

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF MOUNTRAIL

NORTHWEST JUDICIAL DISTRICT

Dakota Petroleum Transport Solutions, LLC,)
)
 Plaintiff,)
)
 v.)
)
 TJMD, LLP, Rugged West Services, LLC, and JT Trucking LLC,)
)
 Defendants.)

ORDER DENYING DEFENDANT TJMD LLC's MOTION TO DISMISS OR TRANSFER VENUE

Civil No. 31-2013-CV-00055

[¶ 1] This Order pertains to Defendant TJMD, LLC's (TJMD) April 29, 2013 Motion to Dismiss or Transfer Venue in the above-captioned case. Plaintiff Dakota Petroleum Transport Solutions, LLC (DPTS), and Defendants Rugged West Services, LLC (RWS) and JT Trucking, LLC (JTT), each responded in opposition to TJMD's motion in a timely manner. TJMD filed a timely reply brief. The Court held a hearing on June 17, 2013, where each of the parties presented on TJMD's motion.

[¶ 2] Two of the parties in the above-captioned case, TJMD and DPTS are involved in another lawsuit in the Fort Berthold District Court. That case is entitled TJMD v. Dakota Petroleum Transport Solutions, et al., CIV 2012-0678 (hereinafter "the Fort Berthold action"). TJMD provided the Court with a copy of June 21, 2013 Interim Order on Jurisdiction from the Fort Berthold action. On or about July 10, 2013, DPTS filed a Petition For Intermediate Appeal to the Northern Plains Intertribal Court of Appeals to appeal the Fort Berthold District Court's Order finding it had jurisdiction over the Fort Berthold action. On July 17, 2013, TJMD filed a copy of its Memorandum in

Opposition to the DPTS's Petition For Intermediate Appeal.

[¶ 3] After reviewing each party's argument and the applicable legal authority, this Court finds it has appropriate jurisdiction to hear and decide the issues involving the above parties in the above-captioned case. After a brief review the parties, the Court's analysis will follow on how it decided TJMD's instant motion.

I. BACKGROUND ON THE PARTIES

A. Dakota Petroleum Transport Solutions, LLC ("DPTS")

[¶ 4] For purposes of this motion, this Court understands that DPTS operates a transloading facility in New Town, ND, and is the Plaintiff in the above-captioned case. DPTS is a Minnesota LLC. Trucks haul crude oil to the facility where the crude oil is moved onto railcars for shipping. DPTS brought this action alleging multiple defendants caused or allowed spills to occur at the transloading facility. DPTS is a non-Indian entity.

B. TJMD, LLP ("TJMD")

[¶ 5] For purposes of this motion, this Court understands that TJMD is a North Dakota LLP with its principal office in New Town, ND that does business both on and off the Fort Berthold Indian Reservation. TJMD performed the physical day-to-day operations of the transloading facility under contract with DPTS from June 2010 to September 2012. TJMD is currently owned solely by Virgil White Owl, who is a member of the Three Affiliated Tribes and is a certified Native American Owned Business with the Tribal Employment Rights Office.

[¶ 6] This Court understands that on February 15, 2010, DPTS was owned

100% by non-tribal members. Mr. White Owl became an owner of TJMD on April 25, 2011, when he acquired 51% interest of TJMD. He subsequently owned 65% of the company on January 1, 2012. Mr. White Owl became the 100% owner of TJMD on November 12, 2012.

C. Rugged West Services, LLC ("RWS")

[¶ 7] For purposes of this motion, this Court understands that RWS made deliveries of crude oil to the transloading facility on March 8, 2011, and January 21, 2012. RWS is not a party in the Fort Berthold action. RWS is a non-Indian entity.

D. JT Trucking, LLC ("JTT")

[¶ 8] For purposes of this motion, this Court understands that JTT made a delivery of crude oil to the transloading facility on August 20, 2012. It is alleged that during the unloading process, a small amount of crude oil, in a space approximately three feet by three feet and less than twenty-one gallons, was inadvertently spilled. JTT is not a party in the Fort Berthold action. JTT is a non-Indian entity.

E. Dakota Plains Holdings, Inc. ("DPH")

[¶ 9] This Court further understands that although not a party to this action, DPH is relevant to this action as it owns, in fee simple, the land upon which the transloading facility is located. The land was leased to DPTS on November of 2009. The land is neither Indian owned or trust land. DPH is a non-Indian entity.

