NORTHERN PLAINS

INTERTRIBAL COURT OF APPEALS

Sisseton, South Dakota
FILED
SISSETON-WAHPETON SIOUX
TRIBAL COURT
8/16/11
Date
By
Clerk of Courts

Rosebud Marshall,
Appellee,

vs.

Norbert D. Jones,
Appellant,

CV-03-03-00

OPINION & DECISION
OF THE COURT

Rosebud Marshall and her brother Norbert D. Jones have a dispute over a house that initially was Norbert's MHO house, which he later assigned to Rosebud. Rosebud moved into the house, made current all delinquent payments and eventually paid the loan off on the house. The house is located on land which is owned by Norbert, but which is held in trust by the United States for the benefit of Norbert. Norbert had a lease with the federal government which allowed the house to be placed on the land in question. The lease with the BIA expired and was not renewed by Norbert and Rosebud did not have any knowledge that she needed to renew the lease. Norbert and Rosebud got into disputes and Norbert moved to have Rosebud removed from the house as he alleged it was an improvement on land owned by him and thus his house and not Rosebud's house.

Rosebud has lived in this house for more than 15 years. Rosebud has made all payments required to maintain the house, and all delinquent debt on the house

owed by Norbert when Rosebud received the house and paid the loan on the house in full. Rosebud lives in the upstairs in the house and Norbert lives in the basement of the house.

The parties are in need of an immediate decision in this matter, and without going into a detailed legal analysis at this time, an abbreviated analysis and full decision will be made by the Court.

First, it is the opinion and decision of this Court that the house belongs to Rosebud. To hold otherwise would be simply wrong, unfair and inequitable.

Second, Rosebud has a right to ingress and egress across Norbert's land to the house through an *easement by necessity* . We are not convinced the Trial Court's analysis that an easement by prescriptive right exists. However, Rosebud must have access to and from the house.

Third, Norbert is entitled to a reasonable rent from Rosebud so long as the house is located upon his land.

This case is thus REMANDED to the Trial Court for a determination of what the amount of *reasonable rent* shall be for Rosebud to pay Norbert in the future and what if any rent is owned by Rosebud to Norbert for the past. We note that

Norbert lives in the house with Rosebud and to that extent the Court may consider whether Norbert owes rent to Rosebud for occupying Rosebud's house.

A more detailed written legal analysis detailing the Court's reasoning will be forthcoming.

Dated this 12th day of August, 2000.

Dennis Edward Johnson
Chief Justice

Tony Hale
Associate Justice

Diane Johnson
Associate Justice

SISSETON- WAHPETON TRIBAL COURT
LAKE TRAVERSE INDIAN RESERVATION
STATE OF SOUTH DAKOTA

IN TRIBAL COURT

Sisseton, South Dakota
FILED
SISSETON-WAHPETON SIOUX
TRIBAL COURT
1/24/00
Date
By: Lis Kahl
Clerk of Courts

ROSEBUD MARSHALL,
Petitioner,

T-98-020-004

vs.

ORDER

NORBERT D. JONES,
Respondent.

This Court entered an order in the above-referenced matter on September 16, 1998 permitting the Petitioner an extension of time to September 1, 1999 to remove her Mutual Self-Help Home Ownership House from the Respondent's allotted land. The genesis of this dispute has been discussed in detail in previous decisions of the Court and will not be reiterated herein with much detail. In summary, the Respondent conveyed his MHO home to the Petitioner, his sister, after he relocated. The Petitioner paid off the house and has made improvements to it. However, after the expiration of the lease the Respondent had executed with the Housing Authority when it originally located the house on the Respondent's land, the Petitioner did not renew the lease, principally because she was never informed of her right to do so, and as a result her house now allegedly trespasses on the Respondent's land. The Respondent refuses to enter into a new lease and the BIA has apparently been unable to resolve the impasse between the Parties. The Respondent has moved this Court for an order ejecting the Petitioner from the land and declaring the MHO home an "improvement" and thus subject to forfeiture to the Respondent. A hearing was held before the Court on October 12, 1999 with the Petitioner appearing personally and through her attorney, Robert Grey Eagle, and the Respondent appearing personally and through his attorney, Gordon Nielsen. It appears from a review of the evidence elicited at that hearing that the Petitioner has attempted to get the HIP program to relocate the home, but that funding for such a move is not available now and may not be available in the foreseeable future. The Petitioner resists the motion and argues that a home is not an "improvement" under the regulations governing leases of allotted lands and that any ruling that the house is an improvement would be a taking of her property without just compensation in violation of the Indian Civil Rights Act, 25 USC 1301(2).

For the reasons stated herein, the Court concludes that the house in question is not an "improvement" under federal regulations and that the Petitioner has a prescriptive easement over the Respondent's land which permits her to continue to occupy the house and to utilize reasonable ingress and egress to get to said property. The Court further directs that the Petitioner pay to the Respondent, through the Bureau of Indian Affairs, a reasonable fee for said easement.

The instant dispute, between a sister and brother, both of whom are elders, could very well have been avoided had someone, the Housing Authority or the BIA, notified the Petitioner that the lease permitting her house to sit upon the Respondent's land was about to expire. That lease contained a renewal provision under which the Petitioner could have renewed the lease at the same rate as the previous lease for a twenty-year period. See Lease submitted at March 4, 1998 hearing, at section 2. That did not occur, however, and the Respondent now refuses to enter into a new lease permitting the Petitioner's home to remain on his property.

Initially, it should be noted that the Respondent's position, throughout this litigation, has been that the Petitioner did not lawfully gain title to the MHO house. He insists that the Petitioner misled him to execute a conveyance of his house to her on the pretense that she needed his signature to get HIP assistance to fix problems with the house. The Respondent moved from the unit on the second week of December, 1984 and the Petitioner, with the Respondent's consent, moved into the unit shortly thereafter. She paid $500.00 in lease arrears and $800.00 on the Respondent's arrears for electricity at that time. She then proceeded to make the regular monthly payments on the MHO house until it was paid off.

On August 7, 1989 the Petitioner mailed the Respondent a conveyance form from the SWST Housing Authority that the Respondent executed and mailed back to the Petitioner. That form conveyed legal ownership of the MHO house the Petitioner resides in to her. On April 27, 1992, the SWST Housing Authority conveyed the MHO home to the Petitioner as the result of the conveyance by the Respondent and the Petitioner's subsequent actions in paying off the home. Despite the rather clear language of the conveyance form, the Respondent continues to insist, as recently as the date of the last hearing in January of this year, that the Petitioner tricked him into conveying his house. In light of the position taken by the Respondent throughout these proceedings, the Court believes that the Petitioner's possession of the house has been open and notorious since August 7, 1989 and has been adverse to the Respondent since that time.

Nothing in this Court's records indicate that the Respondent took any action to eject the Petitioner from the house she occupies on her land, despite his protestations that she was illegally occupying it. Even after he returned or about December 31, 1997 and took up residence in the basement of the house, the Respondent never commenced any action with this Court to attempt to evict her from the home. Instead, the instant dispute started when the Petitioner commenced an action against the Respondent to enjoin him from smoking in the basement and from interfering with her rights to the home. As the result of that action, this Court ruled on March 5, 1998 that the Petitioner is the lawful owner of the MHO house and enjoined the Respondent from interfering with her possessory interest. At that time, the Petitioner was confident that she could remove the home with HIP assistance, but that belief has proven illusory and now the Petitioner apparently is unable to remove the home from the Respondent's allotted land.

The Court believes that the Petitioner has become possessed of a prescriptive easement on the Respondent's allotted land which allows her to continue occupying the home and reasonable ingress and egress to the home. See Masayesva v. Zah, 794 F.Supp. 899, 920 (D. AZ. 1992)(recognizing the legal possibility of one Tribe possessing a prescriptive easement or license over the lands of another Tribe.) See *Ottavia v. Savarese*, 338 Mass. 330, 333-334, 155 N.E.2d

432 (1959) ("From the standpoint of the true owner, the purpose of the various requirements of adverse possession--that the nonpermissive use by another be actual, open, notorious, exclusive and adverse--is to put him on notice of the hostile activity of the possession so that he, the owner, may have an opportunity to take steps to vindicate his rights by legal action. Where a claim of right is made . . . and is communicated or is open and notorious, the purpose of notice is satisfied, for it is likely that the encroachment and the fact of its hostility will come to the attention of the true owner.")

In this case, it is apparent to this Court that the Respondent has disputed the right of the Petitioner to occupy her home since 1989 when the Housing Authority conveyed the property to her. He asserts that this conveyance was the result of a fraudulent act of the Petitioner in gaining his signature on a form the Housing Authority supplied the Petitioner and she asked the Respondent to sign. For almost ten years, the Petitioner continued to make payments and reside in the home while the Respondent took no legal action to dispute the right of the Petitioner to reside there. Now, after the original lease expired, the Respondent requests that this Court evict the Petitioner and declare her home forfeited to him because she is financially unable to remove it from his land.

