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SUPREME COURT
GUAM

IN THE SUPREME COURT OF GUAM

GUAM SANKO TRANSPORTATION, INC.,
Plaintiff-Appellant,

v.

PACIFIC MODAIR CORPORATION, TOYO NETSU KOGYO KAISHA,
LTD., and DOES II through X,
Defendants-Appellees.

Supreme Court Case No. CVA11-009
Superior Court Case No. CV0915-08

OPINION

Cite as: 2012 Guam 2

Appeal from the Superior Court of Guam
Argued and submitted October 24, 2011
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; KATHERINE A. MARAMAN, Associate Justice; and ROBERT J. TORRES, Associate Justice.

TORRES, J.:

[1] Plaintiff-Appellant Guam Sanko Transportation, Inc. (“Guam Sanko”) appeals the trial court’s grant of summary judgment in favor of Defendants-Appellees Pacific Modair Corporation (“PMC”), Toyo Netsu Kogyo Kaisha, Ltd. (“TNK”), and Does Two through Ten (collectively referred to as “PMC-TNK”), finding consent was given on behalf of Guam Sanko to preclude its action of trespass against PMC-TNK. We reverse and remand because Guam Sanko has demonstrated that there are genuine issues of material fact as to whether consent was given, requiring observation of the demeanor of witnesses and evaluation of their credibility at trial, and as to the reasons that SJ Rental, Inc. (“SJ Rental”) delayed its purchase of the property and reduced its purchase price.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Guam Sanko was the registered owner of Lot Number 5099-6, Municipality of Dededo, Guam (“Property”). *See* Appellant’s Excerpts of Record (“ER”), tab 6 at 2 (Decl. Takemitsu Noguchi, Dec. 2, 2009). PMC was the owner of an adjoining lot, Lot Number 5089-1-1. ER, tab 2 at 2 (Defs.’ Mot. Summ. Judgment, Oct. 1, 2009). In May 2008, Guam Sanko entered into a written agreement with SJ Rental by which Guam Sanko would sell and convey the Property to SJ Rental. ER, tab 6, ex.1 at 50-52 (Land Purchase Agreement, May 5, 2008). One day before the scheduled closing, Guam Sanko discovered that PMC had installed water and sewer pipes beneath the Property. ER, tab 6 at 3 (Decl. Takemitsu Noguchi). Upon discovery of the water and sewer lines, SJ Rental delayed its purchase of the Property, and the sale was not completed until September 2008. *Id.* at 3-6.

[3] In August 2008, Guam Sanko filed suit for trespass in the Superior Court of Guam. Record on Appeal (“RA”), tab 3 (Compl., Aug. 11, 2008). In its defense, PMC alleged that Guam Sanko’s prior general manager, Seiji Kiyonaga, gave permission to install the pipes to Hideki Ichinose, then executive officer of PMC. Appellees’ Br. at 4-5 (Aug. 22, 2011). Kiyonaga passed away in 1999 before the instant dispute arose. *See* ER, tab 4 at 54 (Dep. Hideki Ichinose, Apr. 13, 2009). PMC-TNK subsequently filed a motion for summary judgment pursuant to Rule 56 of the Guam Rule of Civil Procedure (“GRCP”), which the trial court granted, finding that PMC-TNK “have met their burden of presenting evidence to support the defense of irrevocable license by estoppel,” and Guam Sanko “has established no evidence to refute the facts demonstrated.” ER, tab 2 at 1-9 (Defs.’ Mot. Summ. Judgment); RA, tab 87 at 11, 13 (Dec. & Order, June 3, 2010). The court also held that “even if the Plaintiff had proven a trespass, there is no evidence that [PMC-TNK’s] alleged trespass proximately caused any of the damages claimed by [Guam Sanko] and summary judgment would be granted in favor of [PMC-TNK] as to the issue of compensatory damages.” RA, tab 87 at 20 (Dec. & Order, June 3, 2010). Guam Sanko thereafter filed a Rule 60(b) Motion for Reconsideration, which the trial court denied. RA, tab 102 at 1-8 (Dec. & Order, Mar. 28, 2011). This appeal followed.

II. JURISDICTION

[4] This court has jurisdiction over an appeal from a final judgment of the Superior Court of Guam pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-89 (2012)), 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[5] A trial court’s decision to grant a motion for summary judgment is reviewed *de novo*. *Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3 ¶ 8.

IV. ANALYSIS

A. The Trial Court's Grant of Summary Judgment in Favor of PMC-TNK

[6] The trial court granted summary judgment in favor of PMC-TNK based on Ichinose's testimony that he received permission to install and use a water/sewer line from Kiyonaga, an authorized agent of Guam Sanko. RA, tab 87 at 11 (Dec. & Order, June 3, 2010). The trial court specifically found that "Plaintiff has established no evidence to refute the facts demonstrated by Defendants." *Id.* at 13. Guam Sanko contends that summary judgment was improper, as a trial was necessary to evaluate the credibility of all the witnesses and properly weigh the evidence to determine whether PMC-TNK's assertion of an oral license is true, given Ichinose's alleged bias and the unavailability of Kiyonaga. Appellant's Br. at 14 (July 22, 2011). PMC-TNK responds by arguing that "Guam Sanko offers no admissible evidence to rebut Mr. Ichinose's testimony," but instead offers inadmissible character evidence and "unfounded attacks on Mr. Ichinose's credibility." Appellees' Br. at 7.

1. Burden on the Moving Party

[7] "In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party." *Guam Top Builders*, 2006 Guam 3 ¶ 8 (quoting *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7) (internal quotation marks omitted). Summary judgment is only 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 and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c).¹ "A material fact is one that is relevant to

¹ GRCP 56(c) is modeled after Rule 56(c) of the Federal Rules of Civil Procedure. Compare GRCP 56(c) with FRCP 56(c).

an element of a claim or defense and whose existence might affect the outcome of the suit.” *Guam Top Builders*, 2006 Guam 3 ¶ 9 (quoting *Flores*, 2004 Guam 25 ¶ 8) (internal quotation marks omitted). “There is a genuine issue, if there is ‘sufficient evidence’ which establishes a factual dispute requiring resolution by a fact-finder.” *Guam Pac. Enter., Inc. v. Guam Poresia Corp.*, 2007 Guam 22 ¶ 8 (citations and internal quotation marks omitted). “Doubts about such factual issues must be resolved against the movement for summary judgment.” *Arney v. United States*, 479 F.2d 653, 659 (9th Cir. 1973). The moving party can satisfy and discharge its burden merely by showing there is an absence of evidence to support the non-moving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party can also satisfy and discharge its burden by producing “evidence negating an essential element of the non-moving party’s case.” *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1106 (9th Cir. 2000).

[8] Rule 56(c) of the Federal Rules of Civil Procedure (“FRCP”) requires summary judgment if, after adequate discovery, the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. There can be no “genuine issue as to any material fact” if there is a complete failure of proof concerning an essential element of the nonmoving party’s case, since such a failure renders all other facts immaterial. *Id.* at 323 (internal quotation marks omitted). This court has previously commented on the elements of trespass:

A party claiming trespass must prove the following elements: a) the tortfeasor intentionally; b) enters land in possession of another, or causes a thing or a third person to do so; or c) remains on the land; or d) fails to remove from the land a thing which he is under a duty to remove.

Guerrero v. DLB Constr. Co., 1999 Guam 9 ¶ 16 (citing Restatement (Second) of Torts § 158 (1988)). Regarding the defense of privilege, Restatement (Second) of Torts § 158 provides:

“Conduct which would otherwise constitute a trespass is not a trespass if it is privileged. Such a privilege may be derived from the consent of the possessor” Restatement (Second) of Torts § 158 cmt. e (1988). Whether consent was given is a material fact in this case because it is asserted as the defense of privilege which affects the outcome of the suit. Applying these standards to the instant trespass action, PMC-TNK met its burden if they showed that no evidence of unprivileged entry exists or if they produced evidence that consent was given. The trial court found that PMC-TNK met its burden by presenting evidence through affidavits that Kiyonaga gave consent to Ichinose. RA, tab 87 at 11 (Dec. & Order, June 3, 2010). Evidence of consent negated an essential element of the trespass action, and the burden shifted to Guam Sanko to point to specific facts showing a genuine issue of material fact for trial that would preclude summary judgment. To show that a genuine issue of material fact exists, Guam Sanko points to specific facts that raise doubt as to the credibility of PMC-TNK’s chief witness.

2. Attacking Credibility of Witnesses at the Summary Judgment Stage

[9] Although Guam Sanko raised the issue of credibility in its opposition to the motion for summary judgment, ER, tab 3 at 3-5 (Pl.’s Opp’n Defs.’ Mot. Summ. Judgment, Dec. 2, 2009), the trial court did not make any reference to any evaluation of Ichinose’s credibility in its Decision and Order. *See* RA, tab 87 at 1-21 (Dec. & Order, June 3, 2010). Guam Sanko asserts that a trial is necessary for the purpose of properly weighing Ichinose’s testimony and that Kiyonaga’s death “impacts on the weight of the evidence rather than its admissibility.” Appellant’s Br. at 16 (quoting *Savarese v. Agriss*, 883 F.2d 1194, 1201 (3d Cir. 1989)). In response, PMC-TNK argues that credibility is not a basis to defeat summary judgment and a trial is not required in the absence of contradictory evidence. Appellees’ Br. at 16-25.

[10] Regarding the burden of the non-movant, GRCP 56(e) provides, in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must set forth specific facts* showing that there is a genuine issue for trial.

GRCP 56(e) (emphasis added). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, whether his ruling is on a motion for summary judgment or for a directed verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). “The opponent of the [summary judgment] motion ‘must adduce factual material which raises a substantial question of the veracity or completeness of the movant’s showing or presents countervailing facts.’” *Vantage Point, Inc. v. Parker Bros.*, 529 F. Supp. 1204, 1213 (E.D.N.Y. 1981) (quoting *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972)). “[W]hen challenges to witness’ credibility are *all* that a plaintiff relies on, and he has shown no independent facts—no proof—to support his claims, summary judgment in favor of the defendant is proper.” *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (citation omitted). If, however, there is any indication that the witness was biased, dishonest, mistaken, unaware or unsure of the facts, there is an obvious advantage to be gained from cross-examination. *See Lundeen v. Cordner*, 354 F.2d 401, 408 (8th Cir. 1966). When a non-movant points to specific facts that raise doubt as to the credibility of the proffered evidence, even though that evidence is sufficient to support a jury finding as to that fact, the non-movant is entitled to a trial if a reasonable jury could conclude otherwise. *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1159 (Fed. Cir. 2004).

[11] Guam Sanko put forth evidence questioning the bias of Ichinose, citing to the fact that he resigned in June 2008 only to be rehired as an advisor at a monthly rate of \$11,500.00 later that

month when the instant dispute arose. Appellant's Br. at 18; ER, tab 3 at 5 (Pl.'s Opp'n Defs.' Mot. Summ. J.); ER, tab 17 at 99 (Dep. Yasuo Murohashi, Jan. 19, 2009). Guam Sanko also pointed to opinion and reputation evidence of Kiyonaga's character, showing that it was in his practice to require a written agreement and payment of rent for the lease of property. Appellant's Br. at 18. Thus, PMC-TNK is wrong in its assertion that there is an absence of contradictory evidence as to the issue of consent. Moreover, Guam Sanko provided evidence that one or both of the defendants would pay SJ Rental or its representative, Joji Sugamura, a fee of \$30,000.00 to have Guam Sanko dismiss the lawsuit, suggesting that Sugamura was biased and had an economic interest in the result of the lawsuit. ER, tab 7, ex. D at 1-2 (Decl. Naoki Shoji, Sept. 22, 2008). From the record, it is clear that Guam Sanko met its burden by showing additional facts indicating possible bias on Ichinose's part. PMC-TNK asserts that Guam Sanko "needs to offer specific facts showing that Mr. Ichinose is not only a liar, but a perjurer," and not merely that he is biased. Appellees' Br. at 17 (emphasis omitted). On the contrary, evidence of bias is enough to present a genuine issue of material fact and require cross-examination of the witness. *See Lundeen*, 354 F.2d at 408. This evidence of lack of credibility is enough to overcome summary judgment. Thus, the trial court erred in finding that Guam Sanko established no evidence to refute the facts demonstrated by PMC and in failing to give credence to the testimony offered by Guam Sanko, particularly because the court must draw inferences and view the evidence in a light most favorable to the non-moving party. *See* RA, tab 87 at 13 (Dec. & Order, June 3, 2010); *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7 (citing *Edwards v. Pac. Fin. Corp.*, 2000 Guam 27 ¶ 17).

[12] The advisory committee note to the 1963 amendment of FRCP 56(e) states: "Where an issue as to a material fact cannot be resolved without observation of the demeanor of the

witnesses in order to evaluate their credibility, summary judgment is not appropriate.” Fed. R. Civ. P. 56(e) advisory committee’s note. However, courts note that “[t]he opposing party cannot as a matter of course force a trial merely in order to cross-examine such an affiant, nor must the Court deny the motion for summary judgment on the basis of a vague supposition that something might turn up at the trial.” *Lundeen*, 354 F.2d at 408. “A mere desire to cross-examine witnesses or a hope to undermine their credibility at trial is not sufficient to avoid summary judgment.” *Woods v. Protection One Alarm Monitoring, Inc.*, 628 F. Supp. 2d 1173, 1196 (E.D. Cal. 2007). Instead, the showing of specific facts that suggest a genuine issue of material fact will support the need to cross-examine the witnesses to assess credibility at trial. *See id.* “Moreover, . . . especially when the basic facts are within the defendant’s exclusive control, credibility questions are important issues which should be presented and preserved for decision by the ultimate fact finder.” *Lancaster v. Ohio River Co.*, 446 F. Supp. 199, 201 (N.D. Ill. 1978).

