



INTERIOR BOARD OF INDIAN APPEALS

Jack Dean Franks v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)

13 IBIA 231 (08/23/1985)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JACK DEAN FRANKS

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 84-46-A

Decided August 23, 1985

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) upholding cancellation of business leases PSL-205A and PSL-205B, Contract Nos. J53C1420-3981 and J53C1420-3892, in Palm Springs, California.

Affirmed.

1. Indians: Leases and Permits: Arbitration--Indians: Leases and Permits: Cancellation or Revocation

A lessee of Indian lands does not have a right to invoke the lease's arbitration clause after the lease has been canceled.

2. Indians: Leases and Permits: Cancellation or Revocation

The Bureau of Indian Affairs is not required to give the lessee of Indian trust land a reasonable time in which to cure a breach of the lease when it is determined in accordance with 25 CFR 162.14 that the breach cannot be cured.

3. Indians: Leases and Permits: Generally

The construction of a contract approved by the Bureau of Indian Affairs on behalf of an Indian or Indian tribe is a question of Federal law. In the absence of Federal cases on point state law may be used as an indication of the general common law.

4. Indians: Leases and Permits: Violation/Breach: Waiver of Breach

Whether the acceptance of rent by an Indian lessor after a default in specific provisions of a lease constitutes a waiver of the default is a question of the lessor's intent, which is determined on the basis of the facts of the particular case.

APPEARANCES: Gregory A. Swajian, Esq., Palm Springs, California, for appellant; Barbara E. Karshmer, Esq., Fresno, California for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On August 20, 1984, the Board of Indian Appeals (Board) received a notice of appeal and brief from Jack Dean Franks (appellant). Appellant sought review of a June 7, 1984, decision by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) upholding the cancellation of leases, Nos. PSL-205A and PSL-205B, entered into by appellant and Barbara Marie Gonzales (formerly Barbara M. Gonzales Young) (lessor, Gonzales). Because Gonzales is a member of the Agua Caliente Band of Cahuilla Indians, Palm Springs Allottee No. PS-92, the leases were approved by the Palm Springs Field Office (PSO), Bureau of Indian Affairs (BIA). Appellee's decision affirmed a March 8, 1983, decision of the Acting Sacramento Area Director (Area Director) terminating the leases after appellant failed to respond to the Area Director's February 18, 1983, notice to show cause why the leases should not be canceled. For the reasons herein set forth, the Board affirms appellee's decision.

Background

On February 9, 1981, pursuant to a BIA delegation of authority, the PSO approved business leases, Nos. PSL-205A and PSL-205B, between lessor and appellant. The leases, which were for 65 years and apparently were first executed in 1979, called for the development by appellant of two noncontiguous pieces of Indian trust land. Under PSL-205A, appellant was to construct an office, mini-warehouse, and retail space on one piece of property. This construction, which was to provide a minimum of 30,000 square feet of space with an \$800,000 value, was to be completed within 1 year. Under PSL-205B, similar facilities, with a minimum of 20,000 square feet and a \$450,000 value, were to be constructed on the second property within 2 years. Both leases called for appellant to post a bond to assure payment of minimum rents during the period of construction.

Apparently sometime during April 1981, appellant learned that Giannini & Associates (Giannini), the lessee of the property adjoining the parcel leased to him under PSL-205B, had encroached on that parcel. An extensive correspondence ensued between appellant and Giannini concerning possible ways to deal with the encroachment. Appellant has attached exhibits to his briefs consisting of letters extending from April 24, 1981, through March 5, 1983, between himself and Giannini. These letters show that although Giannini acknowledged the encroachment and was interested in discovering a way to resolve the problem, he denied the contention that the encroachment was responsible for appellant's failure to complete construction.

By letter dated December 11, 1981, appellant requested that the time for completion of improvements under PSL-205A be extended from 1 year to 2 years, so that construction on each property would be completed by

February 9, 1983. 1/ Appellant did not mention the encroachment in this letter. The extension was granted.

Early in 1983, the Area Director found that construction of improvements had not begun and that appellant had not negotiated with the lessor for additional time. Accordingly, on February 18, 1983, he issued a notice giving appellant 10 days to show cause why the leases should not be canceled for failure to post rental bonds and complete construction as required. On February 23, 1983, without referring to the Area Director's letter, appellant wrote directly to the lessor, asserting that the recent economy had "created complete havoc" for those in the construction business, and it had been "next to impossible to get anything financed or built during that period. Appellant asked the lessor to reconsider her decision not to renew the lease. Appellant did not directly respond to the Area Director's show-cause letter. Having received no response, the Area Director canceled the leases on March 8, 1983.

By letter dated March 11, 1983, notwithstanding the cancellation, appellant requested arbitration "pursuant to a dispute that has arisen between the lessor * * * and the lessee." The nature of the dispute was not specified. The Area Director responded to the request by a March 21, 1983, letter which referred to the previous cancellation and to appellant's right to appeal the decision. An appeal was subsequently made to BIA under 25 CFR Part 2. The cancellation was upheld by appellee on June 7, 1984. Appellee's decision was then appealed to the Board.

Discussion and Conclusions

Appellant raises six arguments on appeal. He first contends that the problems arising under the leases should have been submitted to arbitration pursuant to the lease provisions. In support of this argument appellant cites Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983). Assuming that the problems were properly not submitted to arbitration, appellant argues that the lease cancellations (1) violated 25 CFR 162.14 2/ because he was not given a reasonable period of time to cure any alleged breach, (2) were not appropriate under California law because the breach was not total, and (3) effected a forfeiture of his rights in violation of California law. He further contends that any breach was waived by the acceptance of his rental checks after the purported breach, and that the lessor is estopped to assert breach of the construction deadlines because of her own and BIA's course of conduct. 3/

1/ In the letter requesting an extension of time appellant represented that he had a loan commitment ready to record, and that he was prepared to make the required improvements immediately.

2/ Appellant cites 25 CFR 131.14 as the regulatory provision governing lease cancellations. Part 131 was renumbered as Part 162, without substantive change, by notice published in 47 FR 13327 (Mar. 30, 1982).

3/ Appellant also argues that, should he prevail in this appeal, he is entitled to recover attorney fees in accordance with section 31 of the leases. Because of the Board's disposition of this case, this argument is not addressed.

[1] The issue appellant would have submitted to arbitration is apparently whether he was prevented from completing construction because of Giannini's encroachment. Appellant contends that his request for arbitration should be governed by Racquet Drive, *supra*, in which the Board enforced a lease arbitration clause. The present case, however, differs in one significant and controlling aspect from Racquet Drive: contrary to the facts in Racquet Drive, appellant here admits that he did not request arbitration until after the leases were canceled. Appellant's right to arbitration, which was created by the leases, was lost when the leases were canceled. The mere request, after notice of cancellation, to discuss unspecified problems with the lessor was insufficient to constitute a request for arbitration. Consequently, BIA was not required to grant appellant's request for arbitration.

[2] Because of its holding that the termination of these leases is not subject to arbitration, the Board must consider appellant's additional arguments concerning the validity of the cancellations. Appellant first argues that he was not given a reasonable period to cure any alleged breach, as is required by 25 CFR 162.14. ^{4/} Section 162.14 contemplates that leases of Indian lands will not be canceled because of breaches that may readily be cured. Two breaches were alleged here: failure to post the rental bonds and failure to complete construction. Although the failure to post bonds might easily have been cured early on, appellant totally ignored this breach. Failure to complete construction by February 9, 1983, however, clearly could not have been cured within a reasonable time after February 18, 1983, when construction on PSL-205A had not even been started, and only relatively minor preparatory work had been done on PSL-205B. Under these circumstances, BIA was not required to find specifically that the breaches could not be cured within a reasonable time, or to give appellant a further opportunity to cure the breaches. Downtown Properties Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 62 (1984).

Most of the 41 exhibits accompanying appellant's current brief, like the 59 exhibits accompanying his earlier brief, merely document the extended correspondence between appellant and Giannini during the period April 24, 1981, through March 5, 1983, concerning Giannini's encroachment. These exhibits add little to the merits of appellant's case because they shed no

^{4/} Section 162.14 states in pertinent part:

"Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises."

light on the ultimate issue of impossibility of performance. We conclude that there was indeed an encroachment by Giannini on the property leased by appellant under PSL-205B; but under the circumstances of the case we fail to see why it would excuse appellant from the commitments he made to construct certain specific improvements on lessor's properties within a specified time period--particularly on the parcel covered by PSL-205A, which was not affected by the encroachment.

[3] Appellant next contends that the cancellation is impermissible under California law both because the breach was not total and because it effected a forfeiture of his rights. As the Board noted in Walch Logging Co. v. Assistant Portland Area Director, 11 IBIA 85, 98, 90 I.D. 88, 95 (1983):

The construction of Federal contracts, including contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity, is a question of Federal law. Federal contract law is governed by principles of general contract law. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); United States v. Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Calif. 1977), aff'd mem., 625 F.2d 330 (9th Cir. 1980). In the absence of Federal cases on point, state law may be used as an indication of the general common law. Humboldt Fir, Inc., supra.

Thus, in the absence of Federal law, in this case the Board would look to California law because California is the state with the greatest interest in the leases at issue. Cf., Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983).

In arguing the application of California law, however, appellant overlooks the existence of Federal law on the issues raised. The Secretary's cancellation of Indian leases for failure to complete required construction has been upheld without a requirement that the breach be total and despite arguments that cancellation constituted a forfeiture. Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Calif. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974). See also, Downtown Properties v. Deputy Assistant Secretary, supra; Racquet Drive, supra; Downtown Properties, Inc. v. Sacramento Area Director, 8 IBIA 248 (1981), Sessions, Inc. v. Miguel, 4 IBIA 84, 82 I.D. 331 (1975); Sessions, Inc. v. Ortner, 3 IBIA 145, 81 I.D. 651 (1974); Sunny Cove Development Corp. v. Cruz, 3 IBIA 33, 81 I.D. 465 (1974); Villa Vallerto v. Patencio, 2 IBIA 140, 81 I.D. 9 (1974). The Board thus holds that these leases could be canceled under Federal law. ^{5/}

[4] Appellant next argues that any breach has been waived by lessor's acceptance of his rental checks. Lessor states that she did not accept any rental checks after BIA issued its show-cause notice. The Board, following Sessions, Inc. v. Morton, supra, has held that whether the acceptance of rent by an Indian lessor after a default in the lease constitutes a waiver of the default is a question of the lessor's intent, which is determined on the

^{5/} Because of this disposition, the Board renders no opinion on appellant's interpretation of California law.

basis of the facts of the case. See, e.g., Downtown Properties v. Deputy Assistant Secretary, supra. On the basis of the facts of this case, the Board finds no intent to waive appellant's defaults.

Finally, appellant contends that the lessor is estopped to assert breach of the construction deadlines because of her own and BIA's course of conduct. The specific conduct complained of was the inclusion in the lease of a reference to the cancellation provisions of 25 CFR 162.14; the inclusion of a provision leading appellant to believe that an extension would be granted if conditions beyond his control, including unfavorable economic conditions, prevented completion of construction; 6/ the involvement of BIA and the lessor in appellant's dispute with Giannini; and the fact that the PSO had approved extensions for other lessees under similar circumstances. The Board has carefully reviewed the record relating to the issues raised by appellant, and finds that none of them presented a valid basis for inferring that strict compliance with the terms of the leases would not be expected.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 7, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

//original signed

Bernard V. Parrette
Chief Administrative Judge

We concur:

//original signed

Jerry Muskrat
Administrative Judge

//original signed

Anne Poindexter Lewis
Administrative Judge

6/ In Racquet Drive, the Board held that the question of whether adverse economic conditions was the kind of problem contemplated by the parties as constituting circumstances beyond the control of the lessee, should be submitted to arbitration when arbitration was requested timely. The Board has never held that adverse economic conditions constitute a circumstance justifying failure to complete construction.