

Hanpa Indus. Dev. Corp. v. Asanuma, 10 ROP 4 (2002)
HANPA INDUSTRIAL DEVELOPMENT CORP.,
Appellant,

v.

FRANCISCO ASANUMA, SR.
Appellee.

CIVIL APPEAL NO. 01-39
Civil Action No. 00-128

Supreme Court, Appellate Division
Republic of Palau

Argued: September 9, 2002

Decided: October 17, 2002

15

Counsel for Appellant: Richard Brungard

Counsel for Appellee: Johnson Toribiong

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice;
DANIEL N. CADRA, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN,
Associate Justice, presiding.

SALII, Justice:

The subject of this appeal concerns agreements between Hanpa Industrial Development Corporation (“Hanpa”) and Francisco Asanuma, Sr. regarding two properties. With respect to the first property, Hanpa agreed to design a residence and beauty shop for Asanuma on the second floor of a structure that Hanpa would construct and lease from Asanuma. Asanuma never moved into the space reserved for the beauty shop or the residence, and instead forcibly attempted to evict Hanpa from the space originally designated for Asanuma. Hanpa then filed suit to obtain, among other things, possession of the entire second floor. After a trial, the Trial Division denied Hanpa’s claim for possession of the entire second floor and concluded that Hanpa had not designed the beauty shop in an acceptable manner for Asanuma to conduct business there. The second aspect of this appeal relates to a separate agreement between Hanpa and Asanuma, in which Hanpa was involved in repairing Asanuma’s residence across from Kosiil landing. According to Asanuma’s counterclaim, Hanpa failed to complete previously contracted repairs to the residence. The Trial Division agreed and granted Asanuma \$9,146.15 in compensatory damages in order to complete the repairs. Hanpa now appeals these decisions, as well as the Trial Division’s denial of damages with respect to Asanuma’s failure to occupy the beauty shop and the assessment of damages for repair work not done on the Kosiil residence. We affirm in

part and reverse and remand in part.

A. The Beauty Shop and Residence on the Second Floor of the Newly Constructed Building

We begin by reciting the relevant facts as originally stated by the Trial Division and as shown by the exhibits introduced by the parties at trial. In February 1995, Hanpa and Asanuma entered into an agreement (“February 1995 Agreement”) whereby Hanpa assented to lease for 25 years portions of a L6 building that Hanpa was to construct on land that Asanuma purportedly owns in downtown Koror. Specifically, the lease section of the February 1995 Agreement provides that:

[Asanuma] hereby leases to [Hanpa] the property . . . indicated as the shaded area of the drawing attached hereto as Exhibit E. [Hanpa] intends to construct an expanded structure or structures on the premises in accordance with the plans attached hereto as Exhibit F 1 and 2. Such plans include the demolition of [Asanuma’s] present residence on the premises and the construction of a new residence and beauty shop on the second floor of the part of the structure(s) away from the main Koror road. ([Hanpa] may use the premises for any and all lawful purposes. [Asanuma] shall obtain all necessary building permits to enable [Hanpa’s] construction in approximate accordance with the attached plans.)

Exhibits E, F1 and F2 show a two-story structure, with designs for Asanuma’s beauty shop and residence to occupy the entire second floor, which was to be 1240 square feet, or 62' x 20'. As consideration for the lease, Hanpa would forgive certain debts that Asanuma owed it, and would also pay a monthly rental sum to increase in five year increments. On the same day, Hanpa and Asanuma signed a “Use Right Agreement” whereby Hanpa would be permitted to use the area behind the proposed building for “vehicular parking and shipping container storage.”

Later in 1995, Asanuma and Hanpa negotiated and subsequently agreed to add more floor space to Asanuma’s residence and beauty shop on the second floor.¹ Hanpa thereby increased the size of the second floor to 62' x 28', or 1736 square feet. The space on the second floor was increased another time by mutual assent so that the residence and the beauty shop would occupy 62' x 36', creating a total square area of 2232 square feet. In addition, Hanpa and Asanuma re-designed the proposed layout of the beauty shop and the residence, which resulted in a final drawing showing a residence with four bedrooms (the original plans showed two bedrooms) and a veranda. This construction was completed in June 1996.

In October 1996, Asanuma signed a receipt in which he stated that “I [] promise to move on or before the end of November, 1996 to the 2nd floor of the new building both our residence and beauty shop without any condition.” Nevertheless, because of Asanuma’s expressed

¹The trial court in its decision explained that Asanuma argued that the area should be increased absent additional consideration, because the Use Right Agreement had been given to Hanpa without consideration. The trial court rejected this argument, however, and decided that the Use Right Agreement had been given for adequate consideration because it was executed on the same day as the February 1995 Agreement and should be considered part of that contract.

Hanpa Indus. Dev. Corp. v. Asanuma, 10 ROP 4 (2002)

dissatisfaction with the completed construction of the second floor, Asanuma did not fulfill his promise, which also appears in the February 1995 Agreement, to vacate his old residence at the site of the building. Furthermore, and also in violation of the February 1995 Agreement, Asanuma never moved the beauty shop out of its former location, and the shop, which is run by Asanuma's wife, still stands in front of the L7 completed new building. In 1997, however, Asanuma leased to another business the portion of the second floor intended to be his residence. Eventually, the lease expanded to cover the whole floor, but was terminated by the end of 1998.

Meanwhile, Hanpa had plans to increase the height of the building from two to four stories, and to almost double the square area of the second floor to encompass 4103 square feet, or 92' by 44.6'. Hanpa delayed implementing this phase of construction until Asanuma's residence and beauty shop were vacated. After Asanuma left his residence, Hanpa demolished it. Nevertheless, and as stated above, Asanuma never vacated the old beauty shop. Consequently, Hanpa construed Asanuma's failure to move the old beauty shop as a permanent waiver of the right to occupy the second floor and, irrespective of the continued presence of the old beauty shop on the premises, it completed the planned expansion to the new building by late 1999. At this point, the walls that formerly divided up the rooms designated for the beauty shop and the residence had been removed, and Hanpa began to occupy the second floor. In July 2000, after Asanuma sent Hanpa a "Notice of Eviction" that went unheeded, Asanuma sent three men to forcibly evict Hanpa from the new building.

Hanpa subsequently filed suit against Asanuma, seeking (a) damages for Asanuma's failure to vacate the old beauty shop and occupy the new beauty shop on the second floor; (b) a declaration that Hanpa is entitled to possession of the second floor of the building; (c) an injunction commanding Asanuma to vacate the old beauty shop; (d) a declaration that Asanuma's attempted eviction of Hanpa from the new building was without legal justification; and (e) damages for property loss and impairment resulting from the attempted forcible eviction in July 2000. The Trial Division denied Hanpa's requests for relief relating to Asanuma's failure to vacate the old beauty shop and its claim for a declaration that it was entitled to possession of the entire second floor. The court nonetheless granted Hanpa's request for a declaration regarding the unlawful attempted eviction, and also granted Hanpa's claims for compensatory and punitive damages arising from the attempted forcible eviction. Hanpa and Asanuma both moved to alter or amend the judgment. The trial court granted the motions to amend with respect to two clerical errors, but denied those aspects of the motions challenging some of the court's substantive rulings. Hanpa now appeals the trial court's judgment with regard to this building solely on its claims relating to occupation of the beauty shop, and does not challenge any of the court's conclusions regarding Asanuma's attempted eviction.

The lease agreement

Hanpa's primary assertion on appeal relates to the Trial Division's conclusion that "based upon the conduct and agreements of the parties . . . the second floor in its entirety should be deemed to have been set aside for [Asanuma's] benefit." We reject Hanpa's challenge to the trial court's conclusion that the conduct of the parties amended the original February 1995 agreement to increase the size of the beauty shop and residence so that Asanuma could legally occupy 36' x

Hanpa Indus. Dev. Corp. v. Asanuma, 10 ROP 4 (2002)

62' on the second floor. Nevertheless, we agree with Hanpa that, as a matter of law, Asanuma is not entitled to occupy the entire second floor, which now consists of 4103 square feet.

