

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

Michael Jay Lumsden v. Sault Ste. Marie Tribe of Chippewa Indians Board of Directors and Election Committee

APP-16-04

Decided April 18, 2016

BEFORE: CAUSELY, DIETZ, FINCH, WARNER and WICHTMAN Appellate Judges.

Order Responding to Motion for Summary Disposition

Warner, Acting Chief Appellate Judge, who is joined by Appellate Judges Causley, Dietz, Finch, and Wichtman.

For the reasons spelled out below, Appellee Election Committee’s Motion for Summary Disposition is granted, and Appellant’s appeal is rejected.

Procedural History

The Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians (“Constitution”) establishes the criteria to hold office as a member of the governing body of the Tribe. Art. IV, § 3. The Constitution further provides that “[t]he board of directors shall enact appropriate ordinances to implement nominations and the holding of elections.” Art. V, § 6. Pursuant to its Constitutional authority, the board of directors enacted Chapter 10 of the Sault Tribe Code “to establish authority for holding tribal elections.” STC § 10.101, Election Ordinance. The Election Ordinance establishes the Election Committee; and, generally, the framework for conducting tribal elections including requirements for candidacy, nomination procedures, and the circumstances under which contests and complaints may be filed. STC §§10.108, 10.110-11, 10.118-120.

The 2016 Notice of Election was posted by the Election Committee on January 29, 2016 establishing the timeline of the election. On or about February 19, 2016 Appellant Lumsden filed a Letter of Intent to run for office pursuant to § 10.111. On or about February 26, 2016, the Respondent sent a letter (“Election Committee Letter”) to the Appellant informing him that the Election Committee was statutorily prohibited from certifying him as a candidate. The Appellant filed a notice of appeal with this Court on March 7, 2016 challenging, for the most part, the constitutionality of § 10.110(1)(j) of the Election Ordinance. *Michael Jay Lumsden v. Sault Sainte Marie Tribe of Chippewa Indians Election Committee*, Notice of Appeal, APP-16-03 (March 7, 2016). In response to Appellant’s appeal of March 7, 2016, Appellee submitted a motion for summary disposition. On March 11, 2016, this Court released its opinion granting the motion for summary disposition, as Appellant’s appeal was not ripe at that time nor had he availed himself of the process outlined in the Tribal Code. On March 17, 2016, Appellant filed a request for reconsideration of this Court’s March 11, 2016 decision in APP-16-03. On March 22, 2016, this Court released an Order denying Appellant’s request for reconsideration.

On April 4, 2016, Appellant again filed a Notice of Appeal with this Court from the actions of the Election Committee. *Michael Jay Lumsden v. Sault Sainte Marie Tribe of Chippewa Indians Board of Directors and Election Committee*, Notice of Appeal, APP-16-04 (April 4, 2016). In addition to the previous interactions between Appellant and the Election Committee, Appellant argues that the final action of the Committee giving rise to this new action is a conversation between himself and the Election Committee Chairman, “who informed Appellant that the Election Code was clear regarding his eligibility to run for office.” *Id.* at 3. Appellant asserts that the Chairman of the Committee stated he would call Appellant regarding access to nomination petitions, voter mailing labels, and the tribal newspaper, but that the Chairman did not call him back. *Id.* Appellant also alleges in his most recent notice of appeal that he received a letter from the Tribe’s General Counsel stating that “[t]he Elections Committee has, of course, already provided you with a written determination in the form of a letter” *Id.* Appellant brings this claim against both the Tribe’s Board of Directors and Election Committee. Appellant seeks the following relief in relevant part: “Immediately reinstate[ment of] Resolution 2005-60; Order that [Tribal Code] § 10.110(1)(j) is unconstitutional; Order the Election Committee immediately to certify Appellant as a candidate in the upcoming 2016 tribal election; Grant Appellant immediate access to nomination petitions, voter mailing labels, and the tribal newspaper; Grant Appellant a 14-day extension to circulate his petitions and gather nomination signatures; and Grant all relief commanded by law and equity.” *Id.* at 3-4. In response to the April 4, 2016 appeal, Appellee Election Committee filed a Motion for Summary Disposition on April 6, 2016. On April 7, 2016, Appellee Election Committee also filed a response brief to Appellant’s notice of appeal in the instant matter. Appellant filed a brief in reply on April 8, 2016. On April 13, 2016, Mr. John Wernet filed an Appearance and Notice of Appearance and Response to Appellant’s Assertion of Default by the Board of Directors for the limited purpose of asserting the sovereign immunity of the Board of Directors from suit. On April 15, 2016, this Court heard oral arguments on both the Motion for Summary Disposition and the appeal proper.

For the reasons outlined below, Appellee Election Committee’s Motion for Summary Disposition is granted. Also, Appellant’s claim against Appellee Board of Directors is denied as this court lacks jurisdiction to hear the claim.

Jurisdiction and Standard of Review

Tribal Code Section 10.120(7) allows for direct appeal to this Court in limited original circumstances. Under Tribal Code Section 10.120 (7) decisions of the Election Committee “issued pursuant to subsection (2)(c) may be appealed to the Sault Tribe Chippewa Tribal Court of Appeals pursuant to Chapter 82.” Tribal Code Section 10.120(2)(c) refers to the decisions of the Committee where it will “render a decision in writing and once all appeals have been exhausted according to Subsection (7), publish the decision.” Chapter 82 “established the procedures by which appeals are taken...” Tribal Code Section 82.101. Section 82.201 establishes who may appeal the decision of the Election Committee, the limitations of such an appeal (1) challenging the decision of the Election Committee alleging the Election Committee acted in a manner not consistent with Tribal law; and (2) the challenge must be personal to Appellant and not a generalized grievance. Section 82.202 sets forth that an appeal is proper before this Court if it “concerns a final decision of the Election Committee rendered pursuant to

Tribal Code Chapter 10 at Section 10.120(c).”¹ Accordingly, this Court has limited jurisdiction to hear appeals where an Appellant has filed a proper challenge or contest in accordance with Tribal Code Section 10.118 and the Election Committee meets and renders a decision in writing in accordance with Tribal Code Section 10.120.

Discussion

As mentioned above, Appellant brings his appeal against two Appellees: the Tribe’s Election Committee and the Tribe’s Board of Directors. His claims against each will be discussed in turn below.

Appellant’s Claims against the Tribe’s Election Committee

This Court will focus on Appellant’s new allegations against the Tribe’s Election Committee, as his previous allegations were dismissed. In his new notice of appeal, he essentially focuses on two new developments since his first notice of appeal: 1) his oral communications with the Election Committee Chairman; and 2) the letter he received from Mr. Wernet, the Tribe’s General Counsel. As explained below, neither provides a viable basis for Appellant’s direct appeal to this Court.

Jurisdiction

First, Appellee Election Committee argues in its Motion for Summary Disposition that this Court lacks the jurisdiction to hear this case in its present posture. Appellee Election Committee is correct. As explained above, an original appeal is only allowable under Tribal Code Section 82.202 from decisions by the Election Committee under Tribal Code Section 10.120(2)(c), which are decisions rendered in writing after receiving and deciding a properly filed contest of an Election Board decision pursuant to Tribal Code Sections 10.118 and 10.120, respectively. The oral communications that Appellant had with the Chairman of the Election Committee do not meet the requirements of Tribal Code Sections 10.118 or 10.120 (2)(c), as it is neither a decision of the Election Board after the convening of a meeting upon the filing of a contest nor was it in writing. Furthermore, the letter Appellant received from General Counsel Wernet also does not meet the requirements of Tribal Code Section 10.120(2)(C), as General Counsel Wernet is not the Election Committee. Accordingly, given the actions that Appellant points to in his Notice of Appeal fail to meet the requirements of Tribal Code 10.120(2)(c), this Court does not have jurisdiction over the matter under Tribal Code Section 82.202.

Further, although final determination is not necessary given the finding above, it is uncertain whether Appellant meets the requirements of Tribal Code Section 82.201, which requires specific injury rather than a generalized grievance. Appellant does not assert that Appellee Election Committee incorrectly interpreted the applicable law. Rather Appellant argues that the

¹ Notably, Tribal Code Section 82.202 appears to contain a typo as it references Tribal Code Section 10.120(c), and there is no such provision of the Tribal Code. Appellee Election Committee argued in its brief and at oral argument that this was a typo, and Tribal Code Section 82.202 should reference Tribal Code Section 10.120(2)(c). Appellant did not object to this interpretation. Given Appellant does not object to this interpretation and Appellee’s interpretation would give clear expression to the purpose of the Tribal Code, this Court accepts that this is a typo and Tribal Code Section 82.202 should refer to Tribal Code Section 10.120(2)(c).

law Appellee Election Committee interpreted, Tribal Code Section 10.110(1)(j), is unconstitutional. This strikes the Court as a generalized grievance against the law itself rather than a particularized concern with how the Committee applied the Tribal Code Section.

Appellant argues that he is similarly situated to past Appellants who have successfully obtained relief from this Court. *See e.g. Liedel et al. v. Election Committee*, APP 08-05 (2008); *Hollowell v. Election Committee*, APP 14-02 (2014). However, Appellant's claims can be distinguished from these past cases. First, the Court's rationale in *Liedel* is not applicable here, as the Tribal Code was subsequently amended to limit this Court's jurisdiction in appeals from the Election Committee to those matters outlined at Tribal Code Section 10.120(2)(c). Accordingly, this Court's jurisdiction in original actions arising from the actions of Appellee Election Committee is now primarily defined by Tribal Code Section 10.120 and decisions rendered pursuant to Tribal Code Section 10.120(2)(c). Accordingly, the rationale in *Liedel* is not persuasive here. Similarly, this Court's decision in *Hollowell* is also not persuasive as, in that case, Appellee Election Committee met to decide a properly filed contest under Tribal Code Section 10.118, issued a final decision in that matter, and, as a result, the matter met the requirements of Tribal Code Section 10.120(2)(c).

