IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

LUCY AUGUST,
Appellant,
v.
VALENTINA NGIRAIBIOCHEL and ISEKO TAKAMINE,
Appellees.

Cite as: 2019 Palau 33
Civil Appeal No. 19-004
Appeal from Civil Action No. 18-080

Decided: October 9, 2019

Counsel for Appellant ..... Johnson Toribiong
Counsel for Appellees ..... C. Quay Polloi

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] This appeal arises from an intra-family dispute over the ownership of certain properties. In brief, the trial court granted summary judgment against Appellant based on a default judgment the court had earlier entered against a non-appearing co-defendant. Determining that there are no disputed issues of material fact and that Appellant's due process rights were not violated, we **AFFIRM**.

[1] Although Appellant requests oral argument, we determine that argument is not necessary and resolve this appeal on the briefs pursuant to ROP R. App. P. 34(a).

BACKGROUND

[¶ 2] In 2016, Appellee Iseko Takamine purportedly deeded two pieces of property and two houses in Ngerchemai Hamlet to her granddaughter, Everlyne Ngeskesuk (also spelled "Everlyn"). Specifically, Takamine purportedly split one lot between Ngeskesuk and Takamine's daughter, Appellee Valentina Ngiraibiochel (also spelled "Ngirabiochel"), who is also known as Tina Delumeau. The other piece of property was purportedly deeded to Ngeskesuk in its entirety. One of the two houses was deeded to Ngeskesuk while the other was deeded to her sons, Takamine's great-grandsons. Ngeskesuk subsequently sold these properties to her aunt, Appellant Lucy August, who is also related to Takamine and Ngiraibiochel, and moved to Guam.

[¶ 3] On May 3, 2018, Takamine and Ngiraibiochel filed suit against Ngeskesuk and August. The Verified Complaint alleged that Takamine's signatures on the deeds transferring her property to Ngeskesuk "were forged[,] were obtained through duress or undue influence[,]" or that Takamine "otherwise lacked the capacity to legally consent" to the property transfers. The Complaint further alleged that because August is related to Takamine, she "knew or should have known" that the signatures on the deeds were invalid. The Plaintiffs requested a judgment declaring the deeds null and void and voiding any transactions based on the deeds, including August's purchase of the properties from Ngeskesuk. Both August and Ngeskesuk filed responsive pleadings, but Ngeskesuk's was struck by the trial court as untimely.[2] The trial court also denied August's motion to dismiss.

[¶ 4] Plaintiffs then moved for an entry of default and a default judgment against Ngeskesuk pursuant to ROP R. Civ. P. 55, and served the motion on both named Defendants. The Clerk of Courts entered a default based on Ngeskesuk's failure to file a responsive pleading. The trial court granted a default judgment declaring, inter alia, that the subject deeds "are null and void because of forgery, duress, undue influence, or that [] Takamine otherwise lacked the requisite capacity to legally consent," and that "any transactions based on the deeds . . . are null and void."

[2] The decision to strike Ngeskesuk's Answer is not at issue on appeal.

[¶ 5] Two months later, Plaintiffs moved for summary judgment against August, arguing that because the deeds and subsequent transactions based on those deeds had been declared void, August had no basis to defend her interest in the deeded properties.[3] August opposed the motion and renewed her motion to dismiss. In relevant part, August sought to resist summary judgment by introducing what she described as "new evidence," a video recording made by Ngeskesuk purportedly capturing Takamine orally devising her property to Ngeskesuk. August contended the video created a genuine issue of material fact regarding the legitimacy of the voided property transfers. August also faulted Plaintiffs for failing to join an indispensable party – Ngeskesuk – and clearly contended for the first time that Ngeskesuk may not have been served with the Complaint. August attached an affidavit to her opposition in which she purported to describe the video and stated her belief "that [Takamine] gave her land holdings to [Ngeskesuk] willingly and happily because [Ngeskesuk] was the only relative to take care of [Takamine] in her old age." In their Reply, Plaintiffs addressed August's legal arguments and attached documents refuting the claim that Ngeskesuk was never served with the Complaint: specifically, correspondence between the person who effected service on Ngeskesuk and Plaintiffs' counsel and a photograph purportedly showing Ngeskesuk reading the Complaint on the day she was served.

[¶ 6] The trial court denied August's renewed motion to dismiss and granted Plaintiffs' motion for summary judgment on the basis of the default judgment's conclusion that the deeds and subsequent transactions were null and void. The court rejected August's attempt to create a dispute of material fact, concluding that August had failed to explain why she could not have earlier presented the video to challenge the default judgment and had failed to demonstrate that the video would be admissible at trial. The court further stated that, even if the video was admissible, it did not meet the requirements for proving an oral will and was, in any event, superseded by Takamine's

[3] In addition to seeking a judgment specifically declaring that August did not own the properties she bought from Ngeskesuk, Plaintiffs also sought to cancel the extant certificates of title and issue new certificates in Takamine's name. Plaintiffs recognized that this would also entail canceling the certificate of title in Ngiraibiochel's name and restoring ownership of that parcel to Takamine.

subsequent execution of a written will. The court also rejected August's suggestion that Ngeskesuk was never served with the Complaint.

[¶ 7] August moved for reconsideration and attached an affidavit in which she described representations made to her by Ngeskesuk that Takamine had willingly given Ngeskesuk the properties. After the trial court denied the motion for reconsideration, this timely appeal followed.

STANDARD OF REVIEW

[¶ 8] We review the trial court's grant of summary judgment de novo. *Ngarametal Ass'n v. Ingas*, 17 ROP 122, 124 (2010). In doing so, we consider whether, taking all the evidence and inferences in the light most favorable to the non-moving party, the trial court correctly determined that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*; ROP R. Civ. P. 56(c).

DISCUSSION

[¶ 9] August contends on appeal that summary judgment was improper because there are remaining disputes of material fact. Specifically, she contends that there remains a genuine dispute as to whether Takamine's properties were lawfully deeded to Ngeskesuk. This contention, however, runs headlong into the default judgment. The Verified Complaint plainly alleged that Ngeskesuk procured the deeds unlawfully. Because Ngeskesuk did not deny this allegation in a timely responsive pleading, the trial court deemed it to be admitted. *See* ROP R. Civ. P. 8(d); *Palau Red Cross v. Chin*, 20 ROP 113, 116 (2013). Based on this admission, the trial court determined that the deeds, and the subsequent transactions based on the deeds, were "null and void."[4] Despite having notice of the motion for default, August did not challenge the entry of a default judgment, or the judgment's scope, before the trial court. Nor does she directly challenge the default judgment on appeal: her Notice of Appeal only mentions the trial court's Order granting summary

[4] August's suggestion that the trial court granted summary judgment in part based on a distinct guardianship proceeding in the Court of Common Pleas, or on a medical assessment by Takamine's physician, is belied by the record. The trial court's grant of summary judgment was entirely based on the undisputed facts as established by the default judgment against Ngeskesuk.

judgment and the Order denying her motion for reconsideration. *See* ROP R. App. P. 3(c) ("The notice of appeal . . . shall designate the judgment, order or part thereof appealed from . . . ."). Because she did not designate the default judgment in her Notice of Appeal, "[a]ny substantive argument about [that judgment] is not properly before this Court." *Smengesong Lineage v. Rechebei*, 2017 Palau 30 ¶ 44. Furthermore, regardless of her appeal's procedural posture, with one exception discussed below, she has not provided any developed argument for why the default judgment, as opposed to the grant of summary judgment, was in error. Therefore, in light of the unchallenged default judgment, which established that the property sales to August by Ngeskesuk were "null and void," the trial court did not err in determining that there were no triable issues of material fact precluding summary judgment.[5]

[¶ 10] Beyond the effect of the default judgment, August's attempts to manufacture a genuine dispute of material fact on appeal are unavailing. August heavily relies—as she admits—on evidence and argument that she did not present to the trial court.[6] It is axiomatic that arguments made for the first time on appeal are considered forfeited barring "exceptional circumstances." *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998). The types of exceptional circumstances that would permit excusing failure to present an argument in the trial court are plainly absent in this case. *See Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994) (explaining that a reviewing court may address an issue not raised in the trial court "to prevent the denial of fundamental rights, especially in criminal cases where the life or liberty of the accused is at stake" or where "the general welfare of the people is at stake"). The cases cited by August in fact underscore that these exceptional

[5] August's reliance on *Emaudiong v. Arbedul*, 5 ROP Intrm. 31 (1994), is entirely misplaced as that case did not involve the question of how a default judgment affected the universe of factual disputes allegedly precluding a grant of summary judgment.

[6] August did present the purported video evidence of Takamine's "oral will" to the trial court, but she did not make any effort to authenticate it or otherwise demonstrate to the trial court that the video would be admissible at trial. *See Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 817 (8th Cir. 2010) (noting that inadmissible evidence cannot be used to defeat summary judgment). On appeal, for the first time, she speculates about potential witness testimony that could authenticate the video and also, conceivably, demonstrate that the video was made during a time period relevant to the question of Takamine's intent in deeding the properties to Ngeskesuk. August's passing speculation on appeal is too little, too late.

circumstances are not present in civil cases, like this one, where a litigant only risks losing a personal interest in land. *See, e.g.*, *Kotaro v. Ngirchechol*, 11 ROP 235, 237-38 (2004) (finding no exceptional circumstances where a civil litigant's interest in land was at stake).[7]

[¶ 11] August also contends that the grant of summary judgment in Appellees' favor violated her Constitutional due process rights. However, the record does not support her contention that she was summarily deprived of her property "without the chance to be heard." The record discloses that she was provided notice of the motion for default judgment but did not contest the entry of a default judgment in any way.[8] To the extent she suggests that there is something inherently unreasonable about basing a grant of summary judgment on a default judgment, she has provided no legal authority to support her position.

[¶ 12] Finally, August does offer one contention for why the default judgment itself was improper. Specifically, she contends that the default judgment should be set aside "for good cause shown" because Ngeskesuk allegedly "maintains" she was never served with the Summons and Complaint. *See* ROP R. Civ. P. 55(c) ("For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."); ROP R. Civ. P. 60(b)(4) (a final judgment may be set aside if the judgment is void); *Gibbons v. Cushnie*, 8 ROP Intrm. 3, 5 (1999) ("[I]n the absence of valid service of process, proceedings against a party are void . . . .") (internal quotation marks omitted). But even assuming that August could raise this issue at this juncture, her contention is patently false. The trial court record contains a notarized certificate of service, an email chain between counsel for Appellees

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[7] For the first time on appeal, August squarely makes a legal argument that "the trial court misapplied the law regarding certificates of title as legally conclusive of land ownership." Assuming the doubtful proposition that we can review this new argument, it is unconvincing. August provides no authority for her contention that a trial court cannot find fraud based on a party's admissions to allegations of fraud in a Verified Complaint.

[8] August was not foreclosed from challenging the default judgment or moving to have it set aside, even considering Ngeskesuk's "admission" pursuant to Rule 8(d). For example, August could have argued that even if the deeds were procured unlawfully, the subsequent transactions based on the deeds were "voidable," rather than "void," based on her claimed status as a bona fide purchaser for value without notice. She did not do so.

and the person who effected service, and a photograph purportedly of Ngeskesuk reading the Complaint. Furthermore, Ngeskesuk filed a responsive pleading directly answering the allegations in the Complaint, albeit a responsive pleading that was determined to be untimely. Whatever Ngeskesuk has represented to August outside the record, any assertion that Ngeskesuk was never served with the Summons and Complaint is not credible.[9]

CONCLUSION

[¶ 13] We **AFFIRM** the Trial Division's judgment.

[9] August has not preserved on appeal various other challenges raised below to the manner in which the default judgment was granted. By first raising it in her reply brief, she also has not preserved her argument that the default judgment was improper in light of *Frow v. De La Vega*, 82 U.S. 552 (1872). *See Glover v. Lund*, 2018 Palau 10 ¶ 17 (arguments first raised in a reply brief are not preserved).

SO ORDERED, this 9th day of October, 2019.

ARTHUR NGIRAKLSONG
Chief Justice

JOHN K. RECHUCHER
Associate Justice

ALEXANDRO C. CASTRO
Associate Justice