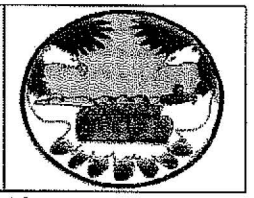
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS Tribal Court	

Court Address: 911 Spring Street, Petoskey, MI 49770 Phone: 231-242-1462

TRIBAL COURT

Case No: C-120-0411

Kenneth Harrington

Plaintiff,

vs.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIBAL COUNCILORS: Belinda Bardwell, Aaron Otto, John Bott, Regina Gasco-Bentley, Melvin Kiogima Sr., Marvin Mulholland, Gerald Chingwa, Rita Shananaquet, and Julie Shananaquet in their individual capacities.

Defendants.

ORDER FOLLOWING TRIAL HEARING

A trial hearing was held on May 17, 2012 at 1:52pm, the Hon. James Genia, Little Traverse Bay Bands of Odawa Indians (LTBB) Associate Judge presiding. Kenneth Harrington, Plaintiff, was present at the hearing. Defendants are represented by Jodi Doak, who was also present at the hearing. At 5:18pm, the hearing concluded for the day and resumed on June 29, 2012. Following the hearing on June 29, 2012, Plaintiff and Defendants, through their representatives, submitted written copies of their closing arguments to the Court for consideration.

FACTUAL SUMMARY

Plaintiff Kenneth Harrington filed suit against Defendants on April 21, 2011. Plaintiff served as Tribal Chairperson of the Little Traverse Bay Bands of Odawa Indians at the time of filing, while Defendants served as Tribal Councilors of the Tribe.

Plaintiff's complaint alleges that Defendant Councilors, on multiple occasions, appropriated funds by amending previously enacted resolutions. The complaint alleges that the appropriations in question were approved by simple motion of Tribal Council, which interfered with Plaintiff's duty under the Tribal Constitution to administer laws and resolutions passed by Tribal Council with the opportunity for Plaintiff, as Tribal Chairperson, to approve or veto such laws. By appropriating funds by simple motion, Plaintiff alleges that Tribal Councilors require Plaintiff to exercise powers not provided to him under the Tribal Constitution.

Plaintiff's complaint also alleges that several of Tribal Council's funding appropriations by simple motion were conducted during closed session, violating the requirement that Tribal citizens have the opportunity to comment on such appropriations.

Plaintiff requested this Court to: declare Tribal Council's practice of appropriating funds by simple motion as unconstitutional in its entirety; enjoin Defendants from appropriating funds by simple motion; and grant whatever other relief deemed equitable or necessary by this Court.

Defendants request this Court to dismiss Plaintiff's complaint for lack of standing. While Defendants acknowledge that Plaintiff was Tribal Chairperson when the case was filed, Defendants nonetheless argue that, because Plaintiff is no longer Tribal Chairperson, Plaintiff lacks standing to bring the case under the Tribe's Rules of Civil Procedure; the Tribe's Rules of Civil Procedure require that all parties be a Real Party In Interest to a case before the Court.

Defendants also argue that Plaintiff lacks standing due to the Tribe's sovereign immunity. The Tribal Constitution bars suit against the Tribe, and all Tribal entities, unless clearly and expressly waived by Tribal Council. Tribal officials are also immune to suit under the Constitution so long as they are acting within the scope of their constitutional duties. Defendants argue that Plaintiff's case against the Tribal Council cannot proceed because Tribal Council has not clearly and expressly waived sovereign immunity.

Likewise, Defendants argue that Plaintiff's suit against individual defendants should be dismissed as Defendants were not acting beyond the scope of their duties. According to Defendants, the Tribal Constitution permits Tribal Council to appropriate funds and enact a budget formulation statute allowing for public input. Defendants note that the Constitutional provision permitting Tribal Council to appropriate funds does not require Tribal Council to make such appropriations through formal legislation requiring the Tribal Chairperson's approval or opportunity to veto. Therefore, Defendants argue that Tribal Council was within its Constitutional right to establish a law allowing for the appropriation of funds by simple motion, and later to appropriate funds by simple motion without bringing such appropriations to the Tribal Chairperson for approval or opportunity to veto.

Defendants make the same argument on the merits of the case, urging the Court to read the Constitution as allowing for Tribal Council to appropriate funds by simple motion.

DISCUSSION

I.

Under the LTBB Rules of Civil Procedure, every action before the Court shall be "prosecuted in the name of the real party in interest . . ." LTBB Rules of Civil Procedure, Rule IX(1). As Defendants point out, the requirement that a real party in interest prosecute a case before the Court is intended to ensure that only parties with an interest in the outcome of the case are allowed to file suit on a matter. This requirement limits the potential large number of lawsuits brought before the Court, thereby increasing courtroom efficiency and overall fairness.

While Defendants acknowledge that Plaintiff, as Tribal Chairperson, was a real party in interest at the time this case was filed before the Court, Plaintiff is no longer Tribal Chairperson, leaving Defendants to argue that Plaintiff is no longer a real party in interest. Hence Defendants move for dismissal of the case on the ground that Plaintiff lacks standing to prosecute the case.

The Court does not agree with Defendants' argument. Although the Court's Rules of Civil Procedure do require real parties in interest to prosecute cases before the Court, the Rules also mandate a liberal interpretation by the Court to secure a "just, speedy, and inexpensive determination of every action and proceeding." LTBB Rules of Civil Procedure, Rule I(2)(a). The Rules also allow the Court to disregard any "technical error or defect to comply with Rules" so long as the error or defect does not affect the substantive rights of parties, particularly those parties not represented by professional attorneys. Id. (Emphasis added).

In the present case, the Court is inclined to disregard the technical matter of Plaintiff's status as Tribal Chairperson as it relates to the requirements for real parties in interest prosecuting cases before the Court. This error is technical and does not affect the substantive rights of the parties and, thus, is appropriately disregarded in this particular instance. Additionally, the Court notes that the Plaintiff's status as Tribal Chairperson is a technical error not of Plaintiff's fault. Indeed, Plaintiff was Tribal Chairperson when the case was filed, and undoubtedly hoped for resolution of the case during his term in office.

The wheels of justice are often slow moving. However, to hold Plaintiff's current status against him would also be unfair under traditional Tribal values, something that the Court is allowed to consider when deciding cases. *Carey v. Victories Casino*, No. A-005-0507 (Little Traverse Bay Bands of Odawa Indians Ct. App. May 5, 2008).

Plaintiff also argues for a finding of standing in his capacity as a Tribal citizen. While Plaintiff makes a potentially appealing argument, the Court ultimately declines to entertain the argument in light of its finding that Plaintiff does have standing to prosecute this case as a real party in interest.

II.

The Tribal Constitution, adopted in 2005, bars parties from bringing suit against the Tribe, including subordinate entities, unless Tribal Council has "clearly and expressly" waived sovereign immunity. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. XVIII, § A. Officials and employees of the Tribe acting within the scope of their duties or authority are also immune from suit. Id. However, Tribal officials and employees acting "beyond the scope of their duties and authority" are subject to suit before this Court to enforce rights and duties owed under the Constitution or inferior statute. Id. at § B. Because Tribal Council has not clearly and expressly waived sovereign immunity for Tribal Council's practice of appropriating funds by motion, Defendants argue that Plaintiff's suit against Tribal Council should be dismissed for lack of standing (Motion to Substitute Parties and Dismiss Case, filed February 2, 2012); Defendants acknowledge that Plaintiff also brings suit against Tribal Councilors as individuals. (Id.).

While Tribal Council has not clearly and expressly waived sovereign immunity for the matter at hand, Tribal Council has a Constitutional mandate to make laws "not inconsistent" with the Constitution. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. VII, § D(1). As the branch of government responsible for interpreting the Constitution, it naturally follows that the Tribal Judiciary is able to rule on matters of Constitutional interpretation, such as the current case presents. Tribal Council has every interest in following the law, including interpretative rulings issued by this Court. To hold otherwise, as Defendants would have, would be to effectively make Tribal Council the supreme interpreter of the Constitution, preventing any true opportunity for checks and balances. Additionally, such an interpretation would effectively result in Tribal Council motions, statutes, or other actions, absent a waiver of sovereign immunity, becoming the supreme law of the Tribe. The framers of the Constitution, and the People of the Little Traverse Bay Bands of Odawa Indians, could not have intended for such an outcome when drafting and ratifying the supreme law of the Tribe.

However, the Court is not required to reach a formal legal conclusion on this matter, as it finds that Defendants acted beyond the scope of their duties and authority in their individual capacities under Article XVIII, Section B. Though, this distinction seems to be one without a discernible difference in this particular case. Indeed, when one brings suit against Tribal Councilors seeking injunctive relief, one necessarily, if implicitly, brings suit against Tribal Council as an entity; Tribal Councilors act through Tribal Council. Thus, if Tribal Councilors' actions violate the spirit or text of the Constitution, Tribal

Council violates the same. For reasons explained later in the opinion, the Court finds that Defendants, acting in their individual capacity, exceeded the scope of their official duties and authority, and are not protected by the Tribe's sovereign immunity.

