

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

ONEIDA TRIBE OF INDIANS)
 OF WISCONSIN,)
)
 Plaintiff,)
)
 v.)
)
 VILLAGE OF HOBART, WISCONSIN,)
)
 Defendant/Third-Party Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA, et al.,)
)
 Third-Party Defendants.)
)
 _____)

Case No. 1:10-cv-00137-WCG

**Plaintiff’s Reply Memorandum
in Support of Motion for Contempt Order**

In response to the Motion for Contempt filed by the Oneida Tribe of Indians of Wisconsin (“Tribe”), the Village of Hobart (“Village”) took two approaches. First, the Village filed a Motion to Amend Stipulation or Judgment. The Tribe files separately a memorandum in opposition to this motion. Second, the Village filed a Brief in Opposition to Plaintiff’s Motion for Contempt. This is the Tribe’s reply to that brief.

The Village makes the same specious factual allegations in both its motion to amend and its opposition to the motion for contempt. The Tribe’s response to those factual allegations is set out in detail in its memorandum in opposition to the motion to amend. Here, the Tribe only summarizes its response to those allegations. In the main, the Tribe addresses the Village’s failure to rebut the need for a contempt order already established by the Tribe.

The motion for contempt relates to two groups of trust land that were subject to the Court's judgment here: first, twenty-two (22) parcels for which the Village suggests unresponsiveness on the Tribe's part in documenting trust status of the parcels; and second, twenty (20) parcels that comprise an abandoned railroad right-of-way ("RR ROW"). The two groups are addressed separately herein.

I. In response to the Tribe's motion for contempt, the Village now concedes the trust status of twenty-two parcels as to which it had previously refused to comply with the judgment.

As the Tribe established in its motion for contempt and supporting papers, there were twenty-two parcels that the Village refused to accept as trust lands subject to the judgment here, notwithstanding the fact that those twenty-two parcels were clearly stipulated between the parties as trust lands. ECF No. 84 ¶¶ 5, 8 and 16.¹ In a footnote in its Brief in Opposition to Plaintiff's Motion for Contempt, the Village now concedes the trust status of these parcels, making general references to "some documentation" provided by the Tribe at some unspecified time. ECF No. 87 at 2, n. 1. This is done lightly and in passing, in an apparent attempt to obscure the reality that, but for the Tribe's motion for contempt, these parcels would still be subject to forfeiture for failure to pay the Village's stormwater management "fees."

The Village fails to note all the measures taken by the Tribe to obtain compliance with the judgment as to these twenty-two parcels. Counsel for the Tribe made the first written request to counsel for the Village on February 26, 2013, that the stormwater charges be removed from the subject trust lands. ECF No. 84 ¶ 13. Counsel for the Village responded to this initial letter

¹ There are several affidavits by Rebecca M. Webster in this litigation. For clarity's sake, all those previously filed are referred to herein by the ECF number. Only the Webster affidavit filed today is referred to herein by name.

quickly, advising that the Village intended to comply with the judgment. *Id.* ¶ 14. After the Supreme Court denied the Village's petition for certiorari, counsel for the Tribe renewed efforts to obtain compliance with the judgment, receiving no response to a letter or emails for four months. On October 9, 2014, more than a year after the Tribe's first inquiry on compliance with the judgment, the Village President finally wrote the Tribe's Chairwoman asking for documentation of the trust status of the twenty-two parcels. *Id.* ¶ 16. This was the first communication from the Village indicating that it had questions regarding these parcels.

On November 18, 2014, the Tribe's Chairwoman responded to the request from the Village President and provided copies of the trust deeds for each of the twenty-two parcels, as well as the Bureau of Indian Affairs' and Brown County recording numbers for each (all of which were matters of public record at the time). *Id.* ¶ 20.² Neither the Tribe nor its counsel received any further response from the Village, notwithstanding letters and emails. On January 14, 2015, counsel for the Tribe advised counsel for the Village that the Tribe would seek relief from the Court if the Village did not comply with the judgment herein. *Id.* ¶ 21.

The Village's concession regarding the twenty-two parcels in its opposition to the Tribe's motion for contempt is the first substantive response the Tribe has received. *Id.* ¶ 22. This concession regarding the twenty-two parcels comes two years and eight months after entry of judgment, two years and three months after the Tribe's first inquiry on compliance with the judgment, seven months after the Tribe provided copies of the trust deeds that the Village

² In the meantime, the Village had obviously been deliberating on the matter. On October 21, 2014, the Village adopted Resolution 2014-16 stating that it would not remove the stormwater charges from forty-two tribal parcels until proof of trust status was provided. ECF No. 84 ¶ 17. There is no explanation in the record as to why the Village persisted in its refusal, even after receiving the trust deeds from the Tribe on November 18, 2014.

requested, and only now in response to a motion for contempt. This record of inactivity on the part of the Village regarding the twenty-two parcels strongly suggests that, had it not been for the Tribe's motion for contempt, there would still be no compliance with the judgment as to those parcels.

Contempt does not require a willful violation of an order. A party can be held in contempt for failure to be "reasonably diligent and energetic in attempting to accomplish what was ordered." *Stotler and Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989) (quoting *American Fletcher Mortgage Co. v. Bass*, 688 F.2d 513, 517 (7th Cir. 1982)). It appears that compliance with the judgment as to these parcels would not have occurred at all had the Tribe not moved for contempt. Under these circumstances, the Village should be held in contempt and the Tribe should be awarded the attorneys' fees that it was obliged to incur to obtain compliance with the judgment in this respect. *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 785 (7th Cir. 1981).

II. The Village manufactures a "Statement of Facts" that bears no relation to reality.

As the Tribe notes in its Memorandum in Opposition to the Motion to Amend, the long-standing dispute between the Village and Tribe regarding the RR ROW parcels completely belies the Village's protestations of ignorance and being misled by the Tribe. The Village has had actual knowledge of the nature of the RR ROW parcels' trust status and possession of the Tribe's documents relating thereto since at least 2007. Specifically, the record of this long-running dispute demonstrates the following gross misrepresentations by the Village:

1. According to the Village, the Tribe has represented that the RR ROW parcels are "unequivocally" held in trust, by which the Village appears to mean held in trust under the Indian

Reorganization Act (“IRA”), and that it had no knowledge of the Affidavit of Easement Cancellation that clearly indicates otherwise. ECF No. 87 at 3, 5, 6, and 12. The reality is that the Village has known of and challenged in court the basis for the RR ROW trust status since 2006. Further, it has had actual possession of the Affidavit of Easement Cancellation since 2007, which is plainly a tribal document that asserts trust status for the RR ROW parcels since 1838 and makes no representation regarding the IRA or the United States’ view of the matter. Affidavit of Rebecca M. Webster (“Webster Aff.”) ¶¶ 3-5.

2. According to the Village, the Tribe attempted to “create” trust land by proposing the stipulation, negotiated the stipulation while “misleading” the Village, and duping the Village into agreement on a list of trust parcels that the Tribe had prepared. ECF No. 87 at 1, 2 and 19. The reality is that the Tribe was fully transparent regarding all the trust parcels, that it offered (but the Village never asked for) all underlying documents for each of the trust parcels, and that the Tribe prepared its list of trust parcels by starting with the first list prepared at the behest of the Village itself as part of its demand to the United States for payment. In other words, the Village made the first representation in this litigation regarding the trust status of the RR ROW parcels, with full knowledge as to the identity of those parcels and the historical circumstances regarding trust status of them. Affidavit of Arlinda F. Locklear (“Locklear Aff.”) ¶¶ 3, 4, 7 and 11.³

³ The Village implies that the Tribe’s counsel Rebecca M. Webster, who prepared the spreadsheet of trust parcels and recorded the Affidavit of Easement Cancellation, is largely responsible for the Tribe’s attempt to mislead the Village. *See* ECF No. 87 at 5, n. 2. But there is not a hint of any such effort on Webster’s part and this innuendo is particularly offensive. As for the spreadsheet of trust parcels, the Webster affidavit plainly states that the spreadsheet included all 143 parcels on the list prepared for the Village by Brown County, making only a few specified corrections thereto. ECF No. 84 ¶ 4. As for the Affidavit of Easement Cancellation, it was served on the Village by the Tribe six weeks after it was recorded. Webster Aff. ¶ 5. The Village was clearly not misled by Webster or anyone else.

