IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

WD AT THE CANYON, LLC, et al., *Plaintiffs/Appellants*,

v.

WAYLON HONGA, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0468
FILED 11-14-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-094807
The Honorable David King Udall, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 WD at the Canyon, LLC and James R. Brown (collectively "WD") appeal the superior court's dismissal of its lawsuit against defendants Waylon and Charlotte Honga, Charles and Artemisa Vaughn, Carrie Imus, Daniel Alvardo, Neil and Mary Ann Goodell, Derrick and Jennifer Penney, Camille Nighthorse, Michael Vaughn, Wilfred Whatoname, Sr., and Jennifer Turner (collectively "Tribal Defendants"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2005, WD entered into an agreement with Hwal'Bay Ba:j Enterprises, Inc. doing business as Grand Canyon Resort Corporation ("GCRC"), an entity of the Hualapai Tribe, for the development of a western-themed tourist attraction ("Western Town"). After WD completed construction of Western Town on the Hualapai reservation, GCRC inspected and accepted the finished product. Under the agreement's terms, Brown had the right to manage Western Town and collect management fees.

¶3 A year later, WD and GCRC entered into another agreement for WD to build cabins near Western Town. WD subsequently constructed 26 cabins. Together Western Town and the cabins make up the "Hualapai Ranch," and under the two agreements, Brown managed the Hualapai Ranch.

¶4 In 2010, the then-interim CEO of GCRC and Brown entered into a new agreement that combined the two previous agreements. The 2010 agreement superseded the two prior agreements and constituted the entire agreement between GCRC and WD. One provision in the 2010 agreement provided that the Hualapai Tribe would be the exclusive venue and jurisdiction for any litigation under the agreement and all other civil or criminal matters arising out of the services provided.

¶5 Over the next two years, while defendant Honga was GCRC's CEO, WD's relationship with GCRC began to deteriorate. In September 2012, a horse on the Hualapai Ranch with hip issues had to be put down. After consulting a veterinarian and horse chiropractor, WD elected to have the Hualapai Police Department euthanize the horse. Although the Haulapai Police Department reported that it had euthanized the horse after WD consulted a veterinarian, GCRC investigated whether WD followed proper procedures in euthanizing the horse and whether the horse had been abused.

¶6 During this time, defendant Turner became GCRC's CEO. At a December 2012 meeting, on GCRC's behalf, Turner provided WD with a notice of events of default and termination letter. The letter stated that WD had breached certain requirements in the 2010 agreement and provided instructions on how to cure the breach within a 30-day deadline. According to the letter, a barn on Hualapai Ranch had to be condemned because it had deteriorated and other buildings did not meet the requirements set forth in the 2010 agreement. WD disagreed that it had defaulted or had breached any provision in the 2010 agreement and attempted to meet with GCRC board members to discuss how to move forward. Turner and the GCRC board did not meet with or respond to WD until after the 30-day cure period had ended. Because WD had not cured the events of default within the 30 days provided, GCRC terminated the 2010 agreement in February 2013.

¶7 In March 2013, an Arizona Republic article on the Tribe's dealings with outside investors quoted defendant Charles Vaughn, a Tribal Council member, as saying that "outside investors violated legal agreements, and the Indian nation has an absolute right to determine what happens on the reservation." Vaughn did not specifically make any comments about WD.

¶8 In January 2014, WD sued GCRC in the Hualapai Tribal Court for breach of contract arising from GCRC's termination of the 2010 agreement. Four months later, WD amended its complaint to add several tort claims against the Tribal Defendants, minus defendants Honga and Charles Vaughn. The Tribal Defendants moved to dismiss for lack of subject matter jurisdiction, which the tribal court granted in August 2015. The tribal court found that it lacked subject matter jurisdiction because GCRC and the individual Tribal Defendants had sovereign immunity from suit and that they had not waived that immunity. WD appealed the tribal court's order to the Hualapai Nation Court of Appeals.

¶9 In November 2015, while its appeal in the tribal court was pending, WD initiated this suit against the Tribal Defendants in Maricopa County Superior Court. WD alleged two counts of fraud and misrepresentation against each of the individual defendants. One count pertained to GCRC's investigation after WD decided to euthanize the Hualapai Ranch horse, and the other pertained to GCRC's notice of events of default letter sent to WD. Additionally, WD alleged that all the defendants, in their individual capacities and not as representatives of GCRC or the Hualapai Tribe, had conspired to fraudulently convince GCRC's board to terminate the 2010 agreement, and engaged in a pattern of unlawful activity under A.R.S. § 13–2314.04.

¶10 Turner answered WD's complaint and denied that jurisdiction and venue were appropriate in the superior court. Shortly thereafter, the other Tribal Defendants moved to dismiss pursuant to Arizona Rules of Civil Procedure 12(b)(1), (2), and (6) on a variety of alternative grounds, including: (1) tribal sovereignty, (2) tribal sovereign immunity, (3) Hualapai tribal law's one-year statute of limitations, (4) the 2010 agreement's provision that the tribal court had exclusive jurisdiction, (5) doctrine of exhaustion due to WD's pending appeal in the Hualapai Nation Court of Appeals, and (6) WD's failure to state claims upon which relief could be granted. With their motion to dismiss, the Tribal Defendants included a declaration from Tribal Defendant Carrie Imus. Imus's declaration stated that each Tribal Defendant acted within the scope of his or her official tribal positions and that the decision to cancel the 2010 agreement was a corporate decision of GCRC's board made after WD breached the agreement. Turner subsequently moved to join the motion to dismiss.

¶11 In June 2016, the superior court held oral argument on the motion to dismiss. The superior court found that the Tribal Defendants were either GCRC board members, GCRC executives, or Hualapai Tribal council members and "permitting this case to be heard in this Court would contravene the tribal sovereignty of the Hualapai Tribe." The court further found that the Hualapai Tribe had clear jurisdiction over WD's claim and "any action by this Court would interfere and infringe upon the Tribe's sovereignty and ability to self-govern." Accordingly, the court granted Turner's motion to join and the Tribal Defendant's motion to dismiss. WD timely appealed. During the time this appeal was pending, the Hualapai Nation Court of Appeals issued its decision affirming the tribal court's ruling that the individual tribal defendants had sovereign immunity from suit.

DISCUSSION

1. Motion to Dismiss

¶12 WD argues that the superior court erred by granting the Tribal Defendant's motion to dismiss. We review a motion to dismiss for an abuse of discretion, *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 107 ¶ 11 (App. 2007), but the superior court's decision to dismiss for lack of subject matter jurisdiction is reviewed de novo, *Gnatkiv v. Machkur*, 239 Ariz. 486, 487 ¶ 8 (App. 2016). In resolving jurisdictional fact issues, the superior court may properly consider affidavits and exhibits without converting a motion to dismiss for lack of jurisdiction into one for summary judgment. *Swichtenberg v. Brimer*, 171 Ariz. 77, 82 (App. 1991). When that occurs, we view the evidence in the light most favorable to upholding the court's ruling and may infer any necessary findings the evidence reasonably supports. *Id.* Because extending state jurisdiction here would infringe on the Tribe's sovereignty and ability to self-govern, the superior court did not err by granting the motion to dismiss.

¶13 Native American tribes have long been considered sovereign nations and have the right to govern themselves: "In recognition of their sovereignty, '[t]he [United States] Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation.'" *Begay v. Roberts*, 167 Ariz. 375, 378 (App. 1990) (quoting *Smith Plumbing Co. v. Aetna Cas. & Sur. Co.*, 149 Ariz. 524, 529 (1986)). Absent governing acts of Congress, the question whether states have subject matter jurisdiction depends on whether the state action "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171–72 (1973). When "the activity in question moves off the reservation[,] the State's governmental and regulatory interest increases dramatically, and federal protectiveness of Indian sovereignty lessens." *Smith Plumbing Co.*, 149 Ariz. at 530. As such, determining the limits of state power regarding tribal sovereignty turns on whether state court jurisdiction will "frustrate federal policy or violate traditional notions of tribal sovereignty." *Id.* at 529.

¶14 Here, the superior court correctly found that tribal sovereignty would be infringed if the state accepted jurisdiction. WD's claims are against individual tribal defendants who acted in their official capacity as either GCRC board members, executives, or Tribal council members. Additionally, the two activities that gave rise to the alleged fraud

and misrepresentations occurred solely on the Hualapai reservation. The first activity, the horse incident, makes up half the counts against each individual tribal defendant. The horse was on the Hualapai Ranch when its hip became dislocated and WD decided to euthanize it. Further, a Hualapai police officer reported to the scene to euthanize the horse. GCRC's decision to conduct its own investigation into the matter and create its own report further supports that this activity occurred exclusively on the Hualapai reservation.

¶15 The second activity the other fraud and misrepresentation counts stem from is the alleged acts of default stated in the letter. In December 2012, GCRC provided WD with a notice of events of default letter, which outlined all WD's alleged breaches. The letter went into detail about several buildings and areas on the Hualapai Ranch that GCRC believed had to be repaired or condemned due to WD's failure to service them. This alleged fraudulent act of condemning buildings and falsely reporting other breaches all occurred on the Hualapai reservation.

¶16 WD counters that the acts of fraud and misrepresentation were not solely located within the reservation and were not necessarily carried out on the tribe's behalf. To support this contention, WD points to the article in The Arizona Republic in which Charles Vaughn was quoted. WD contends that because Vaughn stated that "outside investors" breached their agreements with GCRC, and because the article can be viewed and read outside the reservation, the state court has an interest in exercising its jurisdiction over the claims. But Vaughn's interview with a statewide newspaper did not transform the events discussed in the interview into off-reservation activities. Vaughn's interview thus did not increase the state's governmental and regulatory interest such that a state court would be warranted in accepting jurisdiction to address claims relating to conduct that occurred on the reservation and that was directly related to a contractual agreement relating to on-reservation activities.

¶17 In this factual scenario, WD's arguments are without merit. Although WD is correct that the United States Supreme Court has limited a broad view of tribal sovereignty, *see New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983), any state jurisdiction here would surely infringe on the Hualapai Tribe's right to self-governance. Even in cases in which a state may properly exercise jurisdiction over the tribal members' on-reservation activities, the land where the activities occurred was taken into consideration. *See id.* at 332 n.15 (finding that *Puyallup Tribe Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), and *Montana v. United States*, 450 U.S. 544 (1981), "rested in part on the fact that the dispute

centered on lands which, although located within the reservation boundaries, no longer belonged to the tribe."). The activities here all occurred on the Hualapai reservation and involved Hualapai Tribe officials. Thus, the superior court properly dismissed WD's claims based on lack of subject matter jurisdiction and we need not address the alternative reasons for dismissal.

2. Dismissal with Prejudice

¶18 WD argues that even if the superior court did not err by dismissing its complaint, the dismissal should have been without prejudice. WD contends that because the superior court dismissed its complaint with prejudice, "it has effectively taken upon itself to override the Hualapai Tribe Court of Appeals' opportunity to exercise tribal sovereignty and resolve the pending tribal court appeal by issuing a final judgment on the merits that could in turn foreclose further review by a tribal court." But the Hualapai Nation Court of Appeals already issued its opinion in September 2016, affirming the tribal court's ruling that the individual tribal defendants had tribal sovereign immunity from suit. Even if the dismissal for lack of subject matter jurisdiction should have been without prejudice, *see Chavez v. State of Ind. for Logansport State Hosp.*, 122 Ariz. 560, 562 (1979), we need not address that issue because it is now moot, *see Flores v. Cooper Tire and Rubber Co.*, 218 Ariz. 52, 57 ¶ 24 (App. 2008) ("The mootness doctrine directs that opinions not be given concerning issues which are no longer in existence because of changes in the factual circumstances."). Because the Hualapai Nation Court of Appeals issued its opinion while this case was on appeal, the superior court's dismissal with prejudice does not affect the Hualapai Nation Court of Appeals' authority as WD suggests.

CONCLUSION

¶19 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA