

SAINT REGIS MOHAWK TRIBAL APPELLATE COURT

Loran Thompson,

Appellant

v.

Michelle Cole,

Appellee.

**Case No.: 19-APP-0002
(Lower Ct # 18-CIV-000026)
DECISION AND ORDER**

Background

Appellee Michelle Cole, together with her husband, John Cole, filed a civil complaint with the Saint Regis Mohawk Tribe (SRMT) Tribal Court on December 3, 2018. The Appellees claimed at trial that Mrs. Cole had sole and exclusive right of use of her property on Rooseveltown Road (within the Akwesasne territory) and that Appellant Loran Thompson, was encroaching on her property because he had a mobile trailer occupying a portion of her property.

All pretrial hearings, trial, and post-trial hearings were held before SRMT Chief Judge Hon. Carrie E. Garrow. Appellant was represented by counsel, Gilbert Terrance Jr., and Appellee proceeded *pro se*. Trial was held on September 23, 2019. The decision after trial was issued in favor of the Appellee, ordering the Appellant to vacate and remove the mobile trailer and its contents that currently occupy Appellee's property from said property within 30 days of the entry of said decision and order.

Procedural History

Hearings were held in this matter on June 26, 2019, August 20, 2019, trial on September 23, 2019, and post-trial hearing on November 5, 2019 (for eviction). At all four hearings in this case, Appellant appeared before Judge Garrow. At both the August 20, 2019 hearing and at trial, Appellant was represented by Mr. Terrance. The Court informed the parties that they could request continuances if issues arose in advance of the trial date. No motions were filed by either party requesting a continuance.

Midway through the trial on September 23, 2019, Mr. Terrance made an oral motion for continuance to seek witnesses and/or evidence. The trial court denied the motion and trial proceeded and concluded later that day.

On October 10, 2019, Appellant filed a Notice of Appeal from the decision and order rendered after trial by Judge Garrow. On December 3, 2019, Appellant filed his opening brief. Appellant's two identified bases for appeal are: (1) Chief Judge Garrow "should have recused herself at the June 26, 2019, initial hearing" for the reason that "she *may* be biased against community members who are members of the Longhouse known as the Kanienkehaka Kaianerehkowa Kanonhsesne and Warriors Society" and that she "knew or should have reasonably known the (Appellant's) participation in this longhouse and warrior society" (emphasis added); and (2) that Chief Judge Garrow "was short on directions . . . with little direction on how to proceed to trial concerning timing of trial and evidence concerning witness testimony . . ." and "provided poor guidance concerning affidavit evidence and did not fully answer the (Appellant's) questions regarding this type of evidence. The Appellant goes on to state that "without clear direction by the Chief Judge on evidence . . ." the Appellant's request for a continuance should not have been denied.

Jurisdiction

This case comes before the Court of Appeals on appeal from the decision and order issued by the SRMT Tribal Court after trial in this matter. Pursuant to the SRMT's Rules of Civil Appellate Procedure, this Court may hear an appeal of a final judgment from the SRMT Tribal Court. SRMT Civ.App.Proc. Section II(A); *see also* the SRMT Judicial Code, Section V(2) and VI(1), as amended by SRMT Tribal Council Resolution 2012-13.

The Appeal is timely, having been noticed within thirty days of the decision being issued. SRMT Civ.App.Proc. Section IX, Rule 7(A).

ANALYSIS

No Transcript Provided

Appellant did not provide a transcript nor did he provide the recording of any hearing appealed from.¹ The Appellant is not appealing the decision claiming error which would require

¹ SRMT Rules of Civil Appellate Procedure, Section X [Rule 8] sets forth the requirements for the record on appeal. SRMT Civ.App.R Section X(A)(1) requires that the record on appeal contain "... the transcription of any electronic recording or narrative or agreed statement and copies of all entries. ..." SRMT Civ.App.R Section X(A)(3) also provides that "parties to an appeal may agree by written stipulation that any portion of the record on appeal need not be transmitted to the Appellate Court. ..." Further

the transcript or recording of the September 23 trial, but seems to be appealing the decision based only on the fact that Judge Garrow should have recused herself at the initial hearing on June 26, 2019, and should have provided trial “guidance” to the parties and counsel at the pre-trial conference on August 20, 2019.

Due to the standing Administrative Order issued regarding use of transcripts and recordings in lieu of transcripts, this Court has listened to the recordings of all hearings held before Judge Garrow in this case.

No Oral Argument Required

This Court exercises its discretion to find that this matter does not require oral argument. Civ.App.Proc. Section XVII, Rule 15(D).

Bias Claim

This Court reviewed the recordings and all documents on file in this matter (1) to determine if any prejudice was evident, (2) whether any party raised the issue of bias vis a vis this judge, and (3) whether any party moved to have the judge disqualify herself for any reason.

First, no evidence exists in the written record in this case, nor in the recorded hearings, that Judge Garrow acted in a prejudicial manner to any party. Judge Garrow was respectful to all parties and allowed each time to present the evidence they brought to court for trial. No one complained in either the written or the audio record of her behavior being or appearing prejudicial. The Appellant’s brief fails to point to any evidence in the record of prejudice on behalf of the judge presiding over the matter.

Second, no party, and in particular neither Appellant nor his attorney, have ever raised an issue of suspected bias from Judge Garrow, nor even mentioned bias, prior to this Appeal being filed. Two hearings were held prior to trial, during one of which Mr. Terrance appeared as counsel for Appellant. No issue of bias was raised at either. Mr. Terrance failed to file any motion or raise the issue during the trial itself, limiting his only motion to a motion to continue once Appellee had rested her case. Failure to raise the claim during any of the hearings, and in particular that failure to raise the issue by an attorney representing a party, is considered a waiver of that issue on appeal.

Section X(B)(1) of said Rules requires that the Appellant shall order the transcript of the proceedings “no later than ten (10) days after filing” the Notice of Appeal.

No transcript was attached to Appellant’s brief, nor did Appellant order such transcript within 10 days of filing his notice of appeal, as required.

However, by administrative order dated July 17, 2019, Chief Appellate Judge Michele Mitchell, the appellate court interpreting Section X, Rule 8, Sections C and D of the SRMT Rules Civ. App. Proc, Section IV, ordered that an Appellant would be permitted to transmit the recording of the hearing or hearings appealed from to this Court with the record on appeal.

As for the third basis, no motion was filed, nor was an oral motion made, requesting Judge Garrow to recuse herself or to disqualify her. Mr. Terrance could have filed the motion at any time prior to trial, or raised it prior to trial or during trial, but he elected to go forward with the trial before a judge he now alleges “may” have been prejudiced. He never even raised the issue of membership in the Longhouse and Warrior Society.

The SRMT Code of Judicial Conduct requires that a judge disqualify herself if her impartiality “might reasonably be questioned . . . where the judge has a personal bias or prejudice concerning a party . . .” Absent a judge acknowledging that he/she cannot be impartial with respect to a certain party, it is incumbent upon a party to request the judge to disqualify himself/herself on that basis if the party believes there is such a bias or prejudice.

In his notice of appeal and brief, Appellant states that Judge Garrow is biased against members of the Longhouse and Warrior Society, and that she “knew or should have known” that he is a member of the Longhouse and Warrior Society. No evidence of such a bias was included in the Appeal or originally part of the trial court record below. These new allegations are now made on appeal for the first time without any evidence or support for the claims of Judge Garrow’s prejudice against the Longhouse and Warrior Society.

Even so, a review of the record and audio recordings of hearings show that at the first appearance on June 26, 2019, Appellant did not state to the Court that he was a member of the Longhouse and Warrior Society. There is no evidence to support, and this Court cannot assume, that the Judge was aware of that membership without Appellant’s having disclosed the fact. Even if it had been disclosed, there is no evidence presented in this Appeal that the judge had any prejudice against the Longhouse and Warrior Society. Further, at no time did Appellant request that the Judge recuse herself for any reason whatsoever. The hearing recording reveals no bias on the part of the judge; quite the contrary.

Mr. Terrance first appeared as counsel for Appellant at the August 20, 2019, pre-trial conference. At no time during that hearing did Mr. Terrance or the Appellant make it known to the Court that Appellant is a member of the Longhouse and Warrior Society, nor did either of them request the judge to recuse herself.

The trial commenced on September 23, 2019, the date agreed to by the parties and Mr. Terrance at the pre-trial conference. At no time during the trial did Mr. Terrance or the Appellant mention that Appellant is a member of the Longhouse and Warrior Society, nor did either of them request the judge to recuse herself. They fully participated in the trial; Mr. Terrance cross-examined the Coles after each of their testimonies, submitted at least one document and had the opportunity to call witnesses.

The Court finds no evidence to grant the appeal on this basis, and in fact finds the claims baseless.

Denial of Motion to Continue

Appellant in his brief also states that the Court “was short on directions . . .with little direction on how to proceed to trial concerning timing of trial and evidence concerning witness testimony” and “provided poor guidance concerning affidavit evidence and did not fully answer the (Appellant's) questions regarding this type of evidence. He goes on to state that “without clear direction by the Chief Judge on evidence . . .” Appellant’s request for a continuance should not have been denied.

