2016 WL 2932163
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United States District Court,
D. Vermont.

Jessica Gingras and Angela C. Given, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

Joel Rosette, Ted Whitford, Tim McInerney, Think Finance, Inc., TC Loan Service, LLC, Kenneth E. Rees, TC Decision Sciences, LLC, Tailwind Marketing, LLC, Sequoia Capital Operations, LLC and Technology Crossover Ventures, Defendants.

Case No. 5:15-cv-101
|
Signed May 18, 2016

Attorneys and Law Firms

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OPINION AND ORDER RE: CROSS MOTION FOR JURISDICTIONAL DISCOVERY AND MOTIONS TO DISMISS AND TO COMPEL ARBITRATION

Geoffrey W. Crawford, Judge United States District Court

***1** Plaintiffs have filed a class action against individuals and companies involved in an online lending venture operated by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation in Montana (the Tribe). They claim that the "payday" loans offered by Plain Green, LLC violate federal and state law because of the usurious interest rates (between 198 and 376% annually) and other unlawful features of the loans such as the lender's automatic access to the consumer's bank account to facilitate repayment.

All Defendants have filed motions to dismiss or to compel arbitration. (Docs. 64, 65, 66, 67, 76, 77.) Also pending is Plaintiffs' Motion for Jurisdictional Discovery on the issues of subject-matter jurisdiction and arbitration. (Doc. 43.) The court heard argument on all of the pending motions on December 16, 2015. Plaintiffs filed Supplemental Authority and Supplemental Documents on January 18, 2016 (Doc. 107) and April 8, 2016 (Doc. 114), at which time the court took the motions under advisement.

Background

The facts as they appear in Plaintiff's 43-page First Amended Complaint ("FAC") (Doc. 18) may be summarized as follows. [1]

Plaintiffs are Vermont residents who have borrowed money from Plain Green, LLC. Plain Green holds itself out as a "tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation." (Doc. 18 ¶ 2.) The reservation is located in Montana.

Plain Green operates its lending business over the internet. It has no physical place of business in Vermont or any property or employees in Vermont. Instead, borrowers reply to an internet site and apply for credit through an online application process. (*Id.* ¶ 21.) Within the banking industry, these loans are commonly called "payday loans" because they are frequently marketed as loans sufficient to tide the borrower over until the next paycheck. Plain Green employs subsidiaries of Think Finance, Inc. to market, administer, and collect its loans. (*Id.* ¶ 57.)

Plaintiffs borrowed relatively small sums of money from Plain Green for periods of up to one year. Frequently one loan would follow close on the heels of the repayment of the previous loan.

In July 2011, Plaintiff Jessica Gingras borrowed $1,050 from Plain Green at a rate of 198.17%. She repaid this loan with interest. During July and August 2012, she borrowed

a total of $2,900 at a rate of 371.82%. She has not repaid the second loan. (*Id.* ¶¶ 48-50.)[2]

Plaintiff Angela Given borrowed $1,250 from Plain Green in July 2011. She completed repayment a year later. The annual interest rate was 198.45%. (*Id.* ¶ 60.) Within a few days, in July 2012, she borrowed $2,000. She completed repayment a year later in July 2013 at an annual interest rate of 159.46%. (*Id.* ¶ 61.) She also borrowed $250 in May 2013 which she repaid within a few weeks at an annual interest rate of 376.13%. In July 2013, she borrowed $3,000 at 59.83%. She has not completed repayment of the most recent loan.

***2** Plaintiffs allege that the high interest rates violate Vermont's usury laws which permit a maximum rate of interest of 24%. *See* 9 V.S.A. § 41a. The loan agreements contain other provisions which Plaintiffs say violate state and federal law, including the provision for automatic access to the borrower's bank account in violation of the Electronic Funds Transfer Act, 15 U.S.C. § 1693k(1). (Doc. 18 ¶¶ 181-195.)

Plaintiffs have not sued Plain Green. Instead, they have sued Joel Rosette, who is the Chief Executive Officer of Plain Green, and Ted Whitford and Tim McInerney (the "Tribal Defendants"), who are members of Plain Green's Board of Directors. All three are sued in their official capacity for declaratory and injunctive relief only pursuant to the authority expressed in *Ex Parte Young*, 209 U.S. 123 (1908).

Plaintiffs have also sued Think Finance, Inc. ("Think Finance" or "TF") and its former President, Chief Executive Officer, and Chairman of the Board Kenneth Rees. Think Finance is a Delaware corporation. Kenneth Rees is a citizen of Texas. The FAC alleges that these defendants developed a plan to make loans through a tribal entity in order to take advantage of tribal immunity from state banking laws. (Doc. 18 ¶ 80.) They control the operations of Plain Green. They dictated the terms of the Tribe's finance code. In Plaintiffs' view, Plain Green is a shell company created by Think Finance and Mr. Rees in order to provide a layer of legal protection for a lending business which the Federal Trade Commission and state banking regulators have determined to be illegal. (*See id.* ¶ 3; *see also id.* ¶ 37 ("Plain Green's very existence is an effort to avoid liability.").) Plaintiffs allege that the tribal law relevant to this lending business and the tribal courts with potential jurisdiction over any dispute have been subverted by the money generated by Plain Green.

The next group of defendants are subsidiaries of Think Finance which perform various tasks in connection with the payday lending operation. These include TC Decision Sciences, LLC, Tailwind Marketing, LLC, and TC Loan Service, LLC. (These defendants, together with Think Finance, Inc., are referred to as the "Think Defendants.")

Finally, Plaintiffs have sued two of the financial institutions which they claim provide the funding for loans made by Plain Green. These are Sequoia Capital Operations, LLC (Sequoia) and Technology Crossover Ventures (TCV).[3]

Both of the loan agreements between Plain Green and Plaintiffs contain arbitration clauses. The clauses are detailed and cover several pages of the parties' loan agreements.[4] The arbitration provisions require the borrowers to submit any dispute to binding arbitration, including disputes with "related third parties." (Doc. 13-5 at 50.) The borrower may opt out of the arbitration provision within 60 days of the receipt of loan funds. (*Id.* at 49.) The borrower may select the procedures of the American Arbitration Association or JAMS and the arbitration may occur on the reservation or within 30 miles of the borrower's residence at the choice of the borrower. Plain Green will bear the cost of the arbitration including the filing fee and the arbitrator's costs. Each side pays its own attorneys fees. The arbitrator may award attorneys fees to the prevailing party.

***3** The arbitrator is required to apply Chippewa Cree tribal law to the dispute. He or she is not authorized to hear class-wide claims. He or she must refer any dispute over class arbitration to a tribal court of the Chippewa Cree Tribe. The arbitrator must make written findings to support an award. Any award must be supported by substantial evidence and must be consistent with the loan agreement. The tribal court has authority to aside an award if these conditions are not met. The arbitration agreement and the loan agreement as a whole are subject to tribal law and are not subject to the laws of any state.

Analysis

I. Subject-Matter Jurisdiction

The pending motions to dismiss or to compel arbitration invoke almost all of the categories of defenses outlined in Fed. R. Civ. P. 12(b). The court begins with Rule 12(b)(1)—the defense of lack of subject-matter jurisdiction.[5] "A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to adjudicate it ....' " *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À .R.L.*, 790 F.3d 411, 417 (2d Cir. 2015) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). A court lacks constitutional power to adjudicate a case where "the plaintiff lacks constitutional standing to bring the action." *Id.*

"The plaintiff bears the burden of 'alleg[ing] facts that affirmatively and plausibly suggest that it has standing to sue.' " *Id.* (alteration in original) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)). "In resisting a motion to dismiss under Rule 12(b)(1), plaintiffs are permitted to present evidence (by affidavit or otherwise) of the facts on which jurisdiction rests." *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004). "[C]ourts generally require that plaintiffs be given an opportunity to conduct discovery on these jurisdictional facts, at least where the facts, for which discovery is sought, are peculiarly within the knowledge of the opposing party." *Id.*

Plaintiffs assert the following five bases for federal subject-matter jurisdiction: (1) federal question jurisdiction under 28 U.S.C. § 1331; (2) diversity jurisdiction under 28 U.S.C. § 1332; (3) class action jurisdiction under 28 U.S.C. § 1332; (4) jurisdiction under RICO, 18 U.S.C. § 1965; and (5) jurisdiction under the Federal Consumer Financial Law, 12 U.S.C. § 5481. (Doc. 85 at 28.) Plaintiffs assert federal-question jurisdiction on the basis of claims arising under the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5531(a) and 5536(a), the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45, and the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693k(1). They also assert a civil RICO claim pursuant to 18 U.S.C. § 1962(c).

The Tribal Defendants seek dismissal under Rule 12(b)(1) asserting that: (1) the action is barred by tribal sovereign immunity, and (2) the Plaintiffs lack Article III standing. Plaintiffs argue that tribal immunity and subject-matter jurisdiction are distinct concepts. They also assert that they have Article III standing.

A. Tribal Sovereign Immunity

***4** The first issue is whether tribal sovereign immunity is a jurisdictional question at all. Plaintiffs assert that *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), stands for the proposition that tribal immunity and federal subject-matter jurisdiction are entirely separate concepts. The court disagrees. In *Bay Mills*, the Supreme Court observed that no provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., limited the grant of jurisdiction under the general federal-question statute, 28 U.S.C. § 1331. *Bay Mills*, 134 S. Ct. at 2029 n.2. But that observation related to the initial question of whether federal-question jurisdiction existed, not the subsequent question of whether tribal sovereign immunity might destroy subject-matter jurisdiction. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000) (noting that a federal court can address tribal sovereign immunity only after it confirms that subject-matter jurisdiction exists).

Courts in the Second Circuit have held that Rule 12(b)(1) is a proper vehicle for invoking tribal sovereign immunity. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) (analyzing tribal sovereign immunity as an issue of subject-matter jurisdiction); *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966(CBA), 2009 WL 705815, at *2 (E.D.N.Y. Mar. 16, 2009) (" '[A] motion to dismiss based on tribal immunity is appropriately examined under Fed. R. Civ. P. 12(b)(1).' " (quoting *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F. Supp. 2d 271, 276 (D. Conn. 2002))). Decisions from outside the Second Circuit—some post-dating *Bay Mills*—are in accord.[6] The court therefore analyzes the Tribal Defendants' sovereign-immunity claim in the Rule 12(b)(1) context.

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). "Among the core aspects of sovereignty that tribes possess ... is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' " *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Tribal immunity applies to suits brought by States as well as those brought by individuals. *Id.* at 2031. Tribal immunity also applies "for suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Id.* (citing *Kiowa*

Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998)). [7] Generally, a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (per curiam).

***5** The answer to the Tribal Defendants' sovereign-immunity claim stems from an exception to the general rule stated in *Chayoon.* As individuals sued for injunctive and declaratory relief in their official capacity, the Tribal Defendants are subject to suit by analogy to *Ex Parte Young.* The Supreme Court has recognized the application of the doctrine to tribe members. *See Bay Mills*, 134 S. Ct. at 2035 (under analogy to *Ex Parte Young*, tribal immunity does not bar suit "for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct"); *Santa Clara Pueblo*, 436 U.S. at 59.

The Second Circuit in *Garcia* noted two important "qualifications" limiting a plaintiff's ability to obtain injunctive relief when she invokes the *Ex Parte Young*-type exception. First, any law under which a plaintiff seeks injunctive relief "must apply substantively" to the tribe. *Garcia*, 268 F.3d at 88. An example of a circumstance in which a law does not "apply substantively" to a tribe is when the law specifically exempts "an Indian tribe" from its prohibitions. *See id.* (citing 42 U.S.C. § 2000e(b)). Second, a plaintiff "must have a private cause of action to enforce the substantive rule." *Id.* The Tribal Defendants assert that Plaintiffs' federal claims fail on both counts. However, the court does not read the "qualifications" articulated in *Garcia* as components of the *jurisdictional* analysis. The court treats the Tribal Defendants' arguments on these points as necessary below. [8]

The Tribal Defendants argue that Plaintiffs seek more than prospective injunctive or declaratory relief, and actually seek money damages from the Tribal Defendants —a remedy not available under the *Ex Parte Young*-type exception. (*See* Doc. 66 at 19 n.5.) The FAC does indeed assert (apparently without excepting the Tribal Defendants) that "funds should be returned to the people who fell victim to Defendants' illegal scheme"; and further requests an "[e]quitable surcharge seeking return of all interest charged above a reasonable rate and any financial charges associated with the loan" and also "[a] constructive trust over funds obtained illegally." (Doc. 18 at 42-43.) The court concludes that, to the extent the FAC seeks money damages against the Tribal Defendants, that relief is unavailable. [9]

Finally, the Tribal Defendants assert that the *Ex Parte Young-type* exception applies only to violations of *federal* law, and that as a result all of Plaintiffs' state-law claims fail. (Doc. 66 at 23.) *Ex Parte Young* is itself "inapplicable in a suit against state officials on the basis of state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Thus under the *Ex Parte Young* doctrine, "a federal court's grant of injunctive relief against a state official may *not* be based on violations of state law." *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 595 (2d Cir. 1990) (citing *Pennhurst*, 465 U.S. at 106). Extending that reasoning to tribal cases, the court in *Frazier v. Turning Stone Casino* held that *Ex Parte Young* "only allows an official acting in his official capacity to be sued in a federal forum to enjoin conduct that *violates federal* law." 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003) (emphasis added).

