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United States District Court,
E.D. Pennsylvania.

Commonwealth of Pennsylvania, by
Attorney General Kathleen G. Kane, Plaintiff,
v.
Think Finance, Inc., et al., Defendants.

CIVIL ACTION NO. 14-cv-7139
|
Signed 01/14/2016

Attorneys and Law Firms

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MEMORANDUM

Joyner, J.

***1** Before the Court are Defendants' Motions to Dismiss (Doc. Nos. 67, 68, 69, 70, 71, 73), Plaintiff's Response in Opposition thereto (Doc. No. 75), and Defendants' Replies in Further Support thereof (Doc. Nos. 81, 82, 83, 84). For the reasons below, the Motions to Dismiss are DENIED in part, and GRANTED in part. An Order follows.

I. Factual and Procedural Background

This action concerns high-interest rate, short-term loans made to Pennsylvania citizens over the Internet. The Plaintiff, the Office of the Attorney General ("OAG"), alleges that the Defendants Think Finance, Inc.; TC Loan Service, LLC; Tailwind Marketing, LLC; TC Decision Sciences, LLC; Financial U, LLC (hereinafter "Think Defendants") and Kenneth Rees violated Pennsylvania and federal[1] laws prohibiting usurious and otherwise illegal lending practices. FAC ¶ 2. The OAG also alleges that various debt buyers and collectors, including Defendant National Credit Adjusters, LLC ("NCA"), and affiliated marketing companies, Defendants Selling Source, LLC and PartnerWeekly, LLC, participated in this scheme by referring Pennsylvania residents to the Think Defendants' products and by collecting or attempting to collect these loans. FAC ¶¶ 3, 4. These loans allegedly violated the Loan Interest and Protection Law ("LIPL"), which limits the rate of interest for loans under $50,000 issued by unlicensed lenders to six percent per year. FAC ¶¶ 25, 26; 41 P.S. § 201(a). The OAG alleges that the Defendants partnered with an out-of-state bank and with Native American tribes, in schemes known colloquially as "rent-a-bank" and "rent-a-tribe."

In the alleged "rent-a-bank" scheme, the Think Defendants and Mr. Rees partnered with First Bank of Delaware ("FBD"), an out-of-state bank. FAC ¶¶ 33, 37. FBD acted as the nominal lender while the non-bank entity was the de facto lender – marketing, funding, and collecting the loan. Id. This partnership took advantage of federal bank preemption doctrines to insulate the Defendants from state regulations. FAC ¶ 34.

The OAG alleges that the "rent-a-tribe" scheme similarly avoided state laws by issuing loans in partnership with Native American tribes. FAC ¶¶ 43, 46. In this alleged scheme the tribe acts as the nominal lender and the Defendants benefit from the tribe's immunity. FAC ¶ 43. The Think Defendants and Mr. Rees provide services, including education, marketing, technology, funding, and collection. FAC ¶¶ 47-50. The Defendants maintain that they are merely service providers and as such have violated no laws. The OAG alleges that the Think Defendants and Mr. Rees are themselves the de facto lenders and that their partnership with the tribes, as the partnership with FBD previously, is meant to provide cover as the Defendants violate Pennsylvania and federal law. FAC ¶ 43.

***2** The FAC alleges the Think Defendants and Mr. Rees partnered with three tribes: Chippewa Cree, Otoe-Missouria, and Tunica-Biloxi. FAC ¶¶ 46, 53, 60, 63. As evidence that Think Finance is the true lender in this scheme, the OAG points to the "take-it-or-leave-it" terms of the partnership with Chippewa Cree, which details, among other things, the name of the tribal entity that will issue the loans, the limits of the amount and interest rates of the loans themselves, and the percentage the tribe

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would receive on each loan. FAC ¶¶ 53, 54. The contract with Otoe-Missouria contains similar provisions. FAC ¶ 62. Think Finance (previously known as ThinkCash) customers visiting the Think Cash website were directed to the Chippewa Cree's LLC's website, the FAQ page of which promised the customers would receive "the same" service as previously provided by Think Finance. FAC ¶ 56. The OAG notes that the loans provided by the tribal companies are similar to those provided directly by the Think Defendants in states where such loans are legal. FAC ¶¶ 70, 71. The Think Defendants and Mr. Rees allegedly transferred their portfolio of customers and loan balances, as well as their pre-existing customer database, over to Plain Green, one of the tribal lending enterprises. FAC ¶ 55. Additionally, Think Finance has listed the tribal websites as its own products. FAC ¶ 72. The Defendants made most of the revenue from these loans. FAC ¶ 44. The loan agreements all include provisions indicating the loans will be governed by tribal law. FAC ¶¶ 59, 61, 68.

The OAG acknowledges that the tribal lenders stopped accepting loans from new Pennsylvania consumers sometime in mid-2013. FAC ¶ 77. Collection on pre-existing loans, however, continues, and preexisting costumers have been able to apply for new loans. FAC ¶¶ 78, 79. Additionally, the OAG alleges that the loan companies continue to take personal information from prospective new lenders from Pennsylvania. FAC ¶ 80.

The Plaintiff filed this action on November 13, 2014 in the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania. Doc. No. 1-1. On December 17, 2014, various Defendants removed the case to the United States District Court for the Eastern District of Pennsylvania. Doc. No. 1. On March 11, 2015, Plaintiff filed a motion to remand to state court. Doc. No. 42. This Court denied the Plaintiff's motion on May 28, 2015. Doc. No. 53.

On July 6, 2015, Plaintiff filed her First Amended Complaint ("FAC"). Doc. No. 57. In it, the OAG alleges various violations of state and federal law by the Defendants:

1) Count One: Violations of Corrupt Organizations Act ("COA"), 18 Pa. C.S.A. § 911(b)(1), by the Think Defendants and Mr. Rees.

2) Count Two: Violations of COA, 18 Pa. C.S.A. § 911(b)(3), by the Think Defendants and Mr. Rees.

3) Count Three: Violations of COA, 18 Pa. C.S.A. § 911(b)(4), by all Defendants.

4) Count Four: Violations of the Fair Credit Extension Uniformity Act, 73 P.S. § 2270.1, by the Think Defendants, Mr. Rees, and NCA.

5) Count Five: Violations of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq., by all Defendants.

6) Count Six: Violations of the Dodd-Frank Act, 12 U.S.C. § 5536(a)(1)(B), by the Think Defendants and Mr. Rees.

On August 28, 2015 Defendants filed seven different motions to dismiss. Doc. Nos. 67-73. Since then, claims against Defendant PayDay One have been dismissed, so PayDay One's Motion to Dismiss was denied as moot. Doc. No. 80. The remaining motions are:

***3** 1) Motion to Dismiss for Failure to Join Indispensable Parties, filed by the Think Defendants. Doc. No. 67.

2) Motion to Dismiss for Lack of Capacity to Sue and Failure to State a Claim, filed by the Think Defendants. Doc. No. 68.

3) Motion to Dismiss for Lack of Personal Jurisdiction, filed by Partnerweekly, LLC and Selling Source, LLC. Doc No. 69.

4) Motion to Dismiss for Failure to State a Claim, filed by the Think Defendants. Doc. No. 70.

5) Motion to Dismiss for Failure to State a Claim, filed by NCA. Doc. No. 71.

6) Motion to Dismiss for Failure to State a Claim, filed by Kenneth E. Rees. Doc. No. 73.

Plaintiff filed a joint response in opposition to the various motions to dismiss on October 9, 2015. Doc. No. 75. Defendants filed four separate replies on October 23, 2015. Doc. No. 81-84. We will address the various motions to dismiss.

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II. Jurisdiction

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1331. It has supplemental jurisdiction under 28 U.S.C. § 1367 for the state law claims.

III. Legal Issues

A. Whether the Tribes are Indispensable Under Rule 19

Federal Rule 12(b)(7) allows for a party to move to dismiss a case for failure to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7). Defendants argue that the tribes and tribal lending enterprises are indispensable parties under Rule 19. To decide [2] this motion, we first look to whether the parties are considered "necessary" or "required" under Rule 19(a). [3] Gen. Refractories Co. v. First State Ins. Co., 500 F.3d 306, 312 (3d Cir. 2007). If they are, then we look to whether it is feasible that they be joined. If not, we turn to Rule 19(b) and evaluate whether the court should "in equity and good conscience," dismiss the action or proceed with the existing parties. Fed. R. Civ. P. 19(b). The Court need not turn to Rule 19(b) if it determines the absent parties are not required under Rule 19(a). See Abel v. Am. Art Analog, Inc., 838 F.2d 691, 695 (3d Cir. 1988).

Rule 19(a)(1) provides:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> ***4** (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). The 19(a) inquiry "is not a matter of per se rules; instead it is determined on a case-by-case basis." Cont'lCas. Co. v. Diversified Indus., Inc., 884 F.Supp. 937, 943 n.2 (E.D. Pa. 1995) (internal citations omitted). The Defendants argue the tribes are required parties under both prongs of Rule 19(a)(1). We will address each in turn.

1. Complete Relief Among Existing Parties

Under Rule 19(a)(1), "we ask first whether complete relief can be accorded to the parties to the action in the absence of the joined party." Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 405 (3d Cir. 1993) (citing Fed. R. Civ. P. 19(a)(1)). This inquiry is limited to whether the court "can grant complete relief to the persons already parties to the action. The effect a decision may have on an absent party is not material." Id. (internal citations omitted). Rule 19(a)(1) "stresses the desirability of joining those parties in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court." Gen. Refractories Co., 500 F.3d at 315 (internal quotations omitted) (citing Fed. R. Civ. P. 19 advisory committee's notes).

The Defendants point to two cases to support their claim that we cannot accord complete relief among existing parties. In Hotvela, the plaintiffs, members of the Hopi Tribe in the Village of Hotevilla, sought to enjoin construction of a wastewater [4] treatment facility. Village of Hotvela Traditional Elders v. Indian Health Services, 1 F.Supp.2d 1022, 1024 (D. Ariz. 1997). A Memorandum of Understanding between the defendant, Indian Health Services, and the Hopi Tribe allowed the tribe to construct the facility, and the tribe was engaged in construction at the time of the suit. Id. at 1025. The court found that the injunctive relief sought by the plaintiffs would not offer them full relief because the non-party tribe would not be barred from constructing on the site. Id. at 1026.

In Chehalis, several tribes and tribe members sought a declaration that they (the plaintiffs) had equal rights in the Quinault Indian Reservation. Confederate Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991). The court found that the plaintiffs could not be granted complete relief without joining the Quinault Nation because the Quinault Nation would continue to exercise "sovereign powers and management responsibilities over the reservation." Id.

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In both Hotleva and Chehalis, the actions of the non-party would preclude the relief sought. In contrast, here the relief sought by the Plaintiffs does not require the non-party tribes to do or refrain from doing anything. For example, the Plaintiff seeks disgorgement of the money earned by the Defendants only, not the money the tribes have earned, through the alleged scheme. FAC p. 40. The Plaintiff is not seeking a declaration that the contracts themselves are illegal, but rather a declaration that the Defendants' conduct violates a number of state and federal laws. [5] FAC p. 39. The Chippewa Cree were engaged in consumer lending prior to their partnership with Think Finance and, since the tribes are not bound by the outcome of this case, they would be permitted to continue that business. The tribes continuing their business (without the services of the Defendants) would in no way limit the relief the Plaintiffs seek. See Dillon v. BMO Harris Bank, N.A., 16 F.Supp.3d 605, 615 (M.D.N.C. 2014) ("[J]udgment...will not prohibit the lenders from lending money or from relying on other mechanisms to collect on their loans."). The relief the OAG seeks is thus not "hollow." The tribes are not required under Rule 19(a)(1)(a).

2. Claimed Interests

***5** The Defendants argue that the tribes are also necessary because they claim interests "relating to the subject of the action" and are "so situated that disposing of the action" in their absence may "as a practical matter impair or impede" their ability to protect those interests. Fed. R. Civ. P. 19(a)(1)(B)(i). The Defendants indicate that the tribes claim contractual, economic, and sovereign interests in this litigation. We will address each in turn, then we will look to whether these interests "may as a practical matter" be impaired or impeded by disposing of this case in their absence.

a. Contractual Interest

Throughout the FAC, the OAG characterizes the loans as illegal and usurious under both federal and Pennsylvania law. The loans contain a clause indicating that they are subject solely to tribal law. As this Court indicated in its order denying the OAG's motion to remand to state court, the validity of this clause is necessarily raised by the Commonwealth's cause of action. Doc. 53 at 1 n.1.

While the validity of the clause is at issue, this action is not one for a breach of contract. Defendants cite several cases in which the contractual interests are more closely implicated by the cause of action than they are here. Rashid, for example, was a breach of contract case. Rashid, 957 F. Supp. 70, 71 (E.D. Pa. 1997). In finding an unnamed party necessary under Rule 19, this Court emphasized both the importance of the absent party being an executor of the contract as well as the suit being a claim for breach of that same contract. Id. at 74. Similarly, Fluent and McClendon, both involve terms of leases and the outcome of the litigation would specifically invalidate or enforce those contracts. Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 547 (2d Cir. 1991) (concerning the constitutionality of the statute authorizing lease agreement in which tribe is a party); McClendon v. U.S., 885 F.2d 627, 633 (9th Cir. 1989) (seeking to enforce terms of a lease to which tribe is a party). Finally, Defendants cite an unpublished N.D.N.Y. case finding that a tribal party to a contract is a necessary party to an action seeking declaration that the contract is invalid. U.S., ex rel. Hill v. Coulter, No. 98-CV-111(FJS)(GLS), 1998 WL 460239, at *1 (N.D.N.Y. July 31, 1998).

The matter at hand does not involve a breach of contract or the direct invalidation of any contracts to which the tribes are a party. Even if we were to find in favor of the Commonwealth, the contracts between the Pennsylvania citizens and the tribal enterprises would remain valid. Nevertheless, the issue is whether the tribes claim an interest, not whether they have one. See Cassidy v. U.S., 875 F.Supp. 1438, 1444 (E.D. Wa. 1994) ("Although the Plaintiffs' focus in this case is on the United States rather than the Tribes, it is clear that this case will turn on, among other things, the interpretation of section 835d and the Agreement.").

Here, the validity of the contracts is centrally related to the claims against the Defendants. Therefore, we conclude that the tribes do claim a contractual interest in this litigation.

b. Economic Interest

The Defendants argue that the tribes claim a significant economic interest in this action. While various circuits have recognized economic interests as sufficient for Rule 19(a) purposes, the Third Circuit has not. In Treesdale, the Third Circuit noted that the interests claimed must be "legally protected" and "not merely a financial interest." Liberty Mut. Ins. Co. v. Treesdale, Inc., 419 F.3d 216, 230 (3d Cir. 2005). While lower courts in this Circuit

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have disagreed about whether Treesdale continues to apply to Rule 19(a), we are persuaded by our sister court in Cardenas's thorough analysis and conclusion that Treesdale still offers the best indication of how the Third Circuit would rule on this issue. [6] Hartford Casualty Ins. Co. v. Cardenas, 292 F.R.D. 235, 240 (E.D. Pa. 2013). Therefore, we find the claimed economic interests of the tribes are insufficient under Rule 19(a).

c. Sovereign Interest

***6** The Defendants argue that the tribes' sovereign interests may be affected by this litigation. In support of this view Defendants cite two cases, neither of which involve Rule 19, in which courts have recognized that Tribes have sovereign interests. Doc. No. 67-1 at 13-14 (citing Seneca-Cayuga Tribe of Okla. v. Okla. ex rel. Thompson, 874 F.2d 709, 716 (10th Cir. 1989); Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)). In Seneca-Cayuga, Oklahoma was attempting to enjoin a casino's operation. Seneca-Cayuga, 874 F.2d at 710. In Cabazon, California had attempted to regulate the operation of bingo games on reservations. Cabazon, 480 U.S. at 216 (1987).

Central to the sovereignty interests in both cases is that the tribal activities at issue took place on tribal land. The Supreme Court has noted that the sovereignty that Indian tribes retain is of a "unique and limited character. It centers on the land held by the tribe and on the tribal members within the reservation. Plains Comm. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008) (internal quotation and citation omitted). The Supreme Court has recognized, however, that a tribe "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana v. U.S., 450 U.S. 544, 565 (1981). In other words, "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." Plains Comm. Bank, 554 U.S. at 337. "Even then the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control international relations." Id.

The claimed sovereignty interests stem from the loan agreements between the consumers and the tribes. This still requires "nonmember conduct inside the reservation that implicates the tribe's sovereign interest." Id. at 329. In this case, it appears the bulk of activities at issue did not take place on tribal land. See Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Services, 769 F.3d 105, 115 (finding that the district court did not err in finding that online loan agreements New York residents entered into from within New York did not occur on tribal land for purposes of a preliminary injunction). Additionally, there is no indication that the loans were issued to members of the tribes.

The tribes may claim, however, that the actions that led to issuing these loans took place on tribal grounds. See Otoe-Missouria, 769 F.3d at 115 (noting that the tribes in that case had made such an argument). Therefore, the tribes claim sovereign interests related to conduct on tribal land. We are obliged to recognize these interests without deciding on the merits of those claims. Accordingly, we conclude that the tribes claim sovereign interests in this case.

d. Practically Impaired or Impeded

Having established that the tribes claim contractual and sovereign interests in this litigation, we turn to whether this litigation may as a practical matter impact those interests. The Third Circuit has noted that "as a practical matter" has a limiting as well as an expanding function: "The fact that the absent person may be affected by the judgment does not of itself require his joinder if his interests are fully represented by parties present." Owens-Illinois, Inc. v. LakeShore Land Co., Inc., 610 F.2d 1185, 1191 (3d Cir. 1979). The OAG argues that "[t]his principle applies with no less force when a Native American tribe is the absent party." Doc. No. 75 at 29. Defendants do not argue with the general principle in Owens-Illinois, but rather they argue that tribal interests can only be adequately represented by the United States due to the "special relationship between the federal government and the Indian nations" and that this operates as an exception. Doc. No. 82 at 6 (quoting Conn. ex rel. Blumenthal v. Babbitt, 899 F.Supp.80, 83 (D.Conn. 1995)). Because the United States is not the named party here, this exception does not apply, they argue, and the Defendants cannot adequately represent the interests of the tribes.

***7** The Defendants are correct that the special relationship between the United States and Native tribes is a factor courts consider when determining whether the

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