Appellant makes several equitable arguments, but these arguments are unavailing, as Appellant is not without redress. For example, Appellant can wait for the official action of the Election Committee and use the means available in law to dispute that decision and then appeal; or the Appellant can file an original action in Tribal Court to challenge the constitutionality of Tribal Code Section 10.110(1)(j) under theories raised in his appeal. Also, as mentioned at oral argument, Appellant is welcome to bring his requests directly to the Tribe's Board of Directors for resolution. This Court declines to participate in Appellant's attempt to manufacture an appealable Election Committee decision to (1) avoid proceedings that would be more properly heard, in the first instance, by the Tribal Court in order to ensure the creation of a proper record; or (2) to circumvent the procedural requirements of Tribal Code Section 10.118 to have his grievance addressed by this Court.

In response to the Motion for Summary Disposition, Appellant argues in relevant part that this Court cannot as a matter of procedure grant a Motion for Summary Disposition. Notably, as mentioned above, this Court did find it possessed the authority to do so when it granted the motion for summary disposition in response to Appellant's first notice of appeal. *Lumsden v. Election Committee*, APP-16-03, Order (March 11, 2016). But, also, Tribal Code Section 83.211 allows this Court to incorporate any necessary procedural matters into Subsection 2 of Chapter 82. Tribal Code Section 82.123 contemplates the filing of motions which generally serve as procedural mechanisms to narrow issues, answer questions, and define the scope of review of the Court of Appeals. Furthermore, Tribal Code Section 82.112 allows this Court to enter any orders that may be just and equitable. Given the analysis above, the grant of the Motion for Summary Disposition is certainly just and equitable in this circumstance.

Remedies

Even if jurisdiction existed in this matter, Appellant's claim against Appellee Election Committee would still falter for failing to state a claim upon which relief can be granted. As

mentioned above, Appellant requests that Resolution 2005-60 be reinstated and that Tribal Code Section 10.110(1)(j) be declared unconstitutional. Both of these acts far exceed the authority of Appellee Election Committee, as the Committee only has jurisdiction over the election process. Moreover, given that sovereign immunity precludes Appellant's claims against the Tribe's Board of Directors, as explained below, there is no entity that can be compelled to grant Appellant's requested relief. Appellant cannot compel either party to make the requested changes in the law. And Appellee Election Committee cannot certify Appellant as a candidate nor grant him the access he requires as a matter of law. For these reasons, Appellant has failed to state a claim upon which the requested relief can be granted and Appellee Election Committee's Motion for Summary Disposition is granted.

Appellant's Claims against the Tribe's Board of Directors

Appellant also brings his claim against the Tribe's Board of Directors. He clarifies in his Response to the Motion for Summary Disposition that this is not a claim against individual members of the Board of Directors. As explained below, Appellant's appeal against the Tribe's Board of Directors is precluded for two reasons: lack of jurisdiction and sovereign immunity.

Jurisdiction

First, Appellant has failed to demonstrate how this Court has jurisdiction in this original matter over the Tribe's Board of Directors under Tribal Code Section 82.200, et seq. Tribal Code Section 82.200, et seq. only gives jurisdiction to this Court in specific instances over the Election Committee. Tribal Code Section 82.200, et seq. does not contemplate this Court having jurisdiction over original matters involving other parties. Furthermore, Tribal Code Section 82.100, et seq. does not contemplate this Court having jurisdiction in original matters, rather Tribal Code Section 82.111 only contemplates this Court having jurisdiction over prior actions and orders properly appealed. Accordingly, Appellant has failed to demonstrate that this Court has jurisdiction over the Board of Directors in this appeal.

Sovereign Immunity

Second, Appellant has failed to state a claim against Appellee Board of Directors upon which relief can be granted given Appellee Board of Directors is cloaked in the Tribe's sovereign immunity. Tribal sovereign immunity prevents suits against tribes under certain circumstances, and can only be waived explicitly by either the Tribe itself or the U.S. Congress. Tribal sovereign immunity extends to agencies of the tribes. *See Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670-671 (8th Cir. 1986). Tribal sovereign immunity also applies to tribal officials acting within the scope of their official duties. *Id.* Tribal sovereign immunity extends to claims for declaratory and injunctive relief, not merely damages, and it is not defeated by a claim that the tribe acted beyond its power. *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The U.S. Supreme Court has consistently reaffirmed application of tribal sovereign immunity, even to actions taken by tribes off of the reservation. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). Appellant fails to

demonstrate that the Tribe has waived its sovereign immunity allowing suit against the Board of Directors in this case. Accordingly, Appellant fails to state a claim against the Board of Directors upon which relief can be granted, and dismissal is appropriate in this case.

ORDER

For the reasons specified above, Appellee Election Committee's Motion for Summary Disposition is granted. Further, Appellants claims against Appellee Board of Directors are dismissed for lack of jurisdiction and pursuant to application of the doctrine of tribal sovereign immunity.

It is SO ORDERED.