Docket No. 09-17349 (appeal)
Docket No. 09-17357 (cross-appeal)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATIONAL AREA, INC.,
AND ROBERT JOHNSON,
Appellees/Cross-Appellants,

v.

THE HONORABLE GARY LARANCE, AND JOLENE MARSHALL,
Appellants/Cross-Appellees.

Appeal From The United States District Court
For the District of Arizona
Case No. 2:08-CIV-00474-DGC

CROSS-APPELLEES' RESPONSE IN OPPOSITION

TO WATER WHEEL'S EMERGENCY MOTION

FOR ORDER ENJOINING TRIBAL COURT PARTIES

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INTRODUCTION

On August 30, 2010, Water Wheel Camp Recreational Area, Inc., Cross-Appellant in Docket No. 09-17357 (hereinafter "Water Wheel"), filed an Emergency Motion seeking an injunction which would prevent Cross-Appellee Tribal Court Chief Judge Gary LaRance, or any personnel of the Tribal Court of the Colorado River Indian Tribes (hereinafter "the Tribal Court Parties"), from "taking any action to authorize the eviction of Water Wheel from its [former] leasehold unless and until this Court has ruled on the merits of the parties' cross-appeals …." Emergency Motion, p. 1 (hereinafter referred to as "Em.Mot.").

This is the fifth time in this case that Water Wheel has sought such relief. Water Wheel and Robert Johnson, its president and principal owner, filed this suit on March 11, 2008, seeking to enjoin Tribal Court proceedings in an eviction suit filed by the Colorado River Indian Tribes (CRIT) on October 1, 2007, following the expiration of Water Wheel's 32-year lease on July 7, 2007. Excerpts of Record, p. ER-351. The following day the plaintiffs filed an "Emergency Motion" for a Temporary Restraining Order. U.S.D.C. Dkt. #8. That motion was denied by U.S. District Judge Campbell, who required plaintiffs to first exhaust their tribal remedies. ER-278. On May 10, 2008, plaintiffs filed their Second Motion for Temporary

Restraining Order (U.S.D.C. Dkt. #26), which was also denied for failure to exhaust. ER-216.

On June 13, 2008, Tribal Court Judge LaRance entered judgment to evict Water Wheel and Johnson from the tribal premises. He also awarded damages for unpaid rents, trespass damages, attorney fees, and costs. That Judgment was affirmed in most respects by the CRIT Court of Appeal. ER-156. On September 23, 2009, the U.S. District Court entered its final order, denying Water Wheel's efforts to nullify the Tribal court Judgment.[1]

On November 10, 2009, after the parties filed timely Notices of Appeal and Cross-Appeal, Water Wheel filed another motion in the District Court for an order enjoining Tribal Court defendants to order a stay of proceedings during the pendency of this appeal, pursuant to Fed. R. Civ. P. Rule 62(c). U.S.D.C. Dkt. #89. After briefing by all parties, U.S. District Judge Campbell denied that injunction request on December 18, 2009. U.S.D.C. Dkt. #102.

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[1] With respect to Robert Johnson, the U.S. District Court ordered the Tribal Court to vacate that portion of the judgment pertaining to him, and "to cease any litigation concerning Robert Johnson personally." ER-23. That ruling is the subject of the Tribal Court Parties' appeal, Docket No. 09-17349. The issues raised by Water Wheel's Emergency Motion do not appear to implicate the appeal from the relief granted to Mr. Johnson, who did not join Water Wheel as an emergency movant.

Attached to Water Wheel's latest Motion is a Rule 27-3 Certificate. The Tribal Court Parties, cross-appellees herein, do not concur in a number of statements in that Certificate, in particular the characterizations of the Tribal Court proceedings and the issues before this Court. The Certificate does state accurately that CRIT filed for a Writ of Restitution from the Tribal Court on August 17, 2010. Counsel for the Tribal Court Parties did hear from counsel for Water Wheel on August 19th regarding the intent to seek emergency relief. After contacting Judge LaRance, counsel advised Water Wheel's counsel that no *ex parte* ruling would be made, and that a hearing on CRIT's motion would be set. The Certificate states accurately that counsel for Water Wheel deferred action to seek relief from this Court based on that communication.

The Certificate is also accurate with respect to the setting of the Tribal Court hearing for September 10th. On August 30th, the day the Emergency Motion was filed, counsel for the Tribal Court Parties was on a 4-hour airline flight when counsel for Water Wheel left a telephone message for him regarding his intent to file this motion that day. By the time the plane had landed, and counsel heard the message, the Emergency Motion had already been filed. Nevertheless, given the discussions among counsel on

August 19th, the filing was no surprise, and the lack of actual notice prior to filing is not a basis for any objection on the part of the Tribal Court Parties.

However, as mentioned, the Tribal Court Parties do not subscribe to many of the characterizations of the proceedings in Tribal Court and the U.S. District Court. For example, the statement that Water Wheel's Rule 62(c) Motion for Stay "was summarily denied by Judge Campbell" is inaccurate. In fact, notwithstanding that Water Wheel had failed to meet the requirements of the U.S. District Court Local Rules in the filing of its Motion for Stay, the Court considered Water Wheel's late-filed Memorandum of Points and Authorities. Judge Campbell ultimately held in a 3-page decision denying the motion that Water Wheel had failed to meet the standard set by the Supreme Court in Winter v. NRDC, 120 S.Ct. 365, 374 (2008), for the issuance of an injunction. U.S.D.C. Dkt. #102. This is discussed in Part B of the Argument, below.

Water Wheel's latest injunction request remains fatally flawed and should be denied by this Court because (1) Water Wheel has failed to provide any facts, let alone sworn statements supporting the facts, to justify the injunction; and (2) Water Wheel has both misstated and cannot satisfy the applicable standard for issuance of an injunction.

ARGUMENT

A. Water Wheel has failed to present any facts demonstrating justification for injunctive relief.

The Emergency Motion is defective in that it fails to present any evidence to justify injunctive relief. Fed. R. App. P. Rule 8(a)(2)(B)(ii) requires that a Motion for Stay or Injunction include "original copies of affidavits or other sworn statements supporting facts subject to dispute." None have been provided, although movant certainly could have anticipated that issues of irreparable harm and the balancing of the equities would be matters in dispute. Thus, the Emergency Motion is deficient on its face.

Rather than presenting evidence, Water Wheel glibly states that to demonstrate irreparable harm "Water Wheel need only quote from the proposed Writ [of Restitution] that has been presented to the CRIT Tribal Court for entry." Em.Mot., p. 11. Water Wheel then offers a very abbreviated excerpt from the proposed Writ, supplemented with its own hyperbole. The motion paints a picture of tribal police "destroy[ing Water Wheel's] business" (*id.*, p. 13) by forcing employees and agents of Water Wheel from the premises, seizing personal property, and even confiscating "property belonging to Water Wheel's customers using the facilities …."

Id., p. 11. No evidence is offered to support such a scenario,[2] and Water Wheel simply ignores the fact that it has unlawfully held possession of tribal land for three years since its lease expired on July 7, 2007, that it has paid no rent to the Tribe since 2005, but is collecting fees from its customers. ER-2, ER-196. The proposed Writ (Exhibit B to the Emergency Motion, Dkt. #43-3) is nothing more than a narrowly tailored order to enforce an ordinary eviction—what any landlord must resort to when a tenant refuses to leave the premises after lease expiration. Water Wheel has remained in possession of this tribal land for over three years since the expiration of its lease. This Court should not reward this holdover tenancy.[3] There has been no adequate showing of irreparable harm.

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[2] Indeed, Water Wheel's own Exhibit D to its motion (Dkt. #43-5) refutes its claims. The exhibit is an October 21, 2009, open letter from the CRIT Tribal Chairman to "Members of the Water Wheel Resort", stating that "the Tribes' action against Water Wheel should not interfere with your use and enjoyment of the Resort."

[3] Water Wheel has never offered to post bond of any size, as may be required by Fed. R. App. P. Rule 8(a)(2)(E). This is discussed in Part C, below.

B. Water Wheel has again misapplied the standards applicable to a motion for injunctive relief.

As noted above, Judge Campbell invoked the Supreme Court decision in Winter v. NRDC, 555 U.S. ___, 129 S.Ct. 365 (2008), for purposes of his consideration of Water Wheel's Motion for Stay below, rejecting that motion's reliance on the "sliding scale" test previously applied by the Ninth Circuit, and holding that the movant must first show the likelihood of both success on the merits and irreparable injury, before the second two factors (public interest and balancing equities) may be considered. The District Court held that Water Wheel had not done so.

Water Wheel now relies on this Circuit's recent decision in Alliance for the Wild Rockies v. Cottrell, 2010 U.S. App. Lexis 15537 (July 28, 2010), seeking to apply the "sliding scale" test once more. But movant's interpretation of the precedent is still erroneous, and it necessarily fails to make any sort of a case for injunctive relief.

Water Wheel extrapolates from the language of this Circuit's recent decision in Wild Rockies to offer a standard which the Supreme Court clearly rejected in Winter. The opinion in Wild Rockies simply states that a sliding scale application may still be used if the applicant for injunctive relief has demonstrated that the first two elements of the Winter test have

been met. Lexis reprint, at pp. 10-11. As stated above, according to Winter, the applicant must show the likelihood of both success on the merits and irreparable injury. 129 S.Ct. at 374. The Supreme Court could not have been more clear that a strong showing of the likelihood of success on the merits cannot offset a mere showing of a "possibility" of irreparable harm. *Id.*, at 375.

Yet, Water Wheel continues to argue—cherry-picking language from this Circuit's opinion in Wild Rockies—that an applicant's mere showing that "serious questions" are being raised is enough to compensate for a failure to present evidence in support of the other elements, applying the "sliding scale" method disapproved in Winter. Em.Mot., p. 9. In point of fact, Water Wheel cannot show *either* that there is a likelihood of success on the merits of its appeal *or* any likelihood of irreparable injury. That must be why it continues to argue the existence of ephemeral "serious questions": so that it might be relieved from making the other required showings. The decision in Wild Rockies does not permit such an application of the preliminary injunction test, as such an application would clearly violate the rule as stated by the Supreme Court in Winter.

Besides, Water Wheel's assertion of "serious questions" is not credible. It simply cites back to its briefs filed on the merits of its appeal,

which reveal no serious questions. Water Wheel's principal argument is admitted to be "a simple one" (Em.Mot, p. 10), namely that the language of its lease with CRIT bars the exercise of Tribal Court jurisdiction over an eviction action to remove Water Wheel as a holdover tenant. That argument is both demonstrably weak due to several references in the lease to tribal enforcement authority, including a provision addressing holdover tenancy, and is certainly not the type of "serious question" which might inform the jurisprudence of the scope of tribal authority over non-members. Indeed, Water Wheel's lease-based arguments have nothing to do with jurisdiction at all, but only the enforcement remedies available to a party in the face of breach of the lease. *See* Part A of Appellants' Response to Cross-Appellant's Principal Brief (Dkt. #37, at pp. 9-16. The only federal question which the District Court had jurisdiction to review was whether the Tribal Court had jurisdiction over Water Wheel and Johnson. Federal courts do not act as appellate courts charged with reviewing the merits of tribal court rulings. *E.g.*, AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 904 (9th Cir. 2002).

C. Water Wheel is a holdover tenant and trespasser on tribal land, and cannot show that balancing the equities justifies injunctive relief.

Water Wheel offers two short paragraphs in its Emergency Motion for the proposition that balancing the equities tips in favor of allowing Water Wheel "to continue its decades-old business at the Colorado River." Em.Mot., p. 13. Water Wheel adds that granting a stay of the Tribal Court eviction proceedings "will cause to the Tribe **little-or-no** immediate harm." *Id*. (emphasis in original). This is easy for Water Wheel to say, since it has paid no rent in five years, but continues to collect fees from its tenants and customers on tribal land. ER-2, ER-196. In contrast, the Tribe is damaged daily by this trespass.

But Water Wheel has never offered to post a bond to back up its request for injunctive relief. Not in the District Court, and not here. If Water Wheel were serious about further maintaining its business operations on the Reservation, it would not be unwilling to invest in a bond to insure its continued presence on the Reservation, and to assure the Tribe that it will be compensated for Water Wheel's continuing occupation of tribal land. But that is not Water Wheel's plan at all. It seeks to prolong its lawless and rent-free occupation of tribal lands as long as possible. Indeed, it has claimed

throughout this litigation that, notwithstanding that it signed a 32-year lease with the Tribe in 1975 and that it reaped the benefits of its tribal lease for decades, these are not tribal lands after all, and the Bureau of Indian Affairs had no authority to approve the lease in the first place. ER-354-357. There is nothing equitable about Water Wheel's continuing lawless presence on these lands.

D. No public interest is served by allowing Water Wheel to occupy tribal land without a lease.

Water Wheel contends that the issues it has raised on appeal are of "vast significance" and that a decision in this appeal will have a "potentially profound impact on non-Indians and non-Indian business doing business in Indian Country." Em.Mot., p. 14. This self-serving exclamation is questionable, and Water Wheel has offered no evidence to support it. But even if its assertions could be proved, they still do not demonstrate why this injunction should issue. Water Wheel asserts that an appellate ruling on the merits is necessary because "the Tribal Court impermissibly and without jurisdiction entered … an order of eviction and a $4 million judgment …." *Id.* However, allowing the Tribal Court eviction proceedings to play out while this appeal is pending does not affect this Circuit's review of whether the Tribal Court had jurisdiction to award damages, attorney fees and rents.

Only the eviction issue would arguably become moot. The question will remain whether a tribe may recover damages in tribal court from a holdover lessee who occupies tribal lands unlawfully. That issue is preserved even if Water Wheel is evicted from tribal lands.

Indeed, a more persuasive argument may be made for the proposition that it is in the public interest to *allow* the Tribal Court to authorize enforcement of its eviction order. There is no dispute that Water Wheel does not have a lease to be on the Tribe's land. To thwart the eviction sends the message that the mere filing of a Notice of Appeal from a federal court order denying relief to a non-member businessman who is trespassing on tribal land buys the miscreant more time to profit from his misdeeds.

CONCLUSION

For the foregoing reasons, the Tribal Court parties respectfully request that Water Wheel's Emergency Motion be denied.

Date: September 2, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2010, I electronically filed the foregoing Cross-Appellees' Response in Opposition to Water Wheel's Emergency Motion for Order Enjoining Tribal Court Parties with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tim Vollmann_____

TIM VOLLMANN