

BEFORE THE INDIAN CLAIMS COMMISSION

THE OSAGE NATION,)	
)	
Petitioner,)	
)	
v.)	Docket No. 108
)	
THE UNITED STATES,)	
)	
Defendant.)	

Decided: OCT 27 1965

Appearances:

Guy and Delmas E. Martin, with whom were George E. Norvell, Warren Watkins and Paul M. Niebell, Attorneys for Petitioner

Clifford R. Stearns and Maurice H. Cooperman, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant.

ON DEFENDANT'S AND PETITIONER'S MOTION FOR SUMMARY JUDGMENT PER CURIAM OPINION AND ORDER DENYING MOTIONS

This suit was timely initiated by a petition filed with the Indian Claims Commission on May 14, 1951. The defendant filed an answer on January 11, 1956, setting up three distinct defenses. No trial of the issues raised by the petition and answer has been conducted by this Commission.

On June 11, 1964, the defendant filed a Motion for Summary Judgment of Dismissal, alleging that "There is no genuine issue of any material fact, and the defendant is entitled to judgment of dismissal as a matter of law." On August 7, 1964, the petitioner filed a Cross-Motion for Summary Judgment "upon the pleadings and evidence submitted herein by

defendant." Parenthetically, it may be noted that the defendant has filed ten exhibits in support of its Motion for Summary Judgment, but that the petitioner has filed no evidence in support of its numerous allegations.

The suit was filed to recover from the defendant two particular sums allegedly expended by the petitioner for attorneys' fees.

The petitioner alleges that the first expenditure, amounting to exactly \$50,000.00, would not have arisen if the defendant had not induced the petitioner to enter into a disadvantageous treaty for disposition of tribal lands. The \$50,000.00 was paid to the attorneys who succeeded in defeating the treaty (it failed of Congressional ratification).

The petitioner alleges that the second expenditure, amounting to exactly \$20,000.00, would not have arisen if the defendant had not prevented the petitioner from paying the above attorneys a fee of \$230,000.00. The attorneys' successors claimed the difference (\$180,000.00) and the claim was adjudicated in the Court of Claims which ruled that the \$50,000.00 fee was adequate. Sue M. Rogers v. Osage Nation, 45 C. Cls. 388 (1910). The petitioner alleges that in the course of defending the suit in the Court of Claims, it incurred legal fees amounting to \$20,000.00.

The petitioner also claims interest on the \$50,000.00 from 1874 when that fee was paid and interest on the \$20,000.00 from 1910 when that fee was allegedly paid. The defendant disputes that the Court of Claims litigation cost the petitioner more than \$5,669.34.

In support of the Motion for Summary Judgment under this Commission's Rule 11 (25 C.F.R. 503.11(c)), the defendant contended that "the petition

fails to state a claim upon which relief can be granted" and ". . . neither of the foregoing claims is justiciable or compensable under the Indian Claims Commission Act . . ." A "cause of action" consists merely of the facts alleged in the complaint, and a "right of action" is only the right to pursue a remedy. Foster v. Humburg, et al., 299 P. 2d 46 (S. Ct. Kan., 1956). Whether a claim is "justiciable" depends upon the existence of an actual controversy, a possible remedy, and genuine adversaries. The Borden Company v. Thomason, et al., 353 S. W. 2d 735 (S. Ct. Mo., 1962). An actual factual controversy and genuine adversaries are supplied by the pleadings. As to a possible remedy, there is a general proposition of law that one who counsels, advises, abets, or assists in the commission by another of an actionable wrong is responsible to the injured person for the entire loss or damage. Fenley, et al. v. Ogletree, et al., 277 S.W. 2d 135 (CCivA Tex., 1955).

In ruling on a motion for summary judgment (e.g., Rule 56, Federal Rules of Civil Procedure), the allegations of the party not so moving shall be construed in the light most favorable to that party. Mendez v. District Council for Ports of Puerto Rico, 208 F. Supp. 917 (D. P.R., 1962). Our Rules have their genesis in the Rules of Civil Procedure for the District Courts of the United States, and Rule 11 bears a more than casual resemblance to Rule 56 of the Federal Rules of Civil Procedure. Snoqualmie Tribe, et al. v. United States, 15 Ind. Cl. Comm. 267 (1965) p. 318.

In ruling on the defendant's Motion for Summary Judgment, this Commission is obliged to view the facts alleged by the petitioner in the

light most favorable to the petitioner. From this vantage point, it is arguable that the Lawrence, Leavenworth & Galveston Railroad Company in 1868 sought to defraud the petitioner and that the defendant's agents, employees, and representatives actively "counseled, advised, abetted, and assisted" in the commission of that fraud. It would follow that the defendant could be regarded as having participated in the commission of the wrong of which the petitioner complains.

In view of the foregoing discussion, there is a possibility that the petitioner could secure the remedy of damages for an actionable tort. Combining a possible remedy with an actual controversy and genuine adversaries results in a determination this claim is indeed "justiciable." Whether this Commission has jurisdiction of the claim seems beyond question. The jurisdictional section of the Indian Claims Commission Act (25 U.S.C.A. 70a) is sufficiently broad to comprehend this claim if it develops that a claim exists.

The defendant raised one other point to bar this claim or these claims, stating "The contention that the United States should be required to pay, or to reimburse Indian Tribes for fees paid to their attorneys or agents, or to defray the expenses of tribal litigation, has consistently been rejected by the Commission and the Courts." Numerous decisions in support of this contention are supplied. The petitioner contented itself with the observation that "the cases cited by defendant in support of its contentions are wholly inapplicable." Certainly this contention merits a closer examination.

