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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES RAYMOND ACRES,
Plaintiff,
v.
BLUE LAKE RANCHERIA, et al.,
Defendants.

Case No. [16-cv-05391-WHO](#)

**ORDER GRANTING MOTION TO
DISMISS**

Dkt. No. 39, 8

INTRODUCTION

Plaintiff James Acres seeks declaratory and injunctive relief against the Blue Lake Rancheria Tribe (“Tribe”), the Blue Lake Rancheria Tribal Court (“Tribal Court”) and its Chief Judge, Lester Marston, alleging that the Tribal Court has conducted itself in bad faith in asserting jurisdiction over him in an underlying contractual fraud case because Judge Marston refused to recuse himself from the case and misrepresented his relationship with the Tribe. Judge Marston has now recused himself from the Tribal Court case and appointed the Hon. James Lambden, a retired California Court of Appeal Justice with no prior connection to the Tribe, to preside over the matter. Given Judge Marston’s recusal and the appointment of a neutral judge, there is insufficient evidence of bad faith for the exception to apply. Acres does not meet any of the exceptions to the exhaustion requirement. He must exhaust his tribal remedies before bringing an action of this kind in federal court. The Tribe’s motion to dismiss is GRANTED.

BACKGROUND

In December, 2015, the Tribe brought a lawsuit against James Acres and his company, Acres Bonusing, Inc. in Tribal Court regarding a contract dispute. O’Neill Decl. (Dkt. No. 8-1). After the Tribe filed its case, Acres filed a federal action, seeking declaratory and injunctive relief from the Tribal Court’s jurisdiction. O’Neill Decl. ¶ 3. I dismissed Acres’s first case in August,

1 2016, concluding that he was required to exhaust his tribal remedies before seeking federal relief.
2 O’Neill Decl. Ex. 1.

3 The case progressed briefly in Tribal Court before Acres filed the present action, again
4 seeking declaratory and injunctive relief from the Tribal Court’s jurisdiction. Compl. (Dkt. No.
5 1). Although it is undisputed that he has not exhausted his tribal remedies, Acres argues that the
6 bad faith exception to the exhaustion requirement should apply because the presiding Tribal Court
7 Judge, Judge Marston, failed to disclose that he had an attorney-client relationship with the Tribe
8 and refused to recuse himself from the case in bad faith.

9 The Tribe moved to dismiss Acres’s second complaint, arguing that the bad faith exception
10 does not apply and that Acres must still exhaust his tribal remedies. I heard oral argument on the
11 motion to dismiss on December 7, 2016. At the hearing I expressed concern that Judge Marston
12 appeared to have filed inconsistent declarations in this case and in a California Superior Court
13 Case titled *Blue Lake Rancheria v. Shiomoto* regarding his relationship with the Tribe. In this case
14 Judge Marston filed a declaration stating “I have been the Tribal Court’s Chief Judge, and only its
15 Chief Judge, since March 15, 2007. I am not the Tribe’s Tribal Attorney.” Marston Decl. ¶ 3
16 (Dkt. No. 22). However, on November 5, 2015, in the *Shiomoto* case, Judge Marston filed a
17 declaration stating “I am the attorney for the Plaintiffs, the Blue Lake Rancheria (‘Tribe’), Jennifer
18 Ann Ramos, and Arla Ramsey in the above-entitled action. I am also the Chief Judge of the Tribal
19 Court of the Blue Lake Rancheria.” Acres Decl. Ex. 2 ¶1 (Dkt. No. 25-2). Given this potential
20 misrepresentation by Judge Marston concerning his relationship with the Tribe, I granted Acres
21 leave to engage in limited discovery on the issue of bad faith. (Dkt. No. 30).

22 On January 24, 2017, the Tribe moved for reconsideration on the motion to dismiss. It
23 explained that Judge Marston had recused himself from the case and appointed Justice James
24 Lambden, a retired California Court of Appeal Justice, to hear the case in his place. Judge
25 Marston’s recusal order notes that he appointed Justice Lambden, who has no prior affiliation with
26 the Tribe, because Acres had previously expressed concern that the other associate judges of the
27 Tribal Court were tainted by Judge Marston’s alleged bias as they were all associated with Judge
28 Marston’s law firm. The Tribe argues that the bad faith exception no longer plausibly applies

1 because Acres’s allegations of bad faith centered around Judge Marston’s conduct and Judge
2 Marston has removed himself from the case. Dkt. No. 39 at 6. Acres disputes that Judge
3 Marston’s recusal has cured the bad faith he alleges. Dkt. No. 41 at 9. I heard oral argument on
4 the motion for reconsideration and motion to dismiss on February 22, 2017.

5 **DISCUSSION**

6 The primary question at issue is whether this court lacks jurisdiction to hear Acres’s claims
7 because he has not yet exhausted his tribal remedies.

8 “Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to
9 challenge tribal court jurisdiction.” *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842,
10 846 (9th Cir. 2009). However, under the rules of comity, non-Indians must generally exhaust
11 tribal remedies before bringing suit in federal court. *Id.* at 846. The Supreme Court has
12 recognized four exceptions to this exhaustion requirement: “(1) when an assertion of tribal court
13 jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) when the tribal court
14 action is patently violative of express jurisdictional prohibitions; (3) when exhaustion would be
15 futile because of the lack of an adequate opportunity to challenge the tribal court’s jurisdiction;
16 and (4) when it is plain that tribal court jurisdiction is lacking, so that the exhaustion requirement
17 would serve no purpose other than delay.” *Id.* at 847 (internal quotation marks, citations and
18 modifications omitted).

19 Acres asserts that the bad faith exception applies to this case because Judge Marston
20 concealed his ongoing role as the Tribe’s attorney and misrepresented his relationship with the
21 Tribe in his Non-Recusal Order. Dkt. No. 18 at 9. Acres contends that this alleged bad faith has
22 not been cured by Judge Marston’s recusal.

23 **I. THE BAD FAITH EXCEPTION**

24 Although the Supreme Court and Ninth Circuit have both recognized the bad-faith
25 exception to exhausting tribal remedies, the test for assessing bad-faith is not well defined. The
26 Ninth Circuit’s discussion in *Grand Canyon Skywalk Dev., LLC v. ‘sa’ Nyu Wa Inc.* comes closest
27 to outlining a bad-faith standard. 715 F.3d 1196, 1201 (9th Cir. 2013).

28 In *Grand Canyon Skywalk*, the Ninth Circuit concluded that a federal court must look to

1 the conduct of the court itself, rather than the parties, in assessing bad faith. The *Grand Canyon*
2 *Skywalk* court explained that when “a tribal court has asserted jurisdiction and is entertaining a
3 suit, the tribal court must have acted in bad faith for exhaustion to be excused.” *Id.* The court also
4 noted that the district court should look to the “*proceeding* and the court overseeing that
5 proceeding.” *Id.* (emphasis in original).

6 The court also attempted to address what bad-faith is for the purposes of this test. It cited
7 to the Black Law Dictionary definition that bad-faith means “[d]ishonesty of belief or purpose.”
8 *Id.* The court ultimately concluded that there was no evidence of bad faith and did not elaborate
9 on what conduct might meet the bad-faith test.

10 The limited cases addressing the bad faith exception suggest that allegations of bias alone
11 are insufficient to make a showing of bad faith. In *A & A Concrete, Inc. v. White Mountain*
12 *Apache Tribe*, the Ninth Circuit concluded there was no evidence of bad faith where plaintiffs had
13 alleged bias on the part of the Tribal Judge, because of her connection to the Tribe Council. 781
14 F.2d 1411, 1416-17 (9th Cir. 1986). In *Landmark Golf Ltd. Partnership v. Las Vegas Paiute*
15 *Tribe*, the District of Nevada concluded there was no evidence of bad faith where plaintiffs alleged
16 that any Tribal Court judge or juror would be biased because they would have a vested financial
17 interest in the case’s outcome. 49 F. Supp. 2d 1169, 1176 (D. Nev. Mar. 26, 1999). Similarly
18 vague or general allegations of bad faith, without support are insufficient to sustain a bad-faith
19 claim. *See e.g., Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212 (D. N.M. Jan. 10, 2013)
20 (motion asserting that plaintiffs must exhaust tribal remedies was not evidence of “bad faith”).

21 While there are a handful of cases discussing circumstances that do not meet the bad faith
22 exception, there are no cases outlining what facts would constitute bad faith. It appears that no
23 court has ever found that the bad faith exception applies. *Construction and Application of Federal*
24 *Tribal Exhaustion Doctrine*, 186 A.L.R. Fed. 71 § 2[a] n.10 (2003) (noting that “there are no cases
25 adjudicating this point, except to note that the exception applies only to actions of the tribal courts,
26 which has never been established by the evidence in any case . . .”).

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1 **II. APPLYING THE BAD FAITH EXCEPTION**

2 Given Judge Marston’s recusal and the appointment of a neutral judge, I cannot conclude
3 that this is the first case in which the bad faith exception should apply.

4 Acres’s allegations revolve around Judge Marston’s conduct and relationship to the Tribe.
5 He alleges that Judge Marston is the Tribe’s attorney, is biased against Acres, and is consequently
6 asserting jurisdiction over Acres in bad faith. It is worth noting that the latter two allegations are
7 unproven and, as to the first, it appears that Judge Marston’s representation of the Tribe in the past
8 was (at most) relatively limited. But regardless of the merits of those allegations, Judge Marston’s
9 voluntary recusal and the appointment of a neutral judge undercuts those allegations. Indeed,
10 these developments evidence an attempt to provide Acres a fair and neutral proceeding in Tribal
11 Court. Judge Marston cannot exercise jurisdiction over Acres in bad faith if he has recused
12 himself.

13 Acres makes no allegations that Justice Lambden is not fair and neutral. In appointing
14 Justice Lambden, Judge Marston noted that he was not appointing one of the associate Judges of
15 the Tribal Court because Acres had expressed concern that they would be biased because they
16 were all associated with Judge Marston. It appears that Judge Marston has made a real effort to
17 address Acres’s allegations of bias and has taken steps to ensure that the Tribal Court proceedings
18 are presided over by a neutral outsider with no plausible bias against Acres or in favor of the
19 Tribe. Justice Lambden has no previous relationship with the Tribe and there is no reason to
20 believe Acres will not receive fair and impartial treatment as the Tribal Court case proceeds.

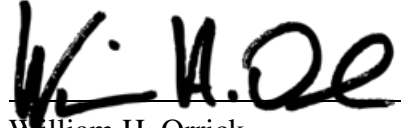
21 The bad faith exception does not apply to this case. Because I have previously determined
22 that the futility and colorable claim exceptions do not apply, Acres has failed to meet an exception
23 to the exhaustion requirement. *See Acres v. Blue Lake Rancheria*, No. 16-cv-2622-WHO, Dkt. No
24 48. Accordingly, this case must be dismissed.

CONCLUSION

For the reasons outlined above, the Tribe's motion to dismiss is GRANTED.

IT IS SO ORDERED.

Dated: February 24, 2017



William H. Orrick
United States District Judge

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