

IN THE DISTRICT COURT OF THE CHOCTAW NATION OF OKLAHOMA

SHEREE BYRD,

Plaintiff,

v.

THE CHOCTAW NATION d/b/a
THE CHOCTAW NATION CASINO,

Defendant.

)
)
)
)
)
)
)
)
)
)

Case No. CJ-2023-0002

FILED
CHOCTAW NATION OF OKLAHOMA
DISTRICT COURT CLERK

JAN 03 2024

SUSAN LOZANO
COURT CLERK

BY  DEPUTY

ORDER

There comes on before this Court The Choctaw Nation d/b/a The Choctaw Nation Casino's ("Defendant") Motion to Dismiss with Brief in Support ("Motion to Dismiss"). After reviewing the arguments and authority in the Motion to Dismiss, Plaintiff Sheree Byrd's ("Plaintiff") response brief ("Response Brief"), Defendant's reply brief and after hearing the oral arguments of counsel, the Court **DENIES IN PART** and **GRANTS IN PART** the Motion to Dismiss, as more fully set forth herein.

Defendant argues in its Motion to Dismiss that this Court should dismiss this matter on three grounds: (1) for lack of subject matter jurisdiction because Plaintiff failed to provide information as required under the Choctaw Nation Gaming Commission Tort Claim Rules and Procedures ("Tort Claim Rules"); (2) based upon Plaintiff's failure to provide timely notice of loss of income and emotional distress; and (3) for Plaintiff's failure to allege sufficient facts in the Petition to support a claim for relief. The Court addresses each argument below.

As a preliminary matter, the Court notes that Defendant has provided matters outside the pleadings to support its Motion to Dismiss, arguing that compliance with the Tort Claim Rules notice provisions is jurisdictional. The procedure for converting a motion to dismiss into a motion for summary judgment when matters outside the pleadings are attached does not apply to motions

to dismiss for lack of subject matter jurisdiction. *Grayhorse Energy, LLC v. Crawley Petroleum Corp.*, 2010 OK CIV APP 145, ¶ 6, n. 10, 245 P.3d 1249; *Kennedy v. City of Talihina*, 2011 OK CIV APP 108, ¶ 4, 265 P.3d 757.¹

I. DEFENDANT'S MOTION TO DISMISS IS DENIED WITH RESPECT TO THE FAILURE TO PROVIDE AN INTERVIEW OR MEDICAL AUTHORIZATIONS.

Under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2722, state governments may negotiate a gaming compact with tribal governments so that those tribes may conduct Class III Gaming on tribal lands. *See Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 4, 315 P.3d 359. In 2004, Oklahoma voters approved a state question that proposed a negotiated gaming compact as an offer to federally recognized tribes in Oklahoma to allow tribes to engage in Class III gaming on tribal lands, pursuant to the terms and conditions of the compact. This model gaming compact (the "Compact") has been codified in the Oklahoma State-Gaming Act, 3A Okla.Stat. §§ 261-282.

Pursuant to the Compact, all patrons of a casino/facility governed thereunder are afforded due process in seeking and receiving just and reasonable compensation for personal injury tort or property claims. *Id.* at Part 6 (A). The Compact at Part 6 sets forth the manner in which a party must seek to assert a tort claim, and requires that the tort claim notice:

shall state the date, time, place and circumstances of the incident upon which the tort claim is based, the identity of any persons known to have information regarding the incident, including employees or others involved in or who witnessed the incident, the amount of compensation and the basis for said relief; the name address and telephone number of the claimant, and the name, address and telephone number of any representative authorized to act or settle the claim on behalf of the claimant.

¹ Oklahoma case law is not binding upon this Court, but the Court does consider it as instructive as the Choctaw Nation's Code of Civil Procedure is similar to the State of Oklahoma's Civil Procedure Code.

Id. at Part 6, Subsection (A)(6).

Furthermore, the Compact sets out other certain specifics of the tort claim notice.

Particularly, the Compact requires at Part 6, Subsection (A)(7):

All tort claim notices shall be signed by the claimant. The rules and regulations may additionally require that the tort claim notices be signed under oath. The rules and regulations may also require that as a condition of prosecuting tort claims, the claimant shall appear to be interviewed or deposed at least once under reasonable circumstances, which shall include the attendance of the claimant's legal counsel if requested; provided that the enterprise shall afford claimant at least thirty (30) days' written notice of the interview or deposition; and provided further that the claimant's failure to appear without cause for any interview or deposition properly noticed pursuant to this paragraph shall be deemed a voluntary withdrawal of the tort claim.

A judicial proceeding may only be maintained if the claimant has followed the provisions of Part 6, including the delivery of a valid and timely written tort claim notice. *Id.* at subsection (A)(9).

The Tort Claim Rules² specify at Rule 9 that the claimant "may be asked to appear to be interviewed or examined under oath at least once under reasonable circumstances" and at Rule 10 that if an interview/examination is requested, the claimant shall be given at least thirty (30) days written notice. Finally, Rule 11 states that "**upon proper notification**, the claimant fails to appear for an interview/examination under oath, this will be deemed voluntary withdrawal of the tort claim." *Id.* (emphases added).

Defendant alleges that Plaintiff submitted her notice under the Tort Claim Rules on June 22, 2022 ("Tort Claim Notice"), in which she alleged that she had tripped on an unfinished

² Within the meaning of the compact the "rules and regulations" referred to herein as the "Tort Claim Rules" means those rules and regulations promulgated by the Tribal Compliance Agency for implementation of the Compact. *See* Compact, Part 2 "Recitals," ¶ 22.

threshold on Defendant's premises and suffered injuries. *See* Defendant's "Statement of Facts," ("SOF"), ¶ 1-3; Ex. 1 to Motion. Defendant alleges that on June 30, 2022 Tribal First (Defendant's third-party claims administrator) sent a letter to Plaintiff's counsel requesting to "interview Plaintiff and requesting that Plaintiff complete and return the medical authorizations enclosed therein to allow Tribal First to acquire Plaintiff's medical records and bills." SOF, ¶ 5; Ex. 2 to Motion. The June 30, 2022 letter did not mention any requirements under the Tort Claim Rules to provide any requested information and sets no deadline by which the interview must occur. Instead, this letter provides:

We would appreciate you keeping us up to date on your client's injury and treatment in reference to this claim. To this end, we have enclosed Disclosures of Protected Health Information forms with a request that you have your client complete and return to our office....We will need one of these forms signed by your client from each facility/doctor your client has treated with. Should you require more forms, please make copies as needed. I would also like the opportunity to interview your client concerning her claim against our Insured. Please contact me with a date and time your client may be available.
See Motion, Ex. 2.

Defendant alleges that Plaintiff failed to provide any information in response to this June 30, 2022 letter or to set up a time for an interview. *See* SOF, ¶ 7.

Defendant alleges Tribal First then sent a second letter on September 7, 2022 in which it once again requested again that Plaintiff execute and return the authorizations and sought an interview with Plaintiff. This letter is the first communication setting a deadline for a response. The letter states "We ask that you provide this information within the next 30 days so that we may move forward with the investigation of your claim." *See* Motion, Ex. 3. Defendant alleges that Plaintiff failed to respond to this September 7, 2022 letter and never provided the requested authorizations or interview. *Id.* at SOF, ¶ 7. According to Defendant, the failure to provide an

interview and the signed authorizations within 30 days of the time requested requires that Plaintiff's claim be considered voluntarily withdrawn, pursuant to Rule 11 of the Tort Claim Rules.