[13] PMC-TNK refutes the need for cross-examination, arguing that Ichinose has already been cross-examined during the deposition hearing and that the province of the jury will not be invaded by a bench trial, because the fact finder will be the same judge who heard the summary judgment motion. Appellees’ Br. at 20-21. PMC-TNK points to the fact that Ichinose’s deposition was videotaped and that the transcript and videodisc of the deposition were filed with the court. *Id.* at 18. Credibility, however, is not to be determined by the judge at the summary judgment stage. *See Anderson*, 477 U.S. at 255. Because the issue of consent cannot be resolved without observation of Ichinose’s demeanor, summary judgment is not appropriate. It is also of consequence that Ichinose is the only available witness that can testify regarding his alleged conversation with Kiyonaga wherein Kiyonaga supposedly granted PMC oral consent; Ichinose’s credibility becomes an important issue to be resolved by the ultimate fact finder. Because there

is a genuine issue of material fact as to consent, the trial court erred in granting summary judgment in favor of PMC-TNK.

3. Evidence Regarding Compensatory Damages

[14] The trial court held that summary judgment was appropriate even if Guam Sanko had proven trespass because Guam Sanko “has failed to produce any evidence that [PMC-TNK’s] acts in building and maintaining a water/sewer line . . . actually caused the reduction in purchase price or delay in sale of the property to SJ Rental.” RA, tab 87 at 20 (Dec. & Order, June 3, 2010). Guam Sanko argues that it set forth “specific probative evidence of its compensatory damages that controverted [PMC-TNK’s] argument or evidence.” Appellant’s Br. at 25. PMC-TNK produced evidence that the main reason for the delay in sale and reduction in purchase price was a large dip in the stock market. Appellees’ Excerpts of Record (“SER”) at 113-15 (Dep. Joji Sugamura, Sept. 9, 2009). Applying summary judgment principles, the burden shifted to Guam Sanko to set forth specific facts showing a genuine issue for trial. *See Fritz Co.*, 210 F.3d at 1106. Guam Sanko provided testimony that itself and SJ Rental “agreed to close escrow on the sale and the purchase of the Property on the condition that the purchase be reduced by \$80,000.00 because of the concealed water and sewer pipes that were beneath the Property.” ER, tab 6 at 6 (Decl. Takemitsu Noguchi). Because Guam Sanko set forth specific facts to show a genuine issue for trial, the trial court erred in granting summary judgment in favor of PMC-TNK on the issue of compensatory damages.²

² Title 18 GCA §§ 2225 and 2226 govern Guam’s statutory authority for compensatory damages, which are controlling in this case. *See* 18 GCA §§ 2225, 2226 (2005).

B. Other Issues on Appeal

[15] The trial court found that PMC could not have acquired a prescriptive easement because it enjoyed permission from Guam Sanko to enter the property. RA, tab 87 at 7-8 (Dec. & Order, June 3, 2010). In its opposition brief, PMC-TNK asserts that a trial would have been futile and that PMC-TNK “would still be entitled to summary judgment because the use [of the Property] would have been a prescriptive easement.” Appellees’ Br. at 22. In essence, PMC-TNK appeals the trial court’s denial of summary judgment with respect to the issue of prescriptive easement. However, PMC-TNK did not file a cross-appeal on the matter and, therefore, we refrain from ruling on the issue.

[16] Guam Sanko also asserts that the trial court erred by not considering Guam Sanko’s evidence of the reputation or opinion of Kiyonaga’s character among his business associates to refute Ichinose’s testimony that consent was given. Appellant’s Br. at 19. Because there was no ruling by the trial court as to the admissibility of the proffered evidence, we likewise refrain from ruling on the issue of its admissibility.

VI. CONCLUSION

[17] We **REVERSE** the trial court’s grant of summary judgment in favor of PMC-TNK and **REMAND** the matter back to the trial court. Guam Sanko met its burden by pointing to specific facts to demonstrate that Ichinose’s credibility should be tested at trial and a genuine issue of material fact exists as to whether oral consent was given by Guam Sanko’s agent, Kiyonaga, allowing PMC to install and use the water and sewer pipes across the Property. Guam Sanko also met its burden by showing evidence that the presence of the water and sewer lines caused SJ Rental to reduce its purchase price and delay its purchase of the Property. We decline to discuss the prescriptive easement issue, as it was not asserted on cross-appeal by PMC-TNK. We also

refrain from discussing the admissibility of certain evidence at the summary judgment stage because the trial court made no ruling regarding its admissibility.

Original Signed: **Robert J. Torres**
By

ROBERT J. TORRES
Associate Justice

Original Signed: **Katherine A. Maraman**
By

KATHERINE A. MARAMAN
Associate Justice

Original Signed: **F. Philip Carbullido**
By

F. PHILIP CARBULLIDO
Chief Justice