01-7795, 01-7797

Oneida Indian Nation v City of Sherrill

VAN GRAAFEILAND, *Senior Circuit Judge, dissenting*:

I agree with my colleagues that the district court erred in granting judgment on the pleadings against Madison county. However, I disagree with their affirmance of summary judgment against Sherrill in the lead case. Accordingly, I dissent with respect to the court's holdings against Sherrill.

In the first paragraph of the majority opinion, we are instructed not to confuse the Oneida Indian Nation of New York, identified in the opinion by the terms "OIN" or "the Oneidas" with the Oneida Indian Nation, "which is not a federally recognized tribe and is not a party to these consolidated cases." The opinion then continues: "The Oneidas lived on what became central New York State long before the founding of the United States." Despite my colleague's admonishment, I assume that Judge Parker uses the word "Oneidas" here to mean the race as a whole, not the Oneida Indian Nation of New York. I see nothing in the record to indicate that the Oneida Indian Nation of New York, which, after all, could not have been in existence before its namesake state, has existed from time immemorial. Although some courts apparently have accepted that aboriginal rights can be inherited somehow by a successor tribe that has no aboriginal rights of its own, I am not persuaded. Moreover, even assuming that aboriginal rights are heritable, I believe that there exists a substantial question as to whether any such rights inherited by the Oneida Indian Nation of New York were forfeited because its tribal existence was abandoned for a discernable period of time.

Rather than add another hundred-page opinion to the quagmire that presently exists in this area, I simply offer the following statements from what I believe are authoritative sources:

- "The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. . . . The possession, when abandoned by the Indians, attaches itself to the fee without further grant." U.S. v. Cook, 86 U.S. 591, 593 (1873).
- "We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to and end." Williams v. City of Chicago, 242 U.S. 434, 437-38 (1916).
- "To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that . . . the trust relationship between the United States and the tribe has not been terminated or abandoned." Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994)(emphasis added).
- "Certainly individual Indians or portions of tribes may choose to give up tribal status. . . . If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." Mashpee Tribe v. New Seabury Corp, 592 F.2d 575, 587 (1st Cir. 1979)(citations omitted).
- "By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere,

which is a surrender and abandonment of the only right given to them by the treaty." Shore v. Shell Petroleum Corp., 60 F.2d 1, 3 (10th Cir. 1932).

- "Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land[.]" Quapaw Tribe of Indians v. U.S, 120 F. Supp. 283, 286 (Ct. Cl. 1954).
- "Since original Indian title is dependent upon proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe constitutes a defense to the aboriginal claim." COHEN FELIX S., FEDERAL INDIAN LAW, Ch. 9, Sec. A2a (1982).
- "The right of occupancy and possession is lost by abandonment, and possession, when abandoned by the Indians, attaches itself to the fee without further grant." 42 C.J.S. Indians § 70 (1991).

The majority claims that the historical records offered by Sherrill to show that the Oneidas cannot establish continuous tribal existence "merely reflect the opinions of a handful of government officials and commentators[.]" My colleagues' attempts to minimize the significant evidence of tribal dissolution in the record are misleading. Sherrill cites numerous persuasive authorities, most notably contemporaneous reports by both the Commissioner of Indian Affairs

and the Department of the Interior, in support of its argument that the tribe ceased to function for a period of time:

- "[The Oneida] tribal government has ceased as to those who remained in [New York] state. . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity . . . . They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." U.S. v. Elm, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).
- "The Oneida Indians have no reservation. . . . [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." 1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior. (JA 1229).
- The 1892 Census map of New York depicts no Oneida reservation. (JA 995).
- "The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior. (JA 1231).
- "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida

Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." 1900 Annual Reports of the Department of the Interior. (JA 1234).

- "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections. . . . At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." 1901 Annual Reports of the Department of the Interior. (JA 1238-39).
- "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have 'squatted' on the Onondaga Reserve: so many of these have intermarried with the Onondaga as to preclude any probability of their removal. . . . About 120 of them are carried on the agency rolls as 'Oneidas at Oneida' which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." 1906 Annual Reports of the Department of the Interior. (JA 1241).

Ironically, after dismissing these federal authorities out of hand, the majority argues that recognition of the Oneida Indian Nation of New York by the Bureau of Indian Affairs, which is merely the modern day corollary to the Department of the Interior offices responsible for most of

the above-cited reports, must end our inquiry into the tribe's continuous tribal existence. I disagree. Our court, in Golden Hill, observed that "tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." Id. at 57. We further stated that, "[r]egardless of whether the BIA were to acknowledge Golden Hill as a tribe for purposes of federal benefits, Golden Hill must still turn to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act." Id. at 58. "The two standards overlap, though their application might not always yield identical results." Id. at 59.

Moreover, the degree of deference we owe to BIA recognition in this case ought to be carefully measured, not only because prior reports by the Department of the Interior cast doubt on the continual existence of the New York Oneidas, but also because BIA recognition was granted to the Oneida Indian Nation of New York prior to the BIA's creation of the comprehensive regulations set forth in 25 C.F.R. Part 83 in 1978. In describing the BIA tribal recognition process prior to the passage of these regulations, the First Circuit has stated that the BIA "has not historically spent much effort in deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the [BIA] has dealt." Mashpee, 592 F.2d at 581. It seems unlikely that the Oneida Indian Nation of New York volunteered to the BIA any evidence that would have weakened its tribal recognition claim, especially when one considers that they apparently were unresponsive to Sherrill's discovery requests on this issue during litigation. Our court ought not to accept reflexively BIA recognition as dispositive of continuous tribal existence when that recognition was granted before the Bureau had adopted its comprehensive criteria and when the record contains such compelling evidence of a period of tribal dissolution.

The majority also contends that the issue of the Oneida's tribal existence was

satisfactorily resolved by our court in Boylan. However, Boylan was decided nearly six years before the Supreme Court enunciated in U.S. v. Candelaria, 271 U.S. 432, 442 (1926), the requirements for establishing tribal existence under the Nonintercourse Act. Following Candelaria, an Indian group seeking to prove tribal existence was required to show that it was "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territiory." Id. (citation omitted); see also Golden Hill, 39 F.3d at 59. It is far from clear that the Boylan majority would have reached the same conclusion under the Candelaria criteria.

With all of the foregoing as background, we now come to the question that constitutes the heart of this appeal: viz. do my colleagues err in granting summary judgment in favor of the tribe? I believe that the question must be answered in the affirmative. The standard for summary judgment bears repeating. The burden is on the moving party to establish that there exists no genuine issue as to any material fact. See Opals On Ice Lingerie v. Body Lines Inc., 320 F.3d 362, 367 (2d Cir. 2003); Burtnieks v. City of New York, 716 F.2d 982, 985 (2d Cir. 1983); First National Bank of Cincinnati v. Pepper, 454 F.2d 626 (2d Cir. 1972). All evidentiary material submitted must be viewed in the light most favorable to, and all inferences must be drawn in favor of, the non-moving party. See United States v. Diebold, 369 U.S. 654, 655 (1961); Opals on Ice, 320 F.3d at 367; Burtnieks, 716 F.2d at 985. Bearing in mind the deference that we owe Sherrill under these standards, summary judgment clearly should not be granted to the plaintiff. The record presents significant, unresolved questions of fact as to whether the Oneida Indian Nation of New York has been in existence continuously over the last century and a half.