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**FORT PECK COURT OF APPEALS  
ASSINIBOINE AND SIOUX TRIBES  
FORT PECK INDIAN RESERVATION  
WOLF POINT, MONTANA**

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IN THE MATTER OF  
GERALD JOHNSON,  
Appellant,

**Appeal No. 118**

vs.

SUNRISE LUMBER,  
Appellee.

**THIS MATTER** came before the Court on a Petition for Review initially filed by Counsel Rita Weeks on behalf of Appellant Gerald Johnson; and reaffirmed by Counsel Mary L. Zemyan on behalf of Appellant. Appellee responded to the petition for review and the matter was argued orally before the Court on June 21, 1991.

**APPEARANCES:**

FOR APPELLANT:     MARY L. ZEMYAN  
                          Attorney at Law  
                          P.O. Box 1094  
                          Wolf Point, Montana 59201

FOR APPELLEE:     MELISSA G. SCHAUER  
                          Lay Law Advocate  
                          P.O. Box 214  
                          Wolf Point, Montana 59201

Briefly, the facts in this case as shown on the records reflect:

On June 6, 1986 a Judgment was entered in a civil action filed on behalf of Sunrise Lumber. There is some question of fact as to when the Judgment was prepared or submitted to the Court; however, it was duly entered on June 6, 1986. The Judgment was against Gerald Johnson in the sum of Seven

Thousand Seven Hundred Ninety-four Dollars and Ninety-four Cents (\$7,794.94), plus interest. **REF. JUDGMENT**, appeal file. A Writ of Execution was entered on February 12, 1988; Appellant filed a Motion to Stay the Execution of the Writ, which was granted by the Court. Subsequently, a hearing was held on a Motion to Set Aside the Writ. The results of that hearing are unclear on the record. On June 12, 1990, a Petition for Writ of Execution was filed by counsel for Sunrise Lumber; a Writ of Execution was issued by Judge Boyd on August 10, 1990, directing the seizure of property at various locations, including Rainbow Junction, the house of Gerald Johnson, Traders State Bank, and other property. **REF. WRIT, TRANSCRIPT**. A stay pending appeal was granted by Judge Boyd on August 24, 1990. On August 27, 1990 counsel for Gerald Johnson filed a Motion for Relief from Judgment. In September of 1990 a Petition for Review was filed with this Court, a response was filed, the matter was briefed and argued and is now presented to this Court for appropriate order.

### **ISSUES PRESENTED:**

**We** find that the following issues are presented for the Court' s consideration:

1. WHETHER THIS MATTER SHOULD BE REMANDED TO TRIBAL COURT FOR A HEARING ON APPELLANT'S MOTION TO GRANT RELIEF FROM JUDGMENT UNDER RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

2. WHETHER THE WRIT OF EXECUTION ISSUED ON AUGUST 10, 1990 WAS OVERBROAD, AND IF SO, WHAT REMEDY IS AVAILABLE TO THE PARTIES AFFECTED?

### **CONCLUSIONS:**

1. We conclude that this matter should not be remanded to Tribal Court for a hearing on Appellant's Motion to Grant Relief from Judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

2. We conclude that the Writ of Execution issued on August 10, 1990 was overbroad in that it may have allowed Sunrise Lumber, Appellee, to seize property that may be owned by person or persons other than Appellant Gerald Johnson.

### **DISCUSSION:**

Rule 60(b)(6) of the FRCP provides in pertinent part:

On motion and upon such terms as are just, the Court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons:

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or

proceeding was entered or taken.

The record in this case shows that judgment was entered on June 6, 1986. The record does not reflect any timely appeal of this order. Thus the issue is whether this Court should order the Tribal Court to hear a motion under Rule 60(b)(6) of the FRCP which, if granted by the Court, would allow a trial de novo, and bring alternative relief to Appellant. We conclude that such relief should not be granted here. The initial judgment was entered over five (5) years ago. The record is clear that Appellant Johnson paid some \$200.00 towards satisfaction of the judgment. Rule 60(b)(6), as well as other federal rules, can be utilized by the Tribal Court as circumstances require. However, where the application of the rule would circumvent the usual appeal procedures, we give priority to the appeal procedures as provided by the Tribal Code. The note of the advisory committee on the federal rules also states clearly "application to the Court under this subdivision (ie. 60(b)(6)) does not extend the time for taking an appeal..." **NOTES TO RULES**, 1991 ED. PAGE 172. Further, the rule provides that regardless of time specifications, the motion "shall be made within a reasonable time". It is our conclusion and opinion it would not be just, equitable or within the scope of the rules to order this matter remanded to Tribal Court for hearing rule 60(b)(6).

**The second basic issue** presented is whether the several Writs of Execution issued in this matter were properly made Writs. The record is incomplete as to the results of a hearing in October of 1988 regarding the original issued Writ. A subsequent Writ was issued by Judge Boyd in August of 1990, and a Stay granted the same month. **TRANSCRIPT.**

Basically, a Writ is simply a writing of the Court to put in force the judgment. **BLACK'S LAW DICTIONARY**. As with all matters of the Court, it must issue by due process.

We do not find any evidence in the file which indicates whether the Writ or Writs were properly issued or valid. Certainly, the Tribal Code and procedures adopted contemplate that due process requires an evidentiary hearing to determine what property is available for execution where such information is not otherwise obtainable. The process as stated in Sections **IV CCOJ §304(B) AND IV CCOJ § 310** provide an orderly means for judgment creditors to obtain the information as to the property available. We remand this matter to Tribal Court for a hearing under said sections, under due process considerations.

It is the duty of the Appeals Court to:

"make any order appropriate to preserve the status quo or to protect any ultimate judgment of the Court of Appeals. 1 CCOJ § 202(c)."  
Fundamental due process considerations require an evidentiary hearing under IV CCOJ § **304** and 310, and other applicable law.

In regard to the issue of the "Rainbow Junction" building and/or business, which has been the partial subject of the writs, there is no evidence in the file as to the reasons for closure of said business pending final disposition. We concur with Judge Boyd that the building and personal property should be secure and not disposed of pending determination of the hearing regarding ownership (Transcript August 31, 1990, page 13). Similarly, a substantial injustice is done where the owner or owners of such

business are not allowed to operate the business in ordinary course pending sale or determination of whether said property is available for sale.

Finally, we find that the life of judgment rule of IV CCOJ § 306 has effectively been renewed here by Appellee by application 'for Writs. The Judgment was effectively renewed for five (5) years from the August 10, 1990 Writ of Execution. **IV CCOJ § 307.**

**OPINION AND ORDER:**

IT IS HEREBY ORDER OF THE COURT AS FOLLOWS:

1. THE JUDGMENT ORDER DATED JUNE 6, 1986 IS AFFIRMED AND RENEWED AS TO EFFECT FROM AUGUST 10, 1990. APPELLANT IS GIVEN \$200.00 CREDIT TOWARDS SATISFACTION OF SAID JUDGMENT.
2. THE PETITION TO REMAND TO TRIBAL COURT UNDER RULE 60(B) (6) FRCP IS DENIED.
3. THE MATTER IS REMANDED TO TRIBAL COURT FOR AN EVIDENTIARY HEARING UNDER IV CCOJ § 304 AND APPLICABLE LAW TO DETERMINE WHAT, IF ANY, PROPERTY OF APPELLANT IS AVAILABLE FOR EXECUTION.
4. THE ORDER CLOSING THE BUSINESS KNOWN AS RAINBOW JUNCTION IS VACATED. APPELLANT, APPELLANT'S SPOUSE, AND THEIR AGENTS AND EMPLOYEES ARE AUTHORIZED TO CONDUCT ORDINARY BUSINESS ON SAID PREMISES PENDING THE DISPOSITION OF THE EVIDENTIARY HEARING ON THE WRIT OF EXECUTION, IF THEY SO CHOOSE.
5. FURTHER, NO SALE, ENCUMBRANCE OR REMOVAL OF PROPERTY SHALL BE MADE FROM SAID PREMISES OTHER THAN IN ORDINARY COURSE OF BUSINESS PENDING THE EVIDENTIARY HEARING THEREON. IT IS THE INTENT OF THIS ORDER THAT RETAIL SALES OF MERCHANDISE BE AUTHORIZED THEREON AS ORDINARILY CONDUCTED PRIOR TO THE CLOSURE ORDER.

**DATED** this 19th day of July, 1990

**BY THE COURT OF APPEALS:**

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GERARD M. SCHUSTER, CHIEF JUSTICE

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