

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

AUG 8 1989

ROBERT L. HOECKER
Clerk

M. FRANK WATSON; BETTY L. WATSON;
BRIAN HARJO WATSON, a minor, by and
through his mother and next friend,
Betty L. Watson,

Plaintiffs-Appellants,

v.

BILL WEAVER; TOM NEWTON; ANDREW S.
HARTMAN; ANDREW S. HARTMAN, P.C.,
an Oklahoma corporation; BARKLEY,
RODOLF, WHITE & HARTMAN, a law
firm composed of Michael Barkley,
Charles Michael Barkley, P.C., an
Oklahoma corporation, Stephen J.
Rodolf, Jay B. White, Andrew S.
Hartman, Andrew S. Hartman, P.C.,
an Oklahoma corporation, Sandra
Rodolf and Denise G. Hartman;
S & T GAS TRANSMISSION COMPANY, INC.,
an Oklahoma corporation; JOHN DOE;
JANE DOE; BOARD OF COMMISSIONERS
OF OKMULGEE COUNTY, OKLAHOMA,

Defendants-Appellees.

No. 88-2796
(D.C. No. 87-412-C)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiffs-appellants appeal the district court's orders and judgments of September 27, 1988, entering summary judgment in favor of each of the defendants. Plaintiffs¹ instituted the underlying action pursuant to 42 U.S.C. § 1983 for violations of their fourth and fifth amendment rights when certain defendants forcibly entered their home and seized their property, pursuant to a writ issued in aid of execution.

We review the grant or denial of summary judgment de novo, applying the same standard as the district court under Fed. R. Civ. P. 56(c). Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988).

Based upon our review of the record on appeal and the parties' briefs, we conclude that under no theory should plaintiffs' case proceed against any defendants other than Andrew S. Hartman, Bill Weaver, and Tom Newton. Therefore, the district court properly entered summary judgment in favor of the other defendants.

The district court entered summary judgment in favor of Messrs. Hartman, Weaver, and Newton on the grounds that plaintiffs

¹ The original plaintiffs in this action consisted of Mr. and Mrs. Watson and their minor son, Brian. During the pendency of the district court case, Mr. and Mrs. Watson filed bankruptcy and the trustee of their estate substituted for them as a party plaintiff. In addition, Brian reached the age of majority.

had an adequate state law remedy for their alleged injuries, relying on Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986). While Parratt may apply to plaintiffs' due process claims under the fifth amendment, it does not apply to plaintiffs' claims for unreasonable search and seizure under the fourth amendment. See Lavicky v. Burnett, 758 F.2d 468, 472 n.1 (10th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); King v. Massarweh, 782 F.2d 825, 827 (9th Cir. 1986); Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984); Wolf-Lillie v. Sonquist, 699 F.2d 864, 872 (7th Cir. 1983).

Since the district court incorrectly applied Parratt to plaintiffs' fourth amendment claim, we must reverse the court's entry of summary judgment in favor of Messrs. Hartman, Weaver, and Newton and remand the action so that the court may consider plaintiffs' claim in the first instance. In so doing, we express no opinion as to the merits of plaintiffs' claim.

Plaintiffs argue on appeal that their fifth amendment claim is so intertwined with their fourth amendment claim that they should be permitted to proceed in federal court on both claims, rather than having their fifth amendment claim dismissed due to adequate state remedies. On remand, the district court should consider plaintiffs' fourth amendment claim on its own and as it may be intertwined with the fifth amendment claim.

The judgment of the United States District Court for the Eastern District of Oklahoma is AFFIRMED in part, REVERSED in

part, and REMANDED for further proceedings consistent with this order and judgment. The mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge