No. 11671

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

SHOFNER IRON AND STEEL WORKS,
a corporation,

Appellee.

Appeal from the District Court of the United States for the District of Oregon.

APPELLEE'S BRIEF

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STATEMENT

Taking the amended complaint by its four corners the allegations of the first cause of action (R. 16-18) are these:

The Appellee, Shofner Iron and Steel Works, originally owned and was in possession of certain real estate described as "Tract I", situated in Multnomah County, Oregon. In September, 1942, Appellee leased this land from Defence Plant Corporation and remained in posses-

sion thereof. On January 30, 1943, Appellee deeded the land to Defence Plant Corporation and still remained in possession under the lease. Reconstruction Finance Corporation succeeded to the interests of DPC and cancelled the lease. Shofner remained in possession and is still in possession. RFC declared the land surplus under the Surplus Property Act. Appellee, it is said, wrongfully withholds possession from the United States.

The allegations of the second cause of action are:

Shofner was in possession of other real estate in Multnomah County, Oregon, described as "Parcel 1" and "Parcel 2". On September 28, 1943, Appellee leased this land to the United States for a term extending until 1963, but remained in possession. The Government has complied with all conditions of the lease. Appellee is still in possession and unlawfully withholds possession from Appellant, the United States.

Both causes of action concern Oregon real estate. In both, possession of the land in Appellee is alleged to be unlawful as against the United States. In the first cause of action title is alleged to be in RFC, and in the second it is said to be in Appellee. In neither is title alleged to be in the United States.

In the first the relation of landlord and tenant between RFC and Appellee is alleged to have ceased; in the second that relation between Appellee and the Government is said still to persist.

In the first cause of action the United States does not claim to have received any transfer of RFC's title

to the land. The only claim is that RFC transferred "jurisdiction over said premises" to War Assets Administration.

In the second cause of action it is not alleged that the lease from the Appellee to the Appellant was declared surplus. The Surplus Property Act is not involved here.

In both causes of action the United States seeks possession only. In neither does the Government seek to try the title. In the second cause of action it does not claim title, but claims only leasehold rights. In the first it alleges title in RFC, but does not allege that that title has been or is denied or threatened, nor does it seek to quiet the RFC's title.

The action as a whole is one which in Oregon is called forcible entry and detainer.

ARGUMENT

The grounds upon which the United States seeks possession of the property described in the two causes of action are, (1) Surplus Property Act, and (2) under the claim that the United States can sue in its own name on any cause of action belonging to RFC.

Neither of these grounds applies to the second cause of action. The leasehold recited therein is not alleged to have been declared surplus under the Surplus Property Act, and the leasehold is alleged to be in the name of the United States. Moreover, Appellee's motion to dismiss did not reach the second cause of action. We

so stated to Judge Brown, and in his decision (Sup. R. .....) he denied Appellee's motion so far as the second cause of action is concerned. The United States then applied for and took a dismissal of the second cause of action without prejudice (R. 28-29). The Government has not appealed (R. 30) and cannot appeal from its own dismissal order. The second cause of action is not before this Appellate Court.*

We address ourselves to the first cause of action. The cases recited by Appellant on Pages 12 and 13 of its brief are not in point. They hold that where a debt or obligation exists in favor of a government owned corporation and against a citizen, either the United States alone or the United States and its corporation can bring suit thereon. But these cases are all for money demands. None of them are for the recovery of possession of real property; none of them are based on the relation of landlord and tenant such as appears in the first cause of action. None are grounded on state statutes.

Only one case related to real estate, namely *United States v. Stein,* (N.D. Oh. Ed.) 48 Fed. (2) 626. Here the United States sought to quiet title to real estate and also asked an injunction against continuing trespasses thereon. During the first World War, the United States, through the Secretary of Labor, requisitioned the real property in question. This was after the United States Housing Corporation had contracted to buy the property

*This Court may well wonder why, in the middle of the war, when DPC appeared to be handling the plant situation with regard to the Appellee, the United States should have taken a lease in its own name to a portion of Appellee's plant. The answer is it did not; the second cause of action is untrue. This lease ran to DPC, not to the Government.

and the owner had refused to comply with his contract. Following the requisition, the owner exhibited recalcitrance and trespassed upon the property and attempted to convey the title, and otherwise impeded the Government. The United States had its decree by force of the Ohio law.

The case bears no relation to that alleged in the first cause of action or to any of the other cases cited by the Government in its brief. The first cause of action is a claim of a landlord against a tenant and charges that the tenant has refused to vacate real property after the termination of a lease. This is a common ground for an action of forcible entry and detainer.

But the Government is a stranger to both the lease and the deed. Its only relation to these instruments is that it owns the stock of RFC.

Federal Courts do not have jurisdiction of forcible entry and detainer actions except by operation of state statutes; *Weber v. Grand Lodge,* (CCA 6) 169 Fed. 522; reh. den. 171 Fed. 839; Cert. Den. 215 U.S. 616; *Iron Mountain Ry. v. Johnson,* 119 U.S. 608; *Holt v. Nixon,* (CCA 7) 141 Fed. 952; *Miles v. Caldwell,* 2 Wall. 35; *Wilcox v. McConnell,* 13 Pet. 496, 516; *Lang Co. v. Fort,* (CCA 3) 76 Fed. (2) 27, 29.

In 13 Cyclopedia of Federal Procedure, 2d Ed., 514, Sec. 6953, the editors say:

> "There are no federal statutes governing ejectment actions in general in the federal courts, and there is no rule of the Federal Rules of Civil Procedure which specifically mentions such actions."

The same is true of forcible entry and detainer.

In *Denee v. Ankeny,* 246 U.S. 208, 213, the Supreme Court of the United States quoted with approval the Supreme Court of Washington as follows:

> " 'The United States statutes have made no provision for determining conflicting rights under claim of possession but the determination of these rights is left to the states to be regulated.' "

We quote from *Miles v. Caldwell,* 2 Wall. 35:

> "Reverting now to the question of policy grounded on the supposed sanctity of land titles as affecting the conclusiveness of judgments in trespass or ejectment we remark that it is the settled doctrine of all courts in reference to all questions affecting the title to real estate to permit the different states of the union to settle them each for itself; and when the point involved is one which becomes a rule of property, we follow the statutes of the states or their views of the general policy."

The doctrine of the cases last cited is the more true in the light of *Erie Railway v. Tompkins,* 304 U.S. 64, 78, where the court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the state."

FORCIBLE ENTRY AND DETAINER STATUTE OF OREGON

Thus the Oregon Statute is brought under examination of this court. This statute will be found in I O.C. L.A. 8-301 to 8-328. The first ten sections of the Oregon

statute define tenancies and provide for notices terminating the same. Section 8-313 is the section which authorizes actions in forcible entry and detainer. This section reads as follows:

> "*Action for forcible entry or wrongful detainer.* When a forcible entry shall be made upon any premises or when an entry shall be made in a peaceable manner and the possession shall be held by force, the person entitled to the premises may maintain in the county where such property is situated an action to recover the possession thereof in the circuit court of said county, or before any justice of the peace of said county."

In *Schroeder v. Woody,* 166 Ore. 93, 96, 97, the Court said with respect to the action of forcible entry and detainer that it is statutory and of a special summary nature and is in derogation of the common law; that the statute must be strictly construed, and applies only as between landlord and tenant. The court sustained a demurrer to a complaint by a vendor against a vendee. We quote:

> (96) " 'Since the action of forcible entry and detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, it is a rule of universal application in such actions that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be coram non judice and void. Even if the action is tried in a court of record, the latter does not proceed therein by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and in such proceeding is, therefore, to be treated as a court of special and limited jurisdiction.' "

(97) " 'It seems also clear that the unlawful holding by force, as defined in section 8-311, refers only to cases where the relation of landlord and tenant exists and, as this is not such a case, there is no authority conferred by the statute for the bringing of an action in this form.' "

In *Twiss v. Boehmer,* 39 Ore. 359, the defendant had entered peacefully and defended on the ground that he was not a tenant of the plaintiff. The plaintiff owned the property, and the court examined the relations between the parties and concluded that the relation of landlord and tenant existed and ousted the defendant. Mr. Justice R. S. Bean said (362):

"It has been decided by this court that the summary remedy given by Chapter XLIV, Hill's Ann. Laws, for the forcible entry and detainer of land, is not a substitute for an action of trespass or ejectment, but is confined to cases where the entry or detention is by force (Taylor v. Scott, 10 Or. 483; Harrington v. Watson, 11 Or. 143, 50 Am. Rep. 465, and note, 3 Pac. 173); or where the relation of landlord and tenant exists between the parties, and the tenant, who is holding over after the expiration of his term, or has forfeited his right to the possession, refuses to vacate, after note to quit: Hislop v. Moldenhauer, 21 Or. 208 (27 Pac. 1052)."

In the case of *Purcell v. Edmunds,* 175 Ore. 68, 70, the defendants purchased the rights of a purchaser of the property and the plaintiff was the owner. The action of forcible entry and detainer was attempted, but both the trial and Supreme Courts held that such an action would not lie. The court said (70):

"The judgment for the defendants must be affirmed, on the authority of Schroeder v. Woody,

166 Or. 93, 109 P. (2d) 597. In that case it was pointed out that an action of forcible entry and detainer is a special statutory proceeding, in derogation of the common law. It was there decided that the Oregon statute in reference to forcible entry and detainer, Secs. 8-311 to 8-324, both inclusive, O.C.L.A., is limited to cases in which the relation of landlord and tenant exists, except when the entry has been made forcibly. The summary remedy given by statute for the forcible entry and detainer of land is not a substitute for an action of trespass or ejectment: Twiss v. Boehmer, 39 Or. 359, 65 P. 18."

We have cited the Supreme Court and other Federal authorities to the effect that the present action is grounded upon the Oregon statute. We have quoted the statute and have cited the Oregon cases construing the same. The action of forcible entry and detainer in Oregon is statutory and is in derogation of the common law and must, in any case, be brought strictly under the statute. It is restricted to cases between the landlord and tenant.

There is no relation of landlord and tenant between the United States and Shofner Iron & Steel Works. The first cause of action alleges such a relation as between RFC and the Appellee but not as between the Government and the Appellee. The cases cited by the Government to the effect that the United States can bring suit for a money judgment or on an obligation due one of its corporations, proceed without the aid of state statutes. Federal corporations are organized under acts making various provisions concerning suits. The Reconstruction Finance Corporation Act authorizes the RFC (15 U.S.C. 604):

> "To sue and be sued, to complain and to defend, in any court of competent jurisdiction, state or federal."

The relationship of landlord and tenant exists under the first cause of action between RFC and the Appellee. Under the facts alleged in the first cause of action, the RFC could bring a suit under the Oregon statute for forcible entry and detainer in a state court for Multnomah County, Oregon, or in the District Court of the United States for the District of Oregon. The United States cannot maintain the present suit without doing violence to the Oregon statute. It is one thing for the Federal courts to look behind the corporate veil sufficiently to allow the Government to bring suit or join as plaintiff in a suit on a promissory note payable to RFC; it is entirely another thing to find the relationship of landlord and tenant within the meaning of the Oregon statute between the Government and an Oregon citizen in respect to Oregon real estate growing out of a lease to DPC or RFC. We submit that Judge Brown was right and that this court should not carry the principle of the cases cited in the Government's Brief to the extent of disregarding the Oregon statute on tenancy and forcible entry and detainer or the construction of that statute as adopted by the Supreme Court of Oregon.

Nor is there anything in the Surplus Property Act which permits or justifies the overriding of the Oregon Statute. As pointed out by the Government's Brief, the Surplus Property Act recognizes owning and disposal agencies. The RFC is the owning agent with re-

spect to the real property described in the first cause of action. The provision of the Surplus Property Act with respect to the duty of the disposal agency cannot amend or override the statute of Oregon with respect to acts of forcible entry and detainer. If the disposal agency requires possession of this real estate in order to perform its functions, the owning agency, having the only existing right to bring suit for that possession, should do so and should eventually secure possession for the disposal agency.

The construction of the Surplus Property Act which the Government seeks this court to adopt impinges upon and disregards the Oregon statute and it is contrary to the expression of the Supreme Court in *Denee v. Ankeny* supra. The construction of the Surplus Property Act which we seek this court to adopt recognizes the sovereignty of Oregon and validity of its statutes and at the same time suggests a means by which the disposal agency can, with any proper aid which the owning agency can give, perform the functions required of it by the Act.

EJECTMENT STATUTE OF OREGON

Before the District Court when we cited the Oregon statutes and decisions on forcible entry and detainer, the United States Attorney took the position that the case at Bar was a suit in ejectment and not in forcible entry and detainer. We doubt whether the Government will take this position in its reply brief, but since this is the only brief we anticipate writing in this case, we

will discuss the Oregon ejectment statute. This will be found at 1 O.C.L.A. 8-201 et seq. Sec. 8-201 provides as follows:

> "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof."

Under this statute the Oregon Court has always held that plaintiff in ejectment must show a good legal title and a present right of possession in himself and that he cannot recover on the weakness of the defendant's title. *Phillipi v. Thompson,* 8 Ore. 428; *Coles v. Meskimen,* 48 Ore. 54, 56; *Comegys v. Hendricks,* 55 Ore. 533; *Bobell v. Wagenar,* 106 Or. 232, 244.

This is the requirement of the ejectment statutes of practically all states. 28 C.J.S. 856, Sec. 10.

There is no general ejectment statute to be found in the United States Code. In ejectment actions as well as in those of forcible entry and detainer, the federal courts follow the rule of property of the state in which the land is located. Again we refer the court to *Denee v. Ankeny,* 246 U.S. 208, and the cases cited with it.

Smith v. McCann, 24 How. 398, 403, was an ejectment suit under the Maryland statute. Chief Justice Taney said:

(403) "In Maryland . . . the action of ejectment

> is the only mode of trying title to lands. And in that action the lessor of the plaintiff must show a legal title to himself to the land he claims and a right of possession under it . . . nor is the defendant required to show any title in himself."

If the first cause of action is treated as ejectment rather than forcible entry and detainer, the United States, as plaintiff, is met by an even stronger statutory bar than is offered by the Oregon statute on the latter action. To recover in ejectment, the Government cannot rely on the weakness, if any, of the Appellee's title. It must prove a "strict legal title" in itself. This the Government does not allege. On the contrary, the allegations are a legal title in RFC. If this court is asked by the Government, in a reply brief, to draw aside the corporate veil of RFC and by that process to find a "strict legal title" in the Government for the purpose of satisfying the Oregon Ejectment Statute, this would constitute a total disregard of that statute and could not possibly fall under the head of interpretation or construction.

We see no reason why this court should impinge upon or destroy the integrity of the Oregon statutory law upon which the sanctity of its real estate titles relies. Reconsruction Finance Corporation, as a plaintiff, in either an ejectment suit or one for forcible entry and detainer satisfies the requirement of the Oregon law.

We do not mean to suggest by this brief that the Government be deprived of such lawful right as it may have to dispose of the real property described in the first cause of action as surplus. We see no reason why

RFC cannot bring a suit to recover its possession and upon doing so turn its possession over to War Assets Administration. If Appellee is able to assert against RFC a defense to a suit for forcible entry and detainer or ejectment, which defense might not be available as against the Government itself, then the RFC, in attempting to turn this property over to War Assets Administration without securing possession, is attempting to turn over more than it has, and should be restrained. If there are weaknesses or flaws in the title of RFC, which the Appellee might assert as against RFC, but not as against the Government, the Appellee should not be deprived of its lawful right or opportunity to rely upon the same.

The orderly disposal of the real property described in the first cause of action does not require or justify the act which the Government seeks to accomplish in this suit or the destroying of the Oregon statutory law which would be brought about if the Government were allowed to succeed in its purpose.

We respectfully submit that Judge Brown's decision should be upheld and that the RFC should be left with the problem of securing possession of this land and turning that possession over to the War Assets Administration if there should be any need for such action.

Respectfully submitted,

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