

1
2
3
4
5
6
7
8

**IN THE
HO-CHUNK NATION TRIAL COURT**

Karen Redhawk,
Plaintiff,

v.

Case No.: **CV 98-30**

**Ho-Chunk Nation and Ho-Chunk Housing
Authority,**
Defendants.

9
10
11

**ORDER
(Denying Defendants' Motion for Summary Judgment)**

12
13

INTRODUCTION

14
15
16
17
18
19
20
21

The Court must determine whether to grant the defendants' request for summary judgment. The defendants contend that the plaintiff filed her amended pleading after the relevant statute of limitation period expired and is likewise barred by the doctrine of laches. The Court denies the defendants' motion since it failed to incorporate either defense within its responsive pleading. However, due to the extreme passage of time, the Court requests that the plaintiff alert the Court within thirty (30) days as to whether or not she wishes to proceed with the case.

22
23

PROCEDURAL HISTORY

24
25
26
27
28

The Court recounts the procedural history in significant detail in its October 26, 1998 *Order (Dismissed & Remand to HCN Housing Authority)*. On October 22, 1999, the Court granted the *Stipulation and Order to Reopen and for Leave of Court to Amend Pleadings* (hereinafter *Stipulation*), which established deadlines and procedures for the parties to file an

1 *Amended Complaint* and *Answer to Amended Complaint*. On November 2, 1999, the Court
2 entered its *Order to Extend Answer Period* since the parties mutually agreed to extend the
3 response period to the plaintiff's October 29, 1999 *Amended Complaint* because the parties
4 wanted to await a decision in a companion case. *See William Goodbear v. Ho-Chunk Hous.*
5 *Auth.*, CV 98-11 (HCN Tr. Ct., Nov. 12, 1999). The defendants ultimately provided an *Answer*
6 *to Amended Complaint* (hereinafter *Amended Answer*) on November 29, 1999.

8 On May 3, 2000, the defendants filed the *Defendants' Notice and Motion for Summary*
9 *Judgment* (hereinafter *Defendants' Motion*) and supportive brief (hereinafter *Defendants' Brief*)
10 and exhibits. *See Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) 18.
11 The plaintiff filed a response (hereinafter *Plaintiff's Response*) on May 9, 2000. *Id.*, Rule 19(A).
12 The defendants filed its May 15, 2000 *Defendant's [sic] Reply Brief in Support of Notice and*
13 *Motion for Summary Judgment* (hereinafter *Defendants' Reply*), and the following day filed an
14 erratum. *Id.* The next filing occurred on January 18, 2006, entitled, *Defendants' Notice and*
15 *Motion to Dismiss for Lack of Activity*. In response, the Court entered its January 20, 2006,
16 *Order (Denial of Motion)* noting that the plaintiff cannot be held responsible for judicial
17 neglect.¹

22 APPLICABLE LAW

23
24 ¹ The presiding judge extends his sincerest apologies to the parties for the failure of the Court to enter a timely
25 decision in this matter. Each trial judge maintains a duty to "dispose promptly of the business of the court." *HCN*
26 *Rules of Judicial Ethics*, § 4-1(E); *see also In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1)
27 (HCN S. Ct., Apr. 9, 2005) (requiring issuance of final judgments within ninety (90) days following completion of
28 trial level process). Former Chief Judges Mark D. Butterfield and William H. Bossman utterly failed in this regard
by not issuing a judgment prior to the expiration of their legislative appointments. In the interests of justice, the
Court informs the parties of the availability of seeking mandamus relief from the Ho-Chunk Nation Supreme Court
in order to compel action of a trial level judge. *See In re: Casimir T. Ostrowski*, SU 05-01 (HCN S. Ct., Feb. 21,
2005) (citing CONSTITUTION OF THE HO-CHUNK NATION, ART. VII, § 6(a)). Judge Joan F. Greendeer-Lee entered an
Order (Dismissed & Remand to HCN Housing Authority) on October 26, 1998. On May 10, 2000, the case was
reassigned to Chief Judge Mark D. Butterfield. Judge Butterfield did not take any action on the case during his
tenure, and it was reassigned to Chief Judge William Bossman who also did not take any action on the case during

1
2 CONSTITUTION OF THE HO-CHUNK NATION

3 Art. III - Organization of the Government

4 Sec. 4. Separation of Functions. No branch of the government shall exercise the powers
5 and functions delegated to another branch.

6 Art. VII - Judiciary

7 Sec. 4 Powers of the Judiciary. The judicial power of the Ho-Chunk Nation shall be
8 vested in the Judiciary. The Judiciary shall have the power to interpret and apply the
9 Constitution and laws of the Ho-Chunk Nation.

10 Sec. 5. Jurisdiction of the Judiciary.

11 (a) The Trial Court shall have original jurisdiction over all cases and controversies,
12 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
13 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
14 officials and employees, shall be a party. Any such case or controversy arising within the
15 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
16 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
17 the Nation's sovereign immunity.

18 HO-CHUNK NATION LEGISLATIVE RESOLUTION 06-09-98A

19 Tribal Court Review

20 Judicial review of any appealable claim may proceed to the Ho-Chunk Nation Tribal Court after
21 the Administrative Review Process contained in this Chapter has been exhausted. The Ho-
22 Chunk Nation Rules of Civil Procedure shall govern any judicial review of an eligible
23 administrative grievance shall [sic] file a civil action with the Trial Court within thirty (30) days
24 of the final administrative grievance review decision.

25 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (Feb. 22, 1997 revision)

26 Rule 6. Answer.

27 A party against whom a *Complaint* has been made shall have twenty (20) calendar days from the
28 date of service to file an *Answer* with the Clerk of Court. The *Answer* shall use short and plain
statements to admit, admit in part, or deny each statement in the *Complaint*, assert any and all
claims against other parties arising from the same facts or circumstances as the *Complaint* and
state any defenses to the *Complaint*. The *Answer* must be signed by the party and his/ [sic] or
her counsel and contain their full names, addresses, and telephone numbers. An *Answer* shall be
served on other parties and may be served by mail.

his tenure.

1 Rule 18. Types of Motions.

2 *Motions* are requests directed to the Court and must be in writing except those made at trial.
3 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
4 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
5 shall contain or be supported by a legal memorandum, which states the issues and legal basis
relied on by the moving party.

6 Rule 19. Filing and Responding to Motions.

7 (A) Motion. *Motions* may be filed by a party with any pleading or at any time after their first
8 pleading has been filed. A copy of all written *Motions* shall be delivered or mailed to other
9 parties at least five (5) calendar days before the time specified for a hearing on the *Motion*. A
10 *Response* to a written *Motion* must be filed at least one day before the hearing. If no hearing is
11 scheduled, the *Response* must be filed with the Court and served on the other parties within ten
(10) calendar days of the date the *Motion* was filed. The party filing the *Motion* must file any
Reply within three (3) calendar days.

12 Rule 42. Scheduling Conference.

13 Scheduling Order. The Court may enter a scheduling order on the Court's own motion or on the
14 motion of a party. The Scheduling Order may be modified by motion of a party upon a showing
15 of good cause or by leave of the Court.

16 Rule 55. Summary Judgment.

17 Any time after the date an *Answer* is due or filed, a party may file a *Motion for Summary*
18 *Judgement* on any or all of the issues presented in the action. The Court will render summary
19 judgment in favor of the moving party if there is no genuine issue as to material fact and the
moving party is entitled to judgement as a matter of law.

20 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (Feb. 11, 2006 revision)

21 Rule 58. Amendment to or Relief from Judgment or Order.

22 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
23 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
24 must be based on an error or irregularity that prevented a party from receiving a fair trial or a
substantial legal error that affected the outcome of the action.

25 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
26 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
27 conclusions or make additional findings or conclusions, amending the judgment accordingly.
28 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
time for initiating an appeal commences upon entry of the amended judgment. If the Court
denies a motion filed under this Rule, the time for initiating appeal from the judgment

1 commences when the Court denies the motion on the record or when an order denying the
2 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
3 motion, and the Court does not decide a motion under this Rule or the judge does not sign an
4 order denying the motion, the motion is considered denied. The time for initiating the appeal
from judgment commences in accordance with the *Rules of Appellate Procedure*.

5 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
6 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
7 must be based upon new information that has come to the party's attention that, if true, could
8 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
9 commences upon entry of the modified judgment. If the Court denies a motion filed under this
10 Rule, the time for initiating an appeal from the judgment commences when the Court denies the
11 motion on the record or when an order denying the motion is entered, whichever occurs first. If
within thirty (30) calendar days after the filing of such motion, and the Court does not decide the
12 motion or the judge does not sign an order denying the motion, the motion is considered denied.
The time for initiating an appeal from judgment commences in accordance with the *Rules of*
13 *Appellate Procedure*.

14 (D) Erratum Order or Re-issuance of Judgment. Clerical errors in a Court record, including the
15 *Judgment* or *Order*, may be corrected by the Court at any time.

16 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
17 party made within a reasonable time for the following reasons: (1) newly discovered evidence
18 which could not reasonably have been discovered in time to request a new trial; (2) fraud,
misrepresentation or serious misconduct of another party to the action; (3) good cause if the
19 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), did not
20 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
released, discharged or is without effect due to a judgment earlier in time.

21 Rule 61. Appeals.

22 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The
23 *Appeal* must comply with the *Rules of Appellate Procedure*, specifically *Rules of Appellate*
24 *Procedure*, Rule 7, Right of Appeal. All subsequent actions of a final *Judgment* or Trial Court
25 *Order* must follow the *Rules of Appellate Procedure*.

