IN THE SUPREME COURT
TERRITORY OF GUAM

CITIZENS SECURITY BANK (GUAM), INC.,
Appellee,

vs.

ESTER R. BIDAURE,
Appellant.

Supreme Court Case No. CVA96-010
Superior Court Case No. CV1304-92

OPINION

Filed: March 20, 1997

Cite as: 1997 Guam 3

Appeal from the Superior Court of Guam
Argued and Submitted 28 January 1997
Agana, Guam

Appearing for the Appellant:
Seth Forman
Law Office of Keogh & Butler
Suite 105, C & A Prof. Building
251 Martyr Street
P.O. Box GZ
Agana, Guam 96932

Appearing for the Appellee:
John A. Spade
Mair, Mair, Spade & Thompson
A Professional Corporation
Attorneys at Law
Suite 807, GCIC Building
414 West Soledad Avenue
Agana, Guam 96910

BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, and MONESSA G. LUJAN, Associate Justices.

WEEKS, J.:

Appellant, Ester R. Bidaure, whose signature appears on a Continuing Guaranty for the indebtedness of M & B Construction Company, appeals from a judgment of the Superior Court, following a bench trial, in favor of Appellee Citizens Security Bank. The Superior Court, the Honorable Benjamin J.F. Cruz presiding, found Bidaure liable to Citizens Security for the balance of a defaulted loan to M & B Construction, plus interest, attorneys' fees and court costs. Appellant contends on appeal that the Continuing Guaranty at issue is unenforceable for failure of consideration. Based, however, on Appellant's failure to adequately raise this defense at trial, we affirm the judgment of the Superior Court.

I. BACKGROUND

[1] On 27 September 1991, M & B Construction entered into a construction contract with Jose Delgado to build a two unit duplex house for Delgado for $195,000.00. The payments from Delgado to M & B Construction were to be made in installments as specified in the Construction Contract. To obtain additional funds for the Delgado project, M & B applied for a $50,000.00 loan from Citizens Security Bank. M & B's loan application was approved by Citizens, and the funds were disbursed to M & B in a single check on 8 October 1991. Also on 8 October 1991, Antonio B. Simpao signed a promissory note on the loan to M & B in his capacity as General Manager of M & B, and also signed a Continuing Guaranty on the loan in his personal capacity. As further security for the loan, Simpao, on behalf of M & B, assigned to Citizens Security Bank M & B's rights under the above referenced Construction Contract between M & B and Delgado.

[2] On 12 November 1991, Antonio Simpao, Manuel Alberto, and Ester Bidaure signed a document entitled "Continuing Guaranty (Relating to Past and Future Indebtedness)." This Continuing Guaranty was for an amount not to exceed $80,000.00. According to the testimony of Simpao, the reason that the Continuing Guaranty was for a maximum amount of $80,000.00, rather than $50,000.00, is that M & B was, at the time the Continuing Guaranty was signed, in the process of applying for an additional $30,000.00 loan. (Trial Transcript, page 16, line 19.) Citizens eventually denied this additional loan request.

[3] In its closing argument at trial, Appellee Citizens addressed various issues raised by Appellant Biduare pertaining to the amount of the defaulted loan. Appellee ended its closing argument by presenting its calculation of the outstanding balance of the M & B loan as $20,700.27 in principal, and $10,834.45 in interest.

[4] Despite Appellant's presentation of evidence challenging the amount of the defaulted loan, Appellant's only argument at closing was that the Continuing Guaranty signed by Appellant on 12 November 1991 is unenforceable for failure of consideration. According to Appellant, the potential consideration for the Continuing Guaranty was M & B's second loan application, the one for $30,000.00. This, according to Appellant, is why the Continuing Guaranty was for up to $80,000.00 rather than $50,000.00, the amount of M & B's approved loan. Because the $30,000.00 loan application was denied, Appellant argued, there was no consideration given to support the Continuing Guaranty signed by Bidaure, and so nothing to bind Bidaure as a guarantor.

[5] Responding to Appellant's closing argument, Appellee argued that, according to Simpao, the Continuing Guaranty executed on 12 November 1991 was one of the conditions of the original loan to M & B and was for any amount provided the amount does not exceed $80,000.00. The $50,000.00 loan

approved and disbursed to M & B, Appellee argued, was consideration for the Continuing Guaranty, and all of the guarantors, including Bidaure are therefore responsible for the unpaid balance.

