FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA
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FORT PECK HOUSING AUTHORITY,
Appellee/Plaintiff

-vs- **APPEAL No. 030**

NEWTON CANTRELL,
Appellant/Defendant

****

OPINION

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THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. Lawyer/Judge Ronald H. Hodge presided.

FOR APPELLANT: David L. Irving, Attorney at Law, Drawer B, Glasgow, Montana 59230 appearing for and with Mary L. Zemyan, Attorney at Law, Wolf Point, Montana.

FOR APPELLEE: Carol A. Connor, Attorney at Law, 1011 Lomas Blvd., NW, Albuquerque, New Mexico 87102.

APPELLANT filed a Brief with the Clerk of the Fort Peck Tribal Court of Appeals. APPELLEE filed no brief. At the time for oral argument, APPELLANT and APPELLEE presented oral arguments.

OPINION by Arnie A. Hove, Chief Justice, joined by Daniel aer, Justice and Gary James Melbourne, Justice.

HELD: UNANIMOUS DECISION TO AFFIRM THE EVICTION OF APPELLANT AND TO REMAND TO TRIBAL COURT FOR A NEW TRIAL ON THE DEMAND BY APPELLEE FOR A JUDGMENT FOR MONEY OR OTHER RELIEF WITH SPECIFIC DIRECTIONS TO THE TRIBAL COURT TO AWARD APPELLANT THE SUM OF $703.00 FOR COSTS AND ATTORNEYS FOR THIS APPEAL IF THE SAME IS PERMITTED BY TRIBAL CODE OR ORDINANCES OR THERE IS A CONTRACT PROVISION PROVIDING THE SAME.

On May 9, 1986, an employee of APPELLEE posted a "Notice to Surrender Premises or Pay (Three Day Notice to Vacate)" at the APPELLANT'S home located within the exterior boundaries of the Fort Peck Indian Reservation. This notice

was given in compliance with Title VII, Section 103(a) of the Comprehensive Code of Justice of the Assiniboine and Sioux Tribes Fort Peck Reservation (hereinafter CCOJ).

On July 23, 1986, the APPELLANT was personally served with a Summons to appear on July 24, 1986. APPELLANT did appear as directed by the Summons and a hearing was held. At this hearing, APPELLANT was not represented by counsel and APPELLEE was represented by Carol A. Connor, Attorney at Law.

The Court allowed APPELLEE to present its case and introduce exhibits on money due and owing by APPELLANT. APPELLANT was provided no copies of these exhibits. After the presentation of APPELLEE'S case, the Court ruled and that portion of the transcript reads as follows:

> Judge Hodge: Mr. Cantrell this court is ready to rule, Counsel and Mr. Cantrell based on the evidence presented sir, you leave the court no options and the court hereby establishes since you owe a debt in access of four thousand one hundred eighty five dollars that you would have to be evicted from this residence and your eviction will take place within five days from this date...(Transcript, p. 9).

On August 4, 1986, the APPELLANT requested a new trial and alleged three (3) grounds for the same. These grounds were as follows:

> (1) he was not advised of his right to a jury trial in a civil action where the amount in controversy exceeds $2,500.00; (2) service of the complant in this matter was ineffective and judgment should be declared void; and (3) misleading and incomplete testimony renders the judgment void and the interests of justice require a full and complete trial.

Chief Judge William McClammy granted the new trial even though Lawyer/Judge Hodge originally handled the matter. However, Lawyer/Judge Hodge regained jurisdiction and the eviction was ordered to be carried out on October 14, 1986. On October 13, 1986, APPELLANT filed his Petition for Review and the same was granted January 31, 1987. The Petition for Review gave specific grounds for the appeal as follows:

> (a) violation of Title VII, Section 104(a) regarding the sufficiency of the complaint; (b) violation of Title VII, Section 104(b) regarding sufficiency of the order and notice of hearing; (c) violation of Title VII, Scetion 104 (c) regarding sufficiency of the service of the complaint, order ad notice of hearing; (d) violation of Title VII, Section 105 regarding the procedure for forcible eviction orders; (e) violation of Title IV, Section 201(c) regarding civil actions where the amount in controversy exceeds $2500.00.

In APPELLANT'S Apoeal Memorandum, there were (2) issues which are as follows:

> I. V7FP.E THE PROCEEDINGS BELOW SO DEFECTIVE AS TO CONSTITUTE A DENIAL OF DUE PROCESS AND AN OPPORTUNITY TO BE HEARD?
>
> II. WAS THE ACCOUNTING SUPPLIED BY APPELLEE LEGALLY AND FACTUALLY ACCURATE?

The issues to be addressed in this opinion will be discussed in greater detail below.

Title I, Section 205(b) of the Comprehensive Code of Justice of the Assiniboine and Sioux Tribes (hereinafter CCOJ) reads in part as follows:

> Civil cases. Any party who is aggrieved by a final order or judgment of the Tribal Court may file a petition requesting the Court of Appeals to review that order or judgment as provided in Section 207.

This court has jurisdiction of appeals as granted by I CCOJ 202. I CCOJ 202 reads in part as follows:

> "Jurisdiction of Court of Appeals.
>
> The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de novo all de teminat ions of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence...."

The Appellant was aggrieved by a final order or judgment of the Tribal Court when he was evicted from the premises. Therefore, this Court has jurisdiction as hereinabove set forth.

I.

At oral argument, the Appeals Court was able to narrow the issues of review by getting the parties to agree that the only is. sue of concern is Issue No. I and whether the proceedings were so defective as to constitute a denial of due process?

The part of the Tribal Code dealing with procedures to be followed in evictions and hearings on complaints for judgments for money or other relief and applicable to the present case is VII CCOJ 104 (b) and (c). This section reads in part as follows:

> "Proceedings in Tribal Court.
>
> (b) Order and notice. Promptly when the complaint is filed the Court shall issue an order and notice setting the demand for eviction for hearing on a date not more than three days after service of the order and notice. The order and notice shall inform the defendant that unless the defendant appears at the hearing and makes defenses satisfactory to the Court, the defendant and all other occupants of the premises and their personal belongings will be forcibly evicted. The order and notice shall also fix a date, not more than 15 days after the complaint is filed, for a hearing on the demand for a judgment for money or other relief, unless the defendant consents that such matters be heard at the hearing set on the demand for eviction.
>
> (c) Service of complaint, order and notice of Tribal Court. The order and notice of the Court, together with the complaint, shall be served without delay and at least within 24 hours after the complaint is filed. The service and complaint is filed. The service and return shall be by a person at least eighteen (18) years of age, by delivering a copy of the complaint, order and notice to defendant, or to some person of suitable age residing on the premises, or, if neither can be found with reasonable diligence, by affixing a copy of the complaint, order and notice on a conspicuous part of the premises where such papers can be seen. The person making service shall make a return of proof of service promptly, and in any event before the date set for hearing. The return of proof of service need not be verified."

Upon reviewing the transcript, it is quite obvious that the proceedings held on July 24, 1986 fell seriously short of meeting the above requirements of VII CCOJ 104(b) and other sections of the Tribal Code. First, the transcript does not reflect that the APPELLANT was asked to consent to the hearing of the matters involving the requests for a judgment for money or other relief. Second, the transcript does not reflect that the APPELLANT was advised of his rights under *IV* CCOJ 103(a) and IV CCOJ 201(c). These sections of the Tribal Code read as follows:

Sec. 103. Hearing.

> (a) The defendant has any defenses to the claim, or wishes to present any counterclaim against the plaintiff or cross-claim against any other party or person concerning the same transaction or occurrence;

Sec 201. Trial procedure.

> (c) Civil cases shall be tried before a Judge and not a jury, except that either party has the right to a jury trial if the amount in controversy in the claim or any counterclaim exceeds $2,500.00, and the court in its discretion may grant a jury trial where the amount in controversy is less than $2,500.00. If a jury trial is granted, the Court shall follow the provisions of Section 507 of Chapter II. The compensation and expenses of the jurors shall be taxed as court costs, and assessed against the parties as provided in the judgment in the case."

APPELLEE admitted that VII CCOJ 104(c) was not followed. However, APPELLEE contends that APPELLANT was advised of his right to retain counsel and that APPELLANT waived his right to counsel off of the record. There is no indication of the above exchange in the record and therefore, this Court has no choice but to find that the APPELLANT was not advised of his right to counsel.

In discussing the procedures in IV CCOJ 201(c), the record does not reflect that APPELLANT was advised of his right to a jury trial. When questioned during oral arugment, APPELLEE admitted that the Court did not advise the APPELLANT of his right to a jury trial on or off the record. Since the amount in controversy exceeded $2,500.00, APPELLANT should have been advised of his right to a jury trial.

In an attempt to justify this obvious lack of due process, APPELLEE argued that the result of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), was to have done away with all but Habeas Corpus relief under ICR Section 1303 as against the Tribe. This is an inaccurate statement of the Martinez decision and its effect. In describing the actual impact of the IRCA on Tribal Courts, the U.S. Supreme Court stated,

> "Tribal forums are available to vindicate rights created by the ICRA, and Section 1302 [of the ICRA, 25 U.S. C. Section 1302] has the substantial and intended effect of changing the law which these forums are obliged to apply."

The Tribes have adopted the CCOJ with specific rules of procedure to be followed in the various criminal and civil actions brought in Tribal Court. These rules shall be followed and it is the duty of the individual parties and there counsel as well as the Tribal Court to insure there are no procedural errors. APPELLEE admitted that because of obvious failure to follow procedure in this case has caused APPELLEE to subsequently hire a process server and set standard procedures to be followed in future eviction cases.

The obvious and serious procedural errors in this case violated the individual rights of APPELLANT afforded him under the IRCA and CCOJ. In addition, other communications in the transcript between the Judge and APPELLANT in the courtroom and the Judge and APPELLEE'S counsel ex parte make this case very disturbing. Although this Court must affirm the eviction of the APPELLANT, it will review the damages, costs and attorney fees suffered by APPELLANT as a result of the procedural errors in its discussion on Issue No. 2 below.

II.

In addressing Issue No. 2, this Court is unwilling to determine whether the accounting supplied by APPELLEE was legally and factually accurate and therefore remands this matter to the Tribal Court with some direction.

Because APPELLANT was forced to appeal to insure his individual rights under the IRCA and CCOJ, this Court directs that in the event there is no specific prohibition in the Tribal Code or Ordinances the Tribal Court is to offset APPELLANT'S damages, costs and attorney fees to bring this appeal that were a direct result of the procedural errors by any monies APPELLEE was owed by APPELLANT. This means that if APPELLANT owed APPELLEE $1,000.00 and had damages, costs and attorney fees in the amount of $200.00, APPELLANT is only obligated to pay the sum of $800.00 and judgment should be entered accordingly.

In order to determine whether there was a specific prohibition to awarding attorney fees and damages and also what APPELLANT did have as damages, costs, and attorney fees, each party was to submit briefs on the issue and APPELLANT was to submit affidavits on the amount of damages.

APPELLEE in its brief and supplemental pleadings argued that "As a practical matter, the Fort Peck Housing Authority is an agency of the United States and there is no authorization in law to award costs and damages as provided under Rule 39 (a) and (b) of the Federal Rules of Appellate Procedure". There are two problems with this argument. First, there has been no evidence by way of a brief or affidavit with attachments to substantiate that the Fort Peck Housing Authority is actually a government agency. Second, there is no law which indicates this Court is required to apply Rule 39(a) and (b) of the Federal Rules of Appellate Procedure to the present case when it has the Tribal Code and its own rules of procedure.

APPELLANT'S brief or supplemental pleadings offered no authority on whether it was appropriate to award damages, costs or attorney fees. IV CCOJ 309 discusses when Tribal Courts can award costs and attorney fees. This section reads,

> "In civil actions costs shall be awarded the prevailing party as part of the final judgment unless the Court otherwise orders. No costs shall be awarded against the Tribe, or against any officer of th Tribe or member of the Tribal Council sued in his official capacity. Costs shall include filing fees, reasonable and necessary expenses of involuntary witnesses, costs associated with compensation and expenses of the jury, and such other proper and reasonable expenses, exclusive of attorneys' fees as the Court may allow. The Court shall not award attorney fees to the prevailing party in a civil suit unless the Court determines that the case has been prosecuted or defended solely for harassment and without any reasonable expectation of success."

It would appear from the above, that an award of attorney fees in this case would not be appropriate unless the Court determined that the case has been prosecuted or defended solely for harassment and without any reasonable expectation of success. This Court made no such determination and unless there is a contract provision providing for attorney fees to the prevailing party, an award of damages, costs and attorney fees would be inappropriate.

As requested, APPELLANT did present several statements and/or affidavits for attorney fees and costs totaling $1,598.00 and damages totaling $4,895.00. The attorney fees included fees to several attorneys two of which had no part in the Appeal or lower court proceedings. The damages included damages for moving and fixing up the new residence which were not contemplated by the oral order to offset monies owed for actual damages and attorney fees.

This Court's oral order was in effect an award of actual damages, costs and attorney fees, not a blank check. In the event the Tribal Court should determine a contract provision provides for the award of attorney fees, this Court would direct the Tribal Court to award only the sum of $703.00, $328.00 for David Irving's bill and $375.00 for Mary Zemyan's bill, as costs and attorney fees and nothing by way of actual damages. The justification for the award of $703.00 costs and attorney fees is that Mary Zemyan's bill includes time after her suspension on February 13, 1987 and the other two (2) counsel were not counsel of record on this appeal. The justification for no actual damages is that APPELLANT was unable to demonstrate the same by way of affidavits.

THEREFORE, IT IS THE UNANIMOUS DECISION OF THIS COURT TO ORDER THAT APPELLANT'S EVICTION BE AFFIRMED AND TO REMAND THIS MATTER TO TRIBAL COURT FOR A NEW TRIAL ON THE DEMAND BY APPELLEE FOR A JUDGMENT FOR MONEY OR OTHER RELIEF WITH SPECIFIC DIRECTIONS TO THE TRIBAL COURT TO AWARD APPELLANT THE SUM OF $703.00 FOR COSTS AND ATTORNEYS FOR THIS APPEAL IF THE SAME IS PERMITTED BY TRIBAL CODE OR ORDINANCES OR THERE IS A CONTRACT PROVISION PROVIDING FOR THE SAME.

Done this 10th day of April, 1987.

BY THE COURT OF APPEALS:

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Arnie A. Hove, Chief Justice

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Daniel R. Schauer, Associate Justice

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Gary J. Melbourne, Associate Justice