

the complaint, sometime in May, just one month after she filed the complaint. This time span is short enough to permit a jury to infer a causal connection.¹⁵

Plaintiff has thus met her “minimal” burden of establishing a prima facie case of retaliation by defendants. As defendants have not offered a “legitimate, non-retaliatory reason for the adverse employment action,” *Jute*, 420 F.3d 166, 173 (citing *Quinn*, 159 F.3d at 768), the presumption of retaliation remains, and plaintiff’s claim must survive summary judgment. Accordingly, defendants’ motion as to plaintiff’s retaliation claim must be denied.

IV. CONCLUSION

While plaintiff has established that reasonable jurors could find that defendants violated the EPA by paying plaintiff less than they paid her male counterpart, she has failed to show that defendants had the discriminatory intent necessary to demonstrate a Title VII and/or NYSHRL violation of unequal compensation. However, plaintiff has set forth sufficient evidence to show that there are genuine issues of material fact such that reasonable people could find defendants engaged in unlawful retaliation after plaintiff filed her EEOC complaint, in violation of NYSHRL.

Therefore, it is

ORDERED that

1. Defendants’ motions for summary judgment as to plaintiff’s Equal Pay Act claim (*Second* cause of action) is DENIED;

15. See *Lovejoy-Wilson*, 263 F.3d at 224 (finding that an employee suspension within the same month the complaint was received by the employer demonstrated a causal connection); *Richardson v. New York State Dep’t of Corr. Service*, 180 F.3d 426, 446–47 (2d Cir. 1999) (holding that abusive acts within one month of receipt of deposition notices may be retaliation for initiation of lawsuit more than

2. Defendants’ motion for summary judgment as to plaintiff’s Title VII and New York State Human Rights Law claims (*First* and *Third* causes of action) of discrimination on the basis of sex are GRANTED; and those causes of action are DISMISSED; and

3. Defendants’ motion for summary judgment as to plaintiff’s New York State Human Rights Law retaliation claim (*Fourth* cause of action) is DENIED.

IT IS SO ORDERED.



ONEIDA INDIAN NATION OF
NEW YORK, Plaintiff,

v.

MADISON COUNTY, Defendant.

No. 5:00–CV–506.

United States District Court,
N.D. New York.

Oct. 27, 2005.

Background: Indian tribe brought action against county, alleging that parcels of land that tribe had purchased within boundaries of former reservation were exempt from taxation. The United States District Court for the Northern District of New York, Hurd, J., 145 F.Supp.2d 226, 145 F.Supp.2d 268, determined that par-

one year earlier); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir.1998) (holding discharge less than two months after plaintiff filed a sexual harassment complaint with management and ten days after filing a complaint with the state human rights office provided evidence of a causal connection between the protected activity and adverse employment action).

cels were not taxable, and county appealed. The United States Court of Appeals for the Second Circuit, 337 F.3d 139, vacated judgment, and certiorari was granted. The Supreme Court, Justice Ginsburg, 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386, reversed and remanded. On remand, county moved to dismiss, and parties cross-moved for summary judgment.

Holdings: The District Court, Hurd, J., held that:

- (1) foreclosure was barred by Nonintercourse Act and sovereign immunity;
- (2) county had failed to comply with due process; and
- (3) taxation was barred by state law.

Plaintiff's motion granted; defendant's motion denied.

1. Federal Civil Procedure ⇨1773

Where motion to dismiss for failure to state claim is made prior to any discovery or filing of answer, court is loath to dismiss complaint, regardless of whether plaintiff is unlikely to prevail, unless defendant can demonstrate that plaintiff is unable to prove facts which would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Courts ⇨41, 65

Doctrine of "abstention" may be applied by federal court to decline to exercise or postpone exercise of its jurisdiction when same issue is also presented in state court with concurrent jurisdiction.

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Courts ⇨41

Abstention is extraordinary and narrow exception to duty of district court to adjudicate controversy properly before it, appropriate only in exceptional circumstances where order to parties to repair to

state court would clearly serve important countervailing interest.

4. Federal Courts ⇨41

Federal court should never abstain from suit merely because state court could entertain it.

5. Federal Courts ⇨43, 46, 47.1, 49, 59

Abstention may be applied in only three categories of cases: (1) those presenting federal constitutional issue which might be mooted or presented in different posture by state court determination of pertinent state law; (2) those where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends result in case then at bar; and (3) those where, absent bad faith, harassment, or patently invalid state statute, federal jurisdiction has been invoked for purpose of restraining state criminal proceedings, state nuisance proceedings directed at obtaining closure of places exhibiting obscene films, or collection of state taxes.

6. Federal Courts ⇨59

Abstention was not warranted in Indian tribe's challenge to constitutionality of county's property tax claim procedures; constitutional issues would not be mooted by decision in state foreclosure action, no difficult questions of state law were presented, and underlying taxability of land was not in question.

7. Courts ⇨493(3)

Generally, pendency of action in state court is no bar to proceedings concerning same matter in federal court having jurisdiction.

8. Federal Courts ⇨41

Federal district courts have virtually unflagging obligation to exercise jurisdiction given them.

9. Federal Courts ⇨41, 65

Circumstances in which federal court action should be dismissed for reasons of judicial efficiency in face of concurrent state court proceeding are considerably more limited than circumstances appropriate for abstention.

10. Federal Courts ⇨41, 65

Factors court considers when deciding whether dismissal for reasons of judicial efficiency is appropriate, when there is concurrent jurisdiction in a state court, include inconvenience of federal forum, desirability of avoiding piecemeal litigation, and order in which jurisdiction was obtained by concurrent forums.

11. Federal Courts ⇨59, 65

Dismissal of Indian tribe's challenge to constitutionality of county's property tax claim procedures was not warranted on ground of judicial efficiency, even though county's state court foreclosure action was pending; federal proceeding had been pending for over five years, during which time state action had been stayed and, although state action was in rem, federal action was in personam.

12. Courts ⇨497

Once state court has taken jurisdiction of res that is subject of state court in rem proceeding, federal court cannot also exercise jurisdiction over res.

13. Courts ⇨490, 511

Rule of "comity" prudentially limits exercise of in rem jurisdiction over res that is already under in rem jurisdiction of another court.

See publication Words and Phrases for other judicial constructions and definitions.

14. Indians ⇨15(1)**Taxation** ⇨2923

State court foreclosure of county's property tax liens was prohibited by Non-intercourse Act, as it would result in transfer of title to land owned by Indian tribe. 25 U.S.C.A. § 177.

15. Indians ⇨27(1)

Indian tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in counterclaim to action filed by tribe.

16. Taxation ⇨2273

Indian tribe was immune from county's suit to collect unpaid property taxes.

17. Constitutional Law ⇨285

It is requirement of due process that property owner be properly notified of tax sale and redemption period. U.S.C.A. Const.Amend. 14.

18. Constitutional Law ⇨285**Taxation** ⇨3014

Under New York law, county was required to give property tax debtors notice that two year redemption period had begun to run; failure to give notice at least two years prior to expiration of period violated due process. N.Y.McKinney's RPTL § 1110.

19. Taxation ⇨2273

New York county's collection of unpaid taxes on property owned by Indian tribe within reservation was barred by state law, even if federal equitable principles barred tribe from claiming tax immunity. N.Y.McKinney's Indian Law § 6; N.Y.McKinney's RPTL § 454.

20. Injunction ⇨14, 16

Party seeking injunctive relief must establish inadequacy of any remedy at law and irreparable harm.

21. Injunction ¶12, 23

Court must weigh potential benefits and harm to be incurred by parties before granting or denying injunctive relief.

22. Taxation ¶2882

Indian tribe, having prevailed on claim that county was precluded from foreclosing on property tax liens, was entitled to injunctive relief; tribe would be irreparably harmed by foreclosure and change of title of its properties, and balance of hardships favored tribe.

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**MEMORANDUM–DECISION and
ORDER and PERMANENT
INJUNCTION**

HURD, District Judge.

A Nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability.

*President Abraham Lincoln
Annual Message to Congress
December 1, 1862*

A district court should not permit the taking of a sovereign nation's land against its will by foreclosure or any other means, without the express approval of the United States Government. In this country such an extraordinary remedy—taking a sovereign nation's land against its will—has never been legally sanctioned.

I. INTRODUCTION

On June 7, 2005, plaintiff Oneida Indian Nation of New York (“the Nation”) filed a motion for summary judgment. Defendant Madison County (“the County”) opposed and cross-moved for summary judgment pursuant to Fed.R.Civ.P. 56. The County also filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), which the Nation opposed. New York State, as amicus curiae, filed a brief in support of the County. Oral argument was heard on September 7, 2005, in Utica, New York. Decision was reserved.

II. BACKGROUND

The Nation filed this action seeking to prevent the County from assessing and enforcing property taxes against Nation-owned property. On June 4, 2001, a Memorandum–Decision and Order issued in this and related cases holding, inter alia, that the lands at issue “are Oneida Reservation lands and therefore are Indian Country. . . . As Indian Country, the properties are not subject to taxation” by the County. *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F.Supp.2d 226, 266 (N.D.N.Y.2001).¹ In addition, the County was enjoined and restrained “from taking any act to impose property taxes upon, or to collect property taxes with respect to” thirteen parcels that were the subject of a 1999 foreclosure action. *Id.* at 267–68. A judgment was entered accord-

1. The subsequent history for this case is set forth in the following text.

ingly. Pursuant to a mandate issued by the United States Court of Appeals for the Second Circuit, the judgment was vacated. *Oneida Indian Nation of N.Y. v. City of Sherrill*, N.Y., 337 F.3d 139, 171 (2d Cir. 2003). The Second Circuit found that the record before it was incomplete as to whether the Madison County parcels “were part of the Oneidas’ historical reservation.” *Id.* Accordingly, the matter was remanded for further proceedings. *Id.*

The United States Supreme Court granted certiorari in the companion cases. 542 U.S. 936, 124 S.Ct. 2904, 159 L.Ed.2d 810 (2004). The Court rejected “the unification [of fee and aboriginal title] theory” and held “that ‘standards of federal Indian law and federal equity practice’ preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.” 544 U.S. 197, 125 S.Ct. 1478, 1489–90, 161 L.Ed.2d 386 (2005) (“*Sherrill*”). Stated another way, the Court held “that the Oneida Indian Nation is not now immune from the taxing authority of local government.” *Id.* at 1494 (Souter, J., concurring). Rehearing was denied.² — U.S. —, 125 S.Ct. 2290, 161 L.Ed.2d 1103 (2005).

III. FACTS

An extensive background of facts is set forth in the prior decisions, familiarity with which is assumed. *See* 337 F.3d at 144–53, 145 F.Supp.2d at 232–36. Only the facts necessary for resolution of the motions are set forth below. The following facts are undisputed unless otherwise noted.

Since the late 1990s the Nation has been reacquiring properties in the County and elsewhere. The Nation currently owns 113 parcels in the County. There is now no dispute that all are within the boundaries of the reservation as described in the

Treaty of Ft. Schuyler and the Treaty of Canandaigua.

The County assessed taxes against Nation-owned parcels, and included the parcels in its yearly foreclosure actions in state court. It was the County’s practice to then withdraw the parcels owned by the Nation, in anticipation of a resolution of the taxability question in *Sherrill*.

The County assessed 2003 taxes against ninety-eight parcels. These parcels were included in the County’s 2003 foreclosure action. However, the County did not withdraw Nation-owned properties from the foreclosure action, as had been its practice. The County instituted a foreclosure action in state court on November 14, 2003. The Petition and Notice of Foreclosure was published in December 2004 and January 2005, and was mailed to the subject parcel owners, including the Nation, on December 8, 2004. The specified last day for redemption of these ninety-eight Nation-owned parcels was March 31, 2005.

The Supreme Court decided *Sherrill* on March 29, 2005, resolving the issue of taxability of reacquired Nation property. On April 28, 2005, the County filed a motion for summary judgment in the 2003 state court foreclosure action. If successful on the motion, possession and title to the properties would be awarded to the County. Accordingly, a preliminary injunction issued enjoining the County from proceeding with the foreclosure action. *Oneida Indian Nation of N.Y. v. Madison County*, 376 F.Supp.2d 280, 283 (N.D.N.Y.2005).

IV. DISCUSSION

A. Standards

1. Motion to Dismiss

A cause of action shall not be dismissed for failure to state a claim under Fed.

2. The City of Sherrill and the Nation reached a settlement and filed a Compact and Stipula-

tion of Dismissal on October 18, 2005.

R.Civ.P. 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). In considering a motion brought pursuant to Fed.R.Civ.P. 12(b), the court must assume all of the allegations in the complaint are true. *Id.* In reviewing the sufficiency of a complaint at the pleading stage, “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

[1] Where a motion to dismiss is made prior to any discovery or the filing of an answer, the court is loath to dismiss the complaint, regardless of whether the plaintiff is unlikely to prevail, unless the defendant can demonstrate that plaintiff is unable to prove facts which would entitle him to relief. *Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 22 (2d Cir.1982); *see also Egelston v. State Univ. College at Geneseo*, 535 F.2d 752, 754 (2d Cir.1976).

2. Summary Judgment

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509–10, 91 L.Ed.2d 202 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the

nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

When the moving party has met the burden, the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. at 1356. At that point, the nonmoving party “must set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S.Ct. at 2511; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248–49, 106 S.Ct. at 2510; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. at 1356.

B. Analysis

1. County’s Motion to Dismiss

The County asserts the doctrine of abstention and lack of subject matter jurisdiction (due to the “prior-exclusive-jurisdiction” rule applicable to *in rem* proceedings) as bases for dismissal. It is therefore appropriate to first address the County’s motion to dismiss.

a. Abstention

[2–5] The doctrine of abstention may be applied by a federal court to “decline to exercise or postpone the exercise of its jurisdiction” when the same issue is also presented in a state court with concurrent jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). However, “it is an extraordinary and narrow exception to the duty of a

District Court to adjudicate a controversy properly before it.” *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)). Abstention is appropriate “‘only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.’” *Id.* (quoting *County of Allegheny*, 360 U.S. at 188–89, 79 S.Ct. at 1063). Additionally, a federal court should never abstain from a suit “‘merely because a State court could entertain it.’” *Id.* at 813–14, 96 S.Ct. at 1244 (quoting *Alabama Pub. Serv. Comm’n v. Southern R. Co.*, 341 U.S. 341, 361, 71 S.Ct. 762, 774, 95 L.Ed. 1002 (1951) (Frankfurter, J., concurring in result)). Abstention may be applied in only three categories of cases. *Id.* at 814, 96 S.Ct. at 1244.

[6] The first category of cases to which the abstention doctrine may be applied is those “‘cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.’” *Id.* (quoting *County of Allegheny*, 360 U.S. at 189, 79 S.Ct. at 1063). The only federal constitutional question presented here is whether the notice provided to the Nation of the impending foreclosure constituted due process. This issue would not be mooted by a decision in the state action. A state court determination of pertinent state law would not result in presentation of this issue in a different posture. *See id.* Accordingly, this case does not fit within the first category of cases to which abstention might be appropriate. *See id.*

The next category of cases are those “‘where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in

the case then at bar.” *Id.* At issue here are the federal questions of application of a federal statute (the Nonintercourse Act), Tribal sovereign immunity, and due process. There is no “‘difficult question[] of state law” presented. *See id.* Thus, this case also does not fit within the second category.

The third and final category of cases in which abstention might be appropriate is those cases “‘where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings . . . directed at obtaining the closure of places exhibiting obscene films, or collection of state taxes.” *Id.* at 816, 96 S.Ct. at 1245–46. This clearly is not a case involving restraint of a state criminal proceeding, nor does it involve a nuisance closing of a place due to obscenity. *See id.* Further, the issue of taxation of the property by the state was resolved in *Sherrill*. *See* 125 S.Ct. at 1494 (Souter, J., concurring) (reiterating the majority’s holding that the Nation “‘is not now immune from the taxing authority of local government”). Accordingly, this case does not fit within the third and final category of cases to which the doctrine of abstention applies. *See Colorado River*, 424 U.S. at 816–17, 96 S.Ct. at 1246.

b. Jurisdiction

[7–9] Although the doctrine of abstention is not applicable in the present case, other principles grounded in judicial efficiency “‘govern in situations involving the contemporaneous exercise of concurrent jurisdictions.” *Id.* at 817, 96 S.Ct. at 1246. “‘Generally, as between state and federal courts, the rule is that ‘the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.’”

Id. (quoting *McClellan v. Carland*, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed. 762 (1910)). Federal district courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Id.* Thus, circumstances in which a federal court action should be dismissed for reasons of judicial efficiency in the face of a concurrent state court proceeding are “considerably more limited than the circumstances appropriate for abstention.” *Id.* at 818, 96 S.Ct. at 1246.

[10] In considering whether dismissal for reasons of judicial efficiency is appropriate when there is concurrent jurisdiction in a state court, factors such as “the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums” may be assessed. *Id.*, 96 S.Ct. at 1247 (internal citations omitted). A court must carefully consider “both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise” when determining whether to dismiss the case. *Id.* No single factor is determinative, and “[o]nly the clearest of justifications will warrant dismissal.” *Id.* at 818–19, 96 S.Ct. at 1247.

[11] Here there is no inconvenience in continuing to proceed with this federal court action. The action has been pending since March 30, 2000. Proceedings have occurred over the five-plus years of its pendency. While state court proceedings were also initiated some years ago, they were held in abeyance at the choice of the parties pending resolution in this and the related *Sherrill* cases. Thus, avoiding piecemeal litigation will be furthered by maintaining the proceedings here. Moreover, although a state court proceeding was initiated in 1999 (as well as those initiated in later years), the order in which jurisdiction was obtained does not favor

dismissal of the federal court action since the first-filed state court action was held in abeyance pending resolution of this matter. In short, there are no factors “counseling against th[e] exercise” of federal jurisdiction in this action. *See id.* at 818–19, 96 S.Ct. at 1247. There is no clear justification warranting dismissal. *See id.* at 819, 96 S.Ct. at 1247.

The only other circumstance in which it would be appropriate to dismiss the federal court action based upon considerations of judicial administration would be where the court in the concurrent actions must exercise jurisdiction over the same property. *Id.* at 818, 96 S.Ct. at 1246 (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412, 84 S.Ct. 1579, 1582, 12 L.Ed.2d 409 (1964)). In that instance, the “state or federal court having custody of such property has exclusive jurisdiction to proceed.” *Donovan*, 377 U.S. at 412, 84 S.Ct. at 1582 (citing *Princess Lida v. Thompson*, 305 U.S. 456, 465–68, 59 S.Ct. 275, 281, 83 L.Ed. 285 (1939)).

[12, 13] Thus, once a state court has taken jurisdiction of the *res* that is the subject of a state court *in rem* proceeding, a federal court cannot also exercise jurisdiction of the *res*. *Donovan*, 377 U.S. at 412, 84 S.Ct. at 1582; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229, 43 S.Ct. 79, 81, 67 L.Ed. 226 (1922). The converse is also true. *Kline*, 260 U.S. at 229, 43 S.Ct. at 81. However, this “first-filed” rule is applicable only to *in rem* proceedings and is not applicable to *in personam* actions. *Donovan*, 377 U.S. at 412, 84 S.Ct. at 1582; *Kline*, 260 U.S. at 230, 235, 43 S.Ct. at 81, 83. This is so because although a state and federal court may have concurrent jurisdiction, “both courts cannot possess or control the same thing at the same time.” *Kline*, 260 U.S. at 235, 43 S.Ct. at 83. Based upon this principle, the rule of comity developed prudentially limiting exercise

of “in rem jurisdiction over a res that is already under the in rem jurisdiction of another court.” *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir.1989) (citing *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195, 55 S.Ct. 386, 389, 79 L.Ed. 850 (1935)). In other words, prior assumption of jurisdiction over a res by a state court creates an exceptional circumstance in which it may be proper for a federal court to decline to exercise its jurisdiction, as set forth in *Colorado River*. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19, 103 S.Ct. 927, 938–39, 74 L.Ed.2d 765 (1983) (applying *Colorado River* to the facts of the case to find that no exceptional circumstances justified staying the federal action).