***6** *Frazier* might have been persuasive authority prior to the Supreme Court's decision in *Bay Mills.* But in *Bay Mills* the Supreme Court stated that, if a tribe were to set up an off-reservation casino, the state "could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license." 134 S. Ct. at 2035. That is because "a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory," and because, when not on Indian lands, tribal officials "are subject to any generally applicable state law." *Id.* at 2034. Thus, as other courts have recognized, *Bay Mills* establishes that "tribal officials may be subject to suit in federal court for violations of state law under the fiction *of Ex Parte Young* when their conduct occurs outside of Indian lands." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015). [10]

Plaintiffs assert that "the activities of the Plain Green enterprise occurred outside the reservation." (Doc. 85 at 32.) The Tribal Defendants disagree (at least in part), maintaining that the loan agreements at issue were formed on the Tribe's reservation. (Doc. 66 at 32.) In support of that argument, the Tribal Defendants cite 2 *Williston on Contracts* § 6:62 (4th ed.): "[I]f the acceptance is not made

simultaneously with the offer, and is made in a different place, ... the place of the contract is the place where the last act necessary to the completion of the contract is done ....” The Tribal Defendants then rely on the following assertion in Joel Rosette's affidavit: “The act triggering the release of a loan to a borrower is Plain Green's final assessment of the consumer's loan application. Plain Green undertakes this final determination from its office,” which is on the Tribe's Reservation. (Doc. 66-1 ¶¶ 6, 9.)

The Tribal Defendants do not explain why the “final assessment” of a consumer's loan application is an “acceptance” in the language of contract-formation. In any case, even if the contract was formed on the Tribe's reservation, a substantial part of the events giving rise to Plaintiffs' claims occurred outside the reservation. [11] The Second Circuit made a similar observation in *Otoe-Missouria Tribe of Indians v. New York State Department of Financial Services*, concluding that the plaintiff-tribes in that case (which were also involved in making short-term internet loans) had “provided insufficient evidence to establish that they are likely to succeed in showing that the internet loans should be treated as on-reservation activity.” 769 F.3d 105, 115 (2d Cir. 2014).

As the court observed in *Otoe-Missonria:*

> Much of the commercial activity at issue takes place in New York. That is where the borrower is located; the borrower seeks the loan without ever leaving the state, and certainly without traveling to the reservation. Even if we concluded that the loan is made where it is approved, the transaction ... involves the collection as well as the extension of credit, and that collection clearly takes place in New York. The loan agreements permit the lenders to reach into the borrowers' accounts, most or all of them presumably located in New York ....

Id. Here, the circumstances are similar and the Tribal Defendants have presented no more evidence than the tribes in *Otoe-Missouria.* Thus, at least for the purposes of the motions to dismiss, the result predicted in that case is the same in this one: the relevant conduct occurred outside of Indian lands. The Tribal Defendants may thus be subject to suit under the *Ex Parte Young* analogy.

***7** Finally, the Tribal Defendants assert that nothing in *Bay Mills* authorizes suits by *private citizens* based on violations of state law. (Doc. 92 at 16.) It is true that Plaintiffs in this case are private citizens, whereas in *Bay Mills* and *PCI Gaming* the plaintiffs were States. But *Bay Mills* does not explicitly limit the application of the *Ex Parte Young* analogy to suits brought by States. In fact, the Court stated that, “[u]nless federal law provides differently, Indians going beyond reservation boundaries are subject to *any generally applicable state law.*” *Bay Mills*, 134 S. Ct. at 2035 (internal quotation marks omitted; emphasis added). That plain language includes state laws that may be enforced by private citizens. *See* Am. Indian Law Deskbook § 7:4 (noting that tribal officer-capacity suits under *Bay Mills* are a “potential remedy for states *and other parties*” (emphasis added)). [12]

Ultimately, tribal sovereign immunity may limit the shape and nature of the relief against the Tribal Defendants, but it is not a complete bar to a lawsuit against them.

B. Standing

The Tribal Defendants, joined by the Think Defendants and TCV, contend that Plaintiffs lack standing because they have not yet incurred injury or damages and because they do not seek redress for injuries they have sustained personally. (Doc 66 at 24–27.) [13] Plaintiffs respond that they continue to owe money on unlawful loans and suffer reputational harm through credit reporting of non-payment. The court agrees with Plaintiffs that the FAC contains sufficient allegations to support individualized standing for each Plaintiff. There is little dispute that both borrowed money on terms which would violate Vermont's usury laws. (*See* Doc. 91 at 12, Amicus brief filed by the Office of the Vermont Attorney General.) Whether Plain Green is subject to these laws is in dispute, but Plaintiffs' status as people alleging injury through violations of state law is not.

Defendants' arguments that no injury is sustained because a person has an outstanding loan balance which has not been reduced to judgment or otherwise affected her interests is contrary to the allegations of the FAC, which the court accepts as true at this stage of the

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