Mr. Terrance is a licensed attorney who represented his client for this trial. As counsel is well aware, the trial court cannot give advice to the parties. Even so, the judge did direct the parties to review the applicable codes, bring documents, and evidence, and be prepared to present them at trial – but to first disclose the documents to the opposing party. At the pre-trial conference on August 20, each time Appellee sought information from the judge as to how to proceed, the court informed her that she could not give her advice. However, in listening to the recording of the pre-trial conference, when, after instruction from the court numerous times on the fact that each party would have to provide copies of all documents sought to be introduced and a witness list to the other party, Mr. Terrance inquired of the court whether witnesses could testify by affidavit. The judge clearly told him that determination is made on a case by case basis, and if he sought to have a witness testify by affidavit, he had to do so in writing prior to trial with notice to the Coles. Mr. Terrance never filed any affidavits or a request to consider them.

The Court gave clear instruction at the pre-trial conference that each of the parties were to provide copies of all documents they sought to introduce into evidence (stating “anything you want me to look at at trial” (*sic*)) and a witness list to the other party by September 10). The Judge also explained to the parties and counsel that if they had witnesses they couldn’t get or who were reluctant to testify, they could always ask the Court for subpoenas. At the close of the pre-trial conference, the judge asked Mr. Terrance if there was anything else he “wanted to bring up” and his response was “no.”

Motions to continue are governed by the SRMT Civil Procedure Code, Section XVI (Rule 13) – where some motions are required to be filed 10 days prior to trial, and others no later than 5 days before trial. Appellant never filed a Motion to Continue.

The trial commenced on September 23, 2019, as scheduled. When the case was first called, the Court actually gave the parties an opportunity to ask for another date to proceed. The parties and Mr. Terrance announced readiness to proceed. Each of the Coles testified and Mr. Terrance fully participated and cross-examined each of them. When it came time for Mr. Thompson to present his case, it was noted that Attorney Terrance had provided no documents or a witness list to the Coles. When asked by the Court why he had not provided those items to the Coles, and if he had any witnesses, he asked for a continuance to get witnesses. When asked why he had no witnesses there, he said he couldn't get hold of them and some were "pre-occupied elsewhere." The Court took a brief recess, considered the information, returned and issued a ruling denying the request for continuance after objection by the Coles/Appellees. Even though Mr. Terrance had not provided his documents to the Coles by the September 10, 2019, deadline, the Appellees did not object to his offering the same into evidence and the Court received the same. Attorney Terrance continued to participate in the trial, and he gave Respondent/Appellant's closing argument.

At no time did he mention that his client was a member of the Longhouse or Warrior Society, nor did he ask the judge to recuse herself.

It is apparent from review of the timeline of this case and the record, and this court finds that the facts of the case do not support the claim on appeal that insufficient time was provided for Appellant. This court finds that Appellant had sufficient time and ability through the series of months and hearings to raise an issue with the court should one have existed. The facts of this case support the trial court denying the continuance. The issue was not timely when raised at trial.

This Court finds the oral motion to continue was untimely.

Subsequent to the trial and the trial Court's decision and order, and upon this appeal, Attorney Terrance wrote a letter dated October 23, 2019, to the Appellate Court. Of course, that is not a part of the trial and cannot be considered by this Court, and Mr. Terrance should surely know that. However, because of the nature of the charges made here against the trial judge, this Court will address those allegations made in said letter:

- (1) Attorney Terrance alleges that when, at trial, Judge Garrow asked if they needed to set another date for trial, she gave "insufficient time" for his client to "elaborate his concerns." The record fails to support this assertion whatsoever. The documents on file in this case do not allege this claim, prior to this letter. There was no evidence in the record or the audio recordings of the hearings of Mr. Terrance's client mentioning

any concerns whatsoever, let alone needing more time to address them. In contrast, Mr. Terrance indicated he was ready for trial.

- (2) Attorney Terrance alleges that Judge Garrow allowed John Cole to "speak on behalf of" Michelle Cole and he is not an attorney and cannot act as a representative. Again, the documents on file in this case, and the audio recordings of the hearings in this matter fail to support this allegation. In fact, it seems Mr. Terrance has apparently forgotten that John Cole was a party to the proceedings, testified and was cross-examined by Mr. Terrance.

The Court finds the claims of insufficient time baseless and denies the Appeal on that basis.

Conclusion

Appellant has failed to show any grounds upon which the Decision and Order of the trial court should be set aside and referred to a new judge.

Order

For the reasons stated herein, this appeal is DENIED with Prejudice. The Decision of the lower court is AFFIRMED.

Signed by our hands this _13th_ day of __April____, 2020



Patricia Lenzi, Acting Chief Appellate Judge
Saint Regis Mohawk Tribal Appellate Court



Barbara R. Potter, Associate Appellate Judge
Saint Regis Mohawk Tribal Appellate Court



Rowennakete P. Barnes, Associate Appellate Judge
Saint Regis Mohawk Tribal Appellate Court