IN THE SUPREME COURT OF GUAM

DANNY JAE H. YANG,
Plaintiff-Appellee,

vs.

EDWARD SA YONG HONG,
Defendant-Appellant.

Supreme Court Case No. CVA97-035
Superior Court Case No. CV0855-93

OPINION

Filed: July 2, 1998

Cite as: 1998 Guam 9

Appeal from the Superior Court of Guam
Argued and Submitted on 5 May 1998
Hagåtña, Guam

Appearing for the Plaintiff-Appellee:
Daniel R. Del Priore, Esq.
Suite 507, GCIC Building
414 West Soledad Avenue
Hagåtña, Guam 96910

Appearing for the Defendant-Appellant:
William C. Bischoff, Esq.
134 Chalan Santo Papa, Ste. 202
Hagåtña, Guam 96910

BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS, Associate Justice; and JOSE I. LEON GUERRERO, Associate Justice.

WEEKS, J.:

[1] Appellant Edward Sa Yong Hong (Hong) timely appeals the trial court's factual findings that Hong owed $80,000 in loans plus interest and costs to Appellee Danny Jae H. Yang (Yang). Hong also appeals the order denying his motion for a new trial, based upon newly discovered evidence at trial. This court finds that the trial court was not clearly erroneous in its factual findings in favor of Yang, nor did it abuse its discretion in denying the motion for a new trial. We therefore affirm the decision below.

I.

[2] Plaintiff-Appellee Yang sued Defendant-Appellant Hong over three insufficient funds checks, payable to cash, amounting to $80,000. Yang contends that the checks were written as evidence of loans that his mother had made to Hong. The first check for $30,000 dated 3 January 1992 with the word "loan" written on the memo line is not in dispute, admitted by Hong to be evidence of a loan made from Yang, but Hong asserts that $29,000 of the $30,000 loan was paid back. The next two checks dated 13 October 1992, for $30,000 and $20,000 respectively, were disputed by the parties. Yang contends that they were evidence of a loan of $50,000 (combined) made to Hong; Hong contends that the checks evidence Hong's guarantee to Yang for Yang's contributions to a failing Korean money club, and that no loan of $50,000 was made from Yang to Hong. The memo line on both these checks is without notation. At trial, there was evidence of $30,000 of Citibank loan proceeds that were used as part of Yang's loan money to the Hongs around the time of the first $30,000 loan in January 1992.

[3] A bench trial was held on 24 January 1997, after which time the trial court entered judgment for Plaintiff Yang in the sum of $80,000 for payment on the three (3) dishonored checks, plus pre- and post-judgment interest, and costs of suit. Hong thereafter sought further records concerning the Citibank proceeds claimed to have been used in the loan. The records showed that the Citibank loan proceeds were disbursed to Yang on 15 October 1992 and remained in Yang's Union Bank account throughout November 1992. They therefore were not used in the loans between Yang and Hong. Hong brought a motion for a new trial based on Yang's testimony at trial of the Citibank loan proceeds. The motion for a new trial was denied by the trial court on 2 July 1997.

II.

[4] The Supreme Court has jurisdiction over this appeal pursuant to 7 GCA §§ 3107(a), 3108(a), 25201 (1994) and 48 U.S.C. § 1424-3(d) (1984). Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Guam R. Civ. P. 52(a); *Coffey v. Govt. of Guam*, 1997 Guam 14 ¶ 6. Factual determinations are reviewed for clear error. *Guam v. Chargualaf*, Crim. No. 88-00068A, 1989 WL 265040, at *2 (D. Guam App. Div. Sept. 26, 1989). Findings of fact made by a judge after a bench trial are subject to the clearly erroneous standard of review. *Wilson v. United States*, 645 F.2d 728, 730 (9th Cir. 1985); *Lei v. Global Eng'g & Maintenance Svc. Corp.*, Civ. No. CV 96-00007A, 1996 WL 875782, at *4 (D. Guam App. Div. Oct. 4, 1996). A decision on a motion for a new trial is reviewed on appeal for an abuse of discretion by the trial judge. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278, 109 S.Ct. 2909, 2921 (1989); *Phillips v. Ceribo*, Civ. No. 83-0053A, 1984 WL 48862, at *1 (D. Guam App. Div. April 1, 1984).

III.

[5] Hong asserts that the trial court abused its discretion in its factual findings in favor of Yang. Hong's reliance on this standard is somewhat misguided. While it is true that a trial judge's reliance on clearly erroneous facts amounts to an abuse of discretion, *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1464 (9th Cir. 1995), the fundamental issue is whether the facts were erroneously determined. Hong bases his position upon the fact that Yang and his father are taxi drivers, and would not have had the money to lend to Hong, as evidenced by copies of previous years' income tax returns. He contends that the trial court's judgment "tends to defy logic and common sense", *Lampley v. Government of Guam*, 882 F.Supp. 957, 959 (D. Guam App. Div. 1995), and amounted to an abuse of discretion. Testimony was elicited at trial concerning a Korean money club, or "gwae tong", to which Yang had contributed substantial amounts. Mrs. Hong was the organizer of the club. Hong contends that the two checks dated 13 October 1992 in the amounts of $30,000 and $20,000, for a total amount of $50,000, were written by Hong to Yang as a guarantee of Yang's contribution to the money club rather than as evidence of a loan. Several witnesses presented evidence of the gwae tong and of their contributions into the Korean money club. Witness Yong Hui An stated that she witnessed Mrs. Hong give Mrs. Yang $20,000, allegedly for partial repayment of the first $30,000 loan. This first $30,000 loan is not in dispute by the parties. At trial, Mrs. Hong stated that on another occasion she had written a member of another gwae tong two (2) checks similar to what she had done with the Yangs on 13 October 1992, as a guarantee of their contributions to the money club, and not as personal loans, where she had written "Gwae's guaranteed money" on the memo line. Hong claims that because the money club was about to fail due to some members not paying their share into the club, the 13 October 1992 checks written to Yang were simply guarantees of Yang's contribution. This was done only because of the repeated request of Mrs. Yang, and no loan of $50,000 was made from Yang to Hong.

[6] Appellee Yang contends that the trial court's findings are amply supported by evidence in the record, testimonial and documentary, presented at trial. "If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Service Employees Int'l Union, AFL-CIO, CLC v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1317 n.7 (9th Cir. 1992) (citation omitted). Yang points out that the trial court actively participated in the proceedings, asking questions of the witnesses, assessing their demeanor and credibility, as well as questioning both counsel throughout trial. Appellee states that Yang had the financial ability to lend $80,000 to Hong based upon evidence of prior years' savings from Danny Yang and his father, earnings from their taxi driving jobs. Danny Yang stated that he had over $70,000 saved. Mrs. Yang held all the monies from her husband and her son Danny, as it is Korean custom to give all earnings to the mother, who is the custodian of the family income. Yang also had available $30,000 in Citibank loan proceeds left over from a loan to purchase a house. Plaintiff-Appellee maintains that the trial court correctly determined that although it was difficult to believe that the Yangs could have that much money available to them, given that Hong conceded that Yang loaned the first $30,000 to him and that the 3 January 1992 check was evidence of the loan, the credible evidence showed that Yang made a loan to Hong for an additional $50,000, and that there was no sufficient evidence of repayment.

[7] This court is persuaded by the argument of Plaintiff-Appellee Yang. We cannot characterize the trial court's findings such that it "tends to defy logic and common sense." *Lampley*, 882 F.Supp. at 959. As stated by the court in *Chargualaf:*

> A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake. The appellate court accords particular weight to the trial judge's assessment of

> conflicting or ambiguous evidence. The applicable standard of appellate review is narrow; the test is whether the lower court rationally could have found as it did, rather than whether the reviewing court would have ruled differently.

Civ. No. 88-00068A, 1989 WL 265040 at *2 (D. Guam App. Div. Sept. 26, 1989). In reviewing the record before us, even if we were to have "weighed the evidence differently", if the trial court's "account of the evidence is plausible in light of the record viewed in its entirety", this court may not reverse. *Service Employees Int'l Union, AFL-CIO, CLC*, 955 F.2d at 1317. The trial court found the Yangs to be the credible witnesses. The fact finder had the opportunity to observe the demeanor and credibility of the witnesses, evaluate and weigh the documentary evidence, and make its decision. We find no clear error in the trial court's judgment in favor of Plaintiff Yang.

[8] Hong further claims that the trial court abused its discretion in denying him a new trial based on the surprise testimony of the Citibank proceeds at trial, stating that this testimony was new and came as a surprise to him. He asserts that only after the trial could he verify the truth or falsity of the testimony, after which time, based upon the Citibank records, he claims that Yang's testimony was perjurious and that the court should have granted him an evidentiary hearing.[1]

[9] Yang contends that Hong was aware of the Citibank proceeds at a pre-trial deposition of Danny Yang taken on 14 July 1993, and it was therefore not a "surprise" to Hong at trial. However, the court in *Moylan v. Siciliano,* 292 F.2d 704, 705 (9th Cir. 1961) stated, "[I]f this record could be said to show reasonably genuine surprise on the part of appellants the remedy would have been to ask for a continuance to allow appellants to 'gather their wits' and prepare for the presentation of rebuttal testimony." Since Hong did not ask for a continuance to address the testimony of the Citibank proceeds, Yang states that Hong should not be allowed relief as a victim of surprise under Guam Rule of Civil Procedure 60(b)(1).

