
**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

RUSSELL KIRN and GAYLE KIRN,
husband and wife,
Plaintiff/Appellant,

vs.

Appeal No. 076

INDIAN CREDIT CORPORATION,
Defendant/Appellee,

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. The Honorable Terry L. Boyd presided.

FOR APPELLEE: Carol Johns, Attorney at Law, P.O. Box 995 Wolf Point, Montana 59201.

FOR APPELLANT: Laura Christoffersen, Attorney at Law, P.O. Box 997, Wolf Point, Montana 59201.

Argued: September 29, 1989. **Decided:** November 30, 1989.

CIVIL: PURSUANT TO F.R.Civ.P. 56(c) SUMMARY JUDGMENT IS NOT PROPER WHERE THERE IS A MATERIAL ISSUE OF FACT; THE PURPOSE OF F.R.Civ.P. 56 IS THE PROMPT DISPOSITION OF A MATTER WHEN THERE ARE NO MATERIAL ISSUES OF FACT; PURSUANT TO IV CCOJ 501, THE TRIBAL COURT RECOGNIZES AN OBLIGATION TO ACT IN GOOD FAITH AND FAIR DEALING IN COMMERCIAL TRANSACTIONS WHICH IS MEASURABLE BY THE JUSTIFIABLE EXPECTATIONS OF THE PARTIES; AND IT IS WITHIN THE SOUND DISCRETION OF A TRIBAL JUDGE TO ENTER SUMMARY JUDGMENT WITHOUT ALLOWING FURTHER DISCOVERY.

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne, Associate Justice and Floyd G. Azure, Associate Justice.

HELD: REVERSED AND REMANDED TO TRIBAL COURT FOR COMPLETION OF DISCOVERY AS PREVIOUSLY ORDERED AND WITHIN THIRTY (30) DAYS AND A TRIAL WITHIN SIXTY (60) DAYS OF THE FILING OF THIS OPINION.

FACTS:

Appellant Russell Kirn is an enrolled member of the Fort Peck Tribes and is married to Gayle Kirn. They reside within the exterior boundaries of the Fort Peck Indian Reservation where they are engaged in a grain farming operation on Indian leased lands.

For a number of years previous to the filing of the complaint herein, Kirns had obtained their operating monies from the Indian Credit Corporation (hereinafter referred to as "ICC"). The only security ever provided to the ICC for this operating line of credit was their machinery and a guarantee from Mr. Kirn's father, Jesse Kirn.

In January of 1987, the ICC approved an operating line for the Kirns and in doing so approved certain monies to be applied toward the Kirns' Indian leases, a tractor payment, a fuel bill and other expenses that were anticipated. As a prior course of dealing, it was normal practice for the ICC to simply write the checks to the Kirns' creditors rather than sending monies directly to the Kirns for many of their expenses.

In March of 1987, the ICC sent a check to the Bureau of Indian Affairs to pay the Kirns' leases. That check was not honored by ICC and in fact was sent back to Trader's State Bank with a notation, "non-sufficient funds." On or about July 24, 1987, the ICC also provided a check to Russell Kirn which was returned, "non-sufficient funds."

The deposition of Mr. James P. Altenhofen, former president of ICC, had been taken. The tribal court did not wait until such deposition was prepared and signed to render its order which granted summary judgment to Appellee. In the deposition, Mr. Altenhofen agreed "non-sufficient funds" checks had been sent to the Kirns with the knowledge that those checks would bounce. Additionally, Mr. Altenhofen testified that it had been 13 days between the time the July 24, 1987 "non-sufficient funds" check was written and the time that ICC rectified the situation. Mr. Altenhofen did not know whether the Kirns had written checks on their account believing that the monies were available for their use or if they had been damaged in any way. (See deposition of James P. Altenhofen, pp. 41-55.)

Appellants allege the ICC required, as part of the loan agreements, that crop insurance be provided. Appellants alleged in their complaint and also in Mr. Kirn's affidavit opposing summary judgment that ICC had agreed to provide funds sufficient to pay for his crop insurance needs. Appellants further allege ICC reneged on this commitment and thus appellants' crop insurance for the 1988 operating year (a disaster year for most of the U.S.) was cancelled, thus making it impossible for them to meet their obligations to ICC.

In November of 1988, ICC sent a letter to the Kirns indicating that it was "calling" the loan because the loan was "undercollateralized." The Kirns contend they never possessed sufficient machinery to cover the line of credit and further ICC had always required the guarantee of Jesse Kirn.

On March 30, 1989, ICC moved the lower court to enter summary judgment in its favor. ICC supported this motion with an affidavit alleging among other matters that it did indeed provide Kirns with "non-sufficient funds" checks, that it did not agree to pay crop insurance and that the reason for calling the loan was not that the loan was "undercollateralized" but rather that the Kirns had been "uncooperative."

On April 5, 1989, Kirns moved the tribal court to compel discovery. Kirns at that time had only received part of the bank file from ICC in response to certain discovery requests with ICC asserting that the remaining portions of the file were not "relevant" to the action. ICC also refused to make key employees of ICC available for depositions here on the Fort Peck Indian Reservation. ICC responded by moving for a protective order.

All of the issues were briefed and on April 15, 1989, the presiding tribal judge, Judge Vance Gillette issued an order. The order entitled Protective Order ordered in part the following:

"1. Any deposition of Defendant Indian Credit Corporation's employees Don Buckley or Deanna Balliet shall take place in Billings, Montana or at a location within 100 miles of Billings, Montana.

"2. The inspection of Defendant's records and documents requested in the Subpoenas Duces Tecum shall take place in Defendant's office located in Billings, Montana.

"3. Defendant's motion to dismiss the emotional distress damage claim on the contract claim is granted; the motion to dismiss the bad faith and punitive damage claim is denied.

"4. Defendant's motion for summary judgment is denied because material facts are in dispute.

" "

On April 18, 1989, Judge Gillette rescinded the portion of his order dealing with summary judgment and allowed ICC to file a reply brief. This order read in applicable part as follows:

" ...

"2. Summary judgment. The order of April 15, 1989 denied the plaintiff's motion for summary judgment. On April 18, 1989 plaintiff's counsel Carol C. Johns requested time to do a reply to plaintiff's opposition to the summary judgment motion. The Court grants the request to do a reply as noted above. The portion of the April 15, 1989 denying summary judgment is hereby vacated (page 2 No.4); the remainder of the order stands as is.

" "

On April 19, 1989, Judge Gillette was removed from his duties and the court assigned the case to Associate Judge Terry L. Boyd. Judge Boyd ordered from the bench that he would rehear the pending motions and he did so. On May 1, 1989, Judge Boyd requested the parties submit briefs on the parole evidence rule.

On May 22, 1989, the tribal court ruled against Kirns and granted summary judgment on all matters to the ICC. The Order Granting Summary Judgment set forth forty-three (43) FINDINGS OF FACT and thirty-four (34) CONCLUSIONS OF LAW. Appellants allege the court utilized findings drafted completely by counsel for ICC and did not request proposed findings from the Kirns.

On May 17, 1989, the Kirns filed a notice of appeal having heard orally from the tribal court that it intended to rule against them. On June 6, 1989 and after having received the written order, the Kirns filed their Petition for Appeal.

Appellants raise six (6) issues on appeal which are as follows:

"1. Material issues of fact existed and the lower court erred in making determinations of fact without hearing all of the evidence which could have been presented at trial and which at such time would have been subject to cross-examination by both parties. It is improper for a trial court to award summary judgment when material issues of fact exist.

"2. The lower court made determinations of fact within the context of a summary judgment action, contrary to Federal Rule of Civil Procedure 56.

"3. The lower court erred in applying the parol evidence rule to exclude evidence regarding verbal agreements between the parties.

"4. The lower court erred in vacating the orders of the previous Judge Vance Gillette, thus inhibiting discovery and thus preventing Kirns from obtaining documents and other documentation vital to prosecution of their case and defense against the summary judgment motion.

"5. The lower court erred in failing to order discovery of material documentation in the possession of Defendant prior to entry of the summary judgment order thus inhibiting Kirns' ability to protect themselves against the summary judgment motion.

