No. 09-6258

UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

BELVA ANN NAHNO-LOPEZ, ET AL., APPELLANTS

V.

JEFF HOUSER, ET AL., APPELLEES

ON APPEAL OF ORDER GRANTING SUMMARY JUDGMENT
FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 08-cv-1147F)

REPLY BRIEF OF THE APPELLANT(S)

ORAL ARGUMENT REQUESTED

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SUMMARY REPLY ARGUMENTS

The Appellant(s) now reply to the Appellee's response brief in the above matter now on appeal from the United States District Court for the Western District of Oklahoma (Friot, J.). The Appellant(s) proffer that the Appellee(s) have failed to address crucial issues that remain unresolved in regards to both the Pence leased property and the allotment of the Kerchee family.

A. Pence Appellant(s)

The Appellee(s) advance the argument that that the Pence lease which is for a period of fifty (50) years and which will terminate upon the leases' own terms on August 22, 2022, is invalid due to lack of specific inclusion in the probate of Ethelene Tartsah Chaat. The BIA letter was issued subsequent to Appellee(s) entering a lease with a future interest holder of the approximately 1.25 acres the Appellee(s) believe is conclusive evidence that the assigned lease of Ethelene Tartsah Chaat expired upon her death. However, the Appellees fail to address that the Mutual Selp-Help Home lease is between the Kiowa Housing Authority and the Pence Appellant(s) and that tribal agency pursuant to its own authority have determined the lease to be valid and still binding.[1] Further, no evidence was

[1] App. App. at 173, Letter dated: May 28, 2008, Kiowa Housing Authority

submitted or entered at the District Court level which showed the lease with Amber Deak (future interest holder) had ever been approved by the Bureau of Indian affairs as is required pursuant to 25 U.S.C. § 348. The lower court fails to adequately discuss these facts, and complete negates federal statutory requirements relating to Indian leases.

B. Kerchee Appellant(s)

The Appellee(s) further argue that the Kerchee property, Comanche Allotment 2329, which was and is indisputably being utilized by Appellee(s) is allowable and legal due to the fact that the Kerchee Appellants granted permissive use of the property pursuant to a lease between the parties. However, even assuming *arguendo*, that said lease was somehow valid the Kerchee Appellant(s) have contended the trespass and encumbrance of their allotment is on-going and still remains as an issue, which was not addressed by the District Court. Further, the Appellee(s) indicate in their Response Brief for the first time that acceptance on behalf of the Kerchee Appellant(s) by the Bureau of Indian Affairs, Anadarko Agency of lease monies was tantamount to constructive approval and thus, legally allowable pursuant to 25 U.S.C. § 348. However, no case law was ever cited that supports this proposition of constructive approval pursuant to 25 U.S.C. § 348.

Clearly legal arguments were advanced by the Kerchee Appellant(s) that made summary judgment inappropriate.

C. Sovereign & Qualified Immunity

Finally, the Appellee(s) relying upon the doctrines of sovereign and qualified immunity advance the argument that their individual actions were sanctioned by the General Council of the Tribe[2] and not in violation of any federal statute or other laws of the United States. Thus, they conclude that said actions are and continue to be within the scope of their individual authority.

The Appellant(s) reply that those arguments constitute only a façade in an attempt by the Appellee(s) to justify their individual actions, not sanctioned by the Ft. Sill Apache Tribe's General Council (membership) and undisputedly in violation of federal law.

II

REPLY ARGUMENTS

A. Pence Leased Property

The Appellee(s) argue that the undisputed facts show that the Appellee(s) individually and in concert acted within the scope of their authority. However, a

[2] App. App. 250 ¶ 2 (General Council Resolution No. FSAGC-99-13, grants permission to acquire lands of Kerchee Appellant(s), which was intended to allow for purchase of said lands and not a lease. According to the Ft. Sill Apache Constitution Article(s) III, IV, the General Council of the Tribe, consisting of all duly enrolled members of voting age must approve any and all agreements, contracts including leases of lands entered into on behalf of the Tribe.)

closer review of the facts shows just the opposite. Assuming that the future interest holder (Amber Deak) in relationship to the Pence Appellant's lease of 1.25 acres has a present interest in the land, the Appellee(s) have failed to proffer any evidence that the General Council of the Tribe authorized a lease with said individual. Clearly, such actions constitute actions outside the scope of the Appellee's constitutional authority based upon lack of General Council approval to enter a lease with Amber Deak. Further, no evidence was proffered by the Appellee(s) that said lease was approved by the Bureau of Indian Affairs as is required by 25 U.S.C. § 348, nor under provisions of a commercial lease pursuant to 25 U.S.C. § 415 et seq. Thus said lease with the future interest holder is null and void and the Appellee(s) are trespassing and have no right to place fixtures or other structures upon said lands.

As well, the letter entered into evidence by the Appellant(s) at the District Court level indicates that the Kiowa Housing Authority, the primary original lessee of said 1.25 acres considered the lease still legal and binding. No evidence was referred to in the Bureau of Indian Affairs document submitted by the Appellee(s) referenced that the Kiowa Housing Authority had requested termination of said lease or the Bureau of Indian Affairs had terminated the lease. Under housing

authority lease provisions the property in question is under lease with the Kiowa Housing Authority and not directly with the Pence Appellant(s). Consequently, the Kiowa Housing Authority has the ability to place any tenant in the home at their choosing for a period not to exceed the term of the lease. A close examination of the original lease states that lessor of said 1.25 acres is the Kiowa Housing Authority and not the Bureau of Indian Affairs. (App. App. 171-172). The lease is between the Kiowa Housing Authority and the lessor, who then transferred to the lease to Ethelene Tartsah Chaat, the natural mother of Margaret Pence.

The letter from the Kiowa Housing Authority is in complete contradiction to the Bureau of Indian Affairs letter; consequently, there exist disputed facts relating to the law as to which agency has the authority to determine the ownership of said 1.25 acres of land in question. Accordingly it was err for the lower court to enter summary judgment in favor of the Appellee(s) in light of these outstanding legal issues, based upon the facts presented.

B. <u>Kerchee Allotment No. 2329</u>

The Kerchee Appellant(s) have throughout this litigation alleged that the trespass and encumbrance of lands of their allotment (No. 2329) is on-going and that although said lands are not being utilized for a parking lot by the Appellee(s), the Appellee(s) continue to trespass, occupy and use the Appellant(s) allotted

lands. The lease agreement entered into between the Kerchee Appellant(s) and the Appellee(s) did not allow for the continued use and occupancy of said lands and consequently, a disputed fact exists as to whether the trespass and encumbrance of the Appellant(s) allotment continues.

The District Court does not discuss whether according to law, failure of the Appellee(s) to receive a valid and legally approved Bureau of Indian Affairs lease, pursuant to 25 U.S.C. § 348, § 415 et seq. allowed for the Appellee(s) to make use of the allotted lands of the Kerchee Appellant(s). The lower court's minimal conclusion that permission was granted to enter and utilize the property of the Kerchee Appellant(s) should not stand, based upon federal statutory law promulgated to protect Indian allotment owners from being taken advantage of by outside individuals who desire to utilize allotted lands for their own benefit. Absolutely no discussion of this statutory obligation of the Appellee(s) exists in the opinion granting Appellee(s) summary judgment. The lower court states at (App. App. 168, Order at 6):

> …Nor have plaintiffs presented any purely legal arguments that would Make summary judgment inappropriate here…

Ibid.

Clearly, such was and is not the case based upon the statutory requirements relating to the leasing of Indian allotted lands.

Finally, the lower court's conclusion that due to the fact that the Kerchee Appellant's allowed the Appellee(s) to utilize and make use of the property in question, somehow exonerates the Appellee(s) from complying with federal statutory requirements is clearly erroneous. Federal statutes relating to the protection of Indian allottees has clearly been held to be required to assist the Bureau of Indian Affairs in fulfilling their fiduciary obligations to Indian allottees.

C. Sovereign Immunity

Appellant(s) concede that it is well established that federally recognized tribes our immune from suit and it is as well established that officers of tribal entities acting within the scope of their authority and employment as well are immune from suit. *See*, Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (10th Cir. 1985); Cook v. Avi Casino Enterprises, 548 F.3d 718, 727 (9th Cir. 2008), cert denied, - U.S. -, 129 S.Ct. 2159, 173 L.Ed. 1156 (2009).

In reiteration, the issue is whether the Appellees are immune from suit; if it is determined they have acted outside the scope of their authority in violation of federal law. Ex parte Young, 209 U.S. 123 (1908); *See*, Santa Clara Pueblo, 436 U.S. at 59 (citing *Ex parte Young*); Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984) (citing *Larson v. Domestic & Foreign*

Commerce Corp., 337 U.s. 682 (1949); cf. Recent case, 79 HARV. L. REV. 851, 852 (1966) (suggesting extension of *Ex parte Young* to tribal sovereign immunity context).

As mentioned the Appellees are knowledgeable, as well as their legal counsel in the procedures set out in federal law to lease or purchase Indian allotted lands. *See*, 25 U.S.C. §§§ 345, 348, 415(a) and common law principles of trespass, including their own constitutional mandates. However, the Appellees did not follow the precepts of federal law and when confronted with the facts of their illegal actions they have continued to ignore and blatantly proceed with actions that continue to violate the property rights of the Appellants. The complete denial of individual rights of the Appellants in this matter and continued bravado of the Appellees should not have been allowed by the lower court and sovereign immunity should not have been allowed to be utilized to mask the illegal actions of the Appellees and their employee. *See, e.g.* Frazier v. Turning Stone Casino, 254 F.Supp.2d 295, 310 (N.D.N.Y. 2003) (*Ex parte Young* has been extended to tribal officials in their official capacities … to enjoin conduct that violates federal law"); Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc., 221 F.Supp.2d 271, 278-79 (D.Conn.2002) ("[u]nder the doctrine of *Ex parte Young*, prospective injunctive and declaratory relief is available against tribal officials

when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact") (citing *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir.2001)); accord Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

In the present case sovereign immunity should not shield tribal officials that violate not only their own tribal laws (constitution), but as well as established federal laws. The day when tribal officials hide behind sovereign immunity in bad faith to justify their illegal actions that harm the property interests of other should be brought to a impeded, as tribal officials should be held to the same legal standard as any individual Indian or non-Indian individual or entity. The luxury of shielding illegal actions should not be allowed and in the instant matter such actions by legally competent adults who use their official capacity to protect them from illegal acts hinders the growth of tribal entities and prohibits economic development that will in the end bring tribes into an age of a sustaining self-determining future. See, Native American Distributing v. Seneca-Cayuga Tobacco Company, 545 F.3d 1288 (10th Cir. 2008).

D. Qualified Immunity

The District Court's decision that the Appellee(s) enjoy qualified immunity must not be allowed to stand, the actions of the Appellee(s) in this matter clearly

violate not only tribal law, but as well federal statutory law. The standards for determining "qualified immunity" has been set out correctly by both parties, however, the District Court's legal analysis completely disregards federal statutory requirements under 25 U.S.C. § 348, § 415 et seq.

To conclude that individuals that are assumed to be competent and are officials and agents of a tribe, who are as well represented by legal counsel are not aware of the statutory requirements of leasing Indian lands, appears to be a swallow conclusion. In the present situation it would seem unnecessary for the Appellant(s) to prove that the Appellee(s) are all competent individuals, however, when the law is well established at the time of their actions that evidence is required to show the individual's state of mind at the time of the their actions is ludicrous. However, that is what appears to be the District Court's conclusion as it states:

> Here, given the uncontroverted evidence regarding defendant's actions, plaintiffs have not identified evidence of any actions by the defendants which arguably violated a constitutional or statutory right. Plaintiffs also have not shown that defendants' uncontroverted actions violated rights that were clearly established at the time. (App. App. 167 ¶ 2)

In the present situation, the Kerchee Appellant(s) have the statutory right to have their lease agreements approved by the Bureau of Indian Affairs to protect them from unscrupulous individuals who attempt to take advantage of their allotted

lands. See, 25 U.S.C. § 348, § 415 et seq. The Appellee(s) have violated that statutory right in not obtaining lease approval pursuant to clearly established federal statutory law.

Irrelevant of which prong of the sequence for qualified immunity is applied, as set out in Pearson v. Callahan, 129 S.Ct. 808, 815, 172 L.Ed. 565 (2009); the Appellees in this case are not entitled to qualified immunity, as the Appellants have established a statutory right to access their allotment or leased property without hindrance from the Appellees. Such actions by the Appellees violate 25 U.S.C. §§ 345, 348 and common law principles of trespass. Both 25 U.S.C. §§ 345, 348 and common law principles of trespass were clearly established laws at the time of their conduct and continue to be well established principles of law. The Appellees and their legal counsel's knowledge of the law makes it crystal clear that such actions were and are in violation of clearly established principles of law and thus, qualified immunity should not apply to the present

III

CONCLUSION

Based upon the foregoing the Appellant(s) respectfully request this Honorable Court remand this matter for further proceedings as is required based upon the arguments set-forth above herein.

RESPECTFULLY SUBMITTED,

DATED this 28th day of June, 2010.

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CERTIFICATE OF COMPLIANCE

Section 1 Word Count

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I certify the information on this page is true and correct to the best of my knowledge.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that I scanned the Appellants Opening Brief for any virus by use of AVG software program.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I caused the foregoing *Appellants Reply Brief* to be electronically transmitted to the Clerk of Court for the Tenth Circuit Court of Appeals using the ECF system for filing and there serving documents on:

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