STATE OF MICHIGAN

COURT OF APPEALS

BAY MILLS INDIAN COMMUNITY, Plaintiff-Appellant, v STATE OF MICHIGAN, STATE BOARD OF AGRICULTURE, GOVERNOR OF MICHIGAN, and MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, Defendants-Appellees.	FOR PUBLICATION March 2, 2001 9:10 a.m. No. 218580 Court of Claims LC No. 96-016482-CM Updated Copy April 13, 2001

Before: O'Connell, P.J., and Zahra and B. B. MacKenzie*, JJ.

B. B. MacKENZIE, J.

Plaintiff appeals as of right from orders granting summary disposition to defendants. As relevant to this appeal, plaintiff alleged that the state of Michigan and the Governor and his predecessors (defendants) wrongfully allowed plaintiff's predecessors' real property to be sold at tax sale in violation of the laws of the United States and the Due Process and Equal Protection Clauses of the United States and Michigan Constitutions. We affirm.

Factual background

In 1855, the United States entered into a treaty with plaintiff's predecessors, reserving certain land for them in Chippewa County. On June 16, 1856, before Congress ratified the treaty

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

and before the land in this dispute could be withdrawn, the federal government issued land patents for the property to a non-Indian individual, Boziel Paul. These patents moved the land from the public domain to fee simple absolute private ownership.

On October 12, 1857, Boziel Paul and his wife deeded the property to Kinsley S. Bingham, then Governor of Michigan, to be held in trust for the use and benefit of plaintiff's predecessors, two bands of Ottawa and Chippewa Indians. The land was subsequently subjected to real property taxes, and the taxes went unpaid. In 1884 and 1885, Chippewa County brought suit for nonpayment of taxes. The auditor general then deeded the land to the third parties who had purchased the property at the tax sales.

Over one hundred years later, on November 6, 1996, plaintiff, the successor of those Indians for whom the land was to be held in trust, brought an action in the Court of Claims, seeking monetary damages for the loss of enjoyment, use, rents, and profits of the land. The Court of Claims essentially concluded that the land was taxable, that its transfer at tax sale was proper, and that neither plaintiff nor its predecessors had been wrongfully deprived of the property and, accordingly, granted summary disposition for defendants. This appeal followed.

Taxability of the subject land

Plaintiff first contends that the Court of Claims erred in concluding that the 1857 conveyance of the subject land from Boziel Paul to the Governor did not operate to make the land exempt from taxation. In reaching this conclusion, the court relied on *Cass Co, Minnesota v Leech Lake Band of Chippewa Indians*, 524 US 103; 118 S Ct 1904; 141 L Ed 2d 90 (1998). In

Cass Co, the United States Supreme Court held that where Congress makes reservation lands freely alienable to Indians or non-Indians, it manifests an unmistakably clear intent that the land is taxable by state and local governments. *Id.* at 106. In the present case, the Court of Claims acknowledged that, unlike *Cass Co,* the land in question was not reservation land, but applying the reasoning of that case, the court concluded that because the land was originally conveyed in fee by the federal government to a non-Indian, Boziel Paul, the federal government intended it to be alienable and, hence, taxable. We agree with the Court of Claims.

Where federal land is sold to a private person, it becomes part of the general mass of property in the state and is subject to ad valorem property taxation. *Oklahoma Tax Comm v Texas Co,* 336 US 342, 353; 69 S Ct 561; 93 L Ed 721 (1949). Thus, the land in this case ceased to be federal land and was subject to taxation when the unrestricted patent was issued to Boziel Paul in 1856. Furthermore, we are satisfied that *Cass Co* compels the conclusion that the land remained subject to taxation when Paul deeded it in trust to the Governor in 1857. In *Cass Co,* the Court addressed the question whether state and local governments could tax reservation land after it was made freely alienable, sold to non-Indians, and subsequently reacquired by tribal members. Citing *Goudy v Meath,* 203 US 146; 27 S Ct 48; 51 L Ed 130 (1906), and *Yakima Co v Confederated Tribes & Bands of the Yakima Indian Nation,* 502 US 251; 112 S Ct 683; 116 L Ed 2d 687 (1992), the Court indicated that when Congress makes reservation lands fully alienable, the land is taxable unless a contrary intent is clearly manifested. *Cass Co, supra* at 113. In *Cass Co*, the Court concluded that once the taxability of the land was established, the land could not become tax exempt once again absent an unmistakably clear statement of

Congress, even if the land is reconveyed to a tribal member. *Id.* Importantly, it was the federal act of patenting the land in fee, thus making it fully alienable, that made the land in *Cass Co* taxable.

