

**Little Traverse Bay
Bands of Odawa Indians
Tribal Court
Civil Division**

OPINION AND ORDER



Court Mailing Address: 7500 Odawa Circle, Harbor Springs, MI 49740

Phone: 231-242-1462~Fax: 231-242-1470

Frederick Roy Harrington, Jr.
Plaintiff,

Case No. C-264-0124

v.

Little Traverse Bay Bands of Odawa Indians Tribal Council,
in their Individual and Official Capacities

**COURT'S ORDER ON THE MOTION TO DISMISS AND FOR SUMMARY
JUDGMENT**

INTRODUCTION

The Court must determine whether to grant the Defendants' Motion to Dismiss and Summary Judgment. The Plaintiff claims that Tribal Council violated three provisions of the Little Traverse Bay Bands of Odawa Indians (LTBB) Constitution, Article VII Section D. 18, Section D. 24, and Section E. At the Pre-Trial Hearing on February 14, 2024, Plaintiff voluntarily dismissed the third alleged violation, Article VII, Section D. 18, that sets out the appropriations of funds through a budget formulation statute that allows for public input from Tribal membership. Defendants move to dismiss the Complaint based on the Little Traverse Bay Bands of Odawa Indians Rules of Civil Procedure (LTBBRCP) XVI (b)(1) and (6) and for summary judgment under LTBBRCP XVII. As sovereign immunity bars the Plaintiff's claims against the Defendants, the Court grants Defendant's Motion to Dismiss and for Summary Judgment.

SUMMARY

The Plaintiff, Tribal Citizen Frederick Roy Harrington, Jr., filed a complaint in Tribal Court on January 03, 2024 requesting Summary Judgment, Declarative Relief, and Injunctive Relief. The complaint alleges Tribal Council Certified Motion #121423-10 and the revised Corporate Charter for the Odawa Economic Development Management, Inc. (OEDMI) adopted on December 15, 2023 by Tribal Council violates three provisions of the Little Traverse Bay Bands of Odawa Indians (LTBB) Constitution:

1. Article VII, Section E of the LTBB Constitution which states the Tribal Council shall not exercise any powers not listed in Article VII, Section D. unless an amendment to the Constitution has been passed.
2. Article VII, Section D. 24 of the LTBB Constitution which sets out management authority of any and all economic affairs and enterprises of the Little Traverse Bay Bands of Odawa Indians by statute and the delegation of management responsibilities to Tribally Chartered corporations or other subordinate Tribal entities.
3. Article VII, Section D. 18 was voluntarily dismissed at the Pre-Trial Hearing.

The Defendants, through their attorney, filed a Motion to Dismiss and for Summary Judgment on January 22, 2024. Defendants stated the following in their Motion:

1. Defendants are immune from suit because their assumption of management duties at OEDMI is within the scope of their authority as corporate shareholders of OEDMI.
2. Plaintiff does not have standing to bring this suit because he has not suffered a concrete, personal injury, and the general constitutional injury he alleges is based on his misunderstanding of Tribal law rather than Defendants' wrongdoing.
3. Plaintiff's claim that Tribal Council is in a position to spend funds that have not met public scrutiny under Article VII. D. 18 is entirely speculative and therefore unripe for judicial review.
4. Plaintiff fails to state a claim that Tribal Council has exceeded its constitutional powers by assuming management of OEDMI when such action is expressly conferred by statute and not limited by Article VII. D of the LTBB Constitution.
5. Plaintiff fails to state a claim that Tribal Council failed to delegate management responsibilities as required by Article VII. D. 24 of the LTBB Constitution because that constitutional obligation is fulfilled through the creation of a Tribally chartered corporation without regard to the form of governance such corporation elects to employ.
6. Plaintiff fails to state a claim that Tribal Council's election to assume management of OEDMI violates Article VII. D. 18 because such election has no effect on Tribal Council's constitutional obligations under that Article.

