

Unkechaug Indian Nation v Indian Cr. Smoke Shop
2018 NY Slip Op 34244(U)
February 14, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 615400/2017
Judge: Martha L. Luft
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Short Form Order

Index No. 615400/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

UNKECHAUG INDIAN NATION,

Plaintiff/Petitioner

-against-

INDIAN CREEK SMOKE SHOP and JOHN
AND JANE DOES 1through 10,

Defendants/Respondents.

Mot. Seq. No. 001 Mot-D
Orig. Return Date: 08/30/2017
Mot. Submit Date: 09/19/2017

PLAINTIFF/PETITIONER'S ATTORNEY

James F. Simermeyer, Esq.
Law Offices of James F. Simermeyer PC
3040 88th Street
East Elmhurst, NY 11369

DEFENDANTS/RESPONDENTS PRO SE

Indian Smoke Shop
104A Poospatuc Lane
Mastic, NY 11950

Karrin Carroll
207 Poospatuck Lane
Mastic, NY 11950

John and Jane Does
104A Poospatuc Lane
Mastic, NY 11950

Upon the e-filed documents number 1 through 16 read on the Order to Show Cause and Temporary Restraining Order, it is

ORDERED, that petitioner/plaintiff's unopposed motion for a preliminary injunction to enjoin and prohibit respondents-defendants and employees, servants, agents, attorneys and assigns from operating Indian Creek Smoke Shop on Unkecaug Indian Nation land at 104A Poospatuck Lane, Mastic and to enjoin further operation of Indian Creek Smoke Shop and illegal activities associated with the Smoke Shop is granted; and it is further

ORDERED, that petitioner/plaintiff shall post an undertaking of \$2500 within forty-five (45) days of the date of this order; and it is further

ORDERED, that petitioner/plaintiff shall serve the attached notice pursuant to New York State Indian Law Article 2, Section 8 upon Karrin Carrol, the alleged owner of

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the Indian Creek Smoke Shop, the Indian Creek Smoke Shop and John and Jane Does,
and it is further

ORDERED that this matter is set down for a hearing pursuant to the above-referenced notice on **April 19, 2018 at 2:00 p.m.** before the undersigned.

This is a proceeding/action by the Unkechaug Indian Nation against the respondents/defendants who are operating the Indian Creek Smoke Shop (“Smoke Shop”) in contravention of the Unkechaug Indian Nation (“Indian Nation”) Tribal Council’s resolution to permanently ban the Smoke Shop from doing business on the Poospatuck Reservation (“Reservation”). The Reservation is the land of the Indian Nation and the members of the nation reside there. It is undisputed that the Tribal Council brought this proceeding/action pursuant to its duly adopted resolution and its customs, rules and regulations.

The complaint alleges that the respondents/defendants initially were granted a license to construct the Smoke Shop. It also alleges that the Smoke Shop was not built in accordance with the conditions in the initial resolution so that construction was to cease pursuant to a Tribal Council resolution dated October 29, 2010. Those issues were resolved and the Smoke Shop construction was completed. The Tribal Council received complaints of criminal activity at the Smoke Shop, including shootings, drug dealing and prostitution, such that it issued a resolution revoking the license in August 2014. Upon representations that illegal activities would cease, the Tribal Council re-issued the licence in September 2014, with the caveat that the license would be revoked permanently should illegal activities re occur. The complaint alleges that since the time of the license re-issuance gang members have been operating the Smoke Shop business, numerous shootings have taken place and drug dealing has been occurring at the Smoke Shop premises. On March 30, 2017 the Tribal Council issued a resolution to ban the Smoke Shop from doing business on the Reservation permanently and served same on the respondents/defendants. This proceeding/action then was brought by order to show cause and a summons and complaint on August 10, 2017. The order to show cause sought a temporary restraining order to cease operation of the Smoke Shop, enjoin the illegal activities taking place on the site and for the Suffolk County sheriff to padlock and close the Smoke Shop. The TRO application was denied (Santorelli, J.).

The complaint contains four causes of action: trespass (First Cause of Action); nuisance (Second Cause of Action); ejection of intruders pursuant to Article 2, Section 8 of the NYS Indian Law (Third Cause of Action or Claim for Relief); and a permanent injunction (Fourth Cause of Action). No opposition to the motion for a preliminary

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injunction has been filed. There has been no answer to the Complaint, although the petitioner/plaintiff has not yet moved for a default judgment.

The Indian Nation is entitled to a preliminary injunction. In order “to prevail on a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position.” *Gluck v. Hoary*, 55 A.D.3d 668, 668, 865 N.Y.S.2d 356, 357 (2d Dep’t.2008). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court. *Dixon v. Malouf*, 61 A.D.3d 630, 875 N.Y.S.2d 918 (2d Dep’t. 2009). When a respondent fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court. *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 369 N.Y.S.2d 667 (1975); *Commissioners of State Ins. Fund v. Garcia*, 49 Misc. 3d 875, 14 N.Y.S.3d 683 (Sup. Ct., Suffolk Cty., 2015).

The unopposed moving papers sufficiently demonstrated plaintiff’s entitlement to the relief requested. The Tribal Nation will be irreparably harmed by the continuation of criminal activities and other nuisances at the premises. The equities balance in the Tribal Nation’s favor. The Tribal Nation also is likely to succeed on the merits given its authority to bring these claims pursuant to NYS Indian Law. *Brenner v. Great Cove Realty Co., Inc.* 6 N.Y.2d 435, 10 N.Y.S.2d 337 (1959); *Matter of Spota v. Jackson*, 10 N.Y.3d 46, 853 N.Y.S.2d 520 (2008).

“While fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court, CPLR 6312 (b) requires that the party seeking an injunction give an undertaking.” *Putter v Singer*, 73 A.D.3d 1147, 1149, 901 N.Y.S.2d 382 (2nd Dept 2010); *Livas v Mitzner*, 303 A.D.2d 381, 383, 756 N.Y.S.2d 274 (2003). In the Court’s discretion, the plaintiffs shall be required to give an undertaking in the amount of two thousand five hundred dollars (\$2,500.00) within forty- five (45) days of the date of this Order. *Edwards-Pinckney v. Edwards*, 57 Misc. 3d 1210(A), 2017 N.Y. Slip Op. 51376(U) (Sup. Ct., Suffolk Cty., 2017).

The Tribal Nation also has sought an order pursuant to NYS Indian Law Article 2, Sections 5 and 8 for a sheriff’s warrant to remove an intruder upon tribal lands. This Court has the jurisdiction to entertain such an application pursuant to NYS Indian Law Article 2 Section 5, which provides that applications by Indians may be “prosecuted and enforced in any court of the state.” Section 8 provides that no person may conduct a

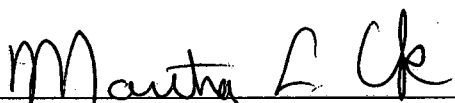
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business upon tribal lands without permission of the Tribal Council. Upon a complaint, the Court may issue notice requiring those a tribal nation considers to be intruding upon tribal lands to appear before the Court. Should the Court determine that person(s) complained of are intruders, a warrant commanding the sheriff to remove such persons will issue. *Id.*; *Tuscarora v. Swanson*, 108 Misc.2d 429, 437 N.Y.S.2d 603 (Sup. Ct., Niagra Cty, 1981); NYS Indian Law Article 2, Section 8. The Tribal Nation, therefore, is directed to personally serve the attached notice upon the respondents/defendants within thirty (30) days of the e-filing of this order.

ENTER

Date: February 14, 2018
Riverhead, New York



MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION