IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CHINA TOURISM DEVELOPMENT GROUP, INC. and XINWU ZHENG,
Appellants,
v.
FRANCISCA BLAILES,
Appellee.

Cite as: 2024 Palau 22
Civil Appeal No. 23-027
Appeal from Civil Case No. 21-162

Decided: August 6, 2024

Counsel for Appellants ..... Raynold B. Oilouch
Counsel for Appellee Francisca Blailes ..... C. Quay Polloi

BEFORE: FRED M. ISAACS, Associate Justice, presiding
DANIEL R. FOLEY, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Supreme Court, Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] This appeal arises from a lease agreement for certain parcels of land owned by Appellee Francisca Blailes ("Francisca") and leased to Appellants China Tourism Development Group and Xinwu Zheng (collectively, "Appellants"). The trial court found that Appellants had materially breached the lease agreement by failing to commence demolition by the contracted, and subsequently amended, deadline. The court awarded Francisca approximately $7.7 million in damages, reduced by $305,500 in restitution to Appellants, and $15,000 in attorney's fees.

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

BACKGROUND

[¶ 3] On March 21, 2014, Appellant Xinwu Zheng ("Xinwu") and Xuwei Zheng entered into a Lease Agreement with Francisca for Cadastral Lot Nos. 048 B 01 and 02, also known as *Blebad*, located in Koror State. On the land are two structures: a two-story concrete building and a wooden house. The term of the Lease Agreement was for fifty-five years for $350,000 in rent, which Xinwu and Xuwei paid in full. Xinwu and Xuwei then formed a corporation, Appellant China Tourism Development Group, Inc. ("CTDGI"), to engage in the hotel business in Palau. One year later, Xuwei transferred all of his shares in CTDGI to Hao Zheng. On June 7, 2016, Xinwu and Xuwei amended the Lease Agreement with Francisca, namely Section 5, extending the deadline to commence demolition of the buildings on *Blebad* to one year after the issuance of an earthmoving permit by the Environmental Quality Protection Board ("EQPB") or June 7, 2021, whichever occurred first. Xinwu and Xuwei paid $100,000 in consideration for the amendment. On May 8, 2019, Xinwu and Xuwei assigned their leasehold interest to CTDGI.

[¶ 4] On January 7, 2020, the EQPB issued a permit to CTDGI authorizing earthmoving, wastewater disposal, and solid waste and hazardous waste management in relation to the "construct[ion] and operat[ion of] Palau International Hotel" on *Blebad* (the "Earthmoving Permit"). One week later, Xinwu travelled to China, but could not return to Palau due to the COVID-19 pandemic.[1] On July 7, 2020, CTDGI authorized Yuki Ngotel, wife of then-Governor Franco Gibbons, to "act on [thei]r behalf in all matters relating to the application of [a] Construction Permit" from the Koror State Government.

[¶ 5] Seeing that no demolition had commenced, Francisca sent a letter of default dated March 5, 2021 to Xinwu's address in China by registered mail, stating, "You are in breach of the lease agreement according to the amendment

[1] Between February 5, 2020 and July 22, 2021, Palau prohibited all flights originating from or transiting through mainland China, Hong Kong, and Macau from entering Palau. Exec. Order No. 456 (July 22, 2021), https://www.palaugov.pw/wp-content/uploads/EO-456-Rescind-EO-435.pdf.

made to section 5 of the lease agreement that we signed on the 7th day of June 2016. Please do not hesitate to contact me for further negotiations." Xinwu received the letter on April 2, 2021. He neither responded to nor acted upon the letter; accordingly, Francisca sent a letter of termination dated July 6, 2021 to Xinwu at the same address in China by registered mail. Her husband also served a copy of the letter on Jenny Alogmad, who lived in one of the buildings on *Blebad*.[2] On July 8, 2021, Francisca's husband served a notice to vacate on Jenny, requiring CTDGI to vacate *Blebad* by August 5, 2021. Jenny sent photos of the notice to Xinwu on WeChat. After an unsuccessful attempt to settle,[3] Francisca and her husband entered *Blebad* on August 5, 2021, cut the utilities and water, erected a "For Lease" sign, and told CTDGI to leave.

[¶ 6] The next day, Appellants sued Francisca, claiming that the Lease Agreement remained valid, and Francisca wrongfully interfered with Appellants' right to possession and enjoyment of *Blebad*. Francisca counterclaimed, alleging that Appellants had breached the Lease Agreement and failed to timely cure. The matter proceeded to trial. The trial court found that Appellants had materially breached the Lease Agreement by failing to timely commence demolition and become unlawful trespassers on *Blebad*. Therefore, the trial court awarded Francisca $7,996,524 in expectation damages for a projected ten-story hotel offset by $305,454.69 in restitution damages owed to Appellants; $13,287.84 in consequential damages for unpaid rent as trespassers from July 7, 2021 to July 28, 2023 and $17.67 for each day thereafter; and $15,000 in attorney's fees. This timely appeal followed.

STANDARD OF REVIEW

[¶ 7] "We review matters of law de novo, findings of fact for clear error, and exercises of discretion for abuse of that discretion." *Chin v. Ngerebrak*

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[2] At trial, Jenny testified that she lived on *Blebad* and is Xinwu's girlfriend. *See* Trial Tr. 281.

[3] After receiving photos of the notice to vacate from Jenny on July 8, 2021, Xinwu contacted his friend, Sarah, who is a Chinese national and business owner residing in Palau, to meet with Francisca. *See* Trial Tr. 289:6–9, 291. Sarah arranged a meeting through Francisca's daughter and met with Francisca's husband and daughter on July 9, 2021 at *Blebad*. Francisca's husband told Sarah that "the lease was terminated but [Francisca] was still open to renewed negotiations [about the price]," namely a new fifty-year lease agreement for $1.5 million. Appellee's Br. at 17, 19; *see* Trial Tr. 290–94. After relaying the conversation to Xinwu by text and video message, Xinwu asked Sarah to help him find a lawyer. *See* Trial Tr. 294–95.

Clan, 2024 Palau 4 ¶ 5. Under clear error review, the findings of the lower court will be set aside only if they "lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion." *Ngcheed v. Imeong*, 2023 Palau 25 ¶ 5. Generally, a discretionary act or ruling is presumptively correct and will not be overturned on appeal unless the decision was "arbitrary, capricious, or manifestly unreasonable or because it stemmed from an improper motive." *Rexid v. Becheserrak*, 2023 Palau 10 ¶ 8.

DISCUSSION

[¶ 8] On appeal, Appellants present several assertions of error that boil down to four key issues: 1) whether the March 5, 2021 letter of default constituted valid notice; 2) whether Francisca properly terminated the Lease Agreement; 3) whether Appellants' failure to timely commence demolition constituted a material breach; and 4) whether the trial court erred in calculating damages. For the reasons set forth below, we reverse on the first two issues; accordingly, we do not address the remaining issues.

I. Notice of Default

[¶ 9] The terms of a contract are generally construed against the party drafting the agreement.[4] *See Mesebeluu v. Ha*, 2024 Palau 20 ¶ 18. When a lease requires notice of default, it must sufficiently inform the lessee of the claimed default under the lease and of the forfeiture and termination of the lease if the claimed default is not cured. *See Veolia Water N. Am. Operations Servs., L.L.C. v. SSAB Alabama, Inc.*, 398 F. Supp. 3d 1150, 1159–60 (N.D. Ala. 2019); *In re Summers*, 86 B.R. 740, 742 (Bankr. N.D. Ga. 1988) ("[I]t must appear . . . that the lessor gave clear and unambiguous notice of the default and the termination, and that the lessor strictly complied with the terms of the lease in effecting the termination.").[5] Additionally, where an opportunity to cure is required by the lease, the demand for performance must be specific

[4] Mr. William Ridpath testified at trial that he was retained and paid by RE/MAX to draft the Lease Agreement and serve as the escrow agent for the transaction as Francisca had signed a commission agreement with RE/MAX. Trial Tr. at 31–32.

[5] In the absence of controlling Palauan law, "[t]he rules of the common law, as expressed in the restatements of law approved by the American Law Institute, and . . . as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic." 1 PNC § 303.

and reasonable. *See* 49 Am. Jur. 2d *Landlord & Tenant* § 238; *240 W. 37th L.L.C. v. BOA Fashion, Inc.*, 899 N.Y.S.2d 63, 63 (App. Term 2009) ("Where . . . a valuable leasehold is at risk and the tenant is under a burden to promptly cure, . . . [a] mere reference to or recitation of a numbered lease provision, without specifying the nature of the violation(s), is insufficient.").