Since Plaintiff voluntarily withdrew the alleged Article VII, D. 18 violation of the LTBB Constitution, the Court will address Counts 1, 2, 4, and 5. Counts 3 and 6 relate to the Article VII, D. 18 and have been dismissed.

The Court held a Pre-Trial Hearing on February 14, 2024 where both parties agreed to address the Motion to Dismiss and for Summary Judgment. Plaintiff, In Pro per, voluntarily withdrew the alleged Article VII, D. 18 violation of the LTBB Constitution. Defendant, by and through their attorney, addressed the other counts in their Motion to Dismiss and for Summary Judgment. The Court allowed both parties to address the issues during the Pre-Trial Hearing.

FACTS

1. The Plaintiff, Frederick Roy Harrington, Jr., is a Tribal Citizen of the Little Traverse Bay Bands of Odawa Indians.
2. The Defendants are Tribal Council Members of the Little Traverse Bay Bands of Odawa Indians (LTBB), in their official and individual capacities.
3. The Little Traverse Bay Bands of Odawa Indians Constitution was adopted on February 1, 2005.
4. The LTBB Tribal Court has jurisdiction under LTBB Constitution, Article IX, Section C, 1. Jurisdiction and 2. Power of Judicial Review.
5. The LTBB Tribal Council created the Odawa Enterprise Management, Inc. Corporate Charter by Statute, #2009-024, Waganakising Odawak Tribal Code of Law (WOTCL), Title 7 Economic Development, Chapter 8, Odawa Economic Development Management.
6. The LTBB Corporations Code, Waganakising Odawak Tribal Code of Law (WOTCL) 12.1, was adopted by the LTBB Tribal Council which governs management of a tribally owned corporation.
7. The Odawa Economic Development Corporate Charter, Article IV. Corporate Management, was revised by LTBB Tribal Council and provides the Corporation has no board of directors, as permitted by WOTCL 12.145. This was approved on December 14, 2023, and certified on December 15, 2023.
8. The LTBB Tribal Council approved on December 14, 2023 Certified Motion #121423-10 that amended the Corporate Charter of Odawa Economic Development Management, Inc. and determined a change in corporate governance was necessary. The motion also made null and void OEDMI's existing bylaws and internal policies as well as designating the Tribal Council Treasurer as the Designated Director of OEDMI
9. The Plaintiff, Tribal Citizen Frederick Roy Harrington, Jr., filed a complaint in Tribal Court on January 03, 2024, requesting Summary Judgment, Declarative Relief, and Injunctive Relief.

10. The Defendants, through their attorney, filed a Motion to Dismiss and for Summary Judgment on January 22, 2024.
11. The Court held a Pre-Trial Hearing on February 14, 2024, where both parties agreed to address the Motion to Dismiss and for Summary Judgment. Plaintiff, In Pro per, voluntarily withdrew the alleged Article VII D. 18 violation of the LTBB Constitution. The Injunctive Relief request was also withdrawn as it also pertains to Article VII D. 18. Defendants, by and through their attorney, addressed the other counts in their Motion to Dismiss and for Summary Judgment.

JURISDICTION

The Court's jurisdiction to hear this case comes from the Constitution. Article IX (C) of the Constitution provides Tribal Court jurisdiction over all civil and criminal cases arising under the Tribal Constitution, statutes, regulations or judicial decisions of the Little Traverse Bay Bands of Odawa Indians. This jurisdiction is based on the Tribe's inherent sovereignty, traditional custom, and Federal law. More specifically under Article IX (C)(2), the Tribal Court shall have the power to interpret the Constitution and law of the Little Traverse Bay Bands of Odawa Indians.

The Plaintiff is a Tribal Citizen and Defendants are Tribal Council Members as well as Tribal Citizens. The documents at issue are Tribal government property and are located on property held in trust for LTBB. Therein, the LTBB Tribal Court has jurisdiction over all issues and all parties.

STANDARD OF REVIEW

The LTBB Rules of Civil Procedure (LTBBRCP) applies to these proceedings. The Defendants filed a motion to dismiss under LTBBRCP XVI (b)(1) and XVI (6) and move for summary disposition under LTBBRCP XVII. LTBBRCP XVI (b)(1) provides for dismissal if there is a lack of jurisdiction over the subject matter. LTBBRCP (6) provides for dismissal when there is a failure to state a claim which relief may be granted. Defendants also filed a motion for summary disposition under LTBBRCP XVII. Therefore, survival of Plaintiff's complaint is contingent upon whether a genuine issue of material fact exists.

SOVEREIGN IMMUNITY

The Court's analysis must begin with the Tribe's sovereign immunity. If the Court finds that LTBB is immune from suit under sovereign immunity then this case shall be dismissed. Under Article IX (C)(4), the Court's jurisdiction shall not be construed to be a waiver of sovereign immunity of the Little Traverse Bay Bands of Odawa Indians. Therefore, the Court should look

to Article XVII Sovereign Immunity. Article XVII (A) states the Tribal Council must explicitly provide a waiver of such immunity before this Court can entertain a cause of action against LTBB, its subordinate entities, or its officials and employees within the scope of their duties.

The Court will first address Defendants assertion that sovereign immunity applies in this case. The LTBB OEDMI Revised Corporate Charter Resolution, Article VIII: Sovereign Immunity provision states, “The sovereign immunity and waiver of provisions in WOTCL 12.118 apply to the Corporation subject to the following exception: The Corporation may only provide a limited waiver of its own sovereign immunity if Tribal Council issues a specific resolution providing such authorization.” The Tribal Council resolution does not provide for a limited waiver of sovereign immunity nor does WOTCL 12.118. The Tribe is immune from suit unless the Tribal Council has clearly and expressly waived its sovereign immunity. LTBB Const., Art. XVII (A). “Even when parties assert rights that arise under the Constitution, the Judiciary’s jurisdiction still requires a clear and express waiver of sovereign immunity before it can review a constitutional claim.” *LTBB Gaming Regulatory Commission v. Roberts, A-018-0811 (December 20, 2023) at 13*. The Court finds that the LTBB Tribal Council did not waive the Tribe’s sovereign immunity for the allegations contained the complaint filed by Frederick Roy Harrington on January 03, 2024.

Next, the Court will address Plaintiff allegations that the LTBB Tribal Council violated Article XVIII (B). Suit Against Officials and Employees. This provision of the constitution states officials and employees who act beyond the scope of their duties and authority shall be subject to suit in Tribal Court for purposes of enforcing rights and duties established by the constitution or other applicable laws. Plaintiff contends Defendants violated the LTBB Constitution Article VII D. 24 and E. and acted outside their scope of authority when they approved the Certified Motion #121423-10 and revised Corporate Charter for the Odawa Economic Development Management, Inc. (OEDMI). Plaintiff states Tribal Council violated Article VII, E. of the LTBB Constitution when Tribal Council placed Treasurer Shomin as the Designated Director of OEDMI Plaintiff furthermore states Tribal Council violated Article VII, D. 24 by naming themselves as managers of OEDMI and that Tribal Council failed to delegate managements responsibilities as required by Statute. In order to address these allegations, the Court will also review Defendants counter arguments as well to determine if the allegations support Plaintiff’s assertions that Tribal Council acted outside the scope of their authority.

Defendants assert, “*Plaintiff seeks to circumvent Tribal Council’s immunity from suit in this matter by contending that Tribal Councilors acted outside the scope of their duties. This alleged waiver of sovereign immunity is a “threshold issue that, like jurisdiction, must be determined before [a Tribal Court] can review the merits of the parties’ various arguments.” Carey v. Victorias, et al., A-004-0606 (LTBB App Ct. 20007) at 5.*”¹ Defendants’ brief goes on to state, “[T]he mere allegation that a tribal official’s actions are based on an unconstitutional law is not sufficient to conclude that sovereign immunity is not a bar”. *Little Traverse Bay Bands of Odawa Indians Tribal Council Members v. Harrington, A-22-1212 (LTBB App. Ct. July 2015), at 7*. Rather, “the allegation of the complaint [must] demonstrate that it is sufficiently likely that the complained of actions were made under color of authority of an unconstitutional law or without

¹ Brief in Support of Motion to Dismiss and For Summary Judgment, Zachery L. Welker, Attorney for Defendants, I.A. page 2.

constitutional authority.” Id. at 7-8. “[T]ribal employees and officials’ enjoy sovereign immunity if their actions are based upon a constitutional law or other constitutional authority.” Id. at 7.”²

Based on the standard described above, the Court must look at Plaintiff’s complaint and whether Tribal Council’s assumption of management of OEDMI violates its duty to delegate management responsibilities under Article VII D. 24. Plaintiff states Tribal Council violated Article VII, D. 24 by naming themselves as managers of OEDMI and that Tribal Council failed to delegate management responsibilities as required by Statute.

Defendants’ brief, page 4, states Plaintiff’s Complaint does not meet the “sufficiently likely” standard necessary to overcome the bar of sovereign immunity because the constitutional provision Defendants allegedly violated is inapplicable to Tribal Council in its capacity as a corporate shareholder of OEDMI. Tribal Council has the power to amend OEDMI’s charter as it did and the provision of Article VII D. 24 authorizes Tribal Council to:

provide by statute for the management of any and all economic affairs and enterprise of the Little Traverse Bay Bands of Odawa Indians that will further the economic development of the Tribe or its members. Such statutes will delegate management responsibilities to Tribally chartered corporations or other subordinate Tribal entities, or where appropriate, to the Executive Branch.

The brief also states, Plaintiff’s contention that Tribal Council’s assumptions of management at OEDMI violates its duty to delegate management responsibilities under this provision is not supported by the plain language above. Tribal Council also asserts as the sole shareholder of OEDMI, WOTCL 12.115, Tribal Council has the power to amend OEDMI’s charter, WOTCL 12.122, and assume management of OEDMI, WOTCL 12.145. Defendants’ Brief, page 4.

WOTCL 12.145 permits the Corporation to either have a board of directors or not. Tribal Council amended and approved a change that states, as permitted, the Corporation has no board of directors. Tribal Council will manage the affairs of the Corporation on behalf of the Tribe and its members, and may adopt bylaws, designate directors or hire staff in order to assist with management.

Article VIII, Sovereign Immunity of the Revised Charter states, the sovereign immunity and waiver provisions in WOTCL 12.118 apply to the Corporation subject to the following exception: The Corporation may only provide a limited waiver of its own sovereign immunity if Tribal Council issues a specific resolution providing such an authorization.

Thus, the Tribal Council retains sovereign immunity unless they were acting outside the scope of their duties. Previous decisions of this Court have held that Tribal employees and officials enjoy sovereign immunity if their actions are based upon a constitutional law or other constitutional authority.

² Brief in Support of Motion to Dismiss and For Summary Judgment, Zachery L. Welker, Attorney for Defendants, I.A. page 2-3.

Although Tribal Council's decision to manage the affairs of the Corporation may be unpopular with some Tribal Citizens, Tribal Council stated the decision to do so was because of previous management decisions that impacted OEDMI. Although the Court is not privy to the report and it is not pertinent to this case, maybe once the issues are resolved, Tribal Council will again modify the management structure. Tribal Citizens have the right to interact with Tribal Council and address their concerns, as well as propose solutions to those concerns. The Court would encourage Tribal Citizens to communicate with Tribal Council.

Based on the Constitution and existing case law governing the application of sovereign immunity, the Court finds that sovereign immunity applies in this case and Defendants are immune from suit.

CONCLUSION

The Court finds Plaintiff's cause of action is barred by sovereign immunity and there is no genuine issue as to any material fact. Defendants' Motion to Dismiss and For Summary Judgment is hereby GRANTED and Plaintiff's case is DISMISSED.

IT IS SO ORDERED.

03/27/24
Date


Chief Judge

CERTIFICATE OF MAILING

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

3-27-2024
Date


Tribal Court Officer