

No. 17-024

**IN THE
YUMA INDIAN NATION SUPREME COURT**

YUMA INDIAN NATION

Plaintiff/Appellee

v.

THOMAS SMITH & CAROL SMITH

Defendants/Appellants

**Interlocutory Appeal
from the Yuma Indian Nation Trial Court**

BRIEF FOR PLAINTIFF

TEAM NO. 189

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COURTS, 22 Am. Indian L. Rev. 285.

QUESTIONS PRESENTED

1. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Defendants Thomas Smith and Carol Smith, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.
2. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims.

STATEMENT OF THE CASE

I. Statement of the Proceedings

The Yuma Indian Nation Tribal Council has filed a breach of contract, violation of fiduciary duties, and violation of duties of confidentiality suit against the Defendants Thomas Smith and Carol Smith in Yuma Indian Nation tribal court. ROA¹ at 3. The Defendants subsequently filed special appearances and identical motions to dismiss the YIN suit claiming the courts lack of personal jurisdiction and subject matter jurisdiction. Id. Defendants' motion also requested the tribal court to stay the suit until an Arizona federal district court rules on whether the tribal court may exert jurisdiction over the Defendants. Defendants' motion was denied. Id.

Defendants subsequently filed a counterclaim against the Yuma Indian Nation for defamation and monies owed. Id. Defendants impleaded the YIN Economic Development Committee ("EDC"), Fred Captain (CEO) and Molly Bluejacket (accountant) in their official and individual capacities. Id.

Along with denying Defendants' motion to dismiss, the tribal court dismissed the Defendants' counterclaims against the YIN, EDC, Fred Captain and Molly Bluejacket. Id. Counterclaims were dismissed because of third party defendants' sovereign immunity. Id. Defendants filed, and the Yuma Indian Nation Supreme Court granted an interlocutory appeal on the two questions presented above. Id.

II. Statement of The Facts

The business relationship between Thomas Smith and the Yuma Indian Nation ("YIN") began in 2007 when both parties entered into a contract in. ROA at 1. The terms of the contract

¹ "ROA" indicates Problem/Fact Pattern provided by NALSA. Corresponding numbers indicate page number of the Problem/Fact Pattern.

stated that Mr. Smith would provide YIN with financial advice regarding an assortment of “economic development issues.” Id. The contract, which was signed in Mr. Smith’s office in Phoenix, Arizona, required Mr. Smith’s to “maintain absolute confidentiality regarding any and all tribal communications and economic development plans.” Id. Further the contract stated that any and all disputes arising from the contract was to be litigated in a “court of competent jurisdiction.” Id. Mr. Smith’s duties also included preparing, submitting, and presenting written reports in person at YIN Tribal Council Meetings on the YIN reservation in southwest Arizona. Id. From 2007 to 2009 Mr. Smith communicated with tribal chairs and Tribal Council members on a daily basis. Id. In 2009 YIN created the YIN Economic Development Corporation. From 2009, Mr. Smith’s main points of contact were Fred Captain (CEO) and Molly Bluejacket (Accountant). Id.

The EDC was created by YIN through a 2009 tribal commercial code in an effort to promote “prosperity of the Nation and its citizens.” ROA at 2. The tribal Council created the EDC through a corporate charter “as a wholly owned subsidiary of the Nation and as an ‘arm-of-the-tribe.’” Id. The mission of the EDC is to “create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona.” Id. However, the board of directors for the EDC, consisting of five experienced business people, is operated independently. Id. The board shall be comprised of three YIN citizens and two non-Indians or may have other tribal affiliation. Id.

The YIN Tribal council has funded the EDC through a \$10 million loan from the YIN general fund. Id. With this money, the EDC may buy and sell fee simple property on or off the reservation, to buy property in any other form of ownership and the ability to be sued or be sued. ROA at 3. The EDC may not, however, incur more debt. Id. The EDC is responsible to manage

its own financial records and must be reviewed and approved by Tribal Council on a quarterly basis. Id. This ensures that fifty percent of EDC net profits are distributed to the YIN general fund annually. Id.

Mr. Smith and his sister Carol Smith, who resides in Portland Oregon, entered entered a contract identical to the contract signed with YIN in 2007. Id. The contract provided that Ms. Smith would provide Mr. Smith, the EDC and YIN with advice regarding stocks, bonds and other securities. Id. Ms. Smith was aware of the contract between Mr. Smith and YIN as she agreed to comply with that contract. Id. Ms. Smith sent bills to the EDC for payment in which the EDC paid her monthly fees. Id. The advice Ms. Smith agreed to provide was sent directly to her brother through email, telephone and mail carrier. Id. Mr. Smith would frequently forward this advice to YIN Tribal Council the CEO of EDC and Ms. Bluejacket. Id. On multiple occasions, Ms. Smith visited the YIN reservation. Id.

From 2009 to present, the EDC has only profited a net amount of \$4 million, repaying only \$2 million of its \$10 million debt to the YIN. Id. Likely to increase profit, the EDC in 2016 decided to research whether marijuana cultivation and sales were feasible. Id. The YIN Council passed an ordinance legalizing marijuana cultivation and use on the YIN reservation. Id. Seeking advice from their business partners, EDC brought the idea to the Defendants'. Id. Defendants' refused to be involved in the business. Id. Furthermore, the Defendants' breached the duty of confidentiality when they informed the Arizona Attorney General of EDC's business plan. Id. Because of this, the Attorney General ordered EDC to cease and desist the development of their marijuana business. Id.

ARGUMENT

I. The Yuma Indian Nation Supreme Court should uphold the trial courts ruling that YIN has personal jurisdiction and subject matter jurisdiction over the Defendants Thomas Smith and Carol Smith.

The Yuma Indian Nation courts have personal and subject matter jurisdiction over Defendant's Thomas Smith and Carol Smith. The YIN court has personal jurisdiction over the Defendant's because Section 1-104 of the YIN Tribal Code is satisfied and the tribal court comports with notions of due process. The YIN court has subject matter jurisdiction over the Defendants because "tribes retain the power to regulate 'the activities of nonmembers who enter consensual relationships with the tribe.'" See Montana v. United States, 450 U.S. 544 (1981).

A. YIN has Personal Jurisdiction over the Defendants.

The crux of personal jurisdiction is the legality of tribal law to subject a defendant to the powers of the court, and the fairness of subjecting the defendant to jurisdiction of the tribal court. See TRIBAL COURT PRAXIS: ONE YEAR IN THE LIFE OF TWENTY INDIAN TRIBAL COURTS, 22 Am. Indian L. Rev. 285. Courts use a two-step analysis to determine whether the court has personal jurisdiction over a defendant. Estate of Witko v. Hornell Brewing Co., 156 F. Supp. 2d 1092 (D.S.D. 2001). "First, the applicable [tribal] long-arm statute must be satisfied and second, the court's exercise of jurisdiction must comport with due process." Id at 1096.

i. The Yuma Indian Nation Tribal Code purports that the tribal court has Personal Jurisdiction over the Defendants

Under Yuma Indian Nation Tribal Code Section 1-104, a YIN tribal court shall have personal jurisdiction over "[a]ny person² who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil

² "person" shall include any individual, firm, company association, corporation or other entity. YIN Tribal Code Sec. 1-104.

cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud.” YIN Tribal Code Sec. 1-104(2)(a). Here, Thomas Smith contracted with YIN to provide “financial advice on a wide range of economic development issues.” ROA at 1. To do this, he was in contact though telephone and email with tribal chairs and Council Members on a “near daily basis.” Id.

The EDC was created as a subsidiary of the YIN “to create and assist in the development of successful economic endeavors, of any legal type of business, on the reservation...” Id. at 1. Mr. Smith knowingly conducted business with the EDC evidenced through his communication with Fred Captain, the CEO of EDC and Molly Bluejacket, accountant for EDC. Id. Carol Smith provided EDC with monthly invoices for payments for her services. Id. at 2. She was well aware that she was conducting business transaction with YIN and the EDC. Id. at 2.

The plain language of the YIN ordinance provides guidance on who shall be subject to the courts personal jurisdiction. It is clear from the language that Defendants falls within the guidelines of the ordinance. Next, the tribal court correctly comported with due process.

ii. Yuma Indian Nation trial court has comported with due process.

“There appears to be a consensus among tribal courts that in analyzing the extent to which a tribe's exercise of personal jurisdiction is consistent with due process of law as required by the Indian Civil Rights Act and tribal constitutional and statutory civil rights provisions, the courts will interpret due process by reference to the United States Supreme Court's precedents.”

TRIBAL COURT PRAXIS: ONE YEAR IN THE LIFE OF TWENTY INDIAN TRIBAL COURTS, 22 Am. Indian L. Rev. 285.

Int'l Shoe Co. v. Washington, states that for courts to assert jurisdiction on out of state defendants, the defendants must have “certain minimum contacts with the forum state...” that

“do not offend traditional notions of fair play and substantial justice.” 326 U.S. 310, 316 (1945). The minimum contact with the forum state needs to be reasonable to require the defendant to be brought to court. Id at 317. World-Wide Volkswagen Corp. v. Woodson, establishes the two-tier threshold formulation of due process that is still in use today. See 444 U.S. 286. Tier A of the formulation states that the defendant must have contacts with the forum state and that this contact must show reciprocity and purposefulness. Id at 298.

To assert personal jurisdiction over a non-resident defendant, the contacts with the forum state are sufficient if the defendant should reasonably anticipate being haled into court there because he has performed some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The inquiry is whether the defendants have directed their activities toward residents of the forum and whether the litigation arises out of those activities. Estate of Witko, 156 F. Supp. 2d 1092 at 1096.

Here, Defendants’ have “directed their activities toward residents” of the Yuma Indian Nation and litigation has arisen from those activities. Id. Members of the tribe comprise 3/5 of the board of directors of the EDC. ROA at 1. The Defendants’ worked directly with residents of the YIN by providing “financial advice on a wide range of economic development issues.” Id. The Defendants’ worked directly with the EDC, an “arm of the tribe” in purchasing real property on or off the reservation. Id. The decisions made from the advice given by the Defendants directly affect the residents of YIN by dictating how tribal money is spent. Litigation has arisen from the contract entered into by both parties in which Defendants’ agreed to absolute confidentiality regarding tribal communications.

In Coeur d’Alene Tribe v. AT&T Corp, during negotiations for the use of an 800 service, AT&T informed the Couer d’Alene tribe that certain legal issues needed to be resolved before AT&T would service the tribe. 23 Indian L. Rep. 6060, 6061 (Coeur d’Alene Tribal Ct. 1996). The Couer d’Alene tribe subsequently filed an injunction against AT&T in tribal court to compel

AT&T to service the tribe. Id. The tribal court held that AT&T had “purposefully directed its activities” towards the tribe because of direct negotiations with tribal members for contracting of the 800 service. Coeur d'Alene Tribe, 23 Indian L. Rep. at 6068. The court further stated that AT&T was involved in “significant forum-related activities” through this action, thus subjecting AT&T to the jurisdiction of the tribal court. Id. Similarly here, Defendants contracted with YIN to provide a service. This advice would potentially benefit the entire reservation in the development of business on the reservation.

B. YIN has subject matter jurisdiction over the Defendants.

Under Yuma Indian Nation Tribal Code 1-106, a YIN tribal court “shall have subject matter subject matter jurisdiction as is expressly conferred by Article IV 1(i) and 1(q), Winnebago Constitution and By-laws to wit...Civil disputes and civil causes of action of any kind whatsoever...” YIN Tribal Code Sec. 1-106(1)(b).

The Yuma Indian Nation Courts have subject matter jurisdiction over Thomas Smith and Carol Smith because they entered into a consensual relationship with the tribe and because the conduct of the Smith’s affects the economic security and welfare of the tribe. See Montana 450 U.S. 544. In Montana v. United States, the general rule that the Court asserts is that “tribal courts... do not have jurisdiction over nonmembers.” Id at 549. However, two exceptions exist under the general rule. See id. First, “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Id at 565. This also means that tribes may exercise jurisdiction over conduct not occurring on reservation land. See id at 565. Second, “a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has

some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id.

Unlike Atkinson Trading Co. v. Shirley, where the court ruled that petitioner’s business did not affect economic security or welfare of the tribe, the defendant’s here have directly affected the economic security and welfare of YIN. 532 U.S. 645 (2001). The petitioner in Atkinson Trading Co. v. Shirley merely owned a hotel on non-Indian land adjacent to the reservation. Id. at 657. There was no direct interaction with the tribe and the petitioner’s business. Id. Here, Defendants’ business is directly linked to the contract entered into with YIN.

Based on the record, the conduct of the Defendants fall under the exceptions of Montana v. United States. It is clear that the Defendants’ have entered into a contractual relationship with the tribe. The conduct of the Defendant threatens the economic security and welfare of the YIN. See id. The advice provided by the Defendants’ directly affect the \$10 million account comprised of YIN funds. The Defendants’ put those funds and the welfare of the tribe in jeopardy when they breached their duty of confidentiality by informing the Attorney General about a potential marijuana business. ROA at 2. Thus, the Yuma Indian Nation Supreme Court should have the power to exercise subject matter jurisdiction over the Defendants.

II. The Supreme Court Should Dismiss Defendants’ Countersuit because the Yuma Indian Nation is Protected from Said Suits by Sovereign Immunity.

A. Yuma Indian Nation is Protected from Suit from Defendants by Tribal Sovereign Immunity.

i. The Yuma Indian Nation is a sovereign entity recognized as such by the United States Congress.

The United States Congress retains plenary power over Indian tribes. See United States v. Kagama, 118 U.S. 375, 382-384 (1886). Congress therefore retains the authority to exercise

that plenary power over Indian tribes throughout the United States. Congress did so when they passed the Indian Reorganization Act (IRA) in 1934, which provides that the Secretary of Interior may issue a charter of incorporation to tribes that petition for a charter. 25 U.S.C. 477 (1934). The IRA allowed for and encouraged Indian nations to create their own courts of jurisdiction and to exercise their own sovereignty within their tribes and tribal lands. It is well understood that Indian tribes are recognized by Congress as “domestic independent nations” that enjoy inherent sovereignty over its members and territories. Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25 (1831); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991). As sovereign entities recognized by the Congress and the United States, Indian tribes “have historically been regarded as unconstrained by those constitutional provisions” of federal or state authority. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). The YIN is incorporated under §477 of the IRA and enjoys tribal sovereignty. 25 U.S.C. 477 (1934). That sovereignty also provided that Indian tribes like the YIN possess “common-law immunity from suit traditionally enjoyed by sovereign powers.” Santa Clara Pueblo, 436 U.S. at 58.

ii. The Yuma Indian Nation Did Not Waive its Sovereign Immunity.

Under federal law, Indian tribes are “subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998); Santa Clara Pueblo v. Martinez, 98 S. Ct. 1670, 1676-1677 (1978). To be valid, sovereign immunity must “clear” and “unequivocally expressed.” Id., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991). The facts before us provide no evidence of the YIN expressly and unequivocally waiving its sovereign immunity. Therefore, sovereign immunity still applies.

iii. Congress Did Not Expressly Abrogate the Sovereign Immunity of the Yuma Indian Nation.

