To be argued by
Elizabeth Taylor
Zuckerman Spaeder, LLP
Time requested: 15 minutes

Supreme Court

State of New York
Appellate Division – Fourth Department

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Plaintiffs-Respondents,

against

GEORGE PATAKI, GOVERNOR OF THE STATE OF NEW YORK, NEW YORK RACING AND WAGERING BOARD and DIVISION OF STATE POLICE,

Defendants-Respondents.

ONEIDA INDIAN NATION OF NEW YORK,

Appellant.

Oneida County Clerk's Index No. 99-533
CA 04-2580 & CA 04-3078

BRIEF OF APPELLANT ONEIDA INDIAN NATION OF NEW YORK

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THE REPORTER COMPANY, *Printers and Publishers, Inc.*
120 East Washington Street, Syracuse, NY—315-426-1235
(S862 – 2005)
Reproduced on Recycled Paper

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STATE OF NEW YORK
APPELLATE DIVISION

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SCOTT PETERMAN, et al.

Plaintiffs/Respondents,

-vs-

Index No. 99-533
RJI No. 32-99-520
(Oneida County)

GEORGE PATAKI, Governor of the State of New York, et al.,

Defendants/Respondents.

APPEAL

The Oneida Indian Nation of New York (the "Nation") appeals the Orders of Supreme Court dated July 8, 2004 and October 17, 2004 in the above-captioned matter.

I. QUESTIONS PRESENTED

1. Whether Supreme Court erred in failing to dismiss for lack of a justiciable case or controversy a suit filed by plaintiffs against the State of New York and the Oneida Indian Nation of New York for a declaration that the Oneida gaming compact was invalid under state law, where the plaintiffs voluntarily dismissed the Nation as a defendant, the State then reached agreement with the plaintiffs that the court should declare the Oneida compact invalid under state law and thereafter struggled to retain and not be relieved of the judgment, the judgment was tailored so as to not affect the State, and the only purpose of the judgment was to affect the Nation, as to which the plaintiffs and the State were adverse.

Supreme Court held that the Oneida Indian Nation, which all parties agree is immune, had no standing to raise the issue of the absence of a case or controversy because it had voluntarily absented itself from the litigation. Supreme Court also held that the parties' agreement regarding entry of judgment and its terms did not deprive the court of jurisdiction. Letter Decision dated June 25, 2004 at 7-9; Record at 9; *see also* Order of the Supreme Court, McCarthy, J., dated July 28, 2004. Supreme Court declined to reconsider that conclusion. Letter Decision and Order dated October 27, 2004, Record at 1075.

2. Whether Supreme Court erred in failing to dismiss because of the absence of an indispensable party, the Oneida Indian Nation of New York, reasoning that the Nation, although immune from suit under federal law, could waive its immunity and appear as a defendant and thus that it was unnecessary to weigh any prejudice to the Nation from proceeding in its absence, notwithstanding that the plaintiffs had dismissed the Nation as a defendant in the suit, the defendants abandoned all defenses to the plaintiffs' request for a declaration that the Oneida gaming compact was invalid under state law, all of the parties before the court were adverse to the Nation and together sought a judgment tailored not to adjudicate a dispute between the parties or to affect any actual defendant but to confirm the parties' agreement regarding the invalidity of the Oneida compact under state law, the only impact of which was that both the plaintiffs and the defendants, who were no longer adverse, would attempt to use the judgment in a federal forum against the Nation.

Supreme Court held that the Nation, although immune, was not an indispensable party, concluding that "the Nation has chosen to voluntarily absent itself from the instant litigation . . . to the extent that the Oneidas are prejudiced by this court's adjudication, if any, it could have

chosen to mitigate its damages by participating in the litigation as a party." Letter Decision dated June 25, 2004 at 6, Record at 9.

II. STATEMENT OF THE CASE

This case began with a genuine dispute between plaintiffs and the defendants, who included, at the outset of the litigation, both the State defendants and Ray Halbritter and the Oneida Indian Nation of New York. The complaint sought a declaration that the Nation's gaming compact was "invalid" under state law; it also sought injunctive relief against the State's expenditure of funds to implement the gaming compact and the immediate cessation of sending state monitors and police to the casino. Both the State and the Nation vigorously opposed the complaint.

Because of the Nation's immunity, the court ordered that the case could not proceed unless it eliminated the Nation as a defendant and also eliminated any requests for relief other than a declaratory judgment on the "validity" of the compact under state law. The plaintiffs tailored their complaint to comply with the court's directions. The relief requested therefore has no impact on the rights and obligations of the State.

Plaintiffs moved for summary judgment, urging that the decision of the Court of Appeals in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), required a ruling that the Nation's compact is invalid as a matter of state law. They also asserted additional legal theories for the same relief. On the eve of a hearing on plaintiffs' motion, the State filed a pleading in which it agreed that, based on *Saratoga*, plaintiffs were entitled to a declaratory judgment. At the hearing, the State affirmatively requested entry of that judgment and opposed the arguments of the Nation, which appeared specially to contest the court's jurisdiction, that

there remained issues for the court to resolve before entering the requested judgment. The Nation's arguments included (1) that the Nation is an indispensable party; and (2) that the doctrine of laches, an issue left open by the *Saratoga* decision, bars plaintiffs from obtaining the recovery they seek. Based on the State's decision to join in seeking a declaratory judgment based on *Saratoga's* separation of powers grounds, plaintiffs withdrew their alternate arguments for the same relief.

The State's affirmative request that the court enter the judgment plaintiffs sought eliminates any case or controversy. It also demonstrates that plaintiffs and defendants are now just plaintiffs and that the relief they seek is against the Nation. Plaintiffs' request for relief was tailored to eliminate any demands for a ruling that would impact the rights and obligations of the State. The only conceivable impact of the declaration sought by both plaintiffs and the State is to affect the Nation's rights to continue Class III gaming at Turning Stone and to impair the Nation's negotiating position in land claims negotiations. In these collateral proceedings, plaintiffs and the State have demonstrated that their interests are aligned with each other and adverse to the Nation.

A. Facts

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. §§ 2701-21, 18 U.S.C. §§1166-68. This statute requires states, such as New York, that permit gaming in any circumstance, to negotiate a tribal- State compact to allow high-stakes gaming on Indian lands. A compact entered into under IGRA becomes effective when it is approved by the Secretary of the Interior, with notice published in the Federal Register. 25 U.S.C. § 2710 (d)(3)(b).

The Nation, through its federally-recognized representative, and the State of New York, by Governor Cuomo, executed a tribal-state gaming compact in 1993, pursuant to 25 U.S.C. § 2710(d)(3). The Compact was approved by the U.S. Secretary of the Interior effective June 15, 1993, 58 Fed. Reg. 113, June 15, 1993, Record at 390-95, and the Nation opened its Turning Stone casino weeks thereafter. Although the execution of the Compact and the opening of the Oneida Nation's Turning Stone Casino were highly publicized in the area, no one challenged the Secretary's approval of the Compact under the federal Administrative Procedure Act, 5 U.S.C. § 704. Nor – until March 1999 – did anyone file a challenge to the validity of the Governor's execution of the Compact. In the meantime, the Nation expended millions of dollars on the development of a resort, anchored by the casino. Thousands of employees – for the most part non-Indians – took jobs with the resort. Local vendors developed products and services to garner resort business. Each year, from 1993 forward, the costs of State regulation of the Turning Stone Casino have been appropriated by the Legislature and reimbursed in full by the Nation pursuant to the Compact. *See generally*, Affirmation of Peter D. Carmen dated April 19, 2004, Record at 345.

The St. Regis Mohawk Tribe also entered into an IGRA gaming compact with the State of New York, signed by Governor Cuomo, in 1993. The Mohawk's casino, however, did not open until six years later, in April 1999. Shortly thereafter, and around the same time that this suit was commenced, taxpayers brought suit against the State for a declaratory judgment that the Mohawk's Compact with the State was invalid. In 2003, the New York Court of Appeals affirmed the issuance of a declaratory judgment that the governor did not have authority, under the state constitution, to enter into the compact with the Mohawk Tribe. *Saratoga*, 100 N.Y. 2d at 801.

Although the legality of gaming on Indian lands is controlled by federal law, plaintiffs and defendants in this case have relied both on *Saratoga* and the lower court decision in this case in efforts to force the Nation to renegotiate its gaming compact with the State. In recent years, the State has interjected demands for revenue sharing from the Turning Stone casino into ongoing settlement negotiations in the land claim litigation. Affirmation of Peter D. Carmen ¶ 13c, dated April 19, 2004, Record at 345. Plaintiffs in this case have stated publicly and in this litigation that their goal is to strengthen the State's bargaining position in its efforts to force a renegotiation of the gaming compact on terms more favorable to the State. *See, e.g.,* Letter from Leon Koziol dated January 27, 2004, Record at 646. An individual affiliated with Upstate Citizens for Equality, one of the plaintiffs here, also has tried to bootstrap the judgment of Supreme Court in this case into an order in a different state court. The Order sought would have enjoined Class III gaming at Turning Stone and prohibited state regulation of the Nation's gaming facilities, with the goal of shutting down the casino. *See Warren v. Pataki*, No. I-2004-5270 (N.Y. Sup. Ct, Erie Cty). In April 1995, the State of New York sued the Nation in federal court contesting the validity of the State's approval of the use of "Multigame" machines at the Turning Stone Casino. *State of New York v. Oneida Indian Nation*, 95-CV-554 (N.D.N.Y.). In recent pleadings in that litigation, the State has relied on the decision in *Saratoga* and the judgment of Supreme Court in the instant case in support of its position that the Nation should be enjoined from offering Multigame machines at Turning Stone Casino. *Id.*

B. Procedural History

On March 2, 1999, plaintiffs filed a complaint against the State defendants and against the Oneida Indian Nation and Nation representative Ray Halbritter. They sought a declaratory judgment that the 1993 Compact, entered into by the Oneida Indian Nation and the State of New

York, is not valid. They also sought injunctive relief against continued gaming under the compact and to compel the State to withdraw State regulation from Turning Stone Casino. Plaintiffs filed an Amended Complaint on April 25, 2000, seeking the same relief.

Both the Nation and the State defendants moved to dismiss the Complaint on the grounds that the Nation's sovereign immunity bars plaintiffs from suing the Nation, that the Complaint must be dismissed because the Nation is an indispensable party, that the plaintiffs lacked standing, and that the doctrine of laches bars plaintiffs from bringing the suit. Memorandum of Law in Support of The State Defendants' Motion to Dismiss the Complaint, dated January 27, 2000.

On March 7, 2001, plaintiffs filed a Motion to File an Amended Verified Complaint, removing the Nation and Ray Halbritter as defendants. The Amended Complaint continued to seek injunctive relief to prevent the State from implementing the compact. Between January 18, 2001 and May 9, 2002, Supreme Court issued repeated orders that the case could proceed only if the plaintiffs eliminated any request for injunctive relief, either against continued gaming under the compact or against the state's expenditure of funds to implement the compact. Order of January 18, 2002; October 24, 2001 Letter Decision; Order of December 20, 2001; Order of May 9, 2002, addressing Second Amended Complaint, dated January 17, 2002.

On April 2, 2001, the Nation filed a Memorandum in Opposition to Plaintiffs' Motion for Leave to file a Second Amended Complaint. The Nation renewed its objection to the Complaint on the ground that the suit could not proceed without the Nation, because the suit still sought to adjudicate the Nation's rights, albeit in the Nation's absence. On October 24, 2001, by Letter Decision, Supreme Court (McCarthy, J.) ruled that the Nation was not an indispensable party. On May 23, 2002, by Letter Decision, Supreme Court below denied the Nation's renewed

opposition to plaintiffs' motion for leave to file an Amended Complaint. Both decisions relied on the first decision of the Appellate Division in *Saratoga County Chamber of Commerce v. Pataki*, that the request for a declaratory judgment on the authority of the governor to enter into a gaming compact did not affect the rights of the tribe that was a party to the compact and which was adequately represented by the State defendants. 275 A.D.2d 145, 153-54 (N.Y. App. Div. 3d Dep't 2000). On August 14, 2002, Supreme Court entered an Order denying the State's motion to dismiss the complaint. The State defendants filed a Notice of Appeal of the Order on August 16, 2002.

On June 12, 2003, the New York Court of Appeals decided *Saratoga*. 100 N.Y. 2d 801. The Court held that Governor Cuomo lacked authority to sign a 1993 gaming compact with the St. Regis Mohawk Tribe without the approval of the Legislature. The United States Supreme Court denied a stay on the understanding that the Court of Appeals' decision allowed both gambling and state oversight to continue at the Mohawk's casino. *Pataki v. Saratoga County Chamber of Commerce*, U.S. Supreme Court Application No. 03A75, Notice dated July 29, 2003. The Supreme Court denied a petition for certiorari on November 17, 2003. *Pataki v. Saratoga County Chamber of Commerce*, 540 U.S. 570 (Mem) (2003).

On or around December 4, 2003, the State withdrew its appeal of this Court's August 14, 2002 Order. Then, on February 9, 2004 plaintiffs filed a Motion for Summary Judgment asking that the court declare the Compact invalid on three grounds: (1) that the Compact violates the anti-gambling provision of the New York State Constitution; (2) that the Compact violates anti-gambling provisions of state statutory law; and (3) that the Compact violates New York separation of powers doctrine. Affirmation of Leon R. Koziol in Support of Motion for Summary Judgment, dated February 10, 2004, Record at 21. With regard to their third argument,

plaintiffs stated: "Because the Oneida compact is in all material respects identical in form and substance to the Mohawk compact, a ruling for plaintiffs here is presumably a formality. *Id.* ¶ 21. Supreme Court scheduled the motion for argument on April 22, 2004.

