APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-0032

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff-Counter-Defendant-Appellee,

v.

SENECA COUNTY, NEW YORK,

Defendant-Counter-Claimant-Appellant.

Argued: Jan. 7, 2020
Decided: Oct. 23, 2020

Before: KEARSE, CALABRESI, and CARNEY,
Circuit Judges.

OPINION

CARNEY, *Circuit Judge*:

This appeal poses the question whether a federally recognized Indian tribe's sovereign immunity from suit prevents a county in New York State from foreclosing on tribal properties within the county's borders for the nonpayment of real estate taxes.

In 2007, the Cayuga Indian Nation of New York (the "Cayuga Nation," the "Cayugas," or the "Tribe") purchased several parcels of land located in Seneca County, New York (the "Properties"). After the Cayugas refused to pay real property taxes levied by Seneca County (the "County") on the Properties, the County in 2010 initiated foreclosure proceedings (the "Foreclosure Actions") under Article 11 of the New York Real Property Tax Law ("Article 11"). In response, the Cayugas sued the County in federal district court, asserting (among other claims) that the Foreclosure Actions were barred by the doctrine of tribal sovereign immunity from suit. The United States District Court for the Western District of New York (Siragusa, *J.*) agreed with the Cayuga Nation, ruling in its favor on the parties' cross-motions for summary judgment and enjoining the County from proceeding with the Foreclosure Actions.

In this appeal, Seneca County argues in principal part that the Foreclosure Actions may proceed under an "immovable-property exception" to tribal sovereign immunity from suit. At common law, the County asserts, a sovereign (*e.g.*, France) would not be immune from legal actions that challenged the sovereign's rights to real (*i.e.*, immovable) property located outside that sovereign's own territory (*e.g.*, in the United States). The County urges us to recognize an analogous exception here to the general rule of tribal sovereign immunity from suit, reasoning that the scope of the immunity to which indigenous tribes are entitled cannot exceed that enjoyed at common law by other sovereigns. On this basis, Seneca County contends, the Foreclosure Actions are permitted.

We need not reckon with the merits of that position, however, because we conclude that, even were we to recognize the County's proposed exception to immunity, the Foreclosure Actions lie outside its bounds. As we explain below, the Foreclosure Actions do not seek to establish Seneca County's *rights* in real estate such as are the animating concern of the immovable-property exception. Rather, because in the Foreclosure Actions the County seeks to seize the Properties as a *remedy* for the nonpayment of taxes, the proceedings are best seen as the functional equivalent of an action to execute on a money judgment. Viewed accordingly, they lie well within the categories of suits from which sovereigns were traditionally immune under the common law, and the existence or not of an immovable-property exception to tribal sovereign immunity is of no moment.

We also reject the County's interpretation of *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) ("*Sherrill*"), as wholesale authorization for state tax foreclosure actions against tribes. We have previously considered and discarded that reading of *Sherrill* in two decisions: *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010) ("*Oneida I*"), *vacated and remanded sub nom. Madison County v. Oneida Indian Nation of New York*, 562 U.S. 42 (2011), and *Cayuga Indian Nation of New York v. Seneca County*, 761 F.3d 218 (2d Cir. 2014) ("*Cayuga I*") (preliminary injunction decision). While, as a technical matter, neither opinion's interpretation of *Sherrill* binds our ruling here, we agree with the reasoning consistently adopted in those two decisions. We therefore finally put to rest the misguided claim that *Sherrill*

abrogated a tribe's sovereign immunity from suit. Read properly, it merely narrowed the scope of tribal immunity from certain forms of state regulation.

For these reasons, and as set forth more fully below, we AFFIRM the judgment of the District Court.

BACKGROUND

The factual background relevant to this appeal is undisputed and was established by the parties in their summary judgment submissions.

The Cayuga Nation is an Indian tribe recognized by the United States government. In 2007, the Cayugas purchased the Properties, comprising five parcels of land located within the boundaries of Seneca County, in upstate New York.[1] The Tribe refused to pay the related real property taxes levied by the County, however, taking the position that the Properties lay in "Indian country" within the meaning

[1] During the state foreclosure proceedings, the five parcels that constitute the Properties were reconfigured as four separate parcels.

of federal law.[2] App'x 13.[3] In due course, the Cayugas' unpaid tax bill resulted in the imposition of liens against the Properties by operation of Article 11 of the New York Real Property Tax Law, the state statutory scheme governing the County's collection of real property taxes. *See Oneida Indian Nation of N.Y. v. Madison Cty.*, 665 F.3d 408, 429-30 (2d Cir. 2011) ("*Oneida II*") (reviewing "the default tax-enforcement procedure established by Article 11"). Then, in October 2010, Seneca County moved under Article 11 to foreclose on the liens and seize the underlying Properties in satisfaction of the Cayugas' tax debt.

As noted above, the Cayugas proceeded to sue the County in federal district court, seeking to enjoin the foreclosure proceedings. The Tribe maintained that New York law exempts their lands from state and local taxation, and that the Foreclosure Actions are also

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[2] As we have explained elsewhere,

> "Indian country" is . . . statutorily defined as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri, 802 F.3d 267, 280 (2d Cir. 2015) (quoting 18 U.S.C. § 1151).

[3] Unless otherwise noted, this Opinion omits all alterations, citations, footnotes, and internal quotation marks in quoted text.

barred by tribal sovereign immunity and the federal Nonintercourse Act, 25 U.S.C. § 177.[4]

In August 2012, the District Court entered a preliminary injunction halting the Foreclosure Proceedings based entirely on the Tribe's claim of sovereign immunity from suit. In doing so, it relied heavily on our analysis in *Oneida I*, where we held that "the long-standing doctrine of tribal sovereign immunity" precluded New York counties from pursuing "[t]he remedy of foreclosure" against tribes that refuse to pay property taxes. 605 F.3d at 151. The Supreme Court vacated our *Oneida I* decision when, after the Court granted certiorari, the tribe expressly waived its sovereign immunity in that proceeding. *See Madison Cty. v. Oneida Indian Nation of New York*, 562 U.S. at 42.[5] Nonetheless, the District Court found

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[4] The Nonintercourse Act (the "Act") generally "bars sales of tribal land without the acquiescence of the Federal Government." *Sherrill*, 544 U.S. at 204. In connection with their claim under the Act, the Cayugas assert that the Properties lie within the historical boundaries of a 64,000-acre federal reservation that the Treaty of Canandaigua established in 1794 for their tribe. Although in 1795 and 1807 they sold most of this land to the State of New York, the Cayugas allege in their complaint that the absence of Congressional approval for the sales rendered the transactions void and violative of the Nonintercourse Act, a position that, the Cayugas argue in a recent submission to the Court, is supported by the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). For its part, Seneca County disputes that the Treaty of Canandaigua established a reservation for the Cayugas in the first place.

[5] While review of *Oneida I* was pending in the Supreme Court, the Oneida Indian Nation "passed a tribal declaration and ordinance waiving its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States." *Madison*

persuasive the reasoning we had adopted in the vacated decision, concluding on grounds similar to those we cited there that the Foreclosure Actions were very likely barred by the Tribe's sovereign immunity from suit, justifying an award of preliminary relief to the Tribe.

The County appealed, invoking our interlocutory jurisdiction. In July 2014, a panel of this Circuit affirmed the District Court's order. *See Cayuga I*, 761 F.3d at 221. In a brief opinion, we declined to express a view as to the substantive import of the Supreme Court's vacatur of *Oneida I*. *See id.* at 220. Instead, based on an independent review of the relevant law, our per curiam opinion simply reaffirmed *Oneida I*'s conclusion that federally recognized tribes are immune from local tax foreclosure actions, *see id.* at 220-21, and therefore that the District Court did not abuse its discretion by entering preliminary injunctive relief.

Following remand, the parties cross-moved for summary judgment, and on December 11, 2018, the District Court ruled in favor of the Cayugas. Relying principally on its earlier preliminary injunction ruling and our interlocutory decision in *Cayuga I*, the District Court concluded that tribal sovereign immunity from suit prevented Seneca County from

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Cty. v. Oneida Indian Nation of N.Y., 562 U.S. at 42. In light of this "new factual development," the Supreme Court vacated our judgment in a brief order and remanded for further proceedings. *Id.* On remand, we found that the tribe's express waiver compelled the conclusion that sovereign immunity no longer barred the counties' tax enforcement actions; the appeal was then resolved on other grounds. *See Oneida II*, 665 F.3d at 414-15.

foreclosing on the Properties. It therefore granted the declaratory and permanent injunctive relief that the Cayugas requested and dismissed their remaining claims as moot. The County then filed this timely appeal.

DISCUSSION

We review *de novo* a district court's grant of summary judgment, "construing the evidence in the light most favorable to the non-moving party." *CIT Bank N.A. v. Schiffman*, 948 F.3d 529, 532 (2d Cir. 2020). A district court may award summary judgment "only if the court concludes that the case presents no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Morgan v. Dzurenda*, 956 F.3d 84, 88 (2d Cir. 2020).

Seneca County advances two main contentions on appeal. First, it asserts that an "immovable-property exception" to sovereign immunity permits the Foreclosure Actions. Generally speaking, this exception refers to a common law doctrine that curtails sovereign immunity in legal actions contesting a sovereign's rights or interests in real property located within another sovereign's territory. Second, the County urges that the Supreme Court's decision in *Sherrill* ended tribal sovereign immunity altogether in tax foreclosure actions.

Below, we consider these arguments in turn. At the threshold, however, we briefly address whether *Cayuga I* controls this appeal—a position pressed by the Cayugas, who insist that it does because the County raises in this appeal the very arguments that we considered and rejected in *Cayuga I*.

The Cayugas' view is incorrect. We resolved *Cayuga I* on interlocutory appeal of a preliminary injunction, a distinctive procedural posture. We long ago observed that, "[o]rdinarily, findings of fact and conclusions of law made in a preliminary injunction proceeding do not preclude reexamination of the merits at a subsequent trial." *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998). This is because a preliminary injunction order is, by its very nature, "tentative." *Goodheart Clothing Co. v. Laura Goodman Enters., Inc.*, 962 F.2d 268, 274 (2d Cir. 1992). To secure preliminary injunctive relief, a plaintiff must show "a likelihood of success on the merits"—it need not achieve "*actual* success." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) (emphasis added). As we explained in *Goodheart Clothing*, "[i]t would . . . be anomalous at least in most cases, and here, to regard the initial [preliminary injunction] ruling as foreclosing the subsequent, more thorough consideration of the merits that the preliminary injunction expressly envisions." 962 F.2d at 274.

Two additional considerations reinforce the correctness of this conclusion. First, in *Cayuga I*, we did not explicitly address Seneca County's immovable-property argument, and as a general practice, we avoid relying on "implicit holding[s]." *Villanueva v. United States*, 893 F.3d 123, 131 (2d Cir. 2018) (citing *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Second, we think that the Supreme Court's decision in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) ("*Upper Skagit*"), weighs in favor of treating the County's invocation of the immovable-property exception as presenting an as-yet unresolved question

of law. In *Upper Skagit*, which the Supreme Court decided after we issued our opinion in *Cayuga I*, neighboring landowners filed an adverse possession action against the Upper Skagit Tribe, seeking to quiet title to a disputed strip of land as to which both groups lay claim. *Upper Skagit*, 138 S. Ct. at 1652. The Washington State Supreme Court initially ruled against the tribe, but the landowners later conceded that the state court's decision rested on an erroneous interpretation of *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). *See Upper Skagit*, 138 S. Ct. at 1652-53. The landowners nevertheless urged the United States Supreme Court to affirm the state court's judgment based on the immovable-property exception to sovereign immunity. *Id.* at 1654.

The Supreme Court declined to address this proposed alternative ground for affirmance, choosing instead to direct the state court to consider the immovable-property exception (presumably, both its definition and application) in the first instance. *See id.* At the same time, four of the Justices signaled their willingness to embrace recognition of such an exception to tribal immunity from suit. In dissent, Justices Thomas and Alito expressed the view that an immovable-property exception—which they described as having been "hornbook law almost as long as there have been hornbooks"—"plainly extends to tribal immunity, as it does to every other form of sovereign immunity." *Id.* at 1657 (Thomas, *J.*, dissenting). For their part, Chief Justice Roberts and Justice Kennedy identified concerns about applying tribal immunity from suit to "property disputes of this sort," writing that, "if it turns out that the [immovable-property

exception] does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would . . . need to be addressed in a future case." *Id.* at 1655-56 (Roberts, *C.J.*, concurring).

In light of these considerations, we do not think that our decision in *Cayuga I* compels us to affirm the District Court's judgment. Rather, we do so for the reasons stated below.

I. The Immovable-Property Exception

As "domestic dependent nations," federally recognized tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Courts must avoid "carving out exceptions" to that immunity and should take care not to restrict tribes' historic immunity from suit. *Id.* at 789-90; *cf. Lewis v. Clarke*, 137 S. Ct. 1285, 1293 (2017) (cautioning against "extend[ing] sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees"). The power to restrict the scope of a tribe's immunity from suit lies, instead, with Congress (which is empowered to authorize suits against tribes) and with the tribes themselves (which may waive their immunity from suit, as occurred in *Oneida II*, 665 F.3d at 414). *See Bay Mills*, 572 U.S. at 788.

Seneca County contends that the common law has long recognized an exception to state and foreign sovereign immunity in certain cases involving real property. The County urges us to find an analogous exception to tribal sovereign immunity, warning that

a contrary holding would "confer[] super-sovereign authority to the Cayuga Nation." Appellant's Br. 14.

To resolve this appeal, however, we need not rule on the existence of such an exception to tribal immunity. This is because, as discussed below, we conclude that the Foreclosure Actions fall outside the purview of the common law version of the immovable-property exception. Otherwise said: even if the County is correct that an immovable-property exception limits tribal sovereign immunity from suit, that exception provides no basis for disturbing the District Court's judgment and allowing the Foreclosure Actions to proceed.

American common law has long recognized an "exception to sovereign immunity for actions to determine rights in immovable property." *Upper Skagit*, 138 S. Ct. at 1655 (Roberts, *C.J.*, concurring); *see also City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 374 (2d Cir. 2006) ("*Permanent Mission of India I*") ("This principle . . . long predated the restrictive theory of sovereign immunity and the [Foreign Sovereign Immunities Act]."). This rule—which has developed primarily in the context of international law and practice—derives from two basic aspects of sovereign authority.[6] The first is that "property ownership is not

[6] As noted in the text of this Opinion, questions regarding the applicability of the immovable-property exception have to date arisen most often in the context of suits against foreign sovereigns. *See Upper Skagit*, 138 S. Ct. at 1657-60 (Thomas, *J.*, dissenting) (tying the emergence of the exception to international law and practice); *see also* Restatement (Fourth) of Foreign Relations Law of the United States § 456, reporters' n.2 (Am. Law Inst. 2018) (collecting cases applying the exception to foreign

an inherently sovereign function." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) ("*Permanent Mission of India II*"). Thus, when a state acquired land outside of its own territory, courts traditionally treated that land as if it were owned by a private individual. *See Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction, he may be considered as so far laying down the prince, and assuming the character of a private individual.").

The second is that each state has "a primeval interest in resolving disputes over use or right to use of real property" located within its own territory. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, *J.*). Land is "indissolubly connected with the territory of a [s]tate," *Upper Skagit*, 138 S. Ct. at 1658 (Thomas, *J.*, dissenting); the boundaries of a state's territory, in turn, generally limit the reach of the state's sovereign powers, *see The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."). A state therefore "cannot safely permit the title to its land to be determined by a foreign power." *Asociacion de Reclamantes*, 735 F.2d at 1521 (quoting 1 F. Wharton, Conflict of Laws § 278, at 636 (3d ed. 1905)).

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sovereigns). The Supreme Court has recognized and applied an analogous exception, however, in suits against the states. *See Upper Skagit*, 138 S. Ct. at 1655 (Roberts, *J.*, concurring); *see also Georgia v. City of Chattanooga*, 264 U.S. 472, 480-482 (1924).

In keeping with these principles, courts and other authorities have generally understood the immovable-property exception as permitting only those lawsuits against a sovereign that "contest[]" its rights or interests in real property. Restatement (Second) of Foreign Relations Law of the United States § 68 cmt. d (Am. Law Inst. 1965).[7] Accordingly, the exception has not been thought to eliminate the immunity defense as to "disputes that arise out of [a foreign sovereign's] rights in real estate but do not actually place [those rights] at issue." *Permanent Mission of India I*, 446 F.3d at 369.[8] Nor has it been applied when the party who invokes the exception "makes no claim to any interest" in a foreign sovereign's real property and is "not seeking to establish any rights" in that

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[7] Different articulations of the immovable-property exception have found favor over the years. *Compare* Restatement (Second) of Foreign Relations Law § 68(b) (the exception covers "action[s] to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction"), *with Permanent Mission of India I*, 446 F.3d at 375 (the exception covers "disputes directly implicating property interests or rights to possession"). As discussed in the text of this Opinion, however, all of the various articulations of the exception center on actions asserting claims to rights or interests in real property that compete with those of the sovereign.

[8] In many of these cases, courts looked to the common law immovable-property exception to help them interpret the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. § 1602 *et seq.*, the statute that now "governs federal courts' jurisdiction in lawsuits against foreign sovereigns." *Permanent Mission of India II*, 551 U.S. at 195. This is because, in enacting the FSIA, Congress intended "to codify the pre-existing real property exception to sovereign immunity recognized by international practice." *Id.* at 200; *see also infra* p. 16-17.

property. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987). Instead, the immovable-property exception has reached only those disputes that require the court to resolve competing claims to a right or interest in real property. *See* Restatement (Second) of Foreign Relations Law § 68 cmt. d (describing the exception as covering "actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction").

Thus, for example, the exception plainly applies to, and allows, a state's eminent-domain proceedings against a foreign state's property located in the state exercising eminent domain. *Permanent Mission of India II*, 551 U.S. at 200. In such proceedings, the parties assert conflicting rights to land. *See Chattanooga*, 264 U.S. at 480 (describing the state's right of eminent domain as "superior to property rights" and as "extend[ing] to all property with the jurisdiction of the State"); *see also Kohl v. United States*, 91 U.S. 367, 371 (1875) (making a similar point). The exception has also been held to cover and permit lawsuits seeking to establish "the validity of [a city's] tax liens on property held by [a foreign] sovereign." *Permanent Mission of India II*, 551 U.S. at 195. In such cases, an interest in property—*i.e.*, the existence of a valid lien on real estate—is in dispute.