In the instant matter, the first letter issued by Tribal First on June 30, 2022 sets no deadline for any interview of the Plaintiff or return of the requested authorization. Although the second letter dated September 7, 2022 does request an interview within the "next 30 days," Tribal First failed to provide a deadline for an interview that was in sufficient advance of the date in which the Plaintiff's claim was deemed denied by operation of law. Pursuant to the Compact, Part 6 (A)(8), "[a]ny portion of a tort claim which is unresolved shall be deemed denied if the enterprise fails to notify the claimant in writing of its approval within ninety (90) days of the filing date...." Here, Plaintiff submitted her claim on June 22, 2023, which was received by the Defendant on June 28, 2022.³ That claim was "deemed denied" on September 28, 2022. Tribal First waited until September 7, 2022 to issue a letter setting out the 30-day interview deadline, which was just 21 days before this "deemed denied" deadline of September 20 occurred. There is no indication in the record of when Plaintiff received this letter demanding an interview. There is also no indication in the record before this Court that within the time period of when Tribal First provided the Plaintiff a request for an interview and the "deemed denied" date of her claim that Plaintiff could have even appeared for an interview or that such a time frame was a "reasonable circumstance" as required by Part 6 (A)(7).

Neither the rules nor the Compact require that the Plaintiff provide for any interview beyond the "deemed denied" date. Indeed, once the claim was "deemed denied" Plaintiff was free to file a judicial proceeding, pursuant to Rule 13 of the Tort Claim Rules, which would then entitle

³ Defendant's Reply reflects at Page 4 that the Notice was received on June 28, 2022. Rule 5 provides that "the date the tort claim notice is received will be the official filing date."

Defendant to depose the Plaintiff pursuant to the CNO Rules of Civil Procedure, and the “interview” is no longer necessary.

There is also no indication in the record that Tribal First was willing to extend the “deemed denied” deadline in order to allow the interview to occur beyond the deemed denied deadline of September 28, 2022, which it could have done under Part 6(A)(8) of the Compact.

Tribal First could have also easily provided a date definite in its June 30, 2022 letter by which the interview was to occur, but it did not do so. Instead, Tribal First waited 71 days from the filing of the Plaintiff’s Tort Claim Notice (June 28, 2022) to send a letter (September 7, 2022) to start the clock running on the 30 days’ interview notice under the Tort Claim Rules. The Court places particular emphasis on the fact that there is no indication in the record when Plaintiff received this September 7, 2022 letter and thus no information in the record whether there was sufficient or proper notice to the Plaintiff to schedule the interview. Defendant may raise the issue in a summary judgment, but the Court currently does not have a sufficient record before it to grant dismissal. Accordingly, dismissal based upon lack of jurisdiction for failing to provide an interview is **DENIED**.⁴

⁴ To be clear, this Court is not holding that the interview requirement of the Tort Claim Rules is permissive, rather than mandatory as asserted by Plaintiff. When an interview is properly noticed, Rule 11 of the Tort Claim Rules mandates that a claimant’s failure to appear for an interview/deposition under oath “will be deemed” as a voluntary withdrawal of the claimant’s tort claim. However, in the instant matter, this Court finds that the record before it is insufficient to establish whether proper notice was provided to the Plaintiff.

II. PLAINTIFF'S ALLEGED DAMAGES FOR LOSS OF INCOME IS BARRED AS NOT BEING SUFFICIENTLY IDENTIFIED IN HER TORT CLAIM NOTICE.

Defendant seeks to dismiss Plaintiff's claims for damages for lost wages and emotional distress, asserting that the Tort Claim Notice fails to provide sufficient notice or indication as to these damages.

Both parties rely upon and cite to Oklahoma's Governmental Tort Claims Act, 51 Okla.Stat. §151 *et. seq.*, ("GTCA") and case law interpreting the same. The Court notes provisions of the Compact are not identical but do contain some similar requirements: both require a written notice setting forth the date, time, place and circumstances of the claim, and the amount of compensation. *See* 51 Okla.Stat. § 156. Accordingly, this Court views case law on GTCA notice requirements as instructive, but not controlling.

As this Court has previously noted, the Oklahoma Supreme Court has taken a practical approach to the statutory notice requirements pursuant to the GTCA. *See McWilliams v. Bd. of Cnty. Comm'rs*, 2011 OK 103, 268 P.3d 79, 85 (rejecting a "hyper-technical application" of the Act's notice requirements in favor of a "more reasoned approach sounding in equity"). Oklahoma has continued to recognize that substantial compliance with the notice provisions of the Act is sufficient when the political subdivision is not prejudiced, and the provided information satisfies the purposes of the statutory notice requirement." *Osterhout v. Bd. of County Com'r of LeFlore County, Okla.*, 10 F.4th 978, 985 (10th Cir. 2021) citing *Mansell v. City of Lawton*, 1995 OK 81, 901 P.2d 826, 830. *See also I.T.K. v. Mounds Public Schools*, 2019 OK 59, 451 P.3d 125 (applying the doctrine of substantial compliance to the notice provisions of the GTCA); *Alburtus v. Indep. School Dist. No. 1 of Tulsa County*, 2020 OK CIV APP 39, ¶ 13, 469 P.3d 742 (noting substantial compliance doctrine has not been expressly overruled regarding the GTCA notice provisions);

Osterhout, 10 F.4th at 986 (10th Cir. 2021) (noting the doctrine of substantial compliance applies to the notice requirements of the GTCA). While the filing of the written notice itself is mandatory, the manner and level of specificity in which the contents of the notice are set forth can, in appropriate circumstances, be subject to a "substantial compliance" analysis. *See e.g., Alburtus v. Indep. School Dist. No. 1 of Tulsa County*, 2020 OK CIV APP 39, ¶ 13, 469 P.3d 742; *see also Wallace v. Bd. of County Com'rs of Tulsa Co.*, 2000 OK CIV APP 131, 15 P.3d 985 (failure to include any monetary amount in claim was not fatal to notice's validity where remainder of notice was in substantial compliance with GTCA).

Oklahoma's GTCA statutory notice requirements were designed to facilitate (1) investigation of a claim; (2) repair of any dangerous conditions; (3) quick settlements; and (4) fiscal planning to meet possible liability. *See Osterhout*, 10 F.4th at 987. Under a substantial compliance analysis, the notice requirements of the GTCA are met as long as enough information is provided to fulfill the purposes of these requirements. *Kennedy v. City of Talihina*, 2011 OK CIV APP 108, ¶ 6, 265 P.3d 757; *Wallace* 15 P.3d at 989; ¶¶ 9, 15.

Utilizing the foregoing cases and authority as instructive, this Court finds that Plaintiff's notice claim is not sufficient with respect to any claim of loss of income. Plaintiff's Tort Claim Notice provides that she is seeking as "the amount of compensation sought" to recover for "medical expenses, pain and suffering; permanent injury" *See Motion*, Ex. 1. Nowhere in this Tort Claim Notice does Plaintiff state that she is seeking to recover for any sort of lost wages. While the failure to provide some details of a claim will not necessarily invalidate the entire claim, the claim must generally provide details such as the date, time, place and circumstances of the event, as well as the amount of compensation and the relief demanded. *See Ullman v. Oklahoma*

Highway Patrol, 2023 OK 100, 538 P.3d 138; *see also* Compact, Part (A)(6)(the tort claim notice shall state the “amount of compensation and the basis for said relief....”)

Here, there is simply no information in the Tort Claim Notice regarding any lost wages, and instead the Tort Claim Notice reflects claims for *physical* injuries and pain and suffering, which is insufficient pursuant to the Compact to preserve a claim for lost wages. *See also Grisham v. City of Oklahoma City*, 2017 OK 69, 404 P.3d 843 (notice of claim alleging only property damage was insufficient to provide notice of any personal injury/nuisance claims arising from the same transaction.) Therefore, the Motion is granted with respect to the lost wages claims.

