IN THE SUPREME COURT OF GUAM
TERRITORY OF GUAM

IIZUKA CORPORATION
Appellant,

vs.

KAWASHO INTERNATIONAL (GUAM), INC., ROYAL PALM RESORT, LTD, THE ASSOCIATION OF APARTMENT OWNERS OF ROYAL PALM RESORT, DOES INSURANCE COMPANIES I THROUGH X, and DOES I THROUGH XX
Appellee.

Supreme Court Case No. CVA96-009
Superior Court Case No. CV0124-94

OPINION

Filed: July 24, 1997

Cite as: 1997 Guam 10

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

Appearing for the Plaintiff/Appellant:
Sandra D. Lynch, Esq.
Carbullido, Pipes & Bordallo
Young's Professional Building
788 North Marine Drive
Upper Tumon, Guam 96911

Appearing for the Defendant/Appellee:
Thomas C. Sterling, Esq.
Klemm, Blair, Sterling & Johnson
Suite 1008, Pacific News Building
238 Archbishop F.C. Flores Street
Agana, Guam 95910

BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, and MONESSA G. LUJAN,[1] Associate Justices.

PER CURIAM:

Appellant Iizuka Corporation ("Iizuka") appeals the Superior Court's granting of a partial summary judgment entered in favor of the Appellees, Kawasho International (GUAM), Inc. ("Kawasho"), Royal Palm Resort, Ltd., and the Association of Apartment Owners of Royal Palm Resort. The trial court dismissed claims of negligent and intentional misrepresentation and breach of contract claims based on wrongful termination, bad faith and breach of the covenant of quiet enjoyment.

After considering the competent evidence and weighing all facts in favor of Appellant Iizuka, this Court finds that no genuine issues of material fact remain as to those claims dismissed by the trial court. The decision below is affirmed.

I.

[1] The Issin Restaurant was opened by Iizuka on April 11, 1986 and was situated on property leased by Iizuka from Genex. of America, Inc. ("Lease 1"). Genex sold the restaurant premises to Matsuzato Corporation and assigned the underlying lease to Matsuzato. In 1989, Kawasho purchased Matsuzato's interest in both the Issin premises and Lease 1. Kawasho obtained the property to develop a condominium/hotel project, the Royal Palm Resort. The Royal Palm Resort was to consist of Building A, Building B and a parking garage ("Block C"). Kawasho and Iizuka negotiated the termination of Lease 1 and on January 29, 1992, the parties entered into a new long term lease for a portion of Building B ("Lease 2"). As part of Lease 2, Iizuka was given the exclusive right to operate a Japanese restaurant in the Royal Palm Resort. Pursuant to this lease, Iizuka opened the Issin II restaurant on June 15, 1993.

[2] On August 8, 1993 a devastating earthquake struck Guam causing damage to the Royal Palm Resort. Specifically, Building A began to lean on Building B. On August 9, 1993 a hazard order was issued by the Department of Public Works, Territory of Guam, ("DPW") restricting entry into the Royal Palm Resort. On August 14, 1993, the Director of DPW ordered Kawasho to demolish Building A because of the imminent danger it posed to the general public and also ordered additional inspections to determine the structural integrity of the remaining portions of the Royal Palm Resort, including the portion in which the Issin II restaurant was situated. Neither party disputes the necessity of ordering the demolition of Building A.

[3] By way of a letter dated October 19, 1993, Kawasho served notice of their intent to terminate Lease 2 in thirty days. The letter indicated that Buildings A and B were to be demolished. The lease was to be terminated under § 16.3 of the lease because the premises could not be repaired within sixty days of the date of the damage.

[4] On October 28, 1993, DPW ordered the demolition of Building B, including the portion in which the Issin restaurant was situated.

[1] Justice Lujan heard oral argument and participated in the resolution of this matter, but due to her untimely death was not available to sign the opinion.

[5] On October 29, 1993, Iizuka's counsel opposed the intended termination of the lease, claiming that Building B and the portion of Building B in which the Issin II restaurant was located could be salvaged and repaired. In early December of 1993, Buildings A and B were demolished by the Cleveland Wrecking Company.

[6] On January 21, 1994 Iizuka filed a complaint against the Appellee seeking damages for terminating the lease. A first amended complaint was filed which included two new claims, conversion and direct action. On July 15, 1996, Kawasho moved for partial summary judgment seeking to dismiss the breach of contract, negligent misrepresentation and fraud claims of the First Amended Complaint.[2] The trial court granted the motion and dismissed those claims of the Second Amended Complaint alleging breach of contract (wrongful termination), breach of contract (bad faith), breach of contract (covenant of quiet enjoyment), negligent misrepresentation and fraud/intentional misrepresentation.

II.

[7] This Court has jurisdiction pursuant to 48 U.S.C. § 1424-3(d). The partial summary judgment was certified under Guam Rule of Civil Procedure Rule 54(b) as final and appealable.

This Court will review de novo the trial court's granting of summary judgment. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1994). Under Rule 56 of the GRCP, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." To grant summary judgment, there must not be a "genuine issue." There is a genuine issue, if there is "sufficient evidence" which establishes a factual dispute requiring resolution by a fact-finder. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). However, the dispute must be as to a "material fact." "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. . . . Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *Id.*

[8] If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the complaint, but must produce at least some significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby.*, 477 U.S. 242, 249 (1986). In addition, the court must view the evidence and draw inferences in the light most favorable to the nonmovant. *E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 982 F.2d 1305, 1307 (9th Cir. 1992). The "court's ultimate inquiry is to determine whether the "specific fact" set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Serv.*, 809 F.2d at 631. Put simply, the question is whether there is a dispute as to a fact which is relevant to those claims dismissed by the trial court.

III.

[9] This Court is presented with the issue of whether there are material factual disputes as to whether the Issin Restaurant premises could have been repaired within sixty (60) days from the date of the casualty.

[2] A second amended complaint was filed by Iizuka on August 1, 1996 which included two additional claims; statutory deceptive trade practice and breach of contract (legal compliance).

[10] In this case, there is no dispute that the casualty occurred on August 8, 1993. The Appellant contends that there are material factual disputes relating to Kawasho's termination of the lease agreement. Specifically, Appellant raises the following factual claims: (1) the Issin II restaurant premises could be repaired in sixty days; (2) Kawasho's reasons for terminating Lease 2 were fraudulent because the demolition of Building B was ordered after the termination letter was served; and (3) Building B did not need to be demolished and that absent such demolition, repairs could have been completed within sixty days; (4) Iizuka reasonably relied on Kawasho's representations relating to the reasons for the termination of Lease 2. For the Appellant to succeed on appeal, the factual disputes must be genuine and they must be material to the claims.

[11] The Appellee counters by arguing that: (1) unrebutted evidence in the form of the demolition order for Building B establishes that the premises could not be completely reconstructed within sixty days and that Iizuka's experts did not consider the demolition of Building B when determining that repairs could be completed within sixty days; and (2) Iizuka provided no credible evidence indicating detrimental reliance.

[12] The resolution of this issue involves the interpretation and application of §§16.1 and 16.3 of Lease 2 which state in relevant part:

> 16.1 Subject to the provisions of [para] 16.3, and subject to the declaration and by-laws of the association, if at any time during the terms hereof, the premises are destroyed or damaged without fault of neglect of tenant, tenant's agents, employee or licensees, then landlord shall at landlord's expense, promptly subject to any delay or inability from causes beyond landlord's control, rebuild, and restore the physical structure around the premises to substantially the condition on which the premises existed prior to such casualty . . .
>
> 16.3 Either landlord or tenant may elect to cancel and terminate this lease upon thirty (30) days' prior written notice if landlord is unable within sixty (60) days following the date of the casualty or damage to fully repair the premises in accordance with [para] 16.1 above.

In the present case, the Appellant claims that the contract is ambiguous. Whether language of a contract is ambiguous is a question of law. *O'Neill v. United States*, 50 F.3d 677, 682 (9th Cir. 1995); *E.M. Chen & Associates v. Lu Island Development Inc*., 1992 WL 469348, at *3 (D. Guam App. Div. 1993). The Appellant makes the argument that the sixty day period contained in §16.3 is ambiguous in that term "premises" is not clearly defined and that the Issin II restaurant premises could have been completed within sixty days after the earthquake. The Appellee argues that the damage occurred on August 8, 1993, that such casualty triggered the sixty day repair period and that sixty days after the casualty the landlord remained unable to fully repair the premises. Once the sixty day period lapsed the landlord (and the tenant) possessed the option of terminating the lease upon thirty days notice.

[13] This Court believes that §§16.1 and 16.3, when read together are not ambiguous. Lease provision §16.1 sets forth the landlord's duty to repair promptly and excuses the landlord for delays outside the landlord's control and §16.3 allows the parties to terminate the lease if such repairs cannot be completed in sixty days, regardless of delays outside the landlord's control. The damage to the Issin II restaurant occurred on August 8, 1993. On October 7, 1993, sixty days after the earthquake, the restaurant was not fully repaired. After October 7, 1993, either party could have terminated the lease upon thirty days notice.

On October 19, 1993 Kawasho did exactly that and served Iizuka with a notice of intent to terminate the lease.

[14] The movant Appellee provided competent evidence that under any scenario, the necessary reconstruction and repair could not be accomplished sixty days from August 8, 1993. DPW ordered the demolition of Building A on August 14, 1993 and noted that the remaining wings would need to be investigated further to assess their structural integrity. The Appellant did not contest this demolition order. On October 14, 1993, Kawasho received a report from the Hart Consultant Group that Building B was structurally unsafe. The letter indicated that the repair to Building B (including the Issin II premises) could not begin for six months. The Appellant provided no credible evidence that repairs to the Issin II premises could begin earlier. On October 22, 1993 a DPW engineer recommended demolition of Building B based on his opinion that Building B may sustain damage from the implosion of Building A.

[15] The Appellant provided reports from two experts in an attempt to create a triable factual dispute. However, neither of the experts stated in certain terms that the repairs could be effected sixty days from the August 8, 1993 earthquake. John A. Martin & Associates issued an October 9, 1993 report which indicated that "[a] much more detailed investigation would be required before we could say that the salvage of the Lobby Tower (Building B) was more than a definite possibility." Martin & Associates stated that if Building B were to be demolished, it would have been possible to sever the portion of Building B where the Issin II was located. The Martin & Associate report did not indicate that the severance and repair of the Issin II restaurant premises could be accomplished sixty days after the earthquake.

[16] Ssangyong Construction Co., Ltd. also issued an opinion that Building B could be repaired without demolition. However, Ssangyong conceded that the repair to Building B and the Issin II premises could not begin until after Building A was demolished and that the demolition of Building A could result in additional damage to Building B. Ssangyong did not state that the Issin II restaurant could have been fully repaired sixty days after the earthquake.

[17] In light of the fact that both Buildings A and B were ordered demolished by the Department of Public Works, and that such demolition did not occur until mid December of 1993, it is beyond factual dispute that the Issin II restaurant premises could not have been repaired within sixty days of the casualty. There was no evidence tending to show that the Issin II restaurant could have been fully repaired sixty days after the earthquake.

[18] Additionally, the demolition of Building B anticipated in Kawasho's notice of termination letter dated October 19, 1993 is also immaterial. On October 19, 1993, Kawasho notified Iizuka that Lease 2 would be terminated in thirty (30) days because of Kawasho's inability to repair Iizuka's premises within sixty (60) days of the August 8, 1993 earthquake. The Kawasho letter was a notice of intent to terminate the lease and not a termination of the lease. A lease does not end until the tenant is no longer entitled to possession. *Robinson v. Chicago Housing Authority*, 54 F.3d 316 (7th Cir. 1994). Iizuka was still entitled to possession after the service of the notice of intent to terminate the lease. Kawasho and Iizuka could have agreed to rescind the intent to terminate Lease 2 after the notice of intent was given and before the thirty day period expired. *Wisner v. Richards*, 113 P. 1090 (Wash. 1911).

[19] The Department of Public Works demolition order of October 28, 1993 effectively terminated Iizuka's possession of the Issin Restaurant premises. It is undisputed, that before the actual termination of Lease 2 thirty days after October 19, 1993, the Territory of Guam, Department of Public Works

effectively ended Iizuka's tenancy by ordering the demolition of Building B pursuant to 21 GCA § 66501 et. seq.. DPW inspected Building B and determined that it was an unsafe building warranting demolition. Appellant was the lessee of the premises on October 28, 1993 when DPW ordered the demolition of Building B. A demolition ordered by a public official pursuant to the police power does not give rise to a breach of the covenant of quiet enjoyment absent a showing that the landlord breached a duty owed. *Dillon-Malik, Inc. v. Wactor*, 728 P.2d 671 (Ariz. Ct. App. 1986); *Ripps v. Kline*, 275 P.2d 381 (Nev. 1954). There is no breach of duty if the landlord assisted in the determination of demolition and actively supported it. *Goldring v. Kline*, 284 P.2d 374, 378 (Nev. 1955). In other words, Kawasho's stated reasons for terminating the lease are not material to the dispute. Under the terms of the lease the only pertinent question involved the possibility of fully repairing the Issin II restaurant premises within sixty days of the earthquake. The DPW orders to demolish Building A and Building B answered this question in the negative and on October 7, 1993 both Kawasho and Iizuka possessed termination rights under Lease 2.

[20] Likewise, the fraud and negligent misrepresentation claims also fail because there was no reliance by Iizuka on a material misrepresentation. On October 5, 1993, Iizuka accompanied his own experts, Martin & Associates, to inspect the damage to the Issin II portion of the Royal Palm Resort. As early as October 9, 1993, Iizuka was under the belief that demolition of Building B was unnecessary and that the Issin II premises could be repaired. In fact, Iizuka obtained estimates as to the cost of repairs after October 18, 1993. Such estimates however, were not based on the assumption that Building B would be demolished. Finally, by the time Kawasho served Iizuka with the thirty day notice of intent to terminate the lease, the sixty day repair period had expired. Therefore, Kawasho's stated reasons for terminating the lease were not material.

CONCLUSION

[21] Kawasho has shown through competent evidence that Buildings A and B were ordered demolished after the earthquake and that the Issin II restaurant could not have been rebuilt sixty days after the earthquake, even if the sixty day period were tolled for the time the property was under the jurisdiction of Public Works. While the court must view the evidence and draw inferences in the light most favorable to Iizuka, some rebuttal evidence must be provided by Iizuka. While Iizuka may have provided competent evidence challenging the Public Works decision to demolish Building B, such evidence was made irrelevant by DPW's unappealed order to demolish Building B. Nor did Iizuka provide competent evidence showing that the repairs could have been completed in sixty days, in light of such demolition.

[22] There is no factual dispute that Building B had to be demolished. There was an unappealed order from DPW to that effect. The argument that Building B did not have to be demolished has little relevance in the present complaint. The proper factual question is whether the Issin II restaurant premises could have been reconstructed sixty days after the earthquake, given the fact that both Buildings A and B were ordered demolished. There was no genuine dispute that the construction could not be completed within sixty days. The decision of the trial court granting partial summary judgment is hereby **AFFIRMED**.