Sovereign immunity may also not apply if Congress expressly limits it through legislation. Kiowa, 523 U.S. at 759. Courts have continually declined to revisit case law to take an active role in determining whether sovereign immunity applies in individual case relating to Indian tribes. Id. Instead, courts have consistently deferred to Congress. See Id. at 759-760; See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910. Congress has at times exercised its authority and allowed some classes of suits against Indian tribes to move forward. Id. To do so, Congress must “unequivocally” express the abrogation of sovereign immunity. C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 121 S. Ct. 1589, 1594; Santa Clara Pueblo, 98 S. Ct. at 1677. However, Congress largely has honored the sovereignty of Indian and promoted tribal self-sufficiency, self-governance and economic development. Oklahoma Tax Commission, 111 S. Ct. at 910; California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1092. The facts before us show no evidence of Congress expressly waiving sovereign immunity for the YIN in this instance. Because no express waiver of immunity from the Tribe nor an abrogation by Congress exists, sovereign immunity still applies for the YIN.

B. As an Arm of the Tribe, the Yuma Indian Nation Economic Development Corporation is Protected by Tribal Sovereign Immunity.

Key to determining whether sovereign immunity applies to a particular tribal entity or affiliate is determining whether the entity is an arm of the tribe. Sovereign immunity extends to entities that are arms of the tribes. Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (2006); see Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 29 (2000).

In Allen, a casino employee was fired from the Gold Country Casino and filed suit after obtaining a right to sue letter from the Equal Employment Opportunity Commission. Allen, 464 F.3d at 1045. Allen argued that the relationship between the Casino and the tribe constituted a relationship “analogous to a government agency or operating in a governmental capacity as an arm of the tribe.” Id. at 1045. However, the Ninth Circuit firmly held immunity extends to business activities of the tribe, nothing that “the Casino’s creation was dependent upon government approval at numerous levels” and that the Indian Gaming Regulatory Act, which allowed for the creation of this and other Indian casinos in order to promote tribal economic development and self-sufficiency. Id. at 1046. Similarly, the YIN EDC was created to assist in economic development endeavors for the tribe and to promote the prosperity of the Nation and its citizens. It also expressly indicates it in the EDC charter that it operates as an arm of the Yuma Indian Nation. Therefore, like Allen, sovereign immunity should extend to the YIN EDC.

Courts have not drawn a distinction between governmental or commercial activities of a tribe in determining whether sovereign immunity applies. Kiowa Tribe of Okla., 118 S. Ct. 1700 at 1703. In fact, as recently as 2017, the U.S. Supreme Court has declined to address the issue of whether there is a difference as to whether sovereign immunity applies to commercial activities of a tribe. See Lewis v. Clarke, 137 S. Ct. 1285, 1291 (2017).

i. Sovereign Immunity still applies if contracted work is done off of tribal land.

Geographic location of contracted work is not a factor in determining whether tribal sovereign immunity is applicable. Sovereign immunity extends contracts, “whether those contracts involve governmental or commercial activities and whether they were made on or off an reservation.” Kiowa, 523 U.S. at 760. Regardless of where the contracts for Defendants were

signed or where the work was done (whether within or outside of tribal land), sovereign immunity still applies.

C. Sovereign Immunity Extends to the EDC CEO, Fred Captain, and Accountant, Molly Bluejacket

Sovereign immunity extends to individual acting in their official capacity, and therefore applies to the YIN EDC, Mr. Captain and Ms. Bluejacket. Only a suit brought against an employee in his or her individual capacity and not against the tribe could avoid the implication of sovereign immunity Lewis v. Clarke, 137 S. Ct. at 1288. We do not have that in this case; the Defendants filed suit against the Yuma Indian Nation, the tribe's EDC and against their official capacities, for which sovereign immunity applies. But Defendants failed to provide evidence as to how the Mr. Captain and Ms. Bluejacket acted in their individual capacities throughout any of the alleged defamation.

CONCLUSION

For the reasons discussed above, we respectfully request the Supreme Court to dismiss for lack of personal jurisdiction, subject matter jurisdiction and sovereign immunity.