In contrast, courts have concluded that the immovable-property exception does not extend to lawsuits against a foreign sovereign that: (1) arise out of a slip-and-fall injury occurring on the foreign sovereign's land, *id.* at 200; (2) seek damages and

injunctive relief on the theory that building renovations on the foreign sovereign's property depreciated the value of neighboring lands, *MacArthur Area Citizens Ass'n*, 809 F.2d at 919, 920-21; or (3) seek monetary compensation from the foreign sovereign in connection with the expropriation of real property located in the United States, *Asociacion de Reclamantes*, 735 F.2d at 1519, 1520-24. Those types of disputes may "arise out of . . . rights in real estate," but they all fall short of "actually plac[ing] [those rights] at issue." *Permanent Mission of India I*, 446 F.3d at 369.

Turning back to Seneca County, we conclude that the Foreclosure Actions fall outside the ambit of the common law exception to sovereign immunity for matters involving immovable property. Although a foreclosure action certainly involves real property, the Cayuga Nation observes—and we are convinced—that these "tax enforcement actions are—fundamentally—about money, not property." Appellee's Br. 32. In commencing the Foreclosure Actions under Article 11, Seneca County does not seek a court determination that its tax liens against the Properties are valid. *See Oneida II*, 665 F.3d at 430 (observing that, under Article 11, "unpaid taxes and other assessments automatically become a lien against the property" after a certain period of time has passed). Nor does the County challenge the legitimacy of the Cayugas' existing rights or interests in those Properties. Rather, Seneca County invokes its tax-collection powers to seize the Properties under Article 11 as satisfaction for the Cayugas' financial debt for accrued, unpaid property taxes.

True, if Seneca County prevailed in the Foreclosure Actions, it would acquire title to the Properties. *See Kennedy v. Mossafa*, 100 N.Y.2d 1, 8 (2003) (explaining that, under Article 11, "the court enters a judgment directing that title pass in fee simple absolute to the county"). That transfer of title, however, would simply serve as a *remedy*—a way to satisfy the Tribe's tax debt. Thus, contrary to the County's urging, we do not view the Foreclosure Actions as "actions *to determine* rights in immovable property." *Upper Skagit*, 138 S. Ct. at 1655 (Roberts, *C.J.*, concurring) (emphasis added). Rather, we see them as actions to pursue a remedy that is available to Seneca County by virtue of its rights in immovable property. Accordingly, the Foreclosure Actions are not covered by the immovable-property exception to sovereign immunity as it has been recognized at common law.

We find additional support for our conclusion in the Restatement (Second) of Foreign Relations Law of the United States (Am. Law Inst. 1965). Courts have regularly consulted this edition of the Restatement when faced with ascertaining the scope of the common law exception to sovereign immunity for immovable property. *See, e.g.*, *Permanent Mission of India II*, 551 U.S. at 200; *Permanent Mission of India I*, 446 F.3d at 372. In comment (d) of section 65, which generally addresses the "[i]mmunity of foreign state[s] from jurisdiction to enforce tax laws," the Restatement reports that (as of that writing) "no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale." Restatement (Second) of Foreign Relations Law § 65 cmt. d. This void, the Restatement explains,

arises because although "particular types of property of foreign governments may be carried on the tax rolls and be made the subjects of levy and assessment," the common law immunities enjoyed by foreign sovereigns "prevent[] the actual enforcement against the property of a foreign state of a tax claim of the territorial state." *Id.*

Seneca County attempts to downplay the significance of comment (d)'s report by suggesting that it "relates only to tax liability arising from ownership of movable property by a foreign sovereign, not tax liability from ownership of immovable property." Appellant's Br. 25. The Restatement does not expressly acknowledge any such limitation, however, and we see no reason to infer one. In any event, the County identifies no case before or since the Restatement issued in which a court in the United States has applied the common law exception for immovable property to permit the foreclosure of a foreign sovereign's real property for nonpayment of taxes.[9]

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[9] In support of its contrary position, Seneca County relies primarily on authorities that we find inapposite: (1) cases and scholarly works that restate the immovable-property exception in general terms; (2) cases in which rights to real property were actually in dispute, *see, e.g.*, *Chattanooga*, 264 U.S. at 472 (eminent-domain proceeding), *Permanent Mission of India II*, 551 U.S. at 195 (lawsuit contesting validity of tax lien); (3) cases that concern doctrines other than the immovable-property exception to sovereign immunity, *see, e.g.*, *State v. City of Hudson*, 231 Minn. 127, 128, 42 N.W.2d 546, 547 (1950)(applying state constitutional provision);*see also, e.g.*, *City Council of Augusta v. Timmerman*, 233 F. 216, 218 (4th Cir. 1916)(applying the rule that "courts will not interfere by injunction with the collection of the public revenue, on the ground that a tax is illegal, unless it

Seneca County's failure to produce such a case is telling, but hardly surprising. Until the middle of the 20th century, the United States afforded foreign sovereigns "absolute immunity" from the execution of judgments against their properties located in this country. *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1233 (2d Cir. 1995); *see also* Restatement (Fourth) of Foreign Relations Law of the United States§ 464 reporters' n.1 (Am. Law Inst. 2018) ("Prior to the enactment of the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments.").[10] Thus, "[e]ven if a court

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clearly appears that the complainant has no adequate legal remedy"); and (4) several academic articles that purportedly identify a handful of judicial decisions (all issued by foreign courts) authorizing the execution of judgment against a foreign sovereign's real property, *see, e.g.*, Charles Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 AM. J. INT'L L. 566, 567 (1928); Note, *Execution of Judgments Against the Property of Foreign States*, 44 HARV. L. REV. 963, 965 (1931). In our view, these sources fall far short of establishing that the immovable property exception under common law should be understood to permit tax foreclosure actions against a foreign sovereign's property.

[10] As we noted above, when describing the common law exception to sovereign immunity for immovable property, courts have generally looked to the Restatement (Second) of Foreign Relations Law. *See, e.g.*, *Permanent Mission of India II*, 551 U.S. at 200; *Permanent Mission of India I*, 446 F.3d at 372. This is because the Restatement (Second) predates the enactment of the FSIA, whereas more recent editions of the Restatement postdate the statute and so naturally focus on the FSIA's articulation of a statutory immovable-property exception to foreign sovereign immunity. In any event. we do not see anything in the Restatement (Third) or Restatement (Fourth) of Foreign Relations Law that casts doubt on the analysis offered here.

acquired jurisdiction and awarded judgment against a foreign state," the "[s]uccessful plaintiffs [would have] to rely on voluntary payment by the foreign state" to obtain satisfaction of judgment because the foreign sovereign's property remains shielded from attachment, arrest, or execution. *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 476-77 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018); *see also Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 708 (2d Cir. 1930) ("The clear weight of authority in this country, as well as that of England and Continental Europe, is against all seizures [of a foreign sovereign's property], even though a valid judgment has been entered.").

Nothing in the longstanding case law, moreover, suggests that this common law rule of "complete immunity from execution" recognized an exception for immovable property. *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 251 (5th Cir. 2002); *see also Stephens*, 69 F.3d at 1233 (observing that "[t]he only exception to this rule was that attachment could sometimes be allowed in order to obtain jurisdiction over the foreign entity"). In line with this view, we observe that Congress apparently did not conceive that such a limitation already existed when, as part of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), it created a series of statutory "[e]xceptions to the immunity from attachment or execution"—including, most notably, an immovable-property exception. 28 U.S.C. § 1610; *see also id.* § 1610(a)(4) (generally abrogating immunity from execution where "the execution relates to a judgment establishing rights in property . . . (B) which is immovable and situated in the United States"). As evidenced by the FSIA House Report, Congress saw

these statutory exceptions as deviations from the common law rule of "absolut[e] immun[ity] from execution." H.R. Rep. 94-1487, 27 (1976), *reprinted at* 1976 U.S.C.C.A.N. 6604, 6626; *see also Permanent Mission of India I*, 446 F.3d at 371 (describing the FSIA House Report as "reliable legislative history"). The Report explains, in particular, that "[s]ections 1610(a) and (b)" of the FSIA—which set forth all of the FSIA's exceptions to immunity from execution—were "intended to modify this rule by partially lowering the barrier of immunity from execution." 1976 U.S.C.C.A.N. at 6626.

A foreclosure action under Article 11 differs in no meaningful way from an execution of judgment against property. Just as execution or attachment enforces a money judgment by seizing the debtor's property, the Foreclosure Actions seek a court order awarding Seneca County title to the Properties as satisfaction for the Cayugas' acknowledged money debt. *See Execution*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "execution" as the "[j]udicial enforcement of a money judgment, usu[ally] by seizing and selling the judgment debtor's property"); *Attachment*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "attachment" as "[t]he seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment"). The County's tax enforcement proceedings therefore fall comfortably within the absolute immunity from execution of judgment that foreign sovereigns traditionally enjoyed at common law.

For all these reasons, we conclude that the common law exception to sovereign immunity for

lawsuits concerning immovable property does not cover the Foreclosure Actions. Accordingly, we need not—and do not—decide whether an analogous exception limits the scope of tribal sovereign immunity from suit.

II. *Sherrill's* Import

Seneca County also urges us to overturn the District Court's judgment based on the Supreme Court's decision in *Sherrill*. In the County's view, the *Sherrill* Court held that a tribe's immunity from suit does not bar tax enforcement actions seeking to foreclose on lands purchased by the tribe on the open market.

We have already rejected this reading of *Sherrill* on two separate occasions: first in *Oneida I*, 605 F.3d at 156-59, and next in *Cayuga I*, 761 F.3d at 221. Although for reasons we discussed above neither decision controls our analysis as a matter of precedent, we agree with those panels' analyses and, for the reasons set forth below, echo their conclusion that *Sherrill* does not strip tribes of their immunity from suit in tax foreclosure proceedings.

Sherrill concerned the taxation of parcels of land located in the City of Sherrill, New York ("the City"), that once were part of the historic reservation of the Oneida Indian Nation (the "Oneidas" or the "Oneida Nation"). *See* 544 U.S. at 202. The Oneidas reportedly sold these parcels to "a non-Indian in 1807," but later, in the 1990's, the tribe repurchased them on the open market. *Id.* at 211. When the Oneida Nation then refused to pay property taxes on those lands to the City, the City initiated eviction proceedings in state court. *See id.* In response, the Oneidas filed a federal

lawsuit seeking "equitable relief prohibiting, currently and in the future, the [City's] imposition of property taxes" on the lands. *Id.* at 211-12. The tribe pressed the position that its "acquisition of fee title to discrete parcels of historic reservation land revived [its] . . . ancient sovereignty piecemeal over each parcel." *Id.* at 202.

The Supreme Court rejected the Oneidas' claim of immunity from taxation. The tribe's newly purchased properties "had been subject to state and local taxation for generations," the Court observed. *Id.* at 214. Invoking the doctrines of "laches, acquiescence, and impossibility," *id.* at 221, it reasoned that the tribe should not be permitted to "rekindl[e] embers of sovereignty that long ago grew cold," *id.* at 214. Thus, the Court concluded, the Oneidas could not "resist[] the payment of property taxes to Sherrill" on the ground that the disputed properties were not subject to the City's "regulatory authority." *Id.* at 202.

As we explained in *Oneida I* and later affirmed in *Cayuga I*, the Court's holding in *Sherrill* pertains to a tribe's immunity from taxation—*e.g.*, whether a state or local authority has the power to *impose* real property taxes on tribal lands. *See Oneida I*, 605 F.3d at 159; *Cayuga I*, 761 F.3d at 221. It does not, however, speak to a tribe's immunity from suit—*e.g.*, whether a state may use the courts against a tribe to *collect* taxes levied against tribal lands. *See Oneida I*, 605 F.3d at 159; *Cayuga I*, 761 F.3d at 221. These two types of immunities are "separate and independent," we emphasized, each defined by a "distinctive history" in the case law. *Oneida I*, 605 F.3d at 158. Tribal immunity from the imposition of taxes, for example, is

"closely tied to the question of whether the specific parcel at issue is Indian reservation land." *Id.* at 157 (quoting *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998)). In contrast, "a tribe's immunity from suit is independent of its lands." *Id.* (citing *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998)). We therefore concluded that *Sherrill* did not abrogate the Oneidas' immunity from a suit to collect taxes by simply recognizing the City's authority to impose taxes on the tribe's non-reservation properties. *See id.* at 159. Instead, we observed "a difference between the right to demand compliance with state laws" (which *Sherrill* addressed) and "the means available to enforce [those laws]" (which *Sherrill* did not consider). *Id.* at 158 (quoting *Kiowa*, 523 U.S. at 755).

We see no reason today to depart from this understanding of *Sherrill*'s scope and import. In support of its reading that *Sherrill* eliminated the Oneidas' immunity from suit in tax foreclosure actions, Seneca County points to a footnote in the *Sherrill* majority opinion assailing the dissent's "suggest[ion] that, compatibly with [the majority] decision, the Tribe may assert tax immunity defensively in the eviction proceeding." *Sherrill*, 544 U.S. at 214 n.7. We agree with the Cayuga Nation, however, that the Court's reference to "tax immunity" in footnote 7 concerns the Oneidas' immunity from taxation, not its immunity from suit to enforce a tax liability. We doubt, moreover, that the Supreme Court would choose to effect such a significant curtailment of tribal immunity from suit using ambiguous language relegated to a footnote. Such an approach would run directly counter to the Court's admonition

against "carving out exceptions" to tribal immunity from suit and its longstanding practice of "defer[ring] to Congress about whether to abrogate [that] immunity." *Bay Mills*, 572 U.S. at 790.

Nor are we free to alter this legal analysis based on Seneca County's dark predictions that, if we affirm the District Court's ruling, tribes will "buy large swaths of property within the County," and the County, in turn, will be left remediless if and when those tribes refuse to pay property taxes. Appellant's Br. 37. As we explained in *Oneida I*, 605 F.3d at 159-60, the Supreme Court has already rejected a similar line of argument in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) ("*Potawatomi*"). There, the Court held that while Oklahoma could tax certain cigarette sales made at the tribe's convenience store, the tribe's immunity from suit precluded the State from suing to collect unpaid taxes. *Potawatomi*, 498 U.S. at 512, 514. In reaching this conclusion, the Court acknowledged that tribal immunity from suit "bar[red] the State from pursuing the most efficient remedy." *Id.* at 514. It resisted, however, Oklahoma's claim that the state "lack[ed] any adequate alternatives." *Id.* The Court pointed out that the State could, among other things, enter into an agreement with the tribe "to adopt a mutually satisfactory regime for the collection of this sort of tax." *Id.* And if that failed, the Court continued, Oklahoma could "of course seek appropriate legislation from Congress." *Id.*

Because those same alternatives are available to Seneca County with respect to the real property taxes at issue here, we will not assume that the County's

right to tax the Properties presumes the right to use Article 11 foreclosure proceedings to collect those taxes. *Cf. McGirt*, 140 S. Ct. at 2481 (observing that Oklahoma's "dire warnings" about the consequences of recognizing certain lands within that State as reservation lands are "not a license for us to disregard the law"). Instead, we adhere to the settled principle that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Bay Mills*, 572 U.S. at 800. We therefore conclude—as we did in *Oneida I* and *Cayuga I*—that "[t]he remedy of foreclosure" is unavailable to the County by virtue of the Tribe's immunity from suit. *Oneida I*, 605 F.3d at 151.

CONCLUSION

For the reasons set forth above, we **AFFIRM** the judgment of the District Court.

Appendix B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 11-cv-6004

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff,

v.

SENECA COUNTY, NEW YORK,

Defendant.

Filed: Dec. 11, 2018

DECISION AND ORDER

INTRODUCTION

This action challenges Seneca County's ability to impose and collect *ad valorem* property taxes on parcels of real estate owned by the Cayuga Indian Nation of New York. The Cayuga Nation contends both that Seneca County cannot impose the property taxes, because the subject properties are "located within an Indian reservation,"[1] and cannot sue to collect the taxes, because the Cayuga Indian Nation enjoys sovereign immunity from suit. Now before the Court are the parties' cross-motions for summary

[1] Amended Complaint [#9] at 1.

judgment. (Docket Nos. [#55][#60]). On the basis of tribal sovereign immunity from suit, Plaintiff's application is granted and Defendant's application is denied.

BACKGROUND

The reader is presumed to be familiar with the Court's earlier written decisions in this action which discussed the facts, procedural history and relevant law in detail. (*See*, Docket Nos. [#23][#44][#50]). It is sufficient here to note that in recent years the Cayuga Nation purchased at least five parcels of land in Seneca County. Seneca County imposed property taxes on the Cayuga-owned properties which the Cayuga Nation refused to pay. Thereafter, Seneca County initiated tax foreclosure proceedings against the Cayuga Nation.

In response to those foreclosure lawsuits, the Cayuga Nation commenced this lawsuit. The Cayugas' Amended Complaint purports to assert two causes of action. The first cause of action alleges that the County's attempts to foreclose on the Cayugas' properties violate federal law, and specifically, the Treaty of Canandaigua, the U.S. Constitution Article I, 8, and the "Non-Intercourse Act," 25 U.S.C. 177. On this point, the Cayugas' pleading alleges that any properties which the Cayugas own in Seneca County are within the geographic boundary of the 64,000-acre Cayuga Indian Reservation that was "acknowledged [by the United States of America] in the Treaty of Canandaigua, November 11, 1794."[2] The Amended Complaint contends that while the Cayuga Nation

[2] Amended Complaint [#9] at 7.

purportedly sold all of that 64,000-acre reservation to the State of New York, such sales were *void ab initio* since they were never approved by Congress as required by the Non-Intercourse Act.[3] Consequently, the pleading asserts, "the Nation's 64,000-acre reservation continues to exist to this day," and the subject properties are "'Indian Country' within the meaning of 18 U.S.C. 1151."[4] Alternatively, the Cayugas contend that regardless of the reservation status of the subject land, the Cayuga Nation possesses "tribal sovereign immunity, which bars administrative and judicial proceedings against the Nation and bars Seneca County from taking any assets of the Nation."[5]

In sum, the Cayugas' first cause of action is twofold: 1) the subject properties are part of the federally-recognized Cayuga Indian Reservation, and the County therefore cannot foreclose on the properties, because it lacks the authority to interfere with the ownership or possession of federal Indian reservation lands; and 2) the "Cayuga Indian Nation of New York" is a "sovereign Indian nation," which is

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[3] *See*, Amended Complaint [#9] at 9 ("All of those transactions and transfers were in violation of federal law and were *void ab initio*, and the Nation never lost its aboriginal title[.]").