Here, the state court proceeding is an *in rem* foreclosure action. However, this federal court proceeding is *in personam*. This *in personam* action in federal court is not foreclosed by the state court *in rem* proceeding. See *York Hunter Constr. v. Avalon Props., Inc.*, 104 F.Supp.2d 211, 215 (S.D.N.Y.2000) (restating Second Circuit law “that federal district courts may adjudicate matters that indirectly relate to the state’s exercise of *in rem* jurisdiction” and the state court must follow the federal court’s adjudication regarding the rights at issue); *United States v. \$3,000,000 Obligation of Qatar Nat’l Bank*, 810 F.Supp. 116, 118 (S.D.N.Y.1993) (citing and quoting *Fischer v. American United Life Ins. Co.*, 314 U.S. 549, 554, 62 S.Ct. 380, 383, 86 L.Ed. 444 (1942) for the proposition that “a state or federal court ‘may properly adjudicate rights in property in possession’ of another court”).

Based upon the foregoing, this action need not be dismissed based upon the doctrine of abstention or because there is a state court *in rem* proceeding.

2. *Motion and Cross-motion for Summary Judgment*

The Nation propounds three bases upon which it is entitled to summary judgment for injunctive and declaratory relief. The County relies upon *Sherrill* in opposition to the Nation’s motion and on behalf of its cross-motion for summary judgment. The following analysis demonstrates that there are four independent bases supporting summary judgment in favor of the Nation: the Nonintercourse Act, Tribal sovereign immunity, due process, and state law.

a. *Nonintercourse Act, 25 U.S.C. § 177*

[14] Section 177 of Title 25 of the United States Code prohibits the “purchase, grant, lease, or other conveyance” of land from “any Indian nation or tribe of Indians” unless it is pursuant to a “treaty or convention entered into pursuant to the Constitution.” 25 U.S.C. § 177. In other words, land owned by an Indian nation is inalienable (except with the approval of Congress, a circumstance not present here). See *id.* Proceeding with the state court foreclosure would result in the transfer of title to land owned by the Nation to the County—alienation of Indian land. This is precisely what is prohibited by the Nonintercourse Act.

The County addresses the Nonintercourse Act only in a footnote in its memorandum. It contends that the Nation advanced the Nonintercourse Act argument before the Supreme Court in *Sherrill* but was unsuccessful. The County suggests that by its holding that the Nation is precluded by equitable principles from the remedy of tax immunity, the Supreme Court rejected the Nonintercourse Act argument. However, nothing in *Sherrill* explicitly or implicitly rejects the validity of the Nonintercourse Act or its applicability with regard to the land in question. The

Court acknowledged that the Nonintercourse Act restricts the alienation of Indian land without Congressional approval. *See* 125 S.Ct. at 1484 & n. 2 (stating that “the Act bars sales of tribal land without the acquiescence of the Federal Government”). The Court also discussed the history of claims relating to illegal dispossession of land from the Indians in this region, all based upon a violation of the Nonintercourse Act. *See id.* at 1486–89. In each action discussed the Indians were successful in their claim for some sort of recompense for the wrongful dispossession, with a single exception. *Id.* That exception pertained to lands ceded to New York State under treaties in 1785 and 1788, under the Articles of Confederation, *id.* at 1488 n. 4, prior to passage of the first Nonintercourse Act in 1790. The lack of success on that claim was not attributable to inapplicability of the Nonintercourse Act.

The Supreme Court in *Sherrill* simply foreclosed the Nation from obtaining the remedy of immunity from taxes. *Id.* at 1494. It noted, in response to the dissent’s suggestion that tax immunity could be asserted defensively, that the “equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.” *Id.* at 1489 n. 7. This does not address the issue of alienability. It merely suggests that the Nation is foreclosed from asserting immunity from taxes as a defense. *See id.*

The Nonintercourse Act, in plain language, prohibits the conveyance of lands from any Indian nation. The foreclosure sought by the County would be a conveyance of lands from the Nation. Accordingly, the foreclosure is prohibited by the Nonintercourse Act.

Similarly, the finding that the land is taxable does not mean that it is subject to foreclosure. Implicit permission to fore-

close as read into the *Sherrill* decision by the County is simply insufficient to authorize such a drastic remedy.

