UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ONEIDA SEVEN GENERATIONS CORPORATION and GREEN BAY RENEWABLE ENERGY, LLC,

Plaintiffs,

v. Case No. 1:16-cv-01700

CITY OF GREEN BAY,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant City of Green Bay (the "City"), by its attorneys GUNTA LAW OFFICES, S.C., respectfully submits this memorandum in support of its motion to dismiss the Complaint of Plaintiffs Oneida Seven Generations Corporation ("OSGC") and its wholly-owned subsidiary Green Bay Renewable Energy, LLC ("GBRE"), pursuant to Federal Rules of Civil Procedure 9(a), 12(b)(1), 12(b)(2), 12(b)(6), and 17(b)(2).

INTRODUCTION

OSGC complains that it was deprived due process under the Fourteenth Amendment when the City rescinded OSGC's conditional use permit ("CUP") to build a solid waste incinerator. The decision to rescind the CUP has been processed to death. It was reviewed by the City under Wis. Stat. § 68.06, and the Wisconsin Circuit Court, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court by certiorari. Attached to the Complaint as Exhibits A and B are the Wisconsin Court of Appeals and Wisconsin Supreme Court decisions and orders reversing the rescission and affirming the reversal, just as OSGC requested.

Rather than enforce the state court judgment as Wisconsin Statutes §§ 815.01, 815.02, and 785.03 entitle OSGC to do, OSGC and GBRE now seek federal review of the same decision along with damages. The Complaint fails to allege that the available state court remedies are inadequate and fails to show that OSGC fully availed itself of those remedies. The Complaint also fails to identify a constitutionally protected property interest and fails to state a claim as a matter of law that the City's decision to rescind the CUP was arbitrary in the constitutional sense. For these independent reasons, the Complaint fails to show a violation of substantive or procedural due process cognizable under § 1983, and should be dismissed pursuant to Rule 12(b)(6).

The Complaint also fails to allege any facts pertaining to GBRE whatsoever beyond identifying itself as a Delaware corporation and OSGC's subsidiary. GBRE has failed to state a claim and should be dismissed pursuant to Rule 12(b)(6), and has failed to allege an injury in fact and should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

In the alternative, the Complaint should be dismissed under Rules 9(a), 12(b)(2), and 17(b)(2) for lack of corporate capacity to sue. OSGC is a tribal corporation chartered under the laws of the Oneida Nation. In 2013, the Oneida General Tribal Council—the governing body of Oneida Nation—voted to dissolve OSGC. The subordinate entity Oneida Business Committee has not dissolved OSGC. Instead, the Business Committee has stripped OSGC of its powers and limited its purpose to strictly "commercial leasing." Then, shortly before OSGC filed this Complaint and in the face of tribal pressure to dissolve OSGC, the General Tribal Council considered a motion specifically designed to allow OSGC to pursue this lawsuit. After debate and consideration, however, the General Tribal Council voted to table that motion and never took any additional action. As such, the filing and prosecution of the present suit has never been authorized or approved.

Under Rule 17(b)(2), corporate capacity to sue is determined by the law under which a corporation was organized. Under Oneida Nation law, OSGC should not exist. To the extent OSGC exists at all, it is not authorized to bring the present lawsuit as it does not advance OSGC's authorized commercial leasing activities. OSGC's lack of capacity was confirmed when the General Tribal Council tabled the motion to prosecute this suit.

ARGUMENT

A. The Complaint, and GBRE in particular, should be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

1. Facts as Alleged in the Complaint.

The City's arguments pursuant to Rules 12(b)(6) and 12(b)(1) are based solely on the facts alleged in the Complaint. The City's arguments pursuant to Rules 9(a), 12(b)(2), and 17(b)(2) are based on supporting facts as required by Rule 9(a). The following allegations from the Complaint provide the relevant background for dismissal based on Rules 12(b)(6) and 12(b)(1).

OSGC sought to build a facility in Green Bay that would convert municipal solid waste into electricity by heating the waste at high temperatures to produce "syngas," similar to natural gas or methane. Complaint, ¶ 2. The City originally granted the CUP in March 2011 following a voluminous application and lengthy presentations by OSGC, and contingent upon compliance with City building code, building permits, standard site plan review and approval and all Federal and State environmental standards related to the proposed use. Complaint, ¶¶ 23–26, 31. While OSGC was obtaining the necessary permits and approvals, public opposition to the facility mounted. *Id.*, ¶ 39. Some faction of the opposition groups accused OSGC of lying in its application in order to obtain the CUP. *Id.*, ¶ 42. In response, the City held a public hearing. *Id.*, ¶ 45. OSGC submitted written materials and appeared before both the Plan Commission and the Common Council in defense of the CUP. *Id.*, ¶¶ 46, 47, 56. Following a public hearing, the Common Council voted

seven to five to rescind the CUP, offering no explanation for its decision. *Id.*, ¶¶ 57, 58. Later, the City Attorney sent a letter claiming that OSGC made "false statements and misrepresentations" regarding "the public safety and health aspect of the Project and the Project's impact upon the City's environment" and "emissions, chemicals, and hazardous materials." *Id.*, ¶ 60.

OSGC requested an administrative appeal. Complaint, ¶ 61. The City Council denied the request pursuant to Wisconsin Statute § 68.11. *Id.*, ¶ 61. OSGC then invoked its right to certiorari review of the City's actions in Wisconsin state court. *Id.*, ¶ 63. The Wisconsin Circuit Court reviewed the City's decision to rescind the CUP and denied OSGC's petition for certiorari. *Id.*, ¶ 65.

OSGC then appealed to the Wisconsin Court of Appeals. *Id.*, ¶ 65. The Wisconsin Court of Appeals applied state law to determine "whether the City exercised [its authority to revoke a CUP based on misrepresentations made during the permitting process] in an arbitrary manner, and without substantial supporting evidence." *Oneida Seven Generations Corp., LLC v. City of Green Bay*, 2014 WI AP 45, ¶ 18, 353 Wis. 2d 553, 846 N.W.2d 33 (unpublished), *aff'd*, 2015 WI 50, ¶ 93, 362 Wis. 2d 290, 865 N.W.2d 162 (attached to Complaint as "Exhibit A"). Finding that "the scant statements the City cites as support for its revocation action do not constitute substantial evidence of misrepresentation," the Wisconsin Court of Appeals ordered that the Circuit Court decision be reversed. Exhibit A, p. 22, ¶ 43.

OSGC then requested that the City reissue the CUP. Complaint, ¶ 70. The City did not reissue the CUP, but appealed to the Wisconsin Supreme Court. *Id.*, ¶ 71. The Wisconsin Supreme Court focused only on "whether the evidence was such that [the City] might reasonably make the order or determination in question." *Oneida Seven Generations Corp., LLC v. City of Green Bay*,

2015 WI 50, ¶ 41–42, 362 Wis. 2d 290, 865 N.W.2d 162 (attached to Complaint as "Exhibit B"). On March 29, 2015, it affirmed the Wisconsin Court of Appeals decision. *Id.*; Complaint, ¶ 71.

OSGC does not allege to have taken any additional action on the order prior to filing this Complaint. *See id.* The Complaint alleges claims for violation of 42 U.S.C. § 1983 based on substantive and procedural due process. Complaint, ¶ 75–96.

2. Standards of Review for Rule 12(b)(6).

To survive a motion to dismiss, the Complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. Rule 8(a). While the Complaint's well-pled allegations must be accepted as true and all reasonable inferences drawn in its favor, *see, e.g.*, *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007), the Court "need not accept as true legal conclusions or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

"A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. Rule 10(c). Consideration of the Exhibits does not convert this motion to dismiss into a motion for summary judgment. *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002).

"When an exhibit attached to the complaint contradicts the allegations in the complaint, ruling against the nonmoving party on a motion to dismiss for failure to state a claim is consistent with the court's obligation to review all facts in the light most favorable to the nonmoving party." *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013); *Massy v. Merrill Lynch & Co.*, 464 F.3d 642, 645 (7th Cir. 2006) ("where an exhibit conflicts with the allegations of the complaint, the exhibit typically controls.").

3. OSGC has failed to state a claim because its available state court remedies satisfied substantive and procedural due process.

OSGC has received adequate process under the law, including relief from the very local land-use decision it now asks this Court to review. To state a claim under either substantive or procedural due process, OSGC must show that these state law remedies were inadequate. As to procedural due process, under *Bettendorf v. St. Croix County*, "[w]here a claimant has availed himself of the remedies guaranteed by state law, due process is satisfied unless he can show that such remedies were inadequate." 631 F.3d 421, 426 (7th Cir. 2011) (dismissing procedural due process claims based on a zoning designation where plaintiff himself initiated state court review and was afforded adequate process in state court system). As to substantive due process, the Seventh Circuit has repeatedly held that "in addition to showing that the decision was arbitrary and irrational, the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies." *Polenz v. Parrott*, 883 F.2d 551, 559 (7th Cir. 1989) (remanding substantive due process claim based on denial of an occupancy permit for a determination as to adequacy of state law remedies). OSGC has not alleged a violation of a substantive constitutional right. Its allegations that the City "acted arbitrarily and capriciously" do not cut it. *Centres, Inc. v. Town of Brookfield, Wis.*, 148 F.3d 699, 704 (7th Cir. 1998) ("Its allegation that the defendants acted … in an arbitrary and capricious manner does not supply the essential element of a separate constitutional violation.") (dismissing substantive due process claim where plaintiff failed to allege that state law remedies were inadequate and had actually received state court review of the same land-use decision).

In terms of what constitutes adequate state law remedies, "scant process is all that is 'due' in zoning cases." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994). "The opportunity to apply for a [writ of certiorari] is enough." *Id.* (dismissing residential

developer's due process claim based on denial of a zoning application where the developer could have pursued common law writ of certiorari); *see also Donohoo v. Hanson*, No. 14-cv-309-wmc (W.D. Wis. Sept. 3, 2015) (unreported) ("[S]o long as there are adequate local or state means for obtaining review of a zoning decision, procedural due process is satisfied.").

More robust constitutional protections are available under the Fifth Amendment and Equal Protection Clause, but OSGC has not invoked the Fifth Amendment and seeks only out-of-pocket expenses, lost profits, and legal expenses—not the market value of the property. In *Behavioral Institute of Indiana, LLC v. Hobart City of Common Council*, the Seventh Circuit affirmed that a complaint with identical features did not allege a Fifth Amendment takings claim. 406 F.3d 926 (7th Cir. 2005). Unlike a takings claim, the scope of property interests protected by due process in land-use cases is exceedingly narrow because "[s]tate and local governments are not required to respect property owners' rights… State and local governments may regulate and even take property; they must *pay* for what they take but are free to use the land as they please." *River Park*, 23 F.3d 164, 167 (1994). When it comes claims based on land-use decisions, "Federal Courts are not zoning boards of appeal." *See, e.g., id.*, 165.

The Complaint fails to allege that OSGC's state court remedies were inadequate, and the facts alleged do not support such an inference. To the contrary, the Complaint incorporates, as exhibits, the decisions of the Wisconsin Court of Appeals and Wisconsin Supreme Court. Complaint, ¶ 66, Exhibit A; ¶ 71, Exhibit B. These decisions were the fruit of OSGC's "opportunity to apply for a writ"—an opportunity that satisfies procedural and substantive due process and defeats OSGC's claim under *River Park*, 23 F.3d at 167.

It is immaterial for purposes of the Due Process Clause whether, as OSGC alleges, "the City Council meeting on October 16, 2012 was not a meaningful hearing" or that "several alderpersons had *ex parte* communications with opponents of the project and made up their minds to rescind the CUP—even prior to the Council convening to consider the issue." Complaint, ¶¶ 91, 92. OSGC had a full opportunity to air these grievances against the City in state court proceedings. *See* Exhibits A and B.

Perversely, OSGC appears to rely on the favorable state court decisions as proof of its denial of due process. That OSGC won in state court does not undermine the adequacy of due process OSGC received under state law—it reinforces it. Where a plaintiff has been relieved of a land-use decision by a state court, he cannot state a federal claim for due process violations. In *Donohoo v. Hanson*, a landowner alleged procedural and substantive due process violations for having been denied a permit to construct an addition to his lakefront home. No. 14–c–309–wmc, *1 (W.D. Wis. Sept. 3, 2015) (unpublished), *aff'd*, No. 16-2405 (7th Cir. Oct. 28, 2016) (unpublished). Before pursuing the federal lawsuit, Donohoo had filed a petition for a writ of certiorari in state court and, while the certiorari action was pending, was issued the land use permit. *Id.* The court rejected his due process claims: "Donohoo does not allege that state law remedies are inadequate. Moreover, such an allegation would be groundless. In this very case, Donohoo pursued a certiorari action. He subsequently obtained a land use permit." *Id.*, *9. *See also Harding v. County of Door*, 870 F.3d 430 (7th Cir. 1989) (finding no violation of condominium developer's due process rights where the county withdrew a building permit based on a neighbor's complaint, but the withdrawal was overturned by Wisconsin Court of Appeals); *Minneapolis Auto Parts Co., Inc. v. City of Minneapolis*, 572 F.Supp. 389, 394 (D. Minn. 1983) (finding no due process violation where plaintiffs were granted permits in state court proceedings).

The timing of the state law remedies also does not undermine their adequacy. OSCG alleges that it "proposed the waste-to-energy project when it did because of the availability of federal, state and local grants, tax deductions and other incentives [which] have expired, such that the project is no longer economically viable." Complaint, ¶ 73. It does not allege when these incentives expired relative to its available remedies, but it does not matter. Due process does not require that state law remedies arrive in time to preserve business expectations. In *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, a wind farm developer complained that the city's arbitrary failure to issue building permits in time to save a profitable power purchase agreement violated his right to due process. 769 F.3d 485 (7th Cir. 2014). As this Court observed, "[t]he fact that it might not have succeeded in time for CEnergy to meet its contractual deadline anyhow is of no moment. Due process requires only a state court remedy, not a guaranteed win by the applicant's contractual deadline." No. 12–C–1166 (E.D. Wis. July 3, 2013) (J. Griesbach, presiding), *aff'd*, 769 F.3d 485 (7th Cir. 2014); *see also River Park v. City of Highland Park*, 23 F.3d 164 (1994) (finding no due process violation where city deliberately delayed rezoning until developer went bankrupt); *Harding*, 870 F.3d 420 (7th Cir. 1989) (finding no due process violation where condominium developer won reversal of zoning decision in state court but, by that time, lacked financing to complete the project).

Similarly, it does not matter that the state court remedies might not recompense OSGC for its alleged "out-of-pocket expenses of approximately $5.2 million, lost profits of approximately $16 million, and substantial legal expenses, including attorney's fees to pursue the state court proceedings and this federal case." Complaint, ¶¶ 85, 96. The amount of damages available under state law remedies does not undermine their adequacy. The contrary argument was squarely rejected in *Barry Aviation, Inc. v. Land O'Lakes Municipal Airport Com'n*:

> The fact that a plaintiff "might not be able to recover under [state law] remedies the full amount which he might receive in a § 1983 action is not…determinative of the adequacy of the state remedies." *Hudson v. Palmer*, 468 U.S. 517, 535, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). "[U]nless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or nonexistent," courts should not ignore the Supreme Court's warning that the Fourteenth Amendment should not be treated as a "'font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Easter House v. Felder*, 910 F.2d 1387, 1404–06 (7th Cir.1990) (quoting *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)).

366 F.Supp.2d 792 (W.D. Wis. 2005) (denying due process claim on motion to dismiss).

4. OSGC has failed to state a claim because it has failed to vindicate its rights in state court.

While the state court decisions themselves are more than enough process to invalidate OSGC's claim, they also made available additional state law remedies, namely enforcing the state court decisions. OSGC's failure to pursue these additional state remedies provides an independent basis for dismissing the Complaint.

In zoning cases, a plaintiff must seek vindication in state court before seeking redress in federal court. The Seventh Circuit recognized in *Gamble v. Eau Claire County* that "even if a taking can be challenged as a denial of substantive due process, a suit based on this theory is premature if the plaintiff has possible state remedies against the zoning regulation or other state action that he wants to attack." 5 F.3d 285, 286–87 (7th Cir. 1993). *CEnergy-Glenmore* confirmed that this requirement applies to both procedural and substantive due process challenges. "Regardless of how a plaintiff labels an objectionable land-use decision (i.e. as a taking or as a deprivation without substantive or procedural due process), recourse must be made to the state rather than federal court." *CEnergy-Glenmore*, 769 F.3d 485, 489 (affirming a motion to dismiss where plaintiff failed to pursue his state law remedies); *See also River Park*, 23 F.3d 164, 167 ("A

person contending that state of local regulation of the use of land has gone overboard must repair to state court.").

OSGC was entitled to enforce the state court judgments by execution pursuant to Wisconsin Statute § 815.01, "[t]he owner of a judgment may enforce the same in a manner provided by law," and § 815.02:

> Where [a judgment] requires the performance of any other act a certified copy of the judgment may be served upon the party…who is required to obey the same, and if he or she refuse he or she may be punished for contempt, and his or her obedience enforced.

If the City then failed to obey the judgment, OSGC could have brought a motion for contempt under Wisconsin Statute § 785.03(1)(a):

> A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

OSGC alleges that after the Court of Appeals' decision, it "met with the City to request the re-issuance of the CUP" and then "sent a follow-up letter," Complaint, ¶ 70, that "[t]he City also refused OSGC's request to re-issue the CUP after the Court of Appeals decision in favor of OSGC," *id.*, ¶ 95, and that "the City never re-issued the conditional use permit to OSGC," *id.*, ¶ 72. It does not allege that it ever attempted to enforce either the Wisconsin Court of Appeals or Wisconsin Supreme Court judgments by execution, let alone renew its request for the CUP after receiving the Wisconsin Supreme Court judgment.

This Court is free to ignore OSGC's colorful, but conclusory allegation that "OSGC has exhausted its potential state law remedies. Only this honorable court remains as a venue to deliver justice to OSGC." Complaint, ¶ 74; *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009); *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013). The allegation is contradicted by the Exhibits

attached to the Complaint. OSGC cannot seek federal review of a local land-use decision without first taking full advantage of state law remedies, particularly when those remedies include a judgment that could eliminate the offending conduct if only OSGC would enforce it.

5. OSGC has failed to state a claim because it has failed to allege a constitutionally protected property interest.

The first element of a claim for deprivation of due process rights is "that the claimed interest is a protected property or liberty interest under the fourteenth amendment." *Polenz v. Parrott*, 883 F.2d 551, 555 (1989).

The interests OSGC alleges are subject to constitutional protection—"the construction, development and occupation of the waste-to-facility based on the CUP and the building permit issued by the City" and "its contracts for waste-to-energy with third-parties, and various grants and tax-credits for the project"—are all contingent on the CUP. Complaint, ¶¶ 88, 89. The CUP is not a protectable property interest and cannot support a contingent protectable interest.

Protectable property interests are defined by state law, *Polenz*, 883 F.2d 551 (1989), and exist only when the state's discretion is "clearly limited such that the plaintiff cannot be denied the interest unless specific conditions are met." *Brown v. City of Michigan City, Ind.*, 462 F.3d 720, 729 (7th Cir. 2006). Under Wisconsin law, including the decisions attached to the Complaint, not only is a CUP subject to a municipality's discretion, it is explicitly not property. "The decision to revoke a CUP, like the decision to grant one, involves the exercise of a municipality's discretion." Exhibit A, p. 10, ¶ 20. (citing *Roberts v. Manitowoc Cnty. Bd. of Adj.*, 2006 WI App 169, ¶ 10, 295 Wis. 2d 522, 721 N.W.2d 499). "A conditional use permit is not property; it is a type of zoning designation." Exhibit B, p. 35, ¶ 93. (quoting *Rainbow Springs Golf Co., Inc. v. Town of Mukwonago*, 2005 WI App 163, ¶ 18, 284 Wis. 2d 519, 702 N.W.2d 40).

While the Supreme Court and Seventh Circuit have both acknowledged the "theoretical possibility that a land-use decision…could constitute a deprivation of property without substantive due process of law," this possibility does not excuse the threshold requirement of a protectable property interest. *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485 (2014) (citing *Polenz v. Parrott*, 883 F.2d 551 (1989)). For example, *Polenz* found a protectable property interest in "the right of use" where the City of Oak Creek denied an occupancy permit, without which plaintiffs "could not occupy the premises for *any use* for a period of eighteen months." 883 F.2d at 55 (emphasis in original) (remanding for a determination on adequacy of state law remedies). And *River Park, Inc. v. City of Highland Park* found a protectable property interest in a zoning classification where state law required the City to grant the plaintiff's zoning application. 23 F.3d 164, 165 (7th Cir. 1994) (dismissing complaint because available state law remedies were adequate).

Neither the Supreme Court nor the Seventh Circuit has definitely concluded that a land-use decision actually amounted to a deprivation of property without substantive due process, let alone found that a CUP could support such a deprivation. When asked to do so by the wind farm developer in *CEnergy-Glenmore*, the Seventh Circuit remarked that "[w]hether CEnergy has even identified a property interest in the building permits it sought, its use of the land it leased, or its agreement with WPS is questionable, but we need not decide those issues." 769 F.3d 485, 488 (dismissing due process claim for failure to show actions were arbitrary and failure to seek recourse under state law); *see also Donohoo v. Hanson*, No. 14–c–309–wmc, *1 (W.D. Wis. Sept. 3, 2015) (unpublished), *aff'd*, No. 16-2405 (7th Cir. Oct. 28, 2016) (dismissing due process claims by "[a]ssuming, without deciding, that Donohoo's requested use permit constituted a property interest that implicated due process…"). Similarly, this case is easily disposed of without addressing the

issue, but if addressed, the Wisconsin state judgments are controlling. "A conditional use permit is not property." Exhibit B, p. 35, ¶ 93.

6. OSGC has failed to state a claim because the decision to rescind the CUP was not arbitrary in the Federal constitutional sense.

OSGC must show that the City "exercised its power without reasonable justification in a manner that shocks the conscience," *Bettendorf,* 631 F.3d 421, 426 (7th Cir. 2011), and "only the most egregious official conduct" qualifies. *CEnergy-Glenmore,* 769 F.3d 485, 488 (2014). "A plaintiff bears a very heavy burden in a substantive due process claim attacking a decision of local zoning officials." *Polenz,* 883 F.2d 551, 558. "And rightly so, for the federal courts are not zoning boards of appeal and will not overturn merely erroneous decision." *Id.*

This Court recently applied the "shocks the conscience" test in *GEnergy-Glenmore* where the plaintiff alleged due process violations based on the Town of Glenmore unreasonably dragging its feet on a building application to kill a wind turbine project. No. 12–C–1166, *1. There, as here, there were no allegations of "corruption or self-dealing by the members of the Town Board" and "no allegation that the Board was bribed or that members had a financial interest in killing CEnergy's contract." *Id.* As in the Complaint, the land-use decision was allegedly motivated by community opposition. *Id.*; Complaint, ¶¶ 57, 81. The Court held "[i]t is hardly surprising, or shocking, that an elected Town Board would be responsive to its more vocal constituents." *CEnergy-Glenmore,* NO. 12–C–1166, *5. The Seventh Circuit affirmed, "[a]s far as the Constitution is concerned, popular opposition to a proposed land development plan is a rational and legitimate reason for a legislature to delay making a decision." 769 F.3d at 488.

CEnergy governs here. OSGC has failed to allege facts that show the City acted arbitrarily in the constitutional sense and has, therefore, failed to state a claim for a violation of substantive due process.

OSGC cites the state court findings to show that the decision was arbitrary. Complaint, ¶¶ 66–68, 80, Exhibits A and B. However, the Seventh Circuit has repeatedly held that "[a] violation of state law is not a denial of due process law." *See, e.g., Coniston Corp v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988). Furthermore, the Wisconsin Court of Appeals defined an "arbitrary decision" as "one that is 'unreasonable or without a rational basis'" or "the result of an unconsidered, wilful or irrational choice, and not the result of the 'sifting and winnowing' process'" and "capricious" as "a whimsical, unreasoning departure from established norms or standards." Exhibit A, p. 11, ¶ 21. The Supreme Court did not even apply an "arbitrary" standard, but asked only "whether the evidence was such that it might reasonably make the order or determination in question." Exhibit B, p. 17, ¶¶ 41–42. The state court rulings to no evidence a constitutionally arbitrary action.

OSGC also relies on the allegation that the City manufactured a "pretext" of misrepresentations to justify its decision to rescind the CUP. Complaint, ¶ 81. But this conduct allegedly occurred after the vote to rescind the CUP. Complaint, ¶¶ 57–60. At the time of the vote, the Complaint alleges that "The Common Council provided absolutely no explanation at the hearing supporting its decisions." Complaint, ¶ 58. OSGC expects more than it's due. "Cities may elect to make zoning decisions through the political process" including "by putting the question to a popular referendum, direct democracy with no hearing of any kind." 23 F.3d 164, 166 (citing *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976)). If OSGC was not even entitled to a hearing, it certainly was not entitled to any justification, and the allegations that the justification was an after-the-fact "sham" do not amount to due process violation. Complaint, ¶ 81.

7. As to GBRE, the Complaint fails to make any allegations beyond its citizenship, let alone state a claim upon which relief can be granted.

"Federal Rule of Civil procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the …claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007). GBRE appears exactly twice in the Complaint—once in the caption, and once in paragraph 12:

> Green Bay Renewable Energy, LLC is a Delaware limited liability company with its principle place of business at 1239 Flightway Drive, DePere, Wisconsin 54115. It is a wholly-owned indirect subsidiary of Oneida Seven Generations Corporation, formed for the purpose of developing the facility.

Paragraph 12 is not a "short and plain statement" of GBRE's claim, it does not show that GBRE is entitled to relief, and it does not give the City fair notice of GBRE's claims. To the contrary, it is impossible from the Complaint to know why GBRE is named as a plaintiff. The only allegations of wrongdoing pertain to OSGC. *See* Complaint, ¶¶ 85–96 (alleging that OSGC's substantive and procedural due process rights were violated, that OSGC incurred out-of-pocket and legal expenses and lost profits, and that OSGC had a constitutionally protected interest in the CUP). As to GBRE, there is only paragraph 12.

Even parsing paragraph 12 does nothing to explain GBRE's claim. The allegations that GBRE "is a wholly-owned indirect subsidiary of Oneida Seven Generations Corporation" and "was formed for the purpose of developing the facility" do not allow GBRE to piggy-back on OSGC's allegations when, according to the Complaint, OSGC and GBRE are distinct corporations. Complaint, ¶¶ 11–12; *see Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 610 (7th Cir. 2009) ("A corporation exists separately from its shareholders, officers, directors and *related corporations*." (emphasis added)); *Aetna Cas. and Sur. Co. of Hartford, Connecticut v. Kerr-*

McGee Chem. Corp., 875 F.2d 1252, 1256 (allowing a *parent* corporation to litigate *subsidiaries*' claims—not a subsidiary corporation to litigate a parent's claims). As such, the Complaint fails to state a claim as to GBRE.

B. GBRE has failed to allege injury in fact and should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

1. Standard of Review under Rule 12(b)(1)

"Article III of the constitution limits federal judicial power to certain 'cases' and 'controversies,' and the 'irreducible constitutional minimum' of standing contains three elements. *Silha v. ACT, Inc.*, 807 F.3d 169 (7th Cir. 2015) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 559–60 (1992)). "To establish Article III standing, 'a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000)). "As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing the elements of Article III standing." *Id.*

There are two types of subject matter jurisdiction challenges, factual and facial. *Id.* A facial challenge argues that the plaintiff has not sufficiently "alleged a basis of subject matter jurisdiction." *Id.* (citing *Apex Dig., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009)). For facial subject matter jurisdiction challenges under Rule 12(b)(1), "a court should use *Twombly-Iqbal's* 'plausibility' requirement, which is the same standard used to evaluate facial challenges to claims under Rule 12(b)(6)." *Id.*

2. The Complaint does not allege that GBRE has suffered an injury in fact.

As the party invoking federal jurisdiction, GBRE bears the burden of establishing standing. The Complaint does not allege that GBRE suffered any injury at all, let alone that it was injured by the City, or that a favorable decision will redress its injury. *See Silha v. ACT, Inc.*, 807 F.3d 169. The only injury alleged in the Complaint is to OSGC. Complaint, ¶¶ 85–96 (alleging that OSGC's substantive and procedural due process rights were violated, that OSGC incurred out-of-pocket and legal expenses and lost profits, and that OSGC had a constitutionally protected interest in the CUP).

The allegation that GBRE is "a wholly-owned indirect subsidiary of [OSGC]" does not support an inference of injury to GBRE. *See* Complaint, ¶ 12. A parent company has Article III standing on the basis of injury to a subsidiary because injury to a subsidiary can cause "actual financial injury" to the parent, and a judicial determination as to the rights of the subsidiary "would prevent such injuries." *In re Neurontin Mktg. & Sales Practices Litig.*, 810 F.Supp.2d 366, 369 (D.Mass. 2011) (discussing *Franchise Tax Bd. of Calif. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 335–36 (1990)). The opposite is not true. A subsidiary does not have standing on the basis of injury to a parent company—injury to the parent company does not cause actual financial injury to the subsidiary, and a judicial determination as to the rights of the parent has no impact on the rights of the subsidiary.

C. <u>The Complaint should be dismissed under Rules 12(b)(2), 9(a), and 17(b)(2) for lack of corporate capacity to sue.</u>

1. Facts Relevant to Dismissal Under Rule 9(a) and 17(b)(2).

The following facts are submitted solely for the purpose of the City's arguments under Rule 9(a), and not for purposes of Rule 12(b)(6).

Plaintiff OSGC is "a tribal corporation chartered under the laws of the Oneida Nation, a federally recognized Indian tribe." Complaint, ¶ 11. Plaintiff GBRE is "a Delaware limited liability company" and "wholly-owned indirect subsidiary of Oneida Seven Generations Corporation." Complaint, ¶ 12.

According to the OSGC Corporate Charter, the Charter was granted by the Oneida Business Committee based upon authority vested in it by the Oneida General Tribal Council. Declaration of Gregg J. Gunta in Support of Defendant's Motion to Dismiss the Complaint for Lack of Capacity to Sue ("Gunta Decl."), ¶ 3, Ex. 2.

As described by the Oneida Nation constitution, the General Tribal Council is "[t]he governing body of Oneida Nation" and is "composed of all the qualified voters of the Oneida Nation." Ex. 1, Constitution and By-Laws of the Oneida Nation (2015), Article III, § 1. The Business Committee consists of nine elected members and is empowered by the constitution to "perform such duties as may be authorized by the General Tribal Council." *Id.*, § 3.

On December 15, 2013, the General Tribal Council moved to dissolve OSGC. Declaration of Leah Dodge ("Dodge Decl."), ¶ 3, Ex. 6. The motion was recorded as "Motion by Cathy L. Mextoxen to dissolve Seven Generations Corporation and for Frank Cornelius to assist and work with the Business Committee on the dissolution, seconded by Scharlene Kasee. **Motion approved by a hand count: 814 yes, 689 no, 69 abstained, total-1,572**." *Id.*

On December 24, 2013, the Oneida Business Committee adopted "BC Resolution 12-24-13-A Reorganization of Oneida Seven Generations Corporation." Gunta Decl., ¶ 4, Ex. 3. The resolution was "to begin the process of dissolution of the Oneida Seven Generations Corporation in a business-like manner." *Id.*, p. 2. It acknowledged that "the General Tribal Council and the Oneida Business Committee have been informed that dissolution of Oneida Seven Generations

Corporation may take up to or exceed 10-12 months in order to minimize negative financial consequences and wind up the activities of the corporation in a business-like manner." *Id.*, p. 1. Under the resolution, Article VI of the OSGC corporate charter, "PURPOSES AND POWERS" was modified as follows:

> The purpose of this Corporation is to engage in ~~any lawful activity within the purposes for which the corporation may be organized under the Oneida Constitution and Oneida tribal laws, ordinances and jurisdiction~~ *activities related solely to the purposes of commercial leasing.*

Id., p. 2.

On May 27, 2015, the Oneida Business Committee adopted "BC Resolution 5-27-15-B Adoption of Amendments to the Oneida Seven Generations Corporate Charter Limiting Purposes to Commercial Leasing Activities Only." Gunda Decl., ¶ 5, Ex. 4. This Resolution recognized that "the General Tribal Council, on December 15, 2013, directed the Oneida Business Committee to dissolve the corporation" and "the Oneida Business Committee began the process of dissolution of the corporation by adoption of amendments to the corporate charter limiting its purposes, removing the board of directors, and appointing an agent for the sole purposes of dissolving the corporation in a financially responsible manner." *Id.*, p. 1. It also recognized that OSGC, GBRE, and the Oneida Tribe had been "sued in regard to alleged contract violations." *Id.*

> [T]he litigation, began in early 2014, remains yet unresolved and subject to the appeals process, such that the Oneida Business Committee has determined that a longer term solution and compliance with the General Tribal Council directive is needed to clearly limit the corporation to commercial leasing and restrict its powers and authorities to maintaining the value of existing assets.

Id.[1]

[1] The 2014 litigation was the suit by ACF Leasing, LLC, ACF Services, LLC, and Generation Clean Fuels, LLC, against Green Bay Renewable Energy, LLC, Oneida Seven Generations Corporation and the Oneida Tribe of

The Oneida Business Committee, therefore, resolved to amend the OSGC Corporate Charter again, *id.*, such that Article VI, "PURPOSES AND POWERS," now states:

> The purpose of this Corporation is to engage in activities related solely to the purposes of commercial leasing. The Corporation is prohibited from engaging in any action not specifically for the purposes of commercial leasing and nothing in the powers granted under this Articke [sic] shall be interpreted to authorize any other purpose or power. In the event of any cause for interpretation of the purposes and powers granted in this article, such interpretation shall be narrowly construed to limit the purposes and powers to commercial leasing activities. The powers of the Corporation are:
>
> * * *
>
> (H) To sue and be sued in its Corporate name as herein specifically provided to the extent allowed by Oneida tribal, state or federal law upon any contract, claim or obligation of the Corporation arising out of the accomplishment of its purposes…

Gunta Decl., ¶ 5, Ex. 4, p. 3–4.

On August 10, 2016, there was a special General Tribal Council meeting. Dodge Decl., ¶ 4, Ex. 8. In response to pressure to finally dissolve OSGC as resolved by the General Tribal Council in 2013, opponents to the dissolution moved "to rescind the December 15, 2013 action dissolving the Oneida Seven Generations Corporation and restrict the corporation to commercial leasing activities." *Id.* The motion was amended as "to allow Oneida Seven Generations Corporation to continue litigation with the City of Green Bay." *Id.* This amendment to the motion was made specifically to allow OSGC to continue litigation against the City of Green Bay. Dodge Decl., ¶ 6, Ex. 10. The main motion to rescind OSGC's dissolution was not voted on. Instead, proponents of the dissolution moved to table it. Dodge Decl., Ex. 8; *see also* Dodge Decl., Ex. 9 at 2:44:29 (Frank Cornelius addressing the General Tribal Council: "What I think we should do is

Indians of Wisconsin. *ACF Leasing, LLC et al. v. Green Bay Renewable Energy, LLC et al.*, No. 1–14–3443 (Ill. Ct. App. Oct. 13, 2015) (unreported).

table the main motion because … the General Tribal Council already voted… to close it and you didn't do that… the business committee failed…"). The General Tribal Council voted to table the main motion and its amendments. Dodge Decl., Ex. 8. On October 2, 2016, the meeting reconvened, and a motion was made to take the item from the table, but this motion failed. *Id.*

The General Tribal Council follows Robert's Rules of Order. Gunta Decl., ¶ 6, Ex. 5. Under "Robert's Rules of Order As Used by the General Tribal Council," a motion to table "has the effect of taking the entire subject matter out of discussion." *Id.*, p. 3. When tabled in a special meeting like the August 10, 2016 meeting, "the matter dies, unless there is another meeting scheduled to discuss the subject." *Id.*

This lawsuit was initiated by plaintiffs OSGC and GBRE on December 23, 2016. Complaint. The Complaint alleges due process violations based on the City's decision on October 16, 2012, to rescind a conditional use permit that would have allowed OSGC to build a waste-to-energy facility. Complaint, ¶¶ 55–58. OSGC has already litigated the decision in Wisconsin courts and won a reversal. Complaint, Exs. A, B.

2. Standard of Review for 9(a) and 17(b)(2), Capacity to Sue.

Under Rule 9(a), "a pleading need not allege… a party's capacity to sue or be sued," but a party may raise the issue "by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge." Fed. R. Civ. P. 9(a). Under Rule 17(b), "Capacity to sue or be sued is determined…for a corporation, by the law under which it was organized." Fed. R. Civ. P. 17(b).

"Questions involving a party's capacity to sue or be sued [] turn on issues of fact" and "must therefore be identified in either a responsive pleading or motion." *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir. 1996). "The pleading requirements for capacity thus correspond to those for personal jurisdiction." *Id.* As to the requirements for personal jurisdiction,

> A complaint need not include facts alleging personal jurisdiction. However, once the defendant moves to dismiss the complaint under federal Rules of Civil Procedure 12(b)(2) for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating the existence of jurisdiction.
>
> The precise nature of the plaintiff's burden depends upon whether an evidentiary hearing has been held. When the district court holds an evidentiary hearing to determine jurisdiction, the plaintiff must establish jurisdiction by a preponderance of the evidence. However, when the district court rules on a defendant's motion to dismiss based on the submission of written materials, without the benefit of an evidentiary hearing, as the district court did here, the plaintiff, 'need only make out a *prima facie* case of personal jurisdiction.' In evaluating whether the prima facie standard has been satisfied, the plaintiff 'is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record.'

Purdue Research Foundation v. Sanofi-Synthelabo, S.A., 338 F.3d 773 (7th Cir. 2003) (citations and parentheticals omitted).

3. OSGC lacks capacity to bring the present suit.

Rather than dissolve OSGC as directed by the General Tribal Council in 2013, the Business Committee amended the OSGC Corporate Charter. Before the dissolution, the purpose of OSGC was "to engage in any lawful activity within the purposes for which the corporation may be organized under the Oneida Constitution and Oneida tribal laws, ordinances and jurisdiction," and OSGC was empowered to sue on any claim "arising out of the accomplishment of its purposes." Gunta Decl., Ex.2, Article VI. At the time this lawsuit was filed, OSGC was "prohibited from engaging in any action not specifically for the purposes of commercial leasing…" Gunta Decl., Ex. 4, p. 3–4. OSGC may still sue on claims of the Corporation "arising out of the accomplishment of its purposes," but its purposes are strictly limited to "commercial leasing." *Id.* In determining whether the present lawsuit "arise[s] out of the accomplishment" of commercial leasing, OSGC's powers and purposes "shall be narrowly construed to limit the purposes and powers to commercial leasing activities." *Id.*

The claims raised in the Complaint do not "arise out of the accomplishment" of commercial leasing activities. Any rights that might even tangentially impact OSGC's ability to commercially lease the property at issue were already determined by the Wisconsin Court of Appeals and Wisconsin Supreme Court. *See* Complaint, Ex. A (*Oneida Seven Generations Corp., LLC v. City of Green Bay*, 2015 WI 50, ¶ 41–42, 362 Wis. 2d 290, 865 N.W.2d 162) and Ex. B (*Oneida Seven Generations Corp., LLC v. City of Green Bay*, 2015 WI 50, ¶ 93, 362 Wis. 2d 290, 865 N.W.2d 162). The state court lawsuits reversed the City's decision to rescind a conditional use permit (and affirmed the reversal), restoring the conditional use permit and any commercial leasing interest OSGC may have had in the conditional use permit. *Id.* This lawsuit will not accomplish any commercial leasing activities, and OSGC is "prohibited" from bringing it. Gunta Decl., Ex. 4, p. 3.

But to even reach this analysis presupposes the ongoing existence of OSGC. Under Oneida law, the will of the Business Committee is clearly subordinate to that of the General Tribal Council. The Constitution and By-Laws of the Oneida Nation designates the General Tribal Council as "the governing body of the Oneida Nation." Ex. 1, Article III, § 1. The Oneida Constitution also instructs the Business Committee to "perform such duties as may be authorized by the General Tribal Council." *Id.*, § 3. This structure is affirmed in the Corporate Charter of Oneida Seven Generations which was granted by the Business Committee "based upon authority vested in it by the Oneida General Tribal Council." Gunta Dec., Ex. 2, Article II; Ex. 4, p. 3, Article II.

The 2013 General Tribal Council resolution to dissolve OSGC stripped the business committee of any authority to continue OSGC's corporate charter. At the time this lawsuit was filed on December 23, 2016, OSGC should no longer have existed under the law of Oneida Nation.

