

NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS
DISTRICT OF NAY AH SHING

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IN THE COURT OF APPEALS

FILED IN THE COURT OF APPEALS
CENTRAL JURISDICTION

David Nilb Aubid,

Plaintiff,

Case No. 03APP01 (02CV714)

v.

Mille Lacs Band of Ojibwe Indians, and
Marvin Bruneau of District 2 and
Melanie Benjamin of District 2 and
Herbert Weyaus of District 1 and
Sandra Blake of District 1 and
Harry Davis of District 3,

ORDER

Defendants.

INTRODUCTION

The present matter arises out of the denial of Plaintiff's candidacy for the position of District II Representative to the Band Assembly, and is before this Court upon the transfer from the Court of Central Jurisdiction. In the Order providing for the transfer of this case from the Court of Central Jurisdiction, Judge Paul Day summarized the procedural posture of this case as follows:

According to the pleadings filed by the parties herein, the Defendants sent the Plaintiff a letter dated March 6, 2002, informing him that his candidacy for tribal office was denied. When the Plaintiff did not get a response from the Defendants regarding his March 15, 2002 letter inquiring into the reasons for the denial of his candidacy, he filed an action in the Band's Court of Appeals seeking an order enjoining the Defendants from holding the primary and general elections until the court had an opportunity to decide the matter after hearing. See, Aubid v. Mille Lacs Band of Chippewa Indians Reservation Business Committee, 02 CV 708. The Plaintiff's

initial action was dismissed by the Court of Appeals on April 24, 2002.

After Case No. 02 CV 708 was dismissed, the Plaintiff renewed his efforts to get a hearing before the Defendants as to the reason(s) for the denial of his candidacy. On May 3, 2002, the Defendants sent the Plaintiff a letter denying his request. The primary and general tribal elections then took place without the Plaintiff's name on the ballot, and Plaintiff was not elected to office.

The Plaintiff then filed an action in the Court of Central Jurisdiction on July 1, 2002, seeking an order from the District Court declaring the June 11, 2002 Mille Lacs Election invalid and for other relief.

The Defendants filed their Answer and Affirmative Defenses on July 17, 2002.

On September 15, 2002, the Defendants filed a Motion to Dismiss and/or a Motion For Summary Judgment, along with a Memorandum of Law in Support of Motion. The Plaintiff filed a Memorandum of Law in Opposition To Motion To Dismiss on October 8, 2002.

On October 8, 2002, the Plaintiff filed a Motion to Amend his Complaint so as to name the Defendants in their "individual and official capacities." Defendants filed a Memorandum In Opposition to the Motion on October 11, 2002. The Motion to Amend is pending at this time.

The District Court did not have a Judge from August 16, 2002 until January 8, 2003, so the arguments on the Motion To Dismiss were not heard until January 23, 2003. After receiving oral arguments from both sides, the District Court took the matter under advisement and ultimately ordered that the case be transferred to the Court of Appeals.

ISSUE BEFORE THE COURT

Plaintiff alleges that he met the candidacy requirements specified in the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, as well as the requirements specified in Election Ordinance #8 (the applicable version of the Minnesota Chippewa Tribe Election Ordinance) to permit him to run for the position of District II Representative to the Band Assembly in the 2002 tribal election at Mille

Lacs. Additionally, Plaintiff alleges that Defendants violated his rights to due process and equal protection under Band law and the Indian Civil Rights Act,¹ because his candidacy was denied without a hearing, and because no reason was given for the denial of his candidacy.

Defendants denied Plaintiff's allegations, and filed a Motion to Dismiss the Complaint, or for Summary Judgment. The Motion of Defendants to Dismiss the Complaint, or in the alternative for Summary Judgment, is presently before the Court. Plaintiff replied, and asserts that the Motion to Dismiss and Motion for Summary Judgment are each inappropriate.

The Revised Constitution and Bylaws of the Minnesota Chippewa Tribe provides that "All elections held on the six (6) Reservations shall be held in accordance with a uniform election ordinance to be adopted by the Tribal Executive Committee".² The uniform election ordinance in effect at the time Plaintiff's present claims arose was Election Ordinance #8, which provides that "Certification decisions are within the exclusive jurisdiction of the Reservation Tribal Council, and are final and unappealable to the TEC".³

While certification decisions at Mille Lacs are within the exclusive jurisdiction of the Mille Lacs Band Joint Session, and are not appealable to the Tribal Election Committee, such decisions may be appealable to a tribunal authorized by the Mille Lacs Band Joint Session.⁴

Mille Lacs Band Statutes specify the appropriate court for jurisdiction to hear election disputes:

The Court of Appeals shall have original jurisdiction over election disputes pursuant to the Minnesota Chippewa Tribal Election Ordinance...⁵

Because Plaintiff's claims arise from his denial of candidacy, and because candidacy for tribal elections is one of the subjects included in the Minnesota

¹ 1 MLBSA Section 8; and 25 U.S.C Section 1302 (8).

² Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Article IV, Section 1.

³ Election Ordinance #8, Chapter 1, Section 3.C.

⁴ Opinion letter of Mark Anderson, counsel for the Minnesota Chippewa Tribe, dated February 7, 2002.

⁵ 5 MLBSA § 111(f).

Chippewa Tribal Election Ordinance, the Court of Appeals has original subject matter jurisdiction to consider the claims. Additionally, the Court of Appeals agrees with the Court of Central Jurisdiction that Plaintiff's due process and equal protection claims are properly joined with his claims under the Election Ordinance before this Court. Because the denial of candidacy claims arise under the Election Ordinance, they are properly before the Court of Appeals. Additionally, because his due process and equal protection claims arise out of the underlying election claims, the interests of justice and the interests of judicial efficiency permit the joinder of the claims before this Court. Accordingly, the Court of Appeals is the appropriate forum with subject matter jurisdiction over the present matter.

The next issue that the Court must address is the applicability of the sovereign immunity defense, and whether this Court can properly exercise its jurisdiction over Plaintiff's claims.

Plaintiff argues that the Band Assembly has waived its immunity from suit by enacting the Band Statute which specifies that disputes arising under the Election Ordinance have original jurisdiction before the Court of Appeals. Defendants argue, conversely, that the Band Statute (5 MLBSA § 111 (f)) does not constitute a waiver of the Band's sovereign immunity, and that the sovereign immunity of the Mille Lacs Band and its individual Band Assembly members remains intact, and protects it from Plaintiff's present claims.

The Court starts with the premise that Indian Tribes and tribal officials who are sued in their official capacities enjoy common-law immunity from suit.⁶ The Band may waive that immunity, either for itself or its officials, but that waiver must be clear and unequivocal and cannot be implied.⁷ Sovereign immunity is a

⁶ See, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

⁷ See, Klowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751 (1998) (tribal sovereign immunity is interpreted under federal law and is not subject to diminution by state or tribal law).

jurisdictional bar to suit and thus precludes a Court from hearing a case.⁸

It is well-settled that Indian tribes, like state and federal governments, are sovereign entities that cannot be sued absent their consent or an unambiguous waiver of their immunity.⁹ An Indian tribe is generally immune from any type of suit, including suits for money damages, as well as equitable and injunctive relief.¹⁰

The courts have recognized numerous manners by which the sovereign immunity of a tribe can be waived or abrogated. Recently, the United States Supreme Court held that a tribe that enters into an arbitration clause as part of a contractual agreement has waived its immunity and can be forced to comply with an arbitration award.¹¹ A tribe can waive its immunity, but that waiver must be clearly and unambiguously expressed, and waiver will not be inferred.¹²

It must now be determined whether there has been a clear and unequivocal waiver of the sovereign immunity of the Band and the individual members of the Band Assembly so as to permit this Court to address the merits of Plaintiff's claims.

Mille Lacs Band statutes include a specific provision which makes clear that the Band's immunity from suit remains intact:

⁸ See, Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000) (reversing the District Court's denial of a motion to vacate a default judgment entered against a tribal entity on the ground that the entity was immune from suit and its default did not give the Court jurisdiction).

⁹ See, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Tamiami Partners v. Miccosukee Tribe, 63 F.3d 1030 (11th Cir. 1995); Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991) See, Davis v. Mille Lacs Band et al., 96 CV 701 (Memorandum decision of September 30, 1996) (Tribe cannot be sued for money damages for action taken by tribal employee).

¹⁰ See, Duncan Energy v. Three Affiliated Tribes of Fort Berthold Reservation, 812 F.Supp 1008, 1011 (D.N.D. 1992), reversed on other grounds, 27 F.3d 1294 (8th Cir. 1994).

¹¹ See, C&L Enterprises v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001).

¹² See, Rosebud Sioux Tribe v. Val-U Construction Company, 50 F.3d 560 (8th Cir. 1995) (Tribe, by consenting to arbitration, waived its immunity from suit); Rupp v. Omaha Tribe, 45 F.3d 1241 (8th Cir. 1995) (Tribe waived immunity as to any claim to land by filing quiet title action regarding same land); Dacotah Properties v. Prairie Island Indian Community, 520 N.W.2d 167, 170 (Minn. Ct. App. 1994) (Tribe, by engaging in commercial enterprises with non-Indian entities under a corporate charter permitting it to sue and be sued, waived its immunity from suit); Conklin v. Freeman, 20 ILR 6037 (N. Plns. Intertr. Ct. of Appls. 1993) (Tribe waived its immunity from suit for declaratory relief by adopting IRA constitution allowing itself to be sued).

