*Palau Marine Indus. Corp. v. Pac. Call Invs., Ltd.*, 9 ROP 67 (2002)

**PALAU MARINE INDUSTRIES CORP.,**
**Appellant,**

**v.**

**PACIFIC CALL INVESTMENTS, LTD.,**
**Appellee.**

CIVIL APPEAL NO. 00-37
Civil Action No. 166-92

Supreme Court, Appellate Division
Republic of Palau

Argued: February 21, 2002
Decided: March 27, 2002
Amended: April 24, 2002

[1] **Appeal and Error:** Standard of Review

Trial Division findings of fact are reviewed under the clearly erroneous standard; conclusions of law are reviewed *de novo*.

[2] **Civil Procedure:** Amendments to Pleadings

An amendment to the pleadings during trial is only appropriate when an issue outside the pleadings is tried by the express or implied consent of the parties or when the court finds that such amendment will advance the adjudication of the matter on its merits and will not prejudice the non-moving party.

[3] **Civil Procedure:** Amendments to Pleadings

The decision to allow the amendment of pleadings at trial lies within the sound discretion of the trial court.

[4] **Civil Procedure:** Amendments to Pleadings

Substantial prejudice may exist in allowing an amendment to pleadings at trial where it is not clear that the opposing party had the opportunity to defend against the new claim and where that party might have offered additional evidence had it known of the claim.

[5] **Civil Procedure:** Amendments to Pleadings

Withdrawn pleadings can be used as evidence of an admission because the amendment of a pleading does not make it any less an admission of the party.

[6] **Appeal and Error:** Standard of Review; **Contracts:** Interpretation

The Appellate Division reviews a lower court's interpretation of a contract *de novo*.

[7] **Contracts:** Severability

Generally, a contract will not be regarded as severable unless (1) the parties' performances can be apportioned into corresponding pairs of partial performances, and (2) the parts of each pair can be treated as agreed equivalents.

[8] **Contracts:** Severability

The question of whether a contract can be properly considered severable is considered in light of the language employed by the parties and the circumstances existing at the time of the contracting.

[9] **Contracts:** Damages; **Damages:** Mitigation

Mitigation is an affirmative defense that must be pled and proven by the party asserting it.

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Counsel for Appellee: Kevin Kirk

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

MICHELSEN, Justice:

This case is an appeal from a judgment awarding damages in a contract dispute. During trial, after Plaintiff Pacific Call Investments Ltd. ("Pacific Call" or "Appellee") had rested and Defendant Palau Marine Industries Corp. ("Palau Marine" or "Appellant") was presenting its case, Appellant's counsel moved to amend the pleadings to abandon the primary defense, and substitute a new defense. The trial court sustained Appellee's objection and denied the motion. After trial, the court entered judgment for Palau Marine. The focus of this appeal is principally centered on the trial court's denial of the motion to amend and its calculation of damages. We affirm, because a motion to amend the pleadings during trial is properly denied when the amendment will cause prejudice to the opposing party, and because the computation of the award of damages was not erroneous. Other issues raised by Appellant were considered, and rejected, for the reasons set forth herein.

**BACKGROUND**

The pertinent facts are largely undisputed. On March 29, 1991, Randall Ho entered into a contract (hereinafter "the March contract") with Donald Wen, then Palau Marine's vice-president, and Milton Chen, then Palau Marine's treasurer. Alex Wen, Palau Marine's president, was also present at the signing, although his name is not on the document. This March contract was an agreement among the signatories in their individual capacities and Palau Marine was not a party to it. It indicated that Ho was forming a Guam corporation to be named Pacific SeaPack, Inc., which would engage in the business of off-loading, processing, and transhipping fish, and that Donald Wen would commit to providing Ho's new company with an annual minimum delivery of 1000 metric tons of fish for a period of five years. The contract established a schedule of fees that the parties were to pay each other for certain obligations and also provided that Ho would be released from personal obligations under the contract at the time Pacific SeaPack was formed. Pacific SeaPack was formally incorporated on April 24, 1991. The terms and performance of the March contract are not an issue in this case.

Early in 1991, Ho and some partners also formed Pacific Call Investments, Ltd., and in July, 1991, a separate contract (hereinafter "the July contract") was entered into, this time between Appellant and Appellee, which contained substantially similar terms to the March contract.[1] It was signed by Donald Wen on behalf of Palau Marine, and later by one of Ho's partners on behalf of Pacific Call. The effective date of the July contract was backdated to May 1, 1991, although no fish had yet been delivered by Wen, Chen or Palau Marine. Indeed, no fish were ever delivered, despite the fact that Donald Wen had gone to Guam, began sharing office space for a time with Ho, and ⊥69 was seen talking with fishing vessels on a radio purchased by Pacific Call for this venture.

Pacific Call filed this action in March, 1992, alleging that Palau Marine breached the contract by failing to supply any fish. In its answer (as well as the amended answer filed soon thereafter), Palau Marine pled an affirmative defense and counterclaim predicated on the theory that it had been misled about Pacific Call's ability to carry out its own obligations under the contract. At trial, after Plaintiff presented its full case and rested, Palau Marine called Milton Chen as a witness. During the direct examination of Chen, counsel sought to introduce documentary evidence to suggest that the object of the July contract (specifically Pacific Call's off-loading of fish on Guam) was illegal. Counsel for Plaintiff objected to the proffer, and counsel for Defendant explained that the evidence was relevant to support the theory that the July contract was not signed by a duly authorized agent of Palau Marine and that his client therefore could not properly be considered a party to that agreement. Pacific Call objected, noting that Palau Marine's amended counterclaim specifically admitted that the parties were acting pursuant to a binding contract and that the affirmative defense pled in the amended answer was predicated on the existence of the July contract. In response, counsel for Defendant sought to withdraw the affirmative defense and counterclaim in order to proceed on this lack-of-authority theory. Counsel explained that "Donald Wen is no longer around and we cannot prove anything" regarding the counterclaim. The trial judge denied the motion and trial continued on

[1]Pacific Call designated Pacific SeaPack to carry out Pacific Call's obligations under the July contract, though Pacific SeaPack was not formally a party to the agreement.

the pleadings as filed before trial.

The trial court's findings of fact and conclusions of law included the following: that the July contract was entered into between Palau Marine and Pacific Call; that Ho and Donald Wen each signed that contract on behalf of their respective companies; that the contract called for Palau Marine to supply Pacific Call a minimum of one million kilograms of fish annually from 1991 to 1996; that Palau Marine was to pay Pacific Call $2.10 per kilogram to offload the fish in Guam and transport it to Japan for sale; that Pacific Call formed a subsidiary to carry out its obligations under the contract; that it quickly became apparent that Palau Marine would not perform its own obligations under the contract; that Pacific Call shut down the subsidiary and disposed of its assets; that between the date on which the parties entered into the July contract (July 8, 1991) and the start of the trial (January 13, 2000), Palau Marine never denied that Donald Wen had the capacity to bind it to the July contract; that none of the pre-trial correspondence between the parties admitted into evidence at trial ever questioned Wen's capacity to sign the July contract on behalf of Palau Marine; that all of the dealings between the parties were consistent with the validity of the July contract; that Palau Marine's counterclaim admitted the existence of the July contract and only argued that it should be absolved from its obligations under that agreement because of Pacific Call's misrepresentations and inability to perform; and that the pled defenses were "completely destroyed" by the testimony of Appellant's own witness, Milton Chen. In addition, the trial judge found that Palau Marine had made a binding admission concerning its status as a party to the July contract when it incorporated by reference into its counterclaim Pacific Call's contention that the contract was entered into between Palau Marine and Pacific Call. The trial judge further held that while it had allowed evidence concerning the authority question to be presented at trial in light of the fact that the ⊥70 Answer did contain a general denial of the existence of the contract, the failure to plead the authority question as an affirmative defense constituted a waiver of that defense. Moreover, the trial judge held that this defense could not be salvaged by amending Palau Marine's pleadings to conform to the evidence pursuant to ROP R. Civ. Pro. 15 since opposing counsel had plainly objected to the evidence, and allowing such an amendment so late in the trial would prejudice Pacific Call. On the question of damages, the trial court held that because Palau Marine failed to plead the defense of mitigation of damages and had failed to present evidence at trial on that issue, damages should not be reduced by any alleged failure to mitigate. The trial court also held that the contract was a unitary agreement for a single five-year term and could not be split into separate annual agreements for purposes of reducing the amount of the total liability. Judgment was entered on October 26, 2000, and an amended judgment quantifying the amount of attorney fees was entered on November 7, 2000. This appeal followed.