Whether or not OSGC still exists, and whether or not the present lawsuit accomplishes a commercial leasing activity, any doubts as to whether OSGC was authorized to bring the present lawsuit were resolved on August 10, 2016 by the General Tribal Council. The capacity of a corporation to sue is determined by the state of its incorporation, even if the corporation is dissolved. Fed. R. Civ. P. 17(b)(2); *Williams v. Bd. of Educ. of Chi.*, 506 Fed. Appx. 517, 519 (7th Cir. 2013) (applying the law of the state of incorporation pursuant to Rule 17(b)(2) to determine a dissolved corporation's capacity to sue). The Constitution and By-Laws of the Oneida Nation are silent on whether a dissolved corporation can sue, *see* Ex. 1, but the General Tribal Council—the governing body of the Oneida Nation—entertained a motion specifically designed to allow OSGC to continue litigation against the City of Green Bay. Dodge Decl., ¶¶ 4–6, Exs. 8–10. That motion did not pass. Ex. 8. It was tabled, and died. *Id.*; *see also* Gunta Decl., Ex. 5 ("Roberts Rules of Order As Used by the General Tribal Council"). This lawsuit should have died with it.

As to GBRE, even if OSGC continues to exist, it cannot delegate authority it does not have. GBRE has no more capacity to sue the City than OSGC.

CONCLUSION

OSGC has failed to show that its state law remedies were inadequate, failed to exhaust those remedies, failed to identify a protectable property interest, and failed to show that the decision to rescind the CUP was arbitrary in the constitutional sense. For each of these independent reasons, the Complaint fails to state a due process violation cognizable under § 1983 and should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim.

As to GBRE, the Complaint has failed to allege anything at all beyond its own citizenship, let alone state a claim upon which relief can be granted or injury in fact sufficient to confer standing. GBRE should be dismissed pursuant to either Rule 12(b)(6) for failure to state a claim or 12(b)(1) for lack of subject matter jurisdiction.

The Complaint should further be dismissed because OSGC and GBRE lack of capacity to sue under Rules 12(b)(2), 9(a), and 17(b)(2).

Dated this 7th day of February, 2017.

GUNTA LAW OFFICES, S.C.
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CONSTITUTION AND BY-LAWS OF THE ONEIDA NATION

We, the people of the Oneida Nation, grateful to Almighty God for his fostering care, in order to reestablish our tribal organization, to conserve and develop our common resources and to promote the welfare of ourselves and our descendants, do hereby ordain and establish this Constitution.

This constitution serves as an affirmation of the Oneida Nation's sovereign status as an independent Indian nation and the solemn trust relationship between this Nation and the United States of America.

Article I-Territory

The jurisdiction of the Oneida Nation shall extend to the territory within the present confines of the Oneida Reservation and to such other lands as may be hereafter added thereto within or without said boundary lines under any law of the United States, except as otherwise provided by law.

Article II-Membership

Section 1. The membership of the Oneida Nation shall consist of:

(a) All persons of Indian blood whose names appear on the membership roll of the Oneida Nation in accordance with the Act of September 27, 1967 (81 Stat. 229), Public Law 90-93.

(b) Any child of a member of the Nation born between September 28, 1967, and the effective date of this amendment, who is of at least one-fourth degree Indian blood, provided, that, such member is a resident of the Reservation at the time of the birth of said child.

(c) All children who possess at least one-fourth degree Oneida blood are born after the effective date of this amendment to members of the Nation who are residents of the reservation at the time of said children's birth.

Section 2. The General Tribal Council shall have the power to promulgate ordinances covering future membership and the adoption of new members.

Article III-Governing Body

Section 1. The governing body of the Oneida Nation shall be the General Tribal Council composed of all the qualified voters of the Oneida Nation.

Section 2. All enrolled members of the Oneida Nation who are eighteen (18) years of age or over shall be qualified voters provided they present themselves in person at the polls on the day of election.

Section 3. The qualified voters of the Oneida Nation shall elect from among the enrolled Oneida Nation members age twenty-one (21) and over who physically reside in either Brown or Outagamie Counties of Wisconsin by secret ballot (a) a chairman; (b) a vice-chairman; (c) a secretary; (d) a treasurer; (e) and five councilmen. These shall constitute the Business Committee and shall perform such duties as may be authorized by the General Tribal Council

A majority of the Business Committee including the chairman or vice-chairman shall constitute a quorum of this body. Regular meetings of the Business Committee may be established by resolution of the Business Committee. Special meetings of the Business Committee shall be held upon a three-day advance notice by the chairman to all members thereof or upon written request of a majority of the Business Committee stating the time, place, and purpose of the meeting.

The General Tribal Council may at any regular special meeting fill any vacancies that occur on the Business Committee for the unexpired term.

The General Tribal Council may at its discretion remove any official on the Business Committee by a two-thirds majority vote at any regular or special meeting of the Tribal Council, pursuant to a duly adopted ordinance. Such ordinance shall fix the specific causes for removal and ensure that the rights of the accused are protected, including his receiving in writing a statement of the charges against him and assurance on sufficient notice thereof where he shall be afforded every opportunity to speak in his own defense.

Section 4. The General Tribal Council shall meet in January and July.

Section 5. The officials provided for in Section 3 of this Article shall be elected every three years in the month of July on a date set by the General Tribal Council. The General Tribal Council shall enact necessary rules and regulations governing the elections of tribal officials.

Section 6. The chairman or fifty (50) qualified voters may, by written notice, call special meetings of the General Tribal Council. Seventy-five (75) qualified voters shall constitute a quorum at any regular or special meeting of the General Tribal Council.

Article IV-Powers of the General Tribal Council

Section 1. Enumerated Powers. - The General Tribal Council of the Oneida Nation shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States:

(a) To negotiate with the Federal, State, and local governments.

(b) To employ legal counsel, the choice of counsel and fixing of fees.

(c) To veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets of the Nation.

(d) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Oneida Nation prior to the submission of such estimates to the Bureau of the Budget and to Congress.

(e) To manage all economic affairs and enterprises of the Oneida Nation.

(f) To promulgate and enforce ordinances, governing the conduct of members of the Oneida Nation, providing for the manner of making, holding, and revoking assignments of tribal land or interests therein, providing for the levying of taxes and the appropriation of available tribal funds for public purposes, providing for the licensing of non-members coming upon the reservation for purposes of hunting, fishing, trading, or other business, and for the exclusion from the territory of the Nation of persons not so licensed and establishing proper agencies for law enforcement upon the Oneida Reservation.

(g) To appoint committees, delegates, and officials deemed necessary for the proper conduct of tribal business or relations.

(h) To charter subordinate organizations for economic purposes and to delegate to such organizations, or to any subordinate boards or officials of the Nation, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power.

(i) To adopt resolutions not inconsistent with this Constitution and the attached By-laws, regulating the procedure of the Council itself and of other tribal agencies, tribal officials, or tribal organizations of the Oneida Reservation.

Section 2. Future Powers. - The General Tribal Council may exercise such further powers as may in the future be delegated to the Council by the Secretary of the Interior or any other duly authorized official or agency of the State or Federal Government.

Section 3. Reserved Powers. - Any rights and powers heretofore vested in the Oneida Nation but not expressly referred to in this Constitution shall not be abridged by this Article, but may be exercised by the people of the Oneida Nation through the adoption of appropriate By-laws and constitutional amendments.

Article V-Judiciary

Section 1. The General Tribal Council shall, by law, establish a judiciary to exercise the judicial authority of the Oneida Nation.

Section 2. Any judiciary in operation prior to the effective date of this amendment to the Constitution may be designated as the judiciary authorized under this article upon passage of a resolution by the General Tribal Council. Such designation shall remain in full force and effect until amended by General Tribal Council.

Article VI – Amendment

Section 1. Amendment by the Oneida Business Committee. Amendments to this Constitution and By-Laws may be proposed by the Oneida Business Committee. Proposed amendments agreed to by eight members of the Oneida Business Committee, excluding the Chair, shall be put before a meeting of the General Tribal Council. If a majority of the voting General Tribal Council members vote in favor of the proposed amendment, the proposed amendment shall be placed upon the ballot of the next General election or special election called for the purpose to consider an amendment.

Section 2. Amendment by Petition. Amendment to this Constitution and By-Laws may be proposed by petition of the members eligible to vote. Every petition shall include the full text of the proposed amendment, and be signed by members eligible to vote, equal in number to at least ten percent (10%) of the members eligible to vote. Petition with the requisite number of signatures may be put before the Oneida people for their approval or rejection at the next general election, except when the Oneida Business Committee or General Tribal Council orders a special election for the purpose. Such petitions shall be filed with the person authorized by law to receive the same at least ninety (90) days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by Oneida law. The person authorized by law to receive such petition shall upon its receipt determine, as provide by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least sixty (60) days prior to the election at which the proposed amendment is to be voted upon. Any amendment proposed by such petition shall be submitted, not less than ninety (90) days after it was filed, to the next general or special election called for the purpose to consider an amendment.

Section 3. Any proposed amendment, existing provision of the Constitution and By-Laws which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by Oneida Law. Copies of such publications shall be prominently posted in each polling place, at Tribal administration offices, and furnished to news media as provided Oneida law.

The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than one hundred (100) words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person who is so authorized by Oneida law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as to create no prejudice for or against the proposed amendment.

If the proposed amendment is approved by sixty-five percent (65%) of the members eligible to vote who presented themselves at the polls and voted on the question, it shall become part of the Oneida Constitution and By-Laws, and shall abrogate or amend existing provisions of the Constitution and By-Laws at the end of thirty (30) days after submission of the final election report as directed law. If two or more amendments approved by the voters at the same election conflict, the amendment receiving the highest affirmation vote shall prevail.

Article VII-Bill of Rights

All members of the Nation shall be accorded equal opportunities to participate in the economic resources and activities of the Nation. All members of the tribe may enjoy, without

hindrance, freedom of worship, conscience, speech, press, assembly, association and due process of law, as guaranteed by the Constitution of the United States.

BY-LAWS OF THE ONEIDA NATION

Article I-Duties of Officers

Section 1. Chairman of Council. - The Chairman of the Council shall preside over all meetings of the Council, shall perform the usual duties of a Chairman, and exercise any authority delegated to him by the Council. He shall vote only in the case of a tie.

Section 2. Vice-Chairman of Council. - The Vice-Chairman shall assist the Chairman when called upon to do so and in the absence of the Chairman, he shall preside. When so presiding, he shall have all the rights, privileges and duties as well as the responsibilities of the Chairman.

Section 3. Secretary of the Council. - The Secretary of the Tribal Council shall conduct all tribal correspondence and shall keep an accurate record of all matters transacted at Council meetings. It shall be his duty to submit promptly to the Superintendent of the jurisdiction, and the Commissioner of Indian Affairs, copies of all minutes of regular and special meetings of the Tribal Council.

Section 4. Treasurer of Council. - The Treasurer of the Tribal Council shall accept, receive, receipt for, preserve and safeguard all funds in the custody of the Council, whether they be tribal funds or special funds for which the Council is acting as trustee or custodian. He shall deposit all funds in such depository as the Council shall direct and shall make and preserve a faithful record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his possession and custody, at each regular meeting of the General Tribal Council, and at such other times as requested by the Council or the business committee.

He shall not pay out or otherwise disburse any funds in his possession or custody, except in accordance with a resolution duly passed by the Council.

The Treasurer shall be required to give a bond satisfactory to the Council and to the Commissioner of Indian Affairs.

Section 5. Appointive Officers. - The duties of all appointive boards or officers of the Community shall be clearly defined by resolutions of the Council at the time of their creation or appointment. Such boards and officers shall report, from time to time as required, to the Council, and their activities and decisions shall be subject to review by the Council upon the petition of any person aggrieved.

Article II-Ratification of Constitution and By-laws

This Constitution and these By-laws, when adopted by a majority vote of the voters of the Oneida Nation voting at a special election called by the Secretary of the Interior, in which at least 30 per cent of those entitled to vote shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be effective from the date of such approval. 7

Adoption Dates

-Original Constitution adopted November 14, 1936 by Oneida Tribe. Approved by the Secretary of the Interior December 21, 1936.
-Amended June 3, 1939, approved June 15, 1939.
-Amended October 18, 1969, approved November 28, 1969.
-Amended June 14, 1969, approved August 25, 1969.
-Amended June 14, 1969, approved August 25, 1969.
-Amended June 14, 1969, approved, August 25, 1969.
-Amendment X approved June 16, 2015, notice received June 24, 2015
-Amendment XI approved June 16, 2015, notice received June 24, 2015
-Amendment XII approved June 16, 2015, notice received June 24, 2015
-Amendment XIII approved June 16, 2015, notice received June 24, 2015
-Amendment XIV approved June 16, 2015, notice received June 24, 2015

2015 IL App (1st) 143443-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois,
First District, First Division.

ACF LEASING; ACF Services, LLC; and Generation Clean Fuels, LLC, Plaintiffs–Appellants,
v.
ONEIDA SEVEN GENERATIONS CORPORATION and the Oneida Tribe of Indians of Wisconsin, Defendants–Appellees.

No. 1–14–3443.
|
Oct. 13, 2015.

Appeal from the Circuit Court of Cook County, 14 L 2768, Margaret Ann Brennan, Judge Presiding.

ORDER

Justice CONNORS delivered the judgment of the court:

Held: Trial court properly granted defendants' section 2–619 motion to dismiss for lack of subject matter jurisdiction where sovereign immunity applied; and trial court properly found that defendants did not expressly waive sovereign immunity by virtue of a forum selection clause in the contract agreements between plaintiffs and GBRE.

***1** ¶ 1 Plaintiffs ACF Leasing, LLC, ACF Services, LLC, and Generation Clean Fuels, LLC, appeal from the circuit court's dismissal of defendants Oneida Seven Generations Corporation (OSGC) and The Oneida Tribe of Indians of Wisconsin (Tribe) for lack of subject matter jurisdiction. This case arose out of a business relationship between plaintiffs and defendants for the lease and service of three liquefaction machines for use in a plastics-to-oil energy project. Plaintiffs filed suit against defendants for breach of the lease and service agreements, and defendants claimed sovereign immunity. The trial court granted defendants' motion to dismiss based on sovereign immunity, and therefore lack of subject matter jurisdiction, and plaintiffs now appeal. On appeal, plaintiffs contend that sovereign immunity was not available under the circumstances of this case, and that there was at least a question of fact as to whether sovereign immunity was waived. For the following reasons, affirm.