II. FACTUAL BACKGROUND

[¶ 10] The Court notes that the facts herein contained do not go to the merits of the case, but instead are detailed for purposes of addressing the Motion before it. The

transloading facility in question is located on the Fort Berthold Indian Reservation near New Town, North Dakota. DPTS and TJMD had a services agreement for that transloading facility on June 24, 2010 that contained an indemnification clause. On June 20, 2012, DPTS informed TJMD its services under the agreement were going to be terminated. DPTS asserts that while TJMD was operating the transloading facility, spills of crude oil occurred which have caused DPTS to incur cleanup expenses. DPTS claims to have brought numerous complaints against TJMD. Though by separate acts, DPTS has also asserted that the negligence of TJMD, RWS, and JTT, has proximately caused damages to DPTS.

[¶ 11] TJMD filed a Complaint with the Fort Berthold District Court of the Three Affiliated Tribes in October of 2012. See CIV 2012-0678. The primary crux of that action stems from TJMD's assertion that DPTS wrongfully terminated its Amended Services Agreement with TJMD and now refuses to pay TJMD more than \$260,000 that TJMD claims is owed to it. Neither RWS nor JTT are listed as a party in CIV 2012-0678.

[¶ 12] DPTS then filed a Complaint with this Court on April 8, 2013. That Complaint essentially asserted that (1) TJMD has a contractual liability to indemnify DPTS for the penalty amounts associated with the various spills at the transloading facility, (2) TJMD negligently caused or allowed spills at the transloading site, (3) RWS negligently caused or allowed spills at the transloading site, and (4) JTT negligently caused or allowed spills at the transloading site. Based on the information contained in the Complaint, DPTS requested damages in an amount to be proved at trial.

[¶ 13] TJMD filed a Motion to Dismiss on April 29, 2013. The Memorandum in

Support of the Motion to Dismiss argued that the case should be dismissed or transferred due to lack of jurisdiction because a case involving the same parties, same facts, and some contracts was already underway in Fort Berthold District Court.

III. APPLICABLE LAW

A. *Montana v. United States*, 450 U.S. 544 (1981).

The pinnacle case for determining tribal jurisdiction in civil matters comes from Montana v. United States, 450 U.S. 544 (1981). That case outlines two circumstances where Indian tribes have inherent sovereign power to exercise jurisdiction over non-Indians. The Court will use the "Montana test" alongside other applicable case law in making its determination on jurisdiction in the case at bar.

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct 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 565-566 (internal citations omitted).

Although an argument can always be made that nearly any activity of non-Indians on fee lands within a reservation can have a direct effect on the political integrity, economic security, or the health or welfare of a tribe, the United States Supreme Court has severely limited this portion of the Montana test. See *Strate v. A-1 Contractors*, 520 U.S. 438, 457-58 (1997) (finding that there is no doubt that "those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members" Even with this finding, the

United States Supreme Court rejected applying the second portion of the Montana test to a case involving a horrific car crash on tribal lands, saying that if the second portion of the Montana test “requires no more, the exception would severely shrink the rule.” Id. at 458.).

Presumably because of the well-known limitation of the second portion of the Montana test, the parties in the case at bar primarily focus their attention on the first portion of the Montana test. The first portion of the Montana test states that a tribe retains inherent sovereign power to exercise jurisdiction over non-Indians when they enter into a consensual relationship with a tribal member “through commercial dealing, contracts, leases, or other arrangements.” Montana, 450 U.S. at 565-566. It is undisputed that DPTS, RWS, and JTT are non-Indians. Therefore, in order for the first portion of the Montana test to apply, TJMD, as a North Dakota LLP, must be considered tribal member for jurisdictional purposes. The case law cited below will demonstrate that North Dakota law and other persuasive authority dictate that a North Dakota LLP should be considered separately from its owners.

B. Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W. 2d 596 (N.D. 1983)

Turtle Mountain Manufacturing was a North Dakota corporation incorporated under the laws of North Dakota. Airvator, 329 N.W.2d at 597. The address of the business was located in Belcourt, North Dakota, which is within the boundaries of the Turtle Mountain Indian Reservation. Id. Fifty-one percent (51%) of the stock in Turtle Mountain Manufacturing was owned by Turtle Mountain investment, which was a North Dakota corporation located in Belcourt and wholly owned by the Turtle Mountain Band of Chippewa Indians. Id.

Turtle Mountain Manufacturing entered into a seeding equipment manufacturing agreement with Airvator. Id. at 598. Airvator alleged that Turtle Mountain Manufacturing did not complete a written purchase order for one-hundred (100) seeders and brought suit in state district court. Id. The district court dismissed the action based on lack of subject matter jurisdiction. Id. After a thorough recounting of this history of Native American law pertinent to the case, the North Dakota Supreme Court reversed the district court, stating:

[S]tate-chartered corporations should be treated as non-Indians independent of their percentage of Indian shareholders. Furthermore, nothing in the record before us reflects that Turtle Mountain Manufacturing is a tribally chartered corporation. A corporation is not in fact or in reality a person, but is created by statute and the law treats it as though it were a person by the process of fiction, or by regarding it as an artificial person distinct and separate from its individual stockholders. A corporation cannot exist without the consent or grant of the sovereign and the power to create a corporation is one of the attributes of sovereignty. The state has plenary power and authority over corporations. A corporate charter is not only the articles of incorporation, but includes all statutes which confer, define, or limit a corporation's powers.

Id. at 602-603 (internal citations removed).

The North Dakota Supreme Court found that because a corporation is a distinct entity from its shareholders the corporation is subject to the laws of the state in which it is incorporated. Id. at 604. Based upon this understanding, the North Dakota Supreme Court determined that Turtle Manufacturing, even though majority-owned by tribal members, was non-Indian for purposes of jurisdiction and allowed Airvator's action to move forward in state district court. Id. at 604-605.

The Court recognizes that TJMD is not a corporation like Turtle Mountain Manufacturing. That does not diminish the analysis contained in the Airvator case.

TJMD is a limited liability partnership formed under the laws of North Dakota. North Dakota law explicitly states, “[a] limited partnership is an entity distinct from its partners.” N.D. CENT. CODE § 45-10.2-07. Thus, deeming the Airvator decision to be applicable, and since TJMD is an entity wholly distinct from the racial make-up of its partners and is a subject to the laws of North Dakota, this Court finds that TJMD is a non-Indian for jurisdictional purposes.

C. Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006)

The Salish and Kootenai College (SKC) was established by the Confederated Salish and Kootenai Tribes in Montana, was located on tribal lands, and described itself as “[a] tribal corporation” in its articles of incorporation. Smith, 434 F.3d at 1129, 1134. The SKC was first incorporated under tribal law and one year later became incorporated under Montana law. Smith, a student at the SKC who was a tribal member of the Umatilla Tribe (therefore not a member of the Salish and Kootenai tribes), was driving a dump truck, as part of a course in which he was enrolled, that malfunctioned resulting in a rollover killing one passenger and injuring Smith and another passenger. Id. Smith sued SKC, lost, and subsequently argued the tribal court lacked subject matter jurisdiction. Id. Both the tribal district court and the federal district court found the tribal court had jurisdiction over the matter. Id. at 1130.

Although the Ninth Circuit Court of Appeals found the SKC is neither a Tribe nor a tribal member, it did determine that the SKC should be considered a “tribal entity” for purposes of jurisdiction. In reaching this conclusion, the Ninth Circuit Court of Appeals found, amongst other things, that (1) the Tribes exercised control over the SKC, (2) the SKC has been identified as a “tribal governmental agency,” (3) the SKC was associated

with the Tribes. Id. at 1134-35. The Ninth Circuit Court of Appeals concluded, “even though his claims did not arise from contracts or leases with the Tribes, Smith could and did consent to the civil jurisdiction of the Tribes' courts. And in this case, the exercise of tribal jurisdiction is consistent with the limited sovereignty of the Tribes.” Id. at 1136.

Unlike the situation in Smith, the Tribe in the case at bar neither exercises control over nor associates with TJMD. Further, TJMD is a privately owned business incorporated under the laws of North Dakota and has never been considered a “tribal governmental agency.” Based on the analysis above, Smith is wholly distinguishable from the case at bar.

D. Williams v. Lee, 358 U.S. 217 (1959)

The rule stemming Williams is “where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction.” Smith, 434 F.3d at 1132 (emphasis in original). A Tribe has exclusive civil jurisdiction over “claims in which a non-Indian asserts a claim against an Indian for conduct occurring on that Indian's reservation.” Roe v. Doe, 2002 ND 136, ¶ 8, 649 N.W.2d 566 (citing Williams v. Lee, 358 U.S. at 223). “Under the infringement test . . . state courts have no jurisdiction over claims if it ‘would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.’” Winer v. Penny Enterprises, Inc., 2004 ND 21, ¶ 11, 674 N.W.2d 9 (quoting Williams v. Lee, 358 U.S. at 223). As stated above in the analyses of Montana, Airvator, Inc., and Smith, the test set forth in Williams is inapplicable to the case at bar because it involves a non-Indian entity suing other non-

Indian entities.

E. Zempel v. Liberty, 143 P.3d 123 (Mont. 2005)

Tiny's Tavern of Charlo, Inc. (TTC), a Montana corporation, operated a bar within the exterior boundaries of the Flathead Indian Reservation. Zempel, 143 P.3d at 126. Zempel, a non-tribal member who was under the age of twenty-one (21), was served alcoholic beverages at the TTC on the evening of July 4, 2003. Id. On the morning of July 5, 2003, another bar patron was driving Zempel home when she crashed the vehicle, seriously injuring Zempel. Id. Zempel sued TTC and its owners/operators for negligence for serving both himself and the other bar patron. Id.

The owners of TTC brought a motion to dismiss, arguing the district court lacked jurisdiction based on the assertion that one or more owners were tribal members and TTC was an "Indian owned business." Id. at 127. The district court dismissed the action against the owners but did not dismiss the action against TTC since it was a Montana corporation. Id. After some additional filings showed that TTC was an Indian owned business, the district court dismissed the action in its entirety. Id.

Using the Montana case as its guide, the Montana Supreme Court reversed the district court. Id. at 132-135. The Montana Supreme Court found the first prong of the Montana test did not apply in this case as "neither TTC nor Zempel are tribal members, no relationship with 'the tribe or its members' exists to provide a basis for tribal jurisdiction." Id. at 133.

[I]t is well settled that a corporation maintains a legal identity which is "separate and distinct" from that of its shareholders. Thus, we can not hold that TTC assumes the mantle of Liberty's tribal membership for jurisdictional purposes. Accordingly, we take TTC for what it is; a corporate entity which exists by virtue of Montana law, and which derives income by selling alcohol

to the public under privilege of a Montana liquor license.

Id. at 132.

F. Maupin v. Meadow Park Manor, 125 P.3d 611 (Mont. 2005)

This case stands for the proposition that “a suit against a limited liability partnership properly may be commenced in any county where any general or limited partner resides.” Maupin, 125 P.3d at 613. While this statement of law may be true when dealing with matters strictly within a state’s borders, Maupin does not deal with any issues associated with tribal jurisdiction. Applying such a broad statement to a matter as complex as tribal jurisdiction would be inappropriate. The Montana test is still good law and is still the pinnacle case for deciding tribal jurisdiction. Therefore, the Maupin analysis, due to the fact that it only involves non-Indians located solely within the State of Montana (i.e., *not* on a reservation), is not applicable to the case at bar.

G. Same Set of Facts and Circumstances

TJMD argues this Court should withhold exercising jurisdiction because this action arises “out of the same transactions and occurrences that are the subject matter of TJMD’s claims” in the Fort Berthold action. To make this assertion, TJMD primarily relies upon N.D.R.Civ.P. 13(a). N.D.R.Civ.P. 13 states as follows:

(a) Compulsory Counterclaim.

(1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against any opposing party, if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

“The purpose of [N.D.R.Civ.P] 13(a) is to promote judicial economy by

preventing multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” First Nat. Bank of Belfield v. Burich, 367 N.W.2d 148 (N.D. 1985). While the Court respects the purpose of N.D.R.Civ.P. 13(a), the Court cannot look to judicial economy alone when determining whether a case should be dismissed to allow another court to potentially assert jurisdiction.

The Court must also take into account N.D.R.Civ.P. 13(b). In the case at bar, the counterclaims asserted require bringing in other parties (RWS and JTT) over whom the Fort Berthold District Court has not (and likely cannot) assert jurisdiction. Both RWS and JTT are nonmembers of the Tribe and have no consensual contractual relationship with the Tribe. See Montana v. U.S., 450 U.S. at 565 (“inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”). Therefore, it would be inappropriate to dismiss the state action under N.D.R.Civ.P. 13 at this point in time.

This Court has reviewed the Interim Order of Jurisdiction from the Fort Berthold District Court, dated June 21, 2013, as well as the appellate materials stemming from that case. That Order determined that the Fort Berthold District Court did have jurisdiction over TJMD’s contractual claims against DPTS. However, the Fort Berthold District Court’s Order did not have any impact on the other Defendants in the case at bar, as they are not subject to that action. DPTS should be able to assert all of its claims with all of the parties present. In the event negligence is found, all parties should have an opportunity to present their defenses during the same hearing in State court.

CONCLUSION


It is undisputed that DPTS, RWS, and JTT are non-Indian entities. Based on the analyses in Montana, Airvator, Inc., Smith, Williams, and Zempel, it is clear that TJMD, as a North Dakota LLP, should not be considered a tribal member or tribal entity for jurisdictional purposes. Therefore, this Court has appropriate authority to exercise jurisdiction in the above-captioned case and dismissing the case under N.D.R.Civ.P. 13, or for any other reason, is not appropriate at this point in time.

ACCORDINGLY, the Court rules and orders that:

1. Defendant TJMD, LLC's Motion to Dismiss or Transfer is **DENIED**; and,
2. The Clerk of Mountrail County District Court shall schedule a status and scheduling conference in the next thirty (30) days.

Dated this 26th day of July, 2013.

BY THE COURT:


Douglas L. Mattson
District Court Judge

Cc: Larry L. Boschee
Jonathan P. Sanstead
Randall J. Bakke
Ronald H. McLean
Peter W. Zuger
Alicia M. Brenna
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