

16-1008
No.

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CHEUNG YIN SUN, LONG MEI FANG, ZONG YANG LI,

Petitioners,

—v.—

MASHANTUCKET PEQUOT GAMING ENTERPRISE, Individually, d/b/a
FOXWOODS RESORT CASINO, ANNE CHEN, Individually, JEFF
DECLERCK, Individually, EDWARD GASSER, Individually, GEORGE
HENNINGSEN, Individually, FRANK LEONE, Individually, MICHAEL
ROBINSON, MICHAEL SANTAGATA, CHESTER SICARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

If the District Court refuses Plaintiffs' Motion to Reopen its case based squarely upon whether the case has no chance of succeeding on its merits, is it a violation of Plaintiffs' Due Process rights for the District Court to ignore new precedent repeatedly brought to its attention that would allow Plaintiffs to succeed on the merits?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

Cheung Yin Sun, Long Mei Fang and Zong Yang Li, Petitioners (Plaintiffs in the Courts below),

Mashantucket Pequot Gaming Enterprise, Individually, d/b/a Foxwoods Resort Casino, Anne Chen, Individually, Jeff DeClerck, Individually, Edward Gasser, Individually, George Henningsen, Individually, Frank Leone, Individually, Michael Robinson, Michael Santagata, Chester Sicard, Respondents (Defendants in the Courts below).

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REPORTS OF OPINIONS BELOW

The District of Connecticut, Order of Janet C. Hall, issued May 29, 2015, is reproduced in the Appendix to this Petition.

The District of Connecticut issued a Judgment June 1, 2015. It is reproduced in the Appendix to this Petition.

The District Court of Connecticut issued a Ruling denying reopening August 3, 2015. It is reproduced in the Appendix to this Petition.

JURISDICTION

The Second Circuit Court of Appeals entered its summary order on October 27, 2016. The Jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1). This Petition for Certiorari is being filed within 90 days thereof.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Plaintiffs' procedural and substantive rights have been violated under the Due Process clauses to the United States Constitution.

A. U.S. Const. amend. V:

The Fifth Amendment to the United States Constitution states in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

B. U.S. Const. amend. IV:

And the Fourteenth Amendment to the United States Constitution states in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law ...”

STATEMENT OF THE CASE**A. The District Court’s Dismissal of Plaintiffs’ Claim Was Based Squarely on The Court’s Ignoring the Developing Precedent of *Pistor v. Garcia*.**

Plaintiffs brought a 42 U.S.C. § 1983 suit against a Connecticut State Police Officer and individual members of the Mashantucket Pequot Indian tribe pursuant to the developing precedent of *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015). The *Pistor* case was on appeal to the Ninth Circuit when plaintiffs filed their complaint herein. In fact, Plaintiffs cited the *Pistor* case in its complaint because it was factually similar in almost every respect to the plaintiffs’ case, and the Second Circuit was not yet following its *remedy analysis* precedent followed by the Ninth Circuit. As the Ninth Circuit later explained when *Pistor* was decided, tribal sovereign immunity does not apply to individual defendants in its jurisdiction who are “sued in their individual rather than their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe.” *Pistor v. Garcia*, 791 F.3d at 1108. The Ninth Circuit had arguably reached the same conclusion in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013) but it took the opportunity in *Pistor v.*

Garcia to clarify its earlier ruling. As *Pistor* explains, the same principles that apply to sovereign immunity analysis among U.S. and state governmental officials “fully apply to tribal sovereign immunity.” 791 F.3d at 1112.

The timeline of the *Pistor* decision is important to the case at bar. The Ninth Circuit published its opinion in *Pistor* June 30, 2015. However, the District of Connecticut issued a final Judgment dismissing Plaintiffs’ claims June 1, 2015. Furthermore, the District Court of Connecticut issued a Ruling denying Plaintiffs reopening their case on August 3, 2015. Neither of these rulings squarely address the new precedent set by *Pistor* in the Ninth Circuit. The District Court of Connecticut completely avoided addressing this important case.

B. The Second Circuit Court of Appeals Likewise Avoided Ruling on *Pistor* by Grossly Misstating the Facts and Arguments Presented Below Concerning Plaintiffs’ Attempt at Serving Process Upon Defendants and Plaintiffs’ Motion to Reopen the Case.

The Second Circuit Court of Appeals would have the public believe that Plaintiffs’ lawyers simply forgot to serve personal process upon the Defendants. In its words:

Upon such review, we conclude that the District Court lacked personal jurisdiction over the appellees substantially for the reasons articulated in the District Court’s well-reasoned opinion. *Cheung Yin Sun, et al. v. Mashantucket Pequot, et al.*, 309

F.R.D. 157 (D. Conn. 2015). The threshold question is one of personal jurisdiction. The appellants do not contest that the appellees were never properly served, nor was a waiver of personal service executed, returned to the appellants, or filed with the District Court. See J.A. 291. Nearly a year after appellants were notified of this defect, they never remedied service to provide the District Court with personal jurisdiction over appellees.

(Appendix, 3a). This is not what happened at all.

Procedurally, what happened below is that the District Court ruled on Defendants' motions to dismiss before Plaintiffs had the chance to file reply briefs. One of the arguments the tribal Defendants raised in their motions to dismiss is that, according to sovereign immunity, they were entitled to be served according to tribal law procedures, not the U.S. Federal Rules of Civil Procedure, and accordingly they refused to execute the returns of service when they were served upon them by mail. After the 12(b) dismissal, Plaintiffs then filed a Motion to Reopen the case based on excusable neglect, and therein Plaintiffs gave numerous responsive arguments to the arguments raised by Defendants in their motions to dismiss, including the issue of sovereign immunity. The District Court ruled against the Plaintiffs' Motion to Reopen. In so doing, it offered some dicta comments on Plaintiffs' reasons for excusable neglect, as well as some dicta comments on whether Plaintiffs had good process on the Defendants or whether Plaintiffs should be allowed to correct their issue

of process. *Ultimately, however, the district court concluded that Plaintiffs did not have a meritorious claim and grounded its ruling squarely upon that.* To quote the District Court word-for-word:

Although the plaintiffs' excusable neglect argument is tenuous, at best, *because the court ultimately concludes that the plaintiffs do not possess a meritorious claim, see infra § IV.B*, the court does not decide whether "the circumstances of the case present grounds justifying relief" based on the plaintiffs' counsel's excusable neglect.

(Appendix, 15a, emphasis added). The district court's discussion of whether Plaintiffs have a meritorious claim is found in § IV.B of that opinion. And there is no denying that this section of the district court's ruling is all about whether the tribal Defendants are entitled to cloak themselves in sovereign immunity.

The point is, in light of the District Court's ruling, Plaintiffs could not merely serve process anew upon the Defendants. Plaintiffs' case was now dismissed as a matter of *res judicata*, the primary justification for which was that Plaintiffs would never prevail on the merits due to Defendants' alleged sovereign immunity. Plaintiffs had no choice but to appeal, and to keep appealing, until they get their fair day in court. Due to the Defendants' clever avoidance of service of process, and their choice to raise their the sovereign immunity defense at the service of process stage, the Plaintiffs were robbed of their day in court and the chance to properly argue

whether *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015) should now be controlling precedent in the Second Circuit.

REASONS FOR GRANTING WRIT

It would be a gross miscarriage of justice, and a violation of Plaintiffs' substantive and procedural Due Process rights, to allow Plaintiffs' claim to be dismissed as it has been. Numerous cases could be cited in plaintiffs' support, but Plaintiffs believe their injustice is clearly visible without superfluous argument. The justification for dismissing Plaintiffs' claims because they could not get good service of process is entirely circular. Plaintiffs would have obtained effective service of process upon Defendants had the District Court and Second Court not been so blatantly unfair to Plaintiffs and sided with Defendants in so arbitrary and capricious a manner.

CONCLUSION

Plaintiffs pray for whatever relief this honorable Court sees fit to grant it so that they may proceed with their claim.

Dated: January 3, 2017

Respectfully submitted,

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