

**IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION**

<p>AKEMI ANDERSON, <i>Appellant,</i> v. KWANG SEOK KIM a/k/a BRIGHT KIM, <i>Appellee.</i></p>

Cite as: 2018 Palau 23
Civil Appeal No. 18-001
Appeal from Civil Action No. 15-076

Decided: November 8, 2018

Counsel for Appellant	Johnson Toribiong
Counsel for Appellee	Siegfried B. Nakamura

BEFORE: JOHN K. RECHUCHER, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

BENNARDO, Justice:

INTRODUCTION

[¶ 1] This appeal presents a case of a business arrangement gone sour. Appellant, Akemi Anderson, and appellee, Kwan Seok Kim, undertook a series of contracts dating back to 2002. Since then, they've accompanied each other as co-defendants in a criminal prosecution and bound themselves together as co-owners of Bright Enterprise Corporation. Most recently, they've assumed the relationship of adversaries in this civil action.

[¶ 2] In short, Anderson sued Kim for breach of contract. Her claim was primarily one for unpaid rent relating to Kim's use of property in Meketii,

Koror. Anderson also sought a declaratory judgment stating that she was the owner of the building built on that property. Kim answered and counterclaimed. Most relevant, Kim sought a declaration regarding the parties' rights and interests in Bright Enterprise Corporation.

[¶ 3] The Trial Division found Kim liable for breach of contract and ordered him to pay Anderson \$66,000 in back rent. It also determined that Bright Enterprise Corporation owns the building and that Kim owns 85% of the corporation and Anderson owns the remaining 15%. The underlying facts that led to the Trial Division's decision are complicated. However, this appeal cannot proceed because no issues are properly before this Court to resolve. Thus, it is dismissed.

DISCUSSION

[¶ 4] Anderson identified three issues for us to review on appeal: whether the Trial Division (1) abused its discretion and clearly erred "in *sua sponte* invalidating a provision of the 2003 contract while holding . . . the remaining provisions of the contract valid," (2) erred "by holding that Bright Corporation has an indefinite lease on the land where the multi-purpose building is built without any written document signed by Appellant in violation of 39 PNC § 626 requiring that no interest in land may be conveyed without a written document signed by the land owner," and (3) abused its discretion and clearly erred "in its *sua sponte* application of the statute of limitations despite Appellee's failure to raise it as an affirmative defense and therefore was waived by Appellee and not properly before the court." Appellant's Opening Br. 1. This list of issues presented governs the scope of Anderson's appeal. *See* ROP R. App. P. 28(a)(6); *see also Kebekol v. KSPLA*, 22 ROP 74, 76–78 (2015) (denying petition for rehearing of an issue not identified in opening brief as an issue presented for review.)

[¶ 5] Anderson's opening brief devotes considerable space to the first appellate issue. *See* Appellant's Opening Br. 9–18. However, those pages fail to present an argument. Under the heading of the first issue, Anderson's brief provides a lengthy recitation of the underlying facts and reproduces pages of the Trial Division's opinion verbatim. *See id.* What it fails to do is make a legal argument or cite to any legal authority other than the opinion on appeal.

Kim pointed out as much in his responsive brief. *See* Appellee’s Resp. Br. 4–6. In her reply, Anderson attempted to salvage the issue, but it is a case of too little, too late. *See* Appellant’s Reply Br. 8–11. The reply brief is not the appropriate forum for an appellant to make her initial arguments. Rather, an appellant’s initial arguments should appear in her opening brief. *See* ROP R. App. P. 28(a)(8). Because the Anderson’s opening brief failed to make an argument for us to consider, we have nothing to decide on this issue.

[¶ 6] Anderson’s second appellate issue relates to the statute of frauds. *See* Appellant’s Opening Br. 18–19. Essentially, Anderson argued that, based on 39 PNC § 626, the Trial Division erred by finding that Bright Enterprise Corporation is the owner of the building in question because there was no written conveyance. *See id.* In response, Kim argued that the statute of frauds was waived when Anderson failed to present this argument to the Trial Division. *See* Appellee’s Resp. Br. 11–12. In her reply, Anderson failed to direct our attention to anywhere in the record that she argued the statute of frauds to the Trial Division. Rather, she used her reply brief to pivot her argument away from 39 PNC § 626 and instead relied for the first time on 39 PNC §§ 501, 502. *See* Appellant’s Reply Br. 11–16.

[¶ 7] Anderson has not confronted or countered Kim’s argument that the statute of frauds was waived by her failure to argue it in the Trial Division. Through our own inspection of the trial record, we discovered that Anderson mentioned the statute of frauds in her answer to Kim’s counterclaim. However, it appears that is as far as it got. Anderson has not directed us to anywhere in the record where the statute of frauds was argued to the Trial Division. In essence, she claims that the Trial Division erred by failing to rule in her favor based on an argument that she did not make. To preserve an issue for appeal, a party generally must raise it to the Trial Division; however, this rule is not absolute. *See Kotaro v. Ngotel*, 16 ROP 120, 125 (2009) (noting that the rule may be “relaxed in exceptional circumstances, such as when necessary to prevent the denial of a fundamental right”); *see also Uchau v. ROP*, 2017 Palau 34 ¶ 23 (applying plain error review to unreserved objection in a criminal case pursuant to ROP R. Crim. P. 52(b)).

[¶ 8] Moreover, an appellant should use the reply brief to challenge any assertions of the appellee with which she disagrees. *See* ROP R. App. P.

28(b). If a party fails to challenge the assertions in her adversary's brief, we may deem those assertions to be admitted. Just as it was not the Trial Division's duty to formulate Anderson's arguments for her, it is not the Appellate Division's responsibility to formulate responses to arguments that are unfavorable to her. Anderson had the opportunity to argue that the statute of frauds issue was properly before this Court, but she failed to make the argument. We decline to make it for her.

[¶ 9] Anderson's third appellate issue relates to whether the statute of limitations should limit her recovery on her successful breach-of-contract claim. *See* Appellant's Opening Br. 19–22. This argument was appropriately developed in Anderson's opening brief. In response, Kim developed his own arguments on the issue. *See* Appellee's Resp. Br. 13–19. In reply, Anderson dismissed this claim without explanation. *See* Appellant's Reply Br. 14 (“On the third issue, Appellant takes back her argument of the application on the statute of limitation in this appeal . . .”). As the appellant in this matter, it is certainly within Anderson's right to withdraw one of her bases for appeal.

CONCLUSION

[¶ 10] For the foregoing reasons, this matter shall be and is hereby **DISMISSED**.

SO ORDERED, this 8th day of November, 2018.