



INTERIOR BOARD OF INDIAN APPEALS

Douglas M. Rhead v. Acting Portland Area Director, Bureau of Indian Affairs

18 IBIA 257 (04/25/1990)

Judicial review of this case:

Affirmed, *Rhead v. Bureau of Indian Affairs*, Case No. 90-0495-E-EJL
(D. Idaho July 8, 1992)



United States Department of the Interior

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

DOUGLAS M. RHEAD

v.

ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-5-A

Decided April 25, 1990

Appeal from a cancellation of a lease of Indian land.

Affirmed.

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

Where a lease of Indian land is assigned in violation of the requirements for assignment contained in the lease, and the lessee fails to cure the violation after notice, the lease is properly cancelled under 25 CFR 162.14.

APPEARANCES: Douglas M. Rhead, pro se; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee; Cathleen Afraid of Bear, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Douglas M. Rhead seeks review of a July 14, 1989, decision of the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the cancellation of Lease No. 839 on the Fort Hall Indian Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Lease No. 839 covers a 1.25-acre portion of Allotment No. 1436 on the Fort Hall Reservation. It was approved by the Superintendent, Fort Hall Agency, BIA, on August 12, 1969, for "[h]omesite purposes in connection with the Mutual Help Housing Project under the Fort Hall Housing Authority." The original lessee was Catherine M. Woonsook, owner of a one-sixth interest in the allotment. The lease term is 25 years with an automatic renewal for another 25 years. The rent is \$1 per year.

The lease contains the typewritten provision: "The lessee is hereby authorized to make subleases and assignments of its leasehold interests in connection with its development and operation of the Mutual Help Housing Project." It also contains the printed provision: "4. SUBLEASES AND ASSIGNMENT. -- Unless otherwise provided herein, a sublease, assignment or

amendment of this lease may be made only with the approval of the Secretary and the written consent of all parties to this lease, including the surety or sureties.”

A modification of the lease was approved on April 14, 1970. It provides:

[A]ny improvements of a permanent nature which would normally attach to the realty when placed on the leased premises by the lessee, assignee, or sublessee, by virtue of a Mutual Self-Help Housing Program, will be considered removable personal property and title thereto will not vest in the lessors herein. Title to such improvements will vest according to the terms of the Mutual Self-Help Housing Program.

A sublease from Woonsook to the Fort Hall Housing Authority "for the purpose of constructing and operating a Mutual-Help Housing Project, and its appurtenances" was entered into on February 26, 1970, and approved by the Superintendent on May 7, 1970. Woonsook also entered into a "Mutual-Help and Occupancy Agreement" with the housing authority on February 26, 1970, providing for, inter alia, payments by Woonsook toward home ownership.

On June 23, 1978, Woonsook's daughter, Cathleen Afraid of Bear, and Cathleen's husband Fred, assumed Woonsook's obligations under the Mutual-Help and Occupancy Agreement. On February 25, 1981, the housing authority conveyed all of its interests in the property and improvements to Cathleen Afraid of Bear "in consideration of the payment in full of all monies and other obligations required to be paid by [her] * * * under the terms of the Mutual Help and Occupancy Agreement."

On August 6, 1984, Cathleen and Fred Afraid of Bear entered into an agreement to assign Cathleen's interest in Lease No. 839 to appellant and his wife for the sum of \$400. The lease assignment was not approved by any BIA official. Also on August 6, 1984, the Afraid of Bears entered into an agreement to sell the house on the leased property to appellant and his wife.

On February 18, 1987, the Superintendent wrote to Cathleen Afraid of Bear, stating that she was in violation of Lease No. 839 because she had assigned it without obtaining consent of the other owners and approval of the Secretary as required by provision No. 4 of the lease. He further stated that appellant was in trespass. He continued:

In order to correct this situation, you are required to remove all personal property from the lease site which does not belong to you. Since [appellant] is in trespass, he is hereby notified by copy of this letter to remove all his personal property from the site. Since you and [appellant] are both in violation of the lease, you are both required to cooperate in removal of his personal property. You have thirty (30) days

from the date of receipt of this letter to come into compliance with the provisions of the lease, which means only your personal property should be on the lease site at that time.