"6. The court erred in failing to review the deposition of James P. Altenhofen, prior to rendering its order, which was discussed at the hearing on the motions but which was not available at the time of his decision."

In appellee's brief, appellee admits the incidents of dishonored checks, and through the affidavit of its employee Deanna Balliet, appellee established a course of conduct and oral agreements between the parties for the paying of appellants operating expenses through the release of funds securing the loan. (See special terms and conditions on the December 11, 1987 Loan Agreement.) This portion of the brief reads as follows:

"Further, with respect to Appellants' allegations, Deanna Balliet's Affidavit stated that although there were checks issued for payment of lease and operating expenses which were dishonored, Appellee upon notice thereof took immediate curative steps. As concerned the dishonor of Appellee's \$6,400.62 check to pay for Appellant's BIA leases, Appellee and Appellant Russell Kirn agreed that Russell Kirn would utilize advance federal government payments due at the end of March, 1987, to pay for the leases. This in fact was done." (See DEFENDANT/APPELLEE'S OPENING BRIEF dated September 28, 1989, page 3.)

In addition to the above, appellee admitted one issue of material fact in its brief as follows:

"The only material fact which Appellants put in dispute was Appellants' allegation that Appellee orally agreed to pay Appellants' crop insurance premiums for the 1987 crop year." (See DEFENDANT/APPELLEE'S OPENING BRIEF dated September 28, 1989, page 4.)

Furthermore, appellee presented three (3) issues for this Court to review. The issues were as follows:

"1. Whether The Tribal Court Properly Entered Summary Judgment In Appellee's Favor Since There Were No Genuine Issues Of Material Fact And Appellees Were Entitled To Judgment As A Matter (sic) Of Law.

"2. Whether The Court Properly Excluded Appellants' Allegations Of An Oral Agreement Modifying The 1987 Loan Contract.

"3. Whether It Was Within The Sound Discretion Of Judge Boyd To Enter Summary Judgment without Allowing Further Discovery."

Oral arguments were scheduled for and held on September 29, 1989. Appellants were present and represented by Laura Christoffersen. Appellee was represented by Attorney Carol Johns. During oral argument, this Court addressed appellee's issues numbered 1 and 2 and will address all three herein.

WHETHER THE TRIBAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN APPELLEE'S FAVOR SINCE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AND APPELLEE WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

In the instant case, the tribal court did not properly enter summary judgment in appellee's favor since there were genuine *issues* of material fact which precluded judgment as a matter of law.

In Buckles vs. Fort Peck Tribal Court, Appeal No. 053 (September 1988), it was stated "Under the Applicable laws Section of IV CCOJ 501, this Court has adopted and followed the Federal Rules of Civil Procedure (hereinafter referred to as F.R.Civ.P.) until such time as the Tribal Executive Board adopts its own rules of civil procedure for the Tribal Court." Furthermore in Buckles, this Court held "A party in Tribal Court can properly move for summary judgment." *Id.* at page 5. The portions of F.R. Civ.P. 56 including subpart (c) which are applicable herein and/or have been referred to by the parties read as follows:

" ...

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross—claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis Added.)

"...

"(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's [pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

"(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"...."

Appellee moved for summary judgment as permitted under F.R.Civ.P. 56. In support of its motion, appellee argued the following:

"The purpose of F.R.C.P. 56 is to determine whether, in fact, there are any genuine issues as to controlling material facts and to dispose of cases when there are no such genuine issues, even though an issue may be raised formally under the pleadings. Summary Judgment is appropriate in such a case. Mosher v. Sallgeld, 589 F.2d 438, 442 (9th Cir. 1978) cert denied, 442 U.S. 941. Specifically, F.R.Civ.P. 56 contemplates an inquiry in advance of trial as to whether there is a genuine issue of material fact, and it may be invoked for the purpose of striking sham claims or defenses which obstruct a prompt determination of the truth. Janis v. Wilson, 521 F. Supp. 1143, 1146 (D.S.D. 1974), remanded on other grounds 521 F.2d 724 (8th Cir. 1975); Wright, Miller & Kane, Federal Practice & Procedure, Section 2712 (1983).

"Thus, summary judgment under F.R.C.P. 56 is a useful tool whereby needless trials may be avoided, Zweig v. Hearst Corp., 521 F.2d 1129, 1135-1136 (9th Cir. 1975) cert denied 423 U.S. 1025, cases may be resolved expeditiously, and precious judicial resources and time may be conserved, Klinge v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56, 61 (8th Cir. 1975). Summary Judgment has been held proper in cases similar to the case at bar involving alleged breaches of loan agreements. See, e.g., Blome v. First National Bank of Miles City, 776 P.2d 525 (Mont. 1989); Shiplet v. First Security Bank of Livingston, Inc., 762 P.2d 242 (Mont. 1988)

This Court agrees with appellee's position as hereinabove set forth as to the purpose of F.R.Civ.P. 56 which is the prompt disposition of cases when there are no material issues of fact. Pursuant to F.R.Civ.P. 56(c), the tribal court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The appellants contend the tribal court clearly erred in rendering summary judgment so early in a case where material issues of fact existed. This Court agrees with appellants' contention.

Appellants contend ICC promised to pay for their crop insurance while ICC contends it did not and this is a material issue of fact. Furthermore, appellants contend they were damaged by the dishonored checks and ICC contends appellants could not have been damaged. With a period of time between an issued check and when it was eventually honored, it is possible the appellants suffered some damage as they have alleged and this too is a material issue of fact.

Appellants contend the tribal court should have reviewed the motion for summary judgment and the pending motions regarding discovery and determined that material issues of fact existed and that in fairness to the Kirns, discovery should have been allowed so that they could properly and completely defend against a motion for summary judgment. Pursuant to F.R.Civ.P. 56(f), the tribal court "may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." This Court previously agreed material issues of fact existed and further agrees that in fairness to the appellants, the tribal court should have refused appellee's motion for summary judgment under F.R.Civ.P. 56(f) until discovery was complete to enable them to properly and completely defend against a motion for summary judgment.

Despite the material issues of fact discussed hereinabove, appellants do acknowledge that a partial summary judgment may still be appropriate, in the instant case. Appellants acknowledge they are delinquent on their notes and security agreements with ICC and suggest that it may have been proper for the court to grant partial summary judgment with respect to the counterclaim of ICC and simply held collection of that judgment in abeyance or as an offset against any judgment received by appellants. This Court again agrees with appellants.

In conclusion, the Protective Order of Tribal Court Judge Vance Gillette dated April 15, 1989, appears to have initially been proper under the circumstances. Furthermore, the tribal court erred in setting aside this order in its entirety and granting summary judgment to appellee when there were material issues of fact. Therefore, the summary judgment of the tribal court is reversed and this matter remanded to tribal court for completion of discovery and a trial on remaining issues as previously ordered by Tribal Court Judge Vance Gillette on April 15, 1989.

II.

WHETHER THE COURT PROPERLY EXCLUDED APPELLANTS' ALLEGATIONS OF AN ORAL AGREEMENT MODIFYING THE 1987 LOAN CONTRACT.

The tribal court did not properly exclude appellants' allegations of an oral agreement modifying the 1987 loan contract because of the bad faith and punitive damage claim. A material issue of fact existed with respect to the promise to pay crop insurance premiums that could not simply be ignored by the tribal court by application of the parol evidence rule when appellants also sued in tort.

The tribal court did not appear to understand the difference between contract remedies and tort remedies after the substitution of Judge Vance for Judge Boyd. As appellant advised the tribal court, contract actions arise simply out of

contracts either oral or written between parties. Parties can sue under a contract when the other party breaches the agreement. Furthermore, the remedies are limited and as a rule emotional damages are not recoverable in a contract action and many types of evidentiary rules govern the evidence that is introduced which includes the parol evidence rule.

Appellants further advised the tribal court the tort action allows plaintiff much broader relief. The plaintiff in a tort action needs only show the defendant owed a duty of care to the plaintiff and that plaintiff breached that duty. Tort actions are generally utilized to provide relief to plaintiffs who have suffered personal or economic injuries. In a tort action, a plaintiff may recover emotional damages and the evidentiary rules such as the parol evidence would not apply. Appellants have attempted to establish the ICC, as the Kirm's primary lender, owed a duty of care that would include not providing "bad checks" to its debtors and that it breached that duty. (See appellants' brief dated September 27, 1989, page 9-10.)

The tribal court in its Order Granting Summary Judgment dated May 22, 1989 made the following conclusions of law:

" ...

"(16). There exists between parties to a contract an implied covenant to act in good faith and with fair dealing.

"(17). Defendant did not breach its implied covenant to act in good faith and with fair dealing.

"(18) plaintiffs are not entitled to actual damages for a breach of the implied covenant of good faith and fair dealing.

"(19) plaintiffs are not entitled to punitive damages for a breach of the implied covenant of good faith and fair dealing.

" "

The tribal court acted appropriately in finding an implied covenant to act in good faith and with fair dealing under the applicable laws statute at IV CCOJ 501(d). This section reads as follows:

" ...

"where appropriate, the Court may in its discretion be guided by statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place.

This transaction or occurrence did take place in the State of Montana. Montana recognizes that in commercial transactions there is an obligation between the parties to act in good faith and fair dealing which is measurable by the justifiable expectations of the parties. This obligation is breached if a party acts in a manner which is arbitrary, capricious or unreasonable. This obligation is also breached if a party fails to exercise honesty in fact and observe reasonably standards of fair dealing in the trade. (See Montana Pattern Instruction 8.06.)

Again, the tribal court properly found an implied covenant to act in good faith with fair dealing. However, the tribal court

improperly found that the defendant did not breach the implied covenant to act in good faith and with fair dealing when there were material issues of fact. Appellants made allegations of the intentional issuance of bad checks and a subsequent agreement to provide funds for crop insurance. Appellants allege that appellee's refusal to provide funds for the crop insurance as subsequently agreed resulted in there inability to repay their loan.

In conclusion, appellants are clearly proceeding under a tort theory of recovery as well as a contract theory. Therefore, the tribal court erred when applying the parol evidence rule to the tort theory and did not properly exclude appellants' allegations of a subsequent oral agreement which is alleged to reflect a course of conduct between appellants as borrowers and appellee as their primary lender and the violation thereof an act of bad faith.

III.

WHETHER IT WAS WITHIN THE SOUND DISCRETION OF JUDGE BOYD TO ENTER SUMMARY JUDGMENT WITHOUT ALLOWING FURTHER DISCOVERY.

It is within the discretion of a tribal court judge to enter summary judgment without allowing further discovery. As has been stated several times herein, summary judgment is appropriate in a case where a party has moved for summary judgment pursuant to F.R.Civ.P 56(c) and the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In the instant case, discovery was ordered by then acting Tribal Judge Vance Gillette on April 15, 1989. On April 19, 1989, Associate Judge Terry L. Boyd was assigned to the case. Judge Boyd then rescinded Judge Gillette's previous order denying appellants further discovery and granting appellee summary judgment.

Although Judge Boyd had the discretion to permit further discovery and/or grant or deny summary judgment, he abused his discretion in this case. Therefore, Judge Boyd's Order Granting Summary Judgment is hereby set aside and the previous order on April 15, 1989 signed by Tribal Judge Vance Gillette permitting appellants to proceed accordingly with their discovery is hereby reinstated.

IT IS THE UNANIMOUS DECISION OF THIS COURT THAT THE ORDER GRANTING SUMMARY JUDGMENT TO APPELLEE BE REVERSED AND THIS MATTER BE REMANDED TO TRIBAL COURT FOR COMPLETION OF DISCOVERY AS PREVIOUSLY ORDERED AND WITHIN THIRTY (30) DAYS AND A TRIAL WITHIN SIXTY (60) DAYS OF THE FILING OF THIS OPINION.

DATED this ____ day of December, 1989.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Associate Justice

Floyd G. Azure, Associate Justice
