SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

DANIEL T. WARREN, Plaintiff, vs. **GEORGE E. PATAKI, MICHAEL J. HOBLOCK, JR. AND WAYNE E. BENNETT.** Defendants	**MEMORANDUM OF LAW** **Index #** 2004-5270

POINT I

IRREPARABLE HARM

The provisional remedy sought in this motion is not against the Seneca Niagara Casino, the Seneca Allegany Casino nor the third casino provided for the in the Seneca compact, so long as it is within the limits of the City of Buffalo or legislative authorization is obtained for an alternate location (It is also interesting to note that the revenue provided for under the Seneca compact is derived from a percentage of the net drop on the slot machines only which are illegal under New York Law (United States v. Cook, 922 F.2d 1026 (2nd Cir. 01/07/1991))). The preliminary injunction sought is against Class III gaming at the Turning Stone Casino and the Akwesasne Mohawk Casino and any other casino as soon as it is determined that its tribal-state compact is invalid (Class I & II gaming may still be conducted at these Casinos under the IGRA and they do not need to be closed just the types of games offered limited.[1]) The Turning Stone Casino nor the Akwesasne Casino have any revenue sharing provisions like the Senecas' compact. Even if they do reimburse the state for some of the services provided therein by the

[1] Class I gaming, defined as ceremonial or traditional gaming, which includes social games for nominal prizes, remains within the exclusive control of the Indian tribe. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo, lotto, pull-tabs, tip jars, punch boards and card games that are either authorized or not specifically prohibited by state law, remains within the jurisdiction of the tribe but is subject to oversight by the National Indian Gaming Commission ("NIGC"). 25 U.S.C. §§ 2703(7)(A), 2710(a)(2), (b) and (c). Class II gaming is only permitted (1) if carried on in a state that allows such gaming for any purpose by any person, organization, or entity; (2) if not prohibited by federal law; and (3) if a tribal ordinance or resolution has been adopted permitting such gaming. 25 U.S.C. § 2710(b)(1)(A), (B), (b)(2) and (b)(4)(A). The IGRA expressly excludes from class II gaming slot machines of any kind. 25 U.S.C. § 2703(7)(B)(ii). Class III gaming, defined as all gaming not listed in either Class I or II, is prohibited unless (1) authorized by a tribal ordinance or resolution; (2) located in a state that permits the particular gaming for any purpose by any person, organization or entity; and (3) conducted in accordance with a compact negotiated between the Indian tribe and the state. 25 U.S.C. §§ 2703(8), 2710(d)(1).

State the State could use that man power, instead of breaking even, to reduce its overtime expenses. In any event those compacts that contain the provisions for reimbursement have been ruled a nullity and therefore the respective Indian tribes and nation are no longer obligated to those provisions nor is the State. Also those respective Indian nations and tribes can police their own territory since the Oneida Nation has an accredited full time police department (http://www.oneida-nation.net/police/) and the Mohawks have the St. Regis Mohawk tribal police. To the extent that the Legislature has recently passed a bill that ratifies the compact relative to the Akwesasne Mohawk Casino that compact is still not effective until the Secretary of the Interior approves it. Until that time it is illegal and should be enjoined[2]. We do not countenance profitable drug dealers if they employ enough people and we should not countenance illegal gambling if those operations are profitable either.

Contrary to the defendants' assertion this order will not limit the State's regulatory function relative to these Casinos the State's law is not currently being enforced relative to Class III gaming in violation of the Court of Appeals decision in Saratoga together with State and Federal laws and this relief will compel the state to perform its lawful regulatory not prevent it from doing so..

POINT II

LIKELIHOOD OF SUCCESS ON THE MERITS

Subsequent to this motion for a preliminary injunction Defendants interposed their Answer on or about June 23, 2004 (a copy is attached hereto). In this Answer the Defendants assert twelve defenses which will be addressed seriatim:

The First Defense asserts that I lack standing to maintain this action in whole or in part. As previously stated plaintiff asserts standing under State Finance Law Article 7-A, common law taxpayer standing and voter standing.

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[2] Plaintiff will be amending the complaint in this action to invalidate this act for same reasons as Part B of Chapter 383 of the Laws of 2001 is alleged to be unconstitutional.

The Second Defense asserts that this action is not ripe for review either in whole or in part. Defendant Pataki raised this defense in Huron Group, Inc., et al v. Pataki, et al, Supreme Court, Erie County, Index #2004-4425 [Huron]. In Huron the plaintiffs challenged so much of the tribal-state compact between the Seneca Nation of Indians and the State of New York relating to the location provisions as unconstitutional. Justice Makowski held that a declaratory judgment action is premature only if the future event is beyond the control of the parties and may never occur citing New York Public Interest Group, Inc. v. Carey, 42 NY2d 527, 531 (1977). Justice Makowski then determined that a number of steps have already been taken toward establishing a location outside the City of Buffalo and if the court waited until the point in time that the Defendants therein asserted the court would lose jurisdiction over the land and it would in effect render the state constitutional issue un-reviewable. Likewise in this case this action is not premature in that Defendants have stated in their Answer in ¶ 8 where they state "deny that any binding agreements have been reached or that negotiations have contemplated any agreement which would be in any way unlawful." Therefore it is their opinion that the contemplated agreements on tax/price parity are lawful. I am therefore entitled to a declaration as to their legality because steps have been taken towards this end.

The Third Defense is based on laches. The legislative act being challenged herein became law on or about October 24, 2001. The tribal-state compact between the Senecas and the State was entered into on or about August 22, 2002. In this case the Senecas have been operating and profiting from one Casino under the challenged compact for over a year and a few months ago opened a second one in their land in the southern tier. Under similar facts the Court of Appeals in Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, refused to dismiss an action commenced nearly six years after the compact was effective. This one was commenced at most just over two and one half years after the passage of the challenged legislative act and resultant effective date of the subject compact.

The Fourth Defense asserts that this action is barred by the applicable statute of limitations. Once again as stated in the Court of Appeals decision in Saratoga County Chamber

of Commerce v. Pataki, 100 N.Y.2d 801, the "Plaintiffs seek a declaration as to the unconstitutionality of the 1993 compact and an injunction against the use of State funds to implement it. That relief cannot be afforded under CPLR article 78. The closest remedy contained in article 78 is prohibition, where an official is proceeding "without or in excess of jurisdiction" (CPLR 7803 [2]). We have held, however, that article 78 may not be used against executive officials, and plaintiffs would therefore have been unable to use article 78 to prevent the Governor from signing the compact (see Matter of Morgenthau v Erlbaum, 59 NY2d 143, 147 [1983]; Matter of Dondi v Jones, 40 NY2d 8, 13 [1976]; see also Sears v Hull, 961 P2d 1013, 1016-1017 [Ariz 1998]). Accordingly, the article 78 statute of limitations does not apply. That being so, plaintiffs' declaratory judgment action falls within the residuary six-year statute of limitations period under CPLR 213(1) (see Vigilant Ins. Co. v Housing Auth., 87 NY2d 36, 42 [1995]; see also Solnick, 49 NY2d at 230; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3001:18, at 446)." With regard to the Akwesasne Mohawk Casino this action is concerning the Defendants actions since that compact was declared illegal in Saratoga by the Court of Appeals on June 17, 2003 and is not concerned with the propriety of that decision nor the relief requested in that action but is an independent plenary action for follow-up relief pursuant to a declaratory judgment (Dale Renting Corp. v Bard, 39 Misc. 2d 266, affd 19 A.D.2d 799) which has been commenced within one year and therefore is within any possible statute of limitations.

The Fifth Defense assert that I have failed to join indispensable party(ies) namely the various Indian governmental entities that may be affected by this action. This defense was also rejected by the Court of Appeals in Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801. In any event I stated my arguments in my moving papers why tribal sovereign immunity should not be a bar to adding the officials of the Indian Gevernmental entities as defendants and requested leave to add them. I would like to take this opportunity to add one more theory.

In light of Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2 Cir. 1964), cert. denied, 381 U.S. 934, 85 S. Ct. 1763, 14 L. Ed. 2d 698 (1965), an Indian Nation or tribe's purely commercial activity should not be protected by any claim of sovereign immunity. For present purposes, a summary of the general principles emerging from Victory Transport should suffice; the contemporary rationale for sovereign immunity is the avoidance of possible embarrassment to those responsible for the conduct of the nation's foreign relations; in determining the scope of the immunity which a foreign sovereign enjoys, courts have therefore deferred to the policy pronouncements of the State Department, see, e. g., National City Bank of New York v. Republic of China, 348 U.S. 356, 360-361, 75 S. Ct. 423, 99 L. Ed. 389 (1955); the State Department has explicitly indicated that its policy is generally predicated on a "restrictive" theory of sovereign immunity -- "recognizing immunity for a foreign state's public or sovereign acts (jure imperii) but denying immunity to a foreign state's private or commercial acts (jure gestionis)."336 F.2d at 358. See 26 Dept. State Bull. 984 (1952); "the purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts,"336 F.2d at 360.

The United States Supreme Court deferred this questionable policy that developed almost by accident to be resolved by Congress. The Court stated "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment." Kiowa Tribe of Okla. v. Manufacturing Technologies Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (U.S. 05/26/1998) This issue was most recently presented to the court in Inyo County v. Paiute-Shoshone Indians, 123 S.Ct. 1887, 155 L.Ed.2d 933 (U.S. 05/19/2003). However, the Court did not reach this issue.

The Sixth Defense asserts that the complaint fails to state a cause of action. This is invalid and stricken for two reasons. First, it is apparent that the complaint states a Cause of action. It names the parties, the obligations, the breach thereon and the remedy sought. Second, the Appellate Division, Second Department has held that an affirmative defense that a complaint fails to state a cause of action cannot be submitted in an answer but must be part of a motion to dismiss. See Petracca v Petracca, 305 AD2d 566 (2d Dept 2003).

The Seventh Defense asserts that I do not have standing to enforce a judgment from a separate action. Namely Saratoga County Chamber of Commerce v. Pataki as it relates to the Akwesasne Mohawk Casino. That action was a taxpayer declaratory judgment action. I am bound by res judicata on all issues actually litigated in that action (Murphy v. Erie County, 28 NY2d 80 (1971)). Had that action been determined against my position Defendants would surely use it as a shield to this action. Additionally class action certification is typically denied in taxpayer actions because the class of taxpayers as a whole should benefit via the doctrine of stare decisis (Matter of Martin v Lavine, 39 N.Y.2d 72, 75; Suffolk Housing Servs. v Town of Brookhaven, 69 A.D.2d 242, 248, app dsmd 48 N.Y.2d 652). As a member of the plaintiff taxpayer class in that prior declaratory action I have standing to commence a second plenary action to seek its enforcement in the face of defendants flouting of that judgment. The CPLR does not directly address the proper procedure for enforcing a declaratory judgment, and there is no other statutory authority. (Cf. CPLR art 52 for enforcement of money judgments.) The earlier cases seem to imply that a plenary action is necessary. (See, e.g., Dale Renting Corp. v Bard, 39 Misc. 2d 266, affd 19 A.D.2d 799; Schulman v Schulman, 223 N.Y.S.2d 353.) However in some cases a motion in the prior action has been held, or implied, as proper (Auer v. Dyson, 25 Misc. 2d 274; Berlitz Pub. v Berlitz, 37 N.Y.2d 878)

In their Eighth Defense Defendants assert that I am estopped from contesting any compact that I have not objected to or challenged the Secretary of Interior's approval of it. This defense must fail because the Secretary cannot validate an otherwise invalid compact. In fact the

tribal-state compact between the Senecas and the State was allowed to be approved only to the extent it is consistent with the IGRA. The IGRA requires a valid tribal-state compact. Additionally, this argument fails because the compact between the St. Regis Mohawks and the State that was invalidated in Saratoga was also approved by the Secretary and published in the Federal Register on December 13, 1993. The CPLR does not directly address the proper procedure for enforcing a declaratory judgment, and there is no other statutory authority. (Cf. CPLR art 52 for enforcement of money judgments.) Earlier cases seem to imply that a plenary action is necessary. (See, e.g., Dale Renting Corp. v Bard, 39 Misc. 2d 266, affd 19 A.D.2d 799; Schulman v Schulman, 223 N.Y.S.2d 353.) Although some now permit a follow-up motion in the prior action (Berlitz Pub. v Berlitz, 37 NY2d 878)

The Ninth Defense asserts that this Court lacks jurisdiction and authority to compel public officials to pursue criminal or enforcement actions. The Supreme Court of the State of New York is a court of general jurisdiction over actions in law or in equity (NY Const. Art. VI § 7). The Court's authority to review the actions of coordinate branches of government where it is alleged they acted in excess of their jurisdiction or unconstitutionally is well settled. The State Constitution provides for a distribution of powers among the three branches of government (see NY Const, art III, § 1; art IV, § 1; art VI). This distribution avoids excessive concentration of power in any one branch or in any one person. Where power is delegated to one person, the power is always guided and limited by standards. In fact, even the Legislature is powerless to delegate the legislative function unless it provides adequate standards (Packer Coll. Inst. v University of State of N. Y., 298 NY 184, 189). Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities. Historically, the prohibitory injunction was the earliest form of judicial restraint imposed upon parties. However, this should not obscure the fact that a court's power to issue a mandatory injunction is well established and has a long history. (See Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 6301.06; Rolls v. Miller [(1640, 15 Chas. I) Tothill's Rep. 144]; Klein, Mandatory Injunctions, 12 Harv. L. Rev. 95, 103 [1898]; see, also, Note, Mandatory Injunctions

as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulation, 38 Col. L. Rev. 903 [1938].) Courts in this State have long held that a mandatory temporary injunction may not ordinarily be granted where the effect thereof is to grant to plaintiff the same relief which may ultimately be obtained after a trial on the merits (Bachman v Harrington, 184 NY 458; Ash v Holdeman, 5 A.D.2d 1017). The relief sought in this motion is far from all of the relief sought in this action as discussed above. However, if the plaintiff clearly demonstrates the necessity and urgency for the relief in advance of trial, including the sustaining in the meantime of irreparable harm, the injunctive relief will be granted pending the trial (Allied-Crossroads Nuclear Corp. v Atcor, Inc., 25 A.D.2d 643, 644). Or, where the undisputed facts are such that a trial is a futility, such relief may be granted (Yome v Gorman, 242 NY 395, 402). The approach the Defendants would have this court take would essentially define the ambit of a constitutional right by whatever a state agency says it is. This approach fails to give due deference to the State Constitution and to courts' final authority to "say what the law is" and to provide a remedy for its breach (Marbury v. Madison, 1 Cranch [5 US] 137, 177; Schieffelin v Komfort, 212 NY 520, 530-31.). As Judge Jasen stated in his dissenting opinion in Wein v. New York, 39 N.Y.2d 136, "The State Constitution is the fundamental and paramount law of this State. The courts cannot close their eyes to the Constitution and see only the acts and doings of the Legislature. (See Marbury v. Madison, 1 Cranch [5 U.S.] 137, 178.) Otherwise, the Constitution would offer but a frail protection and citizens would "be at the mercy of ingenious efforts to circumvent its object and to defeat its commands." (People ex rel. Burby v Howland, 155 NY 270, 281.)"

With respect to the mandatory injunctive relief sought in this application relating to the Akwesasne Mohawk and Turning Stone Casinos both are beyond any doubt unauthorized under state law. The first based upon a decision of the highest court in this State in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003). The latter based upon the State's concession in a currently pending action

that it is unauthorized based upon the same decision (Complaint Ex. A). The mandatory injunctive relief sought on this application does not afford plaintiff complete relief in that it still permits those casinos who are operating under the challenged legislative act to remain open. Furthermore re-litigation of the expenditures related to the tribal-state compacts that lack legislative authorization is barred by the doctrines of res judicata and or stare decisis and is therefore futile.

The prohibitive injunctive relief requested in this action is necessary to maintain the status quo by not permitting tax compacts or new tribal-state compact pending the adjudication of their constitutionality. Plaintiff merely has to demonstrate a likelihood of success on the merits not demonstrate that he is entitled to judgment as a matter of law CPLR § 6312(c). "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (Hoppman v Riverview Equities Corp., 16 A.D.2d 631; Weisner v 791 Park Ave. Corp., 7 A.D.2d 75, 78-79; Peekskill Coal & Fuel Oil Co. v Martin, 279 App Div 669, 670; Swarts v Board of Educ., 42 Misc. 2d 761, 764, supra. Cf. Walker Mem. Baptist Church v Saunders, 285 NY 462, 474)." (Gambar Enters. v Kelly Servs., 69 A.D.2d 297).

The Tenth Defense is duplicative of the Eighth Defense and without merit in fact or law.

The Eleventh Defense asserts that only a federal court can review the terms of this compact. This defense is without merit in light of the recent determination of Justice Makowski in Huron Group, Inc., et al, v. Pataki, et al and Saratoga. I would like to direct the courts attention to the fact that Defendant Pataki sought review of the Court of Appeals decision in Saratoga and was denied Certiorari. If this type of determination was within the exclusive jurisdiction of the federal courts it would have presumably declared so in that action.

