

Ulechong v. Morrico Equip. Co., 13 ROP 98 (2006)
**LAURENTINO ULECHONG dba
LU RENT AND LEASE,
Appellant,**

v.

**MORRICO EQUIPMENT COMPANY,
Appellee.**

CIVIL APPEAL NO. 04-017
Civil Action No. 01-168

Supreme Court, Appellate Division
Republic of Palau

Decided: April 26, 2006¹

Counsel for Appellant: Oldiais Ngiraikelau

Counsel for Appellee: William L. Ridpath

BEFORE: LOURDES F. MATERNE, Associate Justice; J. UDUCH SENIOR, Associate Justice;
and JANET HEALY WEEKS, Part-Time Associate Justice.

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

PER CURIAM:

This appeal follows a judgment of the Trial Division denying Appellant Laurentino Ulechong's ("Ulechong") breach of warranty claim against Appellee Morrico Equipment Corporation ("Morrico"). On appeal, Ulechong does not argue that the trial court erred in rejecting his breach of warranty claim but instead contends that Morrico breached an agreement between the parties. Because Ulechong proceeded under a breach of warranty theory before the trial court and does not challenge the trial court's finding that there was no warranty, and because he did not assert a breach of contract claim before the trial court, his appeal must be denied.

BACKGROUND

In late 1998, Ulechong, who is in the construction business, met with a representative from Morrico, a heavy equipment supplier and servicing dealer, to discuss purchasing two long-reach excavator machines. At that time, Ulechong was interested in purchasing the excavators in order to dredge coral for use in the construction of Palau's Compact Road. Ulechong agreed to

¹ The Court has concluded that oral argument would not materially assist in the resolution of this appeal. *See* ROP R. App. P. 34(a).

Ulechong v. Morrico Equip. Co., 13 ROP 98 (2006)

purchase two excavators manufactured by Hyundai Heavy Industries Co., Ltd. (“Hyundai”) and outfitted with .92 cubic yard (“cy”) buckets. After further discussions with Hyundai representatives, who were concerned that a .92 cy bucket might overload the excavators, Ulechong agreed to purchase the excavators outfitted with .82 cy buckets. Hyundai provided a one year, or 1,500 operation hours, manufacturer’s warranty with the machines.

199 In April 1999, Morrico, which is neither owned by nor an affiliate of Hyundai, delivered the excavators to Palau where they were transported from Koror to Ngchesar and put in use dredging coral. In October 1999, Ulechong complained about problems with the excavators’ bucket cylinders. Hyundai contracted with Daryl Lund to repair the problem, which was determined to be a design defect. After the bucket cylinders were repaired and before the expiration of the Hyundai warranty, Ulechong won a contract to work on the capitol construction project and the excavators were driven from Ngchesar to Melekeok where they were used to excavate soil. In January 2000, Hyundai hired Daryl Lund to repair both excavators for normal wear and tear under the manufacturer’s warranty. In addition, despite an indication that the problems with the excavators resulted from misuse, Hyundai fixed the boom arm joints and the track tension idlers on one of the machines. Morrico then informed Ulechong that he would have to settle his unpaid account with them before the second excavator’s track tension idlers would be repaired under the Hyundai warranty. Although Ulechong eventually paid the balance on his account, Morrico did not repair the second machine’s track tension idlers.²

On July 20, 2001, Ulechong filed a complaint alleging that both Hyundai and Morrico breached their warranty that the two excavators were free from defects. In his complaint, Ulechong asserted that he continued to have problems with the excavators even after repairs were performed under the Hyundai warranty. In particular, he sought to have the boom arm replaced as well as other unspecified defective parts. The action proceeded solely against Appellee Morrico because Hyundai was never served by Ulechong. The trial court entered judgment in favor of Morrico, finding that there was no warranty between Morrico and Ulechong. The court explained that Morrico never created an express warranty. Furthermore, the trial court held that there was no evidence that Morrico induced Ulechong to purchase the equipment or that Morrico warranted that the machines were suitable for excavating soil, which was likely the cause of damage to the boom arms.

After the court’s entry of judgment in favor of Morrico, Ulechong filed a motion to amend the judgment pursuant to Rule 59 of the Rules of Civil Procedure. Ulechong argued that at a minimum he was entitled to have Morrico complete repairs to the track tension idlers because Morrico had agreed to perform the repair if and when Ulechong paid his outstanding accounts, and Ulechong had paid those accounts. The trial court denied Ulechong’s motion to amend judgment, finding no extraordinary circumstances that would merit such relief. On appeal, Ulechong asserts that he is appealing the trial court’s judgment denying his breach of warranty claim; however, he does not challenge the trial court’s finding that no warranty existed. Instead, Ulechong merely argues that Morrico breached its agreement to repair the track tension

² Although unclear from the record below, on appeal it is asserted that the second excavator’s track tension idlers were not fixed after Ulechong paid his account because Morrico insisted that the machine be brought to Koror for repair and Ulechong refused to comply.

idlers on one of the excavators.³

1100

ANALYSIS

On appeal, Ulechong contends that the trial court erred in finding that he was not entitled to the cost of replacing the second excavator's track tension idlers. He argues that there is evidence in the record that the track tension idlers were defective, that Morrico acknowledged the defect, that parts were shipped to Palau to do the repair, and that Morrico agreed to do the repair. Ulechong then asserts that because Morrico agreed to do the repair and did not do so, judgment should have been entered in his favor. This argument must fail because Ulechong proceeded in the trial division solely on a breach of warranty theory;⁴ and the fact that Morrico may have agreed to fix the track tension idlers and did not complete the repairs, which is the only assertion presented on appeal, does not establish that Morrico created a warranty. Thus, Ulechong has failed to present an argument to support a finding that the trial court erred in entering judgment in favor of Morrico as to Ulechong's breach of warranty claim.

Although not explicitly stated in Ulechong's opening brief filed in the instant appeal, it appears that Ulechong is abandoning his breach of warranty claim and attempting to assert a breach of contract claim.⁵ It is well-settled that a party cannot raise new legal theories on appeal. *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004) (citing *Tell v. Rengiil*, 4 ROP Intrm. 224 (1994)). There are two exceptions to this rule. First, an issue raised for the first time on appeal may be addressed "to prevent the denial of fundamental rights, especially in criminal cases where the life or liberty of an accused is at stake." *Id.* (quoting *Tell*, 4 ROP at 226). Second, we may "consider the public good over the personal interests of the litigants" in situations where "the general welfare of the people is at stake." *Id.* (quoting *Tell*, 4 ROP at 226, and citing *ROP v. Airai State Pub. Lands Auth.*, 9 ROP 201 (2002)).⁶

³ This is the same issue that was presented for the first time in Ulechong's Rule 59 motion. Ulechong does not purport to challenge the trial court's denial of his Rule 59 motion on appeal, however, he does raise the same issue presented therein. Even if Ulechong were challenging the trial court's denial of that motion, he would not be entitled to relief. A new trial may be granted under Rule 59 "for manifest errors of law apparent in the record or for newly discovered evidence." ROP R. Civ. P. 59(a). As Ulechong did not challenge the trial court's determination that no warranty existed but instead raised an entirely new claim, it is clear that he did not argue that a manifest error of law occurred at trial in the consideration of his breach of warranty claim. Furthermore, Ulechong asserted that the factual basis for his breach of contract claim was before the court at trial, therefore, he cannot assert that he relied on newly discovered evidence to support his motion. Accordingly, it is clear that the trial court did not abuse its discretion in denying Ulechong's Rule 59 motion. *See Irruul v. Gerbing*, 8 ROP Intrm. 153, 154 (2000) (providing the standard of review).

⁴ *See* Complaint at 4 ("As a direct and proximate result of the defects and numerous failures of defendants' excavators to perform as represented and warranted, expressly and impliedly, plaintiff suffered injury to his goodwill and business reputation, incurred expenses and lost profits in an amount to be proved at trial.").

⁵ Ulechong, does not, at any time, however, refer to his claim as a breach of contract claim.

⁶ In *Kotaro*, this Court also recognized that "[i]n addition to these exceptions, the strict application of the forfeiture rule is tempered by a number of other considerations that are reflected in this Court's rules." 11 ROP at 237 n.2. For example, an argument that a trial court lacked subject matter

¶101 Here, Ulechong cannot demonstrate that either exception to the forfeiture rule is applicable. It cannot be successfully argued that failure to consider Ulechong's claim that Morrico breached an agreement to repair the track tension idlers on his excavator would amount to a denial of Ulechong's fundamental rights or impact the general welfare of the people. Therefore, neither of the exceptions to the forfeiture rule are applicable to this appeal. Accordingly, we decline to address Ulechong's breach of contract claim.

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

jurisdiction may be considered for the first time on appeal because lack of subject matter jurisdiction can never be waived. *Id.* (citing ROP R. Civ. P. 12(h)(3)). As there is no question regarding the trial court's subject matter jurisdiction in the instant action, this rule does not impact the outcome of this appeal. In conducting a plenary review of a trial court's grant of summary judgment, this Court also may consider a newly raised argument that presents a pure question of law and that relies on uncontested facts admitted below. *Id.* Even if the trial court had granted defendant's motion for summary judgment, which it did not, it is clear that a trial court's consideration of a breach of warranty claim will rely on substantially different facts than those considered for a breach of contract claim. In this action, as the trial court was considering whether Morrico created a warranty as to the excavators it sold Ulechong, the factual record below focused on the actions of Morrico prior to the sale of the machines. These facts are insufficient to determine whether Morrico actually entered into an agreement to repair the track tension idlers more than one year after the sale of the excavators and if so, what the terms of that agreement were. In the absence of such factual findings in the record, Ulechong's instant claim for breach of contract clearly does not raise pure issues of law appropriately considered for the first time on appellate review.