IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

MASAO SABO ESEBEI, individually and in his capacity as Administrator of the Estate of Espangel Esebei Arbedul,
Appellant,
v.
FRANCIS REMENGESAU, in his capacity as Trustee for the Creditors of Pacific Savings Bank, Ltd.,
Appellee.

Cite as: 2019 Palau 28
Civil Appeal No. 18-037
Appeal from Civil Action No. 16-061

Decided: August 9, 2019

Counsel for Appellant ..... Yukiwo P. Dengokl
Counsel for Appellee ..... William L. Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] This appeal arises out of a dispute regarding the terms and validity of a contract modification to a lease agreement. Appellant contends that the challenged modification is invalid because it is not supported by consideration. The Trial Division denied his claim and upheld the contract as modified.

[1] Although Appellant requests oral argument, we resolve this matter on the briefs pursuant to ROP R. App. P. 34(a).

[¶ 2] For the reasons set forth below, we **REVERSE in part** and **REMAND**.

BACKGROUND

[¶ 3] This case originates from a 1994 Lease Agreement ("Ground Lease") in which Appellant's father, Espangel Esebei Arbedul ("Ardbuel"), leased nine plots of land to Johnny Reklai and Company ("JR Co.") for a period of fifty-five years, with a fifty-year renewal option. The Ground Lease required JR Co. to pay a yearly rental fee, share a percentage of the net profit earned through JR Co.'s use of the land, and construct two residential houses "with an actual value of not less than $75,000.00 per house" following a minimum twenty-four month waiting period. Ex. 1, art. 4. Shortly thereafter, JR Co. assigned its leasehold interest to Ketund Corporation for a total of fifty years, ending on January 6, 2044.

[¶ 4] On August 9, 1994, Arbedul and Ketund Corp. amended Article Four of the Ground Lease ("the 1994 Amendment"). Specifically, the first paragraph of the 1994 Amendment changed the provisions of the residential construction section (Section 4.02); the second paragraph added a requirement that Appellant vacate the premises within 120 days of receiving written notice from Ketund Corp.; and the third paragraph increased the annual rent payment. Most relevant here is the first of the 1994 Amendment which acknowledged that Ketund Corp. had paid Arbedul and Appellant cash advancements totaling $45,000 and deducted that amount from the minimum $150,000 total value of the residential construction (hereinafter "amended Section 4.02"). As a result, the 1994 Amendment changed Section 4.02's actual construction requirement to a cash payment for the remaining value of the houses. Amended Section 4.02 reads in relevant part:

> [Ketund Corp.] shall provide, within twenty (20) days of presentation by [Arbedul] or [Appellant] of appropriate building permits for their respective homes, a cash payment of $65,000.00 to [Arbedul] for the home to be built for [Arbedul] and a cash payment of $40,000.00 to [Appellant] for the home to be built for [Appellant].

Ex. 3 ¶ 1.

[¶ 5] Through legal proceedings, Pacific Savings Bank ("PSB") later acquired Ketund Corp.'s interest in the Ground Lease. Appellant, acting both in his individual capacity and as the administrator of Arbedul's estate, and PSB, acting through its Receiver, entered into an Agreement on January 18, 2012 relating to the Ground Lease and the 1994 Amendment ("the 2012 Amendment"). It states, in relevant part:

> 1. PSB, within thirty days of its receipt of [Appellant]'s written request for payment, will pay to [Appellant] the amount of forty-thousand dollars ($40,000.00). This payment will be full and total satisfaction and discharge of any and all obligations or duties of PSB or its predecessors and successors to construct any houses or other buildings, to pay any money for their construction, or to make any other payments or to perform any other obligations under the above Ground Lease's section 4.02 or under the above 1994 Amendment's paragraph 1 [hereinafter "Paragraph 1"].
>
> 2. [Appellant] will cause any and persons [sic] who are living on, staying at, or using with his consent any of the Lands to vacate those Lands and any buildings and other improvements thereat and to surrender all rights to any plants or other items thereon by July 31, 2013 [hereinafter "Paragraph 2"].
>
> . . .
>
> 4. [Appellant] hereby releases, transfers, and quitclaims to PSB any and all rights of every nature whatsoever, known and unknown, which he may have or may later acquire pursuant to and under the Ground Lease for the time after October 30, 2044 [hereinafter "Paragraph 4"].

Ex. 7 ¶¶ 1, 2, 4.

[¶ 6] In 2016, Appellant brought suit against PSB seeking to void Paragraph 4 as void for lack of consideration.[2] He argued that the 2012 Agreement did not place any obligation on PSB that it was not already legally

[2] Appellant also claimed that the contents of Paragraph 4 were misrepresented to him, that it was executed by mistake, and that it violated the Constitution. These arguments have been abandoned on appeal.

bound to under the Ground Lease and the 1994 Amendment. The Trial Division denied Appellant's claim, identifying the $40,000 cash payment and the July 31, 2013 vacancy deadline as PSB's consideration. Decision 3 ("[T]he 2012 Agreement modified both the terms of payment of the $40,000 balance to Esebei and the other provisions relating to the vacation of the premises were in favor of Esebei. Thus there was consideration for the 2012 Agreement.").

STANDARD OF REVIEW

[¶ 7] We review the Trial Division's findings of fact for clear error and its conclusions of law *de novo*. *Gibbons v. Koror State Gov't*, 2019 Palau 10 ¶ 6. "Under the clear error standard, findings will be reversed only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record." *Ngarbechesis Klobak v. Ueki*, 2018 Palau 17 ¶ 9 (internal quotation marks omitted).

[¶ 8] "The interpretation or construction of a contract is a matter of law for the court." *Yalap v. Umetaro*, 16 ROP 126, 127 (2009) (citing *Ngiratkel Etpison (NECO) v. Abby Rdialul*, 2 ROP Intrm. 211, 217 (1991)). Whether a contract is supported by consideration is a question of fact reviewed for clear error. *See Martin Printing, Inc. v. Sone*, 89 Conn. App. 336, 345 (2005); *Piaskoski & Assocs. v. Ricciardi*, 2004 WI App 152, ¶ 7.

DISCUSSION

[¶ 9] "As a basic principle, 'the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange, and a consideration.'" *Robert v. Cleophas*, 2019 Palau 6 ¶ 21 (quoting *PPLA v. Tmiu Clan*, 8 ROP Intrm. 326, 328 (2001)). Similarly, the modification of a contract requires consideration. *See* Restatement (Second) of Contracts §§ 273, 279 cmt. b. "To constitute consideration, a performance or a returned promise must be sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. As long as a party received something of value, the contract is not void for lack of consideration." *Chun v. Liang*, 14 ROP 121, 123 (2007) (citations omitted). Because there is no added value in promising to pay someone what they are already entitled to, "[p]erformance of a legal duty owed to a promisor which

is neither doubtful nor the subject of honest dispute is not consideration." Restatement (Second) of Contracts § 73 (1981). However, "a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain." *Id.*

[¶ 10] Appellant contends the Trial Division erred in concluding that the $40,000 cash payment and/or the July 31, 2013 vacancy deadline were consideration for Paragraph 4. Instead, he claims both were part of a limited modification of the 1994 Amendment intended to satisfy PSB's existing obligation to pay for the construction of two residential houses. We treat the $40,000 cash payment and the vacancy provision as separate possible items of consideration and address each in turn.

I. Cash Payment of $40,000.00

[¶ 11] Before addressing Appellant's argument, it is necessary to clearly identify the obligations of each party under both the 1994 Amendment and the 2012 Agreement. Pursuant to the Ground Lease, PSB, as current holder of the leasehold interest, put forth three separate items of consideration in exchange for leasing the land: (1) an annual rental fee, (2) construction costs for two residential houses, and (3) a percentage of the profit earned from activity on the land. We are concerned only with the second item.

[¶ 12] Under the terms of the 1994 Amendment, within twenty days of being presented with a building permit, PSB was required to pay Appellant a cash payment of $105,000[3] for the construction of two residential houses. Although the $105,000 was part of PSB's consideration for the lease, the plain language of the Amendment placed obligations on both parties. PSB was obligated to pay a cash sum of $105,000 and Appellant was obligated to (1) obtain a building permit for each of the residential houses and (2) use the money for no purpose other than the construction of the houses.

[¶ 13] In contrast, the 2012 Agreement required PSB to pay a cash sum of $40,000 within thirty days of Appellant's request, with the payment serving as full discharge and satisfaction of its obligations under amended Section 4.02. Because PSB was already obligated to pay a cash sum of $105,000

[3] The $105,000 payment would be broken into two separate payments: a $65,000 payment to Arbedul's estate and a $40,000 payment to Appellant.

under the 1994 Amendment, accepting a $40,000 payment instead is consideration given by Appellant—not by PSB. Therefore, PSB must provide some form of consideration to Appellant for reducing its debt by $65,000. It met this requirement by relieving Appellant of his obligation to obtain a building permit and to use the money for construction costs. Consequently, this modification was supported by consideration and is a valid modification. *See* Restatement (Second) of Contracts § 73. However, the parties disagree as to the scope of this modification.

[¶ 14] PSB argues that because the $40,000 is consideration sufficient to support the modification and discharge of its obligations under amended Section 4.02[4], it is sufficient to support the additional obligations placed on Appellant under Paragraph 4. While it is true that consideration sufficient to support one promise is generally sufficient to support multiple promises, Restatement (First) of Contracts § 83 (1932), it must be clear and unambiguous that the parties intended it to do so.

[¶ 15] The 2012 Agreement separately identified six different agreements which modify existing provisions of the contract, reiterate previously agreed upon provisions, or add new contractual provisions.[5] Critically, the language of Paragraph 1 acknowledges an existing obligation under the contract and identifies a payment that "will be full and total satisfaction and discharge of any and all obligations or duties of PSB . . . under the above Ground Lease's section 4.02 or under the above 1994 Amendment's paragraph 1." Ex. 7 ¶ 1. There is no indication that this modification was intended to impose any additional obligations or remove any existing obligations outside of those explicitly identified within the paragraph. By its plain language, the $40,000 cash payment is intended solely as a modification of the obligations each party had to meet before PSB's pre-existing duty under amended Section

[4] As noted above, the $40,000 cash payment is the consideration given by Appellant, not the consideration given by PSB. However, to avoid confusion, will we follow the parties' lead and refer to the $40,000 cash payment as the consideration at issue.

[5] Paragraphs 1 and 2 modify existing provisions of the contract regarding housing construction and vacancy requirements. Paragraph 3 is an agreement that PSB had satisfied its rental obligations up to that point. Paragraphs 4 and 5 add new obligations on Appellant regarding the relinquishment of rights under the contract and indemnifying PSB for certain legal claims and expenses. Paragraph 6 reiterates an existing provision regarding payment of attorney's fees.

4.02 of the contract could be discharged. As such, it cannot be used as consideration to support the additional and unrelated contractual obligation placed on Appellant under Paragraph 4.

[¶ 16] We conclude the Trial Division erred in finding that the $40,000 cash payment is consideration sufficient to support Paragraph 4.

II. Extension of Time to Vacate the Premises

[¶ 17] The Trial Division also cited to Paragraph 2 as potential consideration sufficient to support Paragraph 4. Under the 1994 Amendment, Appellant was required to vacate the premises "upon one hundred twenty (120) days written notice from [PSB]." Ex. 3 ¶ 2. Paragraph 2 changed this provision, instead requiring Appellant to vacate the premises by July 31, 2013. As the 2012 Agreement was signed on January 18, 2012, Appellant had eighteen months to vacate the premises, rather than 120 days. The Trial Division concluded that Paragraph 2 "w[as] in favor of [Appellant]." Decision 3. This finding is not clearly erroneous.

[¶ 18] However, Appellant asserts that Paragraph 2 cannot serve as PSB's consideration because the vacancy provision was inextricably linked to the parties' pre-existing obligations under amended Section 4.02. *See* Appellant Opening Br. 14 ("The paragraph numbered 1 of the 2012 Agreement in fact recites that the payment of $40,000.00 was to discharge any and all obligations of PSB or its predecessors or successors to construct any houses or buildings, or to pay any money for their construction. The requirement to vacate the premises by Appellant and those on the premises through him was contingent upon the construction of the two houses as stipulated under the parties' agreement. Thus, the two were tied to each other and provided the consideration for each such obligation."). Appellant argues that he had to vacate the premises in exchange for the construction of the houses. Consequently, any modification to amended Section 4.02 necessarily involves the vacancy provision and the additional time was part of PSB's consideration for discharging that debt.

[¶ 19] As discussed above, the $40,000 cash payment was a modification limited to discharging the obligations of both parties under amended Section 4.02. Consequently, if, as Appellant asserts, the vacancy provision is tied to

the modifications discussed above, it cannot serve as consideration to support Paragraph 4. However, if vacation of the premises is an independent requirement that is separate from the obligations placed on the parties under amended Section 4.02, it is sufficient consideration to support the additional obligations placed on Appellant under Paragraph 4.

[¶ 20] Whether Paragraph 2 is a modification of Appellant's obligations under amended Section 4.02 or a separate, additional obligation is a question of fact reviewed for clear error. However, because the Trial Division discussed the $40,000 payment and Paragraph 2 together when concluding that there was sufficient consideration for Paragraph 4, the Trial Division's finding on this issue is unclear. Therefore, we remand this issue to the Trial Division for a limited determination regarding the sufficiency of Paragraph 2 as consideration to support Paragraph 4.

CONCLUSION

[¶ 21] We **REVERSE in part** and **REMAND** this case to the Trial Division for further factfinding in accordance with this opinion.