26 **FINDINGS OF FACT**

27 1. The Court incorporates by reference *Findings of Fact* 1-9 enumerated in a previous
28 decision. *Order (Dismissed & Remand to HCN Hous. Auth.)* at 2-4.

1 2. A grievance hearing was held on November 19, 1998, and a decision was entered on or
2 about November 25, 1998. *Defs.' Br.* at 2.

3 3. On October 22, 1999, the parties provided the *Stipulation* to the Court, and the Court
4 executed the decisional component, *i.e.*, *Order*, of the *Stipulation* on the same date, which
5 established filing dates for the *Amended Complaint* and *Amended Answer*.
6

7 4. On November 2, 1999, the Court entered its *Order to Extend Answer Period*, which
8 allowed the defendants an additional twenty (20) days to answer the *Amended Complaint*. The
9 parties sought the extension for the purpose of awaiting the entrance of "a decision in the
10 William Goodbear case, CV-98-11 that may set precedent in this case." *Mot. to Extend Answer*
11 *Period*.
12

13 5. On November 12, 1999, the Court held that the Ho-Chunk Housing Authority did not
14 possess sovereign immunity from suit in employment actions "due to the fact that the Housing
15 Authority is subject to the Ho-Chunk Nation *Policy and Procedures Manual* and its limited
16 waiver of sovereign immunity." *Goodbear*, CV 98-11 at 7.
17

18 6. On November 29, 1999, the defendants filed its *Amended Answer*, which included the
19 following list of defenses to the plaintiff's cause of action:

- 20 a. The plaintiff has not alleged any violation of law;
- 21 b. That plaintiff has not asserted that defendants caused an unjustified
22 injury or harm;
- 23 c. That plaintiff has failed to state a claim upon which relief may be
24 granted;
- 25 d. That defendants acted with the scope of their authority;
- 26 e. That the defendant, Ho-Chunk Nation, is immune from suit.
27 Waiver of sovereign immunity by the Ho-Chunk Nation cannot be implied
28 and must be unequivocally expressed. The Ho-Chunk Nation's liability for
obligations incurred by the Housing Authority was expressly withdrawn

1 by the Legislature in the enabling documents of the Housing Authority.
2 HCN TRIBAL ORDINANCE 7(A), Art. V, § 21;

3 f. That the Housing Authority did not waive its sovereign immunity
4 from suit. The Ho-Chunk Nation Legislature authorized the Housing
5 Authority to waive any immunity from suit that it might otherwise have.
6 The Housing Authority did not expressly waive their sovereign immunity
7 when they employed plaintiff;

8 g. That the Trial Court lacks jurisdiction, as the Housing Authority
9 Grievance Policy states that the "decision of the Board [of
10 Commissioners] is to be considered final."

11 *Am. Answer* at 3 (numerical designations modified).

12 7. On May 3, 2000, the defendants filed the *Defendants' Motion*, arguing that the *Amended*
13 *Complaint* is barred by the thirty (30) day statute of limitation and the doctrine of laches. *Def.*
14 *Br.* at 2-3 (citing, in part, HCN LEG. RES. 06-09-98A).

15 8. On May 9, 2000, the plaintiff responded to the *Defendants' Motion*, protesting that the
16 defendant incorporated defenses in its motion that it failed to raise in the *Amended Complaint*.
17 *Pl.'s Resp.* at 1 (citing *Susan Rowlee v. Majestic Pines Casino*, PRC 95-11 (HCN Tr. Ct., Apr.
18 10, 1996) at 4 (holding that sovereign immunity does not preclude suit if not raised as an
19 affirmative defense in the responsive pleading)).

20 9. On May 15, 2000, the defendants filed the *Defendant's Reply* in which they respond that
21 they implicitly preserved the statute of limitation defense by asserting a lack of subject matter
22 jurisdiction within its *Amended Answer*.² *Def.' Br.* at 2. The defendants offered no rationale for
23 its implied retention of the doctrine of laches defense.

24 DECISION

25
26
27 ²The Court subsequently held that an administrative agency cannot insulate its determinations from judicial scrutiny
28 since the CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION) delegates judicial power to the
Judiciary and no other branch of government. *Michelle M. Ferguson v. HCN Ins. Review Comm'n/Div. of Risk.*
Mgmt., CV 99-20 (HCN Tr. Ct., Aug. 12, 1999) at 13 (citing CONST., ARTS. III, § 3, VII, § 4).

1
2 The Court must determine whether to grant the defendants' request for summary
3 judgment. *See HCN R. Civ. P. 55*. Assuming *arguendo* that no material issue of fact exists in
4 the instant case, the defendants still cannot prevail as a matter of law. The Court exercises
5 subject matter jurisdiction over the proceeding due to the cause of action arising under the laws
6 of the Ho-Chunk Nation. CONST., ART. VII, §5(a). Furthermore, the plaintiff exhausted her
7 administrative remedies, thereby rendering her cause of action justiciable, *i.e.*, ripe for judicial
8 review. *Id.*, *see also Kenneth L. Twin v. Douglas Greengrass, Executive Dir. of Admin.*, CV 03-
9 88 (HCN Tr. Ct., May 24, 2004) at 20.
10

11 Regardless, the defendants claim in relation to its statute of limitation defense that

12 [s]ubject matter jurisdiction generally must be demonstrated at the outset by the
13 party seeking to invoke it. It cannot be conferred by consent of the parties, nor
14 can its absence be waived. If a subject matter jurisdiction defect exists, it may be
15 raised at any time, even on appeal, and the court is under a duty to point it out if
16 the parties do not.

17 *Defs.' Reply* at 2 (citation omitted).³ However, the Court previously explained that statutes of
18 limitation do not represent "jurisdictional barriers" and the Court cannot *sua sponte* raise a
19 defense on behalf of a defendant. *Twin*, CV 03-88 (HCN Tr. Ct., Oct. 7, 2004) at 8.

20 In *Twin*, the Court found the following quote particularly illuminating, and chooses to
21 repeat a portion of it here.

22
23 In every case wherein the statement has been made that the running of the statute
24 extinguished a right it extinguished it because and merely because the one in
25 whose favor the statute has run asserted his right to interpose the statute as a
26 defense. When asserted it destroys the right, just as any other proved defense
27 destroys it. The truth is all the discussions of the effect of the statute is nothing but
quibbling. Volumes of such mere quibbling have been written in the opinions of
the courts, all useless and half of it senseless

28 ³ As noted above, the defendants did not attempt to associate the doctrine of laches with subject matter jurisdiction,
and, therefore, the Court shall only discuss the doctrine of laches in the context of whether a defendant is required to
assert its defenses in a responsive pleading.

1
2 *Id.* (citing *Md. Cas. Co. v. Beleznyay*, 245 Wis. 390, 397 (Wis. 1944) (Fowler, J. dissenting)). The
3 dissenting justice also pointed out that courts would not possess the authority to enter default
4 judgments on untimely filed pleadings if statutes of limitation raised jurisdictional concerns, but
5 that courts routinely take such action without any consideration of this non-issue. *Id.*
6 Consequently, the statute of limitation in question does relate to subject matter jurisdiction.
7

8 Due to the defendants' flawed jurisdictional rationale, the Court must simply determine
9 whether the defendants properly raised the relevant defenses. *See Louella A. Kelty v. Jonette*
10 *Pettibone et al.*, CV 98-49 (HCN Tr. Ct., Feb. 22, 2006). The defendants raised several defenses
11 against the asserted cause of action, but fail to include either the statute of limitation or doctrine
12 of laches defenses. *Am. Answer* at 3. Although the February 22, 1997 version of the *HCN R.*
13 *Civ. P.* does not contain a provision regarding amendments to pleadings, parties maintained the
14 ability to directly request permission to amend a pleading as employed in the instant case, *HCN*
15 *R. Civ. P.* 18, or indirectly by seeking a good cause modification of the scheduling order. *Id.*,
16 Rule 42; *see also Order; Scheduling Order*, CV 98-30 (HCN Tr. Ct., May 21, 1998) at 1. In
17 short, the defendants needed to further amend its *Amended Answer*, but failed to timely do so.
18
19

20 The Court accordingly denies the defendants' request for summary judgment. The
21 defendants are well aware of the importance of including proper claims and defenses within
22 pleadings. Despite this holding, the Court affords the plaintiff thirty (30) days from the issuance
23 of this decision to alert the Court as to whether or not she wishes to proceed with her case. To
24 reiterate, the Court extends its sincerest apologies for the extreme delay in rendering this
25 judgment.
26

27 The parties retain the right to file a timely post judgment motion with this Court in
28 accordance with *HCN R. Civ. P.* 58, Amendment to or Relief from Judgment or Order.

1 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
2 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
3 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
4 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
5 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
6 order, together with a filing fee as stated in the appendix or schedule of fees” *HCN R. App. P.*
7 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*
8 *R. App. P.*].” *HCN R. Civ. P.* 61.
9
10
11

12 **IT IS SO ORDERED** this 10th day of March 2006, by the Ho-Chunk Nation Trial Court
13 located in Black River Falls, Wisconsin within the sovereign lands of the Ho-Chunk Nation.
14
15

16 _____
17 Honorable Todd R. Matha
18 Chief Trial Court Judge
19
20
21
22
23
24
25
26
27
28

Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070

