Baillie v. Tucker

Court of Appeal of California, First Appellate District, Division Three

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AMY LYNN BAILLIE et al., Plaintiffs and Appellants, v. SCOTT TUCKER et al., Defendants and Respondents.

Prior History: [*1] Alameda County Super. Ct. No. JCCP004688.

Assenzio (Thomas) v. S.C. (Baillie), 2013 Cal. ***LEXIS*** 2006 (Cal., Mar. 13, 2013)

Core Terms

tribal, entity, immunity, discovery, trial court, loans, Lenders, personal jurisdiction, lending, Tribe, activities, jurisdictional, Services, internet, operations, merits, payday, sovereign immunity, registered, contacts, usurious, licensed, resident, loan business, trade name, ownership, benefits, purposes, lawsuit, issues

Judges: Jenkins, J.; Pollak, Acting P. J., Siggins, J. concurred.

Opinion by: Jenkins, J.

Opinion

This appeal arises from a lawsuit brought by plaintiff/appellant Kathrine Rosas, as private attorney general and on behalf of herself and all other similarly situated persons, against numerous defendants based upon their purported involvement in illegal internet payday loan practices. The particular rulings challenged herein are the trial court's denial of plaintiff's motion for further discovery and grant of the motion to quash service of summons for lack of personal jurisdiction and to dismiss filed by specially appearing defendants/respondents Blaine Tucker and Scott Tucker (hereinafter, the Tuckers).[1] The Tuckers argued, and the trial court agreed, that there was no evidence in this record of their involvement in usurious lending activity intentionally directed at California and that plaintiff's efforts to obtain relevant evidence that might be in the possession of a group of named defendants not involved in this appeal, referred to herein as the "Tribal Entities," are barred by the doctrine of tribal sovereign immunity.[2] For reasons discussed below, we reverse and remand the **[*2]** matter for further proceedings in light of the California Supreme Court's recent decision, *People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 211 Cal. Rptr. 3d 837, 386 P.3d 357 (*MNE*), a

[1] Blaine Tucker passed away in March 2014.

[2] The so-called "Tribal Entities" include the following: Miami Tribe of Oklahoma, MNE doing business as Ameriloan, United Cash Loans and USFASTCASH; Santee Sioux Nation, SFS Inc. doing business as Preferred Cash Loans and One Click Cash; and AMG Services, Inc. (AMG). Other named defendants that are not subject to this appeal are the so-called "Scott Tucker Corporations" (to wit, defendants, AMG Capital Management, LLC, Black Creek Capital Corporation, Black Creek Capital LLC, Broadmoor Capital Partners, LLC, Leadflash Consulting LLC, Level 5 Motorsports, N.M. Service Corp., Park 269 LLC, St. Capital LLC), as well as the Muir Law Firm LLC, and individual defendants, Don Brady, Robert D. Campbell, Timothy J. Muir, and Kim Tucker. The trial court's order to dismiss AMG from the case based upon the doctrine of tribal sovereign immunity is subject to a separate appeal in *Rosas v. AMG Services, Inc.*, A139147.

separate but related case in which the Commissioner of the Department of Corporations sued defendants Miami Tribe of Oklahoma and Santee Sioux Nation, as well as several associated tribal business entities, for essentially the same illegal lending practices alleged herein.

FACTUAL AND PROCEDURAL BACKGROUND

In or around 2005 and 2006, plaintiff obtained five separate payday loans over the internet from the "DEFENDANT LENDERS," defined to include defendants USFASTCASH, Ameriloan, United Cash Loans, Preferred Cash Loans, One Click Cash, MNE, SFS, Inc., AMG Services, Inc. (AMG), Miami Tribe of Oklahoma, Santee Sioux Nation, and Scott and Blaine Tucker (hereinafter, Defendant Lenders). The interest rate on each loan exceeded 750 percent per annum, and the periodic payments on the loans were deducted from plaintiff's Comerica Bank checking account in Salinas, California.

After paying each loan in full, including principal and interest, plaintiff filed this lawsuit on July 1, 2009, alleging defendants were engaged in illegal consumer lending activities on the internet **[*3]** that included charging consumers unconscionable and/or usurious interest rates in excess of 750 percent on payday loans.

In October 2011, this lawsuit, originally filed in 2010, was consolidated by court order with a related lawsuit, *Baillie, et al. v. Dollar Financial Corp., et al.*, and assigned for all purposes to Alameda Superior Court Judge Wynne Carville. Plaintiff Amy Baillie is not a party to this appeal.

Plaintiff subsequently amended her complaint to add several persons, including Charles Hallinan, a business associate of Scott Tucker, and Hallinan Capital Corporation, as DOE defendants (hereinafter, Complaint). The Complaint identified causes of action for: (1) usury and/or unconscionable lending; (2) injunctive relief and restitution under Business & Professions Code, § 17200 et seq.; (3) money had and received; and (4) imposition of a constructive trust.

The gist of the Complaint is that the Defendant Lenders, which include the Tuckers, AMG, USFASTCASH and Ameriloan (among others), engaged in an illicit scheme to provide payday loans over the internet to consumers, including California consumers, with unconscionable and/or usurious interest rates reaching and exceeding 750 percent. According to the Complaint, AMG, a **[*4]** tribal corporation operated from Kansas, was formed when CLK, a limited liability corporation incorporated under Kansas law and owned and controlled by Scott Tucker, was merged into it.[3] However, the Complaint asserts that, in fact, AMG is wholly controlled by the Tuckers, rather than any tribal entity, and thus has waived the right to claim tribal immunity with respect to the payday loan business.[4] As such, the Complaint alleges that the Tuckers cannot rely upon the corporate form to avoid liability for the usurious lending.

In support of plaintiff's theory, the Complaint includes an "alter ego" allegation, which states that, at all relevant times, a unity of interest and ownership existed between the Tuckers and defendant CLK, such that CLK must be deemed the alter ego of the Tuckers "in that CLK was conceived, intended and used by [the Tuckers] as a device to avoid individual liability and for the purpose of substituting a financially insolvent corporation now suspended in place of themselves." The Complaint further alleged that CLK was a "mere shell, instrumentality, and conduit" through which the Tuckers conducted their business, and that the **[*5]** Tuckers exercised complete control over CLK "to such an extent that any individuality or separateness of CLK and [the Tuckers] does not now, and at all times herein mentioned, did not exist."

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[3] The Complaint alleges on information and belief that CLK registered the trademarks of defendants Ameriloan, ONECLICKCASH, USFASTCASH, and United Cash, before later assigning them to defendant SFS and TFS Corporation. As the California Supreme Court in *MNE* explained, "Preferred Cash and One Click Cash are simply trade names under which SFS conducts its lending business. When the Commissioner filed the complaint, Ameriloan, United Cash Loans, and U.S. Fast Cash were trade names under which MNE (through its TFS subdivision) conducted lending operations. But by the time the trial court granted the motion to quash [in *People v. Miami Nation Enterprises]*, MNE had transferred ownership of that lending business, including the trade names, to MNE Services. . . . [T]hus . . . for purposes of determining the immunity of Ameriloan, United Cash Loans, and U.S. FastCash, our focus must be on MNE Services, although evidence regarding MNE's prior operations under those trade names may shed light on the inquiry." (*MNE, supra*, 2 Cal.5th at pp. 250-251.)

[4] As previously mentioned, Defendant Lender AMG is one of the Tribal Entities. These entities were dismissed from this case by the trial court on tribal sovereign immunity grounds, a ruling that, as previously mentioned, is the subject of a separate appeal, to wit, A139147.

On February 26, 2013, the Tuckers made a special appearance to move to quash the summons for lack of personal jurisdiction and to dismiss.[5] In doing so, the Tuckers argued that plaintiff could not establish general or specific jurisdiction because they had no significant contacts with or in California. (Code Civ. Proc., § 418.10.) In support of their motion, the Tuckers submitted a declaration from Scott Tucker, who attested that he was not licensed or registered to conduct business in California; was not an officer, owner or director of any entity licensed or registered to do business in California; had no real property or bank accounts in California; paid no taxes in California; and had not entered into any contracts with a California resident. In addition, Tucker denied having any ownership interests in, or being an officer, director or manager of, the following corporate or tribal entities: USFASTCASH, Ameriloan, United Cash Loans, Preferred Cash, One Click Cash, AMG, CLK Management, "MNE", SFS, Inc., LeadFlash Consulting, **[*6]** LLC, Partner Weekly, LLC, The Muir Law Firm, LLC, or Tribal Financial Services. According to Tucker, his role in AMG was limited to that of an employee who handles "matters related to marketing, operations and information technology, and act[s] as a strategic advisor to the officers and owners of [AMG]."

In addition, Scott Tucker attested that he was the sole owner of AMG Capital Management LLC, Black Creek Capital Corporation, Black Creek LLC, Broadmoor Capital Partners LLC, Level 5 Motorsports LLC, N.M. Service Corporation, and ST Capital LLC. However, Tucker attested that none of these corporate entities was licensed or registered to conduct business in California; had offices, phone listings, addresses or employees in California; owned property or paid taxes in California; entered into contracts with California residents; or had ownership interests in any of the corporate defendants named in the Complaint.

The Tuckers also submitted a declaration from Blaine Tucker, who likewise attested that he was not licensed or registered to conduct business in California; was not an officer, owner or director of any entity licensed or registered to do business in California; had no property, offices, **[*7]** addresses or bank accounts in California; paid no taxes in California; and had not entered into any contracts with a California resident. In addition, Blaine Tucker, like his brother, denied having any ownership interests in, or being an officer, director or manager of, the following corporate or tribal entities: USFASTCASH, Ameriloan, United Cash Loans, Preferred Cash, One Click Cash, AMG, CLK Management, MNE, SFS, Inc., Partner Weekly, LLC, The Muir Law Firm, LLC, or Tribal Financial Services. Also like his brother, Blaine Tucker swore his role in AMG was limited to that of an employee, describing his responsibilities as wholly related to employee services, including staffing, operations, human resources, and payroll, as well as third-party vendor relations. Further, he was sole owner of LeadFlash Consulting LLC, an entity with no significant California contacts.

On January 4, 2014, following a contested hearing, the trial court granted the Tuckers' motion to quash for lack of specific jurisdiction and denied plaintiff's motion for further discovery. In doing so, the trial court began with the observation that, "notwithstanding that sovereign tribal immunity provides no direct protection **[*8]** for the Tuckers, their obvious understanding of the concepts in play has allowed them to enjoy its benefits indirectly, *apparently within the bounds of the law in its current state*." (Italics added.) The trial court then found the following facts to be true based upon the record before it: (1) plaintiff had not established that the Tuckers were the "lenders" behind the internet payday loan business; (2) in all instances one or more of the Tribal Entities, rather than the Tuckers, were the "lenders"; (3) at best, it was established the Tuckers were employees of one or more of the Tribal Entities, which were entitled to tribal immunity in this case; and (4) actions taken outside California by the Tuckers as employees of these immune entities afforded no basis for the court's exercise of jurisdiction.

Further, with respect to plaintiff's request for additional jurisdictional discovery, the trial court issued a denial. While acknowledging "[o]ne of [plaintiff's] problems is her need to access records and other evidence within the exclusive control of entities that enjoy tribal sovereign immunity," the trial court found plaintiff had failed to propose a discovery plan limited to showing that **[*9]** the Tuckers were subject to personal jurisdiction in California, as opposed to a plan "tantamount to full merits discovery," and that, in any event, "any such program would be futile, as the court has learned through the course of the discovery battles to date that the Tuckers have been careful to leave all documents in the custody and control of their tribal 'employers,' who object to any discovery directed to

[5] The Tuckers previously moved to quash for lack of personal jurisdiction in 2010 in San Francisco Superior Court. However, the matter was subsequently consolidated and transferred to Alameda County, where plaintiff filed the operative amended complaint.

them due to their immunity."

Accordingly, the trial court dismissed the Complaint as to the Tuckers, prompting this timely appeal.

However, after briefing in this appeal concluded, the California Supreme Court issued its decision in the aforementioned related matter, *MNE, supra*, 2 Cal.5th 222. In that matter, the Commissioner of the Department of Corporations sued many of the same tribal entities, alleging violations of the California Deferred Deposit Transaction Law, including making deferred deposit loans without a license, issuing loans in excess of the $300 statutory maximum, charging borrowers unlawful fees, and violating the Commissioner's desist and refrain orders. The Second District Court of Appeal subsequently affirmed a court order, similar to here, granting the specially appearing defendants' **[*10]** motion to quash service for lack of jurisdiction and dismissing the case. (*Id.* at pp. 230-231.)

The California Supreme Court, however, reversed, concluding the lower courts had misapplied the doctrine of tribal sovereign immunity. Specifically, after detailing the various approaches used by courts in California and beyond, the California Supreme Court laid out a new standard for determining when a tribal entity merits the designation of sovereign immunity. (*MNE, supra*, 2 Cal.5th at pp. 239-244.) This new standard, a modified version of the standard set forth in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort* (10th Cir. 2010) 629 F.3d 1173 (*Breakthrough*), identifies the following five factors as significant, albeit not individually dispositive: (1) method of creation, (2) tribal intent, (3) purpose, (4) control, and (5) financial relationship. According to the high court, "[these factors] properly account for the understanding that tribal immunity is both 'an inherent part of the concept of sovereignty' and '"necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy."' [Citation.]" (*Id.* at p. 244.)

Importantly, the California Supreme Court clarified for the first time that "a tribally affiliated entity claiming immunity bears the burden of proving by a preponderance of **[*11]** the evidence that it is an arm of the tribe." (*MNE, supra*, 2 Cal.5th at p. 244.) With respect to the type of proof necessary to meet this burden, the high court also emphasized the importance of having in the record functional evidence relating to how the tribal entity actually operates, and not just formal evidence relating to the entity's underlying organizational or control structure. (See *id.* at pp. 252-253.) Further, "until the entity has proven it should be treated as an extension of the tribe, it is no more entitled to a presumption of immunity than any other party." (*Id.* at p. 244.)

Ultimately, after applying this new legal standard to the case before it, the California Supreme Court concluded: "The record reveals a nominally close relationship between SFS and the Santee Sioux, and between MNE Services and the Miami Tribe. But it contains scant evidence that either tribe actually controls, oversees, or significantly benefits from the underlying business operations of the online lenders. On the record before us, which both parties contend is undisputed, we are unable to conclude that defendants have carried their burden of showing that a denial of immunity would appreciably impair either tribe's economic development, cultural autonomy, **[*12]** or self-governance." (*MNE, supra*, 2 Cal.5th at p. 251.) The judgment of dismissal was thus reversed and the matter was remanded to the trial court for further proceedings. (*Ibid.*)

As the parties here recognize, this appeal is in certain ways distinguishable from *MNE* in that neither the legal theories nor the parties wholly overlap. First, the California Supreme Court was not directly concerned with the issue raised herein — to wit, whether personal jurisdiction exists with respect to the Tuckers in the case. Moreover, the Tuckers are not named as defendants in the *MNE* matter. In addition, AMG, one of the Defendant Lenders in this case, is a respondent in one of the related appeals arising from this consolidated lawsuit (to wit, A139147), but is not a respondent here or a named defendant in the *MNE* matter. And defendant MNE, which *is* a named defendant in the *MNE* matter, has been dismissed from this case in a ruling not challenged on appeal.

Yet, at the same time, it is beyond dispute the California Supreme Court's pronouncement of — and application of — a new tribal sovereign immunity standard has significant implications to our resolution of this appeal. Indeed, the trial court, in dismissing the Tuckers from this **[*13]** lawsuit on jurisdictional grounds, expressly relied on its earlier order recognizing the defendant Tribal Entities as immune from liability on the basis of tribal sovereignty. Significantly, defendants asked this court to stay this appeal pending the California Supreme Court's resolution of the *MNE* matter (which we did), explaining that "AMG and MNE share nearly identical organizational structures," such that "the facts and issues underlying [the *MNE* matter] are nearly identical

to the facts and issues in the present appeal."

Given these circumstances, we requested and received supplemental briefing from the parties regarding the impact, if any, of the *MNE* decision on our resolution of this appeal. Accordingly, with this supplemental briefing in mind, we turn to the specific issues raised herein.

DISCUSSION

Plaintiff raises two related arguments on appeal. First, plaintiff contends the trial court erred in denying her request to conduct additional jurisdictional discovery with respect to the Tuckers. Second, plaintiff contends the Tuckers, through their corporations, engaged in illicit lending activities that were directed at, and caused effects in, California, such that specific jurisdiction **[*14]** over them has been established. We begin with the relevant legal framework.

I. The Law Governing Specific Jurisdiction.

"'California courts may exercise personal jurisdiction on any basis consistent with the Constitution of California and the United States. (Code Civ. Proc., § 410.10.) The exercise of jurisdiction over a nonresident defendant comports with these Constitutions "if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate '"traditional notions of fair play and substantial justice."'" ([*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996)] 14 Cal.4th [434,] 444, 58 Cal. Rptr. 2d 899, 926 P.2d 1085 [*Vons*], quoting *Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 [90 L.Ed. 95, 66 S.Ct. 154] (*Internat. Shoe*).)' (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 268 [127 Cal.Rptr.2d 329, 58 P.3d 2] (*Pavlovich*).)" (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1061, 29 Cal. Rptr. 3d 33, 112 P.3d 28 [*Snowney*].)

"'The concept of minimum contacts . . . requires states to observe certain territorial limits on their sovereignty. It "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."' (*Vons, supra*, 14 Cal.4th at p. 445, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 292 [62 L.Ed.2d 490, 100 S.Ct. 559] (*World-Wide Volkswagen*).) To do so, the minimum contacts test asks 'whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State.' (*Kulko v. California Superior Court* (1978) 436 U.S. 84, 92 [56 L.Ed.2d 132, 98 S.Ct. 1690], quoting *Internat. Shoe, supra*, 326 U.S. at pp. 316-317.) The test 'is not susceptible of mechanical application; rather, the facts of each **[*15]** case must be weighed to determine whether the requisite "affiliating circumstances" are present.' (*Kulko*, at p. 92.)" (*Snowney, supra*, 35 Cal.4th at p. 1061.)

"Under the minimum contacts test, '[p]ersonal jurisdiction may be either general or specific.' [Citation.]" (*Snowney, supra*, 35 Cal.4th at p. 1062.) Here, plaintiff does not claim on appeal that general jurisdiction exists with respect to the Tucker defendants and, accordingly, we consider only whether specific jurisdiction has been established. In doing so, we must look to the "relationship among the defendant, the forum, and the litigation." (*Snowney, supra*, 35 Cal.4th at p. 1062.) As the California Supreme Court has held, a court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the court's assertion of personal jurisdiction over the defendant would comport with "fair play and substantial justice." (*Ibid.*) Purposeful availment, in turn, exists where the defendant "has 'purposefully directed' its activities at forum residents, 'purposefully derived benefit' from forum activities, or 'purposely availed' itself of the privilege of conducting activities within **[*16]** the forum state, thus invoking the benefits and protections of the state's laws. (*Vons Companies, supra*, 14 Cal.4th at p. 446 . . . .)" (*People ex rel. Harris v. Native Wholesale Supply Co.* (2011) 196 Cal.App.4th 357, 361, 126 Cal. Rptr. 3d 257.)

"[I]n tort cases, the 'purposeful availment' requirement for specific jurisdiction can be satisfied by the 'effects test,' set out in *Calder v. Jones* (1984) 465 U.S. 783 [104 S.Ct. 1482, 79 L.Ed.2d 804]. (*Panavision Intern., L.P. v. Toeppen* [(9th Cir. 1998)] 141 F.3d 1316, 1321 [applying California law].) 'Under *Calder*, personal jurisdiction can be based upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered — and which the defendant knows is likely to be suffered — in the forum state."' (141 F.3d at p. 1321.)" (*Jewish Def. Org. v. Superior Court* (1999) 72 Cal.App.4th 1045, 1057, 85 Cal. Rptr. 2d 611.)

Where, as here, a defendant moves to quash service of process for lack of specific jurisdiction, the plaintiff has the initial burden of identifying facts, supported by a

preponderance of the evidence, that justify the court's exercise of jurisdiction. (*Snowney, supra*, 35 Cal.4th at p. 1062; *BBA Aviation PLC v. Superior Court* (2010) 190 Cal.App.4th 421, 428-429, 117 Cal. Rptr. 3d 914.) If the plaintiff meets this initial burden, the burden shifts to the defendant to demonstrate "the exercise of jurisdiction would be unreasonable." (*Ibid.*) "The merits of the complaint are not at issue at this stage of proceedings. [Citation.] However, when personal jurisdiction is asserted on the basis of a nonresident defendant's alleged activities in this state, facts relevant to jurisdiction may also bear on the merits **[*17]** of the complaint. [Citation.] The jurisdictional facts shown must pertain to each separate nonresident defendant, even in a case alleging a conspiracy." (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 110, 37 Cal. Rptr. 3d 258 [*Automobile Antitrust Cases*].)

On appeal, reviewing courts consider *de novo* questions of jurisdiction, while reviewing for substantial evidence any underlying factual issues resolved by the trial court. (*MNE, supra*, 2 Cal.5th at p. 250; *Young v. Daimler AG* (2014) 228 Cal.App.4th 855, 865, 175 Cal. Rptr. 3d 811; see also *Centerpoint Energy, Inc. v. Superior Court* (2007) 157 Cal.App.4th 1101, 1117, 69 Cal. Rptr. 3d 202 [in personal jurisdiction matters """we review independently the trial court's conclusions as to the legal significance of the facts"""].)

II. The Record on Appeal.

Here, in contending specific jurisdiction exists with respect to the Tuckers, plaintiff relies on the following evidence of "contacts" between the Tuckers and State of California. First, plaintiff, herself a California resident, received multiple payday loans on the internet through the websites of the "dba's" of Defendant Lender AMG, including Defendant Lenders USFASTCASH and Ameriloan. Moreover, plaintiff was provided all the key information regarding her loan terms on the internet, and thereafter signed the debt instrument electronically. According to the Complaint, these Defendant Lenders then caused plaintiff's California Comerica bank account to be debited **[*18]** seven times in service of her payday loans. Thus, plaintiff argues, regardless of whether the Defendant Lenders directly engaged in business with or in California, the fact remains that their websites were accessible to California residents and were used by California residents, including herself, to enter into loan contracts with them.

To counter this record, the Tuckers first note that the above-identified Defendant Lenders, including MTE, USFASTCASH and Ameriloan, were incorporated under tribal law and headquartered on tribal lands and, as such, are entitled to tribal immunity (as the trial court ruled). Moreover, with respect to themselves, the Tuckers point to evidence that they resided in Kansas, and their loan business was operated out of Kansas, during the relevant time. Further, each Tucker brother attested in his respective declaration that he was not licensed or registered to conduct business in California; was not an officer, owner or director of any entity licensed or registered to do business in California; had no property, offices, addresses or bank accounts in California; paid no taxes in California; and had not entered into any contracts with a California resident. **[*19]** In addition, each Tucker brother denied having any ownership interests in, or being an officer, director or manager of, the following corporate or tribal entities: USFASTCASH, Ameriloan, United Cash Loans, Preferred Cash, One Click Cash, AMG, CLK Management, "MNE", SFS, Inc., Partner Weekly, LLC, The Muir Law Firm, LLC, or Tribal Financial Services. And, finally, each brother swore his role in AMG was limited to that of an employee, describing his responsibilities as wholly related to employee services, including staffing, operations, human resources, and payroll, as well as third-party vendor relations.

Plaintiff, in turn, responds that Scott Tucker is indistinguishable from the Defendant Lenders because he designed this "loan enterprise," created the corporate/tribal entities, and then "rented" for a nominal fee the names of the Miami Tribe of Oklahoma and the Sioux Tribe in Nebraska to escape detection as to the architect of the illicit lending practices. She thus argues specific jurisdiction exists over the Tuckers as a result of the effects in California of their loan activities conducted elsewhere, through the Defendant Lenders, because they "personally and individually participated **[*20]** in the usurious loan business at AMG and through companies to intentionally cause effects in California, that is solicit Californians to borrow money and make payments to Scott's companies, which made usurious loans for years and received part of the ill-gotten gain."

To support this argument, plaintiff cites the following evidence. First, the Tuckers were the only signatories on checks drawn on Defendant Lender AMG's bank accounts and received significant sums of money, indeed many millions from AMG, a company engaged solely in the business of payday loans. In addition, Scott Tucker's now-defunct company, CLK, was the subject of a 2006 State of California cease and desist order,

published advertisements for short term loans on the internet, including in California, and issued plaintiff's 2005 loan under the trade name "USFASTCASH" (evidence plaintiff insists the trial court ignored when granting the Tuckers' motion to quash).

Scott Tucker, in turn, was the single member of CLK, a Kansas limited liability corporation, before it was merged into AMG in 2010 through operation of Kansas law.[6] (K.S.A. § 17-7681(b).) Scott Tucker also signed the trademark applications for Defendant Lenders USFASTCASH, Ameriloan, **[*21]** OneClickCash and UnitedCashLoans in his capacity as president of CLK.

Finally, plaintiff points to deposition testimony from Thomas Assenzio, owner of Processing Solutions Inc. (PSI), the entity that serviced loans for defendant MTE. According to this testimony, Assenzio's only contact at MTE was "Scott Tucker of CLK," all the instructions he received on how to process the internet loans came from Scott Tucker, and he never discussed this loan business with any tribal member of MTE. In fact, according to Assenzio's testimony, Scott Tucker "would not let [PSI] talk to anyone else," aside from him, regarding the loan business: "[W]hen we asked can we speak to anyone, he said, no. I'm handling all that. So, no, never anyone else. He kept that close guarded to his vest."

According to plaintiff, these circumstances demonstrate that "from 2005 to July 29, 2010 all the usurious loans[, including her loan,] were by Scott Tucker through CLK or individually." Indeed, plaintiff notes, that there is no evidence in the record to prove anyone or entity *other than* the Tuckers received the bulk of the profits from the usurious lending, and that respondents have "fail[ed] to refute that the Defendant's conduct **[*22]** was specifically directed at California in that advertisements were published on the internet at the latest in 2005 when Ms. Rosas took out two (2) payday loans." Plaintiff acknowledges, however, there is no actual evidence in our record that Scott Tucker is legally indistinguishable from CLK or AMG, or that he or Blaine purposefully availed himself of the privilege of conducting business in California by engaging in business activities through CLK and AMG. Nor is there authenticated evidence that CLK was lending money or holding out "USFASTCASH" as a trade name, as opposed to merely selling or assigning the right to this name to another entity. Yet, according to plaintiff, these evidentiary deficiencies stem from the trial court's erroneous denial of her request for further discovery and acceptance of defendants' assertions of tribal immunity. In the absence of these allegedly erroneous rulings, she may have been able to prove her theories.

We agree with plaintiff the record in this case was insufficient to permit the trial court to make a reasoned judgment on whether it could properly exercise personal jurisdiction over the Tuckers. More importantly, we agree that, had the trial court **[*23]** applied the correct standard for determining when a tribal entity is entitled to immunity before ruling on the Tuckers' motion to quash, there is a strong likelihood these record deficiencies would have been avoided. In particular, plaintiff theorizes in the operative complaint that Tucker controlled CLK, which, among other things, was the subject of California's Cease and Desist letter and later became the tribal entity AMG. However, under the authority of *MNE*, corporate records of lending activities undertaken by the Tuckers through CLK and, later, following the merger, through AMG and its dba's (including Defendant Lender USFASTCASH), are not shielded from discovery by the tribal immunity doctrine simply because such records are possessed or controlled by the tribal entities. As the California Supreme Court made clear: "Evidence that the tribe actively directs or oversees the operation of the entity weighs in favor of immunity; evidence that the tribe is a passive owner, neglects its governance roles, or otherwise exercises little or no control or oversight weighs against immunity." (*MNE, supra*, 2 Cal.5th at p. 247.) And, in that case, "[t]he record reveals a nominally close relationship between SFS and the Santee **[*24]** Sioux, and between MNE Services and the Miami Tribe. *But it contains scant evidence that either tribe actually controls, oversees, or significantly benefits from the underlying business operations of the online lenders*. . . . [W]e are [thus] unable to conclude that defendants have carried their burden of showing that a denial of immunity would appreciably impair either tribe's economic development, cultural autonomy, or self-governance." (*MNE, supra*, 2 Cal.5th at p. 251 [italics added].) Likewise, in this case, it is far from clear defendants have or could carry their burden with respect to tribal immunity. In any event, it is indeed clear that, given the commonality of circumstances in *MNE* and this case, plaintiff should be entitled to pursue further

[6] According to plaintiff's supplemental brief: "As the [California] Supreme Court pointed out in . . . *MNE*, the trademark USFastcash, the trademark connected to the loan to [plaintiff] was registered by CLK and only transferred by CLK in 2006, after CLK had received a desist and refrain order from the Commissioner [of the Department of Corporations] targeting its deferred lending operations."

discovery with respect to, at minimum, the key issues of corporate governance and control of the named tribal entities before the trial court decides anew whether the Tuckers are subject to jurisdiction.

Indeed, the actual language of the orders under challenge provide further support for our conclusion. For example, when denying plaintiff's motion for further jurisdictional discovery, the trial court directly referenced its earlier August 6 order to continue the hearing **[*25]** on respondents' motion to quash service of process, in which it found plaintiff unable to meet her burden to prove a basis for the assertion of personal jurisdiction over respondents, and notes that "[o]ne of [plaintiff's] problems is her need to access records and other evidence within the exclusive control of entities that enjoy tribal sovereign immunity." The trial court then explained its reason for denying plaintiff's motion for further jurisdictional discovery after the continued hearing as follows:

"The state of the record on August 6 and now is that (1) The Tuckers have not been shown to be the 'lenders' [behind the loan business], (2) that in all instances one or more immune Tribal Entities were the 'lenders', (3) at best the Tuckers have been shown to have been employees of one or more of these immune entities, and (4) the Tuckers' out-of-state actions as employees of these immune entities does not afford the court a basis to assert personal jurisdiction over them. When asked at the most recent hearing what Plaintiff thought might be fruitful jurisdictional discovery under these circumstances, counsel once again outlined a broad discovery program designed to show that the Tuckers **[*26]** have a very substantial role in running the Tribal Entities' online lending activities and that they enjoy enormous financial benefits from that role such that they should be deemed either the lenders or so involved in and profiting from the California lending activities of the Tribal Entities so as to provide a basis for the assertion of personal jurisdiction. As pointed out before, such a discovery program is in no sense 'limited' but tantamount to full merits discovery. Further, any such program would be futile, as the court has learned through the court of the discovery battles to date that the Tuckers have been careful to leave all documents in the custody and control of their tribal 'employers,' who object to any discovery directed to them due to their immunity."

This excerpt, we conclude, reflects the need for the trial court to reconsider whether jurisdictional discovery is in fact complete given the new standards for designating a tribal entity as protected by the doctrine of sovereign immunity laid out by the California Supreme Court in *MNE*.[7]

In reaching this conclusion, we acknowledge the Tuckers' point that, in *MNE*, the precise issue before the California Supreme Court **[*27]** was whether the lower court misapplied the tribal immunity doctrine, not, as here, whether the plaintiff has demonstrated sufficient contacts between the Tuckers and California to warrant the court's exercise of jurisdiction over them. As the Tuckers note: "Evidence purporting to show the Tuckers controlled AMG does not establish personal jurisdiction in California." And while *MNE* held that the party asserting tribal sovereignty has the burden to prove its entitlement to immunity, it is the *plaintiff* that has the initial burden of identifying facts, supported by a preponderance of the evidence, warranting the trial court's exercise of personal jurisdiction. (See *Snowney, supra*, 35 Cal.4th at p. 1062; *MNE, supra*, 2 Cal.5th at pp. 243-244 ["tribal immunity . . . is not 'a true jurisdictional bar' that automatically divests a court of the ability to hear or decide the case," as 'whatever its jurisdictional attributes,' tribal immunity 'does not implicate a . . . court's subject matter jurisdiction in any ordinary sense'"].)

However, even accepting these arguments, the fact remains that, without further discovery in this case and, in particular, discovery of the corporate records of CLK and AMG held by the Tribal Entities, we simply cannot know whether plaintiff **[*28]** can prove the Tuckers controlled the usurious lending activities at the heart of this case, which, as plaintiff contends, took place over the internet and involved California consumers.

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[7] We hold as an initial matter that the *MNE* decision should apply retroactively on remand, particularly in light of the considerations of fairness and the public policy favoring deciding cases on their merits, which are implicated herein. (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 442-443, 41 Cal. Rptr. 3d 482 ["As a general rule, judicial decisions are given retroactive effect, even if they represent a clear change in the law. [Citation.] The exception is when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule"]. See also *Woods v. Young* (1991) 53 Cal.3d 315, 330, 279 Cal. Rptr. 613, 807 P.2d 455 ["Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule. [Citations.]"].)

Finally, we also acknowledge the Tuckers' argument in supplemental briefing that the trial court did not rely solely on tribal immunity as grounds to deny plaintiff's motion for further discovery. Rather, the trial court also relied upon plaintiff's repeated failure to propose a discovery plan limited to jurisdictional, rather than full merits, discovery. Yet, while it may be true that, where a defendant moves to quash for lack of jurisdiction, "[t]he merits of the complaint are not [yet] at issue," it is likewise true that, where, as here, "personal jurisdiction is asserted on the basis of a nonresident defendant's alleged activities in this state, facts relevant to jurisdiction may also bear on the merits of the complaint. [Citation.]" (*Automobile Antitrust Cases, supra*, 135 Cal.App.4th at p. 110.) And given the interrelated nature of the jurisdictional facts and merits of the complaint in this action, as well as the undeniable fact that defendants alone have access to the documents relating to the organization and operational control structure of the Tribal Entities, **[*29]** we cannot conclude, as the Tuckers insist, that the trial court would have denied further discovery to plaintiff notwithstanding its misapplication of the tribal immunity doctrine. As the California Supreme Court recognized in *MNE*, holding the party claiming tribal immunity to the burden of proof "comports with the traditional principle that a party in possession of the facts tending to support its claim should be required to come forward with that information." (*MNE, supra*, 2 Cal.5th at p. 244.)

Thus, because the trial court denied plaintiff's motion for further jurisdictional discovery prior to the California Supreme Court's adoption of the definitive standard for determining whether a tribal entity is entitled to immunity, we conclude the order, and the subsequent judgment of dismissal, cannot stand. We therefore reverse the judgment and remand the matter for further proceedings in light of this new high court authority.[8]

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings in light of the California Supreme Court decision in *People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 211 Cal. Rptr. 3d 837, 386 P.3d 357, as well as the opinions discussed herein.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.

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[8] Appellant's motions for judicial notice filed on June 19, 2014, January 29, 2015, and September 11, ***2017*** are denied as irrelevant in light of our decision to remand this matter to the trial court for further proceedings.