

Rechelulk v. Tmilchol, 2 ROP Intrm. 289 (1991)
RAFAILA RECHELULK,
Appellant,

v.

BECHESERRAK TMILCHOL and B.T. COMPANY,
Appellees.

CIVIL APPEAL NO. 20-88
Civil Action No. 145-86

Supreme Court, Appellate Division
Republic of Palau

Dissenting opinion
Decided: May 9, 1991

Attorney for Appellant: John K. Rechucher

Attorney for Appellees: Johnson Toribiong

BEFORE: MAMORU NAKAMURA, Chief Justice; ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice.

NGIRAKLSONG, Justice.

The Appellees filed and supported their cross-motion for summary judgement with affidavits of Becheserrak Tmilchol and Masao Esebei and the so-called "mystery document", a purported copy of the original deed. I believe the Appellees made a showing with their cross-motion and supporting papers that there were no genuine issues as to any material fact. The Appellant failed, in my view, to produce any probative evidence in support of her opposition to Appellees' cross-motion for summary judgment. The Trial Court properly granted Appellees' motion for summary judgment.

The Court correctly points out the defect of the affidavits used in support of Appellees' cross-motion for summary judgement. This was, however, the responsibility of the Appellant at the Trial Court in opposing the cross-motion for summary judgement. When a moving party has carried his "preliminary burden, then, **1290** the opposing party may not defeat the motion by relying on the contentions of [her] pleading." *United States v. Pent-R-Books, Inc.*, 538 F.2d 519 (1976). The opposing party "must produce significant probative evidence tending to support" her position. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 1593 (1968).

ROP. R. App. Pro. 56(e) deals with evidentiary affidavits, both supporting and opposing, which the Court may consider in deciding whether to grant or deny a motion for summary

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judgment. The Appellant should have filed a motion to strike either or both Appellees' affidavits, the "mystery document" or portions thereof:

. . . The motion to strike should be precise, . . . it should state specifically the portions of the affidavit to which objection is being made, and the grounds therefore. (citations omitted).

6 pt.2 *Moore's Federal Practice*, 56.22(1). One Court lamented as follows:

defendant's motion asking the court to order stricken 'certain portions' of the . . . affidavit and all attached exhibits, is too general. Defendants must point out in their motion specifically just what language or statements in the . . . affidavit they seek to have stricken. The Court cannot and should not be expected to go through the . . . affidavit "with a fine tooth comb" and pick out the "certain portions" which defendants (from their viewpoint) feel should be stricken. That duty and responsibility rests upon the defendants. *Id.* (citations omitted).

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Id. I believe the Appellant's motion to strike was too general to carry the day. Appellant therefore waived any defects in the affidavits and the "mystery document". *Scharf v. United States Attorney General*, 597 F.2d 1240 (9th Cir. 1979); *Moore, Supra*, at 56-761.

Finally, if Appellant was surprised by the "mystery document" and unprepared to respond to the cross motion, she could have under ROP R. App. Pro. 56(f) filed an affidavit to show "that [she] cannot for reasons stated present by affidavit facts essential to justify [her] opposition." If Appellant did that, the "Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." *Id.* Appellant also failed to avail herself of this opportunity provided by the Rule to prepare an adequate opposition to the cross-motion.

I would affirm the Trial Court's Order granting Appellees' cross-motion for summary judgment.