Just as the Nation is precluded from its chosen remedy—tax immunity, so is the County precluded from its chosen remedy—foreclosure. The former preclusion is derived from “standards of federal Indian law and federal equity practice” that “evoke the doctrines of laches, acquiescence, and impossibility.” *Id.* at 1489–90, 1494. The latter preclusion is derived from a federal statute, the meaning of which is clear and unambiguous. *See* 25 U.S.C. § 177. While it has been and will be said that it is unfair and will work a hardship on the citizens of the County to preclude the remedy of foreclosure, so too some will say that it is unfair to the members of the Nation whose tens of thousands of acres of land were illegally taken from them to preclude their tax immunity remedy.

b. Tribal Sovereign Immunity

[15] “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831)). Accordingly, sovereign immunity bars suits against Indian tribes unless the tribe has clearly waived its immunity or the immunity has been abrogated by Congress. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978)). Further, “a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe.” *Id.* (citing *United States v. United*

States Fidelity & Guaranty Co., 309 U.S. 506, 513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940)).

[16] The Nation is a federally recognized Indian tribe. The Nation has not waived its sovereign immunity with regard to its real property. Nor has Congress abrogated the Nation's immunity regarding the property it owns. More generally, "Congress has never authorized suits [against Indian tribes] to enforce tax assessments," although it "has occasionally authorized limited classes of suits." *Id.* at 510, 111 S.Ct. at 910. Thus, sovereign immunity bars suits against the Nation. *See id.* at 509, 111 S.Ct. at 909.

The County argues that *Potawatomi* is inapposite because that was an *in personam* suit against the tribe, while the tax foreclosure suit here is *in rem*. It is of no moment that the state foreclosure suit at issue here is *in rem*. What is relevant is that the County is attempting to bring suit against the Nation. 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. *See Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 755, 118 S.Ct. 1700, 1703, 140 L.Ed.2d 981 (1998) (explaining its holding in *Potawatomi* that Indian tribes are immune from suit to collect unpaid taxes, stating: "a difference [exists] between the right to demand compliance with state laws and the means available to enforce them"); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 38, 112 S.Ct. 1011, 1017, 117 L.Ed.2d 181 (1992) (rejecting the suggestion that there is any "*in rem* exception to the sovereign-immunity bar" in the context of a state's Eleventh Amendment sovereign immunity); *French v. Georgia Dep't of Revenue (In re ABEPP Acquisition Corp.)*, 215 B.R. 513, 516-17 (B.A.P. 6th Cir.1997) (applying *Nordic Village* to re-

ject the suggestion that the "bankruptcy court could burrow past" Eleventh Amendment immunity "by exercising *in rem* jurisdiction").

The County also contends that *Potawatomi* is inapposite because the sales of cigarettes at issue there occurred on land held in trust for the Potawatomis, whereas here, the properties are not reservation land. The County's assertion that the properties are not reservation land is based upon its interpretation of *Sherrill*. Even if the County's assertion were correct, it misapprehends *Potawatomi*. There Oklahoma argued that because the cigarette sales occurred on trust land rather than reservation land the normal rules of sovereign immunity should not apply. *Potawatomi*, 498 U.S. at 511, 111 S.Ct. at 910. The Court in *Potawatomi* refused to distinguish between trust land and reservation land. *Id.* The Court further noted that a case involving a ski resort operated by an Indian Tribe outside of a reservation was not to the contrary. *Id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1978)). In *Mescalero* the Court found that, in the absence of contrary federal law, the operation of the ski resort outside of the reservation was "held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* (citing *Mescalero*, 411 U.S. at 148-49, 93 S.Ct. at 1270). Additionally, in *Kiowa Tribe*, the Court distinguished application of state substantive laws regarding off-reservation conduct with tribal immunity from suit. 523 U.S. at 755, 118 S.Ct. at 1703. The Court held that the Kiowa Tribe was immune from a suit for breach of contract regardless of "whether those contracts involve[d] governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760, 118 S.Ct. at 1705.

It is also notable that the *Potawatomi* Court rejected, on sovereign immunity grounds, Oklahoma's countersuit to enforce its \$2.7 million claim for taxes assessed on the sale of cigarettes which the Tribe failed to pay. *See Potawatomi*, 498 U.S. at 507–09, 111 S.Ct. at 908–09. The Court also rejected Oklahoma's complaints that although it had a right (to assess a tax on sales of cigarettes to non-Indians) it had no remedy if the Tribe had sovereign immunity. *Id.* at 514, 111 S.Ct. at 912. The Court noted that although sovereign immunity might bar Oklahoma from the most efficient remedy, other remedies, such as an "agreement[] with the tribes to adopt a mutually satisfactory regime for the collection of" the tax, were available. *Id.*

As a subset of its claim that tribal sovereign immunity precludes the state tax foreclosure suit, the Nation contends that it is not subject to the imposition of penalties and interest, which amount to a state law fine against it. The County makes no argument in this regard. Therefore, it must be concluded that the County agrees that the imposition of penalties and interest was improper.

c. *Due Process*

[17] It is a requirement of due process that a property owner be properly notified of a tax sale and redemption period. *City of Sherrill*, 145 F.Supp.2d at 257 (citing *McCann v. Scaduto*, 71 N.Y.2d 164, 176, 524 N.Y.S.2d 398, 519 N.E.2d 309 (N.Y.Ct. App.1987); *Yagan v. Bernardi*, 256 A.D.2d 1225, 1226, 684 N.Y.S.2d 117 (N.Y.App. Div. 4th Dep't 1998)). The time periods set forth in the regulatory scheme must be followed; shorter notice violates due process. *Id.* New York has a two-year general redemption period. N.Y. Real Prop. Tax Law § 1110 (McKinney 2000). The parties have not pointed out any different

redemption period set by the County. Thus, in order to comport with due process the County must have given the Nation notice two years prior to expiration of the redemption period. *See City of Sherrill*, 145 F.Supp.2d at 257.

[18] The County first notified the Nation of the March 31, 2005, expiration of the redemption period on December 8, 2004. This is far less than the two years required to comport with due process. Additionally, at the time the notice was sent out the case law of this circuit held that these properties, reacquired by the Nation and within its reservation, were exempt from taxation. It was not until the Supreme Court decision of March 29, 2005, that the law changed making the properties taxable. Subsequently, the County extended the redemption period to June 3, 2005. Even considering the concededly earliest notification on December 8, 2004, and the latest expiration of the redemption period of June 3, 2005, the County falls short of the two-year period required for notice by approximately eighteen months. Thus, the County failed to give timely notice of the redemption period expiration to the Nation, a due process violation.

The County relies upon *Akey v. Clinton County, N.Y.*, 375 F.3d 231 (2d Cir.2004), in support of its position that notice to the Nation comported with due process. This reliance is untenable. The issue before the *Akey* Court was whether the means selected to make the notifications comported with due process. *Id.* at 235. The court stated that notice by mail, reasonably calculated to be received by the property owners, is sufficient to constitute due process. *Id.* In *Akey*, the question raised was whether the County's notice was reasonably calculated to reach the property owners given, for example, failure to do a complete search of public records to find an updated address after a notice of fore-

closure was returned as undeliverable. *Id.* at 236. The timing of the notices was not in issue.

d. State Law

[19] New York State Law provides that “real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation.” N.Y. Real Prop. Law § 454; N.Y. Indian Law § 6 (McKinney 2001) (directing that no taxes be assessed upon Indian reservation lands). The Nation’s “reservation was not disestablished.” *City of Sherrill*, 337 F.3d at 167. The properties at issue are located within the Nation’s reservation. Pursuant to state law, taxes should not have been assessed against the Nation’s properties and such properties are exempt from taxation. Therefore, the County’s assessment of taxes upon the property and its attempts to foreclose for non-payment of such taxes is contrary to state law.

The County argues that relying upon the Second Circuit’s holding that the reservation was not disestablished is contrary to the Supreme Court decision in *Sherrill*. The Supreme Court focused its decision on the requested remedy-tax immunity. *See Sherrill*, 125 S.Ct. at 1490 n. 9. It explicitly declined to decide whether the Second Circuit erred in determining that the reservation was not disestablished. *Id.* Thus, the Second Circuit holding that the reservation was not disestablished remains undisturbed. Further, the Supreme Court’s determination that federal equitable principles prevent the Nation from obtaining its requested remedy of tax immunity necessarily was predicated upon an assumption that the reservation was not disestablished. This is so because if the reservation was disestablished the lands would not be Indian Country and clearly would be subject to taxation. Under such circum-

stances the Supreme Court would not have needed to rely upon the equitable principles of laches, acquiescence, and impossibility to find the properties were subject to local taxation.

In sum, the Nation is entitled to summary judgment based upon each of the foregoing four separate and distinct reasons. The County is not entitled to summary judgment on its cross-motion.

3. Injunctive and Declaratory Relief

[20, 21] A party seeking injunctive relief must establish the inadequacy of any remedy at law and irreparable harm. *Northern Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1307, 105 S.Ct. 459, 460, 83 L.Ed.2d 388 (1984); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir.1999). In determining whether to exercise its discretion and grant equitable relief, a court must “weigh[] the potential benefits and harm to be incurred by the parties from the granting or denying of such relief.” *Ticor Title*, 173 F.3d at 68 (citing *Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 675, 88 L.Ed. 834 (1944)).

[22] Here, it is clear that any remedy at law would be inadequate and irreparable harm would result if an injunction is not issued precluding the County from foreclosing on the Nation’s properties. Monetary damages would be insufficient to remedy a foreclosure and change of title of the Nation’s properties. Indeed, the Nation requested only injunctive and declaratory relief, not monetary relief. Additionally, the Nation would be irreparably harmed by the foreclosure and change of title of its properties. Finally, granting an injunction would mean that the County’s remedy for the non-payment of taxes by the Nation would exclude foreclosure. Limitation of enforcement remedies is insufficient to justify overriding Tribal sov-

reign immunity. *See, e.g. Kiowa Tribe*, 523 U.S. at 755, 118 S.Ct. at 1703 (holding that although the state may tax sales to non-Indians, the Tribe was immune from a suit to collect such taxes). Thus, a balance of the hardships weighs in favor of granting the injunction.

The Nation also seeks a declaration that its reservation was not disestablished. Given the Supreme Court determination that it need not review the Second Circuit's conclusion in this regard, 125 S.Ct. at 1490 n. 9, the Second Circuit's holding that the reservation was not disestablished, 337 F.3d at 167, remains good law. Accordingly, the Nation is entitled to a declaration that its reservation was not disestablished.

V. CONCLUSION

The remedy of foreclosure is not available to the County. *First*, under the Non-intercourse Act, the Nation's properties are inalienable. *Second*, the Nation is immune from suit to collect unpaid property taxes. *Third*, the notice provided to the Nation of the date the redemption period expired failed to comport with due process because it was significantly shorter than two years. *Fourth*, the Second Circuit finding that the Nation's reservation was not disestablished was not abrogated by *Sherrill* and New York State law exempts reservation land from taxation. As a result, the Nation is entitled to the injunctive and declaratory relief it seeks.

The Nation owes real property taxes to the County. However, the County may not, in effect, seize lands owned by the Nation in order to collect those taxes. It

3. As in the *Sherrill* case, there is always the possibility of a settlement agreement between the parties. This would, of course, be the best final result. However, a settlement would require a spirit of cooperation and compro-

must find an alternate method to satisfy the Nation's debt to the County.

There is a vast difference between requiring real property owned by a sovereign nation to be taxed and to comply with local zoning and land use regulations, and allowing ownership of real property to be seized from that sovereign nation. The seizing of land owned by a sovereign nation strikes directly at the very heart of that nation's sovereignty. In the face of Federal and State laws and the solemn treaty obligations of the United States, permitting the seizure of lands from a sovereign nation should require, at the very least, a specific Act of Congress.

This is obviously not the last word. There will undoubtedly be an appeal to the Second Circuit, and perhaps to the Supreme Court.³ However, unless directed otherwise by legislation or judicial mandate, the seizure of land from a sovereign, against its will, will not occur as the result of a ruling from this forum.

Therefore, it is

ORDERED that

1. Madison County's motion to dismiss is DENIED;
2. Oneida Indian Nation's motion for summary judgment is GRANTED;
3. Madison County's cross motion for summary judgment is DENIED;
4. Madison County is permanently enjoined from any attempt to foreclose on Oneida Nation property or in any other way alter title to Oneida Indian Nation property;
5. Madison County is permanently enjoined from assessing and/or collecting

mise on the part of both sides which heretofore has appeared to be sorely lacking. *See* 145 F.Supp.2d at 231. Otherwise this and other federal and state litigation will continue into the indefinite future.

penalties and interest on unpaid taxes against the Oneida Indian Nation; and

6. Oneida Indian Nation's reservation was not disestablished.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.



Sean D. ZHANG, Petitioner,

v.

UNITED STATES of America,
Respondent.

No. 04–CV–3261(ADS).

United States District Court,
E.D. New York.

Nov. 18, 2005.

Background: Motion was made to vacate sentence based on involuntariness of plea to charge of mail fraud.

Holdings: The District Court, Spatt, J., held that:

- (1) waiver of appeal in plea agreement did not bar collateral relief requested, and
- (2) advisories given during plea colloquy regarding likelihood of deportation were misleading and misrepresented the fact that, under law, deportation was automatic.

Motion granted.

1. Criminal Law ⇌1429(2)

Motion to vacate sentence is not a substitute for an appeal, and generally, motion may not present claims that have

not been properly raised on direct review. 28 U.S.C.A. § 2255.

2. Criminal Law ⇌1437, 1438

If a claim has not been presented on direct review of conviction, the procedural bar against raising claim on motion to vacate sentence may be waived only if the petitioner establishes (1) cause for the waiver and actual prejudice from the alleged violations, or (2) actual innocence. 28 U.S.C.A. § 2255.

3. Criminal Law ⇌1440(1)

Procedural default rule precluding the presentation of claims on motion to vacate sentence that were not properly raised on direct review generally does not apply to ineffective assistance of counsel claims. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2255.

4. Criminal Law ⇌1439

To satisfy “cause” requirement for waiver of bar of claims on motion to vacate sentence that were not properly raised on direct appeal, the petitioner must show circumstances external to the petitioner, something that cannot be fairly attributed to him. 28 U.S.C.A. § 2255.

5. Criminal Law ⇌1440(1)

Direct appeal of the deportation issue raised on motion to vacate sentence would have been unnecessary and unavailing and, so, did not bar consideration of the issue on the collateral attack; movant's claim included ineffective assistance of counsel, which was properly brought before the Court for the first time on collateral review to develop the factual record, movant was led to believe that deportation was only a possibility and only learned of the automatic nature of his deportation long after the time for a direct appeal had expired, and finally, any direct appeal would have been futile since movant had