UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,

Plaintiff,

UNITED STATES OF AMERICA,

Plaintiff/Intervenor,

v.

STATE OF NEW YORK, *et al.*

Defendants.

Civil Action Nos.
5:82-CV-783
5:82-CV-1114
(LEK/TWD)

THE ST. REGIS MOHAWK TRIBE, by **THE ST. REGIS MOHAWK TRIBAL COUNCIL** and **THE PEOPLE OF THE LONGHOUSE AS AKWESASNE,** by **THE MOHAWK NATION COUNCIL OF CHIEFS,**

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff/Intervenor,

v.

STATE OF NEW YORK, *et al.,*

Defendants.

Civil Action No.

5:89-CV-829
(LEK/TWD)

DEFENDANTS STATE OF NEW YORK, COUNTY OF ST. LAWRENCE, COUNTY OF FRANKLIN, VILLAGE OF MASSENA, TOWN OF MASSENA, TOWN OF BOMBAY, TOWN AND VILLAGE OF FORT COVINGTON, KEY BANK OF NORTHERN NEW YORK, N.A., NATIONWIDE MUTUAL INSURANCE CO., NIAGARA MOHAWK POWER CO. and CANADIAN NATIONAL RAILWAYS MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Currently before the Court are motions for partial Summary Judgment filed by plaintiffs St. Regis Mohawk Tribe (Dkt. No. 768), the Canadian St. Regis Band of Mohawk Indians (Dkt. No. 769), Mohawks of Akwesasne (Dkt. No. 770) and the United States of America (Dkt. Nos. 771 and 772) (collectively, "Plaintiffs"). Defendant State of New York (or "State"), together with the County of St. Lawrence, County of Franklin, Village of Massena, Town of Massena, Town of Bombay, Town and Village of Fort Covington, Key Bank of Northern New York, N.A., Nationwide Mutual Insurance Co., Niagara Mohawk Power Co. and Canadian National Railways ("Municipal Defendants") (collectively, "Defendants") submit this joint response to Plaintiffs' motions because the legal arguments in opposition to each motions are identical: (1) the issues that Plaintiffs ask the Court to determine are not necessary to the adjudication of this action; and (2) Plaintiffs' motions are premature.

First, Plaintiffs' motion for summary judgment on elements of the Nonintercourse Act does not address the only issue that remains in this case– whether Plaintiffs' claim to the Hogansburg Triangle is barred under *Sherrill* and *Cayuga*. This Court has already dismissed this action with respect to the vast majority of the land in dispute because those claims are barred under *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) and *Cayuga Indian Nation v. State of New York*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006). Following the Corrected and Clarified Memorandum-Decision and Order dated July 23, 2013 ("July 23, 2013 Decision and Order"), the only issue remaining in this action is whether Plaintiffs' claim to the Hogansburg Triangle is similarly barred under *Sherrill* and *Cayuga*. Dkt. No. 641. Plaintiffs seek summary judgment on elements of the Nonintercourse Act, but a decision on that issue gets the parties no closer to a final resolution.

Second, Plaintiffs' motions are premature. The issues that Plaintiffs raise are fact-intensive. Yet, other than the service of initial disclosures and amended initial disclosures, none of the parties has exchanged any discovery in this action. This matter was stayed to allow for settlement discussions from September 20, 2013 to January 11, 2021. The text order granting that initial stay indicated that "if the case does not settle, Plaintiffs would like to file their summary judgment motions while Defendants would like to exchange discovery before motions are filed." Defendants have not had the opportunity to conduct that discovery. Given the stakes of this case, Defendants should receive that opportunity before the Court decides any issues on summary judgment.

Accordingly, Plaintiffs' partial motions for summary judgment must be denied.

STATEMENT OF FACTS

A. Summary of the Complaints

The three civil actions before this Court were instituted by three tribal entities that allege that Defendants wrongfully obtained title to and/or possess lands within a claim area of approximately 12,000 acres adjacent to the St. Lawrence River and three islands on the River. The tribes include: the Canadian St. Regis Band of Mohawk Indians, the plaintiff in Civ. Act. Nos. 82-C-783 ("Compl. I") and 82-CV-1114 ("Compl. II") ("Canadian Band"); the St. Regis Mohawk Tribe, the plaintiff in Civ. Act. No. 89-CV-829 ("Compl. III") ("American Band"); and the People of the Longhouse at Akwesasne, the co-plaintiff in Compl. III ("Longhouse"). The United States intervened as co-plaintiff in all three actions in 1998. ("U.S. Am. Compl.-in-Intvt."). Plaintiffs allege that they are the successors in interest to the historic "Indians of the Village of St. Regis" (hereinafter the "Historic Tribe"), Compl. I ¶ 24; Compl. II ¶ 4; Compl. III. ¶ 8, and that a 1796

Treaty between New York State and the Seven Nations of Canada, 7 Stat. 55, reserved the land at issue in these lawsuits to the historic tribe. Compl. I ¶ 24; Compl. II ¶ 4; Compl. III. ¶ 8.

Plaintiffs allege that Defendant State of New York, in a series of seven transactions between 1816 and 1845, purchased approximately 12,000 acres of land located in Franklin and St. Lawrence Counties reserved to the Historic Tribe. Compl. I ¶ 49; Compl. III ¶ 21. Plaintiffs further allege that Defendant State of New York wrongfully possesses Barnhart, Baxter and Long Sault Islands in the St. Lawrence River that have belonged to the Historic Tribe since time immemorial. Compl. II ¶¶ 18-34; Compl. III ¶¶ 38-46. Plaintiffs claim that these transactions violated the Indian Nonintercourse Act, 25 U.S.C. § 177 (hereinafter "NIA"), and that for over 150 years, Defendants have been in wrongful possession of the land. Compl. I ¶ 49; Compl. II ¶ 1; Compl. III ¶ 1; U.S. Am. Compl.-in-Intvt. ¶¶ 21, 22**.** In addition to a claim arising under the NIA, Plaintiffs allege that the land transfers deprived them of rights, privileges and immunities secured by the Constitution and the laws of the United States, in violation of 42 U.S.C. § 1983. Compl. I ¶ 61; Compl. II ¶ 36; Compl. III ¶ 48.

Plaintiffs seek declaratory relief establishing that they have an absolute right to possession, an order of immediate possession, and the ejectment of Defendants from the subject land**.** Compl. I, Prayer for Relief ¶¶ 3-4; Compl. II, Prayer for Relief ¶¶ 2-3; Compl. III, Prayer for Relief at ¶ 4; U.S. Am. Compl.-in-Intvt., Prayer for Relief at ¶¶ 1, 2.3. In the alternative, Plaintiffs seek damages for the fair rental value of the land, calculated from the date of acquisition of the parcels, and for the value of minerals and other resources removed from the land after those purchases, plus interest. Compl. I, Prayer for Relief at ¶¶ 5-6; Compl. II, Prayer for Relief at ¶¶ 4-6; Compl. III, Prayer for Relief at ¶ 5; U.S. Am. Compl.-in-Intvt., Prayer for Relief at ¶¶ 3-4.

B. Procedural History

Plaintiff Canadian Band filed the original complaint, Compl. I, on July 27, 1982. An amended complaint was filed on September 30, 1982. As amended, Compl. I challenged the seven alleged transactions referred to above between New York State and representatives of the historic tribe from 1816 to 1845, through which title to approximately 12,000 acres purportedly passed from the historic tribe to the State, and subsequently to the municipalities and private individuals. As noted above, Compl. I sought a declaration that plaintiff Canadian Band holds title to and have the absolute right of possession of the subject lands, an order restoring plaintiffs to immediate possession of the lands, and damages based upon the fair rental value of the land calculated from the time of the acquisition. Compl. I, Prayer for Relief at ¶¶ 3-6.

Plaintiff Canadian Band filed Compl. II on October 5, 1982, and amended the complaint on December 17, 1982. As amended, Compl. II challenged the alleged wrongful acquisition of Barnhart, Long Sault, and Croil (or Baxter) Islands by Defendant State of New York and the alleged wrongful possession of the Islands by the NYPA, Niagara Mohawk Power Corporation, and others. Compl. II. ¶¶ 17-19. The Canadian Band asserted that the State's acquisition of the Islands was in violation of the NIA and the Treaty of Ghent (8 Stat. 218), Compl. II ¶¶ 39-50, constituted an illegal deprivation of rights under the United States Constitution, Compl. II ¶ 52, and was a Fifth Amendment taking without just compensation. Compl. II at ¶ 57. The Canadian Band sought a declaration that it owns and is entitled to possess the Islands as well as compensation for those lands, formerly part of Croil Island, that were submerged by the construction of the St. Lawrence Seaway Project. Compl. II. ¶ 24.

On June 30, 1989, Plaintiffs American Band and Longhouse filed Compl. III against the State, Municipal Defendants, the NYPA, and various other individuals. Complaint III challenged

the same alleged conduct with respect to the seven land transfers and the Islands, claiming, *inter alia*, that such conduct was in violation of the NIA and the Treaty of Ghent. Compl. III ¶¶ 23- 56. Compl. III also sought a declaration that the conveyances were null and void, a declaration that any interest the defedants may have in the subject land to be null and void, ejectment of the defendants and the defendant, and damages calculated by the fair rental value of the land from the dates of acquisition. Compl. III, Prayer for Relief at ¶¶ 2-5.

In July 1989, the Canadian Band moved to consolidate the three complaints. That motion was granted in August 1991. Following consolidation, the Court granted a series of stays attempting to facilitate settlement negotiation. Because settlement was not achieved, the motions to dismiss were ultimately briefed and argued in 1999 after the United States had intervened. On May 30, 2001, the Court issued a Decision and Order granting in part and denying in part Defendants' motions to dismiss ("May 30, 2001 Decision and Order"), which included the rejection of the defense of laches based upon this Court's interpretation of then-existing Second Circuit case law and its prior decision rejecting laches as a defense to liability in Cayuga. Dkt. 200; *Canadian St. Regis Band of Mohawk Indians v. State of New York*, 146 F. Supp. 2d 170, 186-87 (N.D.N.Y. 2001) (citations omitted). The Court's decision also noted that "[t]he issue of whether the Longhouse and Canadian Band fall with the protection of [the NIA] undoubtedly will prove fact-intensive . . . ." *Id.* at 184.

Answers were subsequently filed on behalf of all Defendants. Plaintiffs then moved to strike certain of Defendants' defenses, including, *inter alia*, the defense of laches. This Court granted that motion, insofar as laches had been asserted as a defense to the cause of action under the NIA, but denied it insofar as the defense was relevant to remedies. *See Canadian St. Regis Band of Mohawk Indians v. State of New York*, 278 F. Supp. 2d 313, 334 (N.D.N.Y. 2003).

Subsequently the parties engaged in renewed, but unsuccessful, settlement discussions. Concurrently, new developments that changed the legal landscape pertaining to the defense of laches were taking place in litigation involving two other New York Indian land claims, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ("*Sherrill*") and *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d. Cir. 2005), *cert. denied*, 126 S. Ct. 2021, 2022 (2006) ("*Cayuga*").

On November 6, 2006, Defendants filed a motion for judgment on the pleadings, seeking dismissal of Plaintiffs' claims on the basis of the defense recognized by the United States Supreme Court in *Sherrill*. Over the ensuing two years, the parties submitted extensive briefing on the issues raised in Defendants' motion. Dkt. Nos. 446-503. On May 19, 2008, the Court entered an order staying the action pending a decision by the Second Circuit in *Oneida Indian Nation, et al. v. State of New York*. Dkt. Nos. 490, 504. On November, 19, 2010, the Court lifted the stay following the Second Circuit's issuance of the decision in *Oneida*. The Court thereafter permitted the filing of supplemental briefing based upon the Second Circuit's holding in *Oneida*. Dkt. Nos. 549-565.

