

Pac. Call Inv. v. Palau Marine Indus. Corp., 15 ROP 50 (2008)
PACIFIC CALL INVESTMENTS, INC.,
Appellant,

v.

PALAU MARINE INDUSTRIES CORP., TAI CHIN LONG,
and KOROR STATE PUBLIC LANDS AUTHORITY,
Appellees.

CIVIL APPEAL NO. 07-018
Civil Action Nos. 04-182 & 166-92

Supreme Court, Appellate Division
Republic of Palau

Decided: February 7, 2008¹

Counsel for Appellant: David Shadel

Counsel for Long: Richard Brungard

Counsel for KSPLA: Keith Peterson

BEFORE: LOURDES F. MATERNE, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem; ROSE MARY SKEBONG, Associate Justice Pro Tem. Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, **L51** presiding.

POLLOI, Justice:

This appeal concerns an order of the Trial Division dated April 9, 2007, establishing the priority among creditors of Palau Marine Industries Corporation (“PMIC”). The only creditors involved in the present appeal are Appellant, Pacific Call Investments (“PCI”) and Appellee, Tai Chin Long (“Long”). Also party to the action below was Appellee Koror State Public Lands Authority (“KSPLA”). During the Trial Division proceedings, KSPLA moved to intervene as the lessor in a lease agreement with PMIC. The lease was a primary asset of PMIC but was later shown to be terminated. Upon being permitted to intervene, KSPLA successfully moved to have the lease removed from the list of assets to be sold. PCI challenged this decision by way of a motion to reconsider, which was denied, but did not raise the issue in this appeal. Out of an abundance of caution, KSPLA filed a response brief in this appeal pointing out PCI’s failure to raise the issue of the lease on appeal and asking the Court not to disturb the Trial Division’s decision on the issue. As the issue has not been raised at all on the briefs, it is not before this panel, and therefore the panel’s decision will not affect the decision of the Trial Division regarding the lease. This opinion addresses only the disputed issues between PCI and Long

¹ Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

Pac. Call Inv. v. Palau Marine Indus. Corp., 15 ROP 50 (2008)
regarding priority.

BACKGROUND

PCI holds a judgment dated November 7, 2000, in the amount of \$4,425,525.00. Long holds a judgment dated October 21, 2005, in the amount of \$605,280.35. Lon's judgment is based upon twelve promissory notes which were executed between PMIC and Long and which bear security statements pertaining to PMIC's assets. Only three of the twelve promissory notes predate PCI's judgment. The remaining assets of PMIC are limited, and the creditor with priority stands to get all of the assets.

In the proceeding below, the parties agreed as to the validity of the judgment liens as well as to the fact that Long's judgment lien came later in time than PCI's. The Court noted at the outset, however, that liens for judgments are subordinate to all prior legal or equitable liens, citing 46 Am. Jur. 2d, *Judgments* § 368 (2006). Thus, the issues decided by the Court focused on the three secured notes held by Long that predated the PCI judgment. The Trial Division had to determine whether the notes effectively created liens in PMIC's assets because if so, then Long would be entitled to priority based on those three notes. The Court ultimately decided these issues in Long's favor, and this appeal followed.

STANDARD OF REVIEW

Trial court findings of fact are reviewed for clear error. *Palau Cmty. Coll. v. Idid Clan*, 10 ROP 143 (2003). Conclusions of law are reviewed *de novo*. *Mesebeluu v. Uchelkumer Clan*, 10 ROP 68 (2003).

DISCUSSION

A. Were the liens secured?

1. Security language

There are three promissory notes at the center of this dispute. Each one bears the following security language: "This Promissory Note is secured by all the assets of PMIC, 152 including but not limited to, all receivables of the company." PCI argues that the notes failed to create valid security interests because the security statement was too vague and did not track the "normal and necessary" language to create a lien or security interest. PCI does not, however, cite any authority for a magic words requirement or for any required boilerplate language. The only citations offered for the so-called normal and necessary language are to *Am. Jur. Forms*, which we recognize as a practitioner's guide but not a source of legal authority. That the security statement does not track the language shown in *Am. Jur. Forms* does not make the security interest invalid.

PCI next advocates a strict interpretation of the collateral description as under the Uniform Commercial Code ("UCC"). In fact, UCC section 9-108(C) states that generic

Pac. Call Inv. v. Palau Marine Indus. Corp., 15 ROP 50 (2008)

descriptions of collateral, like the one at issue in this case, are insufficient to create valid security interests. However, for the reasons that follow, we decline to apply a strict interpretation as that applicable under the UCC.

Palau has not adopted the UCC, and Palauan law does not otherwise address the level of specificity required of a collateral description in order to create a valid security interest.² Absent a detailed and rigid statutory structure such as that of the UCC, this Court has no clear basis to enforce a strict interpretation of the security agreement. All that this Court can do is to give the parties the benefit of their agreement by honoring their intent under the contract.

“When interpreting agreements . . . courts give words their ordinary and plain meaning unless all parties have clearly intended otherwise.” *Tomomi v. Nelson*, 4 ROP Intrm. 169,170 (1994). Here, the language used reads thus: “This Promissory Note is secured by *all the assets of PMIC, including but not limited to, all receivables of the company.*” (emphasis added). PCI has not shown, and this Court does not otherwise find, that the parties intended that the foregoing words not be given their ordinary and plain meaning. Meanwhile, it is clear from the ordinary and plain meaning of the foregoing language that the parties intended to create a security interest in all of PMIC’s property, including accounts receivable.

Finally, the Court notes that for third party creditors to challenge the sufficiency of the collateral description in a security agreement, there generally must be a showing that the later creditor was somehow misled or prejudiced by the insufficiency of the description. *See In re Vic Supply Co.*, 227 F.3d 928 (7th Cir. 2000). As already discussed above, the description was sufficient. However, even if there was any insufficiency in the description, PCI has not shown that it was prejudiced in any way by such insufficiency.

Because the security language was sufficient and valid, the liens were secured.

2. After acquired property

PCI next argues that since the security statements on the notes do not specifically refer to after-acquired property then Long should have been required to prove which assets of PMIC actually existed at the time each note was signed, and that if the assets were lost or commingled, **153** then Long’s rights in the assets are likewise lost. Again, Palauan law does not address the level of specificity required on this issue. However, as the Trial Division noted, the majority of U.S. jurisdictions today hold that a security interest in accounts receivable presumptively includes an interest in “after acquired” receivables and went on to hold that Long’s notes likewise include after acquired property. *See, e.g., In re Filtercorp, Inc.*, 163 F.3d 570, 579 (9th Cir. 1998).

The *Filtercorp* court observed that in the majority jurisdictions, “a floating lien on inventory and accounts receivable is presumed because the collateral is viewed in aggregate as a shifting body of assets.” *Id.* at 579. Moreover, this presumption does not require magic words.

² It is difficult to find a discussion on common law prior to the UCC because of its wide adoption in the U.S. *See Udui v. WCTC*, 9 ROP 304, 307 (Tr. Div. 2002).

Pac. Call Inv. v. Palau Marine Indus. Corp., 15 ROP 50 (2008)

It is “not created by particular language but springs from an appreciation of the cyclical nature of the collateral itself.” *Id.* at 580.

The *Filtercorp* presumption can be rebutted by showing that the inventory and receivables are not, in fact, regularly turning over. PCI argues that since Long did not show that PMIC’s inventory or accounts receivable were regularly fluctuating, that there was no factual basis for the Trial Division’s holding. This argument reflects a failed understanding of the meaning of “presumption.”³ The presumption works to the benefit of the secured creditor, presuming that the interest includes this fluctuating property. Thus, the burden is on PCI or PMIC to rebut the presumption and show that the property is *not* regularly fluctuating. Since neither PCI nor PMIC made any such showing,⁴ the presumption in Long’s favor is not rebutted, and the after-acquired property is included.

B. Did the liens later become invalid as a result of Long’s judgment?

PCI argues that Long is no longer entitled to claim priority based on the secured status of the notes because the notes, the security interests contained in the notes, and any claims arising therefrom were merged into the October 2005 judgment. PCI similarly claims that Long somehow waived the security interests since the stipulation that resulted in the judgment did not mention foreclosure. Neither argument has any merit, because PCI ignores the important distinction between foreclosure on a security interest and priority among creditors as a result of secured creditor status.

In support of its argument, PCI relies on Sections 24⁵ and 25⁶ of the Restatement **154** (Second) of Judgments.⁷ PCI’s argument also presumes that the facts of this case fall within the

³ “A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.” Black’s Law Dictionary 1223 (8th ed. 2004).

⁴ In fact, as Long points out, there has never been a showing or any evidence establishing that PCI’s assets even include after-acquired property.

⁵ Section 24 provides as follows: (1) When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. (2) What factual grouping constitutes a “transaction” and what groupings constitute a “series” are to be determined pragmatically Restatement (Second) of Judgments § 24 (1982).

⁶ Section 25 provides: The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action. Restatement (Second) of Judgments § 25 (1982).

⁷ PCI also includes several citations to various U. S. state court decisions. While Palauan courts look to U.S. caselaw as a guide to applying common law, *Becheserrak v. ROP*, 8 ROP Intrm. 147 (2000), where there is no applicable Palauan law and the Restatement speaks to the issue, the Restatement is authoritative. *Irikl Clan v. Renguul*, 8 ROP Intrm. 156 (2000).

Pac. Call Inv. v. Palau Marine Indus. Corp., 15 ROP 50 (2008)

ambit of the “General Rule of Merger” as stated in Section 18 of the Second Restatement. PCI’s reliance is misplaced, as this is not the situation contemplated by the merger doctrine.

In this matter, Long is not seeking to foreclose on the secured liens. He is executing a judgment under the procedures set forth in 14 PNC § § 2100 et seq. Moreover, Long admits that at this stage, he could not foreclose on the liens. Long does not attempt to and could not, at any rate, “split” his claim against PMIC. Sections 24 and 25 of the Second Restatement of Judgments precisely address such “splitting” and therefore have no applicability in this instance.

This situation, by contrast, falls squarely within the scenario described in comment g. to Section 18 of the Second Restatement. Comment g. provides, in relevant part:

When by reason of the plaintiff’s obtaining judgment upon a claim the original claim is extinguished and rights arise upon the judgment, advantages to which the plaintiff was entitled with respect to the original claim may still be preserved despite the judgment. Thus if a creditor has a lien upon property of the debtor and obtains a judgment against him, the creditor does not lose the benefit of the lien.

Restatement (Second) Judgments § 18 cmt g (1980). The benefit of alien is the priority the creditor has against other creditors. Long’s judgment retains the benefit of this priority, despite the fact that he could not now foreclose on the liens themselves. PCI offers no authority that persuades the Court otherwise.

PCI essentially urges the Court to proceed as though the security interests never existed in the first place, but this is not the correct **L55** result, even if the security interests are said to have merged into the judgment. Merger would not affect the secured nature of the notes, and therefore does not affect Long’s entitlement to priority.

CONCLUSION

As discussed above, the Appellant’s arguments lack merit and have no effect on Appellee’s entitlement to priority among creditors of PMIC based upon the three secured promissory notes which predate PCI’s judgment. The decision of the Trial Division is hereby affirmed.