[4] Amended Complaint [#9] at 8. 18 U.S.C. 1151 defines "indian country," in pertinent part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government."

[5] Amended Complaint [#9] at 17.

protected from foreclosure lawsuits by the federal doctrine of sovereign immunity from suit.[6]

The Cayugas' second cause of action alleges that Seneca County violated two New York statutes—New York State Property Tax Law 454 and New York Indian Law 6—by assessing property taxes on their properties. On this point, the pleading contends that both statutes forbid the imposition of taxes on "Indian reservation" lands. *See*, Amended Complaint [#9] at 21-22 ("New York [Real Property Tax Law 454] provides that 'real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation[, while] New York Indian Law 6 directs that no taxes shall be established upon Indian Reservation lands. . . . Pursuant to the aforesaid provision[ ] of state law, taxes should not have been assessed against the Nation-owned properties[.]").

As for relief, the Cayugas' pleading seeks two types. First, the Amended Complaint seeks a declaration that the County cannot foreclose on, or otherwise "acquire, convey, sell or transfer title" to, "Nation-owned properties" within Seneca County. Second, the Amended Complaint seeks an injunction, prohibiting the County from making "any further efforts" to foreclose on, acquire, convey or otherwise sell "Nation-owned properties in Seneca County;" prohibiting the County from "interfering in any way with the Nation's ownership, possession, and

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[6] Amended Complaint [#9] at 20; *see also, id.* at 18(d) (referring to "the Nation's sovereign immunity, which derives from Article I, Section 8 of the United States Constitution and from federal common law[.]").

occupancy of such lands;" and requiring the County to "rescind all acts taken to acquire, convey, foreclose, sell or transfer title to Nation-owned properties within Seneca County to date."

When the Cayugas commenced this action, they also filed a motion for preliminary injunctive relief barring Seneca County from proceeding with pending foreclosure actions affecting the five parcels identified in the Amended Complaint, on the basis of sovereign immunity. On August 20, 2012, the Court granted such preliminary injunctive relief. *Cayuga Indian Nation of New York v. Seneca County, New York*, 890 F.Supp.2d 240 (W.D.N.Y. 2012).

Seneca County appealed, but on July 31, 2014, the United States Court of Appeals for the Second Circuit affirmed this Court's ruling, agreeing that the Cayuga Nation has sovereign immunity from suit. *Cayuga Indian Nation of New York v. Seneca County, New York*, 761 F.3d 218 (2d Cir. 2014). In reliance upon the Supreme Court's decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S.Ct. 2024 (2014), the Second Circuit declined to carve out an exception to the Cayuga Nation's sovereign immunity from suit for *in rem* foreclosure proceedings. Further, the Second Circuit declined to "read [an] implied abrogation of tribal sovereign immunity from suit" into the Supreme Court's decisions in City of *Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 125 S.Ct. 1478 (2005) and *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) , stating that "[s]uch implied abrogation would be clearly at odds with the Supreme Court's solicitous treatment of the common-

law tribal immunity from suit—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes," and that "implied abrogation would also run counter to the principle that we must 'defer' to Congress about whether to abrogate tribal sovereign immunity." *Cayuga Indian Nation of N.Y.*, 761 F.3d at 221 (citations and internal quotation marks omitted).

The Cayuga Nation has now moved for summary judgment, seeking a declaratory judgment and permanent injunctive relief as to both causes of action. However, the Cayuga Nation stresses that the Court may grant its motion based entirely on sovereign immunity from suit and not reach the merits of its other claims.[7]

Seneca County has cross-moved for summary judgment on various grounds including some which this Court and the Second Circuit have already considered and rejected. The Court understands, however, that Seneca County is asserting these arguments partly in order to make a record for the

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[7] *See*, Pl. Memo of Law [#58] at p. 2 ("But the Court need not ultimately address [the alternative grounds]: because the Nation is entitled to full relief on its claim of sovereign immunity from suit, the Court may dismiss its other claims without prejudice, on grounds of mootness."); *see also, id.* at p. 8 ("[T]he Nation's sovereign immunity from suit entitles the Nation to summary judgment (in the form of declaratory and injunctive relief) that the County may not pursue foreclosure proceedings as to the Nation-owned properties. That is the full scope of relief that the Nation seeks here. Thus, if the Court grants summary judgment on the basis of sovereign immunity from suit, the Court may dismiss as moot, without prejudice, the Nation's remaining claims.").

appeal that will surely ensue following this Court's ruling. In particular, Seneca County maintains that the Cayuga Nation is not entitled to sovereign immunity from suit in this action, and that the County is entitled to summary judgment on the Nation's claims for the following reasons: 1) Supreme Court precedent including *City of Sherrill* and *County of Yakima* "affirm[s] that State and local taxing authorities may impose and collect real property taxes on non-sovereign properties owned in fee title by Indian tribes"; 2) the Supreme Court's jurisprudence concerning tribal sovereign immunity from suit does not apply to *in rem* foreclosure proceedings;[8] 3) according to *City of Sherill* the Cayuga Nation's claim under the Nonintercourse Act is barred by laches; 4) the Nonintercourse Act does not apply to fee-titled lands over which the Nation cannot exercise sovereign authority; 5) the Court should deny the Cayuga Nation's request for an injunction under the Anti-Injunction Act; 6) the Cayuga Nation has abandoned its claim under 42 U.S.C. § 1983; 7) the Cayuga Nation's properties are not exempt from taxation under New York law because the relevant statutes [New York Real Property Tax Law § 454 and New York Indian Law § 6] "do not apply to fee-titled lands over which the tribe is no longer sovereign";

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[8] *See, e.g.*, Def. Memo of Law [#60-2] at p. 21 ("[P]rinciples of foreign sovereign immunity and State sovereign immunity [including the so-called "immovable property exception"] support the conclusion that Seneca County may bring foreclosure proceedings against Cayuga Nation-owned properties within the County's jurisdiction. This is all the more true considering that Indian tribes actually retain less immunity than that of foreign sovereigns or the States.").

8) the Cayuga Nation should be estopped from claiming that Seneca County cannot impose property taxes on the subject parcels since it pays taxes on other properties that it owns in Seneca County; (9 the Court should decline to exercise supplemental jurisdiction over Plaintiff's state-law claims; and 10) even if the Court reaches the state-law claims the County is entitled to summary judgment as a matter of state law.

On March 2, 2018, the Cayuga Nation filed a reply [#62] addressing the County's arguments. With regard to the argument concerning the Anti-Injunction Act, the Nation contends that the County waived the argument by failing to raise it when opposing the Nation's motion for a preliminary injunction seven years ago.

On April 20, 2018, the County filed a reply [#67] in further support of its cross-motion for summary judgment, which reiterates most of its earlier points but withdraws the argument involving the Anti-Injunction Act.[9] On December 6, 2018, counsel for the parties appeared before the undersigned for oral argument.

DISCUSSION

Plaintiff has moved, and Defendant has cross-moved, for summary judgment pursuant to Fed. R. Civ. P. 56. Summary judgment may not be granted unless "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A party seeking summary judgment bears the

[9] *See*, Sur-Reply [#67] at p. 12, n. 3.

burden of establishing that no genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). "[T]he movant must make a *prima facie* showing that the standard for obtaining summary judgment has been satisfied." 11 MOORE'S FEDERAL PRACTICE, § 56.11[1][a] (Matthew Bender 3d ed.). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir.1996) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)), *cert denied*, 517 U.S. 1190 (1996).

The burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To do this, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

Having considered all of the parties' arguments the Court finds for essentially the same reasons stated in its Decision and Order [#23] granting the preliminary injunction and in the Second Circuit's decision affirming that ruling, which have not changed, that the Cayuga Nation is entitled to summary judgment on its claims seeking declaratory and permanent injunctive relief based upon tribal sovereign immunity from suit. Since the Court finds that the Cayuga Nation is entitled to summary judgment on that basis it does not reach the remaining aspects of the Nation's summary judgment motion.

CONCLUSION

Plaintiff's application [#55] for summary judgment is granted insofar as it is based upon tribal sovereign immunity from suit and is otherwise denied.

Seneca County may not foreclose on, acquire, convey, sell or transfer title to the Nation-owned properties in Seneca County based on the Tax Enforcement Notification and Petition annexed to the Amended Complaint, and all efforts of Seneca County to do so and to thereby interfere with the Nation's ownership, possession and occupancy of such lands are null and void. Seneca County, its officers, agents, servants, employees and persons in active concert or participation with them are permanently enjoined from any further efforts to effectuate, maintain or complete foreclosure, acquisition, conveyance or sale of, or transfer of title to, Nation-owned properties in Seneca County, and from interfering with the Nation's ownership, possession, and occupancy of such lands due to unpaid property taxes. Seneca County, its officers, agents, servants, employees and persons in

active concert or participation with them shall void and rescind all acts taken to acquire, convey, foreclose, sell or transfer title to Nation-owned properties within Seneca County, including those listed in the Tax Enforcement Notification and Petition and Notice of Foreclosure annexed to the Amended Complaint.

Plaintiff's claims that are not based on tribal sovereign immunity from suit are dismissed without prejudice. Defendant's cross motion for summary judgment [#60] is denied. The Clerk is directed to close the case.

SO ORDERED.

Dated: Rochester, New York
December 11, 2018

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District
Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-3723

CAYUGA INDIAN NATION OF NEW YORK,
Plaintiff-Appellee,
v.
SENECA COUNTY, NEW YORK,
Defendant-Appellant.

Argued: Jan. 7, 2014
Decided: July 31, 2014

Before: KATZMANN, *Chief Judge*, JACOBS, and CARNEY, *Circuit Judges*.

OPINION

Per Curiam:

We are called upon to review an order of the United States District Court for the Western District of New York (Charles J. Siragusa, *District Judge*), which preliminarily enjoined defendant-appellant Seneca County, New York from foreclosing upon certain real property owned by plaintiff-appellee the Cayuga Indian Nation of New York ("Cayuga Nation").

Our standard of review of a district court's decision to grant or deny a preliminary injunction is well established, as are the general requirements placed upon a party seeking a preliminary injunction. *See Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011). The only issue in dispute in this appeal is whether the district court properly determined that the Cayuga Nation was likely to succeed on the merits. We review the legal conclusions underlying the district court's decision *de novo* and the district court's factual determinations for clear error. *See id.*

Seneca County initiated foreclosure proceedings against certain of the Cayuga Nation's real property in an attempt to recover uncollected *ad valorem* property taxes. After invoking the doctrine of tribal sovereign immunity and our vacated decision in *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010), *vacated*, 131 S. Ct. 704 (2011), the district court preliminarily enjoined the County's foreclosure proceedings. Seneca County timely appealed the district court's order, contending that we should limit the doctrine of tribal immunity from suit so as to permit states to bring foreclosure suits to recover uncollected taxes levied against the property of Indian tribes.

Seneca County acknowledges that our opinion in *Madison County* squarely addressed the question presented here and held that tribal sovereign immunity from suit bars these foreclosure actions, *see* 605 F.3d at 156-60, but the County emphasizes that the Supreme Court's decision to vacate our opinion leaves this panel free from otherwise binding precedent and urges us to conclude that *Madison*

County misconstrued Supreme Court precedent regarding the doctrine of tribal sovereign immunity. The State of New York, appearing as *amicus curiae*, further contends that the vacatur of our prior opinion casts substantial doubt on the correctness of the reasoning of *Madison County*.

We need not attempt to discern the implied message communicated by the vacatur of our prior opinion because the Supreme Court has since issued further guidance regarding both the continuing vitality of the doctrine of tribal sovereign immunity from suit and the propriety of drawing distinctions that might constrain the broad sweep of that immunity in the absence of express action by Congress. In *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), the Supreme Court once again held that tribes retain, as "'a necessary corollary to Indian sovereignty and self-governance,'" a common-law immunity from suit. *Id.* at 2030 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g, P.C.*, 476 U.S. 877, 890 (1986)). Under this "settled law," *id.* at 2030-31 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)), courts must "dismiss[] any suit against a tribe absent congressional authorization (or a waiver)," *id.* at 2031. This treatment of tribal sovereign immunity from suit is an avowedly "broad principle," *id.* at 2031, and the Supreme Court (like this Court) has "thought it improper suddenly to start carving out exceptions" to that immunity, opting instead to "defer" to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from suit, *id.* (quoting *Kiowa*, 523 U.S. at 758).

Therefore we decline, as has the Supreme Court, to read a "commercial activity" exception into the doctrine of tribal sovereign immunity from suit, *see id.*; *Kiowa*, 523 U.S. at 758, and we decline to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged us to adopt, *see Bay Mills*, 134 S. Ct. at 2031; *see also The Siren*, 74 U.S. 152, 154 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property.").

Notwithstanding Seneca County and the State of New York's vigorous argument, we read no implied abrogation of tribal sovereign immunity from suit into *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), or *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Such implied abrogation would be clearly at odds with the Supreme Court's solicitous treatment of the common-law tribal immunity *from suit*—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes. *See Madison County*, 605 F.3d at 156-59. And implied abrogation would also run counter to the principle that we must "'defer' to Congress about whether to abrogate tribal [sovereign] immunity," *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 758).

In short, in the absence of a waiver of immunity by the tribe, "[u]nless Congress has authorized [the] suit, . . . precedents demand," *id.* at 2032, that we affirm the district court's injunction of the County's

foreclosure proceedings against the Cayuga Nation's property.[1]

Accordingly, the order of the district court is **AFFIRMED**.

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[1] Seneca County also contends that the Cayuga Nation has either waived sovereign immunity or should be otherwise estopped from asserting the defense based on the Nation's arguments before the New York Court of Appeals in *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010). *See* Br. of Defendant-Appellant at 30-32. "[T]o relinquish its immunity, a tribe's waiver must be 'clear,'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)), and thus it "'cannot be implied but must be unequivocally expressed,'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). None of the statements cited by the County represents an unequivocal expression by the Cayuga Nation that it has waived its immunity from suit with respect to the parcels in question.

Appendix D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 11-cv-6004

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff,

v.

SENECA COUNTY, NEW YORK,

Defendant.

Filed: Aug. 20, 2012

DECISION AND ORDER

INTRODUCTION

This action presents the question whether Seneca County ("Defendant") may foreclose on real property owned by the Cayuga Indian Nation of New York ("Plaintiff") for failure to pay *ad valorem* property taxes. Now before the Court is Plaintiff's application for preliminary injunctive relief, enjoining Defendant from foreclosing on the subject parcels, on the grounds of tribal sovereign immunity. (Docket No. 4). For the reasons that follow, the application is granted.

BACKGROUND

Plaintiff is a federally-recognized Indian Tribe which owns real property in Seneca County. The

subject dispute involves land that was formerly part of the 64,000-acre Cayuga Reservation acknowledged by the Treaty of Canandaigua in 1794. Shortly after 1794, the Cayuga Nation sold large portions of the Reservation lands to the State of New York. Plaintiff maintains that such sales were illegal and void *ab initio*, since they did not comply with the requirements of the Non-Intercourse Act, 25 U.S.C. § 177. Plaintiff contends, therefore, that the entire 64,000-acre Cayuga Reservation remains intact to this day. Amended Complaint [#9] at ¶ 10. Defendant disagrees.

Approximately two centuries after selling off the Reservation land to the State of New York, Plaintiff began purchasing parcels of property on the open market that lie within the geographic area of the aforementioned Reservation. Plaintiff contends that such properties are now Reservation land and are "Indian Country" within the meaning of federal law. *See*, Amended Complaint [#9] at ¶¶ 7-10. Defendant again disagrees.

The subject action involves five[1] such parcels of property located in Seneca County, which were originally included in the Reservation, but which were later sold to third parties, and then re-purchased by Plaintiff. Defendant has attempted to collect *ad valorem* property taxes on the parcels, and Plaintiff has denied any obligation to pay them. As a result, Defendant initiated foreclosure proceedings, pursuant

[1] The Amended Complaint indicates that there are five parcels. Amended Complaint [#9] at ¶ 7. However, an affidavit submitted by Plaintiff's counsel indicates that there are four properties. Alcott Aff. [#6] at ¶ 3.

to Article Eleven of the New York State Real Property Tax Law.

On January 5, 2011, Plaintiff commenced this action, seeking permanent declaratory and injunctive relief. At the same time, Plaintiff made the subject application for preliminary injunctive relief, enjoining the County from foreclosing on the properties. Plaintiff contends that it is entitled to injunctive relief because the foreclosure actions are barred by sovereign immunity. Specifically, Plaintiff contends that "[a]s a federally-recognized Indian nation, [it] possess[es] tribal sovereign immunity [from suit], which bars administrative and judicial proceedings against the [Indian] Nation," even if the taxes are properly owed.[2] In that regard, Plaintiff relies, in large part, on the Second Circuit's decision in *Oneida Indian Nation of New York v. Madison County and Oneida County*, 605 F.3d 149 (2d Cir. 2010) ("*Oneida*").

The Court granted Plaintiff's request for an expedited hearing, and scheduled the matter to be

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[2] Plaintiff maintains that in this action it is not claiming that the property is "immune from taxation." Pl. Reply Memo [#21] at 1 ("The Nation does not claim the parcels at issue here are immune from taxation as a matter of *federal* law.") (emphasis added). Instead, Plaintiff contends that while the County may impose taxes, it has no right to collect them. *Id.* ("It is well-established that, even where there is no immunity from taxation, sovereign immunity from suit may bar a state from resorting to a judicial remedy to enforce its tax."). Although, Plaintiff's Amended Complaint indicates that under New York State law, "an Indian tribe's property [is exempt] *from taxation* if located within an Indian reservation." Amended Complaint [#9] at ¶ 1 (emphasis added); *see also, id.* at ¶ 21 (citing New York Real Property Tax Law § 454).

heard on January 13, 2011. However, the parties agreed to stay the foreclosure proceedings, and stipulated to a briefing schedule, thereby mooting the request for an expedited hearing.

On February 3, 2011, Defendant filed opposing papers. Defendant observes that after Plaintiff's application was filed, the U.S. Supreme Court vacated and remanded the Second Circuit's *Oneida* decision, and argues that such decision now "has no precedential value whatsoever." Spellane Aff. [#12-1] at 2. Defendant contends, *inter alia*, that the Second Circuit's opinion was incorrectly decided in any event, since it was contrary to Supreme Court precedent, most notably *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683 (1992) ("*Yakima*") and and *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S.Ct. 1478 (2005) ("*Sherrill*"). According to Defendant, *Yakima* established that tribal sovereign immunity does not bar *in rem* property tax foreclosure proceedings against property owned by an Indian tribe, while *Sherrill* held that an Indian tribe cannot revive its sovereign authority over land by purchasing it after years of inaction.[3]

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[3] Defendant also maintains that the subject foreclosure actions are not barred by the Indian Trade and Intercourse Act of 1834, also known as the Non-Intercourse Act. Plaintiff had argued, in its moving papers, that the foreclosure actions violated the Non-Intercourse Act, which prompted Defendant to devote a large part of its responding brief to that issue. *See*, Def. Memo of Law [#12] at pp. 19-33. However, Plaintiff's reply brief disclaims reliance on the Non-Intercourse Act as a basis for the subject motion. *See*, Pl. Reply Memo of Law [#21] at p. 2, n. 2 (Indicating that tribal sovereign immunity provides a sufficient basis for

On May 5, 2011, counsel for the parties appeared before the undersigned for oral argument.

DISCUSSION

Plaintiff seeks an injunction enjoining the state-court tax foreclosure proceeding, pursuant to the All-Writs Act, 28 U.S.C. § 1651(a) (Providing that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *see also*, 28 U.S.C. § 2283 (A federal court may grant an injunction to stay state court proceedings "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). The parties dispute whether tribal sovereign immunity applies, and therefore disagree as to whether the Court should enjoin the state court proceedings.

A lengthy discussion is unnecessary, since, according to the Second Circuit's *Oneida* decision, Supreme Court precedent clearly determines the outcome of this motion, and holds as follows: Even assuming that Seneca County has the right to impose property taxes on the subject parcels owned by the Cayuga Indian Nation, it does not have the right to collect those taxes by suing to foreclose on the properties, unless Congress authorizes it to do so, or unless the Cayuga Indian Nation waives its sovereign immunity from suit. Congress has not authorized Seneca County to sue the Cayugas, and the Cayugas have not waived their sovereign immunity.

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granting the motion, without regard to the Non-Intercourse Act). Accordingly, the Court need not address the Non- Intercourse Act at this time.

Consequently, the Cayugas' motion for an order enjoining the foreclosure actions must be granted.

The cases upon which the foregoing paragraph rests are well-known to the litigants and to the courts that will undoubtedly be called upon to review this Court's ruling. For the benefit of anyone reading this decision who is not familiar with them, and who may be understandably perplexed by this ruling, the Court will briefly review the controlling law.

In *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 1702 (1998), the Supreme Court reaffirmed the federal common law doctrine that Indian tribes cannot be sued unless Congress authorizes the suit or unless the tribes waive their immunity. Significantly, the Supreme Court held that even if a state has the authority to tax or otherwise regulate an Indian tribe in a particular instance, it does not have the ability to sue the tribe to enforce the tax or regulation, unless Congress authorizes the suit, or unless the tribe waives its sovereign immunity:

> As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. . . . Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from

> suit. In [*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 111 S.Ct. 905 (1991)], for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. *There is a difference between the right to demand compliance with state laws and the means available to enforce them.*

Id., 118 S.Ct. at 1702-1703 (emphasis added, citations omitted). In doing so, the Supreme Court questioned "the wisdom of perpetuating the doctrine" of Tribal sovereign immunity, but deferred to Congress to make any changes in that regard. *Id.*, 118 S.Ct. at 1704-1705 ("The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. . . . [W]e decline to revisit our case law and choose to defer to Congress."). To date, Congress has declined that invitation.

In *Sherrill*, the Supreme Court rejected the Oneida Indian Nation's claim to have sovereign authority, in the form of exemption from property taxation, over real property which had been part of the Oneida's reservation, but which had been sold, and then repurchased by the Oneidas on the open market:

> In this action, [the Oneida Indian Nation] seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject

> th[at] unification theory . . . and hold that standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.[4]

Id., 125 S.Ct. at 1489-1490. Although the Supreme Court held that the Oneidas' property was subject to taxation, as well as to "local zoning or other regulatory controls," it did not explicitly hold that the City of Sherrill could sue the Oneidas to collect unpaid taxes.

Approximately five years later, in *Oneida*, the Second Circuit addressed a dispute that flowed from the Supreme Court's decision in *Sherrill*. Specifically, in the wake of *Sherrill*'s holding that the property recently purchased by the Oneidas was subject to taxation, Madison County and Oneida County attempted to collect unpaid taxes from the Oneidas, by foreclosing on the properties. The Oneidas responded by seeking an injunction in federal district court, enjoining the foreclosure actions, on the grounds of tribal sovereign immunity from suit. The district court granted summary judgment on that basis for the Oneidas, and the Second Circuit Panel affirmed that ruling, stating: "We affirm on the ground that the [Oneida Indian Nation] is immune from suit under the long-standing doctrine of tribal sovereign immunity.

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[4] The Supreme Court observed, however, that the Oneidas could seek to have the land taken into federal trust, and thus exempted from State and local taxation, pursuant to 25 U.S.C. § 465. *Id.*, 125 S.Ct. at 1495 ("Section 465 provides the proper avenue for [the Oneidas] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.").

The remedy of foreclosure is therefore not available to the Counties." *Id*., 605 F.3d at 151.

In that regard, the Second Circuit discussed the difference between "two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit." *Oneida*, 605 F.3d at 156. The Court specifically stated that *Sherrill* involved only the former doctrine, and not the latter. That is, the Circuit Panel held that *Sherrill* merely authorized the imposition of taxes on the Oneida's properties, but did not authorize the taxing counties to take legal action to collect the taxes:

> [W]e do not read *Sherrill* as implicitly abrogating the [Oneidas'] immunity from suit. No such statement of abrogation was made by the *Sherrill* Court, nor does the opinion call into question the *Kiowa* Court's approach, that any such abrogation should be left to Congress. *Sherrill* dealt with the right to demand compliance with state laws. It did not address the means available to enforce those laws.

Id. at 157-159 (citations and internal quotation marks omitted). Although the Second Circuit Panel agreed with the Counties, "that the notion that they may tax but not foreclose is inconsistent and contradictory," it nevertheless concluded that the foreclosure actions had to be enjoined, since Congress had not authorized them, and since the Oneidas had not waived their sovereign immunity. *Id*. at 159.

In a concurring opinion in *Oneida*, Judge Cabranes removed any possible doubt as to the meaning of the Panel's decision:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed. This rule of decision defies common sense. But absent action by our highest Court, or by Congress, it is the law.

Id. at 163 (footnote omitted); *see also, id*. at 164 (Indicating that the Panel's ruling was required by "unambiguous guidance from the Supreme Court," but calling upon the Supreme Court, or Congress, to correct the "anomalous" result and "reunite" "law and logic.").

The county defendants in *Oneida* petitioned for writ of certiorari, and the Supreme Court agreed to hear the appeal. However, in an eleventh-hour tactical move, the Oneidas avoided review by belatedly agreeing to waive sovereign immunity. Consequently, the Supreme Court vacated and remanded the action to the Second Circuit for further action in light of the Oneidas' waiver. *See, Madison County, N.Y. v. Oneida Indian Nation of New York*, 131 S.Ct. 704 (2011) (Mem). On remand, the Second Circuit affirmed the district court's decision in part, reversed in part, vacated in part, and remanded with instructions, on grounds unrelated to the issue of sovereign immunity from suit. *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408 (2d Cir. 2011).

Against the backdrop of these cases, Defendant maintains that it is entitled to foreclose on the Cayugas' properties, and asks this Court to issue a

ruling that is directly contrary to the Second Circuit's ruling in *Oneida*. Defendant maintains that the *Oneida* decision has no force, since it was vacated by the Supreme Court. However, the Court disagrees. Although the Supreme Court vacated the Second Circuit's ruling, it did not do so on the merits, and there is no reason to believe that the Second Circuit would reach a different decision today. To the contrary, Judges Cabranes' concurring opinion, which Judge Hall joined, indicated that the Panel's ruling was necessitated by "unambiguous guidance from the Supreme Court," which has not changed.

Defendant nevertheless insists that *Oneida* was wrongly decided. According to Defendant, *Sherrill* necessarily held that the Oneidas could not invoke sovereign immunity from suit to avoid the *collection* of the disputed property taxes. On this point, in *Sherrill*, the Supreme Court stated:

> [G]iven the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneida's long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe *cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue*.