Although the land at issue in this case was not originally reservation land, as had been the land in *Cass Co,* we do not find that distinction dispositive. Both here and in *Cass Co,* the land enjoyed federal protection status until transferred without restriction by the federal government to a private party. Upon that transfer, the land was removed from federal control and became subject to the state's taxing authority unless and until Congress manifested a contrary intent. Consistent with *Cass Co,* in the absence of any federal intent to once again impose a protected status on the land in this case after it was patented to Boziel Paul, the property continued to remain subject to the state's taxing authority, even when it was transferred to the Governor in trust for tribal members.

We are aware that the Sixth Circuit Court of Appeals decision in *United States on Behalf of Saginaw Chippewa Tribe v Michigan*, 106 F3d 130 (CA 6, 1997), cert gtd and judgment vacated *sub nom Michigan v United States*, 524 US 923; 118 S Ct 2316; 141 L Ed 2d 692 (1998), may appear to conflict with this opinion. However, that decision was vacated and remanded for further consideration in light of *Cass Co*. Furthermore, the decision in that case was based on the taxation of land that had originally been allotted by treaty to individual Indian owners, later conveyed to persons who were not tribal members, and then repurchased by members of the tribe. *Id.* at 132. Here, the land at issue was originally patented to a person who was not a tribal

member, Boziel Paul, in fee simple absolute. Under *Cass Co*, these lands, once patented, were taxable by the state and local governments.

The Indian Trade and Intercourse Act

Plaintiff argues that under the Indian trade and intercourse act, 25 USC 177, which prohibits the conveyance of tribal lands under certain circumstances, the state could not convey the subject land at tax sale without federal approval. The Court of Claims rejected this argument, concluding that the Indian trade and intercourse act applies only to voluntary conveyances by the tribes themselves and not to involuntary conveyances by the state for nonpayment of taxes. We agree.

The Indian trade and intercourse act, sometimes referred to as the Nonintercourse Act, was first passed in 1790 and has not changed materially since that time. *Lummi Indian Tribe v Whatcom Co, Washington*, 5 F3d 1355, 1358 (CA 9, 1993). The act now provides in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The purpose of this provision "is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress . . . ." *Federal Power Comm v Tuscarora Indian Nation*, 362 US 99, 119; 80 S Ct 543; 4 L Ed 2d 584 (1960).

To establish a prima facie case of a violation of the act, a plaintiff must prove that (1) the plaintiff is or represents an Indian tribe within the meaning of the act, (2) the land at issue is covered by the Indian trade and intercourse act as tribal land, (3) the United States has never approved or consented to the alienation of the tribal land, and (4) a trust relationship between the United States and the tribe, established by coverage under the Indian trade and intercourse act, has never been terminated or abandoned. *Catawba Indian Tribe of South Carolina v South Carolina*, 718 F2d 1291, 1295 (CA 4, 1983), rev'd on other grounds *sub nom South Carolina v Catawba Indian Tribe, Inc*, 476 US 498; 106 S Ct 2039; 90 L Ed 2d 490 (1986). Here, assuming that the property was tribal land in the hands of the Governor, plaintiff has failed to establish the third and fourth elements. By fee patents to Boziel Paul, the federal government relinquished all interest it had in the disputed land. The land was subsequently subject to taxation and alienation by virtue of Paul's ownership in fee simple absolute. Furthermore, under the fourth element, this alienation by the federal government terminated any trust relationship involving the United States with respect to the land. In short, the United States relinquished all interest in the land before its transfer to the Governor.

As previously discussed, once the United States removed the restraint on alienation of the land by patenting it in fee simple to Boziel Paul, the property was subject to taxation. Nothing in the Indian trade and intercourse act suggests that its protections precluded taxation or that it acted to revive the federal government's interest in the property sufficiently to require its consent for transfer by tax sale. Furthermore, "courts have said that once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply." *Lummi, supra* at

1359. See also *Anderson & Middleton Lumber Co v Quinault Indian Nation*, 130 Wash 2d 862, 877-878; 929 P2d 379 (1996). We therefore conclude that the Governor's acquisition of the land in trust for plaintiff's predecessors did not trigger the protections of the act and that the state's transfer of the property at tax sale did not violate the act. The Court of Claims properly granted defendants' motion for summary disposition on this issue.

The federal constitutional claims

Plaintiff next contends that the Court of Claims erred in granting summary disposition of plaintiff's federal constitutional claims pursuant to MCR 2.116(C)(8). The court concluded that there was no case law to support claims for damages under the Due Process Clause or the Equal Protection Clause when the claims were brought against the state and the Governor acting in his official capacity. We find no error.

The Court of Claims has exclusive jurisdiction to hear claims against the state and any of its instrumentalities for money damages. *Carlton v Dep't of Corrections*, 215 Mich App 490, 501; 546 NW2d 671 (1996). This jurisdiction also extends to suits for injunctive and declaratory relief against state officers where the officer was acting in an official capacity when committing the acts complained of. *Id.* Private individuals, however, have no state court remedy against the state or state officials acting in an official capacity for damages arising out of alleged violations of the federal constitution. *Id.* at 502-503.

Here, plaintiff's action sought money damages for the constitutional violations of previous governors and the present Governor, each acting in his official capacity. As the Court

of Claims properly pointed out, plaintiff's due process and equal protection claims were in essence a 42 USC 1983 cause of action. However, a § 1983 action for monetary damages for alleged federal constitutional violations may not be brought in state courts against the state or a state official sued in an official capacity. *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Nor may a plaintiff bring such an action by simply giving it another name. *Carlton, supra* at 502-503. Furthermore, because plaintiff sought a monetary award, the suit did not fall within the exception set forth in *Ex parte Young*, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908), which allows certain suits against state officers for injunctive or declaratory relief. Accordingly, we find no error in the dismissal of plaintiff's federal constitutional claims.

The statute of limitations

The Court of Claims granted summary disposition of all remaining noncontinuing state law claims on the ground that they were time-barred. MCR 2.116(C)(7). Again, we find no error.

Plaintiff acknowledges that its claims accrued in 1884 and 1885, when the subject property was sold at tax sale, and suggests that there was no applicable statute of limitations in effect at that time. Noting that, generally, the statute of limitations in force at the time of the accrual of a cause of action is the statute applied to a claim, and stating that there was no applicable statute of limitations in 1884 and 1885, plaintiff reasons that there was no limitation period in which plaintiff was required to bring this action. The flaw in this argument is that a

general six-year limitation period was in effect at the time plaintiff's claim accrued. How Stat 1882, § 8713(7).

Moreover, plaintiff's predecessors were under no disability that would preclude the running of the limitation period. 1841 PA 54, § 1 specifically provided that "any Indian shall be capable of suing and being sued in any of the courts of justice of this state, and shall be entitled to all the judicial rights and privileges of any other inhabitants thereof." Similar provisions have been in effect from 1841 to the present. MCL 600.2011; MSA 27A.2011. Even in the absence of this provision, plaintiff's 1937 reorganization under the Indian Reorganization Act of 1934, 25 USC 461 *et seq*., expressly adopted a provision allowing it to sue or be sued in state courts. Thus, even if plaintiff or its predecessors were under disability to sue, the disability was removed, at the latest, in 1937, and plaintiff's 1996 state claims were therefore time-barred.

Further, even if plaintiff were under disability until 1937, plaintiff's claims are barred under any potentially applicable statute of limitations. Subsection 6452(1) of the Court of Claims Act, MCL 600.6452(1); MSA 27A.6452(1), states that a claim against the state brought in the Court of Claims expires unless it is filed three years after it accrues. To the extent that plaintiff's claims are based on entitlement to the subject land, the claim accrued when plaintiff's predecessors were disseised of the property, MCL 600.5829(1); MSA 27A.5829(1); plaintiff's complaint alleged that its predecessors were dispossessed of the property in 1884 and 1885. Subsection 73 of the General Property Tax Act, MCL 211.73; MSA 7.118, provides, and has provided since its enactment in 1893 PA 206, § 73, that an action to set aside a tax sale must be brought within five years after the date of purchase or deed at tax sale. Actions to recover for

injuries to persons or property must be brought within three years after the claim accrues, MCL 600.5805(8); MSA 27A.5805(8), and this period has applied since 1915. See 1915 CL 12323(2). Finally, the general limitation period that applies to all actions without a specific period of limitation was and remains six years. MCL 600.5813; MSA 27A.5813.

With regard to plaintiff's claim that the Governor as trustee breached his fiduciary duty, it is unclear whether the Court of Claims considered the claim to be a continuing state law claim—and thus not subject to a statute of limitations defense—or a noncontinuing claim to which the defense applies. We conclude that the alleged breach of fiduciary duty at issue in this case was not continuing in nature. A claim of breach of fiduciary duty or breach of trust accrues when the beneficiary knew or should have known of the breach. *Baks v Moroun*, 227 Mich App 472, 493-494; 576 NW2d 413 (1998). Stated otherwise, the period of limitation begins to run when the fiduciary relationship ends; that is, when all the fiduciary's duties have been discharged or repudiated. *Carpenter v Mumby*, 86 Mich App 739, 750-751; 273 NW2d 605 (1978). Here, if the Governor breached his trust duties as plaintiff claims, the breach occurred when the Governor failed to protect the property from tax sale or to timely redeem the property. In light of the public nature of the tax sale, plaintiff's predecessors should have been on notice of any breach of duty or repudiation of the fiduciary relationship in 1884 and 1885. Plaintiff's breach of fiduciary duty claim was therefore not timely filed.

In light of our conclusion that plaintiff's state law claims were time-barred, we need not reach the question whether the Court of Claims erred in dismissing plaintiff's breach of fiduciary duty and state constitutional claims on the merits.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Peter D. O'Connell
/s/ Brian K. Zahra