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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

JAMES D.J. JI,
Plaintiff-Appellee,

v.

ALFRED B. TOVES,
Defendant-Appellant.

Supreme Court Case No.: CVA18-032
Superior Court Case No.: CV0118-09

OPINION

Cite as: 2020 Guam 2

Appeal from the Superior Court of Guam
Argued and submitted on August 20, 2019
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and ROBERT J. TORRES, Associate Justice.[1]

CARBULLIDO, J.:

[1] Defendant-Appellant Alfred B. Toves appeals from a final judgment of the Superior Court of Guam finding for Plaintiff-Appellee James D.J. Ji, awarding specific performance and transfer of land under a contract. We vacate the Judgment and remand for the trial court to expressly state whether it exercises its discretion to allow an amendment to the pleadings; and, if so, for the court to address whether Toves met his burden of establishing undue influence.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Ji and Toves entered into a contract (the "First Contract") on September 28, 2005. Under this contract, Ji had to pay the $580 closing fee on a probate matter—*In the Matter of the Estate of Maria Bamba Toves*, PR0139-90—which made Toves a co-owner[2] of a parcel of land, Lot No. 5, in Barrigada, Guam. Ji was also required under the First Contract to renovate a home on the property for a cost of $35,000. After such renovations were complete, the unit was to be leased or sold, and the parties were to divide the profits equally, after deducting the closing and renovation costs.

[3] Ji and Toves entered into another contract (the "Second Contract"), in which Ji would subdivide the land of Lot No. 5 into two parcels, labeling the parcels Lot No. 5-1 and Lot No. 5-R1. Upon completion of this subdivision, Toves was to deed Lot No. 5-1 to Ji, and Ji would provide Toves with a modular home on Lot No. 5-R1. The parties further agreed that, upon completion of these requirements, the First Contract and lease would become null and void. If

[1] The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

[2] We express no position as to any cloud of title in failing to include the other co-owner, the Estate of Frank B. Toves, in the conveyance or litigation. *See* Guam R. Civ. P. 19.

either party failed to satisfy his respective obligations under the Second Contract, the First Contract and lease would remain in effect.

[4] Ji sued, alleging that Toves had breached both the First Contract and the Second Contract and seeking specific performance of each. Specifically, Ji alleged that he had performed his obligations under the Second Contract by subdividing the property and providing Toves with a modular home, but that Toves breached the agreement by failing to transfer his interest in the adjacent lot by deeding Lot No. 5-1 to Ji. Toves filed an Answer denying the allegations and asserting various affirmative defenses, including that he did not commit a material breach of contract.

[5] Ji moved for summary judgment. In opposition, Toves argued that both contracts were void and that issues of material fact prevented the grant of summary judgment. Among other things, Toves argued:

> Plaintiff is a savvy business man [sic] who knew what he was doing when he drafted and presented the 2005 and 2006 [contracts] to Defendant. Defendant, on the other hand, is a simple man who suffers from Post Traumatic Stress Syndrome [sic] (hereinafter "PTSD") as he is a Vietnam veteran and has been deemed 100% disabled. Defendant never misrepresented the extent of his interest in Lot 5 and Plaintiff always knew that Defendant's interest was only an undivided one-half interest in Lot 5. Plaintiff took advantage of Defendant when he persuaded Defendant to execute the [contracts] knowing that Defendant may not have had the mental capacity to understand the legality of the two [contracts] due to Defendant's PTSD.

Record on Appeal ("RA"), tab 18 at 6 (Opp'n Mot. Summ. J., Mar. 4, 2011). The trial court denied the motion, finding that material questions of fact existed regarding whether Toves had the capacity to enter into the First or Second Contract.

[6] The court held a bench trial, during which Toves appeared *pro se*. After considering the evidence, the court found that the contracts were valid and that Ji performed his obligations under both contracts, but that Toves failed to fulfill his obligation to deed Lot No. 5-1. The court

entered judgment, finding for Ji, and awarded specific performance under the Second Contract requiring Toves to transfer the title to Lot 5-1. Toves timely appealed.

II. JURISDICTION

[7] We have jurisdiction over appeals from a final judgment of the Superior Court of Guam. *See* 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-91 (2019)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[8] We review conclusions of law *de novo*. *Unified Interest v. PacAir Props., Inc.*, 2017 Guam 9 ¶ 24. We review the trial court's findings of fact following a bench trial for clear error. *Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶ 21; *see also Unified Interest*, 2017 Guam 9 ¶ 24. "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Fargo Pac.*, 2006 Guam 22 ¶ 22.

IV. ANALYSIS

[9] Toves argues that the trial court committed clear error in finding that the contracts between himself and Ji were valid. *See* Appellant's Br. at 12 (Jan. 27, 2019). Toves asserts that the trial court erred in failing to find that his apparent consent to the agreements resulted from Ji's undue influence. *See id.* at 13-14. Under Guam law, parties have freedom of contract, an essential element of which is mutual consent. *See* 18 GCA § 85102 (2005). For consent to a contract to be considered valid, it must be freely given, mutual, and communicated by each party to the other. *See* 18 GCA § 85301 (2005). Consent is neither real nor freely given when the result of undue influence. *See* 18 GCA § 85303(4) (2005). Undue influence occurs in one of three situations:

> 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
>
> 2. In taking an unfair advantage of another's weakness of mind; or,
>
> 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

18 GCA § 85311 (2005). Toves asserts that undue influence occurred under all three subsections of 18 GCA § 85311. *See* Appellant's Br. at 12-13. In opposition, Ji argues that Toves never asserted the affirmative defense of "undue influence."[3] *See* Appellee's Br. at 4, 20-21 (May 15, 2019). Toves maintains, however, that the trial court allowed the pleadings to conform to the evidence during the trial. *See* Appellant's Reply Br. at 6-8 (May 29, 2019). For the reasons set forth below, we vacate the judgment and remand with directions.

A. The Trial Court Did Not Indicate Whether It Granted an Amendment to the Pleadings to Include the Affirmative Defense of Undue Influence

[10] In responding to a complaint, a defendant is obligated under the Guam Rules of Civil Procedure to set forth "in short and plain terms the party's defenses to each claim asserted." Guam R. Civ. P. 8(b). Additionally, a defendant "shall set forth affirmatively . . . any [] matter constituting an avoidance or affirmative defense" that he or she has to the claims asserted by plaintiff. *See* Guam R. Civ. P. 8(c). Generally, defenses not raised in the pleadings are waived. *See Citizens Sec. Bank (Guam), Inc. v. Bidaure*, 1997 Guam 3 ¶ 10. However, Rule 15(b) of the Guam Rules of Civil Procedure provides an exception to this rule of waiver and allows parties to try unpleaded defenses at trial. *See id.* ¶ 16; *see also* Guam R. Civ. P. 15(b). Under that Rule, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties,

[3] Both parties have treated the defense of undue influence in this case as an affirmative defense. We accept the parties' characterization of undue influence as an affirmative defense for the sole purpose of resolving this appeal. *See* 18 GCA § 85302 (2005) (stating that contract procured by undue influence is voidable—not absolutely void); *see also Fallon v. Triangle Mgmt.*, 215 Cal. Rptr. 748, 749-50 (Ct. App. 1985); Cal. Civ. Jury Instr. No. 334, Affirmative Defense—Undue Influence (Jud. Council of Cal. Advisory Comm. on Civ. Jury Instrs. 2003).

they shall be treated in all respects as if they had been raised in the pleadings." Guam R. Civ. P. 15(b).

[11] Courts have often relied upon Rule 15(b) or its federal analog to permit parties to present affirmative defenses for the first time at trial or even on appeal. *Citizens Sec. Bank*, 1997 Guam 3 ¶¶ 16-17; *see also, e.g.*, *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456-57 (10th Cir. 1982). "Rule 15 was promulgated to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Hardin*, 691 F.2d at 456.

[12] Whether or not to permit a party to amend its pleadings to conform with the proof at trial "rests largely in the discretion of the trial court." *See Bank of Haw. v. Chan*, 2003 Guam 7 ¶ 7 (collecting cases). "A [Rule] 15(b) determination of whether there was implied consent emphasizes fairness to the opposing party as the primary consideration." *Yoshida v. Guam Transp. & Warehouse, Inc.*, 2013 Guam 5 ¶ 36; *see also Citizens Sec. Bank*, 1997 Guam 3 ¶¶ 18-20. A court will "decline to find implied consent if the nonmoving party would be prejudiced by the injection of the new issue." *Yoshida*, 2013 Guam 5 ¶ 36; *see also* Guam R. Civ. P. 15(b) (stating that court may grant motion to amend pleadings over objection if "the objecting party fails to satisfy the court that the . . . evidence" relevant to unpleaded claims "would prejudice the party in maintaining the party's action or defense upon the merits"). "A party will suffer prejudice 'if the [party] had no notice of the new issue, if the [party] could have offered additional evidence in defense, or if the [party] in some other way was denied a fair opportunity to defend.'" *Yoshida*, 2013 Guam 5 ¶ 36 (alterations in original) (quoting *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982)). An opposing party's failure to object to the evidence outside the pleadings indicates implied consent to try the issues. *See Citizens Sec. Bank*, 1997 Guam 3 ¶ 18; *see also Camacho v. Neri*, Civ. No. 76–028A, 1978 WL 13517, at *3 (D. Guam App. Div.

Apr. 17, 1978) ("[I]mplied consent [to try an unpleaded issue] may be assumed from mere failure to object."). If the record indicates sufficient testimony on the issue and the opposing party had a fair opportunity to refute the arguments, the pleadings may be amended. *See, e.g.*, *Hardin*, 691 F.2d at 458.

[13] We afford considerable leeway toward *pro se* litigants. *San Union, Inc. v. Arnold*, 2017 Guam 10 ¶ 34. It follows that "deference should be given toward a *pro se* party's litigation efforts." *McGhee v. McGhee*, 2008 Guam 17 ¶ 11 (citing *Caspino v. Caspino*, DCA Civ. No. 87–00065A, S.C. Domestic No. 1445–86, 1988 WL 242619, at *2 (D. Guam App. Div. June 7, 1988)). For this reason, "the 'rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant.'" *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (citation omitted). However, the leniency accorded to *pro se* litigants generally applies to the liberal construction of their pleadings and is not without limits. *See Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 243-45 (3d Cir. 2013). "The leniency accorded [to] *pro se* litigants cannot extend to depriving their opponent of due process." *Beck & Panico Builders, Inc. v. Straitman*, C.A. No. 08A-08-014 PLA, 2009 WL 5177160, at *5 (Del. Super. Ct. Nov. 23, 2009).

[14] Both parties claim on appeal that Toves did not formally plead an affirmative defense of undue influence. Reply Br. at 6-8; *see also* RA, tab 7 at 1-2 (Answer, Apr. 3, 2009). We assume to resolve this appeal that the parties' position is correct. In opposing summary judgment, Toves provided an argument regarding his PTSD and mental deficiencies in relation to his competency defense. Toves testified to his PTSD and various medical conditions, including dementia and cataracts. Transcript ("Tr.") at 52-59 (Bench Trial, Mar. 2, 2018). And Ms. Vicky Gayer also testified that she believed Toves was being taken advantage of because he was not of sound mind. *Id.* at 64-66. After trial, the court allowed the parties to submit proposed findings of fact

and closing arguments for the court's final determination. Toves submitted additional evidence—namely, a letter from the Department of Veterans Affairs and medical record progress notes of a mental health physician—to support his undue influence defense. Based on this record, Toves, a *pro se* litigant, appears to have attempted to conform his pleadings to the evidence. *See Citizens Sec. Bank*, 1997 Guam 3 ¶ 16.

[15] The trial court has discretion in allowing a party to amend pleadings, *see Bank of Haw.*, 2003 Guam 7 ¶ 7 (collecting cases); however, in this case, the court did not indicate whether it permitted such amendment to the pleadings. There is no objection by Ji on the record. In its findings of fact and conclusions of law, the court merely referenced Toves's submission to the court. RA, tab 127 at 3-4 (Finds. Fact & Concl. L., July 31, 2018). Yet, the court made no express statement as to whether it exercised its discretion to allow Toves to amend his pleadings to include the affirmative defense of undue influence. *See id.* It appears the court may have permitted Toves to amend his pleadings. But we cannot determine this issue on the record before us, and we remand for the trial court to expressly state whether it exercises its discretion to allow an amendment to the pleadings.

B. The Trial Court Did Not Determine Whether Toves Met his Burden of Establishing Undue Influence

[16] Because the trial court may have liberally construed the evidence to conform to the pleadings to include the affirmative defense of undue influence, it must address the elements of undue influence. *See* Guam R. Civ. P. 52(a) (following a bench trial, a court must "find the facts specially and state separately its conclusions of law thereon"). If the court granted Toves's amendment to his pleadings, the court must consider whether Toves met his burden of establishing undue influence. *See, e.g.*, *Mobil Oil Guam, Inc. v. Young Ha Lee*, 2004 Guam 9 ¶ 24 (defendants bear burden of proving affirmative defense).

[17] The record indicates evidence of Toves's "weakness of mind" based on the testimony and Toves's submission to the court after trial.[4] The trial court did not address whether Toves was unduly influenced. The court referenced Toves's letter in passing in a footnote in its findings of fact and conclusions of law. *See* RA, tab 127 at 1 n.1 (Finds. Fact & Concl. L.). We may infer that the trial court rejected Toves's argument he was unduly influenced because the court did not mention such evidence. However, we cannot review this issue where the court made no express finding as to whether it considered the additional evidence or whether Toves failed to meet his burden of establishing undue influence. The court must explicitly state whether it considered the evidence submitted and its corresponding conclusion. *See* Guam R. Civ. P. 52(a). We remand for the trial court to address the elements of undue influence if the court granted the amendment to the pleadings.

[18] On remand, if the trial court granted the amendment to the pleadings, then the court must allow Ji to respond to the evidence submitted post-trial and to address the issue of undue influence in accordance with due process. *See Beck*, 2009 WL 5177160, at *5. Ji made no objection on the record to the testimony surrounding Toves's mental deficiencies or PTSD. Because Ji submitted his proposed findings before Toves's submission to the court, he was not given an opportunity to respond to the additional evidence. *See Yoshida*, 2013 Guam 5 ¶ 36.

V. CONCLUSION

[19] We **VACATE** the Judgment and **REMAND** (1) for the trial court to expressly state whether it exercised its discretion to allow an amendment to the pleadings, (2) if the trial court granted such amendment, for the court to address whether Toves met his burden of establishing undue influence, and (3) if the trial court accepted any evidence submitted by Toves post-trial,

[4] On appeal, Toves also argues undue influence based on a confidential relationship of landlord and tenant. However, we find no evidence on this record to that effect. The only testimony regarding this issue relates to other tenants on the property and not the defendant in this case as a tenant. *See* Tr. at 41, 47-48, 60, 82 (Bench Trial).

for the court to allow Ji to respond to the new evidence and the issue of undue influence in accordance with due process. The court may then enter a new judgment consistent with this Opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice