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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKETED
1981

No. 531

August Term 1981 DEC 10 P4:59

Argued: November 20, 1981

Decided: December 8, 1981

Docket No. 81-7736

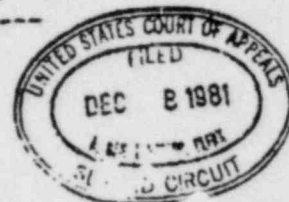
NEW YORK STATE ENERGY RESEARCH AND
DEVELOPMENT AUTHORITY,

Plaintiff-Appellee,

-against-

NUCLEAR FUEL SERVICES, INC., and
GETTY OIL COMPANY,

Defendants-Appellants.



81-7736

Before: LUMBARD and NEWMAN, Circuit Judges, and
ZAMPANO, District Judge.*

Defendants appeal from partial summary judgment entered in the Western District of New York, Elfvig, J., ordering defendants to vacate a leasehold. Reversed and remanded for trial of the issue of the parties' intent concerning transfer of possession upon termination of the lease.

Reversed and remanded.

CLARENCE T. KIPPS, JR., ESQ., Washington, D.C. (Miller & Chevalier, Chartered, Washington, D.C., Alan C. Brown, Esq.; Nixon Hargrave Devans & Doyle, Rochester, N.Y., William D. Eggers, Jr., Esq., of counsel), for Defendant-Appellant Nuclear Fuel Services, Inc.

WILLIAM I. SCHAPIRO, ESQ., Buffalo, N.Y. (Jaekle, Fleischmann & Mugel, Buffalo, N.Y., Henry J. Killeen, III, Esq., of counsel), for Defendant-Appellant Getty Oil Company.

*Honorable Robert C. Zampano, United States District Court for the District of Connecticut, sitting by designation.

1 PHILIP H. GITLEN, ESQ., Albany, N.Y.
2 (Whiteman Osterman & Hanna, Albany, N.Y.
3 John J. Cangilos, Esq., of counsel), for
4 Plaintiff-Appellee New York State
5 Energy Research and Development Authority.

6 CARMINE J. CLEMENTE, General Counsel,
7 Albany, N.Y. (New York State Energy
8 Research and Development Authority, Albany,
9 N.Y., Howard A. Jack, Deputy General
10 Counsel, of counsel), for Plaintiff-
11 Appellee New York State Energy Research
12 and Development Authority.

1 LUMBARD, Circuit Judge:

2 Since 1963, Nuclear Fuel Services, Inc. (NFS)^{1/} has been
3 the tenant of a 3,354 acre tract of land (the Center), owned by
4 the New York State Energy Research and Development Authority
5 (Authority), in West Valley, thirty miles south of Buffalo.
6 On October 20, 1981, the Western District of New York granted
7 partial summary judgment to the Authority, and ordered NFS forth-
8 with to vacate 158.8 acres of the leased land to the United States
9 Department of Energy (DOE). Pending decision of NFS's appeal, we
10 have stayed the judgment which is before us by reason of the
11 district court's Rule 54(b) declaration that this partial summary
12 judgment is final.^{2/} We disagree with the district court's finding
13 that there are no material issues of fact relating to the
14 Authority's right under the lease to transfer the Center to DOE
15 and we reverse and remand for trial of those issues.

16 The rights and obligations of the parties here are
17 governed by a Lease and a Waste Storage Agreement,
18 which were executed concurrently on May 15, 1963 (together
19 referred to as the "Agreements"). Under the Agreements, the
20 provisions of which total 199 pages, NFS was to construct and
21 operate for the Authority facilities for receiving spent
22 nuclear fuel, for storing liquid high level radioactive wastes,
23 and for burying solid low level radioactive wastes. In addition,
24 for its own account, NFS was to construct a plant for reprocessing
25 spent nuclear fuel elements. The Lease was to terminate on
26 December 31, 1980, unless renewed. It appears that, for some
27 years prior to December, 1980, the parties have been in disagree-
28 ment about numerous matters and their resulting obligations,
29 the details of which are irrelevant to this decision. Suffice it
30 to say, NFS wishes to terminate its possession, and all
31 responsibilities thereafter, but it insists that the Agreements
32 require the Authority to accept its surrender of possession and

responsibility. On the other hand, the Authority insists that it has the right to compel NFS to deliver possession of a particular portion of the Center, including the high level liquid waste and reprocessing facilities, to DOE ^{3/} without any acceptance of NFS's surrender.

On December 24, 1980, NFS sued the Authority in the District Court for the Northern District of New York for enforcement of its right to have the Authority accept its surrender of possession. Six days later, on December 30, the Authority sued NFS in the Cattaraugus County Supreme Court to enjoin NFS from abandoning the low level storage facilities at the Center and directing it to continue to maintain those facilities. On that same day, the state court issued a temporary restraining order granting the Authority the relief sought. NFS promptly removed the state action to the Western District on January 7, 1981, on the ground of diversity jurisdiction. Sometime thereafter NFS's Northern District suit was transferred to the Western District, pursuant to 28 U.S.C. § 1404. ^{4/}

The Authority's claim, as set out in a lengthy amended complaint listing 32 causes of action, seeks damages and specific performance to require NFS to remain at the Center and perform its alleged obligations under the Agreement. On September 30, 1981, the Authority shifted ground and moved for partial summary judgment to require NFS to vacate a portion of the Center to DOE. ^{5/} The district court granted the motion, holding that the Authority had the right under the New York law of property to repossess the Center upon the termination of the Lease on December 31, 1980, and that no reasonable interpretation of the Agreements supported NFS's claim that the Authority was required to accept NFS's surrender of possession. We disagree.

Provision is made for transfer of possession

1 of the Center in Articles 26 and 27 of the Lease. Article 26
2 provides:

3 Lessee, upon any expiration or earlier termina-
4 tion or cancellation of this Lease, will
5 peaceably vacate, yield up and surrender to the
6 Authority the Leased Premises, the Leased
7 Facilities, and Lessee's Improvements....

8 Article 27 states that no surrender shall be valid or effective
9 unless required by the provisions of the Lease or agreed to and
10 accepted by the Authority in writing. The parties provided for
11 transfer of responsibility for the radioactive wastes stored at
12 the Center in the Waste Storage Agreement, section 3.04, which
13 states that:

14 upon any cancellation or termination of the Lease,
15 and in any event at the end of the initial term...
16 NPS will surrender, and the Authority will assume,
17 full responsibility for perpetual operation,
18 surveillance, maintenance, replacement and insurance
19 of the then existing High Level Storage Facilities....

20 The district court reasoned that as the Authority had
21 the right to receive physical possession from NPS upon termina-
22 tion of the Lease, and that as there was no reason to believe
23 that the Authority's right to receive possession could not be
24 exercised by directing that it be passed to another entity, the
25 Authority had the right to require NPS to give possession of the
26 158.8 acres of the Center to DOE. Judge Elfvin wrote:

27 Except for the bare language of these
28 provisions, defendants have indicated
29 nothing in either the words or underlying
30 intention of the parties' agreements which
31 invites the conclusion that this possessory
32 right of NYSEFDA cannot be exercised by
33 directing that possession be passed to another
34 entity otherwise legally authorized to
35 physically possess the Center, such as the
36 DOE.

37 The standard for summary judgment is that there be no
38 material issue of fact and that the movant be entitled to judgment
39 as a matter of law. The material issue of fact alleged here is
40 the intent of the parties concerning transfer of the Center upon
41

1 termination of the Lease. NPS asserts that the intent of the
2 parties was that possession of and responsibility for the Center
3 and the radioactive wastes stored there would remain united, and
4 that upon termination, the Authority would accept NPS's surrender
5 and assume responsibility for the perpetual care of the wastes.^{6/}
6 On this motion for summary judgment, the burden lay with the
7 movant Authority to show that this was not a reasonable inter-
8 pretation of the Agreements and that the Agreements unambiguously
9 entitled the Authority to transfer possession to DOE. See
10 Keyman v. Commerce and Industry Insurance Co., 524 F.2d 1317
11 (2d Cir. 1975). If NPS's interpretation of the Agreements
12 is not unreasonable, then summary judgment must be denied. See
13 ome Insurance Co. v. Casualty & Surety Co., 528 F.2d 1388 (2d
14 Cir. 1976). As we cannot say that NPS's interpretation of the
15 parties' intent is unreasonable, we reverse.

