

Kobayashi v. Kamiishi, 13 ROP 72 (2006)
MASAKAZU KOBAYASHI,¹
Appellant,

v.

KATSUO KAMIISHI and KAMIISHI ENTERPRISES CO., INC.,
Appellees.

CIVIL APPEAL NO. 05-005
Civil Action No. 02-109

Supreme Court, Appellate Division
Republic of Palau

Decided: March 7, 2006

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Counsel for Appellants: Johnson Toribiong

Counsel for Appellee: Mark Doran

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; JANET HEALY WEEKS, Part-Time Associate Justice.

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

PER CURIAM:

Appellant Masakazu Kobayashi appeals the lower court's judgment in favor of the plaintiff for \$32,534.90. For the following reasons, the judgment below is AFFIRMED, in part, and REVERSED, in part.

BACKGROUND

This case arises out of a contractual dispute between Kobayashi and Appellees Katsuo Kamiishi and Kamiishi Enterprises Company. Kamiishi Enterprises is incorporated in Palau and does business as Ashibi Restaurant. Kamiishi owns the company and serves as the general manager for Ashibi.

Kobayashi was a frequent customer at Ashibi, where he had an account for food and beverages to be due and payable at the end of each month. Starting in 1996, Kobayashi charged thousands of dollars worth of food and beverages at Ashibi, and Kamiishi claims these debts

¹ The notice of appeal and other appellate filings style the Appellant's name as Kobayashi Masakazu rather than Masakazu Kobayashi. The trial court, however, noted that there was evidence that Appellant's correct name is Masakazu Kobayashi.

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have not been paid. In addition to these charges, Kamiishi contends that Kobayashi has three other sources of debt that Kobayashi has yet to pay. First, Kamiishi argues that Kobayashi's employee Masao Yoshimochi was permitted to charge his dining expenses at Ashibi to Kobayashi's account. Second, between January 2000 and May 2000, Kobayashi accrued an outstanding 174 account in the amount of \$1860.00 at Meyuns Restaurant, and Kamiishi paid this debt for Kobayashi. In return, Kobayashi was to pay back Kamiishi. Third, Kobayashi was unable to pay for the services of Yoshimochi, and Kamiishi apparently paid \$1000.00 to Yoshimochi on behalf of Kobayashi. The latter was to pay Kamiishi back in February 2000.

Kamiishi filed this lawsuit in order to recover the principal amounts due with interest. He also sought post-judgment interest. Kobayashi admitted to accruing debt at the two restaurants, but denied the remaining counts. He offered only one affirmative defense, in which he asserted that he satisfied the debt through credit card charges paid to Southern Marine Divers. Apparently, Ashibi does not have the capabilities to receive payments via credit card, but Kamiishi also owns Southern Marine Divers, which accepts credit cards. Customers with accounts at Ashibi may pay their debt by charging a credit card at Southern Marine Divers.

The credit card receipts submitted at trial indicated that Kobayashi's charges were for "tour fees." Kamiishi argued that these transactions were merely cash advances and were not payments towards Kobayashi's debt. Kobayashi stipulated that cash was withdrawn from the Southern Marine Divers bank account based on these charges, but he insisted that he gave some of the money to Kamiishi for payment of the debt. In addition to his defense, Kobayashi filed a \$5000 counterclaim against Kamiishi. Kobayashi argued that he paid \$5000 towards Kamiishi's loan at Palau Central Bank at Kamiishi's request, and that that money should be credited toward Kobayashi's debt.

The trial court found that Kobayashi was indebted to Kamiishi for \$32,534.90. It reasoned that because the credit card receipts were "fictive paperwork," they could not be tied to any particular transaction and could not be used to prove that they were payments towards the debt at issue in this case. Additionally, the court focused on a letter written by Kobayashi, which indicated that he would settle the accounts owed Kamiishi. The letter was written after the credit card charges, prompting the court to conclude that Kobayashi would not have had outstanding accounts with Kamiishi if the credit card charges satisfied his debt. The court also rejected Kobayashi's counterclaim, finding that there was no credible evidence that Kobayashi paid money to Palau Central Bank on behalf of Kamiishi. In addition to the principle amounts due, the court concluded that Kamiishi was entitled to receive pre- and post-judgment interest at the rate of eighteen percent.

Kobayashi appeals this decision on four grounds. First, he argues that the trial court was clearly erroneous in finding that the credit card receipts did not prove satisfaction of his debt. Second, Kobayashi asserts that the court erred in concluding that he is liable for the money Kamiishi paid Yoshimochi and Meyuns Restaurant without a writing satisfying the Statute of Frauds, which provides that a person is not answerable for the debt of another unless he acknowledges the same in writing. Third, he claims that the court erred in not finding Kamiishi liable to Kobayashi on the \$5000 counterclaim. Fourth, Kobayashi contends that the court erred

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by assessing pre- and post-judgment interest at a rate of eighteen percent.

STANDARD OF REVIEW

The lower court's conclusions of law are reviewed using the *de novo* standard. *Tsai* 175 v. *ROP*, 9 ROP 142, 143 (2002). The factual findings of the trial judge will be disturbed only if they are clearly erroneous. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002). Under this standard, the findings of the lower court will only be set aside if they lack evidentiary support in the record such that no reasonable trier of fact could have reached that conclusion. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). In reviewing the factual findings, the Court will not substitute its own judgment of the credibility of witnesses or the weight of the evidence. *Ngeribongel v Gulibert*, 8 ROP Intrm. 68, 70 (1999); *Tmol v. Ngirchoimei*, 5 ROP Intrm. 264, 265 (1996).

ANALYSIS

A. Credit Card Receipts

Kobayashi defended this action by arguing that he had paid his debt to Kamiishi via credit card payments made to Southern Marine Divers, a business owned by Kamiishi. Several facts are not in dispute. First, Ashibi did not have the capabilities to accept credit cards. Second, six credit card transactions from Southern Marine Divers were made using Kobayashi's card between February 4 and May 2, 2000. These transactions amounted to \$31,193.33. Third, that total is higher than the total amount of principal and interest that Kobayashi owed Kamiishi as of the date of the last payment, based on the evidence presented in this case. Fourth, the credit card transactions listed as payment for "tour fees" were not for tours. Fifth, Kobayashi did not enter into evidence any receipts specifically for debts paid.

The central dispute is whether these credit card charges were intended to satisfy Kobayashi's debt to Kamiishi. Kobayashi argues that they were. Kamiishi, however, contends that these transactions were merely cash advances, and Kobayashi received cash for the amount charged (minus the dive shop's contractual fee paid to the credit card on such charges). Kamiishi asserts that Kobayashi used the cash for a variety of purposes, but not to satisfy his debt at Ashibi.

The lower court's finding that the credit card charges were not related to the satisfaction of Kobayashi's debt is supported by evidence in the record such that the court reasonably reached that conclusion. As an initial matter, the stated purpose of the transaction—tour fees—is not accurate. Both parties acknowledge this fact, and thus, the purpose of the credit card transactions is subject to interpretation. Kobayashi's argument that the receipts prove payment of the debt is contradicted by his letter drafted on December 21, 2001 to Yoshimochi. In the letter, Kobayashi states that he would settle the accounts owed Appellees, and then he would pay Yoshimochi. Kobayashi would not have made this statement if he had, in fact, not owed money to Appellees. Moreover, the six credit card payments appear to be arbitrary amounts, ranging from \$2929.00 to \$8181.00, and Kobayashi provided no documents or invoices to connect these

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payments with specific debts at Ashibi or elsewhere. Accordingly, the trial court was not clearly erroneous in finding that the credit card payments were not intended to discharge Kobayashi's debt to the Appellees.

Kobayashi's argument that receipts are presumptive evidence of payment is accurate. *See* 60 Am. Jur. 2d *Payments* § 131 (2003). Kobayashi's credit card receipts would be presumptive evidence of payment of tour fees, but that presumption is nullified by both parties agreeing that the charges were not for tour fees. Additionally, Kobayashi argues that "the law presumes that money given to **L76** another to whom a debt is owed is given in payment of the debt rather than for some other purpose." *Id.* § 110. Kamiishi's testimony and the December 21, 2001, letter is sufficient to rebut any presumption that may be formed on this premise. Therefore, these presumptions do not apply to the issues in this case.

