UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOSEPH CHAYOON, Plaintiff,	:	
v.	:	CA 03-366T
FOXWOODS RESORTS CASINO, JAMES A. RIGOT, RICH TESLER, LINDA SMITH, MIKE RICH, JOANN FRANK, FAY E. CARLSON, and DOTTIE KILLY, Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court are Defendants' Motion to Dismiss (Document #12) ("Motion to Dismiss") and Plaintiff['s] Petition for Declaratory and Injunctive Relief (Document #22) ("Petition for Relief"). Defendants seek dismissal on the basis of "lack of subject matter jurisdiction due to tribal sovereign immunity from suit," Motion to Dismiss at 1, among other grounds.

This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). Hearings were conducted on April 23, 2004, and August 9, 2004. For the reasons stated herein, I recommend that the Motion to Dismiss be granted and that the Petition for Relief be denied.

Background

According to Plaintiff, he was employed by Foxwoods Resort Casino[1] ("Foxwoods") as a table games supervisor from February 2,

[1] In the caption of the Complaint, Plaintiff lists this Defendant as "Foxwoods Resorts Casino." Complaint at 1. However, Defendants state that the proper name is "Foxwoods Resort Casino." Defendants' Memorandum of Law in Support of Motion to Dismiss ("Defendants' Mem.") at 3 n.2.

1992, until he was terminated on August 29, 2000. See Complaint ¶ 5. Plaintiff alleges that on June 6, 2000, he requested leave under the Family and Medical Leave Act ("FMLA")[2] to care for his then eighty-two year old mother who was "seriously ill." Id. ¶ 12. He further alleges that such leave was initially approved by Foxwoods but he was illegally terminated on August 29, 2000, upon his return. See id. ¶¶ 10, 12.

Plaintiff has filed three previous actions challenging his termination. The United States District Court for the District of Connecticut dismissed the first for lack of subject matter jurisdiction. See Chayoon v. Mashantucket Pequot Tribal Nation, Gaming Enterprise & Foxwoods Resort Casino, CIV. ACTION NO.3:02CV0163(AVC) (Order dated 5/30/02) ("Chayoon I"); see also Plaintiff's Memorandum of Law and Facts Showing Why the Plaintiff Is Not Bar[red] from Litigating the above Case Complaint ("Plaintiff's Supp. Mem."), Appendix 1 (same); Appendix to Motion to Dismiss ("Defendants' App."), Exhibit ("Ex.") 1 (same). The court found that "[t]he defendant has not waived its sovereign immunity and the FMLA does not contain language abrogating tribal sovereign immunity." Id. Judgment was entered for the defendants on May 31, 2002. See Defendants' App., Ex. 1 (Judgment in Chayoon I). Plaintiff's appeal to the Court of Appeals for the Second Circuit was dismissed, because it "lack[ed] an arguable basis in law or fact ...." Chayoon v. Mashantucket Pequot Gaming Enterprise, Tribal Nation, Foxwoods Resort & Casino, 02-7760 (2nd Cir. Oct. 17, 2002)(Mandate) ("Chayoon II"); see also Defendants' App., Ex. 5 (same).

Plaintiff filed another complaint in the United States District Court for the District of Connecticut, which was also

[2] The Family and Medical Leave Act ("FMLA") of 1993, Pub. L. No. 103-3, 107 Stat. 6, is codified at 29 U.S.C. §§ 2601, 2611-2619, 5 U.S.C. §§ 6381-6387, and 29 U.S.C. §§ 2631-2636, 2651-2654.

dismissed for lack of subject matter jurisdiction. See Chayoon v. Reels, et al.,[3] CIV. ACTION NO. 3-02CV1358(JCH) (Ruling on Defendants' Motion to Dismiss of 3/12/03) ("Chayoon III"); see also Defendants' App., Ex. 2 (same). The court found that the tribe had not waived its sovereign immunity and that tribal immunity had not been abrogated, see id. at 3-4, and that Plaintiff had not established subject matter jurisdiction "by merely naming the individual parties rather than the tribe ...," id. at 4. Judgment was entered for the defendants on March 21, 2003. See Defendants' App., Ex. 2 (Judgment of 3/21/03).[4] The court reiterated its holding in its denial of Plaintiff's motion for reconsideration dated April 9, 2003. See Chayoon III (Ruling on Plaintiff's Motion for Reconsideration of 4/9/03) at 3-4; see also Defendants' App., Ex. 2 (same). Plaintiff again appealed to the Second Circuit. See Chayoon v. Chao, 355 F.3d 141, 142 (2nd Cir. 2004) ("Chayoon IV"). The Second Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction, noting that the defendants were immune from suit. See id. at 142-43. The court further observed that:

> The Mashantucket Pequot Tribe is a federally recognized Indian tribe, and neither abrogation nor waiver has occured in this case. The FMLA makes no reference to the amenity of Indian tribes to suit. Furthermore, Chayoon

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[3] Plaintiff named as defendants Kenneth M. Reels, Richard A. Hayward, Pedro Johnson, Michael Thomas, Fatima Dames, Charlene Jones, John E. Perry, William J. Sherlock, **James A. Rigot**, **Rich Tesler**, **Linda Smith**, **Mike Rich**, Bruce Kirshner, Nafeezar Shabazz, **Joann Frank**, **Fay E. Carlson**, **Dottie Killy**, and the Foxwoods Management Team. See complaint in Chayoon III (provided pursuant to Order for Further Briefing of 4/23/04). Plaintiff subsequently sought to join the United States Secretary of Labor, which motion was denied. See Chayoon v. Chao, 355 F.3d 141, 142 n.2 (2nd Cir. 2004) ("Chayoon IV").

[4] The Judgment, consisting of a single, unnumbered page, appears in Defendants' App., Ex. 2 between the Ruling on Defendants' Motion to Dismiss of 3/21/03 and the Ruling on Plaintiff's Motion for Reconsideration of 4/9/03, both of which are numbered.

> 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. Finally, Chayoon did not request any injunctive or declaratory relief and therefore no exception to sovereign immunity is applicable.

Chayoon IV, 355 F.3d at 143 (citations and internal quotation marks omitted).

Plaintiff next turned to the Connecticut Superior Court for redress. His complaint there was also dismissed for lack of subject matter jurisdiction. See Chayoon v. Sherlock, et al.,[5] No. 128101 (Conn. Super. Ct. Apr. 23, 2004) (Memorandum of Decision Re: Motion to Dismiss) ("Chayoon V") (submitted pursuant to Order for Further Briefing dated 4/23/04) at 1, 7. The Superior Court held that the tribal employees were entitled to assert the tribe's immunity from suit and that there was nothing in Plaintiff's allegations which showed that the employees had acted beyond the scope of their authority. See id. at 7.

Plaintiff filed the instant Complaint (Document #1) in this court on August 25, 2003. Plaintiff again alleges unlawful termination in violation of the FMLA, see id. ¶¶ 10, 12, and asserts jurisdiction based on that act, see id. ¶ 1.

After requesting and receiving an enlargement of time in which to file their responsive pleading, Defendants on January 26, 2004, filed the instant Motion to Dismiss (Document #12), along with a memorandum in support thereof and several affidavits (Documents #13-15). On March 1, 2004, after also receiving an enlargement of time, Plaintiff filed the following documents:

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[5] Along with William Sherlock, Plaintiff listed as defendants the same individuals named in the instant Complaint, **James A. Rigot**, **Rich Tesler**, **Linda Smith**, **Mike Rich**, **Joann Frank**, **Fay E. Carlson**, and **Dottie Killy**. See Defendants' App., Ex. 3 (Complaint in Chayoon V).

Plaintiff[’s] Opposition to Defendants[’] Motion to Dismiss (Document #23) (“Plaintiff’s Opposition”), with supporting memorandum; an affidavit (Document #24); and the Petition for Relief (Document #22). Defendants’ Motion to Dismiss and Plaintiff’s Petition for Relief were referred to this Magistrate Judge, and a hearing was scheduled for April 23, 2004. Prior to the hearing, Plaintiff on April 20, 2004, filed Plaintiff’s Motion to Stay Decision on Defendants[’] Motion to Dismiss Pending Court Decision on Plaintiff’s Petition for Declaratory and Injunctive Relief (Document #39) (“Motion to Stay”). The Motion to Stay was subsequently referred to this Magistrate Judge.

A hearing on the Motion to Dismiss and Plaintiff’s Petition for Relief was conducted on April 23, 2004. The court directed the parties to file supplemental memoranda addressing the question of whether Plaintiff was barred from relitigating the issue of subject matter jurisdiction by the doctrines of res judicata and collateral estoppel, also known, respectively, as claim preclusion and issue preclusion, and continued the matter. The court issued a written order reflecting this ruling. See Order for Further Briefing dated 4/23/04 (Document #41).

On May 17, 2004, both Plaintiff’s Supp. Mem. (Document #43) and Defendants’ Supplemental Memorandum of Law Supporting Dismissal of Plaintiff’s Complaint Pursuant to the Doctrines of Res Judicata and Collateral Estoppel (Document # 44) (“Defendants’ Supp. Mem.”) were filed. Plaintiff on July 19, 2004, filed another affidavit (Document #46) in support of Plaintiff’s Opposition. A hearing on the Motion to Dismiss, Plaintiff’s Petition for Relief, and the Motion to Stay[6] was conducted on August 9, 2004. Thereafter, the court took the

[6] By separate order dated March 22, 2005, the court denied the Motion to Stay.

matter under advisement.[7]

Law

I. Pro Se Status

Plaintiff is proceeding pro se, and his Complaint is held to a less stringent standard than one drafted by a lawyer. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed. 652 (1972). It is to be "read ... with an extra degree of solicitude." Rodi v. Ventetuolo, 941 F.2d 22, 23 (1st Cir. 1991). The court is required to liberally construe a pro se complaint, see Strahan v. Coxe, 127 F.3d 155, 158 n.1 (1st Cir. 1997); Watson v. Caton, 984 F.2d 537, 539 (1st Cir. 1993), and may grant a motion to dismiss "only if plaintiff cannot prove any set of facts entitling him to relief," Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997). At the same time, a plaintiff's pro se status does not excuse him from complying with procedural rules. See Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 24 n.4 (1st Cir. 2000). The court construes Plaintiff's Complaint liberally in deference to his pro se status.

II. 12(b)(1) Standard

In ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), a court must construe the complaint liberally, treat all well-pleaded facts as true, and indulge all reasonable inferences in favor of the plaintiff. See Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996); Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995); see also Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.

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[7] Plaintiff has since filed a Motion to Allow Testimony of Witnesses to Prove Court Jurisdiction if Court Is Not Yet Satisf[ied] with Proofs Already Presented to It (Document #48), to which Defendants filed an objection (Document #49) and which was subsequently denied (Document #50), and Plaintiff[']s Amended Opposition to Defendants[']] Motion to Dismiss (Document #51).

Co., 215 F.3d 195, 197 (1st Cir. 2000). "However, in ruling on a Rule 12(b)(1) motion, a court is not limited to the face of the pleadings. A court may consider any evidence it deems necessary to settle the jurisdictional question." Palazzolo v. Ruggiano, 993 F.Supp. 45, 46 (D.R.I. 1998)(citing Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996), 2 James Wm. Moore et al., Moore's Federal Practice ¶ 12.30[3] (3d ed.1997)). It is Plaintiff's burden to prove the existence of subject matter jurisdiction. See Murphy v. United States, 45 F.3d at 522; see also Palazzolo v. Ruggiano, 993 F.Supp. at 46 ("Once a defendant challenges a court's subject matter jurisdiction, the plaintiff has the burden of establishing that jurisdiction exists.")(citing Bank One, Texas, N.A. v. Montle, 964 F.2d 48, 50 (1st Cir. 1992)).

Discussion

Defendants argue that because the United States District Court for the District of Connecticut, the Court of Appeals for the Second Circuit, and the Connecticut Superior Court have all held that Plaintiff's claim is barred by the Mashantucket Pequot Tribe's sovereign immunity,[8] see Defendants' Supp. Mem. at 1, Plaintiff is "precluded by the doctrines of res judicata and collateral estoppel from bringing the instant suit and attempting

[8] Defendants assert that Foxwoods Resort Casino "is not a legal entity separate or distinct from the Mashantucket Pequot Gaming Enterprise, an arm of the tribal government established to operate the Mashantucket Pequot Tribe's gaming facility known as Foxwoods Resort Casino." Defendants' Supplemental Memorandum of Law Supporting Dismissal of Plaintiff's Complaint Pursuant to the Doctrines of Res Judicata and Collateral Estoppel ("Defendants' Supp. Mem.") at 1-2 n.1; see also Defendants' Mem. at 1 n.1; Affidavit Supporting Motion to Dismiss ("King Aff.") ¶ 8. The Connecticut Superior Court held that the Gaming Enterprise is a subdivision of the tribal government. See Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 6; see also Worrall v. Mashantucket Pequot Gaming Enterprise d/b/a/ Foxwoods Resort Casino, 131 F.Supp.2d 328, 330 (D. Conn. 2001)("[T]he Gaming Enterprise is an arm of the Mashantucket Pequot Tribe.").

to relitigate the jurisdictional issues previously decided by these courts," id. Plaintiff counters that preclusion should not apply here, see Plaintiff's Supp. Mem. at 1, 11-12, and states that he is "contesting the sovereign immunity claim via both[] his Objection to Motion to Dismiss and by filing [his] Petition for [D]eclaratory and Injunctive Relief ...." Plaintiff's Supp. Mem. at 8.

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980)(citation omitted). As the United States Supreme Court explained, "res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Id. at 94, 101 S.Ct. at 415. Moreover, because "federal courts generally have also consistently accorded preclusive effect to issues decided by state courts," id. at 95, 101 S.Ct. at 415, res judicata and collateral estoppel "also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system," id. at 96, 101 S.Ct. at 415.

"Dismissal for lack of subject matter jurisdiction precludes relitigation of the issues determined in ruling on the jurisdictional question." Muñiz Cortes v. Intermedics, Inc., 229 F.3d 12, 14 (1st Cir. 2000); see also Walsh v. Int'l Longshoremen's Assoc., AFL-CIO, Local 799, 630 F.2d 864, 870 (1st

Cir. 1980)(noting that principles of res judicata, including collateral estoppel, apply to questions of jurisdiction); accord Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1248 (D.C. Cir. 1999)("[W]hile a dismissal for lack of jurisdiction does not constitute an adjudication upon the merits, it does constitute a binding determination on the jurisdictional question, which is not subject to collateral attack."); Jones v. Law Firm of Hill and Ponton, 141 F.Supp.2d 1349, 1356 (M.D. Fla. 2001)("Collateral estoppel precludes a plaintiff from relitigating the same jurisdictional question after the first suit was dismissed for lack of federal jurisdiction--even though dismissal did not adjudicate the merits of the case."); Dillard v. Henderson, 43 F.Supp.2d 367, 369 (S.D.N.Y. 1999)("[E]ven assuming that a case is dismissed not on the merits but for lack of subject matter jurisdiction, the dismissal has a preclusive effect on the jurisdictional issue.").

> It may seem paradoxical to suggest that a court can render a preclusive judgment when dismissing a suit on the ground that the suit does not engage the jurisdiction of the court. But the paradox is superficial. A court has jurisdiction to determine its own jurisdiction. A ruling that it lacks jurisdiction is therefore entitled to preclusive effect.

Okoro v. Bohman, 164 F.3d 1059, 1063 (7th Cir. 1999)(citations omitted).

In order to invoke collateral estoppel to preclude relitigation of the jurisdictional issue, Defendants must demonstrate that: (1) the instant matter and the prior proceedings involve the same issue of law or fact; (2) the parties actually litigated the issue in the prior proceeding(s); (3) the previous court(s) actually resolved the issue in a final and binding judgment; and (4) the prior court's resolution of that issue was essential to its holding. See Monarch Life Ins.

Co. v. Ropes & Gray, 65 F.3d 973, 978 (1st Cir. 1995).[9] The court notes that Defendants here need not be identical to the defendants in the prior proceedings. See id. at 978 n.8. Rather, all that is needed is that "the *party against whom issue preclusion will be applied* had a fair opportunity to litigate the issue fully." Id. (quoting Kyricopoulos v. Town of Orleans, 967 F.2d 14, 16 (1st Cir. 1992)); cf. Allen v. McCurry, 449 U.S. 90, 101, 101 S.Ct. 411, 418, 66 L.Ed.2d 308 (1980)(noting that collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier proceeding). The court finds that here all of the above factors have been met.

First, it is clear to the court that the same issue of law or fact is involved. Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) on the basis of "lack of subject matter jurisdiction due to tribal sovereign immunity from suit." See Motion to Dismiss at 1. The same was true in the prior proceedings. See Chayoon I (Order of 5/30/02) ("The defendant now moves to dismiss the complaint arguing that ... the doctrine of sovereign immunity bars the action."); Chayoon III (Ruling on Defendants' Motion to Dismiss of 3/12/03) at 1 ("The defendants have moved to dismiss the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The defendants[] argue that the court lacks jurisdiction over the plaintiff's alleged Family and

[9] "When a federal court examines whether a state court decision has a preclusive effect, the federal court must use the same law that a state court would employ in making such a determination." Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F.Supp.2d 206, 213 (D.R.I. 2002). Under Connecticut law, a party asserting collateral estoppel must "establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case." Rocco v. Garrison, 848 A.2d 352, 361 (Conn. 2004).

Medical Leave Act claim due to the doctrine of tribal sovereign immunity."); Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 1 ("First, the defendants claim that the court lacks subject matter jurisdiction because (1) they are protected by tribal sovereign immunity ....").

Second, the issue was actually litigated in the previous actions. In Chayoon III, for example, Plaintiff made several arguments in opposition to the defendants' assertion of immunity, which were addressed by the court in its Ruling on Defendants' Motion to Dismiss. See Chayoon III (Ruling on Defendants' Motion to Dismiss of 3/12/03) at 3-5. The court revisited the issue of tribal immunity, and, specifically, Plaintiff's assertion that the tribe had waived its immunity, in denying Plaintiff's motion for reconsideration. See id. (Ruling on Plaintiff's Motion for Reconsideration of 4/9/03) at 3-4. In Chayoon V, the court noted in its decision that Plaintiff had filed an objection to the defendants' motion to dismiss and that oral argument had been heard. See Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 2. The court discussed the defendants' claim of sovereign immunity and Plaintiff's arguments against such immunity. See id. at 3-7. Accordingly, this court concludes that the matter of tribal sovereign immunity was litigated in the previous actions.

Third, the issue was actually resolved in final and binding judgments of the United States District Court for the District of Connecticut, the Second Circuit, and the Connecticut Superior Court. In Chayoon I the court determined that "[t]he defendant has not waived its sovereign immunity and the FMLA does not contain language abrogating tribal sovereign immunity." See Chayoon I (Order of 5/30/02). In Chayoon III, the court found both that the tribe had not waived its immunity, see Chayoon III (Ruling on Defendants' Motion to Dismiss of 3/12/03) at 3, and

that "there is nothing on the face of the Family and Medical Leave Act that purports to subject tribes to the jurisdiction of federal courts in civil actions brought by private parties," id. at 4; see also id. (Ruling on Plaintiff's Motion for Reconsideration of 4/9/03) at 3-4 (finding neither abrogation nor waiver of tribal sovereign immunity). The Second Circuit agreed that "neither abrogation nor waiver ha[d] occurred in this case." Chayoon IV, 355 F.3d at 143. The Connecticut Superior Court concluded that "the defendant tribal employees are entitled to assert the tribe's immunity from suit against the plaintiff's claim." Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 7.

Fourth, resolution of the immunity issue was essential to the judgment in the previous cases. The United States District Court for the District of Connecticut twice granted the defendants' motion to dismiss on the basis of lack of subject matter jurisdiction due to tribal immunity. See Chayoon I (Order of 5/30/02) ("Neither circumstance [waiver or abrogation of immunity] exists in this case .... Consequently, although the Plaintiff may have, indeed, alleged a credible cause of action under the FMLA, the court simply does not have the authority to hear this case. The motion to dismiss is therefore granted."); Chayoon III (Ruling on Defendants' Motion to Dismiss of 3/12/03) at 5 ("[T]he court finds that it does not have subject matter jurisdiction over this case, and grants the defendant's [sic] motion to dismiss."); Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 7 (finding that tribal employees were entitled to assert immunity defense and stating that "[a]ccordingly, the defendants' motion to dismiss is granted"). The Second Circuit dismissed Plaintiff's appeal of the decision in Chayoon I as "lack[ing] an arguable basis in law or fact," Chayoon II (Mandate of 10/17/02), and "affirm[ed] the district

court's dismissal [in Chayoon III] for lack of subject matter jurisdiction because defendants are immune from this suit," Chayoon IV, 355 F.3d at 142-43. The court therefore concludes that all factors have been met.

Plaintiff argues that collateral estoppel should not apply here for several reasons. First, he notes that in the previous cases, although the relief sought and some of the defendants were the same, "in [the] first two complaints the defendants were sued in their professional capacity and it was not alleged by the plaintiff in his previous complaints that the defendants, while violating the federal law of the FMLA, were also act[ing] manifestly against Tribal Company Policy and beyond the scope of their authority ...." See Plaintiff's Supp. Mem. at 1. Plaintiff did so allege in Chayoon V, and the Connecticut Superior Court rejected his argument:

> In the present case, it is undisputed that the defendants are employees of the gaming enterprise and that the gaming enterprise was established as an arm or subdivision of the tribal government. These facts are confirmed by the defendants' affidavits and the plaintiff does not contest them. The plaintiff's claim against the defendants is based upon their actions surrounding his request for a family leave and his termination from employment. Specifically, the plaintiff alleges discrimination and violations of the Family Medical Leave Act in that he was denied a promotion and terminated because he requested a family leave that he was eligible for. The plaintiff further alleges that the defendants misled him regarding their reason for denying his request for a family leave, and that one of the defendants ... stated that he could resume employment if he gave up his rights under the Family Medical Leave Act. None of the plaintiff's allegations indicate that the defendants acted in their individual capacities. Additionally, there is nothing in the plaintiff's allegations which shows that the defendants were acting beyond the scope of their authority when they terminated the plaintiff; nor do any of the documents submitted by the plaintiff show that the defendants acted beyond the scope of their authority. The plaintiff merely alleges that the

> defendants acted beyond the scope of their authority because they violated the Family Medical Leave Act. Thus, the plaintiff has done nothing more than allege a statutory violation.

Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 6-7 (footnote omitted). As noted previously, federal courts apply res judicata and collateral estoppel principles to claims and issues decided by state courts. See Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). Although the instant Complaint and the complaint in Chayoon V were filed contemporaneously, the Connecticut Superior Court decision was issued first. Accordingly, this court is required to give preclusive effect to the decision of the Connecticut Superior Court. See Penobscot Nation v. Georgia-Pacific Corp., 254 F.3d 317, 323 (1st Cir. 2001)("Where pending state and federal-court suits involve the same underlying dispute, *res judicata* principles usually give the race to the first court to decide the merits.").

Plaintiff also contends that the decisions in Chayoon I and Chayoon III do not bar the instant litigation because certain issues were not raised or addressed by the prior courts. See Plaintiff's Supp. Mem. at 2. Presumably Plaintiff is arguing that he has not had a "full and fair opportunity," Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980), to litigate these issues. The court rejects this argument.

Regarding Plaintiff's related contentions that Foxwoods is an obligated employer under the FMLA, see Plaintiff's Supp. Mem. at 5-6, and has waived its immunity, see id. at 7-8 , Plaintiff's own words defeat his argument. He states that he "presented the courts in Chayoon I, and in Chayoon III, with proofs that Foxwoods Casino DID wa[i]ve immunity and obligated itself to the [FMLA] ...." Id. at 7; see also id. at 5 (noting that he

"raise[d] those point[s] in his Objection to the defendants' Motion to Dismiss"). Moreover, the court in Chayoon III addressed Plaintiff's "proofs," id. at 7, noting that "[o]ther than referencing forms that reference the Family and Medical Leave Act, the plaintiff does not bring forth any other evidence establishing a clear waiver by the tribe to suit," Chayoon III (Ruling on Defendants' Motion to Dismiss of 3/12/03) at 3. Both courts addressed Plaintiff's waiver argument. See Chayoon I (Order of 5/30/02) ("Federal law dictates that a federally recognized Indian tribe may not be sued under a federal statute unless: 1) the tribe has waived its sovereign immunity; or 2) the statute contains express language abrogating tribal sovereign immunity. Neither circumstance exists in this case.")(citations omitted); Chayoon III (Ruling on Plaintiff's Motion for Reconsideration of 4/9/03) at 4 ("There is no such express consent to the jurisdiction of the federal courts contained within the papers that were submitted by the plaintiff .... As such, this court does not find that the tribe waived its sovereign immunity."); see also Chayoon V (Memorandum of Decision Re: Motion to Dismiss) at 5 n.5 (noting that "such forms do not provide a clear waiver of sovereign immunity").