16 The bare words of Articles 26 and 27 of the Lease would
17 seem to indicate that the surrender of possession must be only to
18 the Authority, that surrender must be of the whole Center, and
19 that the Authority must accept surrender. - Article 26 says that
20 NPS "upon any expiration" shall "surrender to the Authority" the
21 "Leased Premises, the Leased Facilities, and Lessee's Improvements."
22 Article 27 says that no surrender "shall be valid or effective...
23 unless agreed to and accepted in writing by the Authority."
24 The Waste Storage Agreement parallels these provisions, providing
25 that upon expiration of the Lease, the Authority will accept
26 NPS's surrender of responsibility for the radioactive wastes at
27 the Center. A reasonable interpretation of this language, suggests
28 NPS, is that the parties intended to have the party in possession
29 bear the responsibility for maintenance, operation, and safety.
30 NPS urges that to turn possession over to DOE as ordered would
31 leave NPS with contractual responsibility for the operation and
32

1 maintenance of the Center while it had no access to the Center.^{7/}

2 At the very least, we find there is a serious ambiguity regarding
3 the surrender of possession. The burden was on the Authority to
4 show that it had a clear right to the transfer of possession to
5 a third party, instead of itself accepting surrender of and
6 responsibility for the Center. This burden the Authority has
7 not carried. We therefore reverse and remand for a trial of
8 the issue of the parties' intent regarding transfer of possession
9 of the Center at the termination of the Lease.

10 The record shows the concern of all the parties for the
11 prompt disposal of the large quantity of high level liquid
12 radioactive wastes and low level solid radioactive wastes which
13 are stored at the Center. We trust that the district court will
14 give preferred early attention to the decision of the issues
15 raised by the parties so that responsibility for the Center and
16 the nuclear wastes thereon may be determined and possession taken
17 accordingly. The transcendent need for maximum safety to the
18 public in dealing with nuclear wastes should move the parties to
19 cooperate toward an early resolution of their disputes.

20 Reversed and remanded.
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FOOTNOTES

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1/ In 1969, Getty Oil Co. acquired all the stock of Nuclear Fuel Services, Inc. Getty was named a codefendant in this action on a theory of derivative liability.

2/ We need not decide whether the issue resolved by the partial summary judgment is sufficiently independent of other matters raised by the Authority's complaint to be a separate claim, appropriate for Rule 54(b) certification, since the district court's judgment, even if not certifiable as a final judgment, contains an injunction appealable under 28 U.S.C. § 1292(a)(1).

3/ The Department of Energy has agreed with the Authority to solidify the 600,000 gallons of high level radioactive wastes stored at the West Valley site and transport the solidified wastes to a permanent disposal site. Work on the solidification was scheduled to begin on October 1, 1981, but has been delayed by the present dispute between NFS and the Authority. The Agreement with DOE does not cover the low level waste burial site.

4/ No judgment has yet been rendered in the suit brought by NFS, which is still pending.

5/ The Authority sought to evict NFS from the 158.8 acres on which the high level liquid wastes and reprocessing facilities are located; the Authority apparently wants NFS to retain possession of and responsibility for the low level waste burial site.

6/ NFS agrees that if it has defaulted under the Agreements, and is found not to have left the Center in the condition promised, then it would be liable to the Authority for damages, notwithstanding the Authority's acceptance of NFS's surrender.

1 7/ Even if another provision of the Lease,
2 section 31.01, permits the Authority to transfer the Center to a
3 third party, who shall thereafter be substituted "with the same
4 force and effect as the Authority," that provision does not
5 provide an unambiguous answer to NPS's claim that its possession
6 cannot be ended without a concurrent termination of its
7 continuing responsibility other than damages. Nor do the Agree-
8 ments unambiguous'y make the issue of NPS's responsibility after
9 termination of the Lease "entirely severable" from its right of
10 possession, as the district court ruled in granting partial
11 summary judgment. NPS is entitled to plenary consideration of
12 its claim that it may not be required to give up possession
13 while subject to further litigation concerning any continuing
14 responsibilities.
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