We first turn to the question whether the trial court properly concluded that Hanpa and Asanuma legally modified the February 1995 Agreement so as to expand the beauty L8 shop and residence space first to 62' x 28' and then to 62' x 36'. Hanpa argues that although the parties' conduct did show an increase in the size of the residence and the beauty shop to 62' x 36', Hanpa received no additional consideration for this increase and this oral modification violated Palau's Statute of Frauds, 39 PNC § 502. We see no error in the court's determination that the parties legally modified the February 1995 Agreement through their conduct, and thus believe that Asanuma is entitled to occupy 62' x 36' of space on the second floor. Generally, oral modifications of a valid lease are invalid if the terms of the lease are greater than the time provided for by the controlling Statute of Frauds. Restatement (Second) of Prop.: Landlord and Tenant § 2.4 (1976). Here, Hanpa's lease of the building is for well over a year, and so any modifications to the lease not in writing would violate the Statute of Frauds. *See* 39 PNC § 502 (providing that leases of property for over one year must be in writing to be valid). Nevertheless, if portions of a lease are ambiguous or uncertain, when ascertaining the meaning of those provisions, a court may look to the parties' subsequent performance or conduct. 49 Am. Jur. 2d *Landlord and Tenant* § 59 (1995).

In this case, we believe that—with regard to the size of the space that Hanpa was to construct for Asanuma's exclusive use—the relevant provision of the lease is sufficiently ambiguous that the trial court's resort to examining the conduct of the parties was proper. First and foremost, the lease never specifies the total square area that Asanuma would occupy in the building. Second, although the lease references an attached exhibit showing initial plans of the yet-to-be-constructed building, the February 1995 Agreement provides that Hanpa “intends to construct an *expanded structure or structures*” and that Asanuma would obtain “building permits to enable Lessee's construction in *approximate accordance* with the attached plans” (emphasis added). The terms “intends,” “expanded structure or structures,” and “approximate accordance” are sufficiently uncertain as to not demonstrate the intent of the parties as to how large ultimately the building would become after the building permits had been obtained. Furthermore, and as a matter of law, nothing in the record belies the trial court's conclusion that the parties' conduct demonstrated that Hanpa and Asanuma intended for Asanuma to occupy the beauty shop and the residence as constructed in 1996, or 62' x 36' feet on the second floor.

The question remains, however, whether the Trial Division correctly determined as a matter of law that the conduct of the parties modified the lease further so that Asanuma should be allowed to occupy the entire second floor as it now stands, or 4103 square feet. The February 1995 Agreement provides that Asanuma would lease to Hanpa the shaded area found in an attached exhibit. Although the agreement was modified in writing on June 13, 1995, and later by oral consent to include more area, nothing in the record demonstrates that Hanpa and Asanuma agreed that Asanuma would occupy the total square area of the second floor after the second phase of the development. Under established landlord and tenant law, “[w]hen the landlord . . . interferes with the tenant making a permissible use of the leased property and the tenant has not consented to the conduct, the landlord has deprived the tenant of his just expectations under the

Hanpa Indus. Dev. Corp. v. Asanuma, 10 ROP 4 (2002)

lease.” Restatement (Second) of Prop.: Landlord and Tenant § 6.1 cmt. a (1976). The lease states that Hanpa “intends to construct an expanded structure or structures . . . in approximate accordance with the attached plans” and provides that Hanpa “may use the premises for any and all lawful 19 purposes.” The unshaded area, which demonstrates the planned location of the beauty shop and Asanuma’s residence, would have the dimensions of 62’ x 20’, with a total area of 1240 square feet. We have concluded above that the trial court properly determined that the space to be occupied by Asanuma was modified through the conduct of the parties to include dimensions of 62’ x 36’. When Hanpa further expanded the second floor to 92’ x 44.6’, or 4103 square feet, neither Hanpa nor Asanuma indicated a belief that Asanuma was to occupy the newly constructed space, which was more than double what the parties originally contracted to. Without evidence of an agreement to expand the unleased space beyond the original contract terms as amended by subsequent conduct, there could be no meeting of the minds sufficient to constitute an amendment to the February 1995 Agreement. *See* 17A Am. Jur. 2d *Contracts* § 513 (1991) (“The consent of both [parties] is required to cancel, alter, or supplant a contract fairly made. The same meeting of minds is needed that was necessary to make the contract in the first place.”). Indeed, Asanuma’s multiple assertions that he receive possession of “family residence and beauty shop on the second floor,” (emphasis added) demonstrates Asanuma’s intent to claim only the square footage set aside for him after the first phase of the construction, and not the entire second floor.

The agreement regarding the construction of the beauty shop

Hanpa’s next argument relates not to the lease aspects of the February 1995 Agreement, but to the provisions of the contract relating to the construction of the beauty shop. Hanpa contends that the Trial Division’s finding that Hanpa had not completed the second floor so as to be fit for use as a beauty shop was clearly erroneous. As this Court has repeatedly held, however, the trial court’s decision to credit one proffer of evidence over another is not clearly erroneous, so long as one view of the evidence supports the factfinder’s decision. *See Tangelbad v. Siwal Clan*, 9 ROP 169, 171 (2002) (collecting cases). Here, the testimony of Asanuma, his wife Hiromi, and the expert witness, Larry Johnsrud, supports the trial court’s conclusion that the beauty shop was outfitted inadequately. Moreover, the trial court actually visited the beauty shop area. As we have not found anything in the record to clearly refute this evidence, the Trial Division’s decision to credit Asanuma’s version of the facts over Hanpa’s cannot be clearly erroneous. Consequently, Hanpa’s request for damages as a result of Asanuma’s failure to move into the new beauty shop fails.

The Kosiil Residence

Hanpa additionally contests the Trial Division’s finding of liability on Asanuma’s counterclaim against Hanpa for uncompleted repair work at a separate residence owned by Asanuma across from Kosiil Landing. Hanpa argues that it was not liable for the repair work because its obligation to Asanuma consisted merely of supplying labor and materials rather than supervision of the project pursuant to a bid. Again, this issue involves the trial court’s resolution of a dispute over facts and, again, we believe that Hanpa has not shown that the court’s resolution of those facts is clearly erroneous.

Hanpa Indus. Dev. Corp. v. Asanuma, 10 ROP 4 (2002)

Two documents regarding this issue were introduced at trial. The first is a letter from Hanpa to Asanuma in which Hanpa provided a “cost estimate for Painting of Asanuma Residence” totaling \$9,146.15. The breakdown of the estimate listed that the price would include materials, a contingency fee, labor, supervision, and a mark up. The L10 second document is a receipt from Hanpa, signed by Asanuma, in which Hanpa charged \$8,663.78 for “Materials” and “Labor.” There is no documentary evidence, however, indicating whether either Asanuma accepted Hanpa’s estimated bid or if the “labor” receipted included supervision. In an attempt to bridge this hole in the documentary evidence, Soon Seob Ha, Hanpa’s president, testified that Asanuma rejected the proposed estimate and supervised the project himself. Furthermore, Ha averred that the receipt was solely for labor costs, and did not include supervision. On the other hand, Asanuma testified that he accepted the bid and that Hanpa supervised, and was responsible for, the project. In its decision, the Trial Division apparently believed Asanuma’s version of the facts over Ha’s and, as stated above, the trial court’s decision to credit Asanuma’s proffer of evidence over Hanpa’s cannot be clearly erroneous. Therefore, the trial court did not err in its decision regarding this matter.

On a related note, Hanpa also contends that the damages figure which the court settled on, \$9,146.15, was not supported by the record. We disagree. Damages are recoverable only to the extent that they can be proved with a reasonable degree of certainty. *Palau Marine Indus. Corp. v. Seid*, 9 ROP 173, 175 (2002). Here, the expert witness Johnsrud estimated that the work left to be done would cost from between \$8,000 and \$12,000. The amount of damages which Asanuma claimed, \$9,146.15, and which the court agreed upon, squarely falls within this range. Although this number suspiciously sounds like the amount of money Hanpa originally offered in its bid to complete all of the work on Asanuma’s residence, “[d]amages need not be calculable with mathematical accuracy and are often at best approximate.” Restatement (Second) of Contracts § 352 cmt. a (1981).

To summarize our conclusions, we believe that the Trial Division erred as a matter of law when it concluded that Asanuma is entitled to use all of the now constructed second floor as his private residence and for the beauty parlor. Thus, we reverse the trial court’s decision on this point and remand for the court to enter a new judgment. Nonetheless, Hanpa has not demonstrated reversible error with regard to any of its other appellate contentions, and so we affirm regarding the remaining issues.