BEFORE THE INDIAN CLAIMS COMMISSION

THE CHOCTAW NATION, Plaintiff,	)	
v.	)	Docket No. 249
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: December 6, 1973

Appearances:

Jess Larson, Attorney for Plaintiff. Alvord and Alvord, Richard J. Ney, and Lon Kile were on the briefs.

William F. Smith, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This case consists of four specific accounting claims and a demand for a general accounting, all brought under clauses (3) and (5) of Section 2 of the Indian Claims Commission Act, 25 U.S.C. §70(a). The first of these claims, contained in allegations 9 through 11 of the petition, relates to tribal funds paid out by defendant for expenses incident to carrying out the provisions of the Atoka Agreement, 30 Stat. 495, concluded in 1897, and amended and ratified by Congress in 1898, and the so-called Supplemental Agreement, 32 Stat. 641, ratified in 1902.

The second claim, in allegation 12 of the petition, deals with a refund of attorney fees. This claim was dismissed with prejudice by consent order dated September 25, 1963. The third claim, in allegation 13 of the petition, relates to educational funds. The fourth claim, in allegation 14, relates to a division of tribal funds with the Chickasaw Nation. The demand for a general accounting is set forth in allegation 15.

Except for the second claim, which has been dismissed, all claims, including the demand for a general accounting, have motions pending.

The pending motions are:

1. Defendant's motion filed January 22, 1963, for summary judgment as to the first claim;

2. Defendant's motion filed December 13, 1963, to join the Chickasaw Nation as a necessary party in the fourth claim;

3. Plaintiff's motion filed March 19, 1964, to dismiss the fourth claim with prejudice;

4. Defendant's motion filed October 21, 1964, to order plaintiff to file exceptions to the General Accounting Office Report, or for summary judgment relating to all claims; and

5. Plaintiff's motion filed August 14, 1972, to amend its petition as to the first claim.

A hearing took place July 13, 1972, at which time the motions then pending were taken up and argued, and the General Accounting Office Report was entered into evidence as Defendant's Exhibit No. 1. The merits of the claims were not reached.

The issues created by all motions have since been thoroughly briefed and are ready for our decision.

For reasons stated below, we grant defendant's motion for summary judgment on the first claim; deny plaintiff's motion to amend the same claim; grant plaintiff's motion to dismiss the fourth claim; deny defendant's joinder motion on the same claim; deny defendant's motion to order the plaintiff to file exceptions to the accounting report or for summary judgment; and set the time for plaintiff to file its exceptions to the accounting report.

First Claim Motions

The factual allegations of this claim are (1) that defendant is indebted to plaintiff for $200,000 wrongfully disbursed by defendant between July 1, 1929, and June 30, 1951, out of tribal funds then in defendant's custody; (2) that these funds were part of the proceeds derived and administered by defendant under the terms of the Atoka and Supplemental agreements, *supra*, and were for expenses incurred by defendant on behalf of plaintiff in carrying out the terms of said agreements; and (3) that at the time the said agreements were entered into defendant, by repeated representations, induced plaintiff to believe that provisions of the agreement then under negotiation would be carried out at the expense of defendant. Plaintiff further claims that had plaintiff understood that the agreements as finally concluded did not contain such an understanding, plaintiff would not have entered into the agreements voluntarily.

The defendant contends that this entire claim was judicially determined adversely to plaintiff in Choctaw Nation v. United States, 91 Ct. Cl. 320 (1940), cert. denied, 312 U. S. 695, and in Choctaw Nation v. United States, 128 Ct. Cl. 195 (1954), aff'g Docket 55, 1 Ind. Cl. Comm. 553 (1951), and that therefore plaintiff is barred by either res judicata, collateral estoppel, or stare decisis.

Plaintiff, in its earlier opposition (filed March 6, 1963, by prior counsel, now deceased) contended that this claim is not barred because it arises under clauses (3) and (5) of Section 2 of our act, and that each of these clauses constitutes a new and different cause of action not raised or ruled on in the cited prior cases. Clause (3) relates to claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, or mutual or unilateral mistake. Clause (5) relates to claims based upon lack of fair and honorable dealings not recognized by any existing rule of law or equity.

In its most recent opposition, filed August 14, 1972, by present counsel, plaintiff appears to be seeking recovery only under clause (5), a new cause of action that did not exist when the 1940 Court of Claims decision was rendered, and which was not considered or adjudicated in the Indian Claims Commission 1951 decision, supra. We take it that plaintiff has abandoned its clause (3) claim. Although we consider the matter on plaintiff's latest position, we note that our final holding applies with equal force to plaintiff's case under either clause.

Plaintiff also points out factual differences between the prior cases and the instant case as an additional reason for denying defendant's motion. These differences are in the respective accounting periods, the number of accounts included and amounts sued on.