The only other solution would be to complete a legal sublease or assignment during the 30 day period. This would require approval of the Bureau Superintendent and of the other landowners, in addition to your and [appellant's] agreement on the provisions of such a sublease or assignment.

If a legal sublease or assignment is not completed or if [appellant's] personal property is not removed within the 30 day period, other steps will be taken: 1) to cancel the lease, and 2) to seize all personal property remaining on the parcel (whether it belongs to you or [appellant]), which will become the property of the landowners.

Since the house was considered to be your personal property, it is not tied to the Bureau and the sale to [appellant] is valid. Therefore, he has the right to remove the house with the rest of his personal property, if he so desires.

(Superintendent's February 18, 1987, letter at 1-2).

Over the next several months, appellant discussed his options with agency personnel. Appellant apparently indicated at one point that he would consider entering into a lease for the fair market rental of the property but then changed his mind. ^{1/} He was advised that his other options were to obtain approval of the landowners for the existing assignment or to face eviction. After appellant failed to take any action, the Superintendent advised him by letter of November 9, 1988, that if he was unwilling to begin negotiation of a valid lease within 30 days, he would be evicted. ^{2/} Appellant indicated he was unwilling to negotiate a lease. Finally, by letter of April 5, 1989, the Superintendent advised Cathleen Afraid of Bear and appellant that Lease No. 839 was cancelled for violation of its provision No. 4.

Appellant appealed to the Area Director. He argued, *inter alia*, that Afraid of Bear's assignment of Lease 839 to him was subject to the typewritten provision in the lease authorizing subleases and assignments, which did not require the consent of the landowners or the approval of the Secretary. He stated:

^{1/} An appraisal approved by the Area Chief Appraiser on Jan. 22, 1988, estimated the fair annual rental of the land without improvements at \$550 and the land with domestic well and septic system at \$825.

^{2/} The Superintendent stated that he did not consider the option of obtaining consent of the landowners to the existing assignment to be a viable option because it would provide nothing for the landowners.

We observed that all of the non-standard provisions of the lease were very favorable to the lessee and knew the lessee had negotiated these provisions and had them made part of the lease. In particular, we noted that lease provision concerning lease assignments was made in favor of the lessee and judged it was intended to enable the lessee to sell the house and give the necessary companion lease assignment without having the burden of negotiating a new lease with landowners or getting the approval of the agency.

(Appellant's Statement of Reasons before the Area Director at 1).

By letter of May 4, 1989, Afraid of Bear informed the Area Director that she agreed to cancellation of the lease. By another letter of the same date, she stated that she opposed appellant's appeal.

On July 14, 1989, the Area Director affirmed the Superintendent's decision. He stated:

[W]e are of the opinion that the purchase of the improvements by Ms. Afraid of Bear from the Fort Hall Housing Authority served to negate the typewritten sublease and assignment clause from the lease. Since the development and operation of the Mutual Help Housing Project was no longer an issue, any lease provision associated with the Project has no effect. It can also be reasonably inferred that this provision only applied to the housing authority since the project's "Mutual-Help and Occupancy Agreement" requires that the "Authority and the Participant will enter into a lease." Catherine M. Woonsook entered into such a lease on February 26, 1970. The original lease to Ms. Woonsook needed a special sublease provision to more easily permit her to participate in the Mutual Help Housing program. It is therefore my decision to affirm the April 5, 1989, decision of the Fort Hall Agency Superintendent whereby he cancelled lease No. 839.

(Area Director's Decision at 5). Appellant's notice of appeal from this decision was received by the Board on September 21, 1989. ^{3/} Appellant, the Area Director, and Afraid of Bear filed briefs.

Discussion and Conclusions

Appellant continues to argue that the typewritten assignment clause in lease No. 839 authorized the Afraid of Bears to assign the lease without obtaining the approval of BIA or the consent of the other landowners. He

^{3/} Afraid of Bear filed a document with the Area Director which appeared to be a notice of appeal. In a letter to the Board dated Oct. 8, 1989, she stated that she was not appealing the Area Director's decision but wished to participate in the appeal in opposition to appellant.

contends that, because the original lessee was a part of the Mutual Help Housing Project, the clause should be interpreted as authorizing future assignments and subleases for the protection of the lessee. "Without such a clause," appellant argues, "a person who did invest significant money and effort in improving the property would have been at the mercies of the several land owners and officials of the B.I.A. if they ever needed to sell their interest in the property" (Appellant's Brief at 3). He further contends that any ambiguity in the assignment clause should be construed in his favor and against the Afraid of Bears and BIA because "[t]hose parties were in the best position to avoid the confusion that has caused this problem." (Appellant's Brief at 7).

Appellant also argues that the Afraid of Bears represented to him that they had full authority to assign Lease No. 839 and sell the house located on the leased property. He states that he has invested money in improving the house and argues that a cancellation of the lease would cause him to forfeit his investment and the equity resulting from the improvements he has made to the property.

Afraid of Bear argues that Lease No. 839 is null and void. Further, she argues that she was defrauded by appellant.

The Area Director argues that the typewritten provision was not effective at the time of the assignment to appellant because the property was no longer part of the Mutual Help Housing Project and the assignment was not made in connection with the Project. He contends:

The typewritten provision was not added to the standard form lease to enable the participant in the Project, when the Project was over, to convey the property for significant value without the consent of the owners and the approval of the BIA. This is an especially reasonable reading given the nominal rental, \$1.00, required by the lease. To allow Cathleen Afraid of Bear to convey this valuable leasehold interest to someone who is not participating in the Project defeats the implicit reason such a nominal rent would be allowed.

(Area Director's Brief at 3-4). The Area Director also argues that the typewritten assignment provision is not ambiguous but explicitly indicates that it concerns assignments and subleases in connection with the housing project. Since the typewritten provision is inapplicable to appellant's assignment, the Area Director continues, standard provision No. 4 applies. The conditions of this provision not having been met, the assignment to appellant was ineffective, and the Superintendent properly cancelled the lease for violation of its terms.

The Board agrees with the Area Director's interpretation of the typewritten assignment clause. On its face, it applies only to assignments and subleases made in connection with the Mutual Help Housing Project. The

house built on the leased property was no longer a part of the housing project once the rights of the Fort Hall Housing Authority were sold to Afraid of Bear on February 25, 1981.

[1] Accordingly, Afraid of Bear's assignment to appellant was subject to standard provision No. 4 of the lease, which required consent of the landowners and approval of the Secretary. 4/ Afraid of Bear's attempt to assign the lease without complying with these requirements was a violation of the lease. She was given notice of her violation by the Superintendent as required by 25 CFR 162.14. Both she and appellant were given more time than required by this section to bring themselves into compliance with the lease. They did not do so. The Superintendent properly cancelled the lease for violation of its terms.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Portland Area Director's July 14, 1989, decision is affirmed. 5/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

4/ To interpret the typewritten provision as extending beyond the point at which the property was removed from the housing project would improperly deprive the landowners of their usual right to receive fair annual rental. 25 CFR 162.5(b) provides that, with certain described exceptions, "no lease shall be approved or granted at less than the present fair annual rental." This section authorizes leases at nominal rental under certain circumstances. Lease No. 839 was granted to facilitate participation of the lessee in the housing project, and undoubtedly the nominal rental was justified on this basis. However, that justification no longer exists when the property is removed from the housing project and the lease is assigned to a party who was not a participant in the project.

5/ This disposition does not address the validity of the Afraid of Bears' sale of the house to appellant or any right appellant may have to recover his investment in the house from the Afraid of Bears. These matters must be addressed in another forum.