Sherrill, 125 S.Ct. at 1483 (emphasis added). Defendant argues that pursuant to *Sherrill*, an Indian tribe that purchases real property that may have previously been Reservation land is treated no

differently than any non-Indian land owner with regard to that property.

At least one district court in this Circuit has agreed with Defendant on this point. In *New York v. Shinnecock Indian Nation*, 523 F.Supp.2d 185, 298 (E.D.N.Y. 2007), which did not involve property taxes, the district court interpreted *Sherrill* as permitting a lawsuit against the Oneidas to collect the unpaid taxes:

> [I]t is clear from the Supreme Court's decision in *Sherrill* that a tribe can be prevented from invoking a defense of sovereign immunity where equitable doctrines preclude the tribe from asserting sovereignty over a particular parcel of land. *In other words, the* Sherrill *Court held that the [Oneidas] could not invoke sovereign immunity to defend against local real property tax enforcement proceedings, including eviction proceedings*. 544 U.S. at 211, 125 S.Ct. 1478. Specifically, . . . Justice Stevens argued in his dissent that tribal immunity could be raised "as a defense against a state collection proceeding." *Id*. at 225, 125 S.Ct. 1478. However, the majority opinion specifically rejected that reasoning. *See id*. at 214 n. 7, 125 S.Ct. 1478 ("The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding against Sherrill. We disagree."); *see also id*. at 221, 125 S.Ct. 1478 (Souter, J., concurring) (rejecting claim of territorial sovereign status whether affirmative or

> defensive). *Thus,* Sherrill *allows a tribe to be sued by a state or town, such as the instant case, to enforce its laws with respect to a parcel of land if equitable principles prevent the tribe from asserting sovereignty with respect to that land*. To hold otherwise would completely undermine the holding of *Sherrill* because, if defendants are immune from suit, plaintiffs here would be left utterly powerless to utilize the courts to avoid the disruptive impact that the Supreme Court clearly stated they have the equitable right to prevent.

(emphasis added). However, the Second Circuit subsequently vacated the district court's decision in *Shinnecock* for lack of subject matter jurisdiction, without addressing the merits of the ruling. *See, New York v. Shinnecock Indian Nation*, 686 F.3d 133 (2d Cir. Jun. 25, 2012).

The New York Court of Appeals has also seemingly interpreted *Sherrill* as permitting lawsuits against the Oneidas, and, by extension, the Cayugas, to collect property taxes on properties that were recently bought on the open market. In that regard, in *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 640, 642-643, 930 N.E.2d 233 (2010), the Court of Appeals made the following observation about the *Sherrill* decision:

> In *City of Sherrill*, the Supreme Court applied the doctrines of laches, acquiescence and impossibility to bar a claim by the Oneida Indian Nation that its repurchase of aboriginal lands resulted in the reassertion of that tribe's sovereign authority relieving the

> tribe of the obligation *to pay real property taxes* on the reacquired parcels.
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> *City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert *sovereign power* over its convenience store properties for the purpose of avoiding real property taxes[.]

(emphasis added).

Consequently, if this Court were writing without the benefit of guidance from the Second Circuit, it might well have been inclined to agree that *Sherrill*'s broad language bars the Cayugas from asserting *any* sovereign authority involving the recently-purchased parcels, including sovereign immunity from suit. *See, Sherrill*, 125 S.Ct. at 1483 ("[T]he tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue."). On this point, the Court finds one of Plaintiff's statements at oral argument to be particularly interesting. Specifically, Plaintiff's counsel indicated that the Tribe does not claim to have sovereign immunity against tax foreclosure proceedings on all real property that it owns, regardless of location, but instead, only claims such immunity with regard to its property within the geographic boundary of the Cayuga Reservation as established by the Treaty of Canandaigua. In other words, Plaintiff maintains that it has sovereign immunity from suit as to foreclosure actions against properties within the Reservation, which it maintains has never been disestablished, but not as to properties

outside the Reservation.[5] This argument seems to admit that the Cayugas' ability to claim sovereign immunity from suit is inherently tied to its ability to exercise at least some amount of sovereign authority over the land. This position, though, does not appear helpful to Plaintiff, since, according to *Sherrill,* the Cayugas cannot assert any sovereign authority over the recently-purchased land, "in whole or in part," due to equitable considerations, even though it may lie within the Reservation.

Accordingly, there is some persuasive force to Defendant's argument that Plaintiff cannot assert sovereign immunity from suit involving the subject properties, based upon the same practical and equitable considerations that drove the *Sherrill* decision. However, for the reasons stated above, the Court will follow the Second Circuit's ruling in *Oneida*, which, although technically without effect after being vacated, clearly rejects Defendant's argument.

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[5] On this point, Plaintiff curiously seems to claim less sovereign immunity from suit than it could have, pursuant to *Oneida*, since in that case, the Second Circuit indicated that sovereign immunity from suit applied even to foreclosure actions involving property that was never part of an Indian reservation. See, Oneida, 605 F.3d at 163 ("[A]n Indian tribe can purchase land (*including land that was never part of a reservation*); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed.") (emphasis added) (Cabranes, J., concurring opinion). Plaintiff's position also seems inconsistent with the statement in *Oneida* that the doctrines of tribal sovereign authority over tribal land and sovereign immunity from suit are entirely distinct.

Defendant nevertheless argues that the Second Circuit's *Oneida* decision is erroneous because it failed to consider that the subject foreclosure actions are *in rem* proceedings, to which, Defendant argues, tribal sovereign immunity from suit does not apply. However, in the district court decision that was on appeal in *Oneida*, Judge Hurd expressly rejected the same argument by Madison County, that tribal sovereign immunity from suit did not apply to *in rem* foreclosure actions: "The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property." *Oneida Indian Nation of New York v. Madison County*, 401 F.Supp.2d 219, 229 (N.D.N.Y. 2005). On appeal to the Second Circuit, the county defendants again argued that the Oneidas' tribal immunity from suit did not apply in an *in rem* tax foreclosure proceeding. *See*, Brief and Special Appendix for Defendants-Counterclaimants-Appellants, 2007 WL 6432637 at pp. 58 ("*Yakima* and other cases make it clear that any sovereignty possessed by a tribe *qua* tribe is irrelevant in an *in rem* tax foreclosure proceeding.") & 60 ("It is clear from *Sherrill* and *Yakima* that different standards govern Indian claims of sovereign immunity, depending on whether there is a claim against the tribe itself, or a claim against land owned by the tribe that is not sovereign Indian country. This central distinction is rooted in the limited nature of an *in rem* action, which looks only to the property for relief.") (footnote omitted).

As already discussed, though, the Second Circuit disagreed with the Counties' arguments, and specifically found that the foreclosure actions were

barred by the doctrine of tribal sovereign immunity from suit. *See*, *Oneida Indian Nation of New York v. Madison* discuss Defendant's argument about *in rem* proceedings in the decision, it obviously considered and rejected it. Accordingly, the Court need not revisit that issue.

To the extent that Defendant's argument on this point relies upon the Supreme Court's decision in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct 683 (1992), the Court disagrees that the case stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings. *Yakima* involved the State of Washington's ability to tax certain "fee patent" parcels of land, located within the Yakima Reservation, that had become alienable under the General Allotment Act. *Yakima*'s use of the terms *in rem* and *in personam* pertained to the difference between the *imposition*, not collection, of taxes on a piece of land, as opposed to an individual. The Supreme Court concluded that Yakima County had the power to impose an ad valorem tax on the land, pursuant to an express grant from Congress, but not the ability to impose an excise tax on sellers of the land. Admittedly, the *Yakima* decision did refer in passing to the "power to assess *and collect* a tax on certain real estate." *Id*., 112 S.Ct. at 692 (emphasis added). However, that statement appears to be dicta, since the *Yakima* decision did not involve tribal sovereign immunity from suit.

Defendant next contends that the Cayuga Nation waived any sovereign immunity from suit to which it may be entitled, by paying taxes on some properties.

However, a waiver of tribal sovereign immunity must be "clear." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (citation omitted). The Cayugas' payment of taxes on certain parcels of property does not amount to such a waiver.

Finally, Defendant argues that the Cayugas should be estopped from claiming sovereign immunity from suit, since, in a separate action before the New York Court of Appeals, they indicated that they were paying property taxes on their lands. *See, Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d at 642, n. 11 ("The Cayuga Indian Nation acknowledges its obligation to pay real property taxes and comply with local zoning and land use laws on these parcels and it is undisputed that the Nation has, to date, fulfilled those obligations."). However, that language from the *Gould* decision referred specifically to the two "convenience store properties," one in Cayuga County and one in Seneca County, that were the subject of that decision, not to all tribe-owned parcels that had been purchased on the open market. Accordingly, the Cayugas are not estopped from claiming sovereign immunity from suit merely because they acknowledged that they were paying taxes on parcels unrelated to this action.

For the foregoing reasons, the Court finds that Plaintiff has demonstrated that the subject foreclosure actions are barred by the Tribe's sovereign

immunity from suit, and that it is therefore entitled to preliminary injunctive relief.

CONCLUSION

Plaintiff's application for preliminary injunctive relief [#4] is granted.

SO ORDERED.

Dated: August 20, 2012
Rochester, New York

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge