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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LAKE

GARY SABALONE, Person asking for protection, vs. DAVID MENDOZA, Person to be restrained.	Case No. 409878 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO REQUEST FOR RESTRAINING ORDER AND IN SUPPORT OF MOTION TO QUASH, DEMURRER, AND MOTION TO DISMISS DATE: March 24, 2011 TIME: 8:15 a.m. DEPT.: 1

INTRODUCTION

On November 3, 2010, Gary Sabalone ("Sabalone") confronted David Mendoza ("Mendoza"), the Chief of the Robinson Rancheria Police Department and a federally commissioned law enforcement officer, for allegedly trespassing on his property. Mendoza had never met Sabalone before November 3, 2010. Mendoza apologized to Sabalone and engaged him in a conversation in which he explained why he was, unintentionally, on Sabalone's property. The conversation was generally civil. The only aggressive behavior was displayed by Sabalone, when he initially confronted Mendoza. The conversation ended in a handshake. Mendoza has not interacted with Sabalone in any way since November 3, 2010.

Four months later, based on that single interaction, Sabalone has asked the Court for an order ("Request") directing Mendoza to stop harassing him, pursuant to Cal. Code Civ. Proc.

527.6.

Sabalone's request for an order to stop civil harassment must be denied and this matter dismissed, on the following grounds. The Court lacks both personal jurisdiction over Mendoza and subject matter jurisdiction over this action as a result of the Robinson Rancheria Band of Pomo Indian's ("Tribe") sovereign immunity from suit, which applies to Mendoza, as an official of the Tribe. The Court also lacks subject matter jurisdiction, because Sabalone has failed to state facts sufficient to constitute a cause of action for the purpose of requesting an order pursuant to Cal. Code Civ. Proc. 527.6 ("Section 527.6 "). Sabalone's request for an order to stop civil harassment, therefore, must be dismissed and/or denied.

I.

UNDER CODE CIVIL PROCEDURE § 418.10, A MOTION TO QUASH CAN BE COMBINED WITH A DEMURRER AND COMMON LAW MOTION TO DISMISS.

Cal. Code Civ. Proc. §418.10 states, in part:

> (a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:
>
> (1) To quash service of summons on the ground of lack of jurisdiction of the Court over him or her. . . .
>
> (e) A defendant or cross-defendant may make a motion under this section and simultaneously answer, demur, or move to strike the complaint or cross-complaint.
>
> (1) Notwithstanding [Cal. Code Civ. Proc.]Section 1014, no act by a party who makes a motion under this section, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. . . .

Thus, Section 418.10(e) expressly permits Defendant Mendoza to combine a motion to quash service of summons with other motions challenging the Court's personal and subject matter jurisdiction without making a personal appearance or waiving objections to the Court's personal jurisdiction.

In addition, Cal. Code Civ. Proc. § 430.10 states:

> The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

(a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading. . . .

(e) The pleading does not state facts sufficient to constitute a cause of action.

Moreover, Cal. Code Civ. Proc. §430.30(a) states:

When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

Finally, in ruling on such a hybrid motion, the Court may consider evidence which does not appear in the complaint or is subject to judicial notice. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* 74 Cal. App.4th 1407, 1417, 1418 (1999) [holding the court is not limited to allegations in the complaint in ruling on hybrid motion to quash/dismiss].

II.

STATEMENT OF FACTS

The relevant facts of this case are set forth in the Declaration of David Mendoza ("Mendoza Declaration"), the Declaration of John Irwin ("Irwin Declaration"), the Declaration of Dean Rogers ("Rogers Declaration"), and the Declaration of Dietrick McGinnis ("McGinnis Declaration"). Paragraphs 1-9 of the Mendoza Declaration, paragraphs 1-15 of the Irwin Declaration, paragraphs 1-6 of the Rogers Declaration, and paragraphs 1-8 of the McGinnis Declaration are incorporated herein as if set forth in full.

For the convenience of the Court, Mendoza will provide a brief summary of the relevant facts.

Sabalone owns a parcel of land within the exterior boundaries of the Robinson Rancheria's Reservation. His land is surrounded on all sides by land owned by the Tribe. Sabalone's access to his home is via an easement through Reservation land. Mendoza Declaration, p. 2, ¶ 3.

The Tribe owns and operates a well near the boundary between the tribally owned land and the parcel owned by Sabalone. McGinnis Declaration, pp. 2-4, ¶¶ 4, 7-8.

In the past, Sabalone has confronted and threatened tribal employees and consultants working on the well. On at least one occasion, Sabalone was in possession of a firearm while

confronting the tribal employees and consultants. McGinnis Declaration, pp. 1-4, ¶¶ 2-8

The tribal consultants were sufficiently concerned for their safety and that of their employees that they requested that the Robinson Rancheria Police Department provide civil standby when the Well was to be tested on November 3, 2010. Mendoza Declaration, pp. 1-2, ¶ 2.

On November 3, 2010, Sargent John Irwin was assigned to provide civil standby for the tribal employees and consultants who were to test the well. Mendoza Declaration, p. 2, ¶ 4. Irwin Declaration, p. 2, ¶ 4.

In the late afternoon, Mendoza stopped by the site of the well testing to coordinate with Sargent Irwin. He made his way to the well area by opening and walking through the gate to Sabalone's property. At the time he did so, he was unaware he was on Sabalone's property. Mendoza Declaration, pp. 2-3, ¶¶ 4, 6.

Shortly after Mendoza passed through the gate, Sabalone drove from his residence to where Mendoza was walking and confronted him for trespassing on his property. Mendoza Declaration, p. 2, ¶ 5.

Mendoza responded by introducing himself to Sabalone, extending his hand to Sabalone, which was ignored by Sabalone, and apologizing and explaining his presence in the area. After a short time, Sargent John Irwin joined the conversation and asked if Sabalaone was concerned with the presence of the tribal employees and consultants at the well. He responded that he was not; that he was only concerned about Mendoza's presence on his property. Irwin returned to the well area. Mendoza continued to engage in a civil conversation with Sabalone for a few more minutes. He shook hands with Sabalone at the conclusion of the conversation, went back to his police vehicle, and drove away. Mendoza Declaration, pp. 2-3, ¶¶ 6-7.

Mendoza has no recollection of resting his hand on his sidearm while talking with Sabalone, and if he did so, he did so unintentionally. Mendoza Declaration, pp. 3, ¶ 9.

Mendoza has not had any contact with Sabalone since November 3, 2010. Mendoza Declaration, pp. 3, ¶ 8.

III.

THE ROBINSON RANCHERIA ENJOYS SOVEREIGN IMMUNITY FROM SUIT ABSENT ITS CONSENT.

As a federally recognized Indian tribe, the Tribe enjoys the protection of tribal sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

The sovereign immunity of an Indian tribe is coextensive with that of the United States itself. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1050 (9th Cir. 1985), rev'd on other grounds 474 U.S. 9 (1985); *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983).

Although tribal sovereign immunity can be waived by Congress or by a tribe, any such waiver must be unequivocally expressed and is to be narrowly construed. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001).

Judicial recognition of a tribe's immunity from suit is not discretionary with a court or administrative forum. Rather, absent an effective waiver, the assertion of sovereign immunity by a federally recognized Indian tribe deprives the court of jurisdiction to adjudicate the claim:

> Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court. . . . Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.

People of the State of California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979). See, also, *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 512-513 (1940).

Tribal sovereign immunity is jurisdictional in nature and applies "irrespective of the merits" of the claim asserted against the Tribe. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), rev'd on other grounds, 463 U.S. 713 (1983).

Decisions of the California State courts have also recognized the mandatory, jurisdictional nature of the doctrine of tribal sovereign immunity. *Hydrothermal Energy Corporation v. Ft. Bidwell Indian Community Council*, 170 Cal App. 3d 489, 216 Cal. Rptr. 59 (1985); *Long v. Chemehuevi Indian Reservation* 115 Cal. App. 3d 853, 171 Cal. Rptr. 733 (1981), *cert. denied*, 454 U.S. 831.

Any assertion of jurisdiction by a court over an Indian tribe would amount to an unlawful interference with tribal self-government. As the court in *Middletown Rancheria of Pomo Indians v. Workers' Compensation Appeals Board*, 60 Cal. App. 4th 1340, 71 Cal. Rptr.2d 105 (1998) stated:

> Here, [the] Tribe's sovereign status is an independent barrier for holding California's workers' compensation laws inapplicable because their enforcement by the Appeals Board unlawfully infringes on the right of [the] Tribe to govern its own employment affairs.
>
> * * * *
>
> While Congress can authorize suits against Indian nations, we are required, as a matter of law, to recognize Tribe's sovereign immunity status in the absence of an explicit congressional waiver.

Id., at 1347-1348.

The doctrine of Tribal sovereign immunity that bars lawsuits brought against an Indian tribe without its consent, equally applies to lawsuits brought against tribal officials and employees acting in their representative capacity and within the scope of their authority: "Tribal immunity extends to Tribal officials acting within their representative capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981); see also, *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983).

In the present case, the declarations submitted in support of the present motion clearly reveal that the action is related to the activities of a tribal official who was, at the time that the alleged events occurred, acting in his official capacity. Since the defendants' actions as set forth in the Request were well within the course and scope of the individual defendants' employment, this Court has no choice but to dismiss the action. *People of the State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979); *State of California v. Harvier*, 700 F.2d 1217 (9th Cir. 1983); *Chemehuevi Indian Tribe v. California State Board of*

Equalization, 757 F.2d 1047, 1051 (9th Cir. 1985).

The Tribe has never consented to a waiver of its sovereign immunity with regard to itself or any of its tribal officers in any action brought by Sabalone. Marston Declaration, p. 1-2, ¶ 3. Thus, there can be no doubt that Defendant Mendoza is protected by tribal sovereign immunity.

IV.

SABALONE HAS FAILED TO STATE FACTS SUFFICIENT TO SUPPORT HIS REQUEST FOR AN ORDER TO STOP HARASSMENT.

Section 527.6 authorizes the Court to issue an order enjoining civil harassment where a person has been a victim of harassment, as defined in the statute:

> For the purposes of this section, "harassment" is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.

Section 527.6(b).

The relevant terms for the present request are defined in the statute:

> (2) "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.
> (3) "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. Constitutionally protected activity is not included within the meaning of "course of conduct."

There is no question that the facts alleged by Sabalone do not meet either of these definitions. First, the only conceivable basis for a claim that Mendoza acted in a manner that would constitute a "credible threat of violence" is the allegation that "while talking with him he rested his hand on his sidearm (gun)." Mendoza has no recollection of doing so. Even assuming that he unintentionally rested his hand on his sidearm, where a law enforcement officer is engaged in a conversation with a member of the public, resting his hand on his

sidearm without a warning or other threatening words or actions cannot qualify as a "credible threat of violence." Second, a "course of conduct" requires a "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." The facts alleged in the Request relate to one incident, the November 3, 2010, conversation with Mendoza. There is no pattern of conduct, no series of acts, and no evidence of continuity of purpose.

Moreover, both of these bases for an order require that the action taken "serves no legitimate purpose." As all of the declarations make clear, Chief Mendoza was present as part of an effort to avoid a confrontation or violence, not to incite a confrontation or violence.

The absence of any apparent sense of threat is further underscored by the time lag between the alleged incident and the filing of the Request. In the four months since the incident occurred, no further incident occurred. If an order to stop harassment was needed, it was needed four months ago, not now.

Thus, even if the court were to accept all of Sabalone's factual allegations as true, there was neither a credible threat of violence nor a pattern of conduct that would provide a basis for the issuing of a order to stop civil harassment.

Defendant, moreover, has submitted four declarations of witnesses to the incident which all refute the facts alleged as support for the Request. As the Mendoza, Irwin, Rogers, and McGinnis Declarations reveal, Mendoza never engaged in any conduct that could be considered threatening. Mendoza never raised his voice or made any threatening gestures. The fact that Mendoza and Sabalone shook hands at the end of the conversation, Mendoza Declaration, p. 3, ¶ 7; Irwin Declaration, p. 5, ¶15, refutes any suggestion that Sabalone was threatened.

Sabalone's claim must also be evaluated in the context of Sabalone's past conduct. The reason that Mendoza and Irwin were present at the scene on the date of the incident was that Sabalone had previously threatened tribal employees and consultants who were working adjacent to Sabalone's property. McGinnis Declaration, pp. 1-4, ¶¶ 2-8, Mendoza Declaration, pp. 1-2, ¶ 2-4. Irwin Declaration, p. 2, ¶ 4. The only aggressive or threatening behavior observed by the witnesses was committed by Sabalone. Mendoza Declaration, p. 3, ¶ 8. Irwin

Declaration, p. 4, ¶ 13, Rogers Declaration, p. 2, ¶ 5. To the extent that there is any pattern of behavior that is relevant to the Request, it is a pattern of unreasonable, threatening behavior on the part of Sabalone toward the employees and consultants of the Tribe.

CONCLUSION

The Court has no jurisdiction over Mendoza or this matter, as a result of the Tribe's sovereign immunity from suit. Sabalone has also failed to state facts sufficient to establish his claim. Sabalone's claims are utterly baseless. For that reason also, David Mendoza respectfully requests that this matter be dismissed and the Request denied.

Respectfully submitted,

Dated: March 22, 2011

RAPPORT AND MARSTON

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