¶ 2 BACKGROUND

¶ 3 Plaintiffs filed a complaint against Green Bay Renewable Energy, LLC (GBRE), OSGS, and the Tribe. In their complaint, plaintiffs alleged that GBRE was a wholly owned subsidiary of Oneida Energy Blocker Corporation, which was a wholly owned subsidiary of Oneida Energy, Inc., which was a wholly owned subsidiary of OSGC. Plaintiffs alleged that ACF Leasing entered into a "Master Lease" with GBRE on May 24, 2013, which involved the leasing of three liquefaction machines by GBRE for use in a plastics-to-oil energy project. Plaintiffs claimed that the Master Lease provided that ACF Leasing would lease the three liquefaction machines to GBRE for $22.2 million for a 21–year term.

¶ 4 Plaintiffs further alleged in their complaint that ACF Services entered into a "Maintenance Agreement" with GBRE on May 24, 2013, which provided for ACF Services to operate and maintain the three liquefaction machines.

¶ 5 Plaintiffs contended that Kevin Cornelius, chairman and chief executive officer of GBRE, acted on behalf of GBRE in executing the Master Lease and Maintenance Agreement. Plaintiffs claimed that they presented facts regarding the project to GBRE, OSGC, and the Tribe numerous times in 2012 and 2013.

¶ 6 Plaintiffs argued that on December 15, 2013, the Tribe voted to dissolve OSGC, which caused the Wisconsin Bank & Trust, the entity that had committed to providing GBRE with financing, to withdraw from its commitment to finance the project. As a result, plaintiffs complained that they suffered irreparable damages and brought claims for breach of contract, promissory estoppel, unjust enrichment, vicarious liability, tortious interference with contract, tortious interference with prospective economic advantage, and tortious interference with business expectancy.

¶ 7 OSGC and the Tribe filed a motion to dismiss for lack of subject matter jurisdiction. In their motion, they stated that OSGC was the sole owner of Oneida Energy, which was the sole owner of Oneida Blocker, which was the "sole owner and member" of GBRE. They stated that GBRE was set up as a "single asset LLC for purposes of developing the Project." Defendants claimed that because neither OSGC nor the Tribe were parties to the Master Lease or the Maintenance Agreement, and because the Tribe is a sovereign Indian Nation, and OSGC is a subordinate entity created by the Tribe, sovereign immunity applied. They further alleged that they did not waive this sovereign immunity, and thus there was no subject matter jurisdiction over them.

***2** ¶ 8 Attached to their motion to dismiss was the affidavit of Patricia Ninham Hoeft, the secretary of the Business Committee of the Tribe. In her affidavit, Hoeft stated that the General Tribal Council had the power to charter subordinate organizations for economic purposes, and that they chartered OSGC as a subordinate organization of the Tribe. Its board members included Kevin Cornelius as Chief Executive Officer, but he resigned in August 2013. Hoeft further stated that in 2004, the Tribe adopted a Sovereign Immunity Ordinance, which states:

> "14.6 Waiver of Sovereign Immunity
>
> 14.6–1. All waivers of sovereign immunity shall be made in accordance with this law.
>
> 14.62. *Waiver by Resolution.* The sovereign immunity of the Tribe or a Tribal Entity may be waived:
>
> (a) by resolution of the General Tribal Council;
>
> (b) by resolution or motion of the Oneida Business Committee; or
>
> (c) by resolution of a Tribal Entity exercising authority expressly delegated to the Tribal Entity in its charter or by resolution of the General Tribal Council or the Oneida Business Committee, provided that such waiver shall be made in strict conformity with the provisions of the charter or the resolution governing the delegation, and shall be limited to the assets and property of the Tribal Entity."

¶ 9 The "Tribal Entity" is defined as "a corporation or other organization which his wholly owned by the Oneida Tribe of Indians of Wisconsin, is operated for governmental or commercial purposes, and may through its charter or other document by which it is organized be delegated the authority to waive sovereign immunity."

¶ 10 Hoeft claimed in her affidavit that neither the Tribe nor OSGC were parties to the lease agreements in question, and that the business committee had never seen the agreements until after it passed a resolution dissolving OSGC on December 15, 2013. Hoeft stated that neither the General Tribal Council nor the business committee had passed a resolution authorizing waiver of the Tribe's or OSGC's sovereign immunity in connection with the lease agreements.

¶ 11 Defendants also attached the affidavit of Gene Keluche, the managing agent of OSGC, who stated that he reviewed the resolutions maintained by OSGC's board of directors meetings from 2010 to the present, and that OSGC did not pass a resolution authorizing the waiver of OSGC's, or the Tribe's, sovereign immunity in connection with the lease agreements at issue.

¶ 12 Plaintiffs responded by filing affidavits of Michael Galich and Eric Decatur. Galich stated that at all relevant times, he was the operations executive of ACF Leasing and ACF Services. He stated that on or about August 7, 2012, he attended a U.S. Department of Energy conference regarding renewable energy for tribal communities on behalf of ACF entities. Kevin Cornelius, (a member of the Tribe, the CEO of OSGC, and the president of GBRE), as well as Bruce King (a member of the Tribe, CFO of OSGC, and treasurer of GBRE) gave a presentation regarding energy projects of the Tribe, and Galich met with them to discuss projects related to the Tribe. Galich stated that Cornelius and King held themselves out as representatives of the Tribe and OSGC. Galich then detailed several other meetings and conference calls he had with Cornelius and King throughout 2012 and 2013. He claimed that Cornelius, King, and other members of the Tribe represented that they were acting on behalf of the Tribe and OSGC, and repeatedly referred to the Tribe as though it was acting in concert with OSGC and GBRE. Galich believed he was dealing with the Tribe and OSGC throughout negotiations, and Galich stated that Cornelius and King corresponded with him repeatedly using OSGC's email address and letterhead. Galich stated that he relied on the representations of Cornelius and King that they had

the authority of the Tribe to enter into the agreements in question.

***3** ¶ 13 Eric Decatur, counsel for the ACF entities, stated in his affidavit that in October 2012, King arranged for $50,000 to be wired to the bank account of Equity Asset Finance (EAF), the entity providing financing for the project, and that the bank statements of EAF demonstrate that such funds were wired to EAF from the bank account of OSGC. Decatur stated that King and Cornelius told him that the Tribe and OSGC would utilize GBRE to lease the equipment for the Project on behalf of the Tribe and OSGC, and that they were utilizing GBRE for internal tax purposes to avoid jeopardizing the tax exempt status of the Tribe and Oneida by generating more than an insignificant amount of unrelated business taxable income. Decatur further stated that during the negotiations, Cornelius repeatedly stated that he could not do anything regarding the project without the approval of OSGC's board of directors. Plaintiff attached an email from Cornelius to Decatur stating that the loan commitment letter had been approved by OSGC's board of directors, but that he needed one more board member's signature before he could sign it.

¶ 14 Decatur further stated that the forum selection provisions contained within the agreements in question were negotiated in good faith by him, attorney Joseph Kavan, King, and Cornelius, and that it was represented to him that Cornelius had the authority to waive sovereign immunity on behalf of the Tribe and OSGC

¶ 15 Defendants filed the affidavits of Bruce King, Joseph Kavan, and Kevin Cornelius in response to the affidavits submitted by plaintiffs. King stated in his affidavit that he was the Vice President and Treasurer of GBRE, and also the CFO of OSGC. He stated that while he was one of 16,000 members of the Tribe, he held no official position with the Tribe and had no authority to speak on behalf of the Tribe. King averred that he never represented that the Tribe or OSGC would be participants in the project between GBRE and ACF entities, and he never represented that he had the authority to waive sovereign immunity because the Tribe has a specific mechanism for doing so that must be followed. King further stated that he had no discussions with Decatur about a waiver of sovereign immunity because GBRE did not have sovereign immunity as a limited liability company incorporated under Delaware state law.

¶ 16 Joseph Kavan, counsel for GBRE, stated in his affidavit that he did not represent OSGC in the negotiations and that he never represented to anyone that he had any authority to speak on behalf of OSGC or the Tribe. He averred that there was never a discussion that the standard, boilerplate forum selection clause in the agreements would serve as a waiver of sovereign immunity, and that it was not logical to negotiate waiver of sovereign immunity since there was no sovereign entity involved in the project.

¶ 17 Finally, Kevin Cornelius stated in his affidavit that from January 2012 through August 2013, he was the president of GBRE. He was also the CEO of OSGC, and a member of the Tribe. Cornelius averred that he had no authority to waive sovereign immunity on behalf of the Tribe, and he never indicated he did to anyone else. Cornelius denied any discussion of waiver of sovereign immunity or choice of law provisions.

***4** ¶ 18 On October 8, 2014, a hearing was held on defendants' motion to dismiss pursuant to subject matter jurisdiction. The trial court found that there was no dispute sovereign immunity would apply to OSGC and the Tribe, but that the question was whether or not they had waived sovereign immunity. On a section 2–619 motion, the trial court noted that it was looking at the competing affidavits and that a knowing waiver was not shown. The trial court noted that none of the case law cited stated that the waiver could be implied, or that it could be inferred from a subsidiary entering into a forum selection clause in an agreement. Accordingly, the trial court found that there was no subject matter jurisdiction over OSGC or the Tribe. Because litigation was still pending against GBRE, the trial court granted defendants a Rule 304(a) finding and this appeal followed.

¶ 19 ANALYSIS

¶ 20 Plaintiffs appeal from the trial court's grant of defendants' section 2–619(a)(1) (735 ILCS 5/2–619(a)(1) (West 2012)) motion to dismiss for lack of subject matter jurisdiction. A section 2–619 motion to dismiss admits as true all well-pleaded facts, as well as reasonable inferences to be drawn therefrom. *Wackrow v. Niemi,* 231 Ill.2d 418, 422 (2008). We must interpret all pleadings and supporting documents in the light most favorable to the nonmoving

party. *Wackrow,* 231 Ill.2d at 422. When supporting affidavits have not been challenged or contradicted by counter-affidavits, the facts stated therein are deemed admitted. *Zedella v. Gibson,* 165 Ill.2d 181, 185 (1995). "A section 2–619 dismissal resembles the grant of a motion for summary judgment; we must determine whether a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal was proper as a matter of law." *Shirley v. Harmon,* 405 Ill.App.3d 86, 90 (2010). We review the trial court's dismissal *de novo. Wackrow,* 231 Ill.2d at 422.

¶ 21 To evaluate defendants' challenge to the trial court's subject matter jurisdiction, we return to first principles. By the power of the Illinois Constitution, our circuit courts are courts of general jurisdiction and have the power to hear " 'all justiciable matters.' " *Wauconda Fire Protection District v. Stonewall Orchards, L.L.P.,* 214 Ill.2d 417, 426 (2005) (quoting Ill. Const.1970, art. VI, § 9)). The circuit courts' jurisdiction is not limited only to State law causes of action, but rather, they " 'have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the law of the United States.' " *Haywood v. Drown,* 556 U.S. 729, CITE (2009) (quoting *Tafflin v.. Levitt,* 493 U.S. 455, 458 (1990)). This "strong" presumption of concurrent State-federal jurisdiction is overcome only where Congress claims exclusive jurisdiction over a federal cause of action, or where a State court refuses jurisdiction for a neutral administrative purpose. *Id.*

***5** ¶ 22 As a matter of federal law, however, an Indian tribe is 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). Indian tribes are " 'domestic dependent nations' " that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma,* 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia,* 5 Pet. 1, 17 (1831)). As dependents, the tribes are subject to plenary control by Congress. *Michigan v. Bay Mills Indian Community,* 52 U.S.——(2014). Thus, unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States v. Wheeler,* 435 U.S. 313, 323 (1978).

¶ 23 Among the core aspects of sovereignty that tribes possess is the "common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). That immunity, as the Supreme Court has explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 890 (1986). The Supreme Court has time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization or a waiver. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 756 (1998). In doing so, the Court has held that tribal immunity applies no less to suits brought by States than to those by individuals, and that tribal immunity "is a matter of federal law and is not subject to diminution by the States." *Kiowa,* 523 U.S. at 756. In *Kiowa,* the Supreme Court declined to make an exception for suits arising from a tribe's commercial activities, even when they took place off tribal lands. In that case, a private party sued a tribe in State court for defaulting on a promissory note. The plaintiff asked the Court to confine tribal immunity to suits involving conduct on "reservations or to noncommercial activities." *Kiowa,* 523 U.S. at 755. The Court said no. *Id.* Accordingly, unless Congress has authorized the suit before us in the present case, or defendants have waived sovereign immunity, United States Supreme Court precedent demands that this case be dismissed. *Michigan v. Bay Mills Indian Community,* 52 U.S.——(2014).

¶ 24 Plaintiffs nevertheless contend that the Supreme Court has never decided the applicability of sovereign immunity to non-contractual activity, and continues to leave this question open. They rely on the following passage from *Kiowa:*

> "There are reasons to doubt the wisdom of perpetuating the doctrine [of sovereign immunity]. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by the States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. [Citations omitted]. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Kiowa,* 523 U.S. at 758.

***6** ¶ 25 However, the Court went on in *Kiowa* to explain that these considerations might suggest a need to abrogate tribal immunity as at least an overarching rule, but that it declined to do so and would instead "defer to the role Congress may wish to exercise in this important judgment." *Id.*

¶ 26 More recently, the Court visited this issue in *Michigan v. Bay Mills Indian Community,* 52 U.S.——(2014), where it specifically discussed its holding in *Kiowa* which stated: "We decline to draw [any] distinction" that would "confine [immunity] to reservations or to noncommercial activities." *Id.* (quoting *Kiowa,* 523 U.S. at 765). The Court noted that it ruled that way "for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Id.* Accordingly, where there is clear precedent from our highest court, we are unwilling to extend our State's subject matter jurisdiction in this case over defendants, and we find that sovereign immunity applies to both the Tribe and OSGC, a tribal entity.

¶ 27 Plaintiffs' reliance on *Hamaatsa, Inc. v. Pueblo of San Felipe,* 310 P.3d 631 (N.M.App.Ct.2013), a New Mexico state appellate court case, and *D'Lil v. Cher–Ae Heights Indian Cmty. of Trinidad Rancheria,* 2002 WL 33942761 (N.D.Cal.2002), a federal district court case, does not convince us otherwise. In *Hamaatsa,* an adjoining landowner brought an action against an Indian tribe, seeking declaration that a road, which crossed land outside the reservation boundaries acquired by the Indian tribe in fee simple, was a state public road. The Indian tribe filed a motion to dismiss based on sovereign immunity. The trial court denied the motion, and the appellate court affirmed, finding that permitting the Indian tribe to assert sovereign immunity in its motion to dismiss would be to permit the tribe to assert control over a state public road, and would deprive any other member of the public an opportunity for recourse. *Hamaatsa,* 310 P.3d at 635.

¶ 28 The court found that it was not a case in which a party suing a tribe engaged in a contractual or commercial relationship with that tribe. *Id.* at 636–37. Rather, the court found that when a tribe acquires property that envelops a state public road and subsequently denies access to existing property owners, those excluded are innocent citizens who had no choice and cannot be held to have known "or anticipated a legal risk" of "a dispositive facial assertion of sovereign immunity by an Indian tribe." *Id.* at 637. Moreover, the court in *Hamaatsa* noted that the issue in the case was a matter of State law, over which the trial court had jurisdiction, because a public roadway was at the center of the controversy. *Id.* at 634.

¶ 29 Unlike *Hamaatsa,* the case at bar is one in which the parties suing a tribe are alleging that they were engaged in a contractual or commercial relationship with that tribe. *Id.* at 636–37. Additionally, the matter at hand is not purely a matter of State law.

***7** ¶ 30 In *D'lil,* two disabled plaintiffs brought suit against the Indian tribe that owned and operated a hotel outside the geographical boundaries of the tribe's reservation. The plaintiffs alleged that the hotel violated the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.* (West 2012)). The tribe filed a motion to dismiss, alleging sovereign immunity, but the district court found that "the strong federal policy and the public interest in enforcing the nation's disability-related civil rights laws outweighs any tribal interest in extending its sovereignty to commercial activities conducted off the reservation." *D'lil,* 2002 WL 33942761, at *8. There are no such federal policy and public interest considerations in the case at bar. Accordingly, we find both cases relied upon by plaintiffs to be inapposite to the case at bar, as well as non-precedential. We instead rely on the highest court in our nation until Congress tells us otherwise.

¶ 31 Plaintiffs argue in the alternative that if sovereign immunity applies to the defendants, then defendants have waived sovereign immunity, or that at least there is a question of fact as to whether they waived sovereign immunity. Plaintiffs rely on the Master Lease Agreement, which provides in pertinent part: "Lessee and lessor agree that all legal actions shall take place in the federal or state courts situated in Cook County, Illinois." Additionally, the "Operations and Maintenance Agreement" provides that "[a]ny disputes pertaining to this Agreement shall be determined exclusively in a court of competent jurisdiction in the County of Cook, State of Illinois." Plaintiffs contend that these are forum selection clauses which "undeniably constitute express waivers of sovereign immunity." Defendants respond that GBRE was a party to the contract, not OSGC or the Tribe, and thus any clauses contained within the agreements did not apply to them. Plaintiffs maintain that OSGC and the Tribe,

despite not appearing on the contract, were nevertheless bound by the contract through their "close relationship" to the dispute. Without addressing this principle of "close relationship", we find that even if OSGC or the Tribe were considered parties to this contract, the forum selection clause in the agreements did not constitute an express waiver of sovereign immunity.

¶ 32 To relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma,* 498 U.S. 505, 509 (1991). Plaintiffs cite to several cases in support of their argument that a forum selection clause can constitute a waiver. However, in each of these cases, the clauses either explicitly waived sovereign immunity or contained an arbitration provision that waived immunity, neither of which is present in the case at bar. See *C & L Enterprises, Inc. v. Citizen Band Potowatomi Tribe of Oklahoma,* 532 U.S. 411 (2001) (arbitration provisions in contract constituted clear waiver of tribe's sovereign immunity, requiring resolution of all contract-related disputes between the parties by binding arbitration); *Altheimer & Gray v. Sioux Manufacturing Corporation,* 983 F.2d 803 (7th Cir.1993) (a tribal entity's charter provided that sovereign immunity "is hereby expressly waived with respect to any written contract entered into by the Corporation"); *Sokaogon Gaming Enterprise Corp. v. Tushie–Montgomery Associates, Inc.,* 86 F.3d 656 (7th Cir.1996) (a tribe and its casino gaming subsidiary entered into agreement and the following arbitration clause was found to be an express waiver of sovereign immunity: "claims, disputes or other matters" arising out the contract "shall be subject to and decided by arbitration" and the agreement to arbitrate "shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof"); and *Ningret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority,* 207 F.3d 21 (1st Cir.2000) ("we believe that explicit language broadly relegating dispute resolution to arbitration constitutes a waiver of tribal sovereign immunity, whereas language that is ambiguous rather than definite, cryptic rather than explicit, or precatory rather than mandatory, usually will not achieve that end.")

***8** ¶ 33 Additionally, in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort,* 2007 WL 2701995, rev'd on other grounds, 629 F.3d 1173 (10th Cir.2010), the language of the parties' agreement stated that the sole and exclusive venue for any and all disputes regarding the agreement was to be located within the state of Colorado. The court found that the parties' agreement spoke only "to *where* a suit may be brought, but it does not expressly or impliedly address *whether* a suit may be brought." 2007 WL 2701995, at *5. It went on to state that unlike cases such as *C & L,* the tribe did not expressly agree to submit any dispute for adjudication; it merely agreed as to where such adjudication would take place if it were to occur. *Id.* In the case at bar, the forum selection clause in the agreements specifies Illinois as the venue for a dispute, but says nothing about expressly waiving sovereign immunity. Accordingly, we maintain that the Tribe and OSGC did not expressly waive sovereign immunity through the forum selection clauses.

¶ 34 We are not persuaded otherwise by plaintiffs' reliance on *StoreVisions, Inc. v. Omaha Tribe of Nebraska,* 281 Neb. 238 (2011), in which the court found that a tribal member's signature on a contract containing a forum selection clause waived immunity, because that tribe's bylaws were silent concerning the authority regarding the waiver of sovereign immunity. In the case at bar, the Tribe's bylaws are clear regarding the waiver of sovereign immunity:

> "*Waiver by Resolution.* The sovereign immunity of the Tribe or a Tribal Entity may be waived:
>
> (a) by resolution of the General Tribal Council;
>
> (b) by resolution or motion of the Oneida Business Committee; or
>
> (c) by resolution of a Tribal Entity exercising authority expressly delegated to the Tribal Entity in its charter or by resolution of the General Tribal Council or the Oneida Business Committee, provided that such waiver shall be made in strict conformity with the provisions of the charter or the resolution governing the delegation, and shall be limited to the assets and property of the Tribal Entity."

¶ 35 Here, there was no evidence presented that a resolution passed authorizing a waiver of sovereign immunity in connection with the agreements at issue. Moreover, if plaintiffs knew they were dealing with an Indian tribe when they entered into the agreements, then they were "charged with knowledge that the tribe possessed sovereign immunity." *Danka Funding Co., LLC*

v. Sky City Casino, 329 N.J.Super. 357, 365 (1999). Accordingly, defendants' section 2619 motion to dismiss was properly granted.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.

Presiding Justice LIU and Justice CUNNINGHAM concurred in the judgment.

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United States District Court,
W.D. Wisconsin.

Barry DONOHOO, Plaintiff,
v.
Doug HANSON et al., Defendants.

No. 14–cv–309–wmc.
|
Signed Sept. 3, 2015.

Attorneys and Law Firms

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Andrew P. Smith, Phillips Borowski, S.C., Rhinelander, WI, for Defendants.

OPINION and ORDER

WILLIAM M. CONLEY, District Judge.

***1** This lawsuit arises out of a relatively common dispute in Wisconsin between county officials and a landowner seeking a land use permit to construct an addition to his lakefront home. The difference here being that the landowner, who was dissatisfied with the process afforded him in state court, now hopes to make a federal case out of it.

The Constitution does, of course, provide protection to property owners. However, any constitutional challenge to a local land use decision must be considered in light of the principle that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Green Valley Investments v. Winnebago Cnty., Wis.,* 794 F.3d 864 (7th Cir. July 27, 2015) (*quoting Warth v. Seldin,* 422 U.S. 490, 508 n. 18 (1975)). For this reason, property owners dissatisfied with a local land use decision generally must appeal to local land use agencies or state court for relief. "[F]ederal courts, as we have explained time and again, are not zoning boards of appeal." *Miller v. City of Monona,* 784 F.3d 1113, 1119 (7th Cir.2015) (*citing CEnergy—Glenmore Wind Farm # 1, LLC v. Town of Glenmore,* 769 F.3d 485, 487 (7th Cir.2014) (collecting cases)).

That being said, there are three constitutional protections frequently invoked by federal plaintiffs challenging land use decisions: the Fifth Amendment Takings Clause; the Fourteenth Amendment Equal Protection Clause; and the Fourteenth Amendment Due Process Clause. The Takings Clause, which applies to states via the Due Process Clause of the Fourteenth Amendment, says that private property may not be "taken for public use, without just compensation." U.S. Const. amend. V. The Due Process Clause, in turn, says that states may not "deprive any person of ... property, without due process of law." U.S. Const. amend. XIV. The Equal Protection clause prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." *Id. Pro se* plaintiff Barry Donohoo appears to invoke all three of these constitutional protections in his complaint.

Local officials in Douglas County, Wisconsin, denied Donohoo's permit request on the grounds that his proposal exceeded County zoning limitations on construction of shoreland property. Believing that the County's shoreland zoning ordinances conflicted with a recently enacted state law, Donohoo then appealed the denial of his permit to the County Board of Adjustment, and when the Board upheld the denial, he filed a petition for writ of certiorari in state circuit court. While his certiorari case was pending, however, the County amended its shoreland zoning ordinances and issued a land use permit to Donohoo. Nonetheless, he filed this federal lawsuit, contending that the initial denial of his permit request, as well as subsequent related actions taken by County officials, violated his constitutional rights.

***2** Now before the court is defendants' motion for summary judgment (dkt. # 27), as well as Donohoo's motion for leave to amend his complaint (dkt.# 61). After reviewing the parties' legal arguments, proposed findings of fact and evidence in the record, defendants' motion will be granted as a matter of law under Fed.R.Civ.P. 56(a), the undisputed facts and governing law confirming that Donohoo cannot prove any federal constitutional claim against the defendants. [1]

UNDISPUTED FACTS [2]

I. The Parties

Plaintiff Barry R. Donohoo lives on Lake of the Woods in the Town of Solon Springs, an unincorporated area in Douglas County, Wisconsin. Defendants are all county employees. Doug Hanson is the appointed Chair of the Douglas County Board of Adjustment; Roger Wilson, Dale Johnson and Larry Luostari are appointed members of the Board of Adjustment; Steven Rannenberg is the Douglas County Planning and Zoning Administrator; Carolyn Pierce is corporation counsel; and Susan T. Sandvick is the county clerk.

II. Donohoo Seeks a Building Permit to Expand His Home.

On May 25, 2015, Donohoo filed a land use permit application and mitigation plan with the Douglas County Planning and Zoning office to construct a small addition to his home.[3] Donohoo had intentionally limited his construction proposal in order to comply with the Douglas County shoreland zoning ordinances, which placed numerous restrictions on building and development located in the unincorporated shoreland areas of the County.

Shortly after filing his permit application, however, Donohoo learned that a state law, 2011 Wisconsin Act 170 ("Act 170"), had been passed on April 17, 2012, restricting local authorities from enacting shoreland zoning ordinances for "nonconforming structures" that were more restrictive than those passed by the Wisconsin Department of Natural Resources ("WDNR"). Believing that the new state law applied to his home and trumped the County's shoreland zoning ordinances, Donohoo notified the County Zoning and Planning office that he was withdrawing his permit application and mitigation plan. On May 30, 2012, he submitted a revised permit application in which he proposed a significantly greater addition to his home. In particular, he proposed to add a second story to the entire principal structure on his property, effectively increasing its area by 100%.

III. Rannenberg Denies Donohoo's Permit Request and the Board of Adjustment Rejects His Appeal.

As the County Planning and Zoning administrator, Rannenberg was responsible for reviewing and either approving or denying Donohoo's permit application. While Rannenberg was unsure how to respond given an apparent conflict between county ordinances and state law, the parties agree that at the time Donohoo filed his revised permit application, his proposal violated the existing County shoreland zoning ordinances. The ordinances limited expansion of a lakeshore home such as Donohoo's to 50% by area, as well as imposed specific mitigation requirements, unless preempted by then recently enacted Act 170, although even before its enactment, the most recent WDNR shoreland zoning regulations were less restrictive than those imposed by the County. *See* Wis. Admin. Code § NR 115. In short, at the time it was initially before him, Rannenberg was uncertain whether Donohoo's revised application violated any or all of the County's shoreland zoning ordinances, WDNR regulations or Act 170.

***3** Accordingly, Rannenberg reached out to the WDNR Shoreland Policy Coordinator, Heidi Kennedy, for guidance on how the WDNR interpreted the changes created by Act 170. *See* Rannenberg Aff., dkt. # 36, Exhs. E, G. Kennedy responded that WDNR legal counsel had opined that, although Act 170 no longer permitted Douglas County to have more restrictive shoreland zoning ordinances than those contained in WDNR regulations, Douglas County's limitation on area expansion was not prohibited by Act 170 and the County could maintain its requirement for a mitigation plan. Rannenberg subsequently denied Donohoo's land use permit application on the grounds that it did not comply with the County's shoreland zoning ordinance. *See* Rannenberg Aff., dkt. # 36, Exh. F (June 7, 2012 letter to Donohoo explaining reasons for permit denial).

On June 22, 2012, Donohoo appealed the denial to the Douglas County Board of Adjustment. The Board addressed Donohoo's appeal at a hearing on July 25, 2012. At the hearing, Rannenberg testified that he rejected Donohoo's permit because it was contrary to County shoreland zoning ordinances and that, based on Rannenberg's communications with WDNR, he did not believe that Act 170 trumped those ordinances. Donohoo then argued that Act 170 trumped the County's shoreland zoning ordinance.'[4] After hearing from Donohoo, the Board members asked questions of both Rannenberg and Donohoo. Ultimately, the Board upheld the denial of Donohoo's permit application.

IV. Donohoo Files a Petition for a Writ of Certiorari in State Court, Douglas County Amends Its Zoning Ordinances, and Donohoo Receives a Permit.

On August 24, 2012, Donohoo brought a certiorari action in Douglas County Circuit Court challenging the Board's decision to uphold the denial of his permit application. *Donohoo v. Douglas County Board of Adjustment,* 2012CV306 (Dougl.Cnty.Cir.Ct.). As the Douglas County clerk, Sandvick was responsible for submitting the record of the Board's decision to the circuit court for review. For reasons that are unclear from the record, Sandvick did not submit the record of the Board's decision to the circuit court until March 7, 2013. *See* Sandvick Dep. at 14–15, Dkt. # 43. That record consisted of the minutes, exhibits and agenda of the July 25 meeting. Additionally, although the Board's July 25 hearing had been recorded, Sandvick did not submit the audio recording to the circuit court on the ground that it had been compromised by a technical failure. [5]

On December 20, 2012, before the circuit court had addressed the merits of Donohoo's certiorari petition, the County amended its shoreland zoning ordinances to conform with Act 170 and WDNR's regulations. The following day, on December 21, Rannenberg notified Donohoo that, under the newly enacted ordinances, Rannenberg could issue Donohoo's requested land use permit, subject to approval of a mitigation plan by the County Land and Water Conservation Department and payment of a $250 fee in conjunction with the mitigation plan. Although it is not entirely clear from the record, disagreements about mitigation requirements seem to have further stalled the issuance of Donohoo's land use permit for several more months. The permit was, however, finally issued on May 31, 2013. [6]

***4** Neither side explains what happened with Donohoo's certiorari action between the time it was filed and the time Donohoo received his permit, but Wisconsin's online court records indicate that Donohoo's certiorari action was ultimately dismissed on January 23, 2014. Perhaps because Donohoo had received a permit from the County before the state circuit court was ready to issue a decision, it also appears that the merits of Donohoo's petition were never decided. The court did, however, issue a decision denying Donohoo's request for fees under Wis. Stat. § 59.694(14), concluding that Donohoo could only obtain fees by proving that the Board acted in "bad faith." Dkt. # 56 (circuit court decision on fees). The court further found that there was no evidence that the Board acted with "gross negligence, in bad faith or with malice" in denying Donohoo's administrative appeal. *Id.* Instead, the court held that although the record showed that the Board may have "misinterpreted the newly enacted state law when it relied upon the advice of its Zoning Administrator and the DNR," the Board did not act in bad faith. *Id.*

Donohoo did not appeal the circuit court's decision, nor did he file any further lawsuits in state court challenging the land use permit he eventually received.

V. Permits Issued to Other Landowners.

After the December 20, 2012, amendments to the Douglas County Zoning Code, two other landowners with property located on Lake of the Woods sought land use permits proposing vertical expansion of structures, similar to the project proposed by Donohoo. In both instances, mitigation plans were required of and implemented by the property owners. *See* Rannenberg Aff., dkt. # 36, at 111154–55.

OPINION

Donohoo alleges in his complaint that his constitutional rights to due process, equal protection and the use and enjoyment of his property were violated when: (a) Rannenberg denied his land use permit in June of 2012; (b) the Board upheld denial of the permit at the hearing on July 25, 2012; (c) the County failed to promptly provide the full record to the circuit court in response to his certiorari action; and (d) the County conditioned his eventual permit on mitigation requirements that were contrary to 2011 Wisconsin Act 170 and more onerous than those imposed on other landowners. Defendants have moved for summary judgment on all of Donohoo's claims, contending that none of the actions about which he complains amount to denial of a constitutional right. Because Donohoo has failed to make a viable legal argument or point the court to legitimate material factual disputes in this record, defendants' motion will be granted in its entirety.

I. Preliminary Matters

At the outset, it is worth noting that Donohoo's brief in opposition to defendants' motion (dkt.# 54), fails to

provide any meaningful response to the legal arguments defendants raised in their brief in support of summary judgment. To the contrary, his entire brief is less than four pages long and contains no discussion of the law applicable to his claims. Further, although he contends that there are factual disputes, he makes no attempt to explain how those purported disputes are *relevant* to any of the constitutional claims he has raised. Indeed, Donohoo fails to address the elements of his constitutional claims at all.

***5** Generally, the failure to provide any meaningfully opposition to an argument operates as waiver. *Wojitas v. Capital Guardian Trust Co.,* 477 F.3d 924, 926 (7th Cir.2014); *Cincinnati Insurance Co. v. Eastern Atlantic Insurance Co.,* 260 F.3d 742, 747 (7th Cir.2001). Moreover, although Donohoo is entitled to some leeway as a *pro se* litigant, he has demonstrated throughout this case that he is a capable litigator. He ably deposed several of the defendants, filed coherent responses to defendants' proposed findings of fact, and submitted numerous documents and other evidence. Donohoo also appears to have had the advice and assistance of his father, who is an attorney, throughout this litigation.

In light of all this, the most reasonable explanation for Donohoo's failure to respond to defendants' legal arguments is that he could find no legal authority that would support any counter-arguments. Indeed, although defendants' motion for summary judgment could be granted based solely on Donohoo's failure to respond to any of defendants' legal arguments, the court will briefly address the merits of his constitutional claims if for no other reason than to attempt to demonstrate to Donohoo's satisfaction that his claims are foreclosed by well-established law, fully realizing that this may prove a fool's errand.

II. Takings Claim.

The Takings Clause generally entitles a landowner to just compensation if a state or one of its subdivisions "takes" the owner's land, although a regulation (such as a zoning ordinance) or a land use decision (such as rejection of a building permit) that prevents the owner from deriving *any* economic value from the land is actionable as a taking. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). Accordingly, Donohoo cannot prove that any decisions by the Douglas County defendants amounted to a taking of his property. Certainly, Donohoo does not claim that the County actually took land from him, and a regulatory taking occurs only where "the challenged government action deprive[s] a landowner of all or substantially all practical uses of the property." *Bettendorf v. St. Croix Cnty.,* 631 F.3d 421, 424 (7th Cir.2011) (citation omitted). Since the record facts show that Donohoo has maintained a house on his property for years, he has not been deprived of "all or substantially all practical uses of the property."

Even if Donohoo could show that a "taking" had occurred as a result of the denial of his initial permit request or the restrictions placed on the permit, he could not maintain a takings claim. The right protected by the Takings Clause is merely to the market value of what was taken. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 190 n. 11, 194–95 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation."). This means Donohoo cannot bring a claim that his constitutional right to compensation has been denied until he exhausts his remedies for obtaining a compensation award or equivalent relief from the County. *Id.* ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). Until then, he cannot know whether he has suffered the type of harm for which the Takings Clause affords a remedy. *Flying J Inc. v. City of New Haven,* 549 F.3d 538, 543 (7th Cir.2008).

***6** Because Donohoo failed to pursue available state remedies, he cannot bring a takings claim in federal court. Donohoo sought judicial review of the decision by the Board of Adjustment, but he failed to appeal the circuit court's decision dismissing his certiorari action. Additionally, Donohoo could have brought a suit for inverse condemnation under Wisconsin statutory law or the state Constitution. *See* Wis. Stat. § 32.10; Wis. Const. art. I, § 13. Accordingly, his takings claim is not ripe and must be dismissed. *See Forseth v. Vill. of Sussex,* 199 F.3d 363, 373 (7th Cir.2000) (dismissing takings claim for plaintiff's failure to exhaust state court remedies); *River Park, Inc. v. City of Highland Park,* 23 F .3d 164, 165 (7th Cir.1994) ("Litigants who neglect or disdain their state remedies are out of court, period.").

III. Equal Protection Claim.

Donohoo next claims that the defendants' actions violated his equal protection rights. There are some limited situations in which a property owner may be able to raise a successful equal protection challenge to a local land use decision. *See, e.g., City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 448–50 (1985) (requirement that group home for persons with disabilities obtain a special permit violated equal protection clause). However, the Seventh Circuit has cautioned plaintiffs that they cannot dodge the exhaustion requirement of *Williamson County* by recasting a takings claim as a claim under the Equal Protection Clause. *Muscarello v. Ogle Cnty. Bd. of Comm'rs,* 610 F.3d 416, 423 (7th Cir.2010) ("Any equal protection claim based on a taking would be unripe and subject to all of the objections that we have just reviewed in connection with the takings claim."); *Patel v. City of Chicago,* 383 F.3d 569, 573–74 (7th Cir.2004) ("The Plaintiffs insist that [the *Williamson County* ripeness requirements] do not [apply] because theirs is an equal protection claim, not a takings claim .... [but] we conclude that the Plaintiffs' have merely re-labeled their takings claim as an equal protection claim, presumably to avoid *Williamson County's* ripeness requirement."); River Park, 23 F.3d at 167 ("Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court.").

Here, Donohoo's equal protection claim is essentially based on the same facts as his takings claim: he contends that defendants' improper denial of his land use permit deprived him of the use and enjoyment of his property and caused him to incur monetary damage. To the extent his equal protection claim is actually a takings claim, the claim is, therefore, barred for his failure to seek relief in state court.

Even assuming Donohoo *meant* to plead an equal protection claim that is factually distinct from a takings theory, his claim fails on the merits. His equal protection claim is not based on an allegation that defendants discriminated against him because of his race, religion or any other protected characteristic. Rather, Donohoo seems to be alleging a "class-of-one" equal protection claim, based on his allegations that defendants rejected his permit and later imposed unreasonable or unlawful mitigation requirements simply because they did not like him or his construction proposal. However, "unless the plaintiff is able to show that there was no rational basis for the officials' actions," a land-use decision does not support a class-of-one claim. *Miller,* 784 F.3d at 1120 (citation omitted). *See also Patel,* 383 F.3d at 573 ("Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives.' ") (citation omitted). "Normally, a class-of-one plaintiff will show an absence of rational basis by identifying some comparator—that is, some similarly situated person who was treated differently." *Miller,* 784 F.3d at 1120 (citation omitted). To be similarly situated, a comparator must be " 'identical or directly comparable' " to the plaintiff " 'in all material respects.' " *Id.* (citation omitted).

***7** Here, Donohoo has identified no suitable comparator. He asserts vaguely in his brief that the County failed to "furnish on a timely basis a land use permit to [him] despite furnishing similar land use permits to others," but he does not expand upon this argument by identifying who those "others" are. Nor does he point to any specific facts about the approval of permits for these "others." Plt.s' Br., dkt. # 54, at 2. [7]

In fairness, the lack of a comparator does not necessarily doom Donohoo's claim. *See Thayer v. Chiczewski,* 705 F.3d 237, 254 (7th Cir.2012); *Del Marcelle v. Brown County Corp.,* 680 F.3d 887, 913 (7th Cir.2012). A plaintiff need not identify a similarly situated person to prove a class-of-one claim if the plaintiff can "exclude rational explanations for why local officials targeted them." *Miller,* 784 F.3d at 1120 (citing *Geinosky v. City of Chicago,* 675 F.3d 743, 748 n. 3 (7th Cir.2012); *Swanson v. City of Chetek,* 719 F.3d 780, 785 (7th Cir.2013)).

For example, in *Geinosky,* the plaintiff was allowed to proceed on a class-of-one claim against officers from a single police unit who issued 24 bogus tickets to him in the course of 14 months. *Geinosky,* 675 F.3d at 745–48. The Seventh Circuit reasoned that the "extraordinary pattern of baseless tickets" amounted to a plausible class-of-one claim, particularly since "[r]eason and common sense provide no answer to why he was targeted that could be considered a legitimate exercise of police discretion." *Id.* at 748.

Similarly, in *Swanson,* the Seventh Circuit reversed the grant of summary judgment against plaintiffs whose neighbor, the local mayor, apparently engaged in

prolonged harassment against them after they tried to build a fence between their property and his. *Swanson,* 719 F.3d at 784–85. The mayor's actions—which included entering the plaintiffs' home without permission, abusing his position to delay issuance of a fence permit, shouting at them during a meeting about the permit, telling the plaintiffs' contractors that they were drug dealers and unlikely to pay, and causing the initiation of baseless prosecution in municipal court—appeared "illegitimate on their face" and "demonstrate[d] overt hostility." *Id.* at 782, 785.

Obviously, Donohoo's situation is readily distinguishable from the outrageous conduct considered in *Geinosky* and *Swanson.* The undisputed facts of record reveal a rational basis for Rannenberg's and the Board's denial of Donohoo's initial permit request. At the time Donohoo filed his initial permit application, the law regarding shoreland zoning was in flux. After contacting WDNR officials for guidance, Rannenberg had reason to believe that certain Douglas County shoreland zoning ordinances continued to apply and the Board in turn had reason to accept his explanation. Moreover, the day after the County ordinances were amended, Rannenberg contacted Donohoo regarding his permit application. Whether or not Rannenberg and the Board interpreted the law correctly, their decisions to deny his permit were not irrational and do not permit any inference of vindictiveness or hostility toward Donohoo. Nor has Donohoo shown that any other actions by Rannenberg or the Board were irrational. *Cf. Indiana Land Co., LLC v. City of Greenwood,* 378 F.3d 705, 712 (7th Cir.2004) (no inference of vindictiveness when council member "dredg [ed] up what may have been the largely forgotten or ignored two-thirds ordinance" that resulted in denial of the plaintiff's permit request). Accordingly, Donohoo has not shown that defendants violated his right to equal protection.

III. Due Process Claim.

***8** This leaves Donohoo's due process claim. All too often due process is invoked because a party feels wronged, rather than because they have been denied due process. This is just such a claim. The Due Process Clause prohibits the government from depriving any person of his or her property "without due process of law." This phrase has been interpreted to mean both that persons are entitled to process before their property is taken (procedural due process) and that they are free from arbitrary and capricious governmental actions (substantive due process). *Bettendorf,* 631 F.3d at 426; *Hudson v. Palmer,* 468 U.S. 517, 539 (1984).

The nature of Donohoo's due process claim is not entirely clear from either his complaint or the materials he filed in opposition to defendants' motion for summary judgment. If his due process claim is based on a takings theory—i.e., that the County's land use restrictions or permit decisions deprived him of use and enjoyment of his property—it must be dismissed for his failure to seek recourse in state court. *See CEnergy–Glenmore,* 769 F.3d at 489 ("[R]egardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court."); *Greenfield Mills, Inc. v. Macklin,* 361 F .3d 934, 961–62 (7th Cir.2004) (when a plaintiff's claim of violation of due process asks a federal court to review the same conduct that resulted in an alleged taking, the "exhaustion requirement applies with full force").

To the extent Donohoo is raising a due process claim distinct from a takings theory, he would first have to show that he was deprived of a "protectable property interest." *Muscarello,* 610 F.3d at 423. Assuming, without deciding, that Donohoo's requested use permit constituted a property interest that implicated due process, the next question is whether Donohoo has shown that he was deprived of that interest without the due process required by the Constitution.

With respect to procedural due process, "the process due in a zoning case is minimal and normally must be pursued in state courts." *Id. See also River Park,* 23 F.3d at 167 ("scant process is all that is 'due' in zoning cases"). For example, there is "no obligation to provide hearings" in a zoning case. *River Park,* 23 F.3d at 167. "[S]o far as the Constitution is concerned, state and local governments are not required to respect property owners' rights.... State and local governments may regulate and even take property," so long as they provide just compensation for taken property. *Id.* Thus, so long as there are adequate local or state means for obtaining review of a zoning decision, procedural due process is satisfied. *Id.*

Here, Donohoo received an abundance of process beyond what he was "due," beginning with a hearing before the Board of Adjustment. He also exercised his right

to certiorari review in state court. Moreover, he could have appealed the state court decision dismissing the certiorari action and chose not to do so. After he received his permit in May of 2013, he also could have filed a state certiorari action or an inverse condemnation action challenging the conditions of his permit, but again chose not to. Additionally, if Donohoo believed that the Board or the defendants failed to follow any local or state rules, or failed to properly respond to the state certiorari action, Donohoo's recourse was to seek relief in state court. *Id.* ("the only procedural rules at stake [in zoning cases] are those local law provides, and these rules must be vindicated in local courts"). In sum, the numerous means by which Donohoo could have sought, and did seek, review of defendants' actions more than satisfy the constitutional requirements of procedural due process.

***9** To prevail on a claim that defendants deprived him of substantive due process, Donohoo's burden is even greater, requiring a showing that defendants' actions were "arbitrary and capricious," "random and irrational" and "shocked the conscience." *CEnergy–Glenmore,* 769 F.3d at 488. Additionally, this circuit has emphasized that in order to state a substantive due process claim, a plaintiff must also allege that some other substantive constitutional right has been violated or that state remedies are inadequate. *Id.* at 489. Although a local land-use decision could "theoretically" violate this high standard, neither the Supreme Court nor the Seventh Circuit have ever "definitively concluded that any land-use decision actually amounted to a deprivation of property without substantive due process." *Id.* at 488.

Obviously, Donohoo does not come close to meeting this high standard. Donohoo has not identified any substantive constitutional right that defendants violated. The focus of his claim actually seems to be that defendants failed to apply the new state law, Act 170, despite knowing that it trumped local shoreland zoning ordinances. Plt.s' Br., dkt. # 54, at 2. Even assuming that Rannenberg and the Board violated state law by rejecting his initial permit request, however, "an error of state law is not a violation of due process." *Indiana Land Co., LLC v. City of Greenwoo* d, 378 F.3d 705, 711 (7th Cir.2004). Nor would a failure to apply this new state law implicate any other substantive constitutional right.

Donohoo also does not allege that state law remedies are inadequate. Moreover, such an allegation would be groundless. In this very case, Donohoo pursued a certiorari action. He subsequently obtained a land use permit. Although the state court rejected Donohoo's request for fees, Donohoo did not avail himself of his right to appeal. He also did not challenge the terms of the permit he received in state court. Under these circumstances, Donohoo could not establish that the state remedial scheme was inadequate. *CEnergy–Glenmore,* 769 F.3d at 489 (affirming dismissal of due process claim where plaintiff "had options under state law for obtaining the building permits that it did not use").

Finally, Donohoo identifies no actions by Rannenberg or the Board that would constitute "arbitrary and capricious" or "random and irrational" decisions. Their decisions were made in the context of confusion regarding a newly enacted state law and after consultation with WDNR officials. Within a few months, the County amended its shoreland zoning ordinances and took the initiative to contact Donohoo personally about his requested permit. No reasonable jury could conclude that these actions "shocked the conscience." Accordingly, defendants are entitled to summary judgment on Donohoo's due process claim as well.

ORDER

IT IS ORDERED that:

(1) Plaintiff Barry R. Donohoo's Motion for Leave to Amend Complaint, dkt. # 61, is DENIED.

***10** (2) The Motion for Summary Judgment, dkt. # 27, filed by defendants Doug Hanson, Roger Wilson, Dale Johnson, Larry Luostari, Steven Rannenberg, Carolyn Pierce and Susan T. Sandvick is GRANTED.

(3) The clerk of court is directed to enter judgment for defendants and close this case.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5177968

Footnotes

1 Donohoo's request for leave to amend his complaint to add additional factual allegations and legal assertions will be denied as futile. (Dkt. # 61 at 1 (plaintiff explaining that his proposed amended complaint "maintains the counts and allegations against the same defendants from the original complaint," but merely adds additional facts learned during discovery to further support his claims).) At this stage, the additional allegations in the proposed pleading will not help Donohoo. In order to survive summary judgment, Donohoo was required to come forward with evidence sufficient to prove each element of his claims-the so-called "put up or shut up" stage in a lawsuit. *Olendzki v. Rossi,* 765 F.3d 742, 749 (7th Cir.2014). Donohoo failed to do so.

2 The court finds the following facts material and undisputed unless otherwise noted. The facts are drawn from the defendants' proposed findings of fact, as well as Donohoo's evidentiary submissions and responses to defendants' proposed findings.

3 Property within the Town of Solon Springs is subject to Douglas County's zoning ordinances.

4 The parties dispute the extent to which Donohoo was allowed to present evidence and argument at the hearing. Defendants say that Donohoo had the opportunity to present his arguments as to why Act 170 required the Board to grant his permit, while Donohoo says that the Board refused to allow him to present some evidentiary exhibits and refused to allow his father, who is an attorney, to present his interpretation of the relevant law. These disputes are immaterial for the purposes of summary judgment because, even under Donohoo's version of events, he has not shown that his constitutional rights were violated even if his right to speak was somewhat truncated. *See* discussion on page 16–18, *infra.*

5 The parties dispute the extent to which the audio recording was actually compromised or whether the County made sufficient effort to repair it. This dispute is also ultimately irrelevant for purposes of summary judgment. As discussed on page 17, *infra,* any complaint plaintiff had regarding the adequacy of defendants' production or their responsiveness to the certiorari action could and should have been raised in that action. Defendants' alleged failure to properly respond to an order from the state court does not provide the basis for a federal constitutional claim.

6 Even after the permit was issued, Donohoo apparently continued to object to conditions imposed on his project. At some point in September or October 2013, Rannenberg gave Donohoo a copy of the permit without any conditions included, although Rannenberg insists that he simply made a copy of the original permit with the conditions covered in order to placate Donohoo, even though both he and Donohoo understood that the original permit imposed various mitigation requirements. *See* Rannenberg Aff., dkt. # 36, ¶ 53. Donohoo maintains that Rannenberg's action was intended to and did confuse him, causing him to believe that all of the conditions had been removed from his permit. *See* Donohoo Aff., dkt. # 59, at ¶ 10. the basis for a federal constitutional claim.

7 Donohoo might be referring to two land use permits issued by the County in 2013 and 2014 for construction to homes located on Lake of the Woods. He submitted with his summary judgment materials copies of two permits: (1) a June 11, 2013 permit issued to "Ruth Erdmann–Sluka" granting permission to construct a basement under her existing home, (dkt.# 57); and (2) an October 16, 2014 permit issued to Michael J. and Darla Higgins, granting permission to construct a second-story on their home, (dkt.# 58). But Donohoo does not explain why these permit-seekers should be considered to be "similarly-situated" to him. On the contrary, even on the face of these permits, these landowners obviously received land use permits *after* the County had already amended its shoreland zoning ordinances in December of2012 and *after* Rannenberg told Donohoo that his own permit application would be approved, subject to an acceptable mitigation plan. And even if these permit holders were similarly situated to Donohoo, he has not explained why he believes they were treated more favorably than he was. Indeed, their permits show that they, like Donohoo, were required to submit mitigation plans.

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2016 WL 6393498
Only the Westlaw citation is currently available.
This case was not selected for
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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 7th Cir. Rule 32.1.
United States Court of Appeals,
Seventh Circuit.

Barry Donohoo, Plaintiff–Appellant,
v.
Douglas Hanson, et al., Defendants–Appellees.

No. 16-2405
|
Submitted October 27, 2016 *
|
Decided October 28, 2016

Appeal from the United States District Court for the Western District of Wisconsin. No. 14–cv–309–wmc

Attorneys and Law Firms

Barry R. Donohoo, Pro Se

Andrew P. Smith, Attorney, Phillips Borowski, S.C., Rhinelander, WI, for Defendants–Appellees

Before WILLIAM J. BAUER, Circuit Judge FRANK H. EASTERBROOK, Circuit Judge MICHAEL S. KANNE, Circuit Judge

ORDER

William M. Conley, Chief Judge.

***1** Barry Donohoo appeals the grant of summary judgment against his claim that local officials in Douglas County, Wisconsin, violated his constitutional rights when they denied him a land-use permit. The district court concluded that this was a matter for local land-use agencies or the state court, and that Donahoo failed to offer proof that any of his constitutional rights had been violated. We affirm.

Donohoo filed a land-use permit and mitigation plan with the Douglas County zoning office to build a small addition to his home. He then learned that a new state law, 2011 Wisconsin Act 170, had been passed, prohibiting local authorities from enacting shoreland zoning restrictions that were more onerous than those passed by the state. Believing that the new law applied to his construction project, Donohoo withdrew his plans. He submitted a revised permit application and mitigation plan proposing a second-story addition to his home. Donohoo's permit application eventually reached Steven Rannenberg, Douglas County's zoning administrator, who denied it. He explained that Act 170 did not prohibit Douglas County's zoning restrictions and allowed the county to maintain its mitigation-plan requirement.

A few weeks later, Donohoo appealed the denial to the County Board of Adjustment. After a hearing at which both Rannenberg and Donohoo testified, the Board upheld the denial. Donohoo then challenged the denial through a certiorari action he filed in Douglas County Circuit Court. For unclear reasons, the county clerk failed to send the hearing record for more than 6 months.

Before the circuit court addressed the merits of Donohoo's petition, the county amended its shoreland zoning ordinances to conform to the state's requirements. Rannenberg notified Donohoo that the newly enacted ordinances allowed him to issue a land-use permit, pending the county's approval of a mitigation plan and payment of a $250 processing fee. Five months later, Donohoo received his permit.

The Douglas County Circuit Court eventually dismissed Donohoo's certiorari action and he filed this suit in federal court. He alleged that the county officials violated his rights under the Fifth Amendment's Takings Clause, the Fourteenth Amendment's Equal Protection Clause, and the Fourteenth Amendment's Due Process Clause when (1) Rannenberg denied his land-use permit, (2) the Board upheld that denial, (3) the county clerk failed to timely send the full record of the Board's decision to the county circuit court in response to his certiorari action, and (4) the county conditioned his permit on mitigation requirements that were contrary to Act 170 and stricter than those imposed on other landowners.

The district court granted the defendants' motion for summary judgment, concluding that Donohoo failed

to make any meaningful legal argument or identify any material factual dispute in the record. The court determined that the claim under the Takings Clause failed because Donohoo provided no evidence that Douglas County deprived him of property or the practical uses of the property. And even if there were a taking, the court added, Donohoo could not bring a federal claim because he had not pursued state remedies. As for his equal protection claim, the court determined that he failed to show that Douglas County's actions lacked a rational basis or that the county treated any similarly situated individual more favorably. Finally, his due process claim failed because local zoning decisions require only minimal process, which he received.

***2** Donohoo then filed a postjudgment motion, *see* Fed. R. Civ. P. 59(e), arguing in part that the district court made a manifest error of law by framing his dispute as one about zoning rather than due process. The court denied the motion, quoting our admonition that "regardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court." *CEnergy–Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 487 (7th Cir. 2014).

On appeal Donohoo has submitted a brief that essentially reproduces the postjudgment motion that he filed in the district court. But he has failed to develop any argument that would provide a basis to disturb the judgment. *See* FED. R. APP. P. 28(a)(8). We have reviewed the record and considered all of Donohoo's arguments, and we AFFIRM for substantially the same reasons stated by the district court.

All Citations

--- Fed.Appx. ----, 2016 WL 6393498 (Mem)

Footnotes

* We have unanimously agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).