[¶ 10] "A party who has bargained for a notice-and-cure provision to protect against forfeiture and litigation is entitled to have that bargained-for protection honored." *DC Farms, L.L.C. v. Conagra Foods Lamb Weston, Inc.*, 317 P.3d 543, 553 (Wash. Ct. App. 2014); *accord E. Empire Constr. Inc. v. Borough Constr. Grp. L.L.C.*, 156 N.Y.S.3d 148, 152 (App. Div. 2021); *Greg Calfee Builders L.L.C. v. MaGee*, 616 S.W.3d 545, 555 (Tenn. Ct. App. 2020); *Kinstler v. RTB S. Greeley, Ltd.*, 160 P.3d 1125, 1128 (Wyo. 2007). This requirement may be excused when a contractor has demonstrated an unwillingness or complete inability to do the job, or where the breach is impossible to cure. *Greg Calfee Builders*, 616 S.W.3d at 555.

[¶ 11] The trial court concluded that "[Francisca]'s notice of default was valid . . . and that [it] contain[ed] sufficient information to inform [Appellants] of the breach." Appellants contend that the March 5, 2021 letter of default was legally deficient and ineffective as notice because the letter was not specific enough to 1) inform the nature of the alleged default, 2) request to cure the alleged default by a specific time, and 3) inform the consequences of failing to cure the alleged default. We agree.

[¶ 12] Sections 11 and 12 of the Lease Agreement govern notice of default and default. Stating in relevant part,

> Lessee shall not be deemed to be in default . . . unless Lessor shall give to Lessee written notice of such default and Lessee shall fail to cure such default within ninety days, or, in the event that such default cannot be reasonably cured within ninety days, Lessee thereafter shall fail to cure such default with reasonable diligence . . . . Notice . . . shall specify the alleged default and the applicable lease provisions . . . .

Under these terms, the March 5, 2021 letter of default was deficient. While it is true that no demolition had commenced on *Blebad* by January 7, 2021, one year after the EQPB had issued the Earthmoving Permit, the letter of default contains only one paragraph that mentions a "breach," but nowhere does it identify what that breach was, much less declare that the breach constitutes a "default." Although the letter identifies the applicable lease provision, it fails to detail the nature of the violation and to demand the required performance to cure it. Further, the notice requirement was not excused as nothing in the record supports the conclusion that Appellants had abandoned the Lease Agreement or could not have commenced demolition following receipt of proper notice. Accordingly, we reverse the trial court's finding that the March 5, 2021 letter constituted valid notice of Appellants' alleged default. Regardless of whether Appellants had breached the Lease Agreement, their duty to cure and any subsequent right by Francisca to terminate were not triggered.

II. Termination of the Lease

[¶ 13] Contract requirements as to notice of termination must be strictly observed. This is particularly the case where, as is here, a contract contains a forfeiture provision. *See* 17A Am. Jur. 2d *Contracts* §§ 533–34 (stating that a party seeking to enforce a forfeiture clause must strictly follow the contracted terms of notice of default and termination). When a party fails to provide notice of a material breach, if required by the terms of the contract, his reliance on that breach to excuse his own contractual performance is improper. *Kinstler*, 160 P.3d at 1128. Accordingly, a party's termination is ineffective, and amounts to a material breach, when the contract provides for notice and such notice is not provided. *See Madden Phillips Const., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 824 (Tenn. Ct. App. 2009).

[¶ 14] "Forfeiture refers to the right of the lessor to terminate the lease because of a breach of covenant or some other wrongful act of the lessee." 49 Am. Jur. 2d *Landlord & Tenant* § 237. Generally, forfeitures are strongly disfavored by courts. *See Dalton v. Borja*, 12 ROP 65, 72 (2005). Although parties are entitled to draft a contract that provides for forfeiture when there is a default, courts will strictly construe such a provision against the lessor. *See id.*; *ROP v. M/V Aesarea*, 1 ROP Intrm. 429, 433 (1988) ("Courts will not search for a construction to bring about a forfeiture, nor will a constrained construction be indulged in to create a forfeiture.").

[¶ 15] The trial court made two determinations regarding Francisca's termination of the Lease Agreement: 1) Appellants had "constructive and actual notice of [Francisca]'s intention to terminate the lease" and 2) Francisca "did not breach the terms of the contract." Appellants argue that Xinwu did not receive the July 6, 2021 letter of termination and Francisca did not comply with the termination procedure required by the Lease Agreement. For the reasons set forth below, we reject Appellants' first argument but agree with their second argument.

[¶ 16] Pursuant to Section 18 of the Lease Agreement, all notices "shall be deemed to have been fully given . . . when made in writing and deposited in the mail, return receipt requested and postage prepaid, and addressed to the parties," or when given to a party personally. On July 7, 2021, Francisca sent by registered mail a letter of termination that was drafted on July 6, 2021 to Xinwu's address in China as listed on the Lease Agreement, the same address to which the previous letter of default had been sent and received by Xinwu. Therefore, Appellants had at least constructive notice of Francisca's intent to terminate the Lease Agreement on July 7, 2021. Moreover, on July 8, 2021, Francisca's husband served a notice to vacate on Jenny at *Blebad*, and she sent photos of the notice to Xinwu on WeChat. In response to the photos, Xinwu asked his friend, Sarah, to meet with Francisca as soon as possible to discuss the notice. Accordingly, Xinwu also had actual notice of Francisca's written intent to terminate the Lease Agreement on July 8, 2021.

[¶ 17] Appellants also argue that, even if they had received notice of termination, Francisca failed to comply with the procedural requirements of the Lease Agreement. As stated previously, Francisca's right to terminate is only triggered if Appellants fail to cure a default within ninety days after receiving valid notice of such default. However, the March 5, 2021 letter was defective as notice of default. Thus, Francisca cannot rely on Appellants' failure to timely commence demolition, and she prematurely terminated the Lease Agreement. Even assuming, *arguendo*, that Appellants had valid notice of default and subsequently failed to cure, Section 12 provides Appellants ninety days from the date of the written notice of termination to "quietly and peacefully deliver possession" of *Blebad*. Ninety days from July 6, 2021 is October 6, 2021. However, Francisca required Appellants to vacate by August 5, 2021, and her husband cut the utilities and water and put up a "For Lease"

sign the same day. Francisca wrongfully terminated the Lease Agreement by failing to comply with the required procedure. Accordingly, we reverse the trial court's determination that Francisca did not breach the Lease Agreement.

[¶ 18] Having reversed the trial court's findings on the first two issues, we vacate its determination of damages, including attorney's fees, because it was based on Appellants being the sole breaching party. A trial court has much discretion, based on all the facts and circumstances, in the assessment of damages and fashioning an appropriate remedy.[6] *See Shih Bin-Fang v. Mobel*, 2020 Palau 7 ¶ 35; *see also Pedro v. Rechucher*, 2017 Palau 5 ¶ 31. On remand, the trial court must consider Francisca's breach of wrongfully terminating the Lease Agreement.

CONCLUSION

[¶ 19] For the reasons set forth above, we **REVERSE** the trial court's determination on notice of default and Francisca's breach. Accordingly, we **VACATE** the trial court's award of damages and attorney's fees, and **REMAND** for further determination consistent with this Opinion.

[6] In their Opening Brief, Appellants "ask[] this [C]ourt to . . . declar[e] that the Lease Agreement is still valid, and to order Appellants to demolish the structures and to pay reasonable compensation to [Appellee] for the delay. In the alternative, if the Lease Agreement is terminated, then . . . award Appellants full restitution." Appellants' Br. at 34; *see* Complaint for Declaratory Relief, Injunctive Relief, and Damages, *China Tourism Dev. Grp., Inc. v. Blailes*, CA No. 21-162, at 6 (Aug. 6, 2021).

BENNARDO, J., concurring:

[¶ 20] I write separately to expand upon the thoughts on 1 PNC § 303 that I shared five years ago in my concurrence to *Techeboet Lineage v. Baules*, 2019 Palau 21 ¶¶ 13–17 (Bennardo, J., concurring). Our opinion today contains many references to U.S. law but does not contain a separate discussion of whether those legal rules and principles are a sensible fit for the development of Palauan law. In support for our reliance on these foreign authorities, we cite to the Olbiil Era Kelulau's instruction in 1 PNC § 303 that the U.S. common law (and in particular the expression of the U.S. common law in the American Law Institute's restatements) has the force of binding law in Palau where there is no written or customary Palauan law.

[¶ 21] In *Techeboet Lineage*, I expressed my skepticism about the OEK's authority to bind the Palauan judiciary to follow another jurisdiction's common law, and particularly the expression of another jurisdiction's law in a non-governmental secondary source. *Techeboet Lineage*, 2019 Palau 21 ¶ 13. Today I'll go further and say that I am not just skeptical of the constitutionality of 1 PNC § 303. I am convinced of its unconstitutionality. *See id.* ¶ 16 ("Section 303 violates the separation of powers by impermissibly raiding the Palauan judiciary of one of its core functions: to form the common law of Palau.").

[¶ 22] If a change is to be made, its genesis will need to come from the Judiciary itself. I do not expect litigants to stop relying on 1 PNC § 303 while the Palauan courts, and in particular the Appellate Division, continue to cite it with approval. Put simply, we the Judiciary should cease relying upon 1 PNC § 303. Further, I would welcome the opportunity to review the constitutionality of 1 PNC § 303 if the issue was brought directly to the attention of this Court in the form of an appeal of a lower court's reliance upon it.