

Nebre v. Uludong, 15 ROP 15 (2008)

**MIA NEBRE,
Appellant,**

v.

**MOSES ULUDONG, MYU PUBLICATIONS, ROP DIVISION OF LABOR,
and ROP DIVISION OF IMMIGRATION, Appellees.**

CIVIL APPEAL NO. 06-023

Civil Action No. 05-119

Supreme Court, Appellate Division
Republic of Palau

Decided: January 21, 2008¹

¶16 - ¶17

Counsel for Appellant: *Pro Se*

Counsel for Moses Uludong and MYU Publications: Oldiais Ngiraikelau

Counsel for ROP Divisions of Labor and Immigration: Erin Johnson, Christopher Hale

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

MATERNE, Justice:

This is an appeal from a civil action brought by Mia Nebre (“Nebre”) against the Republic of Palau Division of Labor (“Labor”), Bureau of Immigration (“Immigration”), MYU Publications (“MYU”) and Moses Uludong (“Uludong”). Nebre brought a number of claims against the Defendant-Appellees arising out of her employment with MYU and Uludong.² On appeal, Nebre argues that the trial court erred in (1) dismissing her claims for declaratory judgment against Labor and Immigration; (2) affirming Labor’s May 6, 2005 Decision (“Labor Decision”); (3) denying her claims of sexual harassment and intentional infliction of emotional distress; and (4) denying her requests for punitive damages and attorney’s fees. She further argues that the trial court failed to make certain findings of fact regarding her claims of false imprisonment, fraud, fraudulent misrepresentation, forgery, and Rule 11 sanctions. We affirm,

¹ The panel finds this case appropriate for submission without oral argument, pursuant to ROP R. App. P. 34(a).

² Uludong and MYU filed counter-claims of defamation and breach of contract against Nebre. The trial court denied these claims, ruling in favor of Nebre. Although, Uludong and MYU filed a cross-appeal in this matter on such claims, this Court dismissed their appeal on May 15, 2007, due to the cross-appellants’ failure to make the final payment for transcript costs in this action.

reverse, and remand in part the trial court's decisions in this matter.

BACKGROUND

On September 26, 2003, Nebre and Uludong entered into an employment contract under which Nebre would work for MYU as a reporter for the Tia Belau. Before the contract **118** was executed and finalized, Nebre's agent gave her a blank Republic of Palau employment contract with penciled-in responses written in certain spaces. Nebre typed in the responses, had the contract notarized, and returned it to her agent to send to Palau. Under the terms of the contract, Nebre was to be employed for a period of two years, during which she would work eight hours per day, six days per week, as a writer and reporter. In return, she would receive a salary of \$500 per month, as well as free room and board, and transportation to and from Koror at the beginning and end of the employment contract.

A few days before her arrival in Palau, Nebre received a copy of an employment contract nearly identical to the one she had signed. The new contract, however, altered the terms of the original to provide that: (1) \$50 would be deducted from her paycheck each pay period to cover the costs of her return airfare in case she breached the contract; (2) Nebre would not be eligible for worker's compensation; and (3) she would be responsible for her own meals. Additional rules were also added to specify how she was to dress for work and how to conduct her duties. Nebre did not see this amended contract until it was sent to her prior to her departure for Palau.

Upon her arrival in Palau on October 28, 2003, Nebre was immediately assigned to cover the Philippine Trade Show, a three-day fair that was held at the Palasia Hotel. Approximately two weeks later, Nebre received her first paycheck. The paycheck did not compensate Nebre for the three days in October during which she covered the Trade Show. In addition, the following deductions had been made: medical permit fee, social security card application fee, and a \$50 deduction towards payment of return airfare to Manila. Nebre submitted a written complaint to Uludong regarding these deductions, but did not receive a specific response to her inquiries. This was the first of many instances during Nebre's employment that Uludong and MYU failed to provide the full salary and benefits promised to Nebre under her original employment contract.

On February 13, 2004, Uludong learned that Nebre had begun a romantic relationship with one of her coworkers, Ed Roj ano, also an MYU employee, and that he had been living with her at the apartment that had been provided to her pursuant to her contract. That same day, Uludong provided Nebre with a memorandum outlining what he believed to be a number of deficiencies in her job performance. The disciplinary memo listed nine specific problem areas, including her: (1) failure to submit a sufficient number of stories; (2) failure to submit stories in a timely manner; (3) poor writing quality; (4) commission of "the most serious blunder this paper has made since [its founding]"; and (5) failure to admit mistakes and attempts to cover-up or excuse errors. In addition, the memo addressed Nebre's cohabitation with a coworker. The memorandum further stated that since beginning work in October 2003, Nebre's work performance had been unsatisfactory. As a result, Uludong presented Nebre with two options: (1) "resign and leave Palau in two weeks or earlier" or (2) "continue to work but with [a]

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reduction in pay of \$50 per month (\$25 biweekly) for three months and agree to produce more and change behavior.” The memo demanded that Nebre respond with her answer by 8:00 p.m. the following evening, February 14, 2004. Failure to do so, according to the memo, **L19** would leave Uludong to “assume that you accept Option 1 and will leave in two weeks or earlier.”

Nebre responded in writing the following day, acknowledging the three-month probationary condition of her employment and essentially explaining her version of the various incidents raised by Uludong. Nebre ends with a request for MYU to terminate her in accordance with her contract and send her home. In a response letter dated March 26, 2004, Uludong characterized her response as “arrogant and unremorseful.” In light of her failure to adequately address her performance deficiencies, Uludong concluded that Nebre’s employment would be terminated effective April 1, 2004, subject to an appeal to the Manager of MYU, Lillian Uludong. Five days after Uludong’s reply, on March 31, Nebre and her boyfriend moved out of the employer-provided housing where they had been living, though she continued to work at Tia Belau.

On Thursday, April 1, 2004, Nebre met with Lillian Uludong, who advised her that she would no longer be employed as a reporter for the Tia Belau, but that she would be able to work as a sales clerk for the Batutti Art Gallery and Lehn’s Motel, also owned and/or managed by the Uluddnns. Lillian Uludong advised Nebre that her monthly salary would be reduced from \$500 to \$300 if she accepted the new positions. Before having the opportunity to decide whether to accept this proposed amendment to her contract, Nebre learned that a ticket had been purchased for her to leave Palau on Saturday, April 3, 2004. Nebre subsequently went into hiding and, on April 5, 2004, filed a complaint with Labor claiming that she had been unfairly terminated from her position at MYU and transferred to the art gallery and motel. A few days later, on April 9, 2004, Labor conducted a hearing on Nebre’s complaint. Prior to the hearing, the Labor mediator informed Nebre that, regardless of the outcome of the hearing, she would be left with two options at its conclusion: either continue her employment with Uludong and MYU or repatriate to the Philippines.

On April 26, 2004, Labor issued a decision ordering Nebre to depart from the Republic of Palau within ten working days, in light of her inability to negotiate continued employment with Uludong and MYU. Nebre subsequently filed an appeal to the Chief of Labor, which was denied as untimely. The order denying her appeal, dated May 25, 2004, further instructed Nebre that she must depart Palau by June 5, or be subject to overstay penalties.

Throughout this time, between April 1 and May 31, 2004, Nebre was unemployed. Subsequently, while preparing an appeal of Labor’s May 25, 2004 order, Nebre continued to negotiate further employment with Uludong. During these negotiations, Uludong presented her with an “Addendum” to her original employment contract. Under this Addendum, Nebre was to be responsible for writing at least two stories per day, six days a week, and for soliciting advertisements. In return, Nebre would receive a monthly salary of \$300, as well as a five percent commission on all advertisement sales. Nebre would be responsible for her own room and board. Nebre was also told by Uludong that her coming back to work at MYU was subject to approval by Lillian Uludong, and had Nebre write an apology letter, addressed to Uludong and

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copied to Lillian Uludong, asking for forgiveness and thanking the two of them for ¶20 “bearing with” her. Nebre signed the Addendum on June 5, 2004.

Thereafter, Nebre continued to work as a Tia Belau reporter from June 1, 2004, through January 31, 2005. On February 1, 2005, Nebre filed a second complaint with Labor alleging, *inter alia*, that Uludong had forced her to sign an illegal Addendum to her contract by threatening to terminate her employment and force her deportation to the Philippines. Nebre also reported that, since returning to work for MYU under the terms of the amended contract, she had only “seldom” received her five percent commission for advertisement sales, and that she had yet to receive her commissions earned during the months of November and December 2003. The complaint also referred to a “malicious rumor” that had been circulated about an alleged relationship she had with Uludong. In light of her present work environment and laws restricting her ability to find new full- or part-time employment in Palau, Nebre asked that Labor order Uludong and MYU to provide her with a return airline ticket to Manila, as required under her contract, and order Uludong and MYU to pay her the remaining commissions due to her. Nebre provided copies of her complaint to various members of the community, including the Office of the President and members of both houses of the Olbiil Era Kelulau.

Labor issued written notice that it was conducting a hearing on Nebre’s complaint on February 10, 2005. Uludong advised Labor in writing that he would not be able to attend the scheduled hearing, and he did not submit any evidence for Labor’s consideration. He did, however, ask for a copy of Nebre’s complaint in order to be able to adequately respond thereto. On February 10, 2005, Labor proceeded with the hearing. It was only at this hearing that Labor became aware of the June 5, 2004 Addendum. On February 28, 2005, Labor issued an order declaring that the Addendum to Nebre’s employment contract was invalid because Labor had not approved it as required by its regulations. Consequently, the order held that Nebre was entitled to her full \$500 monthly salary for the duration of her employment with MYU, as well as free housing. Labor concluded that Uludong and MYU owed Nebre a total of \$2000 and that, in addition, Uludong must purchase Nebre a return airline ticket to the Philippines in light of her decision to end her employment.

Both Nebre and Uludong wrote to Labor, each appealing the February 28, 2005 decision and requesting a hearing. Nebre requested modification of her claim and Uludong asked to respond to Nebre’s allegations. A second hearing was conducted on March 18, 2005. Following the hearing, Labor issued a decision on or about May 6, 2005 (“Labor Decision”) in which it reversed itself, declaring the Addendum valid, despite the fact that it never signed the contract. It reasoned that by failing to either sign or disapprove of the contract, it had tacitly agreed to the terms of the Addendum. Nevertheless, Labor also found that Uludong had breached the terms of the employment contract by failing to pay Nebre commissions and costs of transportation, housing, return airfare, and unpaid salary, and awarded Nebre \$1442.18 under the amended contract.

On the same date, Immigration served Nebre with a “Non-Resident Alien Notice of Overstay and Fine.” According to Nebre, the serving officer showed her the letter, dated April ¶21 5, 2005, from Uludong informing Immigration that Nebre had been terminated from her

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position at MYU, retroactive to February 5, 2005. This was the first time that Nebre saw the termination letter. Uludong's letter to Immigration did not mention the fact that Nebre had a pending Labor dispute against MYU and Uludong, that a hearing had been held, or that she was waiting for Labor's decision to be issued. Upon learning of the pending employment dispute, Immigration withdrew the notice.

Between February 1 and July 25, 2005, Nebre was unemployed. On July 25, 2005, Nebre began work as a reporter for a rival newspaper, the Palau Horizon, with Labor's knowledge and approval. While employed at Palau Horizon, Nebre's work performance, with respect to the quality of her work as well as the volume of her work performed, exceeded the expectations of her supervisor.

While Nebre was employed at MYU, Uludong made several inappropriate, sexually suggestive comments to her and, on several occasions, touched her in an inappropriate and unwanted manner. On numerous occasions at work, usually at night during production time, Uludong would touch her on her shoulders, her legs or thighs, and would nudge or poke her waist while editing or commenting on her writing. In late December 2003 at Palau Hotel, several MYU staff were out for the evening, and Uludong made a comment to Nebre to the effect that he could accommodate her because his wife was scheduled to be off-island soon. Ed Rojano, Nebre's boyfriend at the time, heard Nebre complain of Uludong's unwanted touching and was aware of her discomfort with Uludong's conduct.

On May 19, 2005, Nebre filed her complaint in the Supreme Court. The trial court, on June 14, 2006, issued its decision finding in favor of Nebre on her claim for breach of contract and granting her certain relief. Specifically, the trial court found that the Addendum was invalid, that Uludong and MYU had breached the original employment contract, and that Nebre was owed back-pay and other relief as defined under the original employment contract. The trial court denied Nebre's claims of sexual harassment, intentional infliction of emotional distress, and punitive damages, as well as Uludong's and MYU's counterclaims for breach of contract and defamation. On July 14, 2006, Nebre filed her notice of appeal. In her Notice of Appeal, Nebre indicated that she did not intend to appeal paragraphs two or four of the judgment, which found in her favor on her claim for breach of contract and Uludong's and MYU's counterclaims.

STANDARD OF REVIEW

We review the trial court's findings of fact for clear error. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002). "Under the clear error standard, the lower court will be reversed 'only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.'" *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002) (citation omitted). Although a trial court need not discuss all the evidence relied on to support its conclusions, the court's decision must "'reveal an understanding analysis of the evidence, a resolution of the material issues of fact that penetrate beneath the generality of ultimate conclusions, and an application of the law to those facts.'" *Fritz v. L22 Blailles*, 6 ROP Intrm.152,153 (1997) (citation and internal quotation marks omitted). The trial court's conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP

DISCUSSION

A. Claims Against Labor and Immigration

1. Nebre's Claims for Declaratory Relief

As part of her First Amended Complaint (“FAC”), Nebre brought three claims for declaratory relief against Labor and Immigration (Counts Nine, Eleven, and Fourteen). The trial court dismissed all three claims before trial in this matter. On appeal, Nebre argues that the dismissal of these claims was inappropriate.

In Count Nine of the FAC, Nebre challenged whether Labor violated her constitutional right to due process in failing to issue her a temporary work permit. The trial court dismissed this claim due to the fact that Nebre was issued a temporary work permit in July 2005, thus she failed to set forth a live case or controversy on this issue, and her claim was moot.

In Count Eleven, Nebre asked the trial court to issue a declaratory judgment finding that Labor has a duty “to insure the fair treatment of foreign workers” and that it has the “power to modify a proposed amendment to an employment contract before it signs the amendment, to insure the fair treatment of the foreign worker.” In Count Fourteen, Nebre sought a declaration by the trial court ordering Immigration to “refrain from acting in complicity with employers to harass foreign workers or to make them believe they will be deported when there is no basis in law,” and ordering Immigration to “be of assistance to foreign workers and . . . give access to documents in their possession that pertain to the foreign worker.” The trial court dismissed both of these claims because they were purely hypothetical, failed to present an actual legal controversy between the parties in the lawsuit, and raised only political questions.

This Court applies a *de novo* standard of review when reviewing a trial court’s decision on a motion to dismiss. *Senate v. Nakamura*, 7 ROP Intrm. 212, 212-13 (1999). In adjudicating a motion to dismiss, “all allegations in the complaint are accepted as true, and the Court’s inquiry is limited to whether the allegations are sufficient to make out the elements of a right to relief.” *Baules v. Nakamura*, 6 ROP Intrm. 317, 317 (1996) (citation omitted).

The Palau National Code provides that “[i]n a case of actual controversy within its jurisdiction, any appropriate court of the Republic, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 14 PNC § 1001. To be granted declaratory relief, a litigant “must demonstrate the existence of a ‘substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment’” *Filibert v. Ngirmang*, 8 ROP Intrm. 273, 276 (2001) (quoting *Senate*, 8 ROP at 193 (2000)). A declaratory judgment is not appropriate where the dispute between the **123** parties has been rendered moot. *Antonio v. Koto*, 9 ROP 116,117 (2002).

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In Count Nine of her FAC, Nebre sought a declaration that stated the following:

[A]s a foreign worker . . . she has a due process right to a temporary work permit during the pendency of the litigation, that said temporary work permit should be granted as soon as practicable, and that the delay of 6 months is of such duration that it could impair a litigants [sic] right to due process.

At the time of the lawsuit, Nebre had been issued a temporary work permit, on the basis of which she had obtained employment with Palau Horizon newspaper. Moreover, the trial court found that the delay in the issuance of her work permit was only three months, not six. Counts Eleven and Fourteen of the FAC requested that declaratory judgments be issued by the Court dictating the duties and powers of two government agencies: Labor and Immigration. In her FAC, as well as her opening brief in this appeal, Nebre fails to demonstrate any facts that establish these claims as anything beyond speculative inquiries. Instead, her claims are couched in terms of hypothetical foreign workers in hypothetical situations.

“The Palau Constitution does not limit the jurisdiction of this court to ‘cases or controversies.’ Instead it defines the jurisdiction of this Court as extending to ‘all matters in law and equity.’” *Nakamura v. Sablan*, 12 ROP 81, 85 (2005) (Ngiraklsong, C.J., concurring) (citing Palau Const. art. X, § 5). However, this Court has declined “to enter into speculative inquiries of matters that lack concrete factual situations, fully developed and properly presented for determination.” *Koror State Gov’t v. ROP*, 3 ROP Intrm.127,128-29 (1992) (citing *Electric Bond and Share Co. v. SEC*, 59 S. Ct. 678, 687 (1938)). Thus, the trial court’s dismissal of these claims was appropriate.

2. Appeal of the Labor Decision

Appellant challenges the trial court's decision upholding the Labor Decision. She argues that the Addendum was an invalid alteration to her original employment contract. She notes that the trial court concurred with this conclusion when it reviewed her breach of contract claims in this matter.

On appeal of a Labor decision, a court's review is limited to whether the decision of Labor is “supported by substantial evidence.” 30 PNC § 185(c); *Kazuma v. Republic of Palau*, 14 ROP 112,114 (2007). “Substantial evidence means more than a mere scintilla but less than a preponderance: it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Ministry of Justice v. Rechetuker*, 12 ROP 43, 50 n.3 (2005) (citing *De La Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003)). The reviewing court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” 6 PNC § 147(g).

The court may affirm the decision of the agency or remand the case for further proceedings. The court may **L24** reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

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- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record; or
- (6) arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. “An aggrieved party may obtain a review of any final judgment of the [trial] court under [the Administrative Procedure Act] by appeal to the Appellate Division of the Supreme Court.” 6 PNC § 148.

Upon review of the administrative record and the Labor Decision, the trial court found that “the findings and decisions of Labor with respect to Nebre’s damages claims for transportation, unearned commissions pursuant to the Addendum, housing, unpaid salary, and return airfare are supported by substantial evidence presented at the hearing” The trial court did not affirmatively state whether it believed that substantial evidence supported Labor’s decision that the Addendum was valid. However, by finding that substantial evidence supported Labor’s decisions on Nebre’s claims that were based on the Addendum, the trial court indirectly came to such a conclusion. Although the trial court itself found that Labor had no knowledge of the Addendum prior to February 10, 2005, it concluded that “there certainly is more than a scintilla of evidence contained in the underlying administrative record of Labor’s proceedings to support its decision” We disagree.

In the Labor Decision, Labor noted the following:

At the hearing, the Employer produced documents showing that the Labor Division had been well aware of the change in contract terms and that Labor took no action. Employer essentially argues that Labor tacitly agreed to the new contract by not disapproving it.

Employer’s argument is questionable, and yet the Labor Division finds that the Contract Addendum should be enforced in this instance. Clearly, the Labor Division was aware of the new terms of the Contract and had ample opportunity to sign it, or to disapprove it. Employer should not be penalized for Labor’s failure to follow through **L25** on its duties. Accordingly, the Contract Addendum is considered to be valid.

This analysis, however, is contrary to the agreement defined in the parties’ original

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employment contract. “The lower court’s interpretation of a contract is reviewed de novo. “*Chun v. Liang*, 14 ROP 121, 122-23 (2007) (citing *Palau Marine Indus. Corp. v. Pac. Call Invs., Ltd.*, 9 ROP 67 (2002)).

The first clause listed under the heading “MISCELLANEOUS,” found on page eleven of Nebre’s employment contract, explains that “[t]his contract maybe amended only with the *written consent* of Employer, Employee, and the *Chief of Labor or his designee*.” (emphasis added.) The parties do not contest that Labor never agreed in writing to the Addendum. Labor, however, concluded in the Labor Decision that its silence in regard to the Addendum sufficiently established its “consent,” as required by the contract. Reading the plain language of the contract clause, *written* consent by all the listed parties was required to make any amendments to the employment contract valid. In addition, the Addendum specifically reads that it is an “addendum . . . to the employment contract that was filed with the Division of Labor Ministry of Commerce and Trade in 2003 after which Ms. Nebre’s permit was issued.” Thus, lacking evidence of written consent, it is difficult to find sufficient evidence supporting Labor’s conclusion that the Addendum was a valid alteration of Nebre’s original employment contract. We shall reverse the trial court’s decision affirming the Labor Decision.

3. False Imprisonment Claim Against Immigration

In her opening brief, Nebre alleges that Immigration falsely imprisoned her on May 6, 2005. This claim, however, was not raised by Nebre before the trial court. In Exhibit F, which was filed with her opening brief, Nebre seems to contend that her claim for false imprisonment was raised to the trial court in paragraph 52 of her FAC where she stated that “[o]n or about April 5, 2005, upon information and belief, Uludong wrote a letter to Immigration that served as the basis for Immigration’s issuance of the ‘NonResident Alien Notice of Overstay and Fine.’” Such statement, however, fails to provide sufficient notice of Nebre’s intention to raise a claim of false imprisonment against Immigration.

Generally, an issue that is not raised in the trial court is waived and may not be raised on appeal. *Fanna v. Sponsorol State Gov’t*, 8 ROP Intrm. 9, 9 (1999). Therefore, the Appellate Division will not generally consider an issue unless the issue was first addressed by the trial court. *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998). Thus, Nebre’s claim of false imprisonment must be dismissed as a matter of law.

B. Claims Against Uludong

1. Fraud Involving the Addendum Letters to Labor

Nebre argues that the trial court erred when it failed to issue a finding of fact on whether the letters allegedly submitted by Uludong to Labor in regard to the Addendum were fraudulent. This claim, however, was not raised by Nebre in the FAC filed with the trial court. **126** Although Nebre notes that such claim was asserted in her Supplemental Pre-trial Statement, this is not sufficient.

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For a claim to be raised before the trial court, it must be asserted in the pleadings. 61 B Am. Jur. 2d *Pleading* § 911 (1999) (“Pleadings define the issues to be tried. The issues in each case are limited to those presented in the pleadings.”) “The rule requiring proper issues to be formed by the pleadings is a sound and salutary one, for all parties in the case should be advised in advance as to what the issues are.” *Id.* Rule 7 of the Republic of Palau Rules of Civil Procedure defines “pleadings” as,

a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a thirdparty complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

Rule 7 further notes that “[n]o other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.” Thus, a Supplemental Pre-trial Statement is not considered a pleading, and Nebre’s notation of her claim in such document was not sufficient to raise the issue before the trial court.

As previously noted, Nebre may not raise a claim for the first time on appeal. *Fanna*, 8 ROP Int’rm. at 9. Consequently, this claim must be dismissed as a matter of law.

2. Fraudulent Misrepresentation in Regard to the Addendum

Nebre asserts that the trial court erred when it failed to make a finding of fact that Uludong committed fraudulent misrepresentation in relation to the Addendum. She contends that “[t]here should be a finding of fact saying that Moses lied to me when he said if I don’t sign I will be deported the next day, because he had already given Labor a letter saying, ‘I respectfully ask that the Division of Labor cancel its Order requiring the departure of Ms. Nebre from Palau on June 05, 2004.’” This claim, however, was not raised by Nebre before the trial court.

Nebre seems to assert that this claim was raised in the FAC when she alleged the following:

110. Nebre was induced to sign the Addendum by Uludong telling her that the terms of the Addendum, the salary specified and other conditions, were not binding upon her and could be worked out later. This intentional perversion of the truth, for the purpose of inducing Nebre’s signature and her relinquishment of the rights she had under the original Employment Contract, constitutes fraud.

To raise a claim for relief before a court, a party must submit in his or her pleading “a short and plain statement of the claim showing that the pleader is entitled to relief” ROP R. Civ. P. 8(a)(2). Although in the FAC Nebre clearly raised the claim that the Addendum was invalid **L27** because she was forced to sign it under duress, she did not specifically assert a claim

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of fraudulent misrepresentation, alleging that Uludong had misrepresented that Nebre would “be deported the next day” if she did not sign the Addendum. Again, Nebre may not raise this claim for the first time on appeal. *Fanna*, 8 ROP Intrm. at 9. This claim must be dismissed as a matter of law.

3. Alleged Forgery of the Employment Contract

Nebre argues that the trial court erred when it failed to issue a finding of fact that Uludong committed forgery when he allegedly erased “key portions of the contract after [Nebre] had signed it and proceeded unlawfully as if these changes were legitimate.” No claim of forgery was raised by Nebre before the trial court.

In paragraph nine of the FAC, Nebre noted that,

[t]he employment contract was changed by an agent of MYU and/or Uludong after it was signed by Nebre, to wit, the provision on page 9, paragraph IV, section 2 providing that the employer may withhold a certain amount per pay period for return transportation was blank when Nebre signed the contract, and later an amount of \$50 was added.

This statement was listed as an alleged fact. It was challenged by Uludong and, ultimately, the trial court found it to be a fact of the case. No claim of forgery, however, was alleged in the counts enumerated in Nebre’s FAC.

Again, Nebre may not raise this claim for the first time on appeal. *Fanna*, 8 ROP Intrm. at 9. Thus, we dismiss this claim as a matter of law.

4. Frivolous Claim for Defamation

Nebre contends that the trial court should have made a finding of fact as to whether the cross-claim filed by Uludong against her alleging defamation was groundless and brought in bad faith in order to harass Nebre. Rule 11 (b) of the Republic of Palau Rules of Civil Procedure provides the following:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney, trial counselor, or unrepresented party is certifying that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

- (1) the document is not being presented for any improper purpose, such as to harass or to cause any unnecessary delay or needless increase to the cost of the litigation;
- (2) the claims, defenses, and other legal contentions therein are

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warranted by existing law or **L28** by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on lack of information or belief.

Pursuant to a motion or on its own initiative, a trial court may impose sanctions upon a party that violates Rule 11. ROP R. Civ. P. 11(c).

No motion or request for Rule 11 sanctions against Uludong was made by Nebre in the matter before the trial court. Therefore, it was under the trial court's discretion to impose sanctions on its own initiative, if it chose to do so. The trial court, however, did not impose any sanctions on Uludong. Generally, it is not appropriate for this Court to review a matter on which the trial court did not divulge an opinion. *Ngerketiit Lineage*, 7 ROP Intrm. at 43. Consequently, we dismiss this claim as a matter of law.

5. Claims of Sexual Harassment and Intentional Infliction of Emotional Distress

Nebre appeals the trial court's denial of her claims of sexual harassment and intentional infliction of emotional distress. In support of her argument, Nebre asserts that "[t]he conduct of Moses Uludong was fraudulent, outrageous, a result of evil motive, and engaged in with a reckless indifference to the rights of others." She does not explain what, if any, legal or factual deficiencies she finds in the trial court's analyses on these issues. She seems to merely assert that the trial court should have found in her favor because Uludong's conduct was outrageous.

The trial court found that Uludong's conduct that Nebre was challenging included the following:

While Nebre was employed at MYU, Uludong made several inappropriate, sexually suggestive comments to her and, on several occasions, touched her in an inappropriate and unwanted manner. On numerous occasions at work, usually at night during production time, Uludong would touch her on her shoulders, her legs or thighs, and would nudge or poke her waist while editing or commenting on her writing. In late December 2003 at Palau Hotel, several MYU staff were out for the evening, and Uludong made a comment to Nebre to the effect that he could accommodate her because his wife was scheduled to be off island soon. **L29**

Trial Court Decision at 8, 16. In regard to Nebre's claim for sexual harassment, the trial court

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conducted a lengthy analysis on whether workplace sexual harassment is an actionable claim in Palau, and whether Nebre had sufficiently established liability for such a claim under United States law. After conducting its analysis using United States law, the trial court concluded that Nebre had failed to establish her claim for workplace sexual harassment.

On appeal, Nebre does not challenge the trial court's findings regarding the lack of case law or a statute in Palau establishing a workplace sexual harassment cause of action. Moreover, Nebre does not appeal the trial court's application of United States law in her case. Instead, she states in two sentences her intention to appeal the trial court's decision on her sexual harassment claim and notes that the conduct of Uludong was "fraudulent, outrageous, a result of evil motive, and engaged in with a reckless indifference to the rights of others." She fails to point to any specific facts to support this assertion.

A court in the United States³ must consider the following when making a **L30**

³ 1 PNC § 301 provides, in pertinent part:

The following are declared to be in full force and to have the effect of law in the Republic:

- (1) the Trusteeship Agreement;
- (2) such laws of the United States as shall, by their own force, be in effect in the Trust Territory, including the executive orders of the President of the United States and orders of the Secretary of the Interior;
- (3) laws of the Trust Territory and amendments thereto, to the extent not repealed by the Olbiil Era Kelulau or a prior legislature;
- (4) district orders heretofore promulgated by the District Administrator of the Palau District and emergency district orders promulgated by the District Administrator of the Palau District in accordance with section 108 of Title 1 of the Trust Territory Code;
- (5) the Acts of the Olbiil Era Kelulau when these Acts are not suspended by the High Commissioner, or otherwise become law as may be provided by law; and,
- (6) duly enacted state laws.

In addition, "recognized customary law of the Republic has the full force and effect of law so far as such customary law is not in conflict with such legal authority" and "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and . . . as generally understood and applied in the United States, shall be the rules of

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determination on whether sexual harassment is actionable: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. Thus, even if Uludong's behavior was found to be "fraudulent, outrageous, a result of evil motive, and engaged in with a reckless indifference to the rights of others," such behavior would not necessarily establish an actionable claim for sexual harassment. In any event, the evidence in the record indicates that Uludong's acts were isolated incidents. The evidence does not suggest that such incidents unreasonably interfered with Nebre's work performance or were severe enough, standing alone, to support a sexual harassment claim. We affirm the trial court's denial of Nebre's sexual harassment claim.

Nebre also raised before the trial court a claim for intentional infliction of emotional distress. Her FAC failed to specify what behavior of Uludong's she alleged equated to intentional infliction of emotional distress. The trial court, however, determined that Nebre intended to assert that the same behavior challenged under her claim for sexual harassment was also the basis for her tort claim of intentional infliction of emotional distress. This conclusion is not challenged by Nebre in her appeal.

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" Restatement (Second) of Torts § 46(1) (1965). To establish liability for intentional infliction of emotional distress, a plaintiff must have endured conduct "so extreme as to be an outrage to human decency and dignity." *Arugay v. Wolff*, 7 ROP Intrm. 226, 231 (Tr. Div. 1997) (finding the defendant liable for intentional infliction of emotional distress where defendant committed sexual assault, physical abuse and interrogation, threatened plaintiffs with a knife, and forced plaintiffs to walk naked down a public road in Ngchesar Village).

On appeal, Nebre does not point to any additional facts that she believes the trial court failed to consider in reference to this claim, or that she believes establish that Uludong's conduct was "so extreme as to be an outrage to human decency and dignity." As noted by the trial court, the evidence in the record establishes that there were instances when Uludong treated Nebre inappropriately. However, such conduct does not rise to the level of extreme and outrageous conduct "as to be an outrage to human decency and dignity." *Arugay*, 7 ROP Intrm. at 231. We affirm the trial court's denial of Nebre's claim for intentional infliction of emotional distress.

C. Punitive Damages and Attorney's Fees

Nebre argues that the trial court erred in denying her requests for attorney's fees and punitive damages by failing to consider whether she was due such relief in light of the fraud committed by Uludong. She asserts that punitive damages maybe awarded in lawsuits for breach of contract when fraud is involved. In addition, she asserts that she should have been awarded

decision in the courts of the Republic in applicable cases." 1 PNC §§ 302, 303. Therefore, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is not applicable in Palau.

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her attorney's fees for policy reasons. She maintains that she should be granted such an **L31** award "so [she] can pay [her] attorney, and so that other cases like this can be brought in the future."

Compensatory damages, otherwise known as "actual damages," "are recoverable at law from a wrongdoer as compensation for the actual loss or injuries sustained by reason of the tortfeasor's wrongdoing. The term, while excluding damages characterized as punitive or exemplary, contemplates the usual common-law measure of damages." 22 Am. Jur. 2d *Damages* § 25 (2003).

In contrast, the award of punitive damages "rests entirely in the discretion of the trier of fact[.]" who must determine "whether the defendant was motivated by malice, whether the defendant's conduct was sufficiently willful or wanton to justify the imposition of punitive damages, or whether there was such a reckless disregard of the rights of others as to warrant an award." 22 Am. Jur. 2d *Damages* § 780 (2003). This Court has held that, pursuant to the Restatement (Second) of Torts, punitive damages maybe awarded for conduct that is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Robert v. Ikesakes*, 6 ROP Intrm. 234, 242 (1997) (citing Restatement (Second) of Torts § 908(2) (1977)). The Restatement provides, however, that punitive damages "are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." Restatement (Second) of Contracts § 355 (1981).

In the case at bar, the trial court denied Nebre's request for punitive damages because she had failed to establish "liability under her intentional infliction of emotional distress and sexual harassment tort claims." On appeal, Nebre argues that the trial court's conclusion was in error because it did not consider her claim of fraud against Uludong. However, Nebre never specifically raised a claim of fraud against Uludong in her FAC before the trial court. This claim may not be raised for the first time on appeal, *Fanna*, 8 ROP Intrm. at 9, thus, it must be dismissed as a matter of law.

In addition, Nebre argues that the trial court erred when it denied her request for attorney's fees. In its order, the trial court stated that Nebre was only seeking "punitive damages in the form of attorney's fees against MYU and Uludong, contending that their treatment of Nebre from her arrival in Palau, continuing throughout her employment with MYU and thereafter, was so outrageous as to justify an award of punitive damages." In the FAC, however, Nebre requested relief from the trial court in the form of, *inter alia*, "punitive damages, costs and attorney fees." In Count Thirteen of the FAC, Nebre asserts that "[t]he conduct of Uludong in dealing with Nebre, including his acts of sexual harassment, intentional infliction of emotional distress, and fraud, was so extreme as to warrant an award of attorney fees and punitive damages." Although she requests attorney's fees and punitive damages in the same count, it is not clear that Nebre intended them to be only one claim. If seen as separate claims, the trial court failed to rule on Nebre's request for attorney's fees.

We recognize that Nebre may have failed to present any evidence or argument at trial regarding a separate request for attorney's fees. **L32** Her failure to present any evidence on the

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issue may explain the trial court's analysis of this claim. Without the benefit of a transcript of the trial court proceedings or notations in her brief to sections of the trial recording, we are unable to determine if such evidence and request were presented.

The Trial Division of the Supreme Court of Palau has held that,

in a breach of contract action, compensatory damages are designed to make the prevailing plaintiff whole . . . [thus] if incurring attorney's fees to enforce the contract at issue is a direct and foreseeable consequence of breach of contract, then such attorney's fees are compensable as part of the compensatory damages award.

Foster v. Bucket Dredger SIS "Digger One," 7 ROP Intrm. 234, 242 (Tr. Div. 1997) (hereinafter "*Digger One*") (citing *Ingersoll Mill. Mach. Co. v. M/V Bodena*, 829 F.2d 293 (2d Cir.1987)). Accordingly, we remand this issue back to the trial court for further explanation or review. On remand, the trial court should either explain its prior analysis or review Nebre's request for attorney's fees as a separate claim and determine whether the holding in *Digger One* applies.

CONCLUSION

In summary, we affirm, reverse and remand in part the trial court's decision. We remand this matter to the trial court, directing the lower court to explain its prior analysis regarding Nebre's claim for attorney's fees, or review her request as a separate claim and determine whether the holding in *Digger One* applies. In addition, we reverse the trial court's decision regarding Nebre's administrative appeal of the Labor Decision. Finally, we affirm the trial court's rulings on all of Nebre's remaining viable claims.