Plaintiff's latest position also forms the basis for its motion to amend. Plaintiff's position is that since its claim in Docket 55, for Atoka and Supplemental agreement expenses through June 30, 1929, was not ruled on as to clause (5), the instant petition can be amended to include such claim. Defendant opposes this motion on the additional ground that it is a late-filed claim barred by the jurisdictional limitation contained in the Indian Claims Commission Act.

Both parties cite Creek Nation v. United States, 168 Ct. Cl. 512 (1964), aff'g Docket 168, 12 Ind. Cl. Comm. 128 (1963), and United States v. Creek Nation, 192 Ct. Cl. 425, 427 F.2d 743 (1971), aff'g in part, rev'g in part Docket 167, 18 Ind. Cl. Comm. 343 (1967) and 21 Ind. Cl. Comm. 278 (1970), as authorities determining the application of res judicata and collateral estoppel in this case.

Under the rules enunciated in the two above cases, especially the earlier one, we must compare plaintiff's clause (5) claim as pleaded in the instant case with both prior Choctaw decisions and their jurisdictional acts to determine whether res judicata applies. If we conclude that this doctrine does not apply, then we must compare the factual allegations of the instant claim with the factual allegations and determinations made in both prior cases to determine whether collateral estoppel applies.

The historical background underlying all three cases is common. The Court of Claims described this background succinctly in its 1954 Choctaw decision, supra, at 197, as follows:

> Congress, by Section 16 of the Act of March 3, 1893, 27 Stat. 612, 645, provided for the appointment of the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission, with the object of procuring through negotiations the extinguishment of the national or tribal title to the lands of these tribes in the Indian Territory, either by their cession to the United States in trust or allotment in severalty, in whole or in part, among the Indians, with a view to the ultimate creation of a state or states of the Union to embrace public lands within the Indian Territory. There were other reasons also which prompted Congress to take this action. Congress was concerned about the protection of the rights of the members of the tribe in the communal property.
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> Pursuant to the direction of Congress and the authority conferred upon it, the Dawes Commission on April 23, 1897, after a series of negotiations covering several years, arrived at an agreement, called the Atoka Agreement, with appellant which, as amended by Congress, was ratified by Section 29 of the Act of June 28, 1898, 30 Stat. 495, commonly known as the Curtis Act.
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> On March 21, 1902, representatives of the Choctaw Nation and the Dawes Commission negotiated a Supplemental Agreement, which was ratified by Congress by the Act of July 1, 1902, 32 Stat. 641.

The court explained that the intended purposes of these agreements were for the United States to take over the management, control, and administration of the property, affairs, and funds of the plaintiff theretofore exercised by plaintiff's tribal government; to continue the tribal government only for limited purposes; and to administer and eventually dispose of the property and funds of the Indians for their benefit and best interest. The agreements contained many provisions

as to the manner in which the lands and other property of the tribe should be handled, managed, and disposed of, all under the supervision and control of defendant and all for the benefit of plaintiff. Neither agreement contained any provision whereby defendant expressly agreed to assume and pay expenses incident to carrying out the agreements, except for expenses, not involved here, relating to town lots and allotted lands. Id.

A 1924 jurisdictional act, 94 Stat. 537, which gave rise to the 1940 decision, gave the Court of Claims jurisdiction to:

> * * * hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, * * *.

Under this act plaintiff filed an original and two amended petitions claiming, inter alia, reimbursement for $789,773.17 expended by defendant from plaintiff's funds for expenses incident to carrying out the Atoka and Supplemental Agreements. These expenses were identical to those sued for in the instant case, except that the accounting period ran from July 1, 1898, through June 30, 1929, and except that certain related accounts were included in the 1940 suit but not in the instant case.

In allegation V of the first amended petition in the 1940 case, plaintiff alleged that the Dawes Commission in their representations and preliminary proposals led plaintiff to believe that no administrative

expenses incident to disposing of the common properties would be charged plaintiff. In support of this allegation a copy of the Dawes Commission negotiations was entered in the record. No other evidence on inducements was introduced.

Plaintiff, after quoting the Dawes Commission proposals beginning at page 61 in its proposed findings, then argued that omission of any mention in the Commission proposals as to who was to pay the expenses left the inference that the parties never contemplated that the Indians would pay them.

The court rejected these contentions, stating:

> . . . . When the government assumes the expenses involved in the management, control, and disposition of property of an Indian tribe, it generally provides for so doing, and we cannot infer a liability in this regard where the legislation concerned with the subject matter deals specifically with the details of procedure and makes no mention of such an assumed liability. [91 Ct. Cl. at 368-69.]

The court went on to hold that defendant derived no pecuniary benefit under the agreements and that the intent, evidenced by the agreements themselves, clearly did not impose upon defendant the obligation of paying the expenses involved.

In comparing the foregoing with the instant case we conclude that the jurisdictional act of the prior case did not include plaintiff's clause (5) claim alleged in the instant case, nor was such an issue reached or reachable in the prior case. Res judicata, therefore, does not apply as between the instant case and the 1940 Court of Claims case.

Next, we determine whether res judicata or collateral estoppel applies as between the decision in Docket 55 and plaintiff's claim alleged in the instant case.

In 1951 plaintiff again sued defendant for the same Atoka Agreement and Supplemental Agreement expenses, covering the same accounting period as in the 1940 case, except that this time suit was brought before this Commission under clauses (3) and (5) of our act. This case became our Docket 55. Our decision denying recovery on the merits, 1 Ind. Cl. Comm. 553 (1951), was affirmed by the Court of Claims on appeal. 128 Ct. Cl. 195 (1954).

The amount sued on in this second suit was about $36,000 less than the demand in 1940, a difference caused by excluding certain items of account. The factual allegations once again hinged on alleged inducements and representations by defendant leading plaintiff to believe defendant had assumed payment of the expenses involved.

Defendant, in a motion for summary judgment filed in Docket 55, claimed that the 1940 Court of Claims decision barred plaintiff's action before this Commission. We upheld this position, doing so in terms of res judicata prior to the instructional Creek cases, supra.

However, we went on to decide the issue of inducements and representations on the merits. We held that plaintiff had not

> . . . shown any representations on the part of the defendant that it would bear any of the expenses for which suit is brought, nor has [plaintiff] shown any reasonable basis for it, or any of its members believing, if they did, that the defendant was to bear the expenses complained of. [1 Ind. Cl. Comm. at 572.]

The parties, the legal principles, and the controlling allegations of fact relating to inducements in Docket 55 and in the instant case are identical. However, the demand is different. This difference occurs because the accounting sued on in each case covers different calendar periods. The demand in the instant case covers expenses arising from June 30, 1929, to June 30, 1951. The demand in Docket 55 covers identical expenses prior to June 30, 1929.

Applying the rules enunciated in the cited Creek cases, we conclude that plaintiff is collaterally estoppel to proceed under clause (3) in the instant case. As we have pointed out, the allegations of fact in the two petitions are identical; only the amounts and periods of recovery differ. Plaintiff proposed findings of fact supporting such claim, and the Commission entered findings of fact requiring denial of the claim, which was in fact denied. The Court of Claims affirmed.

As to plaintiff's clause (5) claim, the petitions in this case and in Docket 55 are again identical except for the amounts and periods of recovery. However, plaintiff proposed no findings in Docket 55 specifying lack of fair and honorable dealings, and the Commission made none. The Court of Claims in a footnote to its decision affirming the Commission's dismissal of Docket 55, noted these facts and stated that it presumed plaintiff had abandoned the fair and honorable dealings claim. 128 Ct. Cl. at 197.

In the field of collateral estoppel the weight of authority seems to be that where there is a decree on the merits of a case, it is conclusive on all matters put in issue by the pleadings, litigated and decided, even though not discussed in the court's opinion. However,

where a matter has been put in issue and litigated, but is not decided by the court, the decision on other issues will not estop the subsequent litigation on the issue not decided. U. S. ex rel Donner Steel Company v. Interstate Commerce Commission, 56 App. D. C. 44, 8 F.2d 905 (1926), cert. denied, 270 U.S. 651 (1926). There is some authority to the contrary, resting on the theory that the court must have taken the unmentioned but litigated issue into consideration in reaching its decision. See 1B Moore and Currier, Moore's Federal Practice, § 0.443 [4] (2d ed. 1965).

There are two possible approaches to plaintiff's clause (5) claim in the instant case in the light of the prior decision in Docket 55. Plaintiff's allegations in both petitions assert that the action is brought "under and by virtue of the authority contained in provisions (3) and (5) of Section 2" of the Indian Claims Commission Act. The two petitions then describe the events leading up to the passage of the Dawes Commission Act, the Atoka Agreement, and the Supplemental Agreement. Both petitions then allege that the agents of defendant, in an effort to induce plaintiff to enter into the two agreements, represented (or misrepresented) the provisions in such a way that plaintiff's ancestors were justified in believing that none of the expenses later charged to tribal funds would be so charged; and that had plaintiff known that the agreements would obligate plaintiff to bear such expenses, the agreements would not have been ratified by plaintiff. These specific allegations all support plaintiff's claim under clause (3), particularly as they relate to unilateral mistake and, possibly, fraud on the part of the United States in misrepresenting the meaning of the language in the agreements. The petition does not state

that these specific allegations relate only to the clause (3) claim. If we assume that these allegations were intended to support the clause (5) claim as well, then plaintiff is collaterally estopped from relitigating that claim in the light of the Commission's Docket 55 decision, affirmed by the Court of Claims, rejecting plaintiff's proof of the allegations.

On the other hand, if plaintiff in Docket 55 and in the instant case had some other actions of the Government in mind which would support its claim that defendant acted unfairly and dishonorably in charging these expenses to the Indians, it would appear that both petitions were deficient for alleging only conclusions -- i.e., lack of fair and honorable dealings -- without specific supporting allegations, and the clause (5) claims in both petitions would be vulnerable to dismissal on that ground.

The fact that plaintiff did not make such specific allegations, did not propose any specific findings in support of the clause (5) claim, and did not argue the claim in the briefs in Docket 55, strongly indicates that plaintiff was relying on the same operative facts in support of both the clauses (3) and (5) claims. Since the petition in Docket 249 is identical with the Docket 55 petition, except for the period of time and amount of recovery involved, the Commission is justified in assuming with respect to clause (5) that plaintiff is relying on the same supporting allegations, record and facts presented in Docket 55 and found insufficient on the merits. Under the circumstances, it is not necessary to rely on the court's footnote in Docket 55 in

which the court speculates concerning the possible abandonment by plaintiff in that case of its clause (5) claim. We assume that plaintiff's clause (5) claim was not abandoned in Docket 55, but that it was decided adversely to plaintiff by implication and without specific mention. Plaintiff's attempt to relitigate the identical claim herein is barred therefore under the doctrine of collateral estoppel.

We have examined the remaining arguments raised by plaintiff and find no merit in them. The tribe's earlier reliance on Seminole Nation v. United States, 102 Ct. Cl. 564 (1944) is inapposite. The Court of Claims very carefully distinguished the 1940 Choctaw case in the Seminole case itself, as follows:

> In our former opinion [93 C. Cls. 532] we allowed these expenses as gratuities on the authority of Choctaw Nation v. United States, 91 C. Cls. 320, 366, 371. However, we then overlooked the fact that the agreement under construction in that case had specifically provided that the United States should bear certain expenses incident to the breaking up of tribal ownership and that the claim there asserted by plaintiff was to recover other expenses charged to it which had not been assumed by the United States. We held that the specific assumption by the United States of a certain part of the expenses negatived an intention to assume others. In the case at bar the agreement was altogether silent as to who should bear any part of the expenses. [Id. at 631.]

We therefore grant defendant's motion for summary judgment on the first claim.

We also deny plaintiff's motion to amend the first claim (described above) because the conclusions we have reached above concerning res judicata and collateral estoppel apply with equal force to the claim as modified under the proposed amendment.

Fourth Claim Motions

These two motions are taken together because if plaintiff's motion to dismiss is granted, then defendant's joinder motion becomes moot.

Plaintiff's motion to dismiss the fourth claim has been approved by the Bureau of Indian Affairs by letter dated October 27, 1972, from John O. Crow, Deputy Commissioner of the Bureau, to Harry J. W. Belvin, Principal Chief, Choctaw Nation. We received a copy of this letter attached to a cover letter from tribal counsel, along with a copy of Chief Belvin's letter of September 28, 1972, to the Commissioner of Indian Affairs requesting dismissal approval. We enter these documents into the record as Commission Exhibits 1, 2 and 3, respectively.

Deputy Commissioner Crow's letter of October 27, 1972, states in pertinent part justification for dismissal as follows:

> You explained that the same claim was in Court of Claims Case No. J-231 decided April 6, 1936 (83 Ct. Cl. 140), and that the interpretation by the Court of Claims as set out in its decision would continue to apply to the said cause of action in paragraph 14 of Docket No. 249.

We have examined the case cited and conclude that this motion is appropriate, and we therefore grant dismissal.

Defendant's Motion to Order Plaintiff to File Exceptions

The surviving accounting claims in this docket are the third claim, a specific claim relating to tribal funds expended by the Government for educational purposes, and the final claim, relating to a demand for general accounting.

Under the accounting case procedural guidelines of Sioux Tribe v. United States, Dockets 114, et al., 12 Ind. Cl. Comm. 541 (1963), ordinarily no order need be issued by us directing a plaintiff to file its exceptions to a General Accounting Office Report within 90 days. A dismissal in this case might have been appropriate from 90 days after the filing of the report, except that prior motions were pending. Such pending motions extend the 90 day time period until the motions are disposed of and until the Commission has set a new period for filing exceptions to the report.

Having now disposed of all pending motions in this opinion, plaintiff has 90 days from the date of our order to make exceptions to the accounting report.

CONCLUSION

An order is to be signed rendering summary judgment for defendant as to the first claim and denying plaintiff's motion to amend the same claim; dismissing the fourth claim and defendant's joinder motion; denying defendant's motion for summary judgment to all claims; and ordering appropriate further proceedings.

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner