No. SC-CV-67-16

SUPREME COURT OF THE NAVAJO NATION

Northern Edge Casino and The Navajo Nation,
Petitioners,

v.

Window Rock District Court,
Respondent,

and Concerning:

Irene Johnson,
Real Party in Interest.

OPINION

Before SLOAN, A., Chief Justice, SHIRLEY, E., Associate Justice, and BEGAY, M., Associate Justice by Designation.

An appeal from a decision of the Window Rock District Court concerning Cause No. WR-CV-56-15, the Honorable Carol Perry, presiding.

Joshua M. Montagnini, Gallup, New Mexico, for Petitioners; Robyn Neswood-Etsitty, Window Rock, Navajo Nation, for Respondent; Daniel P. Abeyta, Farmington, New Mexico, for Real Party in Interest.

This case concerns the filing of a complaint against the Navajo Nation under the Navajo Sovereign Immunity Act. Clarification of 1 N.N.C. § 555(A)(3) is provided.

I

The undisputed facts are: on March 1, 2013, Real Party in Interest Irene Johnson (Johnson) was allegedly injured on the premises of the Northern Edge Navajo Casino. From February 19-20, 2015, Johnson served notices of suit upon the Navajo Nation President, Attorney General, and the Chief Legislative Counsel. Thereafter, on March 27, 2015, Johnson filed a Complaint for Damages in the Window Rock District Court. On June 4, 2015, Petitioners Northern Edge Navajo Casino

and the Navajo Nation (collectively "the Nation") moved for dismissal under Rule 12(b)(6) of the Navajo Rules of Civil Procedure arguing that the complaint was filed after the statute of limitations for personal injuries expired on March 1, 2015. On July 6, 2016, the district court denied the Nation's request to dismiss stating, "that filing a notice of intent to sue within the two year prescribed statute of limitations is timely because it constitutes 'commencement' of an action." Order Denying Defendants' Motion to Dismiss at 2, Petitioners' Ex. D.

In response, on November 15, 2016, the Nation filed a Petition for Writ of Mandamus against the Window Rock District Court (Respondent) asserting the district court was required by 1 N.N.C. § 555(A) to dismiss the complaint for lack of jurisdiction because the commencement of an action starts with the filing of a complaint, not with the service of a notice of suit. On February 23, 2017, this Court issued an Alternative Writ ordering Respondent to file a response. On March 1, 2017, Respondent filed a Response to Petitioners' Petition for Writ of Mandamus asserting that it did not err in denying Petitioners' motion to dismiss because equitable tolling applied, and Johnson did, in fact, make a timely filing. Equitable tolling, however, was not mentioned at all in the district court's order. Nonetheless, Respondent argues that because the Navajo Sovereign Immunity Act is silent on whether compliance with the 30-day notice requirement tolls the statute of limitations, it properly found the doctrine of equitable tolling applied under principles of fairness and substantial justice pursuant to *Yazzie v. Tooh Dineh Industries*, No. SC-CV-67-05 (Nav. Sup. Ct. September 20, 2006).

On March 13, 2017, Johnson also filed a Response to Petitioner's Petition for Writ of Mandamus arguing that she filed a proper notice of suit within the statute of limitations. Johnson argues that, although there is no case law directly on point, her timely filed notice of suit equitably tolled the statute of limitations for at least 30 days. Johnson further argues the Navajo Sovereign

Immunity Act was not intended to effectively shorten the applicable statute of limitations for claimants who file a notice within 30 days of the expiration of the statute of limitations. Furthermore, Johnson argues a permanent writ would violate *Diné Bi Beenahaz'áanii* and *K'e* because she and others similarly situated would be denied the right to file suit though a notice of suit was filed within the statute of limitations.

A hearing was held at Twin Arrows on June 9, 2017. At the hearing, Respondent abandoned its written arguments. Respondent now argues that the Nation has a plain, speedy, and adequate remedy at law through an appeal; that the Nation asserts an affirmative defense of statute of limitations that is subject to a discretionary rather than a mandatory ruling; and that the statute of limitations argument as an affirmative defense cannot be raised by a court, including this Court. Having thoroughly considered the petition and arguments, this decision now follows.

II

The issue in this case is 1) whether an action against the Navajo Nation under the Navajo Sovereign Immunity Act commences with service of a notice of suit or with the filing of a complaint.

III

The notice requirements of the Navajo Sovereign Immunity Act are jurisdictional and whether a plaintiff complied with them is a question of law. *Chapo v. Navajo Nation*, 8 Nav. R. 447, 456 (Nav. Sup. Ct. 2004). We review questions of law *de novo*, giving no deference to the district court's decision. *Id.*

IV

"The right of the Navajo Nation to assert a defense of sovereign immunity whenever it is sued is beyond question." *Johnson v. Navajo Nation*, 5 Nav. R. 192, 195 (Nav. Sup. Ct. 1987).

"The Navajo Nation is a sovereign nation which is immune from suit." 1 N.N.C. § 553(A) (2005). "Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation Council as the governing body of the Navajo Nation." 1 N.N.C. § 553(B) (2005).

The Navajo Nation codified its inherent authority in the Navajo Sovereign Immunity Act and set forth specific and express conditions under which immunity is waived and the Navajo Nation can be sued. *Barber v. Navajo Housing Authority*, No. SC-CV-28-12, slip op. at 7 (Nav. Sup. Ct. June 12, 2014).

The Navajo Sovereign Immunity Act provides:

> Any person or party desiring to institute suit against the Navajo Nation or any officer, employee or agent of the Navajo Nation as authorized by this Subchapter shall, as a *jurisdictional condition precedent* provide notice to the President of the Navajo Nation, the Chief Legislative Counsel, and the Attorney General of the Navajo Nation, and the Chief Legislative Counsel, as provided herein.

1 N.N.C. § 555(A) (Resolution No. CJA-06-10, February 13, 2010) (emphasis added). As a "jurisdictional condition precedent," the notice requirements at 1 N.N.C. § 555(A) are jurisdictional. *E.g., Chapo v. Navajo Nation*, 8 Nav. R. 447, 456 (Nav. Sup. Ct. 2004).

The issue on appeal concerns that part of the notice requirements that reads:

> No action shall be accepted for filing against the Navajo Nation or any officer, employee or agent of the Navajo Nation unless the plaintiff has filed proof of compliance with this Subchapter at least 30 days prior to the date on which the complaint or any other action is proposed to be filed with such Court.

1 N.N.C. § 555(A)(3) (2005).

"In matters involving statutory interpretation, we initially look to the language of the statute and attempt to decipher a meaning from the words it uses." *PC&M Construction Co. v. Navajo Nation*, 7 Nav. R. 58, 59 (Nav. Sup. Ct. 1993). "If the meaning is not apparent on the face

of the statute, then resort to other indicia, such as legislative history, is appropriate." *Id.* "The courts shall also utilize Diné bi beenahaz'áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts." 7 N.N.C. § 204(A) (2005).

Fortunately, when the Navajo Sovereign Immunity Act was being amended in 1993 to clarify the procedure for suits against the Navajo Nation, a legislative record from the July 25, 1993 council session was prepared. In that session, the attorney for the Navajo Nation stated "[i]t has been the experience of the Navajo Nation with regards to these actions that have been filed[,] [t]he procedures that are spelled out were too general or were being misunderstood by people who were filing actions against the Navajo Nation." Record of the Navajo Tribal Council, at 934 (July 25, 1993) (discussion of Tribal Council Resolution No. CJY-55-85). As a result, "there would be a notice of claim filed pursuant to the present act . . . [a]nd after the 30 days of the notice, without filing a complaint in the court[,] there would be --- people judging against the Navajo Nation." *Id.* To avoid what was referred to in the legislative record as a "notice of default" against the Nation with no complaint ever being filed, a distinction between a notice of suit and a complaint was intended. Furthermore, amendments were intended "so that people will be on notice, people who are filing actions against the Navajo Nation. They will be on notice that their action really doesn't begin until they have a complaint with the court and a summons is issued to the Attorney General and the Chairman of the Navajo Tribal Council." *Id.*

The legislative clarification that the commencement of an action begins with the filing of a complaint is in accord with Rule 3 of the Navajo Rules of Civil Procedure, which states "[a] civil action is begun by filing a complaint with the court." We, therefore, reject the district court's ruling that "filing" a notice of suit commences an action. There is no "filing" of a notice of suit. At the "service" of a notice of suit, the district court has no authority over such correspondence in the

pre-litigation phase. We, thus, hold that an action against the Navajo Nation commences with the filing of a complaint.

Despite Johnson's arguments that an action commences with a notice of suit, we believe Johnson understood otherwise. Johnson's notice of suit to the Nation stated "We are eager to resolve this dispute and welcome the Navajo Nation to discuss resolution of this matter *prior to the filing of a lawsuit*, however, my client has authorized suit if negotiations are unsuccessful." Notice of Suit at 4, Petitioner's Ex. B (emphasis added). "Prior to filing of a lawsuit" clearly demonstrates that Johnson knew the commencement of a suit or action begins with the filing of a complaint in the district court.

Although the Window Rock District Court launches a new argument at the hearing that the statute of limitations for civil actions at 7 N.N.C. § 602(A) is an affirmative defense that cannot be raised by the court, including the Supreme Court, we disagree in suits against the Nation. "Sovereign immunity is jurisdictional, therefore the Navajo Nation's defense of sovereign immunity automatically raises questions concerning the district court's jurisdiction over the Navajo Nation." *Johnson*, 5 Nav. R. at 195. Furthermore, we are not dealing with a limitation of action provision, 7 N.N.C. § 602(A), in a vacuum. We are dealing with 1 N.N.C. § 555(A)(3), a jurisdictional condition precedent to the Nation's waiver of its sovereign immunity.

Here, the district court found that Johnson was injured on or about March 1, 2013 and that Johnson was required to file her action by March 1, 2015. There is no dispute Johnson filed her complaint on March 27, 2015. Thus, we conclude Johnson failed to file a complaint commencing her action by March 1, 2015. Johnson, thus, failed to comply with 1 N.N.C. § 555(A). In our *de novo* review, we also conclude Johnson failed to comply with 1 N.N.C. § 555(A)(2), which requires the notice of suit to identity of each prospective defendant. "The Navajo Sovereign

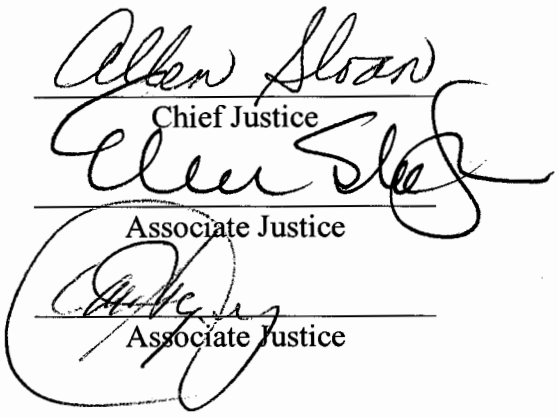
Immunity Act does not require that 'the Navajo Nation' be named in every case, but requires that 'each prospective defendant' be named." *Chapo*, 8 Nav. R. at 457. Here, the notice of suit stated Johnson "will bring suit against the Navajo Nation, Northern Edge Navajo Casino, and *other John Does yet to be identified* to recover damages for personal injuries... ." Notice of Suit at 1, Petitioners' Ex. B (emphasis added). Johnson failed to name each prospective defendant, as required.

Petitioners seek a writ of mandamus. However, [s]overeign immunity defenses are jurisdictional and, if well-founded, provide an appropriate basis for issuing a writ of prohibition." *Atcitty v. District Court for the Judicial District of Window Rock*, 8 Nav. R. 227, 229 (Nav. Sup. Ct. 1996) (citing *Watts v. Sloan*, 7 Nav. R. 185 (Nav. Sup. Ct. 1995)). Johnson filed a complaint more than two years ago on March 27, 2015. Although the Nation moved for dismissal shortly thereafter on June 4, 2015, the district court waited 13 months until it denied the Nation's motion on July 6, 2016. Despite this Court having said "[q]uestions of governmental immunity present issues which should be resolved early in the litigation to 'avoid waste of judicial and litigant resources ....[,]'" *see Atcitty*, 8 Nav. R. at 229, the district court grievously delayed in carrying out its duty to timely consider jurisdiction. Rather than issue a writ of mandamus providing guidance, we hereby issue a writ of prohibition dismissing the suit against the Nation based on the district court's findings of facts and the outcome demanded by law.

V

The Court hereby ISSUES a WRIT OF PROHIBITION against the Window Rock District Court.

Dated this 31st day of July, 2017.



Chief Justice

Associate Justice

Associate Justice