As for Plaintiff's assertion that the "owners of Foxwoods are not present day descendants of the ancient Indian tribe of the Western (Mashantucket) Pequot," Plaintiff's Supp. Mem. at 3, that, too, has been addressed. Plaintiff argued to the Connecticut Superior Court that the defendants there were non-Indians, see Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 4. Moreover, Plaintiff states that he "IS NOT disputing the fact that the Mashantucket Pequot is a Federally recognized Indian Tribe ...." Plaintiff's Supp. Mem. at 3. The Connecticut Superior Court noted that the defendants in that action (seven of whom are named Defendants here), "are,

or formerly were, employed by the Mashantucket Pequot Gaming Enterprise at Foxwoods Resort Casino (gaming enterprise) ...," Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 1 (footnote omitted), and that "[a]ffidavits submitted by the defendants indicate that the gaming enterprise was established by the Mashantucket Pequot tribe as an arm of the tribal government," id. at 1 n.1; see also id. at 4, 6. The court concluded that "it is undisputed that the defendants are employees of the gaming enterprise and that the gaming enterprise was established as an arm or subdivision of the tribal government. These facts are confirmed by the defendants' affidavits and the plaintiff does not contest them." Chayoon V (Memorandum of Decision Re: Motion to Dismiss of 4/23/04) at 6.

Relying on the language of the Second Circuit in Chayoon IV, see 355 F.3d at 143 ("Chayoon did not request any injunctive or declaratory relief and therefore no exception to sovereign immunity is applicable."), Plaintiff asserts that he should not be precluded from litigating the jurisdictional issue because he has now requested declaratory and injunctive relief, see Plaintiff's Supp. Mem. at 4; see also Petition for Relief. The court does not find this factor dispositive. See Matosantos Commercial Corp. v. Applebee's Int'l, Inc., 64 F.Supp.2d 1105, 1110 (D. Kan. 1999)("[I]ssue preclusion bars relitigation of an issue once decided, regardless of the context in which it is framed."). Plaintiff states that he is "contesting the sovereign immunity claim by the defendants via both[] his Objection to Motion to Dismiss and by filing [his] Petition for [D]eclaratory and Injunctive Relief ...." Plaintiff's Supp. Mem. at 8. He offers nothing new in the Petition for Relief but, rather, makes the same arguments in his two filings. Compare Plaintiff[']s Memorandum in Opposition to Defendants[']' Motion to Dismiss ("Plaintiff's Opp. Mem.") with Petition for Relief. Plaintiff

cannot avoid preclusion by simply retitling and rehashing his arguments. Moreover, the Complaint seeks relief in the form of $3.8 million in damages and $10 million in punitive damages, see Complaint ¶ 25, not declaratory or injuctive relief.

As for the remaining arguments in Plaintiff's Supp. Mem., the court finds that they go to the merits of his claim. Because it lacks jurisdiction over the matter, however, the court cannot address the merits. See Chayoon I (Order of 5/30/02) ("[A]lthough the plaintiff may have, indeed, alleged a credible cause of action under the FMLA, the court simply does not have the authority to hear this case."); see also Chayoon IV, 355 F.3d at 143 ("Clearly, tribal sovereignty has the potential to deny many Americans employment benefits and rights that Congress has seen fit to extend to the private sector. While judges, as citizens, may be sympathetic to the plight of people like Mr. Chayoon, the courts are without authority to remedy the matter. Mr. Chayoon's remedy, if there is to be one, lies with Congress.")(citation omitted).

The court concludes that the doctrine of collateral estoppel precludes Plaintiff from relitigating the issue of subject matter jurisdiction, which has previously been found to be lacking due to tribal sovereign immunity. Accordingly, the Motion to Dismiss should be granted, and the Petition for Relief should be denied. I so recommend.

Conclusion

For the reasons stated above, I recommend that the Motion to Dismiss be granted due to lack of subject matter jurisdiction.[10] I further recommend that Plaintiff's Petition be denied.

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten

[10] Having determined that it lacks subject matter jurisdiction, the court does not address Defendants' other grounds for dismissal.

(10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
March 22, 2005