IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

DONALD HARUO,
Appellant,
v.
14TH PELELIU STATE LEGISLATURE and ERIC SABURO,
Appellees.

Cite as: 2023 Palau 19
Civil Appeal No. 23-019
Appeal from Civil Action No. 22-078

Decided: August 28, 2023

Counsel for Appellant ..... Johnson Toribiong
Counsel for Appellee ..... Brien Sers Nicholas

BEFORE: FRED M. ISAACS, Associate Justice, presiding
KATHERINE A. MARAMAN, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] The matter before the court is Donald Haruo's ("Haruo") appeal from the trial court's order granting the 14th Peleliu State Legislature's Motion for Summary Judgment. Two questions are of import: whether a trial court can, upon a motion for summary judgment that receives no opposition, deem the matter confessed and grant summary judgment solely based on the failure to

[1] Although Appellant requests oral argument, we resolve this matter on the briefs pursuant to ROP R. App. P. 34(a). We also emphasize that under this Rule, a request for oral argument must be made on the cover sheet of an opening brief and not as a separate motion.

file an opposition under ROP R.Civ.P. 75(c)(1); and whether a trial court can grant summary judgment on a motion that did not include the necessary supporting documents under ROP R.Civ.P. 56.

[¶ 2] Because we find that there were no remaining genuine disputes of material fact, and that all necessary documents were already part of the record, we **AFFIRM**.

BACKGROUND

[¶ 3] The Peleliu State Legislature is composed of 15 members: five members elected at large, five hamlet chiefs, and five members elected by each hamlet and representing such hamlet. *See* Peleliu State Const., Art. VIII, § 3. The term of the previous 13th Peleliu State Legislature ("13th PSL") came to an end on January 1, 2022, and was immediately followed by the 14th Peleliu State Legislature ("14th PSL"). This election was already subject to a suit in *Singeo v. Rekemel*, 2023 Palau 8.

[¶ 4] Haruo was seated in the Peleliu State Legislature on February 16, 1987, pursuant to his title of *Renguul*, the traditional chief from Sowei Clan of Teliu Hamlet. He claims that the newly elected members of the 14th PSL unrightfully ousted him and replaced him with Appellee Eric Saburo. Haruo filed suit in the Trial Division to enjoin and restrain Saburo from sitting in the 14th PSL, from taking the seat of *Renguul*, and to direct the 14th PSL not to pay any compensation or funds to Saburo until the issue is resolved by the Court.

[¶ 5] On August 10, 2022, Haruo filed a Motion for Temporary Restraining Order and Preliminary Injunction to enjoin and restrain the 14th PSL from seating Saburo and paying him any compensation for his seat, and to stop Saburo from taking the seat of *Renguul*. On August 29, 2022, counsel for the 14th PSL filed an answer and an opposition to the Motion for TRO. These pleadings were supported by the Declaration of Vice Speaker Alex Ngiraingas with Exhibits ("the Declaration").

[¶ 6] The Declaration contained several documents, including (1) a declaration from Alex Ngiraingas, vice speaker of the 14th PSL, stating that Saburo had been seated as an official member of the 14th PSL as *Renguul*, and

authenticating the following documents: (2) a report from the 14th PSL Credentials Committee finding that Haruo had not submitted his credentials, that Saburo had submitted credentials supported by the strong members of Sowei Clan, and recommending that Saburo be seated in the 14th PSL as *Renguul*; (3) two letters addressed to the Credentials Committee, dated January 1 and January 11, 2022, from the female strong senior members (*ourrots*) of Sowei Clan of Teliu Hamlet, recommending that Saburo be seated in the 14th PSL as *Renguul*; and (4) Resolution No. 14-09-22 from the 14th PSL, dated June 21, 2022, seating Saburo in the 14th PSL as *Renguul*.

[¶ 7] The trial court denied the Motion, noting that a remedy at law is available:

> If after the trial on the merits takes place and the [Trial Division] rules in favor of [Haruo] then the [Trial Division] may order the removal of Mr. Saburo from the 14th Peleliu State Legislature and [Haruo] may take his seat. An injunction will not issue when there is an adequate remedy at law.

Temporary Restraining Order, *Haruo v. 14th Peleliu State Legislature*, Civil Action No. 22-078, at 3 (Tr. Div. Oct. 20, 2022).

[¶ 8] On September 9, 2022, the 14th PSL filed a Motion for Summary Judgment. The contents of the Motion relied on the Declaration, but it was not appended to the Motion for Summary Judgment.

[¶ 9] On October 11, 2022, the Trial Division granted summary judgment to Appellees, stating that no opposition to the motion for summary judgment had been filed by Haruo and "failure of the defendants to timely file an opposing brief authorizes the [trial court] to deem the matter confessed and the requested relief is granted."

[¶ 10] On October 19, 2022, Haruo filed a Motion for Reconsideration, stating that he was not served with the Motion for Summary Judgment. In its response, the 14th PSL pointed out that Haruo's counsel was served by email twice on September 9, 2022 with the Motion for Summary Judgment: once by

counsel for the 14th PSL, and once by the Clerk of Courts.[2] However, the 14th PSL recognized that service did not include the Declaration, i.e., the Motion was not appended with the necessary evidentiary material supporting the motion. On October 21, 2022, counsel for the 14th PSL filed the Declaration while acknowledging he made an oversight in failing to include it with the Motion for Summary Judgment. In a reply filed November 2, 2022, Haruo's counsel acknowledged that he had received the Motion for Summary Judgment but overlooked it among other email communications, and argued that the Order Granting Summary Judgment should be set aside because of the failure to include the Declaration.

[¶ 11] The trial court denied the Motion for Reconsideration on March 8, 2023. Haruo now appeals the denial of his Temporary Restraining Order and the Order Granting Summary Judgment, arguing that the Motion for Summary Judgment was legally deficient and could not be granted as a matter of law.

STANDARD OF REVIEW

[¶ 12] We review the trial court's entry of summary judgment *de novo*. *Republic of Palau v. Reklai*, 11 ROP 18, 21 (2003). A motion for summary judgment should only be granted when the pleadings, affidavits, and other papers show that no genuine issue of material fact remains, and the moving party is entitled to judgment as a matter of law. ROP R. Civ. P. 56(c). Additionally, the court must view all evidence and inferences in the light most favorable to the nonmoving party. *Rechelulk v. Tmilchol*, 2 ROP Intrm. 277, 281 (1991).

[¶ 13] A trial court's decision to deem a motion confessed by the nonmoving party and to grant the requested relief is a matter of discretion for the trial court. ROP R.Civ.P. 7(c)(1).

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[2] Under ROP R.Civ.P 5(g), "[u]pon the agreement of the parties, any party may serve papers upon another party by electronic means. Before any papers may be served electronically, the party or counsel who consents to electronic service must file a signed written statement with the court stating their agreement to receive service electronically in that case." Because both counsels are registered with the Court's e-filing systems, they have consented to be served electronically.

> An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighting those factors commits a clear error of judgment.

Salvador v. Angel, 2018 Palau 14 (quoting *Eller v. ROP*, 10 ROP 122, 128-29 (2003)).

DISCUSSION

[¶ 14] Haruo maintains that the Trial Division erred in granting summary judgment because there were pending unresolved issues of material fact and the Motion for Summary Judgment was legally deficient where it failed to include necessary supporting documents, i.e., the Declaration. We consider these arguments consecutively.

I. Standard to Grant Summary Judgment

[¶ 15] We first turn to the broader question of whether the trial court abused its discretion in deeming the matter confessed because there were pending unresolved issues of material facts.

[¶ 16] Under ROP R.Civ.P. 56(c), a litigant who files a motion for summary judgment must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Becheserrak v. Eritem Lineage*, 14 ROP 80 (2007). ROP R.Civ.P. 56(e) spells out the burden placed on one who seeks to oppose a summary judgment motion and the consequences of failing to meet that burden:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party

> does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[¶ 17] Similarly to this Rule, ROP R.Civ.P. 7(c)(1) provides that "[f]ailure to timely file an opposing brief or opposition authorizes the court, in its discretion, to deem the matter confessed and to enter the requested relief." Pursuant to this rule, the trial court granted summary judgment, stating that "[n]o opposition has been filed. Failure of the defendants to timely file an opposing brief authorizes the Court to deem the matter confessed and the requested relief is granted."