3. According to the Village, the United States does not agree that the RR ROW parcels are trust lands and the Village had no knowledge of this fact until after its Freedom of Information Act (“FOIA”) requests and the responses thereto. ECF No. 87 at 17-19. All this was accomplished by the Tribe’s misdirection. *Id.* at 4-10. The reality is that the Village has known since at least 2006 that, in the Tribe’s view, the RR ROW parcels have been continuously held in trust since 1838 under the Treaty, not under the IRA. Webster Aff. ¶¶ 3 and 4. Further, the Village’s FOIA requests and litigation in 2013 show nothing more than that the United States has come to “no final legal opinion” on its view regarding the RR ROW parcels. ECF No. 93-1 at p. 3 of 29, ¶ 7. In other words, it is not true that the United States refuses to acknowledge the trust status of the RR ROW parcels.

4. According to the Village, it has always denied that the subject trust lands are properly held in trust. ECF No. 87 at 10-11. It is correct that the Village made claims in its Answer here that challenged the Tribe’s eligibility under the IRA. None of those allegations related to the RR ROW parcels specifically, but the status of all trust lands held by the United States for the Tribe. Further, the Village abandoned those claims as this litigation proceeded. The Village made no dispositive motions on its claims and failed to raise them in response to the Tribe’s motion for summary judgment. The Village declined to litigate those matters and cannot now raise them.

Under the actual facts here, the Tribe is entitled to a contempt order against the Village for its refusal to honor the stipulation it freely and knowingly entered into and its continuing refusal to comply with the judgment based thereon.

III. The Village is in violation of a clear judgment that depended upon a stipulation entered into by the parties with full knowledge of the circumstances and history of the RR ROW parcels.

The parties here do not dispute the standard governing motions for contempt. *Compare* ECF No. 83 at 5-6 *with* ECF No. 87 at 12-13. Instead, and beyond its false statement of facts, the Village insists that the judgment here does not depend upon the stipulation of the parties and that the stipulation does not contain dispositive admissions regarding the RR ROW parcels. Both contentions are wrong.

A. The judgment here depends upon the stipulation of facts by the parties.

The judgment in this matter was entered on the Tribe's motion for summary judgment. Federal Rule of Civil Procedure 56 sets out the standard for such motions. It states, in pertinent part, that a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). The importance of undisputed, material facts in a summary judgment proceeding is highlighted by the local rules of this Court. Those rules require that the moving party include as part of the moving papers a statement "setting forth any material facts to which all parties have stipulated." E.D. Wis. Civil L. R. 56(b)(1)(B). Further, the local rules provide that the "Court will deem uncontroverted statements of material fact admitted solely for the purpose of deciding summary judgment." E.D. Wis. Civil L. R. 56(b)(4). Clearly, the federal rules and local rules treat the identification of undisputed facts as an essential predicate to proceedings on summary judgment. Thus, whether a fact is uncontroverted or admitted, that fact can be a basis for summary judgment. *Yancick v. Hanna Steel Corp.*, 653 F.3d 532, 54 (7th Cir. 2011) (uncontroverted facts); *Woods v. City of Chicago*, 234 F.3d 979, 988-89 (7th Cir. 2000) (admitted facts).

Here, the existence and identity of trust lands located in the Village are central to this suit. Without such lands, there would be no case or controversy. Without specifically identifying such lands, the application of the judgment would be unknown. As a result, when the Tribe proposed a stipulation of facts to the Village as part of the preparation of its summary judgment papers, counsel for the Tribe identified the list of trust lands subject to the motion as the “single most important fact.” Locklear Aff. ¶ 3. The parties’ stipulation identified 148 subject trust parcels, which included the RR ROW parcels. ECF No. 50. In addition, in its Statement of Proposed Material Facts also made in support of summary judgment, the Tribe stated that there are 148 trust parcels which are identified as the subject trust lands, citing the parties’ stipulation as authority. ECF No. 51 ¶ 6. The Village admitted this fact in its response to the Tribe’s statement of material facts. ECF No. 61 ¶ 6. In its order granting the motion, this Court found that there are 148 parcels of trust land in the Village, also citing the parties’ stipulation as authority. ECF No. 68 at 4. In its judgment, the Court adjudged that “the Oneida Tribe of Indians of Wisconsin’s trust land is immune” from the Village’s stormwater management ordinance and enjoined the Village from “attempting to impose and collect ‘charges’ under the Ordinance from the Tribe or foreclosing on the Tribe’s lands.” ECF No. 69. There is no doubt that the Tribe’s “trust land” or “lands” referred to in the judgment meant the subject lands stipulated by the parties. Whether deemed a stipulation or admission, then, the subject trust lands referred to in the judgment is binding upon the Village. *Yancick, supra; Woods, supra.*

As the Tribe demonstrated in its motion, these circumstances fully support an order of contempt: the judgment comprehends the RR ROW parcels, the judgment contains an injunction against imposition of the Village’s stormwater management fees, and the Village has

affirmatively refused to fully comply. *Analytical Engineering, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443, 449 (7th Cir. 2005).

B. The Village's admission regarding the RR ROW parcels was made with full knowledge of the facts and history relating thereto.

As in all summary judgment proceedings, the stipulation entered into by the parties here was central to those proceedings and the parties treated it as such. The negotiations between the parties were detailed and deliberative, resulting in a statement of agreed upon facts that the Tribe relied upon in its motion for summary judgment. Locklear Aff. ¶¶ 3-10. Among other things, the stipulation stated that there are 148 parcels of trust land that comprise the subject lands here. ECF No. 51 ¶ 6. At the time its counsel negotiated and executed the stipulation, the Village was fully aware that the 148 parcels included the RR ROW parcels — the parcels were identified by the Tribe by the Brown County tax identification numbers, the same numbers used by the Village to identify those parcels in its 2006 suit for quiet title against the Tribe and the same numbers used by the Village to identify trust parcels in its 2011 demand to the United States for payment. Webster Aff. ¶ 3; ECF No. 84 ¶ 4. At the time its counsel negotiated and executed the stipulation, the Village was fully aware that the trust status of the RR ROW parcels was based upon the Affidavit of Easement Cancellation — the Tribe served the Affidavit of Easement Cancellation upon the Village in November 2007, just six weeks after recordation of the Affidavit. Webster Aff. ¶ 5. As a result, the Village knew that the stipulation included the RR ROW and that those parcels' trust status was based upon the Treaty of 1838, not the IRA. There is certainly nothing in any of these circumstances even hinting at an effort by the Tribe to conceal anything regarding those parcels from the Village.

Neither is there anything in the introductory limitation contained in the stipulation that limited its binding effect between the parties. To the contrary, those introductory limitations only highlight the distinction between legal and factual issues. With regard to legal conclusions, the parties to the stipulation agreed that they made “no stipulation, admission, or concession regarding legal implications or alleged consequences of the stated factual matters.” ECF No. 50 at 1. As a result, the parties can and do continue to dispute whether the IRA authorizes the Secretary to acquire trust land for the Tribe. However, the stipulation, denominated a “Stipulation of Facts,” does set out a number of factual statements to which the parties agreed. *Id.* As a result, the Village has conceded that the RR ROW parcels are trust lands for purposes of this litigation — a fact the Village itself had already asserted in its demand to the United States for payment.⁴

It bears emphasis that the stipulation was entered into *for purposes of this litigation only*. The parties can and certainly will continue to dispute the status of the RR ROW parcels in other contexts. Nothing in the judgment in this matter precludes the Village from asserting regulatory or other authority regarding those parcels. No doubt, there will be a time and place to join issue on the Village’s claimed authority, but that time and place is not here insofar as the applicability of the Village’s stormwater management “fees” is concerned.

Conclusion

The Village attempts to obscure its lack of diligence, at best, or obstinate refusal to comply with the judgment, at worst, with irresponsible and unproven allegations about deceit and

⁴ Because the factual statements in the stipulation are just that, i.e., statements of fact and not legal conclusions, neither can the stipulation be deemed dictum. *See* Tribe’s Memorandum in Opposition to Motion to Amend Stipulation or Judgment, p. 10.

fraud on the part of the Tribe. None of its allegations withstands scrutiny. In the end, this is a simple matter: the parties stipulated that the RR ROW parcels are trust land for purposes of this litigation, they did so with full knowledge of the history and circumstances surrounding those parcels, and the parties must be held to their admissions. The judgment in this matter depends upon those stipulated facts and should be enforced as to the RR ROW parcels.

Respectfully submitted this 10th day of July, 2015.

s/ Arlinda F. Locklear
Arlinda F. Locklear
Bar No. 962845
4113 Jenifer Street,, NW
Washington, DC 20015
alocklearesq@verizon.net
(202) 237-0933

James R. Bittorf, Deputy Chief Counsel
Wisconsin State Bar No. 1011794
jbittorf@oneidanation.org
Rebecca M. Webster, Senior Staff Attorney
Wisconsin State Bar No. 1046199
bwebster@oneidanation.org
ONEIDA LAW OFFICE
N7210 Seminary Road
Post Office Box 109
Oneida, WI 54155
(920) 869-4327