IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

WILLIAM PETERSON, III, Plaintiff, v. HARRAH'S NC CASINO COMPANY, LLC and CAESARS ENTERTAINMENT, INC., Defendants.	Civil Action No. 1:23-0036-MOC-WCM **DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO JOIN A NECESSARY PARTY UNDER RULE 12(b)(7)**

Defendant Harrah's NC Casino Company, LLC ("Harrah's"), and Caesars Entertainment, Inc., ("Caesars") (collectively, the "Defendants") hereby submit this Reply in Further Support of Their Motion to Dismiss for Failure to Join a Necessary Party under Rule 12(b)(7).

I. INTRODUCTION

Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint (the "Response") crystallizes that there is no dispute that the Eastern Band of Cherokee Indians ("ECBI") and its wholly owned and operated entity, the Tribal Casino Gaming Enterprise ("TCGE"), enjoy sovereign immunity from Plaintiff's claims and, therefore, cannot be joined under Rule 19. The only dispute is whether ECBI, and, by extension, TCGE, are necessary parties under Rule 19(a) which Plaintiff improperly failed to join under Rule 12(b)(7). The Response asks this Court to answer that question in the negative based on: (a) an implicit request that this Court depart from its own precedent; (b) an improper conflating of the standards of review under Rule 12(b)(6) and Rule 12(b)(7), and; (c) Plaintiff's haphazard misinterpretation of excerpts of, and whole-cloth invention of provisions purportedly in, the management agreement between Harrah's and ECBI (the "Management Agreement").

As a result, pursuant to the arguments raised below, and in Defendants' initial Motion to Dismiss for Failure to Join a Necessary Party under Rule 12(b)(7) and supporting Memorandum

of Law (collectively, the "Motion to Dismiss"), the Court should dismiss Plaintiff's Complaint with prejudice for Plaintiff's failure to join necessary parties which cannot be joined due to sovereign immunity.

II. ARGUMENT

A. Plaintiff's Response Asks This Court to Depart from Established Precedent without Providing any Authority to Support His Request.

The Response asks this Court to conclude that TCGE (an arm of ECBI) was not Plaintiff's true employer, and therefore not a necessary party under Rule 19, despite the myriad case law unanimously finding the opposite, including precedent from *this Court*. Specifically, this Court, in nearly identical factual and procedural circumstances, has twice been asked whether employees at a Harrah's casino located in Cherokee, North Carolina, could bring employment claims against Harrah's, to the exclusion of the TCGE, for alleged unlawful workplace conduct[1], and on both occasions, this Court responded in the negative. *See generally Humble v. Harrah's NC Casino Co., LLC*, No. 1:17-cv-262, 2018 U.S. Dist. LEXIS 167966 (W.D.N.C. June 1, 2018) (FLSA and NCWHA claims), *Clark v. Harrah's NC Casino Co., LLC*, No. 1:17-cv-240, 2018 U.S. Dist. LEXIS 167963 (W.D.N.C. Apr. 27, 2018) (same; citing *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541 (4th Cir. 2006). To wit, to conclude as Plaintiff requests requires this court to disregard binding precedent in *Yashenko v. Harrah's NC Casino Co., LLC*, which similarly concluded that an employee at a Harrah's casino property in Cherokee, North Carolina, was precluded from proceeding with his FMLA claims against Harrah's because the TCGE, and not Harrah's, was the employee's true employer. *See Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552-553 (4th Cir. 2006). Astonishingly, Plaintiff makes this argument without any authority, even outside the 4th Circuit, to support his

[1] I.E., the exact question Plaintiff posits here.

position. (*See* Dkt. No. 18, 4-10.) Plaintiff's glaring lack of case law is telling, as the arguments Defendants raise in the Motion to Dismiss have been unanimously accepted across the country. (*See* Dkt. No. 16, 4-6.)

