

FILED 7

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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HIROKO SUGIYAMA,	: CIVIL APPEAL NO. 11-028
	: (Civil Action No. 10-200)
Appellant,	:
	:
v.	: OPINION
	:
AIRAI STATE PUBLIC LANDS	:
AUTHORITY,	:
Appellee.	:
-----X	

Decided: 11th day of May, 2012

Counsel for Appellant: Roy Chikamoto
Counsel for Appellee: Mariano Carlos

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Hiroko Sugiyama appeals the Trial Division's August 12, 2011, order denying Sugiyama's motion for reconsideration, as well as the Trial Division's June 27, 2011, amended decision. We are not persuaded by Sugiyama's arguments and, accordingly, we affirm the Trial Division's decisions as to both orders.¹

¹ Sugiyama requests oral argument. After reviewing the briefs and the record, the Court finds this case appropriate for submission without oral argument. ROP R. Civ. P.

I. BACKGROUND

This case began on November 23, 2010, when Appellee Airai State Public Lands Authority (“ASPLA”) and Airai State Government (“ASG”) alleged that Sugiyama had illegally occupied — and continued to illegally occupy — land known as Ngerikiil in Airai State. The complaint from ASPLA and ASG alleged that Sugiyama had occupied the land beginning in 1993 and that she continued to do so without a valid lease.

In March 2009, Sugiyama went to the Airai State offices.² While she was there, ASPLA staff realized that Sugiyama did not have a valid lease and required her to file for one. She did so on March 25, 2009. On April 28, 2009, ASPLA issued a letter approving Sugiyama’s lease application, but ASPLA decreased the size of her lot to 22,556 square meters, set a rental price of \$0.25 per square meter per year, and asked her to make, within ninety days, a lease payment totaling \$5,691.00.

In December 2009, Sugiyama petitioned ASPLA to lower the lease price to \$0.05 per square meter per year. ASPLA sent numerous letters to Sugiyama in late 2009 and early 2010 requiring her to comply with the terms of the new lease. ASPLA also sought

34(a) (“The Appellate Division on its own motion may order a case submitted on briefs without oral argument.”).

² The parties offered differing theories as to why Sugiyama went to the Airai State offices: ASPLA said she wanted to make a lease payment, while Sugiyama countered that she wanted to apply for a building permit for a chicken coop. Although this is a dispute, it is not material, as the action simply prompted ASPLA to investigate the validity of the lease and to determine a new one was needed.

back payments in the total amount of \$90,224.00 for the sixteen years Sugiyama occupied the land.³

Thus, in their complaint, ASPLA and ASG alleged trespass, and sought declaratory judgment, injunctive relief, and damages. On January 20, 2011, Sugiyama brought a counterclaim, seeking a court order requiring ASPLA to draft lease terms of her choosing; or, if the remedy was ejection, for restitution and compensation for crops and improvements she made on the land.

The parties filed cross-motions for summary judgment. Sugiyama sought partial summary judgment as to whether she had a valid lease to the land she occupies. ASPLA sought partial summary judgment as to whether Sugiyama was a trespasser on the lot; whether Sugiyama should cease all activities; and whether ASPLA was entitled to back rent. In her opposition to ASPLA's motion for summary judgment, Sugiyama maintained that three facts were still disputed: (1) whether she had written authorization from ASPLA to occupy and farm Ngerikiil Farm; (2) whether Defendant paid rent for the lease; and (3) whether the rental rate of \$0.25 per square meter was a reasonable or fair rate for the farm.

³ In its complaint, ASPLA sought payment in the amount of \$111.00 for "lost coral sands and for expenses of delivery." ASG, with permission from the Governor, dumped three piles of coral sands on the property Sugiyama occupied in order to stop her from her farming and other activities ASPLA believed were illegal.

The Trial Division disagreed, holding that there were no genuine issues of material fact. The court found that the Airai State Governor had issued an enforceable lease in 1993, relying upon the signed Addendum to Lease Agreement No. 0075-NR as the enforceable lease agreement. The lease was for a fifty-year term. The lease was recorded with the Clerk of Courts in 1997, and that same year, Sugiyama received a permit to “construct, renovate, or extend her house” in Ngerikiil.