[10] We find Hong's claims of surprise and newly discovered evidence in his motion for a new trial to be without merit. Rule 60(b) states in relevant part:

> **Rule 60. Relief from Judgments or Order.**
>
> **(b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party . . . .

GRCP 60(b). Hong cannot claim surprise or newly discovered evidence because the record shows that he was aware of the Citibank loan at Danny Yang's pretrial deposition on 14 July 1993, even though the loan proceeds were not tied into the Hong loan at that time. However, it became clear at trial that these partial loan proceeds were available to the Yangs, during which time Hong could have obtained further information, before a final judgment was rendered. Even if we were to adopt Hong's position and treat this as newly discovered evidence, it was discovered during trial, which would have been the appropriate

[1] *See Phillips v. Crown Cent. Petroleum Corp.*, 556 F.2d 702 (4th Cir. 1977); *Tas Int'l Travel Serv., Inc. v. Pan Am. World Airways, Inc.*, 96 F.R.D. 205 (S.D.N.Y. 1982); *Western Reserve Oil and Gas Co. v. Key Oil, Inc.*, 626 F.Supp. 948 (S.D.W.Va. 1986).

time to bring it to the attention of the court and seek a continuance for further discovery, before judgment was rendered.

Guam Rule of Civil Procedure 9(b) reads:

> **Rule 9. Pleadings in Special Matters.**
>
> **(b) Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

GRCP 9(b).

[11] Hong in his motion for a new trial states, "A fraud has been practiced upon the court". While the circumstances are set forth, only the general averment of fraud as stated above is given. In his opening and reply briefs, the word "fraud" is not mentioned, focusing instead on the word "perjury". Whether the fraudulent circumstances are stated with particularity is an issue that we do not reach, for the trial court found that Hong had the opportunity before conclusion of the trial to subpoena documents and to rebut any evidence of the alleged fraudulent circumstances.

[12] As to the alleged perjury of Yang, Yang brings forth testimony that the Yangs never categorically stated that the Citibank loan proceeds were received at the same time Mrs. Yang gave the first cash loan of $30,000 to Mrs. Hong. At trial, in response to Hong's questions about when the loan proceeds were received, Mrs. Yang first states, "I can't remember." Further questioning along the same line begets : Q. You were pretty sure a few minutes ago [referring to receipt of the Citibank proceeds in Jan. 1992, when Mrs. Yang gave $30,000 to Mrs. Hong], why . . . why are you so unsure now? A. I answered because you said "around that time". Reporter's Transcript of Proceedings on Appeal at 114, Jan. 24, 1997. Additional testimony adduced was that the Yangs never kept any receipts, thereby adding credibility to the discrepancy in the timing of receipt of the Citibank proceeds and its use in the Hong loans. Yang deems that this mistake in testimony of the dates could never be characterized as perjury, but rather "harmless error", and that the appellate consideration is whether a different decision would be reached based upon Defendant Hong's contention. *Moylan*, 292 F.2d at 705.

> Guam Rule of Civil Procedure 61 reads:
>
> **Rule 61. Harmless Error.** No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or order, unless the refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

GRCP 61. Hong claims that the Yangs lied about when they received the partial Citibank loan proceeds and the use of these proceeds in the Hong loan. The trial court found sufficient evidence in the record to make a determination that Yang had made specific loans to Hong, regardless of the when the Citibank proceeds were received and how they were used. As the trial court stated, "Where she [Yang] gets her money is not the issue in the case . . . . You prove that she did or didn't give money." Reporter's Transcript of Proceedings on Appeal at 22, Jan. 24, 1997. The timing of when the proceeds were received and how they were used was not a determining factor in the trial's court factual findings. A consideration

in passing on a motion for new trial is whether the grounds offered suggest a substantial chance of reaching a different result in a new trial. *Moylan*, 292 F.2d at 705. In the instant case, Yang's error in the time of receipt of the proceeds and their use in the Hong loan would not have made a difference in the trial court's decision, thus not affecting the substantial rights of the parties.

IV.

[13] Based on the foregoing analysis, we find that the trial court did not clearly err in its factual findings in favor of Plaintiff-Appellee Yang, nor did it abuse its discretion in denying Appellant's motion for new trial.[2] The order of the trial court is **AFFIRMED**.

[2] The court notes with dismay the language used by Defendant-Appellant Hong's counsel in suggesting the trial court's reasons for certain of its actions during the trial. First, as counsel are often reminded during trial, one cannot know what is in another's mind; second, the words used were both sarcastic and disrespectful. Such are not appropriate in pleadings before the highest court of Guam.