On March 5, 2004, the Nation requested that the State defendants, in opposing the plaintiffs' Motion for Summary Judgment, make the argument that the suit should be dismissed under the doctrine of laches, which *Saratoga* explicitly left open. The Nation offered to provide the State defendants with affidavits demonstrating both the Plaintiffs' unreasonable delay and the prejudice to the Nation. The Nation urged the State to seek discovery so that a full factual record could be made on the issues relevant to the Plaintiffs' reasons for delay in bringing the suit. The Nation also requested that the State defendants renew the argument that Plaintiffs have no standing to bring this suit. In particular, the Nation urged the State to make the record clear that all of the Legislative appropriations that plaintiffs challenged as taxpayers were authorized by the legislature, thus eliminating a separation of powers challenge based on taxpayer standing. Letter from Elizabeth G. Taylor to Robert Siegfried dated April 8, 2004, Record at 358.

On April 6, 2004, counsel for the State defendants advised the Nation that the Governor's office had directed him not to present the defense of laches. Counsel also advised the Nation that the State would not renew its standing defense or supplement the record on that issue. Letter from Elizabeth G. Taylor to Robert Siegfried dated April 8, 2004, Record at 358.

On April 15, 2004, the State defendants filed a Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment. This "Opposition" opposed the motion only insofar as the plaintiffs' motion for summary judgment gave multiple bases for the court to find the Compact invalid. It stated: "The defendants agree that the Oneida Nation State Compact was entered into under the same circumstances as the St. Regis Mohawk's compact and therefore

Saratoga is dispositive with respect to the separation of powers argument. . . . [T]he plaintiffs can obtain the complete relief they are seeking entirely on the separation of powers claim . . ." Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, dated April 15, 2004, Record at 847.

On April 19, 2004, the Nation entered a special appearance to assert its sovereign immunity and to challenge the court's jurisdiction on the ground that the Nation is immune from suit and is an indispensable party to this litigation. The Nation renewed its Motion to Dismiss the complaint on the ground that the Nation is an indispensable party to the suit.

On April 21, 2004, counsel for plaintiffs filed an affidavit addressing the State's nominal "Opposition." In light of the State's agreement that the state separation of powers doctrine entitled plaintiffs to a declaration that the Compact was "invalid" under state law, plaintiffs withdrew the additional arguments for invalidation of the Compact. In the affidavit, plaintiffs' counsel stated that "by reason of the state's parallel reasoning and agreement with the position taken in our moving papers, there is no compelling reason for proceeding to the alternate arguments raised in either the pleadings or the moving papers." Affidavit of Leon R. Koziol ¶ 3, dated April 21, 2004, Record at 950. He went on: "Based upon this court's prior rulings, the framing of issues remaining for resolution herein, as all counsel concede, and the limited nature of declaratory relief now sought before the court, as further narrowed above, I believe there is nothing remaining for argument in this reply." *Id.* ¶ 4.

On April 22, 2004, Supreme Court held oral argument on both pending motions – plaintiffs' motion for summary judgment and the Nation's cross-motion to dismiss. With regard to plaintiffs' motion for summary judgment and the validity of the Compact, counsel for defendants simply stated: "Number one, we agree that Saratoga is dispositive. That's what we

put in our papers, our response to the motion and we believe that the plaintiffs are entitled to a declaration on that basis." Transcript, April 22, 2004, at 60, Oral Argument by Mr. Siegfried, Record at 1020. The State also argued against the Nation's Motion to Dismiss, urging that all of the Nation's arguments were rejected in *Saratoga* and that "the tribe certainly could have waived their sovereign immunity." *Id.* at 60, 63. Supreme Court took both issues under consideration.

On May 6, 2004, the Nation filed an additional affirmation and memorandum of law in support of its cross-motion to dismiss. The basis for these submissions was that in light of the defendants' agreement at the April 22 oral argument to join in plaintiffs' request for relief, and the affidavit of Mr. Koziol dated the day before the oral argument, taken in conjunction with the defendant's "Opposition" papers, there was no longer a justiciable case or controversy. Record at 954 and 1054. The State opposed the motion and requested that the court enter the declaratory judgment sought by plaintiffs. Letter from Robert A. Siegfried dated May 17, 2004, Record at 1070.

On June 25, 2004, Supreme Court issued a Letter Decision denying the Nation's cross-motion, granting plaintiffs' motion for summary judgment and declaring the Compact to be invalid as a matter of state law under the state doctrine of separation of powers. Letter Decision dated June 25, 2004, Record at 9. In the court's letter decision, it requested plaintiffs to submit a form of order consistent with the Decision for the court to sign. The order proposed by plaintiffs stated only that the plaintiffs' motion for summary judgment was granted. Counsel for the State pointed out that plaintiffs' order did not include a declaration on the validity of the compact and affirmatively requested that such a declaration be included in the judgment. Letter of Robert A.