The Trial Division noted that ASPLA’s Regulations, which were adopted September 3, 2008, and went into force in October of that year, have retroactive application. See Regulations for the Airai State Public Lands Authority (“Regulations”), Part I, § 4.B. The Regulations delineate the requirements that ASPLA must follow in order to lease public land.⁴

The Trial Division denied Sugiyama’s motion for partial summary judgment and granted in part and denied in part ASPLA’s summary judgment motion. The Court found that Sugiyama had a valid lease from 1993 through 2008 because the “essential requirements of a lease agreement were met.” Sugiyama had authorization to occupy and farm, but only if she complied with the requirements of the lease. The court found that

⁴ The Regulations state that ASPLA can lease public lands so long as the lease “results in a fair and reasonable income for Airai State and the National Treasury”; the lease “specifies the terms of the lease” and “describes the leased property and improvements”; and allows ASPLA to terminate the lease within a certain number of days. Regulations., Part VII, Subpart 1, § 1. The Regulations also provide that lease rates shall be between \$0.10 and \$5.00 for the first twenty-five years and \$0.20 and \$5.00 for the twenty-sixth through fiftieth years. Regulations, Part VII, Subpart 1, § 3.

no dispute of fact existed as to whether Sugiyama paid rent, because she failed to pay rent for sixteen years. Moreover, Appellees terminated the lease due to non-payment of rent. Finally, the Court held that ASPLA's Regulations are "presumed reasonable" and that ASPLA was well within its Regulations when it set the annual lease rate at \$0.25 per square meter per year.

Finally, the Trial Division found that Sugiyama presently has no valid lease and that she owes Appellees rent from 1993 through 2008 at a rate of \$60.00 per year, along with fees in the amounts of \$5,691.00 and \$5,639.00 for 2010 and 2011. The court also found that ASPLA should be awarded attorneys' fees.

On August 28, 2011, Sugiyama filed for reconsideration. Her motion was denied. The Trial Division found that Sugiyama raised no new issues under either ROP R. Civ. P. 7(b)(5) (motion for reconsideration) or ROP R. Civ. P. 59(e) (motion to alter or amend judgment). The court found there were "no manifest errors of law and fact, no newly discovered or previously unavailable evidence, no manifest injustice and no intervening change in the controlling law." Sugiyama now appeals⁵ the court's decision on the motion for reconsideration as well as the court's original decision denying summary judgment in Sugiyama's favor.

⁵ This appeal is limited in parties and in scope. Only ASPLA is part of this appeal. Moreover, ASPLA filed a Notice of Waiver of Claims on June 27, 2011, stating that it waived its claim for damages to three coral sand piles and for punitive damages.

II. STANDARD OF REVIEW

A lower court's conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001); *see also ROP v. S.S. Enters., Inc.* 9 ROP 48, 50 (2002) (“Review of a Trial Division decision on summary judgment is plenary It includes both a review of the determination that there is no genuine issue of material fact, and whether the substantive law was correctly applied.” (citation omitted)). Factual findings of the lower court are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002).

Sugiyama has also appealed the order denying the motion for reconsideration. “[A] trial court’s decision to reconsider a previous decision is ordinarily reviewed on appeal for abuse of discretion.” *In re Idelui*, 17 ROP 300, 303 (2010). Under this standard, a decision of the Trial Division will not be overturned unless it was “clearly wrong.” *Rechebei v. Ngiralmou*, 17 ROP 140, 144 (2010).

III. ANALYSIS

Appellant presents five arguments in support of her appeal of the motion for summary judgment. We examine each in turn before turning to the appeal of the motion for reconsideration.

A. Validity of ASPLA's Regulations

Sugiyama's first, second, and fifth arguments focus on regulations that ASPLA promulgated. First, Sugiyama argues that the Regulations were not legally issued because they violate Palau's Administrative Procedures Act ("APA"), 6 PNC § 106 *et seq.* Specifically, she argues that, while 35 PNC § 215(c) permits the Palau Public Lands Authority to grant each state lands agency the authority to enact its own regulations, there is a specific rulemaking procedure, outlined in the APA, that must be carried out. She maintains that "to the best of Appellant's knowledge, no evidence was available to determine whether the APA procedures were followed by Appellees before ASPLA's Regulations became effective." She argues that a "lack of evidence" of compliance with the APA "leads to the conclusion that the statutory procedures set forth in the Administrative Procedures Act were not followed and therefore, the Regulations which Appellees seek to apply to Appellant, are themselves defective and invalid."

Second, Sugiyama argues that the ASPLA Regulations should not be applied retroactively to alter the terms of her land lease. The Regulations "shall have retroactive application on all leases, exchanges, sales, and other conveyances entered into by ASPLA prior to the effective date of these regulations." Regulations, Part I, § 4.B. Sugiyama believes the Regulations violate Article IV, Section 6 of Palau's Constitution. That section provides, "Contracts to which a citizen is a party shall not be impaired by legislation." Sugiyama argues that the Regulations allow for retroactive application (so

they apply to her lease) but that Part III, § 1(E)(vi) invalidates any lease encumbering public lands unless approved by a majority vote. Therefore, Sugiyama appears to argue that her lease with ASPLA is encumbered by the Regulations and therefore the Regulations are invalid.

Sugiyama believes that the provisions concerning leases should be “struck down as an unconstitutional exercise[] of authority in violation of Palau’s national constitution[.]” Sugiyama argues that in *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208-09 (1988), the United States Supreme Court held that an agency cannot give a rule retroactive effect unless Congress provides express approval to do so. Here, Sugiyama contends that the statute creating ASPLA contained no provision granting power to promulgate regulations with a retroactive application. Sugiyama argues ASPLA’s actions “should be struck down as unconstitutional” for “exceeding the legislative authority granted to ASPLA by the Airai State Legislature and the National Government.”

Sugiyama’s final argument is that ASPLA’s Regulations contain language that is arbitrary, capricious, and unreasonable. She argues that ASPLA’s Regulations at Part VII, Subpart 1, § 2 provide lease rates in specific amounts per square meter per year in four usage categories, including residential, commercial, residential/commercial, and non-profits. She believes there is no category for farming and, therefore, the rent

amounts provided in the Regulations are not reasonable because they do not take this into account.

With respect to each of these arguments, the result is the same. We cannot entertain these arguments for the first time on appeal. *S.S. Enters., Inc.* 9 ROP at 52. Arguments made for the first time on appeal are considered waived, although there are exceptions. *Id.* In *Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994), we found that the reviewing court can address an issue not raised below to prevent the denial of fundamental rights or in cases affecting the public interest. *See also Ngaraard State Pub. Lands Auth. v. Rechucher*, 10 ROP 11, 12 (2002) (exceptions to the general rule exist, but because no argument was raised as to the applicability of either, they will not be entertained). Sugiyama stated in passing that this case “is such an exception” to the general rule. However, she does not adequately justify why she introduces new arguments at this time.

As ASPLA points out, the validity of its regulations was not before the Trial Division. Sugiyama did not discuss whether the Regulations were properly executed according to the APA; whether the ASPLA had the authority to enact rules with a retroactive application; or whether the Regulations contain language that is arbitrary and capricious. We note that the Trial Division presented some discussion of ASPLA’s Regulations in its Amended Decision, but that was in the context of lease rates, not whether the Regulations themselves were properly promulgated. In failing to raise any

argument concerning the Regulations, Sugiyama waived the right to present arguments about the validity and applicability of ASPLA's Regulations.

B. Waiver of Termination Rights

Sugiyama argues that Appellees waived their right to terminate her land lease by failing to collect rent for sixteen years. Sugiyama cites to *Restatement (Second) of Property: Landlord and Tenant* § 12.1(c) (1986), which states that a landlord "may waive his right to the prompt payment of rent by acting in such a manner that the tenant is led to believe that a later date of payment than that specified in the lease is acceptable."

Waiver does not appear to have been raised in the court below. More fundamentally, the Court's legal conclusion that a lease existed is correct: the addendum to the lease meets all four requirements for a lease. *See Renguul v. Orak*, 6 ROP 334, 337 (Tr. Div. 1997) (lease must contain names of parties; description of realty; statement of lease terms; rent or other consideration). ASPLA did not act as though later payment would be acceptable; Sugiyama never paid at all. Sugiyama's actions constitute a breach of contract.

Sugiyama argues that ASPLA is estopped from terminating the lease because it did not collect rent for sixteen years, citing to *Platner Lumber Co. v. Krug Park Amusement Co.*, 270 N.W. 473, 473 (Neb. 1936). That case offers the following rule in the State of Nebraska: "A landlord who fails for a long period of time to exercise an option to declare a forfeiture of a lease for failure to pay rent according to the terms,

while the tenant with the knowledge and consent of the landlord was constructing a building, may be estopped to exercise such option when the improvements are completed.” That case is distinguishable on its facts. There, the court found that if a landlord failed to exercise the forfeiture for non-payment of rent during which time the tenant was building something with the landlord’s knowledge, the landlord would indeed be estopped from later declaring a forfeiture. *Id.* In that case, the landlord failed to act within 90 days (the option period) to forfeit the lease. Moreover, the landlord failed to exercise this option even as the tenant reconstructed a building that had burned down, all with the landlord’s knowledge.

Here, there was no option period for declaring a forfeiture, and while there was one improvement, we are not convinced that the rule in Nebraska applies here. We do not believe we are required to find that ASPLA was estopped from terminating the lease. The court below correctly held that Sugiyama breached the parties’ lease agreement by failing to pay rent. Once it realized the error, ASPLA was within its rights to require back rent and revoke the 1993 lease. There is no triable issue of fact with respect to this issue. Accordingly, we affirm the Trial Division.

C. Tender of Rent Payments

Sugiyama’s fourth argument is that ASPLA rejected her attempts to tender payment and that the request that she file a new lease was “tantamount to an anticipatory repudiation of the lease agreement by Appellees.” Sugiyama argues that ASPLA should

have accepted Sugiyama's attempts to pay rent. She also argues that ASPLA's notice that the lease agreement was not valid was improper.

ASPLA argues that there was no anticipatory breach because ASPLA performed as required under the contract but Sugiyama breached. The Trial Division held that ASPLA gave notice in March and April of 2009 that Sugiyama had violated the 1993 lease agreement. We find that ASPLA's actions in March and April of 2009 (requiring a lease and then approving the lease application with conditions) served as sufficient notice that Sugiyama's 1993 lease agreement was no longer valid. The lower court's legal conclusion was correct.

In sum, the Trial Division drew the correct legal conclusions with respect to the existence of a valid lease; Sugiyama's financial obligation to ASPLA for back rent; and the amount owed. The factual findings the Trial Division made are not clearly erroneous. Accordingly, we affirm the Trial Division's decision with respect to the cross-motions for summary judgment.

D. Motion for Reconsideration

Sugiyama has appealed the Trial Division's denial of her motion for reconsideration. We review the denial of the motion for reconsideration under the abuse of discretion standard. *In re Idelui*, 17 ROP at 303. Because the underlying cross-motions on summary judgment were properly decided, we do not believe the Trial

Division abused its discretion or was clearly wrong. Accordingly, we affirm the Trial Division's denial of the motion for reconsideration.

IV. CONCLUSION

Sugiyama has not shown that the Trial Division erred or that its legal conclusions were incorrect. For the foregoing reasons, the Trial Division's decisions with respect to both Sugiyama's Motion for Partial Summary Judgment and Motion for Reconsideration are **AFFIRMED**.

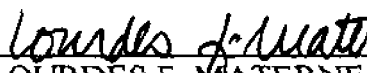
SO ORDERED, this ² 11 day of May, 2012.



ARTHUR NGIRAKLSONG
Chief Justice



KATHLEEN M. SALII
Associate Justice



LOURDES F. MATERNE
Associate Justice