B. Statute of Frauds

On appeal, Kobayashi argues that the court should not have found him liable for the funds Kamiishi paid Meyuns Restaurant and Yoshimochi because the Statute of Frauds requires a written promise to answer for the debts of another. *See* 39 PNC § 504(b).² Although Kobayashi briefly discussed this issue in the closing argument at trial, he did not raise the issue in his answer, nor did he attempt to amend his answer to include a statute of frauds defense. Rule of Civil Procedure 8(c) requires a defendant to affirmatively set forth any statute of frauds defense in the pleadings. ROP R. Civ. P. 8(c). Thus, Kobayashi has effectively waived the statute of frauds defense, *see In re Rengiil*, 8 ROP Intrm. 118, 119 (2000), and this Court need not address the merits of the argument.

C. Counterclaim

The trial court rejected Kobayashi's counterclaim because it found "no credible evidence that he paid money to the bank on behalf of Kamiishi." Kobayashi points to Defendant's Exhibit 7 as evidence that he paid Kamiishi five thousand dollars. Defendant's Exhibit 7A provides an English translation for the Japanese characters in Exhibit 7, and it states:

TO KOBAYASHI
Total \$5,000.00 includes no. 1 and no. 2.
No. 1 \$3,000 and No. 2 \$2,000 received
No. 3 \$1,000. No. 4 \$500.

² 39 PNC § 504 states, in part:

In the following cases every agreement shall be void unless such agreement or some note or memorandum thereof is in writing, and subscribed by the party to be charged therewith, or by his lawful agent under written authority:

....

(b) A special promise to answer for the debt, default, or misdoings of another person. . . .

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No. 5 \$500.

Remaining balance \$3,000.00

Jan 31st 2000. Present. Kamiishi Katsuo (Masao)

The underlying meaning of this document is vague, and trial testimony did not provide significant help in determining its meaning. Kobayashi argues that it proves that Kamiishi received \$5000 from Kobayashi based on the line that reads “No. 1 \$3,000 and No. 2 \$2,000 received.” He did not, however, have any receipts from Kamiishi that indicate a monetary transfer. Kamiishi argues that the exhibit only reveals that he received \$2000 from Kobayashi, and that money was part of a commission on a joint business venture with Roman Tmetuchl.

These are two plausible explanations for the vague document. Where there are two permissible views of the evidence, the court’s choice between them cannot be clearly erroneous. *Uchelkumer Clan v. Isechal*, 11 ROP 215 (2004); *Seventh Day Adventist Mission of Palau, Inc. v. Elsau Clan*, 11 ROP 191 (2004); *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161 (2004); *Saka v. Rubasch*, 11 ROP 137 (2004). Thus, the trial 177 court was not clearly erroneous in its finding that there was no credible evidence to support the counterclaim, and therefore, it appropriately rejected the counterclaim.

D. Pre- and Post-Judgment Interest

The trial court awarded Appellees pre- and post-judgment interest at a rate of 18% per year, the highest percentage allowed for consumer transactions pursuant to 11 PNC § 305. On appeal, Kobayashi argues that the court should have only awarded interest at a rate of 9% per annum. He cites to 14 PNC § 2001, which sets a post-judgment rate of interest rate of 9% per year. This Court has declared that it is appropriate for a trial court to award pre-judgment interest at 9%, or to award a higher rate when the parties have entered into a valid contract providing for a higher interest rate. *AJJ Enterprises v. Renguul*, 3 ROP Intrm. 29, 31 (1992); *accord* Restatement (Second) of Contracts § 354 (1981) (“If the breach consists of a failure to pay a definite sum in money . . . , interest is recoverable from the time of performance on the amount due . . .”).

In the findings of fact, the trial court stated that “Kamiishi testified that Kobayashi agreed to pay interest at the highest rate allowed by law.” Kamiishi made this same statement in his written closing argument, but neither Kamiishi nor the court pinpointed the location of this testimony in the transcript. Having thoroughly reviewed the trial transcript, this finding is not supported by any testimony. The extent of Kamiishi’s testimony on interest is limited to the following:

Mr. Doran: At some point, did you ever come to an understanding with Mr. Kobayashi about paying interest on these invoices?

Mr. Kamiishi: For a long time, there was no payment made so I told them I will add the interest and I will, uh, send them the bill.

Doran: Do you remember when that was?

Kamiishi: I, uh, maybe it was around 1999 or year 2000.

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Doran: Okay. And did you happen to mention some sort of, uh, a specific interest rate that would be charged?

Kamiishi: Yes, I have sent him a fax.

Doran: Okay. What, what was the interest rate?

Kamiishi: I don't know too much about, uh, interest rates and so forth so I have asked, uh, employee of the bank to, for some advice. I believe he recommended or he put it, he wrote a 1.7%.

Doran: Okay. 1.7% or 17%.

Kamiishi: Isn't 1.7 and 17, the same? I'm not sure. It's some rate that, uh, that is equivalent to the bank.

Doran: Okay. When you talked to Mr. Kobayashi, did you mention a specific rate such as the rate charged by the bank or annual rate, every year, the rate?

Kamiishi: I have not spoken directly to Mr. Kobayashi about this rate but we computed here ourselves.

.....

Doran: You said you talked with Mr. Kobayashi about the interest in around 1999 or 2000.

Court: Can you be more specific about the date?

Kamiishi: I don't remember the date.

Doran: Okay. Can you pinpoint **L78** whether it was 1999 or 2000?

Kamiishi: It was between 19--'99 and 2000. I, uh, wrote, uh, the invoice, I sent the invoice to Mr. Kobayashi and I also sent the invoice to Mr. Yoshimochi.

Transcript at 14-16. And with respect to interest related to the charges at Meyuns Restaurant, Kamiishi testified as to the following:

Doran: And did you have any understanding with him about paying interest for the money that you paid to Meyuns Restaurant?

Kamiishi: No, I have not.

Tr. at 19.

Without more evidence, the trial court was clearly erroneous in finding that Kobayashi agreed to pay interest at the highest rate allowed by law. Kamiishi did not testify that Kobayashi agreed to an 18% interest rate. In fact, Kamiishi stated it was either 1.7% or 17%. Thus, there was no evidence to prove an agreement with respect to interest, and under those circumstances, *AJJ Enterprises* only permits pre-judgment interest at a rate of 9%. This requires reducing the judgment from \$32,534.90 to \$24,319.90 (\$15,668.10 in principal and \$8651.80 in interest³) as of December 24, 2004.

With respect to post-judgment interest, the trial court awarded Appellees \$7.73 per day for post-judgment interest. This figure reflects a daily interest of 18% from the \$15,668.10 judgment of principal owed. The legislature, however, has set a ceiling of 9% on all post-judgment interest. 14 PNC § 2001. Therefore, the trial court erred and its judgment with respect

³ We have adopted the figures used in Kamiishi's written closing argument.

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to the post-judgment interest should be amended to an award of only \$3.86 per day for payment after December 24, 2004.

CONCLUSION

In summary, the trial court was not clearly erroneous in finding that the credit card receipts did not establish Kobayashi's payment of his debt to Kamiishi. Similarly, the trial court was not clearly erroneous in finding "no credible evidence that he paid money to the bank on behalf of Kamiishi." With respect to the statute of frauds argument, Kobayashi did not raise this affirmative defense at trial. Thus, this court is precluded from hearing argument on that subject. Finally, the trial court erred in setting pre- and post-judgment interest at 18%. There is no evidence in the testimony or documents offered at trial that would support the finding that Kamiishi and Kobayashi agreed to the highest interest rate permitted by law, and the holding of *AJJ Enterprises* controls in this case. Ultimately, we affirm, in part, the trial court's judgment, and reverse only to reduce the judgment from \$32,534.90 to \$24,319.90 plus \$3.86 per day for interest after December 24, 2004.