cir. 1999) (quotation omitted). When the burden is on the contemnors, they “must
15 show they took every reasonable step to comply.” *Stone v. City and County of San Francisco*,
16 968 F.2d 850, 856 (9th Cir. 1992); *SEC v. Children’s Internet, Inc.*, No. 06-6003, 2009 WL
17 2160660, at *2 (N.D. Cal. July 20, 2009). There is no good faith exception to the requirement of
18 obedience to a court order. *Stone*, 968 F.2d at 856; *In re Crystal Palace Gambling Hall, Inc.*, 817
19 F.2d 1361, 1365 (9th Cir. 1987).

20 Here, Plaintiffs have certainly made a *prima facie* showing. While Plaintiffs appreciate
21 that Defendants were not forced “to provide [Christmas S]upport to tribal members,” **the Court**
22 **made clear that if Defendants chose to further issue Christmas Support benefits, they were**
23 **enjoined from “treating the proposed disenrollees differently from other tribal members.”**
24 *Order*, at 8, 13. Defendants defied this mandate when on December 19 and 20 they directed

1 Accounting Department staff to “issue[] approximately 20 Christmas support checks to Tribal
2 members” while at the same time directing them “not [to] issue any Christmas support checks to
3 any member of the Nooksack 306.” Zapata Decl., at ¶9, 10.

4 **III. CONCLUSION**

5 In light of the above, Plaintiffs respectfully request that this Court direct Defendants to
6 appear personally before the Court and show cause why an order holding them in contempt
7 should not be issued.

8 DATED this 2nd day of January, 2014.

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10 _____
11 Gabriel S. Galanda
12 Anthony S. Broadman
13 Ryan D. Dreveskracht
14 Attorneys for Plaintiffs
15 GALANDA BROADMAN, PLLC
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1 DECLARATION OF SERVICE

2 I, Gabriel S. Galanda, say:

3 1. I am over eighteen years of age and am competent to testify, and have personal
4 knowledge of the facts set forth herein. I am co-counsel of record for Plaintiffs.

5 2. Today, I caused the attached documents to be delivered to the following:

6 Grett Hurley
7 Rickie Armstrong
8 Tribal Attorney
9 Office of Tribal Attorney
10 Nooksack Indian Tribe
11 5047 Mt. Baker Hwy
12 P.O. Box 157
13 Deming, WA 98244

14 A courtesy copy was emailed to:

15 Thomas Schlosser
16 Morisset, Schlosser, Jozwiak & Somerville
17 1115 Norton Building
18 801 Second Avenue
19 Seattle, WA 98104-1509

20 The foregoing statement is made under penalty of perjury under the laws of the Nooksack
21 Tribe and the State of Washington and is true and correct.

22 DATED this 2nd day of January, 2014.

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24 _____
25 GABRIEL S. GALANDA