

2019 WL 13082007  
United States District Court, W.D. Texas, San Antonio Division.

Matthew MITCHELL, Plaintiff,

v.

Orico BAILEY, Defendant.

No. 5:17-CV-411-DAE

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Signed 06/10/2019

ORDER DENYING PLAINTIFF'S MOTION FOR FINAL JUDGMENT

David Alan Ezra, Senior United States District Judge

\*1 Before the Court is Plaintiff Matthew Mitchell's ("Plaintiff" or "Mitchell") Motion for Final Judgment Under Rule 54(b) filed on May 17, 2019. (Dkt. # 58.) No response was filed. Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the motion, the Court—for the reasons that follow—**DENIES** Plaintiff's motion. (Dkt. # 58.)

BACKGROUND

Plaintiff Matthew Mitchell filed this personal injury and breach of contract action against Hoopa Valley Tribe ("the Tribe") and Orico Bailey ("Bailey") (collectively, "Defendants") to recover damages for injuries he sustained on June 20, 2015, while assisting with disaster relief operations in Wimberley, Texas. (Dkt. # 1.) Plaintiff Mitchell is a Texas citizen and San Antonio Fireman. (Id. at 1, 4.) The Tribe is a federally recognized Indian Tribe located in Hoopa, California. (Id. at 1.) The AmeriCorps Hoopa TCCC is a national service program that the Tribe created with federal grant money from the Corporation for National and Community Service<sup>1</sup> (the "CNCS"). (Id. at 4.) Defendant Bailey is a member of the AmeriCorps Hoopa TCCC. (Id.) At all relevant times, Bailey was acting in his capacity as a member of the AmeriCorps Hoopa TCCC. (Id.)

In June 2015, a massive storm struck Wimberley, Texas. (Id.) Shortly after the storm, Bailey and Mitchell went to Wimberley to assist with disaster relief operations. (Id.) On June 20, 2015, while removing debris that had accumulated at the riverbank of the Blanco River in Wimberley, Bailey and Mitchell came across an uprooted Live Oak tree (the "Tree"). The Tree had fallen in a horizontal position and was resting above the ground, atop trees that were still rooted in the ground. (Id. at 5.) According to the Complaint, Mitchell and Bailey agreed to remove any loose debris around the Tree before removing the Tree or any of the smaller trees that were propping up the Tree. (Id. at 5–6.) While Mitchell was removing the debris on the ground near the Tree, Bailey purportedly removed one of the supporting trees with a chainsaw, which allegedly caused the tree to fall to the ground. (Id. at 6–7.) On its way to the ground, the Tree struck Mitchell and pinned him to the ground. (Id. at 7.) Mitchell survived the accident but suffered serious injuries as a result. (Id.)

On May 9, 2017, Plaintiff filed an action against Bailey and Hoopa Valley Tribe to recover damages for the injuries he sustained on June 20, 2015. (Dkt. # 1.) Plaintiff's Complaint alleges three causes of action: (1) breach of contract against the Tribe; (2) negligence against the Tribe; and (3) negligence against Bailey. (Id. at 7–12.)

On May 2, 2018, Defendants filed a motion to dismiss pursuant to [Rule 12\(b\)\(1\) of the Federal Rules of Civil Procedure](#), arguing that Plaintiff's claims are barred by the doctrine of tribal sovereign immunity. (Dkt. # 32.) On June 1, 2018, Plaintiff timely filed a response in opposition to the motion to dismiss. (Dkt. # 34.) Defendants timely filed a reply to Plaintiff's response to their motion to dismiss on June 15, 2018. (Dkt. # 41.)

\*2 On May 2, 2018, Defendants filed a motion to substitute party and/or petition for certification of federal employment pursuant to the Westfall Act. (Dkt. # 35.) Plaintiff filed a response to the motion to substitute on June 14, 2018. (Dkt. # 40.) The United States filed a response to the motion to substitute on October 22, 2018, arguing that the petition for certification was premature, as no request for certification had been made (Dkt. # 46), and Defendants filed a reply to both responses to their motion to substitute on November 26, 2018 (Dkt. # 47).

On February 4, 2019, this Court granted the Tribe's motion to dismiss and denied as moot the motion to substitute. (Dkt. # 48.) On February 15, 2019, Mitchell filed his motion to reconsider. (Dkt. # 49.) The Court denied that motion on April 25, 2019. (Dkt. # 57.)

Mitchell now petitions the court to enter final judgment pursuant to [Federal Rule of Civil Procedure 54\(b\)](#) on the decision of the Court finding that tribal sovereign immunity applies and dismissing the Tribe as a defendant in this case. (Dkt. # 58.) Mitchell wishes to appeal that decision before going to trial against Bailey on his negligence claim. (Id.) The request is unopposed by Bailey or the Tribe, and though Mitchell notes in his motion that Third-Party Defendant United States is opposed, no response has been filed in opposition. (Id. at 1.)

#### LEGAL STANDARD

[Rule 54\(b\) of the Federal Rules of Civil Procedure](#) provides that, where an action involves multiple parties or claims, the district court may direct entry of a final judgment as to one or more—though not all—parties or claims “only if the court expressly determines that there is no just reason for delay.” [Fed. R. Civ. P. 54\(b\)](#). “A partial final judgment is meant to prevent the ‘hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had.’” [Johnson v. Owen Loan Serv. LLC](#), 916 F.3d 505, 507 (5th Cir. 2019) (quoting [Dickinson v. Petroleum Conversion Corp.](#), 338 U.S. 507, 511 (1950)).

In evaluating a motion made under [Rule 54\(b\)](#), a court must make two determinations. First, the court must determine whether it is dealing with a “final judgment”—in other words, “a decision upon a cognizable claim for relief ... that is an ultimate disposition of an individual claim entered in the course of a multiple claims action.” [Curtiss-Wright Corp. v. Gen. Elec. Co.](#), 446 U.S. 1, 8 (1980) (internal quotation marks omitted). Second, the court must “make an express determination that there is no just reason for delay.” Id. at 3. [Rule 54\(b\)](#) motions should not be granted routinely, [Brown v. Miss. Valley State Univ.](#), 311 F.3d 328, 332 (5th Cir. 2002), and “[a] district court should grant certification only when there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal.” [PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.](#), 81 F.3d 1412, 1421 (5th Cir. 1996).

DISCUSSION

This Court's dismissal Order and Order denying reconsideration found that the Tribe was entitled to tribal sovereign immunity and, accordingly, immune from suit, and that Mitchell's claims against Bailey in his individual capacity could go forward. (Dkts. ## 48, 57.)

The Court recognizes that Mitchell is correct that the question of whether tribal sovereign immunity applies to off-reservation tortious conduct is an open one in this Circuit and at the Supreme Court. [Michigan v. Bay Mills Indian Co.](#), 572 U.S. 782, 799 n.8 (2014) (noting the Court has not decided, and declined to in the instant case, whether immunity would apply to a tort victim if there was no alternative form of relief). However, the Court chooses to follow non-binding federal precedent in finding the Tribe to be immune from suit. See [Arizona v. Tohono O'odham Nation](#), 818 F.3d 549, 563 n.8 (9th Cir. 2016) (“We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law.”); [Cook v. AVI Casino Enterprises, Inc.](#), 548 F.3d 718, 725 (9th Cir. 2008); [Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council](#), 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999) (“Nothing in [Kiowa](#) could be construed to limit sovereign immunity to contractual claims[;] in fact, the Court expanded the scope of sovereign immunity by including contracts made off the reservation for governmental or commercial activities ... [There is] no distinction between tort and contract claims in applying sovereign immunity.”)

\*3 Mitchell now asks the Court to enter final judgment pursuant to [Rule 54\(b\)](#) with regard to the tribal sovereign immunity because he “desires to take an immediate appeal of the Court's Order ... finding that the [ ] Tribe is protected from suit by tribal sovereign immunity.” He argues that such an appeal is “in the interest of justice because it will further [ ] Mitchell and the [ ] Tribe's obtaining a timely final resolution of the [ ] Tribe's immunity defense.” (Dkt. # 58 at 2.) Mitchell further argues that granting this motion is in the interest of judicial economy because the tribal sovereign immunity issue is separate and independent from his tort claim against Bailey. (*Id.* at 2–3.) While the Court agrees that the claims are separate, the Court finds that Mitchell has presented no reason why delaying his appeal of the sovereign immunity question would result in “hardship or injustice.” [PYCA Indus., Inc.](#), 81 F.3d at 1421.

In determining whether just reason exists for delay, the court must strike a balance between the “inconvenience and costs of piecemeal [appellate] review” and “the danger of denying justice by delay.” [Road Sprinkler Fitters Local Union v. Cont'l Sprinkler Co.](#), 967 F.2d 145, 148 (5th Cir. 1992). The question Mitchell seeks to immediately appeal is an open question, both in the Fifth Circuit and nationally. The case upon which Mitchell principally relies, from the Alabama Supreme Court, has a pending petition for a writ of certiorari to the Supreme Court. [Wilkes v. PCI Gaming Authority](#), — So.3d —, 2017 WL 4385738 (Ala. Sept. 29, 2017) (modified on rehear'g Oct. 3, 2017) (cert. pet. docketed Feb. 22, 2018). Supplemental briefs on that petition were filed as recently as June 5, 2019, it has been distributed for conference twice (and will be again on June 20, 19), and certiorari has not yet been granted. *Id.* Accordingly, it does not appear there is any danger of denying justice by having Mitchell go forward with his tort claims against Bailey and then pursue his appeal in its entirety. Further, this case, which was filed in 2017, is set for trial on December 2, 2019, and entering final judgment on the sovereign immunity claim will further delay the conclusion of trial proceedings in this Court. It is also possible that Mitchell will also wish to appeal an element of the trial proceedings to the Fifth Circuit. There is, therefore, a real concern about piecemeal appeals which are certainly not in the interest of judicial economy. [Brown](#), 311 F.3d at 232.

Because granting the motion will only further prolong the litigation, because Mitchell has not identified any prejudice to him based on the Court's failure to enter final judgment, and because the Supreme Court has not yet taken up the open question Mitchell seeks final judgment on, the Court finds that Mitchell's motion for final judgment shall be **DENIED**. (Dkt. # 58.)

CONCLUSION

Based on the foregoing, Mitchell's motion for final judgment pursuant to [rule 54\(b\)](#) is **DENIED**. (Dkt. # 58.)

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2019 WL 13082007

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**Footnotes**

- <sup>1</sup> CNCS is a federal agency established in 1994 through the National and Community Service Trust Act of 1993. The corporation makes financial grants which help create AmeriCorps chapters around the United States.