With respect to the emotional distress damages, Plaintiff’s notice claim did reflect that she was seeking to recover for “pain and suffering.” The Petition alleges both “pain and suffering” as well as “emotional distress.” *See* Petition, ¶ 4. Generally, “pain and suffering” is compensable when made an element of damage in an action based on a wrong which is in itself actionable. *See Bennett v. City Nat. Bank & Trust Co.*, 1975 OK CIV APP 71. “Emotional distress” is a term that is used to include mental pain and suffering. *See* OUJI-CIV-20.3 (the term “emotional distress” means mental distress, mental “pain and suffering,” or mental anguish). At this time, the Court declines to dismiss Plaintiff’s emotional distress claims based upon the record before it. It is possible that during discovery Defendant determines that the terms “pain and suffering” and “emotional distress” indicate two different types of damages, and the Court will address any such argument on a summary judgment or other motion.

Accordingly, Plaintiff’s claim for lost wages is dismissed. This Court denies the request at this time to dismiss any claim or request for damages for emotional distress.

III. DEFENDANT'S MOTION IS GRANTED AS PLAINTIFF HAS FAILED TO STATE SUFFICIENT FACTS WITH RESPECT TO THE ALLEGED INCIDENT IN QUESTION.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, the United States Supreme Court analyzed Fed.R.Civ.P. 8 which requires that a plaintiff's complaint must allege "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* The Court established in those cases that Fed.R.Civ.P. 8 does not require detailed factual allegations in a complaint, but it does demand that a plaintiff plead more than "unadorned 'the defendant unlawfully harmed me' accusations" and that a pleading must offer more than mere labels, conclusions or formulaic recitation of elements of causes of action. *Iqbal* at 678. Thus, Federal Courts require that in order for a party to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." *Id.* A claim has facial probability when a plaintiff pleads factual contentions that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Under this framework, Courts are not required to accept threadbare recitals of all of the elements of a cause of action, supported by mere conclusory allegations. *Id.* at 678.

In *Wright v. Cannady*, Order Granting Mot. Dismiss, Case No. CJ-2021-12 (District Court for the Choctaw Nation of Oklahoma), this Court adopted the foregoing federal pleading standards under *Twombly* and *Iqbal* as the most efficient and economical standard to utilize when considering a motion to dismiss pursuant to 2008 of the Choctaw Nation Code of Civil Procedure.⁵ The Court will therefore apply the foregoing to analyze the sufficiency of Plaintiff's claims.


⁵ As set forth in the *Wright* Order, 2008 of the Choctaw Nation Code of Civil Procedure is similar to Fed.R.Civ.P. 8 in that both require a "short and plain statement of the claim" showing the pleader is entitled to relief.

In his Petition, the Plaintiff alleges only formulaic recitations that her "fall was a direct result of Defendant's negligence in either: failing to adequately inspect and maintain the premises; creating a hidden trap, snare or pitfall; and/or failing to warn of a hidden trap, snare or pitfall of which they had notice." *See* Petition, ¶ 2. Plaintiff's Petition does not plead facts sufficient for this Court to reasonably infer that the Defendant is liable for the misconduct alleged, as her allegations are mere formulaic recitation of elements of his causes of action. Such "threadbare recitals of all of the elements of a cause of action, supported by mere conclusory allegations" are insufficient to state a claim. *Iqbal*, 556 U.S. at 678 citing *Twombly*, 550 U.S. 556.

Accordingly, Defendant's Motion is **GRANTED** with respect to the sufficiency of the claims plead in Plaintiff's Petition, and the Petition is dismissed without prejudice.

Plaintiff may file an Amended Petition within ten (10) days of this Order, but such Petition shall not include any relief for loss of income, as set forth in this Order.

IT IS SO ORDERED this 3rd day of January, 2023.



AMY J. PIERCE
DISTRICT COURT JUDGE

BT/Roby
C. Reynolds
JRM