

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF ERIE

2 DANIEL T. WARREN,)
3 Plaintiff,) NOTICE OF CROSS-MOTION
3 vs.)
4 GEORGE E. PATAKI, MICHAEL J. HOBLOCK, JR.)
4 AND WAYNE E. BENNETT.) Index # 2004-5270
5 Defendants)
5)

6 UPON the affirmation of Peter D. Carmen, Esq. affirmed to on the 17th day of October,
7 2004, and the exhibits attached thereto, the affidavit of Daniel T. Warren, sworn to on the 27th of
8 September, 2004, and the exhibits attached thereto, Plaintiff Daniel T. Warren will move this
9 court on the 29th day of October, 2004, for leave to amend the complaint to name the Oneida
10 Indian Nation of New York or its officers as party defendants pursuant to CPLR §§ 1001, 1003,
11 3025, together with such other, further or different relief as the court deems just and proper.
12

13 Dated: October 20, 2004
14 Buffalo, New York

15 Yours, etc.,

16 _____
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1 SUPREME COURT OF THE STATE OF NEW YORK
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4 GEORGE E. PATAKI, MICHAEL J. HOBLOCK, JR.)
4 AND WAYNE E. BENNETT.)
5 Defendants)

MEMORANDUM OF LAW
IN OPPOSITION TO ONEIDA INDIAN NATION'S
MOTION TO DISMISS AND IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION

5)
6)
6) **Index # 2004-5270**

7 PROCEDURAL DEFECTS IN THE ONEIDA NATION'S MOTION TO DISMISS

8 This motion is procedurally defective and should not be heard. New York no longer recognizes a
9 special appearance to challenge jurisdiction (CPLR § 320; CIBC Mellon Trust Company v. Mora
10 Hotel Corporation N.V., 100 N.Y.2d 215, 792 N.E.2d 155, 762 N.Y.S.2d 5 (N.Y. 05/08/2003)).
11 Movant has yet to be named a defendant in this action nor has it moved for leave to intervene as a party
12 defendant raising the jurisdictional objection in it proposed Answer. Furthermore, it has not even moved
13 for leave to appear as amicus curiae to submit briefs in support of the position of the State Defendants.
14 Movant for the foregoing reasons also have not appeared in the action of Peterman v. Pataki, Supreme
15 Court, Oneida County, Index# 99-533. Also movant's arguments addresses the merits of the claim, inter
16 alia, in regard to injunctive relief and whether or not approval by the U.S. Secretary of the Interior will
17 validate a compact that is invalid under state law, and dismissal because it is an indispensable party and is
18 otherwise seeking dismissal on non-jurisdictional basis, therefore such an appearance should be deemed a
19 general appearance and any jurisdictional issues waived. As the court in Al-Dohan v. Kouyoumjian,
20 116 Misc.2d 1024, 456 N.Y.S.2d 974, held "Once a party defends on the merits, or otherwise
21 affirmatively participates in the action other than by objecting to jurisdiction or by performing an
22 act specifically permitted without jurisdictional consequences, he has "appeared". "[It] is
23 unimportant how process was served or that it was served at all, and by appearing, all objections
24 to the regularity or sufficiency of the service of process is waived" (Matter of Dell, 56 Misc. 2d
25 1017, 1019; 4 Carmody-Wait 2d, § 26:36.)" the court went on to hold "The court notes that
defendant's appearance here was hardly inadvertent. This is not a case of a pro se party

1 inadvertently appearing by answering a calendar or requesting time to answer. Here, experienced
2 counsel knowingly, deliberately and actively pursued the action on the merits. The defendant
3 sought affirmative legal relief through the process of the court; he thereby voluntarily submitted
4 himself to the court's jurisdiction.” Instead of concentrating on whether this court has subject
5 matter or in personam jurisdiction over the issue movant has addressed issues that goes to the
6 merits of this action.

7
8 Therefore, movant has waived through its arguments on the merits any objection to this
9 court’s jurisdiction based on the claims of sovereign immunity or personal jurisdiction and this
10 court should grant plaintiff’s cross-motion to add the Oneida Indian Nation of New York as a
11 party defendant.

12
13 **ALTERNATIVELY THE MOTION SHOULD BE DISMISSED ON THE MERITS TOGETHER WITH THE**
14 **DEFENDANTS FIFTH DEFENSE SHOULD BE DISMISSED**

15 The movant had appeared as amicus curiae in Saratoga and had an opportunity to present these
16 issues therein. The New York Court of Appeals acknowledged the affect that its ruling may have on
17 movants. Specifically in the majority opinion the court stated “The Tribe is not a party to this action.
18 Although its interests are certainly affected by this litigation, the Tribe has chosen not to
19 participate. Unless Congress provides otherwise, Indian Tribes possess sovereign immunity
20 against the judicial processes of States (see e.g. Santa Clara Pueblo v Martinez, 436 US 49, 58
21 [1978]; United States v United States Fidelity & Guaranty Co., 309 US 506, 512 [1940]; Turner
22 v United States, 248 US 354, 358 [1919]). As a result, New York courts cannot force the Tribe to
23 participate in this lawsuit. The State claims that the Tribe's absence requires us to dismiss this
24 action. We disagree.” The court then evaluated the factors under CPLR § 1001(b) and upon weighing
25 the potential prejudice to the absent tribe held “We conclude that the alleged constitutional violation
will be without remedy if this action is dismissed for the Tribe's non-joinder. We further

1 conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its
2 rights under the compact, the Tribe could have mitigated that prejudice by participating in the
3 suit (cf. *United States ex rel. Steele v Turn Key Gaming, Inc.*, 135 F3d 1249, 1252 [8th Cir
4 1998]). The Tribe's non-joinder is therefore excused, and we proceed to discuss the merits.” As
5 in *Saratoga, supra*, if the Oneida Indian Nation desires to mitigate any perceived prejudice they can
6 participate in this action.

7
8 Movant also claims that the Plaintiff’s motion for Partial Summary judgment is seeking to close
9 the Turning Stone Casino that they operate. This is not the case. The motion seeks to halt the illegal
10 Class III gambling at the Turning Stone Casino as well as the Akwesasne Mohawk Casino due to the lack
11 of a valid tribal-state compact under the IGRA. Both Class I and Class II gaming may be conducted at
12 both casinos without a valid tribal-state compact under the IGRA. Movants allege that they are
13 prejudiced, as well as the surrounding community, if an injunction is issued as requested in my motion.
14 This is simply untenable, this is not a defense to continue the operations of drug dealing operations,
15 prostitution rings, racketeering enterprises and it should not justify illegal gambling operations.

16 Movant further argues that injunctive relief is not proper and attempts to support its claim
17 by pointing to the lack of a request for injunctive relief, whether limited by the court or the
18 parties, in *Peterman and Saratoga* together with Justice Ginsburg’s notation in denying a stay
19 pending the State’s petition for cert in *Saratoga*.

20
21 The court and the parties were correct in not seeking injunctive relief in those actions. It
22 is black letter law that it is this court’s function to say what the law is. Once the courts of this
23 state say what the law is it is the Defendants’ constitutional duty to “take care that the laws are
24 faithfully executed” (N.Y. Const. Art. IV § 3). It is for this reason the courts of this state
25 generally will not resort to a coercive injunction until it is demonstrated that the Executive
Branch is recalcitrant in carrying out their constitutional duties. In any event the movant
misrepresents the rationale of the court in *Peterman, supra*, in relation to not issuing injunctive

1 relief. As borne out in the transcript of the proceedings on April 22, 2004, the issue of the
2 propriety of the request for injunctive relief was not actually litigated. The order regarding
3 injunctive relief placed into effect the agreement between the Oneida Indian Nation and the other
4 parties of that suit to dismiss them from the action and remove any objections as to whether they
5 were indispensable parties to that action (Movant's Ex. L page 57 line 11 through page 58 line 5
6 and page 64 line 15 through page 65 line 11). Additionally the court in Peterman v. Pataki in its
7 October 24, 2001, Letter Decision at page 10 (Movants' Ex. M) stated "In light of the foregoing,
8 together with plaintiffs' counsel's representation on the record that the plaintiffs *do not seek*
9 *injunctive relief against the casino. . .*" In this action plaintiff does not seek any injunctive
10 relief against the Nation nor its casino. The injunctive relief is directed to the State Defendants
11 only.
12

13 Movants reference to Justice Ginsburg's notation has no bearing on the issue of whether
14 or not injunctive relief is proper or appropriate. As previously stated there is no stay to a non-
15 executory portion of an order or judgment. The stay only prevents the executory provisions of
16 the order or judgment or to its enforcement through coercive measures. Likewise a stay issued
17 by the U.S. Supreme Court only stays the enforcement of the judgment to be reviewed (Supreme
18 Court Rule 23(2); 28 USC § 2101(f)) it does not affect the non-executory provisions of the
19 judgment.
20

21 The judgments of the courts of this state are not only binding on the executive branch, but
22 the legislature as well. Movant's argument that the executive branch obtained legislative
23 approval when the legislature appropriated funding for the obligations to be carried out is
24 without merit. The Court of appeals held in Saratoga, supra, that this was not sufficient and the
25 Defendants' are bound to that determination by res judicata and this court is bound by that
determination by stare decisis. Movants' position that the legislature by appropriating funds to

1 carry out the State's obligations imposed by this now invalid compact some how validates it was
2 soundly rejected in Saratoga, supra, wherein it held "The State argues that by passing certain
3 appropriation bills, the Legislature has signaled its approval of the compact. We disagree. Those
4 enactments are no substitute for approval or total ratification. The Legislature has been free to
5 ratify the compact but, as yet, has not done so. Indeed, the State Assembly in a resolution
6 expressly opposed the Governor's unilateral action in negotiating and signing the compact. The
7 resolution asked the Secretary of the Interior not to approve any compact unless approved by the
8 Legislature. The Assembly stated that "[a]ny compact permitting casino gambling necessarily
9 requires at a minimum the exercise of legislative power with respect to regulatory appropriations
10 and related police powers," and that therefore "[t]he Governor lacks authority to act on behalf of
11 the State to enter into a Tribal-State compact" (Res of Assembly A 2413 [1996]). This
12 expression does not square with the State's claim that the Legislature has impliedly approved the
13 compact."

14
15 Movants contention that only federal courts may re-arrange rights on obligations
16 established by the respective compacts is meritless. The rights and obligations that the Nation
17 claims simply does not exist because the compacts have been declared void and unconstitutional
18 (It is somewhat odd that the movants argue that Peterman and Saratoga did not affect their rights
19 on one hand, but then assert they are aggrieved by the judgment so as to afford them standing to
20 appeal the judgment entered in Peterman). Secondly, whatever claims the Nation may have that
21 it perceives is within the exclusive jurisdiction of the federal courts can be raised in the federal
22 action that this action seeks to compel the state to initiate (Complaint, ad damnum clause ¶ L).

23
24 There is no relief requested in this action that will compel or require the Oneida Indian
25 nation of New York to "waive its sovereign immunity and join this litigation." Although by it
doing so would be a better use of judicial resources (both federal and state) it could just as easily

1 await the outcome of this action, and if plaintiff is successful in seeking and obtaining the
2 injunctive relief, raising any defenses in the federal court proceeding that this action seeks to
3 compel the state to initiate.

4
5 Whether or not a state has entered into a valid tribal-state compact is a question of state
6 law and the Secretary's approval can not and do not alter the validity of the compact under state
7 law (*Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir.), cert. denied 118 S. Ct. 45
8 (1997)). State law also determines if a state has any authority to enter into such a compact as
9 well. The court in *In re Indian Gaming Related Cases Chemehuevi Indian Tribe*, 331 F.3d 1094
10 (9th Cir. 2003) stated "The State already had no obligation to conclude compacts with tribes
11 permitting slot machines and banked card games, see *Rumsey*, 64 F.3d at 1258; the decision
12 [*Hotel Employees & Restaurant Employees International Union v. Davis*, 21 Cal.4th 585 at 601,
13 981 P.2d 990, 88 Cal.Rptr.2d 56.] meant it now also lacked the authority to do so."

