

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

NORTHERN NATURAL GAS COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 80 ACRES OF LAND IN THURSTON)
 COUNTY, NEBRASKA; UNITED STATES)
 OF AMERICA; PATRICIA E.)
 ABATANGELO, aka PATRICIA PETTIT)
 SOLOMON; CORA N. SOLOMON;)
 MARIANNE SOLOMON WIGGANS;)
 CHRISTINE MARIE SOLOMON;)
 KATHERINE SOLOMON; WILBUR)
 SOLOMON; MICHAEL ANDREW)
 SOLOMON; NOLAN J. SOLOMON; AND)
 UNKNOWN OWNERS,)
)
 Defendant.

CASE NO. 8:17-CV-328

PLAINTIFF’S RESPONSE BRIEF IN
OPPOSITION TO DEFENDANT
NOLAN SOLOMON’S SECOND
MOTION TO DISMISS
(FILING NO. 51)

Plaintiff Northern Natural Gas Company (“NNG”) hereby submits this Response Brief in opposition to Defendant Nolan Solomon’s (“Solomon”) “Motion to Dismiss” (Filing No. 51).

I. INTRODUCTION

Pro se defendant Nolan Solomon (“Solomon”) filed a motion entitled “Motion to Dismiss” on August 31, 2018 (Filing No. 51). Solomon cites to Fed. R. Civ. P. 19 and 71, but neither of these rules provide a mechanism to dismiss a suit. Therefore, it is unclear under which rule he has filed his motion to dismiss. It was filed at the Court’s deadline for Motions for Summary Judgment, but appears on its face to be a 12(b)(6) or 12(b)(7) Motion to Dismiss or, perhaps more accurately, a Motion for Reconsideration of the Court’s earlier Order granting Plaintiff’s Motion for Partial Summary Judgment (Filing No. 49). Regardless, Filing No. 51 is without merit and should be denied.

II. ARGUMENT

1. If Filing No. 51 is a Motion to Dismiss It Should Be Stricken as Improper Under Rule 71 and this Court's Previous Ruling (Filing No. 33).

Filing No. 51 is entitled “Motion to Dismiss,” but such a motion is not permitted. The only provision for a motion to dismiss is found in Rule 12 and the Court has already ruled that a motion to dismiss is not permitted under Fed. C. Civ. P. 71.1(e)(2) (Filing No. 33). Therefore, if the Court characterizes Filing No. 51 as a motion to dismiss under Fed. R. Civ. P. 12, it should be denied as untimely and outside the scope of the permitted pleadings under Rule 71.

2. If Filing No. 51 is a Motion for Judgment on the Pleadings it Should Be Denied Because the Court has Already Ruled on the Merits.

If Filing No. 51 is instead a Motion for Judgment on the Pleadings, it should be overruled because the Court has already rejected the arguments made by Solomon when it entered partial summary judgment in favor of Northern. (Filing No. 49). In addition, Fed. R. Civ. P. 71.1(e)(2) does not allow for any additional pleadings in these proceedings. Further, even though Solomon does not offer any evidence, he references facts outside the pleadings which would prevent a judgment on the pleadings.

Even if the Court entertained Filing No. 51 as Motion for Judgment on the Pleadings, it fails on the merits. The Omaha Tribe is not a required party under Fed. R. Civ. P. 19(a). As the Court has already ruled, the condemnation action does not impact the Omaha Tribe because it has already contractually granted Northern all of its rights to the Northern ROW. (Filing No. 49). Similarly, Fed. R. Civ. P. 71(c)(1) only requires the addition of “parties who have or claim an interest,” and the Omaha Tribe has contractually granted its effected interests to Northern.

For these reasons, if Filing No. 51 is a Motion for Judgment on the Pleadings, it should be denied.

3. *If Filing No. 51 is a Motion for Reconsideration of the Court's Order Denying His Motion to Dismiss it Should be Denied as Meritless.*

If Filing No. 51 is a Motion to Reconsider the Court's previous Order granting partial summary judgment, it should be denied. Solomon does not provide the Court with any new facts or case law that would warrant the Court reversing itself on the issue and nothing in the cases cited by Solomon involves a contractual grant of rights by a tribe as the Omaha Tribe has done here.

The cases cited by Solomon are not applicable to this case. In *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989) the 10th Circuit found that a tribe was a required party under Fed. R. Civ. P. 19 because the claims in that case involved the tribe's contractual rights in two bingo management contracts. The proceedings there would have impacted the tribe's rights and the tribe was not a party because it did not consent to be sued. Here, the Omaha Tribe has already consented to the Northern ROW so there is no right left for it to protect in these proceedings.

Similarly, *Public Service Company of New Mexico v. Barboan* 857 F.3d 1101 (10th Cir. 2017) is distinguishable because the tribe in that case had not voluntarily granted its interest in the rights-of-way at issue. For the reasons set forth by this Court in its July 26, 2018 Order, Solomon's instant motion should be denied.

4. If Filing No. 51 is a Motion for Summary Judgment it Should be Denied Because it Fails to Comply with Fed. R. Civ. P. 56 and the Merits of the Motion Have Already Been Ruled Upon by the Court.

Considering that Filing 51 was filed on the last day of the Court's deadline for motions for summary judgment, it is probable that Solomon was trying to file such a motion. If so, it should be denied. First, Solomon has not complied with any of the requirements of Fed. R. Civ. P. 56(c) or NECivR 56.1 and has offered no proof in support of his motion.

Second, there is no merit to his arguments. As discussed above, his argument regarding the indispensable nature of the Omaha Tribe has been considered and rejected by the Court. (Filing No. 49). The Court correctly held that the Omaha Tribe had the right to give its consent for Northern to acquire a right in any property owned or after-acquired by the Omaha Tribe for the Northern ROW. Accordingly, the Court should deny Solomon's "Motion to Dismiss" (Filing No. 51).

IV. CONCLUSION

For the foregoing reasons, Northern requests that the Court deny Solomon's Motion to Dismiss at Filing No. 51.

Dated this 21st day of September, 2018.

NORTHERN NATURAL GAS COMPANY

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CERTIFICATE OF SERVICE

I certify that on the 21st day of September, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record who participate in the CM/ECF system and by US Mail, postage prepaid to the attorneys and interested parties who do not participate in the CM/ECF system.

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