

Eluil Clan v. Arbedul, 10 ROP 37 (2002)
ELUIL CLAN,
Appellant,

v.

ESPANGEL ESEBEI ARBEDUL,
Appellee.

CIVIL APPEAL NO. 02-18
Civil Action No. 01-173

Supreme Court, Appellate Division
Republic of Palau

Argued: December 2, 2002
Decided: December 6, 2002

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Raynold B. Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice;
R. BARRIE MICHELSEN, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII,
Associate Justice, presiding.

MILLER, Justice:

Eluil Clan brought suit against Espangel Esebei Arbedul seeking a share of the proceeds from a lease agreement between Ngerkebesang Hamlet and Tosiwo Nakamura (hereinafter "Lease Agreement"). The Trial Division granted summary judgment in favor of Arbedul. For the reasons set forth below, we affirm.

BACKGROUND

Appellant Eluil Clan filed a complaint in the Trial Division on July 7, 2001, seeking a share of monies paid to Ngerkebesang Hamlet for the rental of its property. Eluil Clan alleged that Arbedul held money in trust for Eluil Clan arising from property leased from the hamlet, but that he refused repeated requests to release it. In Eluil Clan's responses to Arbedul's interrogatories, Eluil Clan revealed that its claim for a distribution of Ngerkebesang's lease proceeds arose from money Arbedul had received in trust for Ngerkebesang from Tosiwo Nakamura. Arbedul subsequently filed a motion for summary judgment to which he attached a copy of an agreement to lease land known as "Umetate" entered into between "Arakabesan Hamlet (a.k.a. Ngerkebesang Hamlet)" as lessor and Tosiwo Nakamura as lessee and recorded on

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May 7, 1997. The Lease Agreement was signed by four chiefs of Ngerkebesang Hamlet, including the chief of Eluil Clan, and required Mr. Nakamura to pay \$333,615.00 to Arbedul “as trustee for Lessor.”

Eluil Clan filed a cross-motion for summary judgment along with a supporting **L38** affidavit by Daniel Ngerchokebai on March 6, 2002. Eluil Clan maintained that the fact that it was one of the four clans that signed the lease proved that it was a lessor and thus entitled to one-fourth of the proceeds. On April 16, 2002, the Trial Division granted summary judgment in favor of Arbedul. The court determined that Eluil Clan was not entitled to a share of the proceeds under the terms of the Lease Agreement and that Eluil Clan failed to submit any other evidence that could support its claim. Eluil Clan appeals.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo* to determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Tellames v. Cong. Reapportionment Comm'n*, 8 ROP Intrm. 142, 143 (2000).

DISCUSSION

Eluil Clan contended below that it was entitled to a share of lease proceeds because it was one of the four clans of Ngerkebesang Hamlet that were signatories of the Lease Agreement. It renews that contention here, arguing in its brief that “[t]he fact that Appellant was one of the lessors warrants that it is entitled to a portion of the rental consideration.” Arbedul maintains that the owner and lessor of the land is “Arakabesan Hamlet,” not Eluil Clan, and there is nothing in the Lease Agreement that would entitle Eluil Clan to a share of the proceeds. The Trial Division agreed; so do we.

The first paragraph of the Lease Agreement states: “This Lease Agreement . . . is made and entered into this 8th day of September, 1996, by and between ARAKABESAN HAMLET aka Ngerkebesang Hamlet of Koror State, Republic of Palau, represented herein by its undersigned chiefs . . .” “Lessor” is subsequently defined in the recitals of the Lease Agreement as “a hamlet of Koror State, Republic of Palau.”

The Lease Agreement was signed by Espangel of Omrekongel Clan, Obak ra Iuong of Iuong or Ucheliow Clan, Rengiil ra Eluil of Eluil Clan, and Rechebei of Odilang Clan, but the lessor is Ngerkebesang Hamlet. The Lease Agreement clearly indicates that the chiefs signed the agreement as representatives of the lessor.

With regard to the payment of rental proceeds from the Lease Agreement, Section 3 simply requires Mr. Nakamura to make payments due under the agreement to the “Lessor,” which, as discussed above, is Ngerkebesang Hamlet. The Lease Agreement specified that Mr. Nakamura was to deliver those payments to Arbedul as “trustee for Lessor.” From these considerations the Court can only conclude that the lease proceeds are the sole property of

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Ngerkebesang Hamlet and are held by Arbedul as trustee. There is no mention in the agreement of a distribution to Eluil Clan. Thus, we agree with the Trial Division that Eluil Clan failed to establish that it is entitled to rental proceeds pursuant to the terms of the Lease Agreement itself.

Counsel for Eluil Clan contended at oral argument that an assertion of custom contained in an affidavit by Daniel Ngirchokebai attached to the Clan's motion for summary judgment below was sufficient to raise a genuine issue of material fact that would preclude summary judgment in favor of Arbedul. We decline to address this claim of error. As we have previously observed, raising an argument for the first time at oral 139 argument prevents responsive briefing by opposing counsel and pre-argument preparation by the Court on that issue. *Dalton v. Heirs of Borja*, 5 ROP Intrm. 95, 100 n.2 (1995). Counsel "act at their and their clients' own peril in omitting arguments from briefs." *Id*; see also *Henningson, Durham, & Richardson v. Prochnow*, 477 P.2d 285, 289 (Ariz. Ct. App. 1971) (refusing to entertain new theories of error raised for the first time at oral argument).

CONCLUSION

For the foregoing reasons, the decision of the trial court granting summary judgment in favor of Arbedul is AFFIRMED.