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Re *Peterman v. Pataki*
RJI No. 32-99-0520

LETTER DECISION

The above-referenced matter is before this court pursuant to [1] Plaintiff's motion for summary judgment [New York Civil Practice Law and Rules § 3212, and [2] the Oneida Indian Nation of New York's [herein after Nation] cross-motion for leave to renew [New York Civil Practice Law and Rules § 2221[e]]. Oral argument was heard by the court on April 22, 2004, after which, on May 6, 2004, counsel for the Nation "supplemented" its initial motion. Final submissions were received on May 22, 2004, after which decision was reserved. Having reviewed the submissions of the parties and the Nation, for the reasons set forth below, this court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact:

As more fully set forth in this court's previous Letter Decisions, the instant action finds its genesis in the 1993 Compact entered into between the Nation and the defendant, State of New York. Plaintiffs challenge the authority of then Governor Mario Cuomo to execute a compact with the defendant, Oneida Indian Nation of New York to operate gambling casinos within the State of New York under the Indian Gaming Regulatory Act of 1988 [25 U.S.C. § 2701, *et seq.*]. In essence, the plaintiffs argue that then Governor Cuomo lacked the authority to enter into the compact without

legislative approval, and that the compact contravenes public policy against class III gaming activity.

Following a conditional dismissal of the instant action by Justice Murad, this court, by Letter Decision dated October 24, 2001 granted plaintiffs' motion for leave to file second amended complaint, and denied the plaintiffs' motion for summary judgment as premature.¹ On December 20, 2001 this court signed an Order consistent with its letter decision. The Order was filed and entered in the Oneida County Clerk's office on January 24, 2002. On the same date, plaintiffs filed their second amended complaint. Following entry of the order and service of the second amended complaint,, the Oneida Indian Nation of New York moved for leave to renew and reargue this court's January 24, 2002 order, the State of New York moved to dismiss plaintiffs' second amended complaint and plaintiffs, Scott Peterman, Upstate cross moved for summary judgment.

By Letter Decision dated May 23, 2002, the court granted the Nation's motion for leave to renew/ and or reargue, and based upon a review of the record before it, adhered to its original decision, denied the State of New York's motion to dismiss and denied plaintiffs' cross motion for summary judgment as premature². Following entry of this Courts' August 14, 2002 Order, the State of New York appealed this court's decision to the Appellate Division, Fourth Department. In December of 2003, the State of New York withdrew its appeal, and the instant motion and cross motions were brought.

By Notice of Motion dated February 9, 2004, plaintiffs moved for summary judgment arguing that:
The high court [New York Court of Appeals] has rendered a decision on the validity of a 1993 compact entered into between the Mohawk Tribe and New York

In granting plaintiffs' motion for leave to file second amended complaint, this court found that the plaintiffs had plead facts sufficient to demonstrate taxpayer standing with respect to Scott Peterman and David Townsend, organizational standing with respect to Upstate Citizens for Equality and found that the Oneida Indian Nation of New York was not a necessary and indispensable party. This Court further found that the plaintiff, the Hon. David Townsend did not have standing to proceed as a legislator.

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In that Letter Decision, this court found, based primarily upon the Appellate Division, Third Department's Decision Saratoga Chamber of Commerce v. Pataki, 293 A.D.2d 20 (3rd Dept. 2002), aff'd as modified, 100 N.Y.2d 801, cert.denied, 124 S.Ct. 570, the Oneida Indian Nation of New York was not a necessary and indispensable party to the action, that the plaintiffs had standing, that the action was not pre-empted, and that the instant action was not barred by the applicable Statute of Limitations and laches.

State, finding that the purported transaction violated the separation of powers doctrine. As relevant here, it found that the compact was illegal, by virtue of its lack of legislative authorization. The governor cannot bind the state to such a compact, and notwithstanding the various positions claiming constructive ratification, the [Court of Appeals] handed down a decision substantially consistent with the reasoning of most high courts in other states that have addressed the question.

[Plaintiffs' Counsel's Affirmation in Support of Summary Judgment at ¶ 20]. In sum and substance, plaintiffs argue with respect to their first cause of action that, under the doctrine of *stare decisis*, this court is bound to follow the New York Court of Appeal's Decision in Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801 (2003), and to find the compact invalid³.

Defendants, in opposition to the instant motion for summary judgment, in essence concede the applicability of the decision in Saratoga Chamber of Commerce, *supra*, with respect to the plaintiffs' first cause of action. This concession, however, is not the end of the court's analysis.

On April 19, 2004, three days before the scheduled return date, the Nation entered: "...special appearance for the limited purpose of contesting the jurisdiction of the court, and specifically to renew the nation's motion to dismiss the Complaint on the grounds of Tribal sovereign immunity." [April 18, 2004 Notice of Special Appearance]. The Nation's motion for leave to renew is predicated on two arguments:

First, the ruling of the Court of Appeals in *Saratoga Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, *cert. denied*, —U.S.—, 124 S.Ct. 570 (2003), establishes that this litigation affects significant interests of the nation. Consequently, this Court's decision to the contrary must be reconsidered. Second, the ruling in Saratoga has altered the interests this court considered in ruling that the litigation could proceed in the tribe's absence. There is now no compelling interest in addressing a significant issue of state law. The potential prejudice to the nation, however, is even greater than it was prior to the ruling in *Saratoga*, because it is now clear that the State cannot and will not adequately protect the Nation's interest. The State's refusal to present a meritorious laches defense on behalf of the Nation is illustrative of this conflict.

[Nation's Memorandum of Law at p.2].

Plaintiffs additionally moved for summary judgment on their second and third causes of action, in which they allege that the Compact violates Article 1, Section 9 of the New York State Constitution. Based upon representations made by the Assistant Attorney General at oral argument, plaintiffs withdrew their motion with respect to the constitutionality of the Compact.

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Following oral argument on April 22, 2004, counsel for the Oneida Nation submitted a Supplemental Affirmation, raising for the first time an argument that the instant action should be dismissed insofar as there no longer exists a justiciable controversy. The affirmation is predicated on an argument that insofar as the parties agree there is no genuine dispute, and thus no justiciable controversy the court is required to dismiss the instant action. In opposition to the supplemental affirmation, the State defendants argue:

...The Oneidas now urge that the state and the plaintiffs entered into an agreement regarding the separation of powers issue resolved in the Saratoga County Chamber of Commerce case, which effectively prejudiced the interests of the Oneidas. There was never any 'agreement' made between the State and the plaintiffs.

As the record demonstrates, the State conceded that under the principal of stare decisis [so in original], this court was bound to follow the Court of Appeal's determination in Saratoga on the separation of powers question pertaining to the Governor's authority to enter into the 1992 Compact with the Oneidas without legislative authority [citation omitted]. The State also concedes that the application of the Saratoga decision to the instant matter would result in a declaration that the Governor violated State separation of powers law when he entered into the compact with the Oneidas in 1993, and consistent with the ruling in Saratoga, the Compact was void and unenforceable under State law.

[May 17, 2004 Letter from Assistant Attorney General Robert A. Siegfried].

In light of the foregoing, this court turns its attention to the substantive issues before it.

Conclusions of Law:

A. Motion for Leave to Renew, Oneida Indian Nation of New York's [New York Civil Practice Law and Rules § 2221[e]:

As set forth in the Nation's counsel's affirmation in support of its motion for leave to renew, the Nation's argument is limited to "... the grounds of tribal sovereign immunity and the indispensability of the Nation as a party to the case." [Affirmation of Peter D. Carmen in Support of the Nation's Motion for Leave to Renew at ¶ 2]. As more fully set forth above, the Nation's position is predicated upon an argument that the Court of Appeal's decision in Saratoga County Chamber of Commerce, supra, establishes that a significant interest of the Nation will be effected, and second that the State, as a result of the decision, will no longer act to protect the interests of the Nation in this action.

New York Civil Practice Law and Rules § 2221[e] provides:

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

N.Y.Civ. Prac. L.&R. § 2221[e] (McKinney 1993) [emphasis added]. Upon review of the papers submitted by the Nation, this Court grants leave to renew.

Turning to the merits, in its two previous Letter Decisions and resultant Orders, this court held that the Nation is not an indispensable party, as defined by New York Civil Practice Law and Rules §1101. In reviewing the decision of the Court of Appeals in Saratoga County Chamber of Commerce, supra, this court does not find, as the Nation argues, that the decision announced a change in the law sufficient to change the court's prior determination. In holding that the Mohawk tribe was not an indispensable party in the Saratoga case, the Court of Appeals engaged in a painstaking analysis of CPLR § 1101, and concluded that:

The Tribe has chosen to be absent. Nobody has denied it the 'opportunity to be heard'; **in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate.** While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe (see Keene v. Chambers, 271 N.Y. 326, 330 [1936]; Plaut v. HGH Partnership, 59 A.D.2d 686 [1st Dept.1977]; 3 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 1001.10 [citing cases]). **While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court. In balancing the CPLR 1001 factors, the Appellate Division concluded that the equities weighed against dismissal.** That conclusion was not an abuse of discretion. While in other cases sovereign immunity might support dismissal, [footnote omitted] here the factors weigh toward allowing judicial review of this constitutional question (see generally Siegel, N.Y. Prac. § 133 ['Dismissal of the action for nonjoinder of a given person is a possibility under the CPLR, but it is only a last resort']). [footnote omitted]

We conclude that the alleged constitutional violation will be without remedy if this action is dismissed for the Tribe's nonjoinder. **We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its**

rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit (cf. United States ex rel. Steele v. Turn Key Gaming, Inc., 135 F.3d 1249, 1252 [8th Cir.1998]). The Tribe's nonjoinder is therefore excused... Saratoga County Chamber of Commerce, supra at 820-821 [emphasis added]. The same can be said in the instant action. While the Nation goes to great lengths on the instant motion for leave to renew to show the potential economic harm it will suffer if the court invalidates the 1993 Compact, the Nation has chosen to voluntarily absent itself from the instant litigation, a choice that is clearly well within its right as a sovereign nation. To paraphrase the Court of Appeal's decision in Saratoga, 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. [see, In the Matter of the Herald Company, Inc. v. Robert Feurstein, et al., —Misc.3d—, 2004 W.L. 503440 (S.Ct. N.Y.Co. 2004)].⁴

Nor is the court persuaded by the Nation's argument that the instant action should be dismissed as barred by laches. In support of its position, the Nation argues: " In *Saratoga*, the Court of Appeals affirmed the lower court's refusal to dismiss the Complaint on the ground of laches, because the record was insufficient to support dismissal on that grounds. The record in this case will demonstrate a very different picture." [Nation's Memorandum of Law at p. 11]. While counsel for the Nation is technically correct in his assertion, a more thorough analysis of the opinion is necessary.

In deciding the issue of laches, the Court of Appeals did not limit its decision to the paucity of the record concerning economic harm to the Mohawks, finding:

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Respondents also argue that the petition must be dismissed because the Oneidas are a necessary party who cannot be forced to appear in this matter as they are not subject to judicial process. Clearly, the Oneidas are not a party to this action. Although their interests are certainly affected by this litigation, the Oneidas have chosen not to participate. Unless Congress provides otherwise, Indian tribes, including the Oneidas, possess sovereign immunity against the judicial processes of states (see Saratoga County Chamber of Commerce Inc. v. Pataki, 100 N.Y.2d 801, 818, 766 N.Y.S.2d 654, 798 N.E.2d 1047, cert. denied --- U.S. ----, 124 S.Ct. 570, 157 L.Ed.2d 430 [2003]; see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 [1978]; United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 [1940]). **As a result, New York courts cannot force the Oneidas to participate in this matter. However, contrary to respondents' claim, the Oneidas' absence does not require this Court to dismiss this action.**

In the Matter of the Herald Company, Inc. v. Robert Feurstein, et al., supra at 2004 W.L.503440, *8

Plaintiffs argue that the Tribe was on notice as to the possible illegality of the compact, citing a memorandum from Governor Cuomo's Counsel indicating that the Tribe had been informed that legislative approval would be required before the State could enter into effective compacts. [footnote omitted]. Thus, while the casino is presumably expected to make large sums over the next several years, and while plaintiffs' suit threatens that source of revenue, the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches. Were it otherwise, very few suits would proceed past laches analysis, and certainly no suits seeking to invalidate illegal contracts could ever proceed.

Saratoga County Chamber of Commerce, *supra* at 817-818. In reaching this conclusion, the Court of Appeals makes reference to the June 15, 1993 Memorandum from Elizabeth Moore, Esq., counsel to then Governor Mario Cuomo, in which she "...amplifies our reasons for seeking enactment of legislation to authorize the state to carry out...[its] duties pursuant to the Indian Gaming Regulatory Act..." [Memorandum of Elizabeth Moore to then Governor Mario Cuomo, attached to Nation's Counsel's Affirmation in Support of Motion to Renew, Exhibit F]. The memorandum goes on to make specific reference to the Compact which is at issue in the instant action. While counsel for the Nation attempts to limit the effect of the Memorandum in the instant action, it is clear that, just as with the Mohawks in the Saratoga case, the Nation was on notice of the potential vulnerability of the Compact, and thus this court finds: "... the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches."

B. Justiciable Controversy:

Following oral argument on April 22, 2004, counsel for the Nation submitted a: "Supplemental Affirmation Supporting Motion by the Oneida Indian Nation of New York to Dismiss Complaint for Lack of Justiciable Controversy." As more fully set forth above, the affirmation is predicated on an argument that insofar as the parties agree there is no genuine dispute, and thus no justiciable controversy, the court is required to dismiss the instant action. As set forth above, and in this court's two previous Letter Decisions, the Nation is neither a party to the instant action, nor is it an indispensable party, thus the first question before this court is whether it has standing to raise the issue of justiciable controversy.

Citing to decisions in which courts have declined to issue judgment declaring the rights of parties, where the rights of a third party would be adversely affected, as well as cases in which courts have declined to issue such judgments where there is no longer a "genuine or justiciable controversy" before it, the Nation argues that the court has been divested of its authority to declare the rights of the parties. The cases cited by the Nation in support of its argument involve fact patterns in which the third parties had an interest in the outcome of the litigation, which is the case here, but who were

excluded from the litigation. There are no cases cited by the Nation in which a party, that has voluntarily absented itself from the litigation, was later allowed to object to the court rendering a decision.⁵

Even if the Court were to accept the Nation's argument that it has standing in its limited appearance to raise the issue of justiciable controversy, turning to the merits of their argument, this court finds it to be without merit. In the instant case, the court does not find that the actions of the plaintiffs and defendants create a feigned controversy necessitating dismissal. Here there is no agreement either express or implied to submit the action to the court solely to obtain a predetermined declaration of the rights of the parties.

At oral argument in the instant action, counsel for the State of New York conceded that the court, under the doctrine of *stare decisis* was bound to follow the decision of the New York Court of Appeals in Saratoga County Chamber of Commerce v. Pataki, *supra*, insofar as the instant action is indistinguishable from the decision. This court does not find that, under the circumstances of this case, that a concession by counsel in opposing a motion for summary judgment of existing, controlling precedent, divests this court of jurisdiction to declare the rights of the parties before it. Where the Nation's argument taken to its logical conclusion, any time that a party cited controlling precedent in support of its position and opposing party conceded the applicability of the precedent to the matter before the court, the court would be precluded from declaring the rights of the parties based upon controlling case law, a position that strikes at the very heart of the doctrine of *stare decisis*⁶. Accordingly, the Nation's Motion to Dismiss the Complaint based on a Lack of Justiciable

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Again the Nation argues that it would be substantially prejudiced by the decision of this court. However, as the Court of Appeals held when determining that the Mohawks were not an indispensable party: "We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit." Saratoga Chamber of Commerce v. Pataki, *op.cit.*

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'...The doctrine of *stare decisis* provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided (emphasis added) in conformity with the earlier decision' (People v. Bing, 76 N.Y.2d 331, 337-338). The doctrine, which 'rests upon considerations of practicality and principle' (People v. Damiano, 87 N.Y.2d 477, 48 [Simons, J., concurring]), recognizes that a legal question, once resolved, should not be reexamined each and every time that it is presented (see, Matter of Deposit Cent. School Dist. v. Public Empl. Relations Bd., 214 A.D.2d 288, 290, lv. dismissed, lv. denied 88 N.Y.2d 866; Dufel v. Green, 198 A.D.2d 640, affd. 84 N.Y.2d 795). Simply stated, the established precedent prevails

Controversy is, in all respects denied.⁷

C. Summary Judgment:

Turning to the merits of the case before it, as framed by counsel for the parties to the instant action, the sole remaining issue to be determined by this court on plaintiffs' motion for summary judgment is whether then Governor Mario Cuomo exceeded his authority in entering into the 1993 Compact with the Oneida nation without legislative approval.

Reviewing the case before it in light of the Court of Appeals Decision in Saratoga County Chamber of Commerce v. Pataki, *supra*, this court finds the unilateral actions of then Governor Cuomo in entering into the Compact without legislative approval clearly violated the doctrine of separation of powers recognized by Articles 3-5 of the Constitution of the State of New York (see N.Y. Const., art. III, § 1; art. IV, § 1; art. VI, § 1)⁸, and thus declares the 1993 Compact invalid.

unless there is a compelling reason to depart from it (see, Matter of Schulz v. State of New York, 241 A.D.2d 806, 808, appeal dismissed 90 N.Y.2d 1007; Dufel v. Green, *supra*).

Battle v. State, 257 A.D.2d 745, 746 (3rd Dept. 1999), lv.to.app.denied, 93 N.Y.2d 805 (emphasis added); see also, 28 N.Y. Jur. 2d Courts and Judges § 220; 1 Carmody-Wait 2d § 2:261, Courts and Their Jurisdiction, Generally; Statement and Purpose of Doctrine [*Stare Decisis*].

As Judge Celya, writing for the First Circuit Court of Appeals observed in The Dartmouth Review v. Dartmouth College, *et al*, 889 F.2d 13 (1st Cir. 1989): "We find this to be a ketchup bottle type argument: it looks quite full, but it is remarkably difficult to get anything useful out of it." *Id.* at 18.

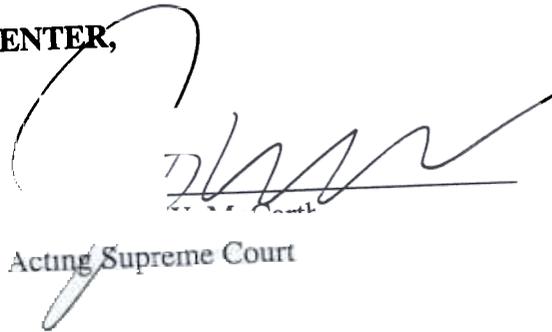
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"Stated succinctly, the separation of powers 'requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies' (Bourquin v. Cuomo, 85 N.Y.2d 781, 784,[1995] [citing Matter of New York State Health Facilities Assn. v. Axelrod, 77 N.Y.2d 340, 349(1991)])." Saratoga County Chamber of Commerce v. Pataki, *supra* at 821-822.

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The foregoing constitutes the Letter Decision of the Court. Counsel for the plaintiffs is to submit an Order consistent herewith for signature within five days of receipt.

ENTER,



Acting Supreme Court

Dated: June 25, 2004
at Oswego, New York

JWM/knc
cc: Court File