UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 20-2232
(1:20-CV-00005-MR)

APRIL LEDFORD, Plaintiff-Appellant, vs. EASTERN BAND OF CHEROKEE INDIANS, Defendant-Appellee.	**APPELLEE'S INFORMAL RESPONSE BRIEF**

Under the Court's instructions and Local Rule 34(b), Appellee Eastern Band of Cherokee Indians submits this Informal Response Brief, in Memorandum format, in response to Appellant's Informal Opening Brief. (Appellate ECF 7).

BACKGROUND

On January 6, 2020, April Ledford (the "Appellant"), proceeding pro se, filed a Complaint asserting a claim against the Eastern Band of Cherokee Indians (the "Appellee") under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-04, for allegedly violating her due process rights by terminating a life estate she held in Cherokee, North Carolina. (District Court ECF 1, at 3).

On January 31, 2020, the Appellee moved to dismiss for lack of subject-matter jurisdiction and failure to state a claim. (District Court ECF 7). On March 2, 2020,

Appellant filed an Amended Complaint. (District Court ECF 13). On March 3, 2020, the Court denied the Appellee's Motion to Dismiss as moot. (District Court ECF 14).

On March 16, 2020, Appellee filed a second Motion to Dismiss on the same grounds. (District Court ECF 16). On March 30, 2020, Appellant responded to Appellee's second Motion to Dismiss. (District Court ECF 19). On April 6, 2020, Appellee replied. (District Court ECF 21). On November 12, 2020, Western District of North Carolina Chief Judge Martin Reidinger filed an Order dismissing Appellant's Complaint for lack of subject-matter jurisdiction. (District Court ECF 23). Appellant timely appealed that order, (District Court ECF 25), and has since filed and served her informal opening brief. (Appellate ECF 7).

ARGUMENT

I. STANDARD OF REVIEW.

As an initial matter, the Plaintiff-Appellant bears the burden of proving that subject-matter jurisdiction exists. See Richmond, Frederickburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). The District Court's dismissal of a complaint for lack of subject-matter jurisdiction is reviewed de novo. Berkley v. Mountain Valley Pipeline, LLC, 896 F.3d 624, 629 (4th Cir. 2018), cert. denied sub nom. Berkley v. F.E.R.C., 139 S. Ct. 941 (2019).

As for the limits on leniency for pro se litigants, "[t]hough these litigants cannot, of course, be expected to frame legal issues with the clarity and precision ideally evident in the work of those trained in law, neither can district courts be

required to conjure up and decide issues never fairly presented to them." Skillings v. Knott, 251 F. Supp. 3d 998, 1001–02 (E.D. Va. 2017) (citations omitted).

II. ISSUE ONE: THE 14TH AMENDMENT DOES NOT WAIVE APPELLEE'S TRIBAL SOVEREIGN IMMUNITY.

A. Existence of Tribal Sovereign Immunity.

The United States Supreme Court has consistently recognized and upheld tribal sovereign immunity since at least 1850. Parks v. Ross, 52 U.S. 362, 374 (1850) ("The Cherokees are in many respects a foreign and independent nation. They are governed by their own laws and officers, chosen by themselves."); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940) ("Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."); Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754-755 (1998) ("To date, our cases have sustained tribal immunity from suit without drawing distinction based on where the tribal activities occurred. . . . Nor have we yet drawn a distinction between governmental and commercial activities of the tribe."); see also Michigan v. Bay Mills Indian Community, 572 U.S. 782, 789 (2014) ("[The U.S. Supreme Court has] time and again treated the 'doctrine of tribal immunity [as] settled law'.").

Additionally, this Court has held repeatedly that the Eastern Band of Cherokee Indians is an Indian Tribe within the meaning of the Constitution and laws of the United States. United States v. Boyd, 83 F. 547, 555 (4th Cir. 1897); United States v. Colvard, 89 F.2d 312 (4th Cir. 1937); United States v. 7,405.3 acres of land,

97 F.2d 417 (4th Cir. 1938); Blair v. McAlhaney, 123 F.2d 142 (4th Cir. 1941); United States v. Parton, 132 F.2d 886 (4th Cir. 1943); Haile v. Saunooke, 246 F.2d 293, 297 (4th Cir. 1957) ("The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument."); E. Band of Cherokee Indians v. Lynch, 632 F.2d 373, 380 (4th Cir. 1980) ("the current status of the Indians, rather than their North Carolina citizenship, determines the state's power to tax."); see also, Toineeta v. Andrus, 503 F. Supp. 605, 608 (W.D.N.C. 1980).

The policy rationale of tribal sovereign immunity was artfully articulated last year by this Court in Big Picture Loans. Williams v. Big Picture Loans, LLC, 929 F.3d 170 (4th Cir. 2019) (holding that tribal sovereign immunity from suit extended to a tribal enterprise which provided high-interest rate loans). There, this Court reached its determination

> with due consideration of the underlying policies of tribal sovereign immunity, which include tribal self-governance and tribal economic development as well as protection of 'the tribe's monies' and the 'promotion of commercial dealings between Indians and non-Indians.'. . . A finding of no immunity in this case, even if animated by the intent to protect the Tribe or consumers, would weaken the Tribe's ability to govern itself according to its own laws, become self-sufficient, and develop economic opportunities for its members. . . . It is Congress–not the courts–that has the power to abrogate tribal immunity. See Bay Mills, 572 U.S. at 800, 134 S. Ct. 2024 ('[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.').

Id., at 185. This policy consideration is consistent even in cases where bad faith is alleged or inherent to the claims. Miccosukee Tribe of Indians v. Lewis Tein, P.L., 227

So.3d 656. 668 (Fla. 3d DCA 2017) cert. denied, Lewis Tein, P.L. v. Miccosukee Tribe of Indians of Fla., 138 S. Ct. 741 (2018) ("[tribal sovereign immunity] is a policy choice made by our elected representatives to further important federal and state interests. It is a choice to protect the tribes[,] understanding that others may be injured and without a remedy. The immunity juice, our federal lawmakers have declared, is worth the squeeze.")

B. Requirements for Waiver.

If and when Congress chooses to impair a tribe's sovereign authority, it must do so clearly—whether diminishing tribal sovereign territory, McGirt v. Oklahoma, ___U.S.___, 140 S. Ct. 2452, 2482 (2020) (Congress may disestablish a reservation, but the Court "require[s] that Congress clearly express its intent to do so") (citing Nebraska v. Parker, ___U.S.___, 136 S. Ct. 1072 (2016)); abrogating tribal sovereign immunity, Bay Mills, 572 U.S. at 790 (2014) (requiring Congress to " 'unequivocally' express" intent to abrogate sovereign immunity from suit); or abrogating tribal treaty rights, Herrera v. Wyoming, ___U.S.___, 139 S. Ct. 1686, 1698 (2019) ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'").

Consequently, Federal courts have found that the standard for finding "a waiver of tribal sovereign immunity is extremely difficult to satisfy." Smith v. Babbitt, 875 F. Supp. 1353, 1361 n.4 (D. Minn. 1995), cert. denied, 522 U.S. 807 (1997); see also Meyers v. Oneida Tribe of Indians of Wisconsin, 836 F.3d 818, 826–27 (7th Cir. 2016) ("Meyers has lost sight of the real question in this sovereign immunity case — whether an Indian tribe can claim immunity from suit. The answer

to this question must be 'yes' unless Congress has told us in no uncertain terms that it is 'no.'").

C. The 14th Amendment Does Not Waive Appellee's Tribal Sovereign Immunity.

As Chief Judge Reidinger recently explained in a separate case involving the Eastern Band of Cherokee Indians,

> Because Indian tribes are neither states nor part of the federal government, the Bill of Rights and the Fourteenth Amendment generally do not apply to them." Deardorff v. Lummi Indian Nation, 95 F.3d 1157 (9th Cir. 1996). As such, the Plaintiff cannot bring a claim based on a Fourth or Fourteenth Amendment violation against an Indian tribe like the Defendant. Oviatt v. Reynolds, 733 F. App'x 929, 933 (10th Cir. 2018) (dismissing Fourth Amendment claim against an Indian tribe "because the Fourth Amendment does not bind Indian tribes."); R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983) (dismissing § 1983 claim based on a Fourteenth Amendment violation against an Indian tribe because "Indian tribes are separate and distinct sovereignties and are not constrained by the provisions of the [F]ourteenth [A]mendment."); see also Santa Clara Pueblo, 436 U.S. at 56 (stating that Indian "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). Accordingly, the Plaintiff's claims under the Fourth and Fourteenth Amendments fail to state a claim against the Defendant.

Oxendine-Taylor v. E. Band of Cherokee Indians, No. 1:20-CV-00214-MR, 2020 WL 5639307, at 3 (W.D.N.C. Sept. 14, 2020), aff'd as modified, 829 F. App'x 672 (4th Cir. 2020) (unpublished per curiam opinion); accord Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556-57 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959) ("Indian tribes are not, however, states and these Constitutional limitations [from the 14th Amendment] have no application to the actions, legislative in nature, by Indian tribes."). Appellant has failed to indicate any law to the contrary or sufficient cause to alter this well-

established principle of Federal Indian law. Therefore, Appellants claims under "Issue One" are insufficient.

III. ISSUE TWO: THERE IS NO "BAD FAITH" EXCEPTION TO TRIBAL SOVEREIGN IMMUNITY AND APPELLANT HAS FAILED TO EXHAUST TRIBAL REMEDIES.

Because of the same Federal policy and caselaw explained above and specifically demonstrated in Lewis Tein, there simply is no "bad faith" exception to tribal sovereign immunity. Here, Chief Judge Reidinger correctly recognized that "[i]ndeed, the Defendant would have little tribal sovereign immunity if it could be sued for breaking laws, acting beyond the scope of its authority, or acting in bad faith." (District Court ECF 23, at 4).

Further, Appellant's conclusory allegations of exhausting tribal remedies, which she mentioned in the first two issues of her informal opening brief, (Appellate ECF 7), are fundamentally untrue. On June 5, 2017, Cherokee Court Chief Judge Cochran signed an eviction order against Plaintiff. (District Court ECF 20, Ex. 11). Plaintiff had thirty days to seek counsel or otherwise appeal the matter to the Cherokee Supreme Court, per Cherokee Supreme Court Appellate Procedure Rule 3(b). Plaintiff alleges that on June 23, 2017, she wrote a letter intended as an appeal of her eviction. (District Court ECF 20, Ex. 12). She claims her appeal was effectively rejected for failure to pay a filing fee. Plaintiff does not allege making any inquiry or application to file her appeal in forma pauperis, available under Rule 5(b) of the Cherokee Supreme Court Rules of Appellate Procedure. Appellant does not allege any other attempt to comply with the formal judicial appeal process available under

Cherokee law, nor does she allege any final decision by the Cherokee courts regarding an appeal.

Further, Appellant does not allege compliance with provisions available for appealing Cherokee legislative decisions. In other words, the Appellee has a statutory scheme, under Cherokee Code Sec. 117-40, by which anyone whose personal property interests will be directly and adversely affected by a decision of Tribal Council can "protest" that decision.[1] While Appellant makes conclusory references to contacting the Chief and to Council members ignoring her requests to be heard, (Appellate ECF 7, at 2), she does not allege sufficient facts to demonstrate compliance with the legislative appeal provisions and, therefore, actual exhaustion of Tribal remedies.

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[1] Sec. 117-40. - Protest and rehearing of tribal council decisions.

(a)Any interested party who disagrees with a decision of the Tribal Council, or one of its appointed committees, shall have the right to one protest of the decision. For purposes of this section, an "interested party" is a person who has a direct financial stake in the outcome of the decision being protested or a person whose individual property interests will suffer a direct adverse effect because of the decision being protested.
(b)To exercise the right to protest, the interested party shall submit a written protest to the Tribal Council Chairman within ten calendar days following the decision that is being protested. The writing shall clearly describe the direct impact to the interested party's financial or property interests. Failure to include the statement of direct impact shall render the protest void and it shall not be placed on the Tribal Council agenda. If no valid protest is received within ten calendar days, then the decision of the Tribal Council or committee shall be final, except for rehearing permitted in subsection (e) or as provided by other Tribal law.
(c)Protests shall be accompanied by a written resolution stating the action or amendment sought from Tribal Council by the protesting party. Protests shall not serve to delay the implementation of legislation passed by Tribal Council. Protests shall be limited to specific government actions and shall not be used to air generalized grievances against any official, person, entity, or policy.

Plaintiff cannot be given a free pass into Federal jurisdiction because she failed to act timely on available Tribal judicial remedies (including applying for in forma pauperis status) and failed to pursue available Tribal legislative remedies. Allowing plaintiffs to avoid or wait out tribal judicial and legislative remedies would create an exception to the exhaustion of Tribal remedies that would swallow the rule. Litigants would be incentivized to simply not be responsive to statutory deadlines, only to later plead in Federal Court that they lack Tribal remedies to exhaust. Such an option would deflate the widely accepted purposes that compel exhaustion of Tribal remedies. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16–17 (1987) ("proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.' The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts."). Therefore, Appellant's argument under "Issue Two" is insufficient.

IV. ISSUE THREE: SUPREME COURT AND FOURTH CIRCUIT PRECEDENT EXPRESSLY HOLD THAT THE ICRA IS INAPPLICABLE HERE.

Appellant's Amended Complaint provides only one basis for a potential waiver of sovereign immunity, the ICRA. (District Court ECF 13). Despite Appellant's repeatedly stated preference for the adoption of the dissenting opinion, the binding-holding from the majority of the U.S. Supreme Court clarifies that,

> This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit'.

> . . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978). Further, this Court has already expressly overruled its prior caselaw inconsistent with Martinez. Crowe v. E. Band of Cherokee Indians, Inc., 584 F.2d 45 (4th Cir. 1978) (per curiam). In Crowe, this Court clarified that prior inconsistent caselaw had been overruled by the "clear and unequivocal holding of the Court in Martinez" which "requires that the jurisdictional ruling of the trial court be set aside. Accordingly, this case is remanded to the district court with directions to dismiss the complaint for lack of jurisdiction." Id. at 46. Nothing since Martinez and Crowe—in Congress or otherwise—suggests any reason that the outcome in this case should be different from the outcome in those cases. In other words, because the ICRA does not give an individual right of action in Federal courts against tribes, besides habeas corpus, Appellant's "Issue Three" is insufficient, and dismissal should be affirmed.[2]

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[2] "This bill [ICRA] does not provide the federal courts to review all decisions of the Indian courts. In fact, provision for federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. The only provision in this bill that provides for federal court interference is writ of habeas corpus, and that probably exists as law now, although I am not quite certain."

Sen. Sam Ervin speaking at Hearing before the subcommittee on Constitutional Rights of the Senate Committee of the Judiciary, Amendment to the Indian Bill of Rights, 91st cong., 1st Sess. 19 (1969).

CONCLUSION

WHEREFORE, the Appellee requests that the District Court's Order dismissing Appellant's claims be AFFIRMED, that Appellant's claims otherwise be dismissed in their entirety, and that the Appellee be awarded such other and further relief as the Court may deem just and proper.

This 30th day of December, 2020.

/s/ Dale A. Curriden
Dale A. Curriden
NC Bar No: 24196
Nevin Wisnoski
NC Bar No: 55038
VAN WINKLE, BUCK, WALL, STARNES AND DAVIS, P.A.
P.O. Box 7376
Asheville, NC 28802-7376
Telephone: 828-258-2991
Attorneys for Appellee

CERTIFICATE OF SERVICE

I certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to Appellant. I am also serving a copy of the foregoing on Appellant by depositing same in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service and addressed as follows:

April Ledford
PO Box 2150
Bryson City, NC 28713

THIS 30th day of December, 2020.

/s/ Dale A. Curriden
Dale A. Curriden