[6] Immediately following closing arguments, the trial court rendered judgment in favor of Appellee Citizens against all of the defendants, including Appellant Bidaure, for the entire outstanding balance of the M & B loan, $31,570.42. The court held an additional hearing on the issues of attorneys' fees and costs on 14 August 1996. In the court's Judgment, filed on 22 August 1996, the court awarded attorneys' fees in the amount of $5,236.25, and costs in the amount of $182.25. Notice of appeal was timely filed.

II. DISCUSSION

[7] On appeal, Appellant raises the failure of consideration issue, first presented in her closing argument at trial. According to Appellant, because the Continuing Guaranty was executed a month after the borrowed funds ($50,000.00) were disbursed to the borrower, M & B, the Continuing Guaranty was without consideration. Appellant's position is that she signed the Continuing Guaranty, which was for an amount not to exceed $80,000.00, in order to enable M & B to secure an additional $30,000.00 loan from Citizens. If the additional loan had been approved, according to Appellant, the additional $30,000.00 would have been consideration for the Continuing Guaranty. Because, however, the additional $30,000.00 was denied by Citizens, Appellant contends, her signature on the Continuing Guaranty was not supported by consideration.

[8] To support her argument, Appellant cites Guam Civil Code §2792, also codified at 18 Guam Code Annotated §31201, which provides as follows:

> **§2792. Necessity of consideration.** Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

In addition, Appellant argues that even without §2792, the well accepted common law rule is that when a contract of guaranty is entered into independent of the transaction creating the original debt, the guarantor's promise must be supported by new consideration.

[9] In support of the trial court's Judgment, Appellee Citizens Security points out that Appellant's failure of consideration argument is an affirmative defense under Guam Rule of Civil Procedure 8(c). According to Appellee, because Appellant did not include this affirmative defense in her pleadings as required by Rule 8(c), this Court should deem Appellant to have waived the defense. We agree.

[10] Rule 8(c) of the Guam Rules of Civil Procedure, identical to Rule 8(c) of the Federal Rules, requires that parties include affirmative defenses in their pleadings. Courts have interpreted this rule to mean that affirmative defenses not included in the pleadings are waived. Circuit Courts of Appeal have generally refused to address affirmative defenses not included in the pleadings and raised for the first time on appeal. *Putnam v. De Rosa*, 963 F.2d 480 (1st Cir. 1992)(holding laches defense waived); *Camp, Dresser & McKee, Inc. v. Technical Design Associates, Inc.*, 937 F.2d 840 (2nd Cir. 1991)(holding statute of limitations defense waived); *Great Southwest Life Insurance Co. v. Frazier*, 860 F.2d 896 (9th Cir. 1988)(holding estoppel defense waived); *Northwest Acceptance Corporation v. Lynnwood Equipment, Inc.*, 834 F.2d 823 (9th Cir. 1988)(holding novation defense waived); *Perry v. O'Donnell*, 749 F.2d 1346 (9th Cir. 1984)(holding statute of limitations defense waived).[1]

[1] There are a number of cases, including some involving the failure of consideration defense, in which trial courts have rejected attempts to raise affirmative defenses not included in the pleadings. For example, in *Federal Deposit Insurance Corp. v. Central Air Control, Inc.*, 785 F.Supp. 898 (D. Kan. 1992), under facts similar to those of the instant case, guarantors of certain

[11] All of these cases involved affirmative defenses that were never included in the pleadings, and never raised at all prior to the appeal. From the language of most of these cases, it seems that when courts have refused to address affirmative defenses that were not pleaded as required by Rule 8(c), an important factor has been the fact that these defenses had not been raised at all at the trial level. For example, in *Perry v. O'Donnell*, the Ninth Circuit held as follows:

> Because Fed. R. Civ. P. 8(c) requires a defendant to plead affirmatively the statute of limitations defense, we refuse to address the merits of the defendants' claim. Failure to raise the defense in the district court constitutes a waiver.
>
> *** Our decision in *Rivera v. Anaya*, 726 F.2d 564 (9th Cir. 1984), is not to the contrary. There, we merely recognized that failure to assert the statute of limitations defense in the initial pleading does not necessarily waive the defense. Because we found no prejudice to the other party, we agreed with the districts court's ruling that the defendant could raise the defense for the first time in a motion for summary judgment. *Id*. at 566. Here, the defendants never raised the issue in the district court, and we decline to address it on appeal.

Perry, 749 F.2d at 1353.

[12] As in the *Perry* case from the Ninth Circuit, other circuits that have rejected affirmative defenses per Rule 8(c) also base this rejection, at least in part, upon the fact that the defenses were being raised for the first time on appeal. *See e.g., Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993)(holding that collateral estoppel defense was waived because of failure of defendant to assert in answer *or at any time* in district court).

[13] Fairness to the opposing party is also an important factor in determining whether failure to plead an affirmative defense should be deemed a waiver of the defense. As indicated by the above quote from *Perry v. O'Donnell*, there is a line of Ninth Circuit cases that stand for the proposition that an affirmative defense not included in the pleadings is only waived if the other party has suffered some prejudice. *Rivera v. Anaya*, 726 F.2d 564 (9th Cir. 1984); *Healy Tibbitts Construction Co. v. Insurance Co. of North America*, 679 F.2d 803 (9th Cir. 1982).

[14] The Fifth Circuit takes a similar approach to this issue, and has allowed affirmative defenses not raised at the trial level when fair notice has been given to the other party in the course of litigation. *Marine Overseas Services, Inc. v. Crossocean Shipping Co.*, 791 F.2d 1227 (5th Cir. 1986). In *Marine Overseas*, the Fifth Circuit determined from the district court's findings of fact that the parties were well aware of an agency relationship that formed the basis of a contested affirmative defense. The court concluded that adequate notice to the objecting party had been given to justify allowing the affirmative defense. *Marine Overseas*, 791 F.2d at 1233.

[15] In the instant case, the failure of consideration defense, though never pleaded, was raised at trial during closing arguments. Appellant argues that the defense was therefore tried by implied consent, and should be allowed as an exception to Rule 8(c), as authorized by Rule 15(b). Based on considerations of fairness, however, we reach a different conclusion regarding the applicability of Rule 15(b) in this case.

[16] Rule 15(b) of the Guam Rules of Civil Procedure, identical to Rule 15(b) of the Federal Rules of Civil Procedure, has been recognized by the various circuits as an exception to the pleading requirement

---

promissory notes raised, in opposition to a summary judgment motion, the defense of failure of consideration. The District Court held that, because the defendants failed to raise this defense in their answer, the defense was waived. *Id.* at 901. As in the *Federal Deposit* case, attempts to raise defenses not included in pleadings have often been rejected by trial courts. The decisions of trial courts to reject these untimely defenses are usually affirmed on appeal. *See, e.g., Travellers International, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570 (2nd Cir. 1994); *Bokunewicz v. Purolator Products, Inc.*, 907 F.2d 1396, 1402 (3rd Cir. 1990); *Equal Employment Opportunity Comm'n v. White and Son Enterprises*, 881 F.2d 1006 (11th Cir. 1989).

of Rule 8(c). It has often been invoked to permit defendants to present affirmative defenses at trial or on appeal even though they did not include these defenses in their pleadings. The First Circuit, in *Federal Deposit Insurance Corp. v. Ramirez-Rivera*, 869 F.2d 624 (1stCir. 1989), discussed this use of Rule 15(b) as follows:

> [C]ourts may treat an affirmative defense that has been raised after the pleadings stage, but has been fully tried under the express or implied consent of the parties, as if it had been raised in the original responsive pleading. Fed. R. Civ. P. 15(b); *see* 8 *C. Wright & A. Miller, Federal Practice and Procedure* § 1278 (1987). This rule is applicable, however, only where it is clear that the "issue not raised in the pleadings and not preserved in the pretrial order has in fact been tried . . . ." *Systems, Inc. v. Bridge Electronics Co.*, 335 F.2d 465, 466-67 (3d Cir. 1964). Thus, an affirmative defense that was not raised in any capacity at trial cannot be raised for the first time on appeal. *Id.* at 466.

Ramirez-Rivera, 869 F.2d at 626-27; *See also, Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975)("Under Rule 15 the district court may and should liberally allow an amendment to the pleadings if prejudice does not result.").

[17] Other circuits follow the same approach as the First Circuit, and allow unpleaded claims to be raised on appeal provided they have been tried by express or implied consent. *See e.g., Campbell v. Board of Trustees*, 817 F.2d 499 (9th Cir. 1987); *United State sfor Use of Seminole Sheet Metal v. Sci, Inc.*, 828 F.2d 671 (11th Cir. 1987); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984).

[18] All of the above circuits apply the same general approach to Rule 15(b) determinations, emphasizing fairness to the opposing party as the primary consideration. As the Eleventh Circuit noted in *Seminole Sheet Metal*,

> Failure to object to evidence raising issues outside of the pleadings constitutes implied consent as long as the evidence is not relevant to issues already within the pleadings. *** Courts, however, will not find implied consent if the nonmoving party would be prejudiced by the injection of the new issue.

Seminole Sheet Metal, 828 F.2d at 677(citations omitted).

[19] The Ninth Circuit has articulated the relevant inquiry for determining whether an issue has been tried by implied consent, for purposes of Rule 15(b), as follows:

> The purpose of Rule 15(b) is to allow an amendment of the pleadings to bring them in line with the actual issues upon which the case was tried. *** While it is true that a party's failure to object to evidence regarding an unpleaded issue may be evidence of implied consent to a trial of the issue, it must appear that the party understood the evidence was introduced to prove the unpleaded issue.

Campbell, 817 F.2d at 506 (citations omitted). In *Campbell*, the plaintiff sought to amend his pleadings after the trial to include the issue of breach of a covenant of good-faith. Campbell argued that evidence of this issue had been introduced without objection at trial. The Ninth Circuit rejected this argument, however, because the court found that the evidence only inferentially supported the good-faith claim, and that there was no indication that the opposing party, by not objecting, recognized that the issue was being tried. *Id.*

[20] Like the circuit courts cited above, this Court looks to considerations of fairness in determining whether to allow a party to present, on appeal, an affirmative defense, arguably raised at trial, but not included in the pleadings. A number of factors, in the instant case, weigh against allowing the failure of

consideration defense under Rule 15(b). Among them is the fact that the defense was never presented in an opening statement at trial, or at any time during the six years prior to the trial of this matter. In addition, much, if not most, of the evidence Appellant presented during the trial, did not relate to the failure of consideration defense, but instead related to other issues not even mentioned in Appellant's closing argument. Finally, the fact that Appellee Citizens did not reference the failure of consideration issue during its oral argument, but instead addressed only Appellant's dispute regarding the amount owing on the loan, indicates that Appellee did not recognize that evidence had been introduced to prove the unpleaded defense. If Appellee Citizens had truly understood that the failure of consideration issue was being litigated, it could have called additional witnesses to support the contention that the Continuing Guaranty was a condition of the original $50,000.00 loan.

[21] Based on the above described factors, it would be unfair to allow Appellant to assert the defense of failure of consideration on appeal. Appellant did not include this defense in her pleadings as required by Rule 8(c), and the defense was not tried by implied consent within the meaning of Rule 15(b). Accordingly, this Court will not address the failure of consideration defense on appeal.

[22] A remaining issue is Appellee's request for attorneys' fees and costs incurred in defending this action on appeal. We find such an award, in this case, justified by the express language of the Guaranty which formed the basis of Appellant's liability on the defaulted loan. *E.g.*, *Berven Carpets Corp. v. Davis*, 210 Cal.App.2d 206, 215 (Cal. Dist. Ct. App. 1962)("It is beyond dispute that such request finds a legal basis in the provisions of the promissory note"). A provision of the Continuing Guaranty in this case provides that "[g]uarantors agree to pay a reasonable attorney's fee and all other costs and expenses which may be incurred by Bank in enforcement of this guaranty." Accordingly, the trial court is hereby ordered to conduct a hearing for the purpose of awarding Appellee additional attorneys' fees and costs.

III. CONCLUSION

[22] For the foregoing reasons, the Judgment of the Superior Court is **AFFIRMED**. The cause is **REMANDED** to the Superior Court solely for the purpose of awarding Appellee reasonable attorneys' fees and costs incurred in defending this action on appeal.