United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5095 **September Term, 2016**

FILED ON: APRIL 18, 2017

WILLIAM C. TUTTLE,
APPELLANT

v.

RYAN ZINKE, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00365)

Before: BROWN, KAVANAUGH, and WILKINS, *Circuit Judges*.

J U D G M E N T

This appeal of a grant of summary judgment from the United States District Court for the District of Columbia was considered on the record and on the parties' briefs. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the District Court's grant of summary judgment be affirmed.

This case concerns the alleged wrongful termination of a lease between William C. Tuttle ("Mr. Tuttle") and the Colorado River Indian Tribes (the "Tribe"). The lease at issue was executed on March 31, 1977, between the Tribe, Mr. Tuttle, and Robert E. Tuttle ("Robert"),[1] and concerned a 98.24-acre tract of tribal land. The lease was made pursuant to the provisions of the Act of April 30, 1964, 78 Stat. 188, and incorporated by reference the regulations contained in 25 C.F.R. Part 131 and all amendments to that section relevant to business leases on restricted Indian lands. Mr. Tuttle voluntarily signed the lease. The Bureau of Indian Affairs ("BIA"), an agency of the U.S. Department of the Interior, administers certain aspects of the lease because

[1] Mr. Tuttle inherited Robert's ownership interest in the lease after Robert's death. Robert is not a party to this appeal.

the United States holds the land in trust for the Tribe. Accordingly, the Superintendent of the Colorado River Agency ("Superintendent"), a division of the BIA, acted pursuant to authority delegated from the Secretary of the Interior ("Secretary"), and approved the lease. In June 1986, the Tuttles and the Tribe entered into a lease modification. The BIA and Interior Board of Indian Appeals ("IBIA") upheld the validity of the lease modification.

Subsequently, Mr. Tuttle defaulted on his lease. On September 30, 2009, the Tribe and Superintendent sent Mr. Tuttle a notice of default. Mr. Tuttle responded to the notice of default on October 14, 2009, but the Superintendent concluded that his explanations and documentation were insufficient to cure the default. On March 2, 2010, the Superintendent informed Mr. Tuttle of the deficiencies in his response, and notified him of the decision to terminate his lease. Both the notice of default and notice of cancellation were signed by the Superintendent.

Mr. Tuttle appealed the notice of cancellation to the BIA on April 1, 2010. On July 19, 2010, the Acting Western Regional Director of the BIA affirmed the Superintendent's decision to cancel the lease. The IBIA then affirmed the BIA's decision on December 18, 2012. Mr. Tuttle subsequently filed suit in the District Court challenging the IBIA's decision. The District Court affirmed the IBIA's decision on summary judgment and held that the cancellation did not violate any applicable regulations or provisions of the lease. *See Tuttle v. Jewell*, 168 F. Supp. 3d 299, 309-13 (D.D.C. 2016). The present appeal followed.[2] We have jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291.

We review *de novo* the District Court's decision to grant summary judgment. *Grimes v. District of Columbia*, 794 F.3d 83, 88-89 (D.C. Cir. 2015). Summary judgment is appropriate if there is no genuine issue of material fact, and judgment can be granted as a matter of law. FED. R. CIV. P. 56(a). In assessing a summary judgment motion, the Court must view all evidence in the light most favorable to the nonmoving party. *Carter v. George Wash. Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004). Summary judgment will only be granted if no reasonable jury could find for the nonmoving party. *See Jones v. Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009); *Carter*, 387 F.3d at 878.

Appellant, Carol Tuttle, Trustee for the William C. Tuttle and Carol M. Tuttle Family Trust, requests that the Court reverse the District Court's grant of summary judgment. *First*, Appellant argues that the District Court erred by concluding that the BIA (and by extension, the Secretary) did not delegate its authority to the Tribe when it cancelled the lease. *See* Appellant Br. 13-16. In particular, Appellant contends that the BIA erroneously permitted the Tribe to determine whether the lease should be terminated, when the regulations require the Secretary to make that decision. This argument lacks merit. Nothing in the lease prohibits the BIA or Secretary from consulting with the Tribe; in fact, the opposite is true. The lease expressly incorporates the BIA's leasing regulations by reference. These leasing regulations require the BIA to consult with the Tribe on lease violations once the cure period has expired. 25 C.F.R. § 162.467(a). This is particularly important given that the Tribe – not the BIA – has the authority to waive any breaches of the lease. Thus, there is no conflict with the BIA consulting with the Tribe – which is the lessor, and thus, a direct party to the lease – regarding the lease termination.

[2] Mr. Tuttle's estate filed the appeal in this matter.

Further, there is no evidence in the record that mere consultation with the Tribe resulted in a delegation of authority. The Superintendent – not the Tribe – signed the notice of cancellation and explained the reasons for the lease's termination. The BIA's Western Regional Director and IBIA – not the Tribe – then affirmed this decision to cancel the lease in two separate opinions. Thus, the BIA always retained the ultimate authority to cancel the lease and did not delegate the termination. Appellant cannot point to anything in the record to support a contrary assertion.

Second, Appellant claims that the District Court erred by concluding that the Secretary's "ex post facto and conflicting regulations control the lease termination." Appellant Br. 16 (capitalization altered) (emphasis omitted); *see id.* at 16-21. In particular, Appellant contests the applicability of the 25 C.F.R. Part 162 regulations to the lease because these regulations were promulgated "long after the Tuttle Lease was executed," and cannot be given retroactive effect. *Id.* at 16, 20-21. Appellant also maintains that the terms of the lease control if they conflict with the Part 162 regulations, and that the BIA failed to comply with these terms in cancelling the lease. *Id.* at 18-19. These arguments are without merit. The lease is subject to the BIA's leasing regulations "and any amendments thereto relative to business leases on restricted Indian lands." J.A. 2; *see* Appellee Br. 15. Thus, the regulations contained in 25 C.F.R. Part 162, which were promulgated as amendments to the BIA's leasing regulations, are fully applicable even though they did not take effect until five years after the lease was signed.

Moreover, the BIA adhered to all relevant regulations and provisions of the lease when it terminated the contract. Article 17 of the lease required the BIA to send Mr. Tuttle a written notice of default and provide 60 days to cure the violations. If Mr. Tuttle failed to timely cure the default, the BIA was authorized to terminate the lease. The regulations provide for this same procedure. Part 162 of the regulations states that if a lease is violated, the BIA must send the tenant a notice of violation. 25 C.F.R. § 162.466(b).[3] Within ten business days, the tenant is required to cure, dispute the notice, or request additional time to cure. *Id.* § 162.466(b)(2). Where the tenant fails to cure, the BIA is required to consult with the Indian landowner – in this case, the Tribe – to decide whether to cancel the lease or pursue other remedies. *Id.* § 162.467(a). If the BIA decides to terminate the lease, it must send a notice of cancellation along with an explanation and notice of right to appeal. *Id.* § 162.467(c).

The BIA complied with all of these procedures. Specifically, the Superintendent and the Tribe sent Mr. Tuttle a notice of default on September 30, 2009. This notice satisfied the requirements set forth in both Article 17 of the lease and Part 162 of the regulations. The notice of default adequately described the numerous lease violations and provided Mr. Tuttle with ten business days to cure these violations, dispute the default, or request additional time.[4] On

[3] We reference the current version of the statute for simplicity. When the Superintendent issued the notice of cancellation in 2009, the regulations at 25 C.F.R. §§ 162.618-.619 applied. The District Court referenced an updated provision in its opinion as 25 C.F.R. § 162.618(a). The substance of the regulations remains consistent despite the change in citations.

[4] A discrepancy exists between the cure period provided for in the lease and the regulations. The lease states that Mr. Tuttle will have 60 days to cure, while the regulations grant Mr. Tuttle only 10 business days to cure, 25 C.F.R. § 162.466(b)(2). Thus, an argument could have been made before the BIA that the notice of default did not comply with the lease on this basis. Mr. Tuttle, however, never made this

October 14, 2009, Mr. Tuttle sent the Tribe a letter purporting to cure the violations. However, the BIA and the Tribe found that Mr. Tuttle's letter did not cure any of the violations listed in the notice of default. Mr. Tuttle made no other proper attempt to cure the violations before the Superintendent issued a notice of cancellation on March 2, 2010. Thus, the BIA fully satisfied all lease and regulatory requirements.

Third, Appellant argues that the District Court erred by applying the Act of April 30, 1964 to the lease. *See* Appellant Br. 21-24. This argument was not raised before the BIA or the District Court and, therefore, will not be considered by this Court on appeal. *See Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (stating that courts of appeal should only address issues raised for the first time on appeal in "exceptional circumstances"); *Peralta v. U.S. Attorney's Office*, 136 F.3d 169, 173 (D.C. Cir. 1998) ("[B]ecause the government raised this argument for the first time on appeal, we shall not consider it."); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 468 (D.C. Cir. 1996) ("[A]s a general rule, we will not consider an argument raised for the first time on appeal.").

Fourth, as a final side argument, Appellant claims that Mr. Tuttle only signed the lease and lease modification under duress and coercion. Appellant Br. 14. In particular, Appellant alleges that Mr. Tuttle never received any consideration for executing the lease modification, thus implying that the modification agreement is void. *Id.* These arguments are raised too late, as the IBIA ruled on the validity of the lease modification back in 2008, and no direct appeal was ever taken from that decision. *Cf. O'Hearne v. United States*, 66 F.2d 933, 935 (D.C. Cir. 1933) ("If appellant considered the decree in the injunction proceeding unlawful, his remedy was to appeal therefrom, which he did not do then, and which he cannot do now by collateral attack in the contempt proceeding."). Thus, any reference to impropriety with regard to signing the lease and lease modification is outside the scope of this appeal.

Therefore, the District Court's grant of summary judgment in favor of Appellees is affirmed. Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

---

argument before any agency, and Appellant does not challenge the adequacy of the notice of default on appeal. Further, Mr. Tuttle actually received 153 days to cure – far more than required under the lease or regulations.