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

FRED ALLRUNNER and IRIS ALLRUNNER,
Appellants,

vs. **Appeal No. 198**

FORT PECK HOUSING AUTHORITY,
Appellees.

Upon review of the Tribal Court record, pleadings, briefs and oral arguments the Fort Peck Court of Appeals hereby makes the following:

It is the opinion of the court that the issues raised by the Appellants Allrunners in their grievance filed with the Fort Peck Housing Authority in March of 1993 must either be addressed by the Grievance Board, or addressed by the Court. By granting the motion in limine to exclude the issues raised by the grievance prior to the May 3, 1993 court hearing (Hearing Trans.p.58), the Appellants are denied either an administrative hearing and/or court determination of the grievance issues. The purpose of the grievance proceedings is to insure a fair and impartial hearing on such issues prior to eviction. Ref. 24 CFR Sec. 905.340(a). If not provided at an administrative hearing, they must be heard by the court. Sec. 905.340, supra, at (a) (2).

This matter is not ripe for adjudication by this court for the reasons stated above. It does not meet the requirement of Title I CCOJ, Sec. 202, as to final orders in that administrative proceedings and/or Tribal Court proceedings have not been exhausted.

IT IS NOWTHEREFORE THE ORDER OF THIS COURT:

This matter is hereby remanded to the Grievance Board of the Port Peck Housing Authority for an administrative determination of the issues of the grievance. In the alternative this matter is remanded to the Port Peck Tribal Court for hearing on said issues.

DATED this _____day of July, 1994

FORT PECK COURT OF APPEALS

By_____
Gerard M. Schuster,
Associate Justice

By_____
Gary James Melbourne,
Associate Justice

DISSENTING OPINION

COMES NOW Justice BEAUDRY and submits the following as his dissenting opinion.

NATURE OF THIS CASE

Appellant's appeal the decision of the Honorable Robert E. Welch in the matter of Fort Peck Housing Authority v. Fred Allrunner and Iris Allrunner dated May 21, 1993.

FACTS

The facts indicate that on or about February 21, 1991, the Fort Peck Housing Authority (Housing) filed a complaint against Fred and Iris Allrunner, (Allrunner) for money due and for eviction. On June 18, 1991 the court ordered Allrunners to:

> a) sign a dwelling lease;
> b) update an application for rent calculation and recertification;...
> c) make satisfactory arrangements to pay rental delinquency; and
> d) **cooperate with HOUSING in examining the house for water leakage.**

In the same order Housing was ordered to:

> a) grant Allrunners a travel allowance;
> b) grant Allrunners a student allowance;
> c) recompute rent accounting for allowances;
> d) **inspect the dwelling for water damage.**

It appears from the record that the tribal court found that Allrunners, outside of entering into a lease agreement on October 15, 1991, substantially failed to comply with the June 18, 1991 order. Allrunners with considerable delay, submitted information to complete an updated application for rent calculation

and certification only after Fort Peck Housing Authority filed its motion for writ of eviction.

In its order of May 21, 1993 the court found that the parties met on March 19, 1993 for the purpose of signing a satisfactory payback agreement. It appears from the record that the delinquent amount agreed to between the parties, at that time was $3,244.00, it also appears that housing tendered an installment plan for payback and Iris Allrunner rejected the offer. Iris Allrunner then submitted a counteroffer agreeing to pay back the delinquency at a rate of five ($5.00) dollars per month. Housing rejected that counteroffer on the basis that it would have taken fifty-four years to pay off the delinquency. The court found that the Allrunners failed to make "satisfactory arrangements" to pay the delinquency.

The court further found that in accordance with its order of June 18, 1991 that the Housing Authority inspected the dwelling for water leakage and repaired the problem. On August 28, 1991 housing inspected the dwelling with the assistance of Iris Allrunner; an inspection report was made determining the extent and source of the water seeping into the basement; circa October 23, 1991 the problems were fixed and a work order was signed off on October 25, 1991. Housing subsequently inspected the premises and verified that the problem had been repaired. The court found that after October 23, 1991 nobody including the Allrunners complained to housing of any further problem with water seeping into the basement of the dwelling. The findings indicate that during August of 1992, housing workmen laboring within the premises for three (3) days failed to detect any water seeping into the basement. These facts concerning the water seepage are pendant to the issue on appeal of rent abatement, hereinafter discussed.

In its findings the tribal court concluded that the Housing Authority diligently complied with the court's order of June 18,
1991.

On February 9, 1993, the Housing Authority filed a writ of eviction claiming that the Allrunners, for the most part, did not comply with the Tribal Court order of June 18, 1991. The court held a hearing on March 31, 1993 to consider the motion; it provisionally denied the motion pending a Show Cause hearing. It further ordered the parties to submit a comprehensive brief setting forth compliance of the individual requirements of its June 18, 1991 order. Inter alia, on March 19, 1993 after the writ of eviction, Iris Allrunner filled out a "Grievance Form" alleging improper calculations of rent, failure of Housing Authority to apply abatement clause and confidentiality violations. The abatement clause contained in the lease entered into between the parties on October 15, 1991 states:

> If repairs or defects hazardous to life, health and safety are not made, or temporary alternative accommodations offered to the Tenant within seventy-two (72) hours, the Tenant's rent shall abate during the entire period of the existence of such defects, while he is residing in the unrepaired premises.

Prior to show cause hearing of May 3, 1993 to determine the writ of eviction filed on or about

February 9, 1993 counsel for the Housing Authority filed a motion in limine seeking to exclude any evidence from the show cause hearing related to the grievance issues. The Housing Authority argued that the evidence of the grievance should be excluded on the basis of it immaterial and irrelevant nature.

The court granted the motion in limine concluding that the issues raised by the Allrunners in their grievance filed on or about March 19, 1993 were irrelevant and immaterial to the court's order of June 18, 1991.

ISSUES

The Appellant raises the issue on appeal:

WHETHER THE TRIAL COURT ERRED IN GRANTING THE FORT PECK HOUSING AUTHORITIES MOTION IN LIMINE?

DISCUSSION

The standard for review herein is abuse of discretion. Generally, appellate court will not reverse a lower courts decision absent a finding that the lower court abused its discretion. DeAnda v. City of Long Beach, 7 F.3d 1418, 1421-1422 (9th Cir. 1993) . Fort Peck Housing Authority points out to the court that:

> Under the abuse of discretion standard of review, the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place. Rather, 'an abuse of discretion is established only where no reasonable man could agree with the district court; if reasonable men could differ as to propriety of the court's action, no abuse of discretion has been shown.

Binks Mfg.Co. v. Nat. Presto Industries, Inc., 709 f.2d 1109, 115 (7th Cir. 1983)

Here, reasonable men could differ as to the Tribal courts actions in finding the grievance and pendent abatement issues as being irrelevant and immaterial. Neither this court nor any reasonable man could state that the proffered evidence is absolute in relevancy or materiality, differing opinions exist on this matter, for this reason the decision is discretionary. The discretionary decision of its probative value falls in the hands of the trial court and where after analysis and legal reasoning the trial court finds that the evidence lacks sufficient probative value to justify receiving it into evidence no appeals court should find an abuse of discretion.

The Fort Peck Housing Authority argues that the grievance and abatement issues are collateral

issues not relevant to a determination of whether the eviction should be allowed, I agree.

At the show cause hearing of May 3, 1993 the court convened to determine whether the Housing Authority had the right to evict Allrunners. The Fort Peck Housing Authorities basis for the eviction was the fact that Allrunner's failed to comply with the court order of June 18, 1991 an order issued subsequent to a petition for eviction filed in February of 1991. The record clearly indicates that the June 18, 1991 order demanded the Allrunners to:

> a. sign a dwelling lease;
> b. to update an accurate application for rent calculation, accompanied by all necessary documentation;
> c. to make satisfactory arrangements to pay their rental delinquency; and
> d. to cooperate with the FPHA in examining their unit for water allegedly leaking in the unit's basement.