III.

Tribal Council is vested with the legislative powers of the Tribal government. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. VII, § A. Among these powers include the duty to make laws "not inconsistent" with the Constitution and, most important to this case, the duty to "[a]ppropriate funds, and enact a budget formulation statute that allows for public input." Id. at § D(1), (18). Tribal Council explicitly lacks any powers not reserved to it under the Constitution. Id. at § E.

Article VIII vests executive power in a Tribal Chairperson and Vice Chairperson. Among the Tribal Chairperson's responsibilities are the execution and administering of laws and resolutions of Tribal Council. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. VIII, § C.

Article VI establishes the organization of Tribal government. Specifically, Article VI stipulates that Tribal Council makes laws and appropriates funds in accordance with Article VII, and that the Executive Branch "administers such funds." LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. VI, § C. (Emphasis added). No branch of the government shall exercise the powers, duties or functions delegated to another branch. Id. at § D.

Defendants contend that Tribal Council's practice of appropriating funds by motion, which is expressly authorized under the Administrative Procedures Statute, is in line with Tribal Council's powers under the Constitution. Waganakising Odawak Statute 2011-014, § XII (G)(11), Administrative Procedures Act, May 23, 2011 Amendment. Defendants also aptly note that there are multiple powers of Tribal Council that do not require the approval or opportunity to veto from the Tribal Chairperson. As there is no language in the previous Constitutional provisions granting Tribal Council the power to appropriate funds that explicitly grants the Tribal Chairperson the power to sign or the opportunity to veto any appropriations, Defendants urge the Court to hold that appropriating funds is a power not requiring such, thereby bringing this power in line with other Tribal Council duties not requiring the Tribal Chairperson's approval or veto.

Read as a whole, the Constitution does not support such an interpretation. While the language used in the previously mentioned provisions granting Tribal Council the power to appropriate funds is vague and does not explicitly require the Tribal Chairperson's approval or opportunity for veto, other sections of the Constitution suggest that this clause should be read to require such. Indeed, Article VI states that Tribal Council shall "appropriate funds" and that the Executive shall "administer" those appropriations. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. VI, § C. Providing additional guidance to the aforementioned requirements, Article VIII states that the Tribal Chairperson shall "execute and administer" resolutions and laws; both

resolutions and laws provide the Tribal Chairperson or Tribal Council the power to veto or disapprove of matters brought before them. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS CONST. art. VIII, § C(2). Nowhere is the Tribal Chairperson empowered to administer motions. Because the Tribal Chairperson is required to administer the appropriation of funds passed by Tribal Council, but is later limited to only administering laws and resolutions, it reasonably follows that Tribal Council's appropriation of funds must at the very least be submitted to the Tribal Chairperson for his approval or opportunity to veto. These appropriation requests sent to the Tribal Chairperson, consistent with Article VIII, must take the form of a proposed statute. Any other reading would require the Tribal Chairperson to exercise powers not granted to him under the Constitution, which is expressly prohibited under the Constitution. Id. at § F. When there are conflicting interpretations of the Tribal Constitution, the interpretation that is most consistent with a reasonable reading of the document, and does not threaten to explicitly violate any other section of the document, will prevail. The Court thus finds that Defendants violated the Constitution by appropriating funds by motion. In violating the Tribal Constitution by appropriating funds by simple motion, Defendants acted beyond the scope of their duties and authorities.

IV.

Plaintiff also alleges that Defendants violated the Constitutional requirement that Tribal Council enact a budget formulation statute that allows for comment from the Tribal citizenry. However, since this case can be resolved without further interpreting the Constitution, the Court declines to address the merits of this claim.

CONCLUSION

In light of the Court's finding, Plaintiff's request to enjoin Defendants from appropriating funds by motion that do not, at a minimum, allow for the Tribal Chairperson to approve or veto the motion, is granted. Such actions are unconstitutional on their face, as is any application of statutes that has the same effect of allowing Tribal Council to appropriate funds without allowing the Tribal Chairperson the opportunity to approve or veto the funding appropriations.

Consequently, Section XII G(11) of the Administrative Procedures Statute, May 23, 2011 Amendment, which grants Tribal Council the authority to appropriate funds by motion without presenting such motions to the Tribal Chairperson for approval or veto, is STRICKEN as a violation of the Tribal Constitution.

IT IS SO ORDERED

11-29-12
Date

[redacted]
James Genia, LTBB Associate Judge

CERTIFICATE OF MAILING

I certify that on this date copies of this *Order* were served to the parties by First-Class Mail and/or E-Mail.

11-29-12
Date

[redacted]
Tribal Court Officer