Going further, whether this Court concludes that TCGE was Plaintiff's sole employer or a joint employer, along with one or more of Defendants, the analysis and conclusion remain the same. TCGE (and, by extension ECBI), even as a mere joint employer, nonetheless satisfies the definition of a necessary party under Rule 19(a) regarding Plaintiff's employment claims because there would be nothing precluding Plaintiff from separately suing TCGE and/or ECBI in the appropriate forum based on the same underlying factual allegations, and, as a result, Plaintiff cannot proceed in the absence of TCGE and ECBI here. *See Gilliand v. Koch Trucking Inc.*, No. JFM 11–3073, 2015 WL 2395148, at *4-5 (D. Md. May 19, 2015).

B. Plaintiff Asks this Court to Disregard Evidence Attached to the Motion to Dismiss, which is Properly Before this Court, Based on His Inappropriate Conflating of the Standards of Review for Rule 12(b)(6) and Rule 12(b)(7).

Plaintiff next tries to distract the Court from evidence properly before it by asserting that the Court cannot consider "alleged facts or documents outside the four corners of the complaint." (*See* Dkt. No. 19, 3-4) (citing *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015). However, Plaintiff's reliance on *Zak* is misguided, because *Zak* relates to a Rule 12(b)(6) motion, which, under Rule 12(d), precludes the court from considering evidence outside of the pleadings. *See Zak*, 780 F.3d at 606. In contrast, Rule 12(d) expressly permits the Court to consider evidence outside of the pleadings on a Rule 12(b)(7) motion. *See* Fed. R. Civ. P. 12(d); *see also Marina One, Inc. v. Jones*, 22 F. Supp. 604, 607 (E.D. Va. 2014) ("A court addressing [a Rule 12(b)(7) motion to dismiss] may consider evidence presented outside of the pleadings.") (citing *R-Delight Holding LLC v. Anders*, 246 F.R.D. 496, 499 (D. Md. 2007)).

Applying the correct standard, this Court can and should consider the evidence

Defendants provided as exhibits to the Motion to Dismiss which demonstrates, unambiguously and without any countervailing testimonial or documentary evidence from Plaintiff, that: (a) all employees at the Harrah's Cherokee Casino Resort in Cherokee, North Carolina, including Plaintiff and every individual identified by name in the Complaint, are employees of TCGE, not Harrah's (*see* Dkt No. 16-1, ¶¶ 5-6); (b) TCGE, and not Harrah's, paid Plaintiff's wages (*see* Dkt. No. 16-1, at Ex. 1), and; (c) Plaintiff admitted to the EEOC that TCGE is, at bottom, his joint employer. (*See* Dkt. No. 16-2, at 1.)

C. Plaintiff Misrepresents His Haphazard Misinterpretations and Mischaracterizations of the Management Agreement as "Evidence" Purportedly Showing that Defendants are Plaintiff's True Employer.

Plaintiff next argues that the Management Agreement demonstrates that Harrah's was Plaintiff's true employer, despite admitting that he does not know what the Management Agreement says, based entirely on his misinterpretation of an out-of-context excerpt of a single provision of the Management Agreement from an appellant's arguments to the 4th Circuit Court of Appeals in 2018. (*See* Dkt. No. 18, 6.) Plaintiff disingenuously refers to this out-of-context excerpt from a brief filed nearly five years ago as "evidence" in this matter, and asserts in conclusory and self-serving fashion that this excerpt stands for the premise that Harrah's satisfies the definition of an employer under the FMLA. (*See id.*, 6-7.) Plaintiff goes on to assert, again without evidence, that Harrah's exercised control over the terms and conditions of Plaintiff's employment. (*See id.*)

However, this Court should not be persuaded by Plaintiff's wildly speculative assertions, untethered from any evidence, particularly where Defendants have offered evidence that provides exactly the opposite. Specifically, all of the employees at the subject casino, including Plaintiff, his supervisors, and every alleged bad actor identified by Plaintiff in his Complaint, were at all times relevant employees of TCGE. (*See* Dkt. No. 16-1, ¶¶ 5-6.) Furthermore, the

State of North Carolina *requires* that all employees at any casino gaming facility on ECBI land must be employees of ECBI. (*See* Exhibit A, December 3, 2020 Second Amended & Restated Tribal-State Compact between the Eastern Band of Cherokee Indians and the State of North Carolina (the "Gaming Compact"), § 5(C).)[2] Indeed, and contrary to Plaintiff's wholly unsupported assertion that TCGE lacked any control over the terms and conditions of Plaintiff's employment, the Gaming Compact:

- requires ECBI (and not Defendants) to conduct preemployment background checks for prospective employees for the casinos, (*see id.*, § 5(A)(13)[3];
- requires ECBI (and not Defendants) to provide gaming licenses to casino employees whose job duties include game operation, and to provide and maintain a procedural manual, with disciplinary standards, for such employees, (*see id.* § 5(A)(5)[4], and;
- sets limitations on who ECBI (and not Defendants) may hire to work at the casinos, such as individuals under age 21 and/or individuals with specific criminal convictions or pending criminal charges. (*See id.*, § 5(A)(1).)

Indeed, by virtue of the Gaming Compact, the State of North Carolina forecloses any possibility that Plaintiff was an employee of Defendants, or that Defendants, and not TGCE (and, by

[2] The Gaming Compact is made publicly available by the United States Department of the Interior Bureau of Indian Affairs (*see* Exhibit A, Eastern Band of Cherokee Indians and State of North Carolina Tribal State Gaming Compact (bia.gov), last visited Aug. 2, 2023) and, therefore, the Court may take judicial notice of the same. *See Yates v. Municipal Mortg. & Equity, LLC*, 744 F.3d 874, 881 (4th Cir. 2014).

[3] TCGE conducted a background check on Plaintiff prior to offering him employment. (*See* Dkt. No. 16-1, ¶ 9.) Plaintiff does not dispute this fact. (*See generally* Dkt. No. 18.)

[4] Plaintiff was employed by TCGE as a table games dealer, and thus operated table games at the subject casino. (*See* Dkt. No. 16-1, ¶ 8). As a result, pursuant to the Gaming Compact, Plaintiff's license was controlled by ECBI (via TCGE), and he was subject to the procedural manual and disciplinary standards issued and maintained by ECBI (via TCGE). (*See* Ex. A, § 5(A)(5) and Exhibit I.)

extension, ECBI) controlled the terms and conditions of his employment.

As a result, there can be no doubt that TCGE, as an arm of ECBI, was Plaintiff's true employer, and Plaintiff cannot proceed with his FMLA and USERRA claims in the absence of these necessary and indispensable parties.[5]

III. CONCLUSION

WHEREFORE, Defendants respectfully request that this Court enter an Order GRANTING dismissal of Plaintiff's Complaint with prejudice for failure to join a necessary party.

Dated: August 3, 2023

Respectfully submitted,

/s/ Kevin M. Cleys

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[5] Plaintiff further requests that the Court provide him with the opportunity to engage in discovery regarding whether TCGE (and by extension, ECBI) or Defendants are his true employer. (*See* Dkt. No. 18, 5). This Hail-Mary request does nothing to overcome the legal and factual impossibility that Defendants, and not TCGE, could somehow be Plaintiff's true employer. *See supra* §§ II(B) and (C). Setting that aside, even if this Court were to determine that Defendants jointly employed Plaintiff, along with TCGE, discovery would be fruitless because, as noted herein, the Rule 19 analysis and conclusion remain the same–TCGE and ECBI are necessary and indispensable parties that cannot be joined, requiring dismissal of Plaintiff's Complaint as a matter of law. *See Gilliand*, No. JFM 11–3073, 2015 WL at *4-5. (*See also* Dkt. No. 16, 3-7.)

CERTIFICATE OF SERVICE

This is to certify that on August 3, 2023, the undersigned filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following CM/ECF participants in this case.

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