Allrunners rights to a grievance and abatement arise from a court ordered contract for lease to the subject property. In this case, as well as in all contract cases, the formation of the contract is a condition precedent to the rights arising from that contract. When the court made its order of June 18, 1991 it could only have been envisioned that the entire order would be complied with and that as a result the parties would enjoy a contractual relationship. It would be unreasonable to allow the Allrunners to use as a sword the terms and conditions of the court ordered lease to cut to pieces the remaining court order. Allrunners are estopped from relying on the terms and conditions of the court ordered lease when they have substantially failed to comply with the remaining inseparable court order of June 18, 1991. The lease is void as a matter of law and for this reason there is no formation of contract and therefore the rights of grievance and abatement do not exist.

The majority in its opinion states that "By granting the motion in limine to exclude the issues raised by the grievance prior to May 3, 1993 court hearing (citation omitted), the Appellants are denied either an administrative hearing and/or court determination of the grievance issues." The majority cites 24 CFR Sec. 905.340(a) as its authority of providing a fair and impartial hearing on such issues prior to eviction. I understand the majorities willingness in assuring that the Appellants are afforded due process prior to eviction. However, it is my opinion that the Appellants have been afforded due process prior to eviction.

The record is clear that this case was initiated on February 21, 1991 when the Fort Peck Housing Authority filed a complaint against Fred and Iris Allrunner requesting, among other things, money owed and due, and eviction of the Allrunners from their unit. See Tribal Court's FINDINGS OF FACT within its court order of May 21, 1993. The request for eviction of February 21, 1991 precipitated all aspects of due process, including a hearing on the issues dated June 18, 1991. The issues adjudicated on June 18, 1991 included the water leakage problem in the unit and rent calculation guidelines under federal regulations. The Appellants recognize this fact and assert in their INITIAL BRIEF OF APPELLANTS, filed in this court:

> "Trial was held on June 18, 1991 before the Honorable Robert E. Welch. During the course of the hearing, the Allrunners produced photographs and other documentation that the basement wall of the unit leaked water which would pool on the floor near the east wall and by the electrical breaker box on the south wall. FPHA denied that any problems existed in the unit and requested that the Allrunners be immediately evicted and that they be ordered to pay any arrearage that existed in their account. The Allrunners claimed that the FPHA had not properly calculated their rental obligation under federal guidelines that apply to Indian Housing Authorities." See Appellants Initial Brief, page 1-2.

Considering the fact, that Allrunners eviction action was initiated in February of 1991 and the Allrunners had and utilized the opportunity to defend that action, Allrunners defenses and all issues relating to that eviction action merged into the final judgment of June 18, 1991.

Under the doctrine of res judicata, an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent actions, conclusive of the rights of the parties and conclusive on all material issues that were or might have been determined. French v. Rishell, 40 Cal.2d 477, 479, 254 P.2d 26; Dillard v. McKnight, 34 Cal.2d 209, 213, 209 P.2d 387; Wynn v. Treasure Co., 146 Cal.App.2d 69, 78, 303 P.2d 1067. The doctrine rests upon the sound public police that there must be an end of litigation and, accordingly, persons who have had one fair trial on the issue may not again have it adjudicated. The hearing of June 18, 1991 is the culmination of the litigation initiated by the Fort Peck Housing Authority in February of 1991. The final order of June 18, 1991 should be deemed conclusive and determined fully adjudicated on all issues including the defense issues of abatement. As to the issue of granting the Appellants a grievance procedure; the Appellants were afforded that right under federal law at the outset of litigation in February of 1991 when the action for eviction was initiated.

For all the foregoing reasons I hereby dissent.

Dated this _____ day of July, 1994.

BY THE COURT OF APPEALS:

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Gary M. Beaudry, Chief Justice