The defendant quoted with approval from an early decision of this Commission, Western (Old Settler) Cherokee Indians v. United States, 1 Ind. Cl. Comm. 394 (1950) in which the petitioner sought compensation for the legal expenses of successful prosecution of a suit in the Court of Claims against the United States. The two stated grounds for denial of reimbursement of attorneys' fees were (1) that no statute requiring the United States to reimburse the then petitioners for attorneys' fees was known and (2) that

Another and equally compelling reason for denying plaintiffs' claim is that the United States is not liable for attorneys' fees in the absence of a statute permitting such a charge (citations omitted). Counsel have cited no statute, nor have we found any, which permits an allowance of counsel fees in suits against the United States. Since the beginning of our government the Supreme Court has consistently held that, in the absence of statute directly permitting it, the United States is not liable for the costs and expenses of litigation (citations omitted). We find nothing in the Act of August 13, 1946 which can be construed as in anywise permitting the collection or awarding of costs against the defendant. Attorneys' fees are in the nature of costs and expenses of suit.

To the same effect, defendant cites Loyal Creek Band v. United States, 1 Ind. Cl. Comm. 195 (1950). In that case, there was an effort to recover amounts paid, futilely, for representation before Congress. The Commission denied the claim on the ground that the representation gained the petitioner nothing (*id.*, at pp. 229, 230).

The defendant, after contending that the above two decisions (and the case law cited in the first of them) were legally dispositive of the instant claims, went on to state:

Where the United States is a party to an action before the Court of Claims, the governing statute, U.S.C. Title 28, sec. 2412, provides:

The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress.

Where cases are referred to the Court of Claims by special acts and the United States is not a party, the Court has consistently adopted the position that it has no jurisdiction to tax costs against the losing party in the absence of a provision in the special act authorizing such action. In practice, therefore, each such party in the Court of Claims defrays its own litigation costs and attorneys' fees.

No citations in support of the second proposition were supplied.

The general proposition offered by the defendant seems accurate, if stated precisely enough. It was and is the law that where the United States is engaged in litigation, its adversary cannot recover costs of legal service in the absence of an authorizing statute (United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926); Piggly Wiggly Corporation v. United States, 112 C. Cls. 391 (1949)), even if suit is successful to compel the United States to do something it ought to do (United States v. Worley, Admr., et al., 281 U.S. 339 (1930)), or if the United States picks a fight in court and loses. Walling v. Norfolk Southern Railway Company, 162 F. 2d 95 (4th Cir., 1947). The section of Title 28 quoted by the defendant (28 U.S.C. 2412(a)) is only a codification of existing decisions (H. Rep. 308 (80th 1st)) to accompany H.R. 3214 - Revision of the Judicial Code and Judiciary - page A189). The Old Settler decision quoted above follows the common law and the statute.

The one theme or thread running through the cited decisions is that the United States must be actively engaged in the litigation which

results in legal expenses to the opponent. Then, and only then, may the United States reject a claim for compensation for legal expenses. That is not this case.

The petitioner alleges that the United States by inducing unlettered savages to accept a disadvantageous treaty put those unlettered savages to great legal expense to secure defeat of the treaty by failure of ratification. There was no litigation at the time and the now petitioner and now defendant were certainly not knowing adversaries. As to the claim for \$50,000.00, it has often been held that where the wrong is of such character that the proper protection of his rights requires the petitioner to employ counsel to gain redress, the petitioner may recover reasonable counsel fees as an element of damages. Robert A. Reichard, Inc. v. Ezl. Dunwoody Company, 45 F. Supp. 153 (D. Pa., 1942); Seaboard Surety Company v. Permacrete Construction Corporation, et al., 221 F. 2d 366 (3d Cir., 1955); Smith, et al. v. Phillips Pine Line Company, et al., 128 F. Supp. 61 (D. Okla., 1955); Chittim v. Texas Pacific Coal & Oil Company, 317 F. 2d 81 (10th Cir., 1963); Carter Products, Inc., et al. v. Colgate-Palmolive Company, 214 F. Supp. 383 (D. Md., 1963).

As to the claim for \$20,000.00 (or whatever amount it may turn out to be), it has often been held that where the natural and proximate consequence of a wrongful act has been to involve the petitioner in litigation with others, there may, as a general rule, be a recovery in damages against the author of such act of the reasonable expenses incurred therein including compensation for attorneys' fees. Frommeyer, et al.

v. L. & R. Construction Company, et al., 261 F. 2d 879 (3d Cir., 1958); Vaughan v. Atkinson, et al., 369 U.S. 527 (1962), reversing 291 F. 2d 813 (4th Cir., 1961), reh. den. 370 U.S. 965 (1962); Freed v. The Travelers, et al., 300 F. 2d 395 (7th Cir., 1962). In the Permacrete case (supra), the Court stated (id., p. 372):

The language of Section 914, Restatement, Torts is expressly on the point. It says

A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred.

In summation, the pleadings in the instant case supply an actual factual controversy and genuine adversaries. There is at least a theory of recovery and a possible remedy. This Commission has jurisdiction of the right and cause of action and the claim may be compensable in the sense of being susceptible of precise determination.

The defendant's legal defense -- that the claims are debarred by Section 2412(a) of Title 28, United States Code -- is demonstrably invalid; the natural result of confusion between attorneys' fees incurred in a suit against the United States as opposed to attorneys' fees which are a measure of damage committed by the United States in some other situation.

This Commission does not intimate any view of the ultimate outcome of this suit and none should be inferred. This Commission does

conclude that the defendant's position is not so firm as to warrant granting the defendant's Motion for Summary Judgment. If the defendant's position is not firm, the petitioner's position is far less firm. To grant the petitioner's Cross-Motion for Summary Judgment would be absurd.

IT IS THEREFORE ORDERED that the above motions for summary judgment be and the same are hereby denied.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner