IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CLEOPHAS ROBERT,
Appellant,
v.
CLEORY N. CLEOPHAS (a.k.a. CLEORY C. ROBERT),
Appellee.

Cite as: 2019 Palau 6
Civil Appeal No. 18-023
Appeal from Civil Action No. 17-068

Decided: February 26, 2019

Counsel for Appellant ..... Siegfried B. Nakamura
Counsel for Appellee ..... Tamara D. Hutzler

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Oldiais Ngiraikelau, Presiding Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] This appeal arises from the Trial Division's judgment in favor of Appellee, Cleory N. Cleophas ("Cleory"), determining that Appellant, Cleophas Robert ("Robert"), breached a contract to build a house for Cleory on Cadastral Lot No. 007 E 10. The Trial Division awarded Cleory ownership of the house and Robert restitution in the amount of $15,329.13, the labor cost Robert paid to his employees for the house's construction.

[1] Although Appellant requests oral argument, we resolve this matter on the briefs pursuant to ROP R. App. P. 34(a).

[¶ 2] The Court now **AFFIRMS** in part and **REVERSES** in part the Trial Division's decision and judgment.

BACKGROUND

[¶ 3] Robert is Cleory's father. Robert is a contractor and has been in the construction business for over 30 years. In mid- to late-2013, Robert and Cleory discussed Robert building a house for Cleory and his family on Cadastral Lot No. 007 E 10 in Choll, Ngaraard, on the former site of Uldekl's house. The parties agreed that Robert would build for Cleory a one-story house with a concrete slab ceiling. In exchange, Cleory would give his father $25,000.00 and the sum of the proceeds of a house party.[2]

[¶ 4] Cleory applied for a loan in June 2013 and obtained the necessary building permits in December 2013. In or around January 2014, Cleory deposited into Robert's bank account $25,000.00 from the loan he secured, and construction began.

[¶ 5] Throughout the home's construction, both Robert and Cleory expended additional personal funds on materials and labor to build the home. At some point during construction, Robert got mad at Cleory, "gave him the house key and all the receipts he had, and told [Cleory] to find another person to complete the house." Decision 4. Cleory apologized to Robert and also told him that, when the house was finished and his outstanding loan decreased, he would refinance the loan and pay Robert more money. *Id.* at 4–5.

[¶ 6] In September 2015, the house was substantially complete, so Cleory held a house party on October 17, 2015. Cleory received $11,087.00 at the house party, including $1,000.00 from Robert's two minor children. Robert told Cleory to give him $10,000.00 from the party.

[¶ 7] Following the house party, but before the house was completed, Robert again got angry at Cleory and refused to give Cleory the keys to the house and property gate. The house was complete in December 2016, but

[2] House parties, or housewarming parties, "are a common occurrence in Palau," *Isechal v. Umerang Clan*, 18 ROP 194, 197 (2011), where individuals throw a party for themselves to raise money to defray the costs of new home construction or a home renovation project.

Robert did not turn it over to Cleory, instead claiming the house as his own. As a result, Cleory brought suit.

[¶ 8] The Trial Division determined that there was a valid oral contract between Robert and Cleory and that Cleory owns the home that Robert built. It further determined that, because Cleory knew that his father had spent his own money on the home's construction, it was "simply not equitable for the son to receive the benefit of the bargain (by keeping the house) and be further unjustly enriched at the expense of the father." Decision 13. In an effort to balance the perceived inequity, the Trial Division, in its discretion, awarded Robert restitution in the amount of $15,329.13, the amount that the Trial Division determined Robert had proven he spent on labor for the project.

[¶ 9] Robert now appeals the Trial Division's decision, arguing both that there was no valid contract to breach and that the Trial Court erred in the amount of its restitution award.

STANDARD OF REVIEW

[¶ 10] This Court has previously and succinctly explained the appellate review standards as follows:

> A trial judge decides issues that come in three forms, and a decision on each type of issue requires a separate standard of review on appeal: there are conclusions of law, findings of fact, and matters of discretion. Matters of law we decide de novo. We review findings of fact for clear error. Exercises of discretion are reviewed for abuse of that discretion.

Kiuluul v. Elilai Clan, 2017 Palau 14 ¶ 4 (internal citations omitted).

[¶ 11] The Court reviews *de novo* the Trial Division's finding that a contract existed between the parties and applies the clearly erroneous standard to the findings of fact that the Trial Division used to support its legal determination.

[¶ 12] The Trial Division's findings concerning Robert's restitution award are reviewed for abuse of discretion.[3] *Fan v. Pacifica Dev. Corp.*, 16 ROP 56, 59; 60–63 (2008) (stating that the standard of review is *de novo*, but applying abuse of discretion standard in its analysis). *See also Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998) (restitution awards reviewed for abuse of discretion; *Invest Almaz v. Temple-Inland Forest Prod. Corp.*, 243 F.3d 57, 66 (1st Cir. 2001) (same); *Voest–Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 211 (3d Cir. 1990) (same), *but cf. Keptot v. ROP*, 2018 Palau 2 ¶ 3 (applying to restitution amount the clearly erroneous standard because restitution was part of criminal sentence, which is reviewed for clear error).

ANALYSIS

I. Oral Contract

[¶ 13] For there to be a valid contract, there must be an offer, acceptance, and consideration. *Sumang v. Pierantozzi*, 7 ROP Intrm. 36, 37 (1998) (elements of contract shown to be offer, acceptance, and consideration).

[¶ 14] Cleory asked Robert to build him a house on Cadastral Lot No. 007 E 10 in Choll, Ngaraard, on the former site of Uldekl's house. In exchange, Cleory agreed to secure the building permits and pay Robert $25,000.00 plus the proceeds from a house party. Robert agreed. The Trial Division determined that Robert and Cleory entered into an oral agreement with those terms. *See* Decision 8.

[¶ 15] Robert contends that the Trial Division erred in finding the existence of a valid contract. He argues that the parties' obligations were not set forth with sufficient definiteness for there to be a contract.[4] Opening Br. 8

[3] Without citation to supporting case law, Cleory asserts that restitution is a matter of law to be reviewed *de novo*. Cleory's Resp. Br. 10 n. 1. We disagree.

[4] To the extent that, in his reply brief, Robert makes an argument regarding ineffective offer and for the first time provides support for an argument regarding an absence of a meeting of the minds, those arguments are waived because they were not properly raised in his opening brief. *See Koror State Pub. Lands Auth. v. Tmetbab Clan*, 19 ROP 152, 156 n.2 (2012) (citing *Rechucher v. Lomisang*, 13 ROP 143, 149 (2006) (declining to consider an argument raised for the first time in reply brief)). The Court acknowledges that Robert asserted in his opening brief that there was no "meeting of the minds about specific terms," but he did not provide

(relying on *Adelbai v. Masang*, 9 ROP 35, 40 (2001) ("a court can enforce a contract only if the obligations of the parties are set forth with sufficient definiteness that it can be performed.") (internal quotation omitted)). Specifically, Robert asserts that Cleory had "no [] knowledge of the value of the house, or even how much his father spent to build the house," and that "[t]here was also no clear indication of who was responsible for what[.] . . . [A]t times Cleory was buying air conditions [sic], windows, and paint, while his father Robert took care of the labor costs." *Id.* He concludes from this that, "what was expected of Cleory in exchange for Ro[bert] building the house was never fully agreed upon." Reply Br. 8.

[¶ 16] "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." Restatement (2d) Contracts § 33 (1981).[5]

[¶ 17] The facts establish that a contract was formed. Robert agreed to build a house for Cleory if Cleory secured the necessary permits and paid him $25,000.00 plus the proceeds from a house party. Cleory secured the permits and got a loan, paid Robert $25,000.00 plus $10,000.00 from the house party, and Robert constructed the house. The record supports the Trial Division's finding that there was, as described, a contract between the parties. We likewise find that there was a valid contract and that there is no clear error with respect to the findings of fact on which the Trial Division relied to reach that decision.

[¶ 18] Robert's argument that the parties' obligations lacked sufficient definiteness is unavailing. "[U]ncertainty as to incidental or collateral matters is seldom fatal to the existence of a contract." § 33 cmt. a.

[¶ 19] Robert contends that Cleory's lack of knowledge regarding the value of the house and the amount of money Robert spent on its construction in some way led the contract to be insufficiently definite. Those facts, however, do not change the underlying contractual agreement.

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any supporting evidence for this assertion in his opening brief. Therefore, the Court does not consider this argument.

[5] In the absence of controlling Palauan law, "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of the Republic." 1 PNC § 303.

[¶ 20] As construction progressed, both Robert and Cleory were aware that the house cost more to build than Cleory had agreed to pay and that Robert spent his own money in constructing the house. *See* Decision 9. Nonetheless, until Robert disowned his son, he also indicated that he was willing to spend the money on Cleory simply because he was his son and he loved him. *See id.* at 5 ("[Robert] testified that he [used his own money to complete the house] because he wanted to complete the house for the son whom he loved"); *see also* Tr. 229:6–12 (when counsel sought to confirm that Robert knew there was "question about whether Cleory c[ould] even afford a [$70,000.00] house before [construction] even started," Robert responded regarding Cleory: "He is my son. How many times I repeat. I don't care [] how much money I spend for him because I love him. He's my true blood."). Similarly, one can assume that Robert contracted to build the house for less than the full construction cost for the same reason.

[¶ 21] A fundamental contracting principle demands that "competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co v. Harding Glass Co.*, 283 U.S. 353, 356 (1931); *see also* Restatement (2d) Contracts 8 Intro. Note (1981) ("In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance."). If, for example, a party enters into a contract that binds him to a bad bargain, absent a public policy limitation, he cannot count on the court to rescue him from his bargain. *Walker v. Gribble*, 689 N.W.2d 104, 110 (Iowa 2004) ("The courts can have no concern with the wisdom or folly of . . . a contract." (quotation omitted)). Moreover, "[w]hen determining whether an agreement is an enforceable contract, courts do not normally inquire into the adequacy of consideration. . . . Instead, [c]ourts only review whether the consideration is legally sufficient." *Chun v. Liang*, 14 ROP 121, 123 (2007) (internal citations omitted). "As long as a party received something of value, the contract is not void for lack of consideration." *Id.* (citation omitted); *see also* Restatement (2d) Contracts § 79 ("If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged; or [] 'mutuality of obligation.'").

[¶ 22] Here, Robert bargained for and accepted a contract on which he likely knew from the outset, or should have known, that he would lose money. We cannot ignore that a valid contract was made simply because he later did not like his agreement.

[¶ 23] Nor can we say that the contract was modified or rendered unenforceable when, during construction, Robert got mad at Cleory, "gave him the house key and all the receipts he had, and told [Cleory] to find another person to complete the house." Decision 4. In response, Cleory apologized to Robert and also told him that, when the house was finished and his outstanding loan decreased, he would refinance the loan and pay Robert more money. *Id.* at 4–5. Even if Cleory had made a specific promise to pay Robert an additional set sum, such a promise would not be enforceable under the circumstances of this case. *See* Restatement (2d) Contracts § 73 cmts. a & c; Ill. 4 ("Because of the likelihood that the promise was obtained by an express or implied threat to withhold performance of a legal duty, the promise does not have the presumptive social utility normally found in a bargain;" "And the lack of social utility in such bargains provides what modern justification there is for the rule that performance of a contractual duty is not consideration for a new promise;" "A, an architect, agrees with B to superintend a construction project for a fixed fee. During the course of the project, without excuse, A takes away his plans and refuses to continue, and B promises him an extra fee if A will resume work. A's resumption of work is not consideration for B's promise of an extra fee.").

[¶ 24] Robert also asserts that the terms were insufficiently definite because it was unclear "who was responsible for what," as there were occasions when Cleory paid for materials himself and Robert paid for labor costs. Opening Br. 8. That Cleory contributed more than was required by the contract's terms is immaterial to the validity of the parties' agreement.[6] At the time Cleory made additional contributions, there were no essential terms left open for further negotiation. That is, "the obligations of the parties [were previously] set forth with sufficient definiteness that it [could] be performed." *Adelbai*, 9 ROP at 40.

[6] Cleory has made no claim regarding voluntary contributions he made toward the home's construction.

[¶ 25] In the alternative, Robert attempts to frame his breach of the existing contract as "action that may even be seen as rescinding or otherwise reneging on a contract." Opening Br. 9. He also maintains that Cleory engaged in conduct that amounted to rescission. To support his argument, Robert points to Cleory stating that "he would have reconsidered the total cost of the house" if he had known that it was going to be more than he had agreed to pay,[7] and the fact that Robert kept the keys after the fallout between the two parties, "reasoning that the amount of labor and effort he expended justified his expressed ownership of the house." *Id.*

[¶ 26] Rescission "involves in effect a mutual release of further obligations." *Republic of Palau v. Pacifica Dev. Corp.*, 1 ROP Intrm. 214, 224 (Tr. Div. 1985) (internal quotation and citation omitted); *see also* Restatement (2d) Contracts § 283 (1981) (rescission requires "an agreement under which each party agrees to discharge all of the other party's remaining duties of performance under an existing contract."). There is no indication in the record that the parties mutually agreed to discharge each other from any remaining performance obligations under the contract. Thus, there was no rescission.

[¶ 27] However, it is possible that Robert means to argue that, through the acts described, each party attempted to avoid the contract. *See* § 283 cmt. a (explaining that the Restatement uses the term "agreement of rescission" "to avoid confusion with the word 'rescission,' which courts sometimes use to refer to the exercise by one party of a power of avoidance"). A party has the power of avoidance where "one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract." *Id.* § 7. Robert has not argued that such circumstances exist in this case. Accordingly, Robert's contention that the contract was rescinded fails.

[7] Robert has not supported this statement with any record evidence. For purposes of this entry, the Court will presume the statement was made by Cleory, but advises counsel in the future to follow ROP R. App. P. 28(e) for all references to the record.

II. Restitution

[¶ 28] Robert also asserts that the Trial Division erred in awarding "only the cost of labor borne by Robert, when [he] is entitled to more than the awarded amount." Opening Br. 10. He argues that "the valuation of said house . . . should have been taken into consideration." *Id.* Specifically, the evidence at trial "clearly showed that the construction cost of the house was more than $100,000." *Id.* (citing Tr. 171:2–6; 211:22–23). He seeks "either an additional $121,950.87 or up to $134,430.87" in addition to the court-ordered $15,329.13 restitution award. *Id.* at 11.

[¶ 29] As Robert correctly indicates, restitution can be awarded to a party who breaches a contract. *See* Opening Br. 10 (citing *Fan*, 16 ROP at 62). However, there exist very specific circumstances under which a party in breach may seek restitution. The breaching party must "establish that [his] incomplete or defective performance [*i.e.*, breach] has in fact conferred a net benefit on the recipient, taking into account the various costs to which the [non-defaulting party] has been subjected in the wake of the claimant's default." Restatement (3d) Restitution § 36 cmt. a.

[¶ 30] Here, the conditions required for a restitution award to the breaching party have not been met. Robert's breach did not confer a net benefit on Cleory. Quite the opposite, Robert's breach prevented Cleory from receiving any benefit of his bargain: Cleory was supposed to receive a house in return for his securing the building permits and paying Robert $25,000.00 and the proceeds from the house party.[8]

[¶ 31] Although the Trial Division determined that a restitution award was appropriate, stating that "[i]t is simply not equitable for the son to receive the benefit of the bargain (by keeping the house) and be further unjustly enriched at the expense of the father," it abused its discretion in reaching that conclusion. Decision 13.

[¶ 32] "Unjust enrichment occurs where a person receives a benefit and the retention of the benefit is unjust." *Republic of Palau v. Reklai*, 11 ROP

[8] Cleory retained $1,087.00 of the proceeds of the house party, the contribution Robert's minor children brought to the party plus $87.00. Robert makes no argument that he is entitled to the remaining balance of the house party proceeds. As such, we do not decide the issue.

18, 22 (2003); *see also* Restatement (3d) Restitution § 1 cmt. b (defining unjust enrichment as "the transfer of a benefit without adequate legal ground"). Cleory received the benefit of his bargain only and was not unjustly enriched as he did not receive any benefit beyond that for which he had contracted. *See Freeman v. Harleton Oil & Gas, Inc.*, 528 S.W.3d 708, 740 (Tex. Ct. App. 2017) ("[T]he doctrine of unjust enrichment does not operate to rescue a party from the consequences of a bad bargain, and the enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract." (quotation and citation omitted)).

CONCLUSION

[¶ 33] For the foregoing reasons, we **AFFIRM** the Trial Division's decision and judgment with regard to its finding that there was a valid contract and **REVERSE** the Trial Division's award of restitution.