IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BURREL JONES, *Plaintiff*, v. ALABAMA-COUSHATTA TRIBE OF TEXAS AND NASKILA GAMING, *Defendants.*	§ § § § § § § § § § §	No. 9:20-CV-63

DEFENDANTS' OBJECTIONS TO REPORT AND RECOMMENDATION ("R&R")

The R&R [DE 25] recognizes that Indian tribes like the Alabama-Coushatta Tribe of Texas (the "Tribe") have the "common-law immunity from suit traditionally enjoyed by sovereign powers." R&R at 3 (collecting cases). It accordingly concludes that tribal sovereign immunity forecloses Plaintiff's premises-liability claim as a matter of law. *Id.* at 4–6. The R&R nonetheless recommends that Plaintiff be permitted to proceed on his declaratory-relief claim—despite questions about its legal viability—which seeks declarations (1) that applying sovereign immunity violates his constitutional right to petition here and (2) that Plaintiff "is not barred by sovereign immunity from bringing his premises liability claim in federal or state court." *Id.* at 4 & n.2.

Although the R&R correctly recommends dismissal of Plaintiff's premises-liability claim, it incorrectly recommends that Plaintiff be allowed to pursue his declaratory-relief claim. That claim seeks only to vindicate Plaintiff's alleged right to bring a tort claim. Because the Tribe is immune from such claims, Plaintiff has suffered no injury that can be vindicated by declaration. Because Plaintiff's premises-liability claim cannot proceed against the Tribe in any court, accepting the R&R's recommendation with respect Plaintiff's declaratory-judgment claim would

effectively require the Court to issue an advisory opinion. Defendants respectfully object to Part IV.A and V of the R&R and ask that all of Plaintiff's claims be dismissed with prejudice.

BACKGROUND

Defendants included a full background of this case in their Motion to Dismiss (at 2–5) [DE 18]. Relevant here, the Tribe operates Naskila Gaming ("Naskila"), an electronic bingo facility on its reservation. Plaintiff alleges that he was injured in a fall at Naskila's entrance and subsequently was told that the Tribe "was not subject to suit in the tribal court." First Am. Compl. ("FAC") ¶¶ 16–21 [DE 12]. After seeking more information, he could not find the court's website and was told that "both the Casino and the Tribe 'had sovereignty,' and that there was no way to seek remedy for Plaintiff's injuries in tribal court." *Id.* ¶¶ 21–24. Plaintiff concluded that the Tribe's "court was either dysfunctional or non-existent," *id.* ¶ 24, and filed this lawsuit. Beyond damages for his alleged injuries, Plaintiff seeks declarations that (1) the Tribe's sovereign immunity "violates Plaintiff's right to petition under the First Amendment of the U.S. Constitution due to the lack of an active Alabama-Coushatta tribal court in which Plaintiff can bring his premises liability claim"; and (2) Plaintiff is not barred by sovereign immunity from bringing his premises-liability claim in federal or state court. *Id.* ¶¶ 37, 44.

LEGAL STANDARD

Because Defendants timely object to the R&R, the Court reviews it *de novo*. R&R at 6–7. If a court cannot remedy a party's alleged injuries, there is no Article III case or controversy to support federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568–71 (1992). To that end, "sovereign immunity is not merely a defense on the merits—it is jurisdictional in nature. If sovereign immunity exists, then the court lacks both personal and subject-matter jurisdiction to

hear the case and must enter an order of dismissal." *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985).

ARGUMENT

Plaintiff's fundamental alleged injury comes from a slip-and-fall at Naskila. But tribal sovereign immunity precludes any claim for damages on that injury. Plaintiff's only other alleged injury—serving as the basis for his declaratory claim—is an inability to petition in court under the First Amendment because of the combination of sovereign immunity and the supposed lack of a tribal court. The Court lacks jurisdiction over that claim for two reasons. First, unlike the cases on which the R&R relies, there is no independent and viable declaratory claim here. And second, Plaintiff's declaratory-relief claim does not satisfy Article III standing. Because Plaintiff's tort claim indisputably is barred by tribal sovereign immunity, it serves no purpose to permit Plaintiff to seek a declaration that he may sue the Tribe for that claim.

I. Plaintiff Does Not Offer An Independent (Or Viable) Declaratory Claim.

Plaintiff concedes that the Tribe has immunity, FAC ¶¶ 4, 6, 29, but seeks to circumvent it by arguing that the Court has jurisdiction over a declaratory claim that, in turn, supplies supplemental jurisdiction for a tort claim. The R&R correctly finds that there is no jurisdiction for the tort claim, but recommends that the Court allow Plaintiff to obtain a declaration that he can bring such a tort claim. That approach does not correctly reflect the law on sovereign immunity or declaratory claims. Plaintiff's "declaratory" claim should be recognized for what it really is: an attempt to salvage jurisdiction for his barred tort claim. *See* Mot. to Dismiss at 12.

This Court previously has recognized that "no real controversy exists" when a plaintiff "would get nothing from a declaratory judgement that they would not get from prevailing on their [coercive] claims." *Scritchfield v. Mut. of Omaha Ins. Co.*, 341 F. Supp. 2d 675, 682 (E.D. Tex. 2004) (dismissing request for declaratory judgment). That is true here. Plaintiff's declaratory

claim seeks only a declaration that he may bring his tort claim. As the Second Circuit reiterated just last month, declaratory claims that are the "functional equivalent" of a claim for money do not abrogate tribal sovereign immunity. *See Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, No. 19-32, at 3 (2d Cir. Oct. 23, 2020) (slip op.). In applying that rule, the Second Circuit also explained that the common-law exception to sovereign immunity at issue in that case "does not extend to lawsuits against a foreign sovereign that . . . arise out of a slip-and-fall injury occurring on the foreign sovereign's land." *Id.* at 13 (citing *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200 (2007)).

To support denying the Tribe's motion as to the declaratory claim, the R&R relies on two Fifth Circuit cases where sovereign immunity did not preclude claims seeking equitable relief: *Comstock Oil & Gas Inc. v. Alabama & Coushatta Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001) and *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999). But *Comstock* and *TTEA* provide no support for allowing all claims denominated as ones for "declaratory relief" to abrogate tribal sovereign immunity. It matters what the plaintiff seeks. *See, e.g.*, *Cayuga*, No. 19-32, at 3.

Separately, the analysis for jurisdiction of a declaratory action also considers whether the defendant could have brought a coercive claim to enforce its rights. *See Comstock*, 261 F.3d at 573 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 (1983)). For instance, in *Comstock*, companies with whom the Tribe had mineral leases sought a declaration as to the status of the tribal court because it would affect the status of those leases in the future for both parties. *Id.* at 569. Similarly, in *TTEA*, the plaintiff sought a declaration concerning the applicability of a federal statute to a contract it had with the Indian tribe. 181 F.3d at 679–80.

Declaratory suits thus may proceed against Indian tribes in limited circumstances involving claims for prospective relief or to declare the rights of parties under contracts subject to a

comprehensive federal regulatory scheme. *Id.* at 573–74. Neither of those circumstances exists here. There is no reciprocal right of the Tribe at issue for a coercive claim and the only prospective relief that Plaintiff seeks is the ability to assert a tort claim that the R&R correctly found was barred by sovereign immunity. *See* Mot. to Dismiss at 5–6.

Finally, as set forth in Defendants' Motion to Dismiss and Reply, there are multiple reasons for rejecting Plaintiff's First Amendment theory as a matter of law, including that the First Amendment does not apply to Indian tribes. *See* Mot. to Dismiss at 7–13; Reply at 2–3 [DE 21]. As the Tenth Circuit recently observed, "sovereign immunity is not foreclosed by either the Declaration of Independence or the constitutional right to petition for redress of grievances." *Hoffmeister v. United Student Aid Funds, Inc.*, 2020 WL 3422864, at *3 (10th Cir. June 23, 2020). To hold otherwise would allow any plaintiff with a foreclosed tort claim to avoid sovereign immunity by recasting the claim as one for declaratory relief under the First Amendment, subjecting sovereigns to the very litigation that immunity is meant to foreclose. Plaintiff's theory of declaratory relief has no legal support, as Plaintiff implicitly conceded by offering no rebuttal to these points. *See* Reply at 2.

II. There Is No Article III Jurisdiction For Plaintiff's Declaratory Claim.

Plaintiff relies on the alleged lack of a tribal court to seek a declaration that his First Amendment right to petition is being infringed. But the application of sovereign immunity here—as in every case in which the doctrine applies—means that Plaintiff cannot petition for tort damages against the Tribe in any court. That Plaintiff's declaratory claim raises a foreclosed question of law establishes that he has suffered no particularized injury and that no court can

provide him redress.[1] Plaintiff lacks standing to bring his declaratory claim. *See Lujan*, 504 U.S. at 560–61 (Standing requires "an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized [and] not 'conjectural' or 'hypothetical.'"; It also must be "likely" that the plaintiff's injury will be "redressed by a favorable decision."); *Scritchfield*, 341 F. Supp. 2d at 682 (holding that if plaintiff can get nothing, "no real controversy exists").

Finally, because Plaintiff cannot obtain the damages he seeks from the Tribe, his theory of the case also invites the Court to issue an improper advisory opinion. Although the Declaratory Judgment Act does not depend on further relief being sought immediately, a declaration must have some legal effect moving forward. 28 U.S.C. § 22.1(a). That is why an "actual controversy" must exist, and the court must consider whether it has the authority to grant the declaratory relief. *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). Here, the declaration Plaintiff seeks is the ability to bring a tort claim indisputably barred by sovereign immunity. *See TTEA*, 181 F.3d at 680–81. Such a "declaration" would constitute an improper advisory opinion because it can never have a future affect. *See Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 604 (5th Cir. 2004) (A ruling that has "no effect on the rights of the parties" is an "advisory opinion.").

CONCLUSION

The Tribe respectfully asks the Court to (1) accept the R&R's recommendation to dismiss Plaintiff's premises-liability claim, (2) decline the R&R's recommendation to allow Plaintiff's declaratory claim to proceed, and instead (3) dismiss this case in its entirety for lack of subject-matter jurisdiction.

[1] Although not legally relevant, the Tribe does have a well-functioning tribal court, *see* Mot. to Dismiss at 11 n.4 & Exs. B–E, and Plaintiff provided no evidence to the contrary.

Dated: November 2, 2020

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Objections to Report and Recommendation* was served upon the counsel listed below through the Court's CM/ECF system on November 2, 2020:

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