## DISCUSSION

**[1]** Trial Division findings of fact are reviewed under the clearly erroneous standard. *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 17, 19 (1998). Conclusions of law are reviewed *de novo*. *See Roman Tmetuchl Family Trust v. Whipps* , 8 ROP Intrm. 317, 318 (2001). Appellant has alleged several different ways in which the trial court erred. We are not persuaded and will address each argument in turn.

**1. Denial of Motion to Amend**

Palau Marine asserts that it cannot be held liable for breach of the July contract because Donald Wen lacked the authority to bind it to that agreement. This defense was not part of the pleadings. At no time during the eight year run-up to trial did Appellant suggest that Donald Wen's authority to bind Palau Marine to the July contract was an issue in this case. Although Appellant's initial and amended answers denied the fact that there was a contract between the parties, that denial did not specifically advert to any lack of authority. Rather, it was simply part of a more general denial of paragraphs 1-4 of Pacific Call's complaint. This general denial was short-lived, because Appellant expressly incorporated those same four paragraphs from the complaint by reference into its own counterclaim. In light of the pleadings as a whole, the original denial in the answer does not constitute adequate notice that Appellant intended to interpose any sort of authority defense.

**[2-5]** Palau Marine moved to amend the pleadings after the Plaintiff rested, but an amendment to the pleadings during trial is only appropriate when an issue outside the scope of the pleadings is tried by the express or implied consent of the parties or when the court finds that such amendment will advance the adjudication of the matter on its merits and will not prejudice the non-moving party. *See* ROP R. Civ. Pro. 15(b). The decision lies within the sound discretion of the trial court. *See Klsong v. Orak* , 7 ROP Intrm. 184, 187 (1999). "Substantial prejudice may exist where it is not clear that the opposing party had the opportunity to defend against the new claim and where that party might have offered additional evidence had it known of the claim." *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 680 (2d Cir. 1985). Because both of those considerations apply in this case, the trial court did not abuse its discretion in denying the motion to amend. This conclusion renders Appellant's ratification argument – that the July contract ⊥71 cannot be enforced against Palau Marine because it never ratified Wen's *ultra vires* actions – untenable. Similarly, because of this waiver, Appellant cannot succeed on its claim that the trial court committed reversible error by denying Palau Marine's motion, made during trial, to withdraw its affirmative defense and counterclaim. Even had Appellant been allowed to withdraw its affirmative defense and counterclaim, the withdrawn pleadings could still have been used as evidence against it as an admission. *See, e.g.* , *United States v. GAF Corp.* , 928 F.2d 1253, 1259 (2d Cir. 1991). "The amendment of a pleading does not make it any the less an admission of the party". *Andrews v. Metro N. Commuter R.R.* , 882 F.2d 705, 707 (2d Cir. 1989). Since Appellant failed to present any admissible evidence whatsoever in support of its lack-of-authority theory, the original pleadings alone would have been sufficient evidence to defeat the claim.

**2. Impossibility Defense**

Appellant contends that it cannot be held liable for breach of contract because Appellee's performance of its own obligations under the contract was impossible. This argument has no support in the record. Appellant's primary witness, Milton Chen, conceded that he had no knowledge of any deficiencies in Appellee's operations that would have made it impossible for Appellee to carry out its obligations under the July contract, and Appellant introduced no other evidence on this point. On this record, it would have been clearly erroneous for the trial court to

find that Appellee's performance *was* impossible.

**3. Conditionality Defense**

Appellant next avers that the July contract was somehow conditional, and that since the conditions were not satisfied, it cannot now be held liable for breach. This argument is baseless. The text of the July contract does not suggest any such conditionality. Appellant suggests that Trial Exhibit G somehow manifests conditionality. Exhibit G is a letter dated August 28, 1991, from Palau Marine's counsel to Pacific Call, Donald Wen, and Milton Chen, but the letter simply indicates that Wen and Chen were not to be released from their obligations under the March contract unless and until Pacific Call performed its obligations under the July contract. In no way does it support the theory that Appellant's performance was somehow conditional.

**4. Severability Defense**

**[6-8]** Appellant also argues that the trial court erred by determining that the July contract was a unitary, five-year, contract for purposes of assessing damages, rather than one that created a series of annual, severable, obligations. We review a lower court's interpretation of a contract *de novo*. *NECO v. Rdialul* , 2 ROP Intrm. 211, 217 (1991). "Generally, a contract will not be regarded as severable unless (1) the parties' performances can be apportioned into corresponding pairs of partial performances, and (2) the parts of each pair can be treated as agreed equivalents." *Ginett v. Computer Task Group, Inc.* , 962 F.2d 1085, 1098 (2d Cir. 1992) (citing Restatement (Second) of Contracts § 240). The question whether a contract can be properly considered severable is considered "in light of the language employed by the parties and the circumstances existing at the time of the contracting." *Nederlandse Draadindustri NDI, B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846, 852 (E.D.N.Y. 1979) (citing, *inter alia*, 5 Williston, Contracts §§ 861-63 (1961)).
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There is nothing in the record that pertains to this question beyond the plain text of the July contract itself. It is true that the contract speaks in terms of annual minimum tonnage requirements, and provides for an annual fee scale. But Section 13 of the July contract plainly states that the agreement is for a term of five years. Given that this is "the language employed by the parties[,]" and that Appellant made no showing at trial that a different arrangement was contemplated "at the time of the contracting[,]" we are satisfied that the contract was not intended to be a divisible one and that the trial court's interpretation of the contract was correct.

**5. Mitigation**

**[9]** Appellant's argument that the trial court erred by failing to consider the question of mitigation ignores the black letter principle that mitigation is an affirmative defense that must be pled and proven by the party asserting it. *See Klsong v. Orak* , 7 ROP Intrm. at 187; *Lennon v. U.S. Theatre Corp.*, 920 F.2d 996, 1000 (D.C. Cir. 1990); *Modern Leasing v. Falcon Mfg. of Cal.*, 888 F.2d 59, 62-63 (8th Cir. 1989). As discussed above, what is not pled is waived. Appellant failed to plead mitigation as an affirmative defense. Therefore, the trial court correctly refused to consider the issue.

**6. The Damages Award**

Appellant argues that the damages award is unsupported by evidence in the record and is unduly speculative. However, the record is replete with concrete, detailed evidence concerning Pacific Call's anticipated gross profits, off-setting expenses, and other factors that allowed for a definite and specific determination of damages. Indeed, the record demonstrates that Appellee made conservative projections and did not seek recovery for every item for which it might have had a colorable claim. Randall Ho's uncontroverted testimony on the proper measure of damages is particularly notable for its precision. The trial court did not clearly err by basing its determination of damages on this record.

## CONCLUSION

Pleadings are an important step in the litigation process. The well-known rule that pleadings are to be construed to do substantial justice does not excuse a complete shift in defense strategy, without notice, after the Plaintiff rests. Litigants are entitled to prepare for trial based upon the assertions and defenses that were on the record at that time, and need not prepare for defenses improvised during trial.

For the foregoing reasons, the trial court's Judgment is hereby affirmed.