On September 28, 2012, Magistrate Judge Dancks issued a Report and Recommendation granting in part and denying in part Defendants' motion. Dkt. No. 581. On July 8, 2013, following briefing of objections to the Report and Recommendation, the Court issued a Memorandum Decision and Order, which adopted in part and rejected in part the recommendations made by Magistrate Judge Dancks. Dkt. No. 683. Plaintiffs thereafter moved for clarification of the Court's decision. Dkt. Nos. 639, 640.

By the July 23, 2013 Decision and Order, the Court granted Defendants' motion and dismissed Plaintiffs' claims except with respect to the Hogansburg Triangle *See* Dkt. No. 641.

With respect to the Hogansburg Triangle, the Court found that it could not decide, based on the record before it, whether the *Sherrill* doctrine barred claims to that parcel of land. *Id.*

Following the July 23, 2013 Decision and Order, this Court granted a series of stays to facilitate settlement negotiations. Dkt. Nos. 643 – 753. On January 11, 2021, Magistrate Judge Dancks issued a Text Order lifting the stay and directing the parties to file a proposed discovery schedule. Dkt. No. 756. A stay remains in effect at the Second Circuit in an appeal arising out of this matter.

On January 25, 2021, following a telephonic status conference, the Court directed that amended Rule 26 initial disclosures be served by March 2, 2021. Dkt. No. 758. Additionally, the Court set a deadline for the parties to file dispositive motions. *Id.* The purpose of these motions, as articulated in a January 19, 2021 letter from counsel for the St. Regis Tribe, was to narrow the anticipated discovery "to issues that truly require factual development." Dkt. No. 757. To date, the only discovery that has been conducted is the exchange of standard Rule 26 initial disclosures, per the Court's January 2021 directive. No other discovery has been exchanged at any point in this action.

Plaintiffs now move for partial summary judgment, requesting that the Court rule, as a matter of law, that they have met various elements of the NIA, and that State of New York's counterclaims are invalid. Plaintiffs' motions do not address the issue of whether their claim to the Hogansburg Triangle is barred under *Sherrill* and *Cayuga*.

ARGUMENT

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED

Plaintiffs' motions for partial summary judgment should be denied. The motions seek to adjudicate issues not relevant to this litigation. In addition, should the Court determine that those issues are relevant to the litigation, it should not resolve those issues until Defendants have had the opportunity to conduct the discovery necessary to articulate a complete defense.

POINT I

THE ISSUES THAT PLAINTIFFS ASK THE COURT TO DETERMINE ARE NOT NECESSARY TO THE ADJUDICATION OF THIS ACTION

Plaintiffs ask this Court to rule as a matter of law that they have satisfied certain elements of the NIA and to reject Defendants' counterclaims. Yet they fail to explain how a ruling on these issues, even in their favor, would have any material impact on the outcome of the litigation, given the steps the district court has already taken to narrow the issues.

The procedural history in this case establishes that the issues Plaintiffs propose for summary judgment are not relevant. The July 23, 2013 Decision and Order assumed that the Hogansburg Triangle was within the reservation boundary insofar as "Two sides of the Hogansburg Triangle abut reservation land *while the third side continues the reservation's boundary with the Town of Bombay,* of which the Triangle is a part." *Id.* at *57-58 (emphasis added). Nevertheless, the Court clarified that the outcome of plaintiffs' assertion of rights to ancestral land does not turn on its interpretation of the Non-Intercourse Act, but the viability of defendants' argument under *Sherrill*:

> Three specific factors determine when ancestral land claims are foreclosed on equitable grounds: (1) 'the length of time at issue between the historical injustice and the present day'; (2) 'the disruptive nature of claims long delayed'; and (3) 'the degree to

> which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to plaintiffs' injury.

Id. at *15-16 (citations omitted). The Court issued this holding in the context of a Fed. R. Civ. P. 12(e) Motion for a More Definite Statement, signifying that additional fact-gathering was required.

The doctrine announced in *Sherrill* is a complete defense to an Indian Tribe's assertion of sovereign rights to a parcel of land, regardless of the theory under which the tribe asserts such rights. Indeed, in *Sherrill*, the plaintiff tribe was barred from proceeding despite a finding that the treaty at issue "did not demonstrate a clear congressional purpose to disestablish or diminish the Oneida Reservation," 544 U.S. at 212—a finding identical in substance to what the Plaintiffs' now assert. And in deciding *Oneida, Cayuga*, and *Onondaga* in *Sherrill*'s wake, the reviewing courts did not reach whether the disputed property transfers violated the NIA because, assuming that it did, their claims were still barred under *Sherrill*.

Plaintiffs maintain that a finding that Defendants violated the NIA would be beneficial because it would establish that their sovereign rights to the Hogansburg Triangle had never extinguished. As prior rulings in this case make clear, however, the Court's focus is on the threshold question of *Sherrill*'s applicability. Notably absent from any of Plaintiffs' papers is any suggestion that the *Sherrill* question could be affected by a finding that the transfer of the Hogansburg Triangle was made in violation of the NIA.

Because a finding that Defendants violated the NIA will do nothing to move this litigation forward, this Court should decline Plaintiffs' invitation.

POINT II

PLAINTIFFS' MOTIONS ARE PREMATURE

Assuming that the Court finds it necessary to reach the question whether Plaintiffs have met certain elements of the NIA, it should decline to decide that question in the current posture, because Plaintiffs make their motions too soon.

Rule 56(d) of the Federal Rules of Civil Procedure states that:

> When a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery;
>
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

A review of this Court's May 30, 2001 Decision and Order and July 28, 2003 Decision and Order in this case abundantly demonstrates that discovery will be required to resolve the issues Plaintiffs have raised in their summary judgment motions. As a threshold matter, it remains unclear whether the Canadian Band and the Longhouse have standing to participate in this action. As this Court has already held, discovery is necessary for resolution of this jurisdictional issue:

> [T]he Longhouse and Canadian Band's asserted claims under the Nonintercourse Act, as well as their related constitutional and treaty-based claims, suffice to withstand these motions to dismiss. Of course, if defendants contest standing in the future, the Longhouse and Canadian Band will need to produce specific facts to support these general allegations. . . . *The issue of whether the Longhouse and Canadian Band fall within the protection of the Act undoubtedly will prove fact-intensive* and, thus, are beyond the purview of these motions to dismiss which confine the court to an examination of the sufficiency of the allegations contained in the pleadings.

May 30, 2001 Decision and Order, Dkt. No. 200 at 32 (emphasis added). Similarly, Judge McCurn denied Plaintiffs' motion to strike Defendants' affirmative defense based on the argument that the Treaty of Buffalo Creek of 1838 constituted a release by Plaintiffs of any claim involving the challenged transactions:

> Assuming for the moment that the nature of the title is dispositive as to the release and relinquishment defense, for the same reasons set forth above as to abandonment, the court denies the Tribes' motion to strike release as a defense. *See Oneida Reservation*, 194 F. Supp. 2d at 127 (using the same reasoning, on a motion to strike, court allowed defenses of abandonment, and release and relinquishment to stand). *Denial is proper because the record is factually incomplete, indeed practically non-existent. The lack of an adequate record precludes a thorough analysis of the facts and circumstances surrounding the challenged transactions, and greatly hinders as examination of the relevant statutes and treaties.*

Dkt. No, 275 at 53-54 (emphasis added).

These issues remain as fact-intensive today as they were when Judge McCurn made these observations in 2001. And resolution of such fact-intensive inquiries depends on the development of a factual record.

"Since summary judgment is a 'drastic device,' it should not be granted when there are major factual contentions in dispute. This is particularly so when, as here, one party has yet to exercise its opportunities for pretrial discovery." *Ass'n of Car Wash Owners Inc. v. City of New York,* 911 F.3d 74 (2d Cir. 2018) (quotation omitted). "Only in the rarest of cases may summary judgment be granted against a [party] who has not been afforded the opportunity to conduct discovery." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000). This is because in the ordinary case, the nonmoving party will be unable to respond effectively until it has "had the opportunity to discover information that is essential to his opposition' to the motion for summary judgment." *Trebor Sportswear Co. v. The Ltd. Stores, Inc.*, 865 F.2d 506, 511 (2d Cir.

1989); *see also Sutera v. Schering Corp.*, 73 F.3d 13, 18 (2d Cir. 1995) (vacating district court's order granting summary judgment where "[s]ummary judgment was entered before any discovery had taken place" which precluded the plaintiff, the nonmoving party, from having "a full and fair opportunity" to respond to the defendant's claims). Thus, "[t]here is a critical distinction . . . between cases where a litigant opposing a motion for summary judgment requests a stay of that motion to conduct *additional* discovery and cases where that same litigant opposes a motion for summary judgment on the ground that it is entitled to an opportunity to *commence* discovery." *Crystalline H_2O, Inc. v. Orminski*, 105 F. Supp. 2d 3, 6-7 (N.D.N.Y. 2000) (emphasis in original).

This case presents the latter scenario. Despite an extensive procedural history, Defendants have not had an opportunity to even *commence* discovery, other than the exchange of initial disclosures. Plaintiffs' motions violate the basic tenets of Rule 56, under which a party must have a full and fair opportunity to conduct pretrial discovery to mount a defense to summary judgment. *Sutera*, 73 F.3d at 18.

Moreover, as the Court is aware, this action had been stayed for over seven years to allow for settlement discussions. The stay was entered after the Court's decision on Defendants' motion for judgment on the pleadings, a motion that did not require pre-motion discovery. Due to the extensive periods during which pre-trial deadlines have been stayed, no meaningful discovery has ever occurred, or been required, of the parties on the various complex claims which Plaintiffs now seek to resolve via summary judgment. Indeed, even after the Court ordered the parties back into an active litigation posture, settlement negotiations remain ongoing.

To make their case, Plaintiffs cite to decades-old, if not centuries-old, texts and treaties which they deem sufficient as legal authority. However, because this case turns on the validity of the ancient transactions, these materials lend *factual*, not legal, support to Plaintiffs' arguments.

Consequently, Plaintiffs cannot yet insist that the Court draw inferences from these materials without establishing their foundation. Nor can they deprive Defendants an opportunity to obtain evidence placing these materials in context by declaring in conclusory fashion that no such evidence exists.

In short, the issues that Plaintiffs now seek to summarily resolve in their favor through their motions are not yet ripe for this Court's review. *Crystalline H_2O, Inc.*, 105 F. Supp. 2d at 8 ("The Second Circuit has denied motions for summary judgment as premature in cases where nonmoving party did not have a fully adequate opportunity for discovery at the time the moving party sought summary judgment"). Defendants should not be required to mount a fact-based defense on these issues before it has had a fair chance to assemble the supporting facts. *Trebor Sportswear Co.*, 865 F.2d at 511. "Particularly in a case with the wide-ranging ramifications of this one, a chance for all parties to develop a complete record regarding the circumstances of the conveyances at issue promotes a more accurate, and thus, more just, resolution." *Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938, 945 (N.D.N.Y. 1987).

CONCLUSION

For all of the reasons detailed above, Plaintiffs' motions for partial summary judgment should be denied.

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