This assertion is also made in the Defendants' Memorandum of Law in opposition to this motion in Point II subpart F wherein the defendants' assert "Whether a state has entered into a compact in accordance with its own laws may be, as was held in Saratoga County, a matter for state court, but interpreting and redrafting the terms of this Compact, reached with the Senecas, who are absent here, and approved by the Secretary, over whom this Court has no jurisdiction, is beyond this Court's authority." This action does challenge whether this State has entered into a compact in accordance with its own laws and does not seek to reform the compacts herein. Plaintiff commenced this action to determine whether the Legislature acted within its constitutional powers in authorizing these compacts and if so whether it did so in accordance with proper constitutional procedures.

The Twelfth Defense is also meritless as all State statutes are approved by the Legislature. The question in this action is whether or not the Legislature exceeded its authority as limited by the State Constitution. To the extent that this defense refers to the Legislature approving appropriation bills for the expenditures at the Turning Stone and Akwesasne Mohawk Casino and thereby ratifying the respective underlying compacts this was soundly rejected in Saratoga wherein the Court of Appeals stated "The State argues that by passing certain appropriation bills, the Legislature has signaled its approval of the compact. We disagree. Those enactments are no substitute for approval or total ratification. The Legislature has been free to ratify the compact but, as yet, has not done so. Indeed, the State Assembly in a resolution expressly opposed the Governor's unilateral action in negotiating and signing the compact. The resolution asked the Secretary of the Interior not to approve any compact unless approved by the Legislature. The Assembly stated that "[a]ny compact permitting casino gambling necessarily requires at a minimum the exercise of legislative power with respect to regulatory appropriations and related police powers," and that therefore "[t]he Governor lacks authority to act on behalf of the State to enter into a Tribal-State compact" (Res of Assembly A

2413 [1996]). This expression does not square with the State's claim that the Legislature has impliedly approved the compact."

POINT III

AMOUNT OF UNDERTAKING

An undertaking must be reasonable in order to cover defendants damages in the event that he was not entitled to the preliminary injunction. As the court can readily see that as to the portion of this motion that seeks to enjoin: Defendant Wayne E. Bennett as Superintendent of the NYS Division of State Police and all those in his control to enforce the provisions of Penal Law Article 225 on the premises of the Turning Stone Casino and the Akwesasne Mohawk Casino; Defendant Wayne E. Bennett as Superintendent of the NYS Division of State Police and all those in his control from conducting any background investigations as was previously required in the illegal and void tribal-state compacts between the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe and the State of New York; Defendant Michael J. Hoblock, Jr. as Chairman of the NYS Racing and Wagering Board and all those in his control from conducting any inspections as was previously required in the illegal and void tribal-state compacts between the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe and the State of New York; Defendant George E. Pataki as Governor of the State of New York to request the Attorney General of the State of New York pursuant to Executive Law § 63 to initiate an action against the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe to enjoin the illegal Class III gaming at the Turning Stone and Akwesasne Mohawk Casinos under 25 USC § 2710(d)(7)(A)(ii); there will be no damages whatsoever since these issues are either conceded or cannot be re-litigated due to res judicata.

As to the relief requested enjoining defendants from entering any tax/price parity agreement there currently is no such agreement in place and in any event since Defendant

Pataki is refusing to enforce provisions of the Tax Law on non-members on Indian land despite last years legislative mandate that it be enforced there can be no damages from restraining them from entering into such an agreement.

With regards to enjoining the defendants from binding the State to any new tribal-state compact pending the determination of this action, it again merely seeks to maintain the status quo and it does not prevent defendants from negotiating any such compact, just their ability to bind the State to it.

Another factor to consider in setting the amount of undertaking is the length of time the preliminary injunction is anticipated to be in effect. Plaintiff anticipates that there will be little discovery. Plaintiff intends to use only Interrogatories, Notice to admit, and a Notice to produce documents. Plaintiff does not intend to depose anyone. After this discovery it is anticipated the parties will cross-move for summary judgment.

In Johnson v. City of New York, 152 Misc. 2d 576, 578 N.Y.S.2d 977, the court set the undertaking at $100.00 when it enjoined renting of a single apartment. In Nigra v. Young Broadcasting of Albany Inc., 177 Misc.2d 664, 676 N.Y.S.2d 848, the court enjoined defendant from enforcing a restrictive covenant and waived the requirement of an undertaking. However, see Rourke Developers Inc. v. Cottrell-Hajeck, Inc., 285 A.D.2d 805, 727 N.Y.S.2d 667 which holds that an undertaking may not be waived.

Dated: June 26, 2004
Buffalo, New York

Yours, etc.,

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