14 Furthermore the Court of Appeals in *Saratoga*, supra, held "Initially, we hold that IGRA
15 does not preempt State law governing which State actors are competent to negotiate and agree to
16 gaming compacts. IGRA imposes on "the State" an obligation to negotiate in good faith (25 USC
17 § 2710 [d] [3] [a]), but identifies no particular State actor who shall negotiate the compacts; that
18 question is left up to State law (see *Pueblo of (*18)Santa Ana v Kelly*, 104 F3d 1546, 1557 [10th
19 Cir 1997], cert. denied 522 US 807 [1997]). As the Supreme Court noted, the duty to negotiate
20 imposed by IGRA "is not of the sort likely to be performed by an individual state executive
21 officer or even a group of officers" (*Seminole Tribe v Florida*, 517 US 44, 75 n 17 [1996] [citing
22 *State ex rel. Stephan v Finney*, 836 P2d 1169 (Kan 1992)])." Movants misrepresent the Court of
23 Appeals decision in *Saratoga*, supra by pointing to footnote 4 of its decision and stating that the
24 Court "acknowledged that the legality of Indian gaming on reservation land is determined under
25 IGRA" It acknowledged no such thing. The IGRA prohibits all Class III gaming on Indian land

1 unless there is a valid tribal-state compact in effect. An invalid tribal-state compact cannot be in
2 effect for purposes of the IGRA exception to this general prohibition.

3
4 The movants cite *Gaming Corp. of America v. Dorsey and Whitney*, 88 F.3d 536, for the
5 proposition that the U.S. Supreme Court's decision in *Cabazon* limiting the role of states in the
6 regulation of gambling was codified into the IGRA. This decision is simply not applicable to the
7 State of New York. *Gaming Corp.*, *supra*, was an action concerning the State of Minnesota
8 which unlike the state of New York does not have a Congressional grant of criminal and civil
9 jurisdiction over Indian land (25 USC §§ 232, 233).

10
11 Class III gaming is illegal under state law unless there exists a valid tribal-state compact.
12 One court has already declared movant's tribal-state compact void and unconstitutional and two
13 courts (*Peterman*, *supra*, and *Saratoga*, *supra*), one of which is the State's highest court, held that
14 a tribal-state compact entered into absent legislative authorization is void and unconstitutional.

15
16 18 U.S.C. §§ 1166(a), 1955 makes the same illegal gambling prohibited by Penal Law S 225.30 a
17 federal offense and 25 U.S.C. § 232¹ is a provision of Federal law that grants New York concurrent
18 criminal jurisdiction under 18 U.S.C. § 1166(d) and the laws of New York are not preempted under the
19 IGRA (*United States v. Cook*, 922 F.2d 1026 (2nd Cir. 1991)). Since the possession of a slot machine is
20 only lawful under state law in the presence of a valid tribal-state compact under the IGRA, and the State
21 Courts have held that the tribal-state compacts with the Oneidas and St. Regis Mohawks is invalid, the
22 possession and use of the slot machines at the Turning Stone Casino and Akwesasne Mohawk Casino is
23 illegal under State Law and 18 U.S.C. §§ 1955, 1166 makes those same slot machines illegal under
24 federal law (see also 15 U.S.C. 1171-1178).

25

¹ 25 U.S.C. § 232 was enacted after the Court in *United States v. Forness*, 125 F.2d 928 (2nd Cir. 01/20/1942) questioned the longstanding presumption that Indian tribes in New York was under the State's general jurisdiction. (see Hearings on S.1686, S.1687 Before the Subcomm. On Indian Affairs of the Senate Comm. On Interior Affairs, 80th Cong. 2d Sess. 13 (1948), Comment, *The New York Indians' Right to Self-Determination*, 22 *Buffalo L. Rev.* 985, 992 (1973)

1 Movant's claim of prejudice due to the potential economic impact is simply unavailing. The
2 nation is engaging in a gambling operation that is now illegal under state and federal law (Penal Law Art.
3 225, 18 USC §§ 1955, 1166) and its proceeds are therefore subject to state and federal forfeiture
4 provisions (i.e. 15 USC § 1177 and CPLR Art 13). The Nation may have an arguable equitable defense
5 to protect its proceeds prior to the decision in Peterman, supra, but it certainly does not have any
6 thereafter. As previously stated this state does not countenance illegal drug dealing or illegal prostitution
7 because of the "economic benefits" they may produce as a consequence of their operation and this state
8 should not countenance illegal gambling on this basis either.

9 Since the movants are conducting Class III gaming in violation of state and federal criminal law
10 any immunity the tribe may have cannot shield the employees and officers of the tribes engaging in this
11 illegal activity.

12
13 Wherefore, the motion of the Oneida Indian Nation of New York should be denied and leave
14 granted to plaintiff to add the Oneida Indian Nation of New York or its officers as a party defendant.

15 Dated: October 20, 2004
16 Buffalo, New York

Yours, etc.,

17
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