Neither party has offered a viable alternative to the instant legal dispute. The Respondent argues that the Court should evict the Petitioner and declare her home an "improvement" reverting to the Respondent's possession. The Petitioner argues that the home is not an improvement and should remain in the title of the Petitioner. The Petitioner does not explain how such a ruling would resolve the instant dispute, however, because a trespass would continue due to the house still remaining on the Respondent's allotted land without permission of the legal titleholder, the United States, and the beneficial landowner, the Respondent. The Respondent's proposed remedy would result in unjust enrichment to him because he would become the legal owner of a home which the Petitioner took over and paid off after he vacated it and moved away from the area. The Court, cannot, in good conscience, ignore how inequitable such relief would be.

The Court believes that this matter must be resolved because it does not appear that the prior remedy of the Court- that the Petitioner move the house- is going to result in a satisfactory resolution due to the Petitioner's inability to raise the financial resources necessary to remove the home. The Court finds it telling that for almost 15 years the Petitioner resided in the home originally awarded the Respondent and the Respondent never took any legal action to remove her despite his protestations to this Court that the Petitioner fraudulently obtained possession of the home. The Court finds that this inactivity has created a situation where the Petitioner has reasonably relied upon her ability to access her property by ingress and egress onto the property of the Respondent. See Greiner v. Columbia Gas, 41 F.Supp. 2d 625 (D.WVa. 1999). In such a case, a prescriptive easement has been created and cannot be disturbed by the lawful landowner. The Court acknowledges that at the time the Petitioner did have a valid lease of the property because she was the assignee of the original lease that the Respondent executed with the Housing Authority. However, the Respondent asserts that the assignment was fraudulent and the Court construes this assertion as a challenge to the Petitioner's rights to occupy the premises and the right of her as an assignee of the original lease to the Housing Authority. The Petitioner's

occupance of the house was therefore open and notorious, as well as adverse to the Respondent's rights.

The next question the Court must resolve is whether open and notorious occupancy for a period of almost fifteen years is a sufficient predicate to a finding that a prescriptive easement exists herein. The Court notes that the Tribal Code contains one general statute of limitations contained at Title 33-03-01 which requires a party to commence a civil action within two years from the date of accrual of that action. Although this limitations period is dramatically shorter than most limitations sections of state law, especially as they pertain to adverse possession, the Court must adhere to tribal law here and conclude that the Respondent had until, at the latest, April 27, 1994 to commence an action against the Petitioner to challenge the manner in which she gained title to the MHO house. He failed to do so and the law does not now permit this Court to award him that house when tribal law dictates that this Court lacks the jurisdiction to adjudicate a dispute arising more than two years prior to its commencement in this Court. The Court therefore concludes that under tribal law open and notorious adverse possession for over two years is sufficient to establish the legal predicate for a finding of an easement by prescription.

The Court is also cognizant that a question may exist regarding the right of a person to obtain an easement by prescription against the United States as legal landowner. However, the Court has already ruled in this case that the United States is not an indispensable party in this matter and the United States has opted not to intervene in the instant dispute. This Court believes that the United States Court of Appeals for the Eighth Circuit in Conroy v. Conroy, 575 F.2d 175 vests sufficient authority in tribal courts to resolve disputes revolving the legal ownership of allotted lands, including questions regarding the existence of prescriptive easements. The Court also notes that a recent federal court decision regarding the rights of several different tribes to occupy certain Indian trust lands suggested that an Indian tribe may have prescriptive rights in trust lands. See Masayesva v. Zah, 794 F.Supp. 899, 920 (D. AZ. 1992)(recognizing the legal possibility of one Tribe possessing a prescriptive easement or license over the lands of another Tribe.) The Court is not in any way intimating by this decision that the United States is not the legal titleholder to the lands in question, nor is it questioning the beneficial ownership of the Respondent. It is merely ruling that the Petitioner has a prescriptive easement over said lands sufficient to permit her to continue occupying her home and reasonable ingress and egress over the Respondent's land to get to said house. This easement also includes the right to continue using any well or other outbuilding necessary to her survival there.

The Court respectfully requests that the local BIA agency determine the reasonable value of this easement and collect the same from the Petitioner. The Court also directs that counsel for the Petitioner submit appropriate findings of fact and conclusions of law to implement this decision.

So ordered this 24th day of January, 2000.

BY THE COURT:

B.J. Jones
Chief Judge

ATTEST:
Clerk of Courts