[¶ 18] Nevertheless, summary judgment is not proper merely because the nonmovant failed to file a response. Before that, the moving party must meet its "initial responsibility of informing the trial court of the basis for its motion, and identifying the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 109 (1995); *Salvador v. Angel*, 2018 Palau 14 ¶ 1 ("[T]he trial court must always require that a party moving for summary judgment meet the standards for summary judgment set forth in ROP R.Civ.P. 56."). The burden on the nonmovant to respond arises only if the summary judgment motion is properly "supported" as required by Rule 56(c). *Reed v. Bennett*, 312 F.3d 1190, 1194 (10th Cir. 2002). If the evidence produced in support of the summary judgment motion does not meet this burden, "summary judgment must be denied *even if no opposing evidentiary matter* is presented." *Id.* (quoting Fed.R.Civ.P. 56 advisory committee notes to the 1963 amendments) (emphasis added).

[¶ 19] To summarize, a party's failure to file a response to a summary judgment motion is not, by itself, a sufficient basis on which to enter judgment against the party. The trial court must make an additional determination that judgment for the moving party is appropriate under Rule 56. *See Reed*, 312 F.3d at 1194 (finding that a local rule deeming an uncontested motion confessed did not permit a district court to grant summary judgment without making the determinations required by Fed.R.Civ.P. 56(c)); *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001) (finding it improper to grant summary judgment solely on the failure to file an opposition); *Anchorage Assocs. v.*

Virgin Islands Bd. of Tax Rev., 922 F.2d 168, 175 (3d Cir. 1990) (finding a local rule deeming an uncontested motion conceded is not a sufficient basis for the entry of summary judgment); *Livernois v. Med. Disposables, Inc.*, 837 F.2d 1018, 1022 (11th Cir. 1988) (finding summary judgment improper without determining if the moving party had satisfied its initial responsibility to demonstrate no genuine issue of material fact); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160–61 (1970) ("Rule 56(e) . . . was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact.")

[¶ 20] Undoubtedly, the trial court's order limited itself to deeming the matter confessed for failure to file an opposition. The order did not make a determination as to whether there were any genuine disputes of material facts. Nevertheless, because our review of the record reveals no such disputes, we hold that error harmless. "The Appellate Division will not reverse a lower court decision due to an error where that error is harmless." *Ngetechedong Clan v. Haruo*, 19 ROP 139, 143 (2012).

[¶ 21] Summary judgment is appropriate against a nonmoving party who fails to make an evidentiary showing sufficient to raise a factual question as to an element essential to that party's case and on which that party will bear the burden of proof at trial. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 109 (1995); *Aquino v. Nestor*, 11 ROP 278 (Tr. Div. 2004). In addition,

> To be "genuine," the evidence offered by the nonmovant must be sufficient to support a trier of fact's finding in the nonmovant's favor on the disputed fact. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. The nonmoving party who will bear the burden of proof at trial on the challenged element cannot rely on conclusory allegations in an affidavit to establish a genuine issue of fact. (citations omitted).

Becheserrak v. Eritem Lineage, 14 ROP 80, 83 (2007).

[¶ 22] First, the 14th PSL's Motion for Summary Judgment argued that the decision of the 14th PSL to seat Saburo is a non-justiciable political question. A controversy is nonjusticiable – i.e., it involves a political question – where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and

manageable standards for resolving it. . . ." *Obeketang v. Sato*, 13 ROP 192, 195 (2006) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). We have previously found that summary judgment is appropriate where a case seeks resolution of a nonjusticiable political question. *Louis v. Nakamura*, 16 ROP 144, 148 (2009). More specifically, we have held in *Sato* that a legislative body's decision to seat a member is a non-justiciable political issue that precludes our review in the absence of alleged constitutional violations. *Sato*, 13 ROP at 199.

[¶ 23] Critically, Haruo did not argue below that there were any constitutional violations during the seating of Saburo. In the absence of such argument, the trial court had no jurisdiction to review a non-justiciable question. His amended verified complaint relies in main part on the res judicata doctrine, arguing that a previous case, Civil Action 99-309, decided the issue, and res judicata bars Saburo from claiming the seat occupied by Haruo.

[¶ 24] Res judicata, or claim preclusion, "generally bars a subsequent claim that concerns any issue actually litigated and determined by an earlier final judgment between the same parties." *Carlos v. Carlos*, 19 ROP 53, 58 (2012) (internal quotations omitted). Res judicata deals with subsequent actions on the same claim, although it may also bar an issue that ought to have been litigated during a prior claim. *See Carlos*, 19 ROP at 58; *Ngerketiit Lineage v. Tmetuchl*, 8 ROP 122, 123 (2000) (holding that a claim that "could have, and should have, been raised" in earlier proceedings is barred in later proceedings).

[¶ 25] In Civil Action 99-309, Saburo Olkeriil, Eric Saburo's uncle, filed suit against Haruo, asking the court to determine membership within the Sowei Clan and ownership of the *Renguul* title. The decision carefully articulates the interplay of our jurisprudence, including *Sato*, and states, "while the Court can and should make findings as to the membership of Sowei Clan, this is not a proper case for the Court to make any declarations as to the holder of the title of *Renguul*." Decision, *Olkeriil v. Haruo*, Civil Action No. 99-309, at 4 (Tr. Div. Dec. 15, 2006). The Civil Action did not address the issue of who holds the title of *Renguul*. It only recognized that both Saburo Olkeriil and Haruo were members of Sowei Clan. *Id.* at 9. Accordingly, res judicata cannot apply.

[¶ 26] Under these circumstances, Haruo's arguments were almost entirely non-justiciable, and the res judicata issue was inapplicable. Even the most liberal construction of Haruo's evidence does not meet the standard necessary to withstand a motion for summary judgment. Hence, the trial court could not have found any unresolved issues of material fact.

II. Properly Supported Motion for Summary Judgment

[¶ 27] Haruo's second argument is that the trial court erred in granting summary judgment where the Motion for Summary Judgment was deficient because it was not properly appended with supporting affidavits, i.e., the Declaration.

[¶ 28] As we have explained at length *supra*, the trial court can only grant summary judgment if presented with a procedurally sound motion for summary judgment. Indeed, ROP R. Civ. P. 7(b)(2) provides that "[i]f a motion requires consideration of matters not established by the pleadings, the moving party, at the time of filing the motion, shall also file such evidentiary materials, including affidavits, as are being relied upon."

[¶ 29] In *Salvador v. Angel*, the plaintiff Angel filed a motion for summary judgment which the Trial Division granted because the defendant Salvador had failed to file a timely opposition. 2018 Palau 14 ¶ 4. We vacated and remanded with instructions to deny the summary judgment, finding that Angel's motion for summary judgment did not adhere to the requirements of either Rule 7 or Rule 56. *Id.* at ¶ 8-9. We explained that Angel had failed to provide evidentiary material supporting the motion, and that Salvador's "failure to respond is insufficient to override the plaintiff's initial and mandatory obligation to provide admissible evidence to support a summary judgment motion." *Id.* at ¶ 11. In other words, Angel had not carried his preliminary burden to prove his assertions of facts, so summary judgment could not be granted as a matter of law.

[¶ 30] Nonetheless, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." ROP R.Civ.P. 56(a). Therefore, "in cases where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to

interrogatories, and admissions on file[,]" as well as affidavits. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also* ROP R.Civ.P. 56(c). ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") Put another way, the trial court does not have to limit its purview to the motion for summary judgment itself and its supporting documents, but can consider other materials in the record when making its determination. *See* 10A Fed. Prac. & Proc. Civ. § 2721 (4th ed.) ("Rule 56 is an *enlarging* provision as to what may be considered, not a restriction.") (emphasis added).

[¶ 31] In our case, the 14th PSL had filed the Declaration on August 29, 2022. It is thus undisputed that the documents supporting the Motion for Summary Judgment were already part of the record. This is distinguishable from *Salvador*, where Angel's motion for summary judgment contained statements of facts that were unsupported by any part of the record. The 14th PSL's failure to directly append the Declaration to the Motion for Summary Judgment did not make the Motion legally insufficient. The 14th PSL had met its initial burden of proof regardless of its failure to append the Declaration.

CONCLUSION

[¶ 32] Accordingly, the Motion for Summary Judgment was properly supported, and while the trial court erred in failing to make an additional determination as to the propriety of summary judgment, we hold this error harmless. Haruo's remaining arguments regarding the denied temporary restraining order and preliminary injunction are moot. We **AFFIRM** the Trial Division's judgment.