Ulechong v. Palau Pub. Utils. Corp., 13 ROP 116 (2006)

LAURENTINO ULECHONG,
Appellant,

v.

PALAU PUBLIC UTILITIES CORPORATION
and NORIWO UBEDEI,
Appellees.

CIVIL APPEAL NO. 04-010
Civil Action No. 02-043

Supreme Court, Appellate Division
Republic of Palau

Decided: May 17, 2006[1]
⊥117
Counsel for Appellant: J. Roman Bedor

Counsel for Appellees: Douglas Parkinson

BEFORE: LOURDES F. MATERNE, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro-Tem; JANET HEALY WEEKS, Part-Time Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Appellant Laurentino Ulechong brought a trespass action seeking the removal of an electric power pole in Ollei Hamlet, Ngarchelong, on land to which he had obtained a use right. The Trial Division granted summary judgment in favor of Appellee Palau Public Utilities Corporation (hereinafter "PPUC"), on the grounds that PPUC's predecessor, which had installed the utility pole, obtained an oral license by constructing and maintaining the pole in an open, obvious, and visible manner. The court also concluded that Appellant was estopped from challenging the existence of the pole due to the original landowner's failure to object to the installation and upgrade of the pole. Appellant now challenges this grant of summary judgment. For the reasons discussed below, we affirm the Trial Division's grant of summary judgment.

[1] The court has concluded that oral argument would not materially assist in the resolution of this appeal. ROP R. App. P. 34(a).

⊥118 **BACKGROUND**

The first electric power system in Ngarchelong State, owned and operated by Ngarchelong State Government, was installed in 1994. This system utilized generators and wooden utility poles installed by national government employees of the Bureau of Public Works on behalf of Ngarchelong State. Permission to place the utility poles through Ngarchelong was obtained by a committee of older men within Ngarchelong, who were responsible for determining the location of the utility lines in consultation with the various landowners. The original owner of the Lot, Takao Obeketang, however, denies having been contacted by the committee or otherwise consenting to the placement of the pole on the Lot. Ngarchelong State did not obtain any written easements of licenses from any property owner whose lands were crossed by the utility poles.

In 1998, the Republic began connecting the various state power systems to the national power system as part of a Japanese grant program to upgrade the electrical power system on the island of Babeldaob. As part of this project, the wooden utility poles previously used by the Ngarchelong State power system were replaced with concrete poles. The Babeldaob utility upgrade project was completed at the request of the respective State governments and with much fanfare. Prior to the commencement of the upgrade project, all local residents received notice of the project via radio, posted notices, and personal contact. Residents of Ollei Hamlet, where the land in question is located, hosted a party to celebrate the completion of the utility upgrade project. In May 1999, following the completion of the Babeldaob upgrade project, PPUC took possession and assumed operation of the Ngarchelong power system, which had previously been owned and operated by the Ngarchelong State government.

On July 27, 1998, Takao Obeketang obtained a Certificate of Title to land identified as Cadastral Lot 018 F 44 (hereinafter "the Lot").[2] Some three years later, on October 26, 2001, the Republic of Palau awarded Ulechong a contract to construct a concrete road in Ngarchelong. After being awarded the contract, worth $1,099,599.00, Ulechong obtained a use right to the Lot from Obeketang on December 4, 2001. Ulechong then began construction of a storage warehouse on the Lot. While constructing the warehouse, Ulechong contacted PPUC and requested that they relocate the utility pole on the Lot. PPUC representatives conducted an assessment of the requested relocation pursuant to its regulations. In January 2002, PPUC informed Ulechong that relocation of the utility pole would cost an estimated $769.86, and that work would begin after he had remitted that amount. Ulechong refused to pay for the relocation, instead building his warehouse with holes in the walls to allow a portion of the utility lines to pass through the building. In addition, on January 30, 2002, Ulechong brought a trespass action against PPUC and its General Manager Noriwo Ubedei, seeking removal of the utility pole and damages.

The trial court granted summary judgment in favor of Defendants-Appellees PPUC and Ubedei on the ground that the original landowner's failure to raise an objection to the presence of the utility pole barred Ulechong from bringing such claims. ⊥119 Although the original

[2] Although Obeketang did not obtain title to the Lot until 1998, the parties agree that he was the owner of the Lot during the initial construction of the pole in 1994.

landowner, Obeketang, submitted an affidavit stating that neither PPUC nor its predecessor had requested permission to place the utility pole on the Lot, the court found that "the absence of a record of objection by prior and current owners of the land creates the inference that the presence of the poles and the use of the property was permissive." *Ulechong v. PPUC*, Civil Action No. 02-043 (Order dated Feb. 24, 2004) (hereinafter "Trial op.") at 4. In light of Obeketang's failure to raise such objections, the court held that PPUC's predecessor obtained a license, which became "executed and irrevocable once PPUC's predecessor and then PPUC continued to expend money and labor to maintain the utility pole." *Id.* at 7. Regarding Ulechong's assertion that Obeketang never consented to placement of the utility pole, either in writing or in any "customary way," the court held that Obeketang's failure to object to such placement, having had ample opportunity to do so, "amounted to acquiescence in the placement of the pole on his Lot." *Id.* at 6. In light of this acquiescence and Obeketang's continued failure to object when PPUC and its predecessor entered the Lot to maintain and upgrade the pole, the court held that Ulechong was estopped from challenging that placement of the pole. Finally, the court rejected Ulechong's argument that PPUC's interest in the Lot resulted from an unconstitutional taking of private property for public use without just compensation, holding that any takings claim would have to have been brought as a separate claim against PPUC's predecessor, Ngarchelong State, or the national government, rather than PPUC, an independent corporation.

Ulechong now appeals, urging that neither Ngarchelong State nor the Republic obtained permission from Obeketang prior to installation of the utility pole and that its installation and maintenance constitutes an unconstitutional taking.

STANDARD OF REVIEW

Summary judgment is only proper when the pleadings, affidavits, and other papers show no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. ROP R. Civ. P. 56(c). When considering a motion for summary judgment, the court must consider all evidence and inferences in the light most favorable to the nonmoving party. *ROP v. Reklai*, 11 ROP 18, 21 (2003). The Appellate Division reviews appeals from summary judgment *de novo*. *Id.* In doing so, our review is plenary, considering both whether there is no genuine issue of material fact and whether substantive law was correctly applied. *Mesubed v. ROP*, 10 ROP 62, 64 (2003) (citing *Akiwo v. ROP*, 6 ROP Intrm. 105, 106 (1997), and *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2510 (1986)).

ANALYSIS

Appellant raises three main issues in his brief. First, he maintains that the installation and maintenance of the utility pole on the Lot constitutes an unconstitutional taking. Second, he urges that an implied license could not have been created because Obeketang never consented to the installation of the pole. Finally, Appellant argues that he cannot be estopped from bringing suit because his predecessor never consented to the installation of the pole, which, in any event, constituted an unconstitutional taking. We will address these issues in turn.

I. Takings Claim

Appellant devotes the bulk of his brief to arguing that the installation and ⊥120 maintenance of the utility pole constituted an unconstitutional taking. In granting summary judgment, the Trial Division rejected Appellant's takings claim on the ground that Appellant had not brought a separate takings (or inverse condemnation) claim, but rather only raised the issue in response to Appellees' motion for summary judgment with respect to his trespass claim. In effect, the court held that Appellant had sued the wrong party, noting that in order to consider the claim, Appellant "would have to bring in either PPUC's predecessor or the national government to answer to the claim of the unconstitutional taking." Trial op. at 8.

Although Appellant devotes the bulk of his brief to his takings claim, he has not addressed the Trial Division's conclusion that his takings claim must fail because he did not bring it as a separate, independent claim against the state or national government. Indeed, it is not even clear whether his discussion of the takings issue is intended to stand as an independent takings claim, or whether he only raises the issue to dispute the trial court's conclusion that PPUC maintained the pole under an implied license. Regardless, in light of Appellant's failure to address the merits of the trial court's decision, any takings claim may be rejected summarily. *See Ngirmeriil v. Estate of Rechucher* , 13 ROP 40, 47 (2006) ("[A]ppellate courts generally should not address legal issues that the parties have not developed through proper briefing."); *ROP v. Airai State Pub. Lands Auth.*, 9 ROP 201, 204 (2002) (