Oneida Tribal Judicial System

Onʌyote ʔ a·ka Tsiʔ Shakotiyaʔ Tolé hte

TRIAL COURT

Kurt Jordan,
Quality Construction Management,
Petitioner

v.

Dale Wheelock-Oneida Housing Authority,
Respondent

Docket No: **12-TC-052**

Date: **June 19, 2012**

DECISION ON RESPONDENTS' MOTION TO DISMISS

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers, Mary Adams, Jean M. Webster, and Leland Wigg-Ninham, presiding.

Background

This case involves Respondent the Oneida Housing Authority's (OHA) alleged failure to apply Chapter 57 of the Tribe's laws and give preference to Petitioner in awarding a construction contract. Petitioner filed a motion for injunction seeking, among other things, an order stopping the OHA from going forward with the construction project while this litigation is pending and for investigation to be done by the Indian Preference Department. Respondents seek to dismiss the motion on various grounds. We issued an injunction on April 3, 2012 in order to maintain the status quo and permit the Indian Preference Department to investigate. As much as we dislike doing so in this case, we are compelled by the law to grant Respondent's motion to dismiss.

On March 30, 2012 Petitioner, Kurt Jordan-Quality Construction Management, filed a Motion for Injunction and/or Restraining Order against Respondents seeking the Court to order

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Respondent OHA to cease and desist accepting bids for several projects including, drywall, solar, and radian system with on demand water heater. Petitioner claims the total contract value for the three bids is $324,225.00.

On April 3, 2012 the Court granted the Injunction and held a hearing on its merits on April 4, 2012. The parties agreed to brief their positions. Respondents submitted their brief on Tuesday, April 10, 2012 and Petitioner submitted its brief April 13, 2012.

A hearing was held on Monday, April 16, 2012. Respondents submitted a motion to dismiss based on two grounds: 1) That injunctive relief should be denied because Petitioner cannot establish a right to relief as there is no requirement that Respondent OHA enter into a contract with QCM even though it was the lowest bidder and 2) QCM's suit is barred by sovereign immunity.

On April 23, 2012 the Court had already addressed Respondent's Motion to Dismiss: "Respondent's Motion to Dismiss shall be held in an abeyance. Respondent is prohibited from contracting with any vendor for the services at issue in this lawsuit." In addition, the Court granted Petitioner's request for an *Injunction and schedules this matter for a hearing on the petition.*

On April 24, 2012 Oneida Indian Preference Department (IPD) requested an extension of time for their investigative report. IPD explained that to adequately investigate the circumstances surrounding the alleged violation they need more time. The Court agreed and rescheduled the hearing date to May 22, 2012 at 9:00 am.

At the May hearing the parties were instructed to submit additional briefs; both briefs were submitted on June 8, 2012.

Issue

Is Petitioner's suit barred by sovereign immunity and Chapter 57?

Analysis

For purposes of deciding Respondent's Motion to Dismiss, we will construe the facts in a light most favorable to Petitioner. The Indian Preference Department May 18, 2012, report states "*Quality Construction Management (QCM) was given the opportunity to bid all three times that the notices were released. The Indian Preference Department finds no violation of the Indian Preference Law.*" The IPD goes on to state the OTJS should not have accepted the injunction until after their investigation was completed. (We respectfully disagree; the Indian Preference Department should be completing its duties on time. Timely investigation and reporting would reduce or eliminate this type of litigation.)

Petitioner claims he filed the complaint with the IP department the same day he filed his motion for an Injunction with the OTJS on March 30, 2012. If the IP department had concluded its investigation in a timely manner this issue may have been concluded shortly after March 2012.

Petitioner's arguments

Petitioner contends Respondent's motion to dismiss must be denied under federal notice pleading, because it is not necessary for the plaintiff to plead specific facts but only give the defendant fair notice of the claim and grounds upon which to rests. Petitioner argues when deciding a motion to dismiss, a court must construe the complaint "in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inference" in favor of the plaintiff.

Petitioner claims QCM previously earned contracts through the bidding process. Petitioner asserts he was notified that QCM was awarded the contracts and later the Law Office told him to re-bid. Petitioner alleges upon the second time he re-bid the contract was again offered to QCM to sign; this is when QCM signed the contract. Petitioner points out; an enforceable contract has three elements: 1) an offer, 2) an acceptance and 3) consideration. Petitioner contends the written contract offered by Respondent to QCM constituted an offer. Petitioner contends QCM was ready, willing and able to perform the terms of the contract and thereby signing it constitutes

QCM's acceptance. Petitioner further contends nowhere in the contract was a provision requiring a conditional acceptance requiring the Oneida Law Office's approval. Petitioner asserts there was an offer, acceptance, and consideration resulting in a binding contract. In addition, Petitioner argues although Oneida has changed its policies regarding contracting with tribal employees this change would not affect QCM's contract because policy changes are not retroactive.

Petitioner claims that for years contracts have been bid and entered into with tribal employees with the same tribal contracting procedures and regulations concerning IPL, FICA, FUTA and FLSA that exist today. Petitioner argues there has been no change in tribal or federal law which would warrant a change in policy and therefore, BC Resolution 04-25-12E is wrong and unsupported by any law or reason. Petitioner points out that the Oneida Law Office never produced any form of justification or proof for their opinion and can only speculate.

Petitioner argues they have a right to file their claim with the OTJS because the IPL says an aggrieved individual may file a complaint and states *"The IPD shall have the authority to conduct an investigation of a written complaint that alleges specific violations of this law..."* Petitioner asserts the IPL allows an aggrieved individual the right to file a complaint in an alternative setting.

Respondent's arguments

Respondents argue Petitioner's complaint should be dismissed because Petitioner failed to state a claim or establish a right to relief based on the facts and law presented. Respondents contend this case was based on the issue that a violation of the Indian Preference Law exist and the Indian Preference Department's investigation which determined that there have been no violations of the IPL, therefore case should be dismissed.

Respondents claim Petitioner's request for a permanent injunction should be denied because tribal law grant the Indian Preference Department the exclusive authority to investigate violations of the Indian Preference Law. Respondents point out the Court held the motion to

dismiss and the motion for injunction in abeyance until after the IPD submitted its investigation report. Respondents assert according to O-Tech Solutions, LLC Mr. Curtis Danforth vs. Oneida Bingo & Casino, Oneida Indian Preference Department, stated *"only the Indian Preference Department is given the power to bring court proceedings for violations of the Indian Preference Ordinance, Chapter 57, Sec. 57.14-3."* Furthermore, the case explains that Chapter 57 does not allow vendors the right to sue for alleged Indian preference violations, which was also prevalent in Mathew J. Denny Sr., DH Cash Management Services vs. Chad Fuss, Assistant GM-Finance, Respondents point out the trial court stated "it makes sense as an investigation by the IPD will determine whether there is merit in the complaint to go further in the process." Respondents conclude that on May 18, 2012 the IPD submitted its investigative report and determined that there were no violations if the IPL. Therefore, Respondents allege the Trial Court should not further entertain Petitioner's claims and requests the Court to reconsider its decision to hold Respondent's motion to dismiss in abeyance and dismiss Petitioner's motion for injunction and/or temporary restraining order and dissolve the temporary injunction.

Respondents argue Petitioner's request for a permanent injunction should be denied because the Tribe cannot enter contracts with tribal members or employee owned business in accordance with the Tribe's Standard Construction Agreement, paragraph 10, which states *"Contractor agrees that all of its officers, employees, agents, directors, and representatives shall not be deemed or construed to be an employee of the Tribe."* Respondents assert Mr. Jordan admits he is an employee who works for the Division of Land Management and is also the owner and employee of QCM. Respondents points out according to the IPL, in order to qualify as an Indian Preference Vendor, Petitioner must be an enrolled Oneida member and: 1) own and control at least 51% of the company, 2) be directly involved in the management of the company and, 3) be involved in the day-to-day operations of his company (IPL §57.3-14, 57.4-3, 57.5-4). Respondents contend knowing these undisputed facts, the Tribe cannot enter into a contract with QCM knowing it would violate the terms of the Tribe's Standard Construction Agreement.

Respondents assert that on April 25, 2012 the Oneida Business Committee adopted amendments to the Independent Contractor Policy, which prohibits the Tribe from entering into contracts with

tribal employees or employee owned businesses. Respondents contend under the Independent Contractor Policy Respondent is prohibited from entering into such a contract with Mr. Jordan or QCM. Therefore, Respondents request the Court to dismiss Petitioner's motion for injunction and/or temporary restraining order and dissolve the temporary injunction.

Court's findings and conclusion of law

The Court finds that under the current Independent Contractor Policy adopted by the Oneida Business Committee on April 25, 2012 that prohibits the Oneida Tribe from entering into contracts with employees that own their own business was not in effect when Petitioner filed his claim. Therefore, the policy does not apply to this case because the policy changes are not retroactive.

The Court grants Respondents motion to dismiss because according to O-Tech Solutions and DS Cash Management Services the IPD shall first investigate and then file on *behalf* of the vendor at the OTJS for violations of the IPL. It seems the original intent of the IPL was written so that the IPD assisted the vendors with some form of remedy.

However, we are disturbed by the facts of this case which raise questions about the Tribe's commitment to Chapter 57 and giving preference to tribal members and tribal-member owned businesses. QCM was awarded and completed several contracts with OHA under the same conditions as those in this case. Mr. Jordan was the owner of QCM and an employee of the Oneida Tribe when those previous contracts were awarded. The Tribe attempts to support its denial in this case with dubious arguments.

First the Tribe claims there are labor, employment and tax issues when an employee of the Tribe also does work as a contractor for the Tribe. This may or may not be true, but the Tribe has not presented any persuasive evidence to support its assertion: no case law, no statute, no correspondence or communication with the federal government. Furthermore, it has apparently awarded previous contracts to QCM under the same circumstances as those present here. Second, the Tribe claims it is not obligated to give preference to QCM. This assertion strains

credulity. Assuming that all other things are equal such as the amount of the bid, the quality of work and eligibility of the contractor, what else does the word "preference" mean? Section 57.9-1(a) states the Tribe "shall give preference in contracting." Preferring one over another means giving priority. The order of priority is stated in Sec. 57.9-1(a).

Mr. Wheelock three times previously awarded QCM the contract presumably because he thought the contract was in accordance with Chapter 57. Those contract awards were later rescinded because they did not receive legal approval. Based on the record before us, it is difficult to believe that the Indian Preference Department did not find a "genuine and material issue of non-compliance." Sec. 57.14-3. It is true that Chapter 57 permits deviation from preference when prohibited by law or grant funding requirements. However, no persuasive allegation has been made that awarding the contract to QCM was prohibited by law or grant funding requirements.

Nevertheless, this Court cannot go against the ordinance or precedent. Chapter 57 describes a comprehensive enforcement scheme that does not include individual vendors suing for violations.

Our decision addresses only the issue of QCM's ability to bring an enforcement action on its own under Chapter 57. The merits of QCM's claims remain unadjudicated. We do not rule whether Chapter 57 has been violated. We do not rule whether Respondents are prohibited by law or grant funding from receiving and entering into a contract with the OHA. We do not rule whether QCM and Respondent OHA entered into an enforceable contract.

Decision

Respondents' Motion to Dismiss is granted. The injunction is lifted.

IT IS SO ORDERED.