

Ho v. Liquidation Comm. of Nanjing Orientex Garments, Co., 11 ROP 2 (2003)

FRANK HO,
Appellant/Cross-Appellee,

v.

LIQUIDATION COMMITTEE OF NANJING ORIENTEX GARMENTS CO., LTD.,
Appellee/Cross-Appellant.

CIVIL APPEAL NO. 02-010
Civil Action No. 99-82

Supreme Court, Appellate Division
Republic of Palau

Decided: October 9, 2003¹

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Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Bill R. Mann and Mariano W. Carlos

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice;
KATHLEEN M. SALII, Associate Justice.

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

SALII, Justice:

The appeals presented in the instant case arise from a judgment issued by the Trial Division in favor of Frank Ho on his counterclaim against the Liquidation Committee of Nanjing Orientex Co., Ltd., (“Liquidation Committee”) in the amount of \$373,365.40. Ho appeals contending that the award should have been greater. The Liquidation Committee cross-appeals contending that Ho should not have received any award at all. For the reasons stated below, we affirm.

BACKGROUND

Nanjing Orientex was a garment-manufacturing company incorporated in the People’s Republic of China. World Fame, Inc., a Hong Kong corporation wholly-owned by Frank Ho, had a 51% share of Nanjing Orientex. Pukou Jaingsu Nongken Industrial and Commerce Co. (“Pukou”), a wholly-owned subsidiary of Jiangsu State Farms and **14** Agribusiness Corp. (“Jiangsu”) incorporated in the People’s Republic of China, owned the remaining 49%.

¹The parties have requested that their appeals be heard without oral argument pursuant to ROP R. App. Pro. 34(a).

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In July 1992, Ho proposed to Su Nan Jun, the general manager of Jiangsu, that they start a garment manufacturing business by the name of Orientex Palau in the Republic of Palau where, due to the Compact of Free Association with the United States, many of the import restrictions could be avoided. *Jiangsu State Farms & Agribusiness Corp. v. Ho*, 7 ROP Intrm. 268, 268 (Tr. Div. 1998). Orientex Palau was incorporated and received its corporate charter in April 1993. *Id.* From March 1993 through March 1995, Nanjing Orientex provided Orientex Palau with prefabricated materials for the construction of a garment factory and dormitories, covered the transportation costs of workers from China to Palau, and advanced the costs for a variety of other items necessary for the startup of garment factory operations. After the factory in Palau became operational, Orientex Palau repaid almost \$500,000 to Nanjing Orientex, but payments ceased in 1994 due to financial difficulties. Nanjing Orientex became insolvent when the payments from Orientex Palau ceased. Pressure was increasingly brought upon Ho because of the financial difficulties of both Nanjing Orientex and Orientex Palau. Ho transferred \$373,365.40 to Nanjing sometime in 1994 and an additional \$150,000 in January 1995. However, these cash infusions were not enough to prevent bankruptcy, and Nanjing Orientex was ordered into liquidation. Appellee Liquidation Committee was appointed on December 18, 1998, to liquidate Nanjing Orientex.

The Liquidation Committee brought suit to recover outstanding debts owed by Orientex Palau and Ho. The Liquidation Committee alleged that Ho failed to pay for garment orders received from Orientex Palau. Ho filed a counterclaim, alleging that Nanjing Orientex was liable to him for, among other things, his cash payments to Nanjing Orientex. The Liquidation Committee eventually dropped its claim against Ho. The instant appeals arise out of Ho's counterclaim.

The precise issue on appeal is the correct characterization of the cash payments made by Ho to Nanjing Orientex. Ho argued before the trial court that his payments were loans, while the Liquidation Committee attempted to establish that they were payments on accounts due and owing Nanjing Orientex or that they were capital contributions. The Trial Division observed that there was no evidence that Ho received any additional stock for these payments, nor was there proof that Ho received credit toward outstanding debts. Thus, the court concluded that Ho must be classified as a creditor of Nanjing Orientex and awarded Ho \$373,365.40 on his counterclaim. However, the court denied Ho's claim for \$150,000 as "outside the scope of the pleadings." Ho appeals, arguing that he should have been awarded this \$150,000. The Liquidation Committee cross-appeals, asserting that Ho should not have received any award at all.

DISCUSSION

A. Ho's Appeal

Ho argues that the trial court erroneously excluded his claim for the repayment of a loan he made to Nanjing Orientex in the amount of \$150,000 as outside the pleadings. In support of this claim, Ho presented the following testimony:

Q: Okay, Let's talk about, uh, Exhibit F, the Exhibit F. Was that **15** amount

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of money a [sic] \$150,000 given to Nanjing in cash?

A: This money was, I brought it in from Hong Kong. I gave it to Mr. Xu, the accountant of Nanjing Orientex.

Q: In cash?

A: In cash.

Q: What was the purpose of this money?

A: To pay off creditors.

Q: Of Nanjing?

A: Of Nanjing Orientex.²

Ho claims that he stated this claim in his Answer and Counterclaim, which provides:

9. Prior to 1995, Defendant/Counterclaimant Frank Ho through World Fame, Inc. purchased equipment and machinery for Nanjing Orientex Garments Co., Ltd. at the cost of \$160,000.

10. Upon information and belief, Pukou Jiangsu Nongken Industrial and Commerce Co. has expropriated the entire inventory including . . . [the] equipment and machinery therein

These pleadings do not support Ho's claim for the repayment of a \$150,000 loan. Ho's testimony is about a \$150,000 loan that he personally made to Nanjing to pay off creditors. In his pleadings, however, Ho alleged that World Fame, Inc. purchased equipment and machinery with a value of \$160,000 for Nanjing Orientex. These are two entirely separate allegations. The Trial Division correctly concluded that Ho's claim for repayment of a loan in the amount of \$150,000 was outside the scope of the pleadings.

Alternatively, Ho argues that the Trial Division should have granted his motion to amend the pleadings pursuant to ROP R. Civ. P. 15(b). In his motion, Ho maintained that amendment should be allowed because the Liquidation Committee did not object to his submission of evidence of the loan. Rule 15(b) requires amendment when issues are tried by express or implied consent. *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 880 F.2d 642, 646 (2d Cir. 1989). Whether an issue has been tried by express or implied consent is a finding of fact. *See Am. Eagle Credit Corp. v. Select Holding, Inc.*, 865 F. Supp. 800, 809 (S.D. Fla. 1994). We review a trial court's findings of fact for clear error. *Irikl Clan v. Renguul*, 8 ROP Intrm. 156, 158 (2000).

²2 Trans. 191-92.

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The Trial Division's finding that the issue of the \$150,000 loan was not tried with the express or implied consent of the Liquidation Committee is adequately supported by the record. On cross-examination of Ho, counsel for Liquidation Committee demanded, "Now, I also note in your counterclaim, uh, that you don't refer to 16 any loan of \$150,000. Isn't that true?" Ho's appeal is hereby denied.

B. Liquidation Committee's Cross-Appeal

The Liquidation Committee cross-appeals, insisting that the Trial Division incorrectly characterized the cash payment of \$373,365.40 made by Ho to Nanjing Orientex as a loan. With regard to the appropriate standard of review, the Liquidation Committee contends that the characterization of Ho's cash payment to Nanjing Orientex as a loan is a mixed question of law and fact which should be reviewed for correctness. The Liquidation Committee also insists that the trial court improperly shifted the burden of proof to it, requiring it to disprove the existence of a loan, rather than requiring the claimant, Ho, to bear the burden of proof. Ho argues that this issue is essentially a factual one and thus should be reviewed under a clearly erroneous standard.

The Liquidation Committee is correct in maintaining that, for purposes of his counterclaim, Ho bore the burden of proving by a preponderance of the evidence that his cash payment of \$373,365.40 to Nanjing Orientex was a loan. *Cf. Wolff v. Sugiyama*, 5 ROP Intrm. 105, 111 (1995) (stating that the claimant has the burden of establishing the elements of his or her claim). A loan is a "[d]elivery by one party to and receipt by another party of [a] sum of money upon agreement, express or implied, to repay it with or without interest." *Black's Law Dictionary* 647 (6th ed. 1991); *see also Berger v. Alaska*, 910 P.2d 581, 586 (Alaska 1996) (stating that "[a] loan is a payment of money by a lender to a borrower in exchange for an agreement to repay with or without interest"). Neither party contests the fact that Ho delivered and Nanjing Orientex received a sum of money. However, proof of delivery and receipt of funds is not enough. In order to succeed on his counterclaim, Ho needed to establish the existence of an express or implied agreement on behalf of Nanjing Orientex to repay the sum delivered by him.

Determining whether Ho's cash offer was a loan Nanjing Orientex accepted with the understanding that it had an obligation to repay ultimately boils down to ascertaining the parties' intentions. Ho asked the trial court to imply an agreement on behalf of Nanjing Orientex to repay the funds he delivered. When funds are furnished at the receiver's request, an agreement that the funds will be repaid will be implied as a matter of law. *Pinnacle Packing Co. v. Herbert*, 70 P.2d 31, 35 (Or. 1936); *see also* 17A Am. Jur. 2d *Contracts* § 15 (1991). Absent evidence of such a request, whether an agreement to repay funds should be implied depends on the factual circumstances in which the transaction was made. *Loitang v. Jesus*, 5 ROP Intrm. 216, 218 (1996).

Ho testified as to the circumstances surrounding his cash payment to Nanjing Orientex on cross-examination:

Q: Mr. Ho, regarding the loans that you claim that you made to Nanjing

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Orientex, uh, who asked you to make this [sic] loans?

A: Nobody asked me to do so. Being a shareholder of Nanjing and when all the creditors of Nanjing Orientex would come to my house, look for money and threaten **L7** my family safety I had to, and I was told by Chine-Chinese party said I was chairman, was a vice chairman of the corporation, I'm the person responsible for the payment. I had to pay it.

Q: Who told you that?

A: Uh, Mr. Xu of, uh Chiang Xu Nengkon.

Q: X-U? Mr. Xu.

A: Xu and Mr. Frank told me I'm resp-I'm the one since the Chairman of the Board I'm the one responsible for all the debts.

Q: What interest rate were you to receive on the loan?

A: Never discussed it.

Q: Why not?

A: Because, because people was (indiscernible) just give money to (indiscernible) or to creditors.

Q: Well, did you advise Accountant Xu that this money was a loan?

A: Was never said it was a loan.

Q: So you didn't ask for an IOU or a promissory note or anything?

A: There was always IOU with all the receipts. Unless I have the receipts that would have been in the book of, uh, Nanjing Orientex.

Q: Well, I understand that you have produced the receipt but what I'm asking you is did you ask accountant Xu to give you a promissory note or IOU or something?

A: No, I did not.³

Nanjing Orientex's accountant, Mr. Xu, also testified concerning the circumstances surrounding the transaction. Mr. Xu stated that Ho did not inform him that the cash payment was a loan. Mr. Xu testified that Ho did not state clearly what the money was for, which Mr. Xu

³2 Trans. 202-04.

Ho v. Liquidation Comm. of Nanjing Orientex Garments, Co., 11 ROP 2 (2003) thought was unusual, and that Ho directed him to use the money to pay a debt to a supplier. Mr. Xu testified that had the payment been a loan, he would have issued a receipt to show that Nanjing Orientex had borrowed money from Ho.

Mr. Heng Yi Fang, general manager of Pukou, owner of 49% of the stock of Nanjing Orientex, testified that to his knowledge no **L8** one ever asked Ho to make a loan to Nanjing Orientex. Mr. Heng stated that he would not have ever thought to seek money from Ho because he believed that Ho did not have any money given the fact that Ho had failed to fulfill his capital contribution obligation to Orientex Palau.

Given the testimony from Ho and Mr. Heng that Nanjing Orientex did not request a loan, an agreement to repay the funds cannot be implied as a matter of law. *See Herbert*, 70 P.2d at 35. Rather, it is a question of fact which we will review for clear error. When reviewing for clear error, if the trial court's findings of fact are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless the Appellate Division is left with a definite and firm conviction that a mistake has been committed. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

It is clear to us that, at least at the time Ho tendered the cash, none of the parties involved knew exactly how to categorize the transaction. Nanjing Orientex had not requested a loan nor did it issue a promissory note. Ho did not specify any repayment terms nor did he demand repayment until over four years later when the Liquidation Committee filed a claim against him for outstanding debts. Nanjing's accountant, Mr. Xu, wasn't even sure which entity the money was received from—Nanjing Orientex believed that Ho's company World Fame had outstanding debts and that Ho owed capital contributions to Orientex Palau. Arguably, Ho's tender could have been accepted as a gift, a loan, a payment on an outstanding debt, or a capital contribution.

Despite the lack of clarity surrounding the transaction between Nanjing Orientex and its majority shareholder, Ho, the precise issue presented by the Liquidation Committee's cross-appeal is whether a reasonable trier of fact could have concluded that Ho established that his cash payment to Nanjing Orientex was a loan to be repaid. We believe so. There is no reason to believe that Ho gave the money to Nanjing Orientex as a gift. While it is possible that Ho's transfer of funds was accepted by Nanjing Orientex as a payment for debts or as a capital contribution, Ho did not receive any credit toward alleged outstanding debts to Nanjing or toward capital contributions to Palau Orientex. The transaction most closely resembles a loan. Nanjing Orientex's accountant, Mr. Xu, testified that Ho gave him money and directed him to use it to pay Nanjing Orientex's debt to a supplier. Under the circumstances, it was reasonable for the court to infer a promise that the money would be repaid at a later time. Even if this Court were convinced that it would weigh the evidence differently, it may not reverse unless it is left with a definite and firm conviction that a mistake has been made. *Ongklungel v. Uchau*, 7 ROP Intrm. 192, 194 (1999). After reviewing the evidence before the Trial Division, we are not left with such a conviction.

CONCLUSION

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The trial court's judgment is hereby affirmed.