NO. 2014-CI-APL-001

IN THE NOOKSACK COURT OF APPEALS
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

SONIA LOMELI, ET AL.,

Appellants,

v.

ROBERT KELLY, ET AL.,

Appellees.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. ARGUMENT

1. The Trial Court's Contempt Powers Do Not Derive From, And Are Not Limited By, N.T.C. § 10.05.100; Nor Does Sovereign Immunity Shield Appellees From The Court's Authority To Enforce Its Orders.

Appellees argue that N.T.C. § 10.05.100(c) "prohibits the Court's contempt power from being used against Appellees."[1] Further, Appellees argue that N.T.C. § 10.05.100(c) "prohibits the Court's contempt power from being used against Appellees."[2] Appellees are mistaken on both accounts.

N.T.C. § 10.05.100(c) applies only contempt orders that are issued for "[v]iolent or disorderly conduct in the Courtroom while the court is in session" and "willful disregard of court procedures."[3] Appellants do not allege that Appellees have acted violently or disorderly in the Courtroom while the court was in session; nor do they allege that Appellees willfully disregarded court procedures. Instead, Appellants allege that Appellees have failed to comply with the Order from Scheduling Hearing issued by the Trial Court on March 28, 2013 ("Stipulation and Order"). Appellants have requested the Trial Court direct the Appellees to show cause why an order should not be entered holding them in contempt for this failure to comply.[4]

This request for relief is thus not derived from N.T.C. § 10.05.100. Instead, it is derived from the Tribal Court's "inherent limited authority to enforce

[1] Response Brief of Appellees ("Response"), at 7.
[2] *Id.*
[3] N.T.C. § 10.05.100(a)(1)-(2).
[4] CP 92, Motion for Order to Show Cause re: Contempt.

compliance with court orders and ensure judicial proceedings are conducted in an orderly manner."[5] Certainly, the fact that Tribal Council granted the Tribal Court jurisdiction "to order declaratory or injunctive relief"[6] necessarily provides more than the mere ability to issue a final order — the Court must also issue subpoenas, set deadlines, and otherwise generally "manage [its] own proceedings and . . . control the conduct of those who appear before [it]."[7] As noted by the Mohegan Tribal Court in *Davison v. Mohegan Tribe Election Committee*:

> [W]hile an express grant of jurisdiction is a prerequisite to the exercise of the court's jurisdiction, there is no corresponding requirement that there be an express grant of each of the powers available to the court to effectuate justice in cases where it has jurisdiction. [Although t]he Court agrees that its powers are derived from the ordinance which created it, . . . each specific power [need not] be enumerated in such ordinance, where this Court has subject matter jurisdiction.

7 Am. Tribal Law 355, 357 (Mohegan Trial Ct. Dec. 1, 2008) (quotation omitted).

Here, the Tribal Court has been granted jurisdictional authority to adjudicate the legality of acts and omissions taken by the Appellees, to issue orders related to that adjudication, and to enforce those orders. Although the Tribal Council has not provided explicit "sanctions or a method of enforcement"

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[5] *Nasingoetewa v. The Hopi Tribal Court,* 4 Am. Tribal Law 420, 422-23 (Hopi Tribal Ct. App. Apr. 15, 2002); *see also In Re the Welfare of C.H.*, 5 NICS App. 105, 111 (Tulalip Tribal Ct. App. Apr. 28, 1999) ("Contempt is a remedy available to punish . . . the knowing violation of the trial court's order."); *Yates v. U.S.*, 227 F.2d 844, 845 (9th Cir. 1955) ("The power of the court is inherent and can only be removed when the court is abolished."); *Mitan v. International Fidelity Ins. Co.*, 23 Fed.Appx. 292, 298 (6th Cir. 2001) ("The power to punish for contempt also is an inherent power . . . including the power to punish violations of [the court's] own orders.").
[6] *Lomeli v. Kelly*, No. 2013-CI-APL-002, at 14 (Nooksack Ct. App. Jan. 15, 2014).
[7] *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996).

in the event that Appellees ignore an order of the Court, a waiver of sovereign immunity has necessarily attached to the Court's orders issued vis-à-vis the general grant of jurisdiction over the action[8] — "in order to enforce the legislative will."[9] Were it otherwise, the decisions of the Tribal Court "could be treated not as obligatory but rather as mere recommendations which the [Tribe] could violate negligently or intentionally behind a shield of sovereign immunity."[10] This Court has already held that such a reading of Title 10 cannot and does not comport with the Nooksack Constitution.[11]

Neither Title 10 nor sovereign immunity impedes the imposition of a remedy. Nor do they obstruct the enforcement of a remedy. The fact that the remedy is being enforced against governmental agents in their official capacity has no bearing on the matter. [12]

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[8] Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and **enforce** judgment. Jurisdiction presupposes the existence of a duly constituted court with control over a subject matter which comes within the classification limits designated by the constitutional authority or law under which the court is established and functions. Jurisdiction also presupposes control by the court over the parties litigant, duly acquired either by general appearance or by such service of process as brings them before the court, actually or constructively, in a constitutional sense.

Jones v. Brinson, 78 S.E.2d 334, 337 (N.C. 1953) (emphasis added).

[9] *Aqua Bar & Lounge, Inc. v. U. S. Dept. of Treasury Internal Revenue Service*, 539 F.2d 935, 942 (3rd Cir. 1976).

[10] *Id*.; *see also U.S. v. Ray*, 273 F.Supp.2d 1160, 1167 (D. Mont. 2003) (holding that the "argument is that sovereign immunity prevents this Court from doing anything to enforce [its] Order . . . eviscerates the independence of the judiciary to manage assigned cases").

[11] *Lomeli*, No. 2013-CI-APL-002, at 8.

[12] *U.S. v. Shelton*, 539 F.Supp.2d 259 (D.D.C. 2008) (Department of Justice ordered to show cause re: contempt); *Landmark Legal Found. V. EPA*, 272 F.Supp.2d 59 (D.D.C. 2003) (Environmental Protection Agency held contempt for not complying with a court order to provide documents).

2. The Trial Court Erred In Holding That Appellants Do Not Possess Standing To Bring A Contempt Action.

Citing to *Spangler v. Pasadena City Bd. of Educ.*,[13] Appellees argue that Appellants lack standing to bring a contempt action because they are not "the real parties in interest" and are "not within the zone of interests" that the Stipulation and Order intended to protect.[14] Appellees are mistaken yet again.

First, Appellees' argument makes no sense. This Court has held that there were six individual plaintiffs in this lawsuit.[15] These same six individual plaintiffs brought the Motion for Order to Show Cause Re: Contempt. Not only are these six individual plaintiffs the real parties in interest — they are the only parties in interest.[16] Second, again, when an agreement is forged between two parties, it is the parties who entered into the agreement, not the subject matter of the agreement, who are harmed by a breach of the agreement.[17] While the subject matter may be collaterally damaged, particularly where the agreement was intended to protect a third party, it is the parties who made the promises who attain primary injury and for whom enforcement lies.[18] Appellants, and nobody

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[13] 537 F.2d 1031 (9th Cir. 1976).
[14] Response, at 8-9 (quotation omitted).
[15] *Lomeli*, No. 2013-CI-APL-002, at 14-17.
[16] *Cf. Spangler*, 537 F.2d 1031 (contempt proceeding brought by an individual not a party to the original proceeding).
[17] *See e.g. People ex rel. Libin v. Berkovitch*, 109 A.D.3d 846 (N.Y.A.D. 2013) (parties who enter into a stipulation bring contempt for breach of that stipulation, not the child who is the subject matter of the stipulation).
[18] *Berger v. Heckler*, 771 F.2d 1556, 1564 (2nd Cir.1985); *see also Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (courts must "rely on basic contract principles to interpret [a] Stipulation"); *Haines v. Pacific Bancorporation*, 30 P.2d 763, 764 (Or. 1934) ("As a general rule,

else, are "within the zone of interests" that the Stipulation and Order intended to protect.[19] Finally, and most importantly, the authority cited by Appellees actually stands for the exact *opposite* of the proposition that it is cited for — Appellees cite and quote to Judge Wallace's *dissenting* opinion in *Spangler*.[20]

The Trial Court erred in ruling that Appellants lack standing.

3. **Appellees Have Violated The Stipulation And Order.**

Appellees urge this Court to determine the merits of Appellants' motion below, arguing that they "cannot be held in contempt because they have not . . . violated a specific and definite order."[21] According to Appellees, this Court must look beyond the Stipulation and Order itself, and to the testimony of Appellee's counsel, in order to discern "the intent of the parties at the time they entered into the Stipulation."[22] Again, Appellees are mistaken on all accounts.

First, because the Tribal Court did not make findings of fact pertaining to the merits of Appellants' motion, this is a matter for the Tribal Court to determine

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only parties or privies to a contract can maintain an action to enforce its stipulations; and allowing a stranger to do so is an exception to, and inconsistent with, this rule."); *Alliance Mut. Life Assur. Soc. of United States v. Welch*, 26 Kan. 632, 632 (Kan. 1881) ("[T]hird parties not privy to a contract, nor privy to the consideration thereof, may sue upon the contract to enforce any stipulations made for their especial benefit and interest."). When, for instance, two parents enter into a stipulation for joint child custody, it is not the child who enforces the stipulation; it is the parents — the parties who are privy to the agreement. *See e.g. Cornell v. Cornell*, 778 N.Y.S.2d 193 (N.Y. App. Ct. 2004).

[19] Response, at 9.

[20] Courts must rely on the lawyers before them to state the law clearly, candidly, and accurately. *In re Girardi*, 611 F.3d 1027, 1037 (9th Cir. 2010). Appellees have failed the Court on this point.

[21] Response, at 12.

[22] *Id.* at 12-13.

in the first instance.[23] Second, even were the Court to delve into the merits of Appellants' motion below,[24] interpretation of the Stipulation and Order begins and ends "with the language of the written agreement."[25] "[A]ny subjective, unexpressed intent of one of the parties is ineffective."[26] This is particularly true when the supposed "intent" of one of the parties is actually hearsay offered via an attorney appearing as both a witness and an advocate in the same litigation.[27] Most importantly, here, because the Stipulation and Order is "clear and unambiguous on its face"[28] the Court "cannot assign it another meaning."[29] The Stipulation and Order clearly and unambiguously states: "No person will be disenrolled prior to completion of the meetings before the Tribal Council, regardless of whether that individual has requested a meeting with the Tribal

[23] *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586, 590 (9th Cir. 1987); *Colson v. Smith*, 427 F.2d 143 (5th Cir. 1970).
[24] The Court may, of course, take any "'action as the merits of the case and the interest of justice may require.'" *Roberts v. Kelly*, No. 2013-CI-CL-003, at 5 (Nooksack Ct. App. Mar. 18, 2014) (quoting N.T.C. § 80.09.010).
[25] *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004).
[26] *Sterling, Winchester & Long, L.L.C. v. U.S.*, 83 Fed.Cl. 179, 183 (Fed. Cl. 2008); *see also Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004) (when the court encounters unambiguous contract terms, "extrinsic evidence is inadmissible to interpret them").
[27] CP 81, the Declaration of Grett Hurley. When it first appeared in the Tribal Court, Appellants moved to strike this improper declaration on numerous legal and ethical grounds. CP 88, Plaintiffs' Response to Defendants' Motion to Adopt Proposed Findings of Fact and Conclusions of Law Re: Parties and Effect of Stipulation of March 20, 2013, at 8-10. The Tribal Court, however, neglected to rule on this motion. *See generally* CP 95, Findings of Fact and Conclusions of Law. Appellants request that this Court strike CP 81, The Declaration of Grett Hurley, for the reasons urged below. The interest of justice requires it. N.T.C. § 80.09.010.
[28] *Sterling, Winchester & Long, L.L.C.*, 83 Fed.Cl. at 183.
[29] *Triax Pac., Inc. v. West*, 130 F.3d 1469, 1473 (Fed. Cir. 1997). The Court is prohibited from assigning another meaning "no matter how reasonable that other meaning might seem to be." *Id.*

Council."[30] Appellees urge this Court to qualify the term "person" as Nooksack "members on the April 12, 2013 Galanda Broadman representation list."[31] Unlike the preceding paragraph, which does qualify the term "individuals" by defining it as those "identified on [a] list," the term "person" in the subsequent paragraph is unqualified, unambiguous and, thus, the Court cannot assign an alternative meaning to the word.[32] Appellees' doth protest far too much.

II. CONCLUSION

Appellants respectfully reiterate their request that the Trial Court's denial of Appellants' Motion for Order to Show Cause be reversed and remanded for disposition consistent with the reversal.

DATED this 23rd day of April, 2014.

Respectfully submitted,

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Attorneys for Appellants

[30] CP 93, Declaration of Gabriel S. Galanda in Support of Motion for Order to Show Cause re: Contempt, Ex. D.
[31] Response, at 12.
[32] CP 93, Declaration of Gabriel S. Galanda in Support of Motion for Order to Show Cause re: Contempt, Ex. D. Again, "[i]f a term is unambiguous, the court cannot assign it another meaning, no matter how reasonable it may appear." *Anderson Columbia Environmental, Inc. v. U.S.*, 43 Fed.Cl. 693, 698 (Fed. Cl. 1999).

DECLARATION OF SERVICE

I, Gabriel S. Galanda, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am employed with Galanda Broadman, PLLC, counsel of record for Appellants.

2. Today, I caused the attached documents to be delivered to the following:

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A copy was emailed to:

Thomas Schlosser
Morisset, Schlosser, Jozwiak & Somerville
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

The foregoing statement is made under penalty of perjury under the laws of the Nooksack Tribe and the State of Washington and is true and correct.

DATED this 23rd day of April, 2014.

GABRIEL S. GALANDA