

According to the Ho-Chunk Nation constitution and code, a candidate for president of the Ho-Chunk Nation must not be a person convicted of a felony, among other requirements.

Plaintiff included the State of Wisconsin, Department of Justice (“ Defendant DOJ”), as a defendant to this matter as Defendant DOJ is alleged to be a body politic that maintains records of criminal convictions in the State of Wisconsin.

Defendant Cleveland has filed a motion to dismiss this present action, which is joined by the Defendant DOJ, on the basis of lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, lack of standing, and issue preclusion.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief may be granted tests the legal sufficiency of the complaint to state a claim for which relief may be granted. Kaloti Enters. v. Kellogg Sales Co., 2005 WI 111, ¶11, 283 Wis. 2d 555, 699 N.W.2d 205. The complaint should be dismissed as legally insufficient if there are no conditions under which the plaintiff can recover. Id. In reviewing a motion to dismiss, the court must accept as true all well-pleaded facts in the complaint and any reasonable inferences therefrom. Data Key Partners v. Permira Advisers, LLC, 2014 WI 86 ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. The court must not, however, add facts in the process of construing a complaint, and legal conclusions stated in the complaint need not be accepted as true. Id.

ANALYSIS

Subject Matter Jurisdiction

Defendant, Cleveland, argues that the court's subject matter jurisdiction is preempted by federal law because any decree entered by this court would be an impermissible intrusion by the State court into the internal and social relations adopted by the Ho-Chunk Nation. The court finds Defendant Cleveland's lack of subject matter jurisdiction argument unpersuasive as the requested relief in this action only seeks to clarify the criminal status (felony or misdemeanor) of a criminal conviction. In fact, Plaintiff, in his brief opposing Defendant Cleveland's motion to dismiss states, "[i]f this court provides the declaratory judgment sought, the Ho Chunk nation will remain free to interpret its own constitution and laws as it wishes." Pl. Br. Opposing Def. Mot. at p. 6.

The requested relief does not ask the court to apply any decree to Ho-Chunk Nation law and does not ask the court to impose any decree on the Ho-Chunk Nation. While the complaint alleges that a decision in this matter will assist the Ho-Chunk Nation, the Ho-Chunk Nation is not a party to this action. The court finds that the reference of the Ho-Chunk Nation laws in the complaint were provided as context to develop an argument for the alleged controversy.

The Wisconsin Constitution provides that the circuit court shall have original jurisdiction in all matters civil within this state. Wis. Const., Article VII, Section 8. An action filed pursuant to the Uniform Declaratory Judgments Act, as the one filed in the present matter, is such a civil matter. See Wis. Stat. § 806.04. Further, the Jackson County Circuit Court is a court of record as contemplated in Wis. Stat. § 806.04(1). Accordingly, this court has subject matter jurisdiction in this action.

Declaratory Judgment

Plaintiff's complaint seeks relief pursuant to Wis. Stats. § 806.04 based on the Uniform Declaratory Judgment Act. In order for declaratory relief to be obtained, there must be a justiciable controversy. Loy v. Bunderson, 107 Wis. 2d 400, 409-410 320 N.W.2d 175 (1982); State ex rel. La Follette v. Dammann, 220 Wis. 17, 22, 264 N.W. 627 (1936).

A controversy is justiciable when the following factors are present:

- (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
- (2) The controversy must be between persons whose interests are adverse.
- (3) The party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest.
- (4) The issue involved in the controversy must be ripe for judicial determination.

Putnam v. Time Warner Cable, 2002 WI 108, ¶41, 255 Wis. 2d 457, 649 N.W.2d 626. If all four factors are satisfied, the controversy is justiciable, and it is proper for the court to entertain an action for declaratory judgment. Olson v. Town of Cottage Grove, 2008 WI 51, ¶29, 309 Wis. 2d 365, 749 N.W.2d 211(citing Miller Brands-Milwaukee, Inc. v. Case, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991)).

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. Wis. Stat. § 806.04(6).

(a) Claim against the State of Wisconsin & Department of Justice

Plaintiff has filed the present action against the State of Wisconsin, DOJ. The Complaint asserts two allegations regarding the Defendant DOJ, specifically paragraphs six and seven. Plaintiff alleges that it believes the Defendant DOJ maintains records of criminal convictions in the State of Wisconsin, and avers in conclusory fashion that the Defendant DOJ has an interest in the issues and controversy in this matter. Pl. Compl. ¶¶ 6 & 7.

Defendant DOJ disagrees and argues that sovereign immunity bars the State of Wisconsin from being a party to a declaratory judgment action, and further argues that there is no justiciable controversy against Defendant DOJ. Accordingly, the Defendant DOJ asks this court to dismiss the present action against it and the State of Wisconsin.

(i) Sovereign Immunity

As the Defendant DOJ points out, the Wisconsin Constitution provides that the legislature shall direct by law in what manner and in what courts suits may be brought against the state. Wis. Const., Art. IV, Sec. 27. The Wisconsin declaratory judgment statutes do not make any provision for suits against the state, and the Wisconsin Supreme Court had held that declaratory judgments against the state are barred by sovereign immunity. City of Kenosha v. State, 35 Wis. 2d 317, 323, 151 N.W.2d 36 (1967). Therefore, any action against the State of Wisconsin in this matter is hereby dismissed on the grounds of sovereign immunity.

As pointed out by Defendant DOJ and the above-cited case, while sovereign immunity bars this action against the State of Wisconsin, it does not bar this action against Defendant DOJ.

(ii) Justiciable Controversy

As context for his claim against Defendant DOJ, Plaintiff believes that the State of Wisconsin needs to be a party to this action in order to comply with Wis. Stats, sec. 806.04(11). Specifically, Plaintiff argues that the state has an interest which would be affected by the declaration of the court in this matter because the state was the plaintiff in the underlying 1972 criminal action referenced in this action. See Wis. Stat. § 806.04(11). Further, Plaintiff asserts that the state obtained a judgment in the referenced criminal matter, and thereby the state has an interest in the question of whether or not the criminal case it prosecuted resulted in a felony or misdemeanor conviction. As stated above, the State of Wisconsin is dismissed from this action based upon sovereign immunity. See supra.

As the Defendant DOJ points out in its brief, the Defendant DOJ and the State of Wisconsin are not one in the same. While the Defendant DOJ may represent the State of Wisconsin in certain matters, direct authority to prosecute criminal actions in circuit court, such as the crime referenced in the complaint, is the appropriate work of the local district attorney. See Wis. Stat. § 978.05(1). The court agrees, in light of the above factual distinction, the “State” in State v. Cleveland, as referenced in the complaint, is represented by the Jackson County District Attorney and not the Defendant DOJ.

In application of the required elements of a justiciable controversy, the court considers the first element, that is whether a controversy in which a claim of right is asserted against one who has an interest in contesting it. A question in the first element is whether the Defendant DOJ has an interest in contesting this matter. While the complaint contains a conclusory statement

that the Defendant DOJ has such an interest, Plaintiff fails to allege any specific facts showing that Defendant DOJ has an interest in contesting this matter.

The alleged controversy is whether Defendant Cleveland was convicted of a felony or a misdemeanor in a 1972 Jackson County criminal case. There are no facts alleged that the Defendant DOJ prosecuted the 1972 Jackson County criminal case or that it is the official record-keeper of the Jackson County Circuit Court. Defendant DOJ maintains a statewide criminal history repository, but such repository consists of information obtained from other sources, which would be updated if new information were to be provided. Accordingly, the court agrees that Defendant DOJ does not have an interest in *contesting* the alleged controversy in this matter.

The second element of a justiciable controversy requires the controversy must be between two parties whose interests are adverse. Defendant DOJ in its brief has argued that its interests are not adverse to Plaintiff's interests in this matter. Plaintiff has not responded to Defendant DOJ's argument, and therefore the court finds that Plaintiff concedes that the second element of a justiciable controversy has not been met.

For the foregoing reasons, and without further analysis of the remaining elements, the court finds that there is no justiciable controversy present against Defendant DOJ. Accordingly, the court dismisses this action against Defendant DOJ.

(b) Claim against Defendant Cleveland.

Defendant Cleveland filed a motion to dismiss in this matter on the grounds that: the Plaintiff has failed to state a claim upon which relief can be granted, the Plaintiff lacks standing to sue in this matter, and the matter is barred by issue preclusion. The underlying argument by

both parties on the defenses of failure to state a claim upon which relief can be granted and lack of standing is whether there is a justiciable controversy.

(i) **Justiciable Controversy**

The necessary elements required for a justiciable controversy are set forth above, and are applied and analyzed here as to claims against Defendant Cleveland.

(1) Is there a controversy in which a claim of right is asserted against one who has an interest in contesting it?

The court understands that the Plaintiff's position in the alleged controversy is that Defendant Cleveland was convicted of a felony in the referenced 1972 Jackson County criminal matter. And, the court understands that the Defendant Cleveland's position is that the conviction is a misdemeanor.

However, Plaintiff has failed to assert he has any legal claim of right that is affected by the Defendant Cleveland's conviction status. There are no facts alleged that Plaintiff would be prevented from running for Ho-Chunk Nation president due to Defendant Cleveland's 1972 criminal conviction status.

Accordingly, the court finds that the first element of a justiciable controversy has not been met.

(2) Is the alleged controversy between persons whose interests are adverse?

Paragraph three of the Plaintiff's Complaint states that the Plaintiff was a past candidate for Ho-Chunk Nation president and has expressed interest in being a candidate for Ho-Chunk Nation president in future elections. Plaintiff also seems to be implying in his complaint that Defendant Cleveland may run for such office by the allegation in paragraph 26, "[a] determination of [Defendant] Cleveland's status as a convicted felon will assist the HO-CHUNK

nation in evaluating and determining [Defendant] Cleveland's qualifications to run for future office against [P]laintiff."

Plaintiff seems to be alleging that Plaintiff's and Defendant Cleveland's interests are adverse due to the fact that Plaintiff and Defendant Cleveland *might* both run for Ho-Chunk Nation president in the future. The court disagrees that the facts alleged demonstrate that Plaintiff's and Defendant Cleveland's interests are adverse. Even if both individuals run for the same elected office, that does not mean the parties have adverse legal interests. Plaintiff fails to allege any facts showing that there is a legal relationship between Plaintiff and Defendant Cleveland that would affect the legal rights of Plaintiff.

(3) Does the party seeking the declaratory relief have a legal interest in the controversy (a legally protectable interest)?

The 'legal interest' component of justiciability has often been expressed in terms of standing. City of Madison v. Town of Fitchburg, 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983). In order to have standing to bring a declaratory judgment action, a party must have a personal stake in the outcome and be directly affected by the issue in controversy. Lake Country Racquet & Athletic Club v. Vill. Of Hartland, 2002 WI App 301, ¶17, 259 Wis. 2d 107(citing Village of Slinger v. City of Hartford, 2002 WI App 187, ¶9, 256 Wis. 2d 859. A personal stake in the outcome is measured by whether the claimant has sustained, or will sustain, some pecuniary loss or otherwise will sustain a substantial injury to his interests. Id.

Plaintiff alleges that a determination of Defendant Cleveland's status of a convicted felon will assist *the Ho-Chunk Nation* in evaluating and determining Defendant Cleveland's qualifications to run for future office against Plaintiff. See Compl. ¶26. Even if such an allegation were to be true, and the Ho-Chunk Nation had a legal interest in the alleged

controversy, the Ho-Chunk Nation is not seeking declaratory relief in this matter and is not a party to this action.

As stated above, Plaintiff's mere expression of an interest in running for Ho-Chunk Nation president in the future does not result in having personal stake in the outcome of the alleged controversy. Plaintiff has not alleged any facts that show a direct effect on his legally protected interests. More specifically, Plaintiff has not alleged any facts that would indicate he would be prohibited from exercising his right to run for Ho-Chunk Nation president depending on the outcome of the alleged controversy. There are no allegations that Plaintiff will suffer some pecuniary loss or that he has sustained, or will sustain, any substantial injury to *his* interests.

Accordingly, the court finds that Plaintiff lacks standing and lacks a legal interest in the alleged controversy due to having no personal stake in the outcome of such controversy.

(4) Is the issue involved in the controversy ripe for judicial determination?

The basic rationale of the "ripeness" doctrine is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. Lister v. Board of Regents, 72 Wis. 2d 282, 309, 240 N.W.2d 610 (1976). Accordingly, the facts must be sufficiently developed to avoid courts entangling themselves in such abstract disagreements. Miller Brands-Milwaukee, Inc. v. Case, 162 Wis. 2d 684, 695, 470 N.W.2d 290 (1991)(citing Loy v. Bunderson, 107 Wis. 2d 400, 412, 414, 320 N.W.2d 175 (1982)). Declaratory judgment actions are not meant to determine hypothetical or potential future circumstances, but rather requires the existence of present and fixed rights. City of Janesville v. Co. of Rock, 107 Wis. 2d 187, 199, 319 N.W.2d 891 (Ct. App. 1982). Courts will not render merely advisory opinions. Id.

Nonetheless, the underlying philosophy of the Uniform Declaratory Judgments Act, is to enable controversies of a justiciable nature to be brought before courts for settlement and

determination prior to the time that a wrong has been threatened or committed. Putnam v. Time Warner Cable, 2002 WI 108, ¶43, 255 Wis. 2d 457, 649 N.W.2d 626(citing Lister, 72 Wis. 2d at 307). Ripeness required for a declaratory judgment is different from the ripeness required in other actions. Id. at ¶44. In the declaratory judgment context, the requisite harm may be anticipatory in nature if imminence and practical certainty of the event exist or there is intent, capacity and power to perform the event, as opposed to remote, contingent, and uncertain events that may never happen. See id. at ¶46(citing Loy, 107 Wis. 2d at 414).

Here the Plaintiff is asking the court to resolve an alleged controversy that is not certain to become a controversy. The disagreement is not based upon present facts, but is rather contingent upon whether Defendant Cleveland runs for Ho-Chunk Nation president in the future. There are no facts alleged that the Defendant Cleveland *is* running or *intends* to run for Ho-Chunk Nation president. Nor has the Plaintiff alleged or demonstrated any imminence or practical certainty that Defendant will run for Ho-Chunk Nation president. Without the presence of such facts, the Plaintiff is asking the court to declare Defendant Cleveland's 1972 criminal conviction status *in the event* he decides or is able to run for Ho-Chunk Nation president in the future.

In order for the alleged controversy to have any effect, Defendant Cleveland must run for Ho-Chunk Nation president, and there are no facts alleged that he will in fact run for such office. Accordingly, the court finds that the facts in this matter are not sufficiently developed, are hypothetical in nature, and involve potential future circumstances. The alleged dispute is merely an abstract disagreement, and the court will not entangle itself here in this abstract disagreement.

To further illustrate the point, if the court were to enter declaratory judgment as to the 1972 conviction status and Defendant Cleveland never runs for president of the Ho-Chunk

Nation, then any future judgment of the court becomes meaningless. Upon the stated illustration, it is clear that the requested remedy appears to be more akin to seeking an advisory opinion. Accordingly, the court finds that this matter is not ripe for judicial determination.

The court finds that Plaintiff has failed to show the presence of the four necessary elements for a justiciable controversy, and therefore dismisses Plaintiff's declaratory judgment action against Defendant Cleveland.

(ii) Declaratory Judgment Would Not Terminate the Controversy

In addition to the lack of a justiciable controversy, the court finds that any declaratory judgment in this matter would not terminate the uncertainty or controversy giving rise to the proceeding. The court may refuse to enter a declaratory judgment in such a case. See Wis. Stat. §806.04(6).

Plaintiff, in his brief opposing Defendant Cleveland's motion to dismiss states, "[i]f this court provides the declaratory judgment sought, the Ho Chunk nation will remain free to interpret its own constitution and laws as it wishes." Pl. Br. Opposing Def. Mot. at p. 6. The alleged controversy is a controversy only in the context or application of Ho-Chunk Nation law. Stated another way, the only way the alleged controversy would be resolved is if the Ho-Chunk Nation government accepts this court's determination of Defendant Cleveland's 1972 criminal conviction status. Along the same reasoning, there is no remedy that the court could enter solely against Defendant Cleveland that would terminate the controversy.

Accordingly, the court finds that any declaratory judgment entered in this case would not terminate any alleged uncertainty or controversy giving rise to the proceeding.

(iii) Issue Preclusion

Defendant Cleveland also alleges that the present matter is barred by issue preclusion. The court will not address Defendant Cleveland's argument relating to issue preclusion due to the fact the court has disposed of this matter upon other grounds, as stated above.

CONCLUSION

For the foregoing reasons, the court finds that there are no conditions under which the plaintiff can recover. The Defendants' motion to dismiss in this matter is granted. Defendant DOJ and Defendant Cleveland may prepare an order consistent with the court's decision.

Electronically signed by Honorable Rian W. Radtke

Circuit Court Judge

02/15/2018