The Band Assembly shall direct by law, in what manner, and in what courts, suits may be brought against the Non-Removable Mille Lacs Bands of Chippewa Indians. Except as specifically authorized by Band Statute, the Non-Removable Mille Lacs Band of Chippewa Indians shall not be subject to suit in any court of competent jurisdiction without its express written consent to such suit. The sovereign immunity of the Non-Removable Mille Lacs Band of Chippewa Indians shall apply unless expressly waived by Band Statute.¹³

The above-referenced Band Statute mandates that in order for a waiver of the Band's sovereign immunity to be effective there must be an express waiver of the Band's sovereign immunity from suit in an applicable Band statute. Plaintiff argues that the Band Assembly has indeed enacted a Band Statute which specifically waives the Band's immunity from suit so as to permit this Court's exercise of subject matter jurisdiction over his present claims. Specifically, Plaintiff argues that enactment of 5 MLBSA § 11 (f),¹⁴ constitutes an effective waiver of the Band's immunity to permit the Court to address the merits of his present claim.

Defendants, on the other hand, argue that 5 MLBSA § 111 (f), is a general statement of the subject matter jurisdiction of this Court, which does not constitute a waiver of the Band's sovereign immunity from suit. Defendants argue further that an effective waiver in this case requires that Plaintiff produce a Resolution of the Band Assembly, or other affirmative act of the Band Assembly, which clearly and unequivocally waives the Band's immunity with respect to Plaintiff's specific claims herein. Defendants argue that because the Band Assembly has not clearly and unequivocally waived its immunity from suit with respect to Plaintiff's specific claims herein, that this Court is therefore unable to exercise the jurisdiction set out in 5 MLBSA § 111 (f).

Plaintiff points out that in the case of Luxon v. Rosebud Sioux Tribe of South Dakota,¹⁵ the Eighth Circuit recognized that a disqualification of candidacy for tribal

¹³ 2 MLBSA § 5(a).

¹⁴ "The Court of Appeals shall have original jurisdiction over election disputes pursuant to the Minnesota Chippewa Tribal Election Ordinance..." 5 MLBSA § 111 (f).

¹⁵ 455 f.2d 698 (8th Cir. 1972).

office was a recognizable cause of action pursuant to the Indian Civil Rights Act¹⁶ as a denial of due process. Additionally, Plaintiff points out that in the case of Wounded Heel v. Tribal Council,¹⁷ the Eighth Circuit recognized that the equal protection provisions of the Indian Civil Rights Act are implicated when an Indian tribe does not permit candidacy for tribal office. Plaintiff also relies upon the decision of the United States Supreme Court in Santa Clara Pueblo v. Martinez,¹⁸ for the proposition that this Court has jurisdiction over his claims.

In Martinez, the United States Supreme Court held that the Indian Civil Rights Act had not limited tribes' immunity from suit, and that the Act cannot be enforced directly against tribes.¹⁹ The Court upheld the ability of Congress to impose limitations on tribal government actions, but held that federal court enforcement of the standards included in the Indian Civil Rights Act is limited to habeas corpus jurisdiction on behalf of persons in tribal custody.²⁰ The Supreme Court acknowledged in Martinez that tribal immunity does not shield tribal officials from equitable actions, but held that there is no implied cause of action for equitable relief in federal court to enforce the Indian Civil Rights Act.²¹

In the case of Reum, et al. v. Mille Lacs Band of Chippewa Indian, et al.,²² the Court of Central Jurisdiction was faced with a case involving the rights of Mille Lacs Band members to peacefully assemble within the meaning of the Indian Civil Right Act,²³ and the parallel law embodied in Mille Lacs Band Statutes.²⁴ The Court referenced the further protection for tribal members' embodied in the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe:

¹⁶ 25 USC Section 1302 (8). Plaintiff also makes his claims pursuant to the parallel rights embodied in 1 MLBSA Section 8.

¹⁷ 507 F.2d 1079 (8th Cir. 1972).

¹⁸ 436 U.S. 49, 58 (1978).

¹⁹ Id. at 58-59.

²⁰ Id. at 56-57.

²¹ Id. at 59-73.

²² Case Number 94-CV00721, May 2, 1996.

²³ 25 U.S.C. Section 1302 (1).

²⁴ 1 MLBSA §1.

All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.²⁵

The Court explained that if "there was a pattern of the Band's Community Centers being denied to a group of Band members solely because of their political beliefs, the court would protect those rights as provided by law.²⁶ Hence, the Court recognized that the rights of individual Band members were of such fundamental importance that the Court would provide a remedy for the protection of such rights, in an appropriate case, even in the face of the Band's sovereign immunity from suit.

Mille Lacs Band Statutes guarantee the equal protection and due process of law:

All persons within the territorial jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians shall be accorded the equal protection of the Band's laws and no person shall be deprived of liberty or property without due process of law.²⁷

Additionally, the Indian Civil Rights Act provides equal protection and due process guarantees:

No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.²⁸

Plaintiff's present claims arise because of the land situation at Mille Lacs, unique among the Bands of the Minnesota Chippewa Tribe. Where the other five Bands of the Minnesota Chippewa Tribe have recognized boundaries where Band members are adequately on notice as to where they must reside in order to meet the qualifications for certification as a candidate for tribal office, the Mille Lacs Band does not have such recognized boundaries. Plaintiff claims that this situation, unique to Mille Lacs, has resulted in a denial of his fundamental due process and

²⁵ Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Article XIII, Rights of Members.

²⁶ *Reum* at 3.

²⁷ 1 MLBSA §8.

²⁸ 25 U.S.C. § 1302 (8).

equal protection rights because he is not fairly on notice as to the specific location of permitted residences so as to qualify for candidacy for the position of District II Representative to the Band Assembly. Additionally, Plaintiff claims that the residency requirements are elastic, changing from one election cycle to the next, with the result that similarly situated Band members have been previously certified as candidates for the District II Representative seat, where he has not been so certified.

The Minnesota Chippewa Tribe Election Ordinance includes a provision for recognizing certain lands as a "Reservation" or "Indian Country" so as to permit Band members to be considered residents for purposes of being certified as candidates for tribal office.

A reservation is defined as all lands within the exterior boundaries of the reservation. A Band governing body, by formal action may define "reservation" to include specified lands outside the boundaries of the reservation, as may be defined by treaty, statute, executive order, or other document considered sufficient authority by the Band governing body, including all lands considered Indian Country under governmental authority of that Reservation.²⁹

The Court is now confronted with a conflict between the Band's asserted sovereign immunity from suit, and the individual rights of a Mille Lacs Band member. Additionally, the Court is cognizant of, and is guided by, the equitable concepts of *Sha wa ni ma*, and the unwritten customs and traditions of the Mille Lacs Band.

DECISION

After considering the totality of the circumstances present in this case, the Court has concluded that Plaintiff is entitled to limited equitable relief herein. The Court has concluded that Plaintiff is entitled to be informed of the reasons for his denial of candidacy for the position of District II Representative to the Band Assembly. Additionally, Plaintiff is entitled to know if similarly situated persons have been certified as candidates for Mille Lacs tribal office; and if so, how his circumstances differ from prior candidates who were certified. Also, Plaintiff is

²⁹ Election Ordinance No. 8, Section 3,B.

entitled to know if there is a process for bringing his residence into conformity with the Mille Lacs Band's definition of "Reservation" as described in the Election Ordinance. Because a candidate for tribal office must establish residence on the "Reservation" one year prior to the primary election, such information should be provided to Plaintiff in a timely manner.

The Court has considered the following specific factors unique to the present case in arriving at its decision:

- That the Band does enjoy sovereign immunity from suit, and it has raised the defense in this case.
- That tribal immunity from suit does not shield tribal officials from equitable actions (Santa Clara Pueblo v. Martinez).
- The importance of fundamental rights of Band members as embodied in the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Band Statutes, and the Indian Civil Rights Act.
- Precedent of the Court of Central Jurisdiction embodied in (Reum, et al. v. Mille Lacs Band, et al.).
- The unique land situation of the Mille Lacs Band in the face of applicability of the Uniform Election Ordinance.
- That this Court has once dismissed Plaintiff's present claims.
- That if the Court does not provide relief, a Mille Lacs Band member is without a remedy for serious alleged infractions by tribal officials.
- Denial of relief is not consistent with peace amongst Band members; and is not consistent with *Sha wa ni ma*, and the unwritten customs and traditions of the Mille Lacs Band.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT

Dated: 3/4/05

Alvina Aubele
Alvina Aubele
Chief Appellate Judge

Dated: 3/3/05

Clarence Boyd
Clarence Boyd
Appellate Judge

Dated: 2/19/05

Joseph Plumer
Joseph Plumer
Special Appellate Judge