



Finn v. United States

2001 | Cited 0 times | D. Oregon | October 25, 2001

OPINION AND ORDER

The matter before the court is the plaintiff's motion for partial summary judgment (#11) as a matter of law that there is no basis for the defendant's defense of immunity under the federal Flood Control Act of 1928.

UNDISPUTED FACTS

On June 11, 1997, Kelly Finn, his parents, and his brother paid a fee and entered LePage Park as business invitees. The park is located on the John Day River, above the John Day Dam, in Sherman County, Oregon. It is owned and operated by the United States Army Corps of Engineers. The park contains a designated swimming area with a floating raft.

On June 11, 1997, Kelly Finn drowned while swimming in the designated swimming area at LePage Park.

The John Day Dam is part of the Columbia River Flood Control System. On June 11, 1997, the Columbia River was in flood condition, and the John Day Dam was being actively monitored for flood control purposes. On that day, as a result of the decision of the United States Army Corps of Engineers to actively monitor the flow of water going through the John Day Dam, the water level behind the John Day Dam was allowed to rise. The flood pool for waters contained by the John Day Dam on June 11, 1997 reached five miles up the John Day River from its confluence with the Columbia River. LaPage Park on the John Day River, where Kelly Finn drowned, was approximately 1/4 mile from the confluence of the John Day River with the Columbia River. The waters in the swimming area at LaPage Park on June 11, 1997 had been allowed to rise during the day as a result of the decision of the United States Army Corps of Engineers to limit the full flow of water through the John Day Dam on that day.

On June 22, 2001, plaintiff Charles Finn, the personal representative of the estate of Kelly Finn, filed a wrongful death action under the Federal Torts Claims Act alleging, in part, that "Kelly Martin Finn drowned in the designated swimming area at LePage Park as a result of defendant's [United States Army Corps of Engineers'] negligent operation and maintenance of the swimming area." Complaint, p. 2. The defendant in its answer raised the affirmative defense of immunity under the federal Flood Control Act of 1928.



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CONTENTIONS OF THE PARTIES

The plaintiff contends that he entitled to judgment as a matter of law because there is no basis for the defendant's defense of immunity under the federal Flood Control Act. The plaintiff contends that there is no evidence that flood water contributed in any way to the death of Kelly Finn. The plaintiff contends that it was not the character of the water or the performance of the defendant's flood control function that caused Kelly Finn's death. The plaintiff contends that Kelly Finn's death came about because of the negligent operation of a recreational swimming beach.

The defendant contends that the plaintiff is not entitled to judgment as a matter of law on the defendant's affirmative defense of immunity because the character of the water at LePage Park on the day that Kelly Finn drowned was flood water. The defendant relies upon the fact that the John Day River at LePage Park where Kelly Finn drowned was in flood stage, and that it was being actively monitored by the United States Army Corps of Engineers on that day. The defendant contends that the trier of fact will have to determine what role, if any, the depth of the water played in the fatal circumstances of that day, and that there is no question but that the United States Army Corps of Engineers was actively manipulating the depth of the river on that day in an effort to control flooding. The defendant contends that summary judgment should be denied because the record does not support a conclusion as a matter of law at this stage in the proceedings that flood water played no part in the death of Kelly Finn.

APPLICABLE STANDARD

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

APPLICABLE LAW

33 U.S.C. § 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

In *Central Green Co. v. United States*, 531 U.S. 425 (2001), the petitioner, the owner of 1,000 acres of pistachio orchards, brought an action against the United States and the Madera Irrigation District alleging that their negligence in the design, construction and maintenance of the Madera Canal had caused subsurface flooding, resulting in damage to his orchards. The United States moved for judgment on the pleadings relying on the immunity granted by the federal Flood Control Act of 1928. The district court accepted the petitioner's submission that the Madera Canal was used for irrigation purposes but nevertheless dismissed the complaint because the parties agreed that the canal was part of the Friant Division of the Central Valley Project, and that flood control was one of the purposes of



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that Project. The United States Court of Appeals for the Ninth Circuit agreed with the petitioner that the Madera Canal "serves no flood control purpose" but nevertheless held that immunity attached "solely because it is a branch of the Central Valley Project." 177 F.3d 834, 839 (9th Cir. 1999).

The United States Supreme Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit that immunity attached and remanded the case for further proceedings. In *Central Green Co.*, 531 U.S. at 1009, the United States Supreme Court reviewed the "admittedly confusing dicta" in its earlier case of *United States v. James*, 478 U.S. 597 (1986), which had lead the lower court to focus on whether the damage related in some tenuous way to a flood control project, rather than whether it related to "floods or flood waters." Section 702c. The United States Supreme Court directed the lower court to "resort to the text of the statute . . . rather than to that isolated comment" to determine whether the alleged damage is covered by Section 702c immunity. *Central Green Co.*, 531 U.S. at 1009. The United States Supreme Court explained that "the text of the statute directs us to determine the scope of the immunity conferred, not by the character of the federal project or the purposes it serves, but by the character of the waters that cause the relevant damage and the purposes behind their release." *Id.* at 1010-11. Finally, the United States Supreme Court remanded the case for further proceedings consistent with the opinion, directing the lower court as follows:

"Accordingly, in determining whether § 702c immunity attaches, courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project." *Id.* at 1012.

RULING OF THE COURT

There are facts in the record to raise a genuine issue of material fact as to whether the water in which Kelly Finn drowned was flood water. The undisputed fact relied upon by plaintiff Charles Finn in support of his position that the flood water did not cause the drowning states that "Kelly Finn drowned while swimming in the designated area at LePage Park." Amended Stipulated Concise Statement of Facts, p. 2. There are no facts in the record from which the court can conclude as a matter of law that flood water did not play any part in the drowning.

The plaintiff's motion for partial summary judgment (#11) as a matter of law that there is no basis for the defendant's defense of immunity under the federal Flood Control Act is DENIED.

IT IS SO ORDERED.

DATED this 25th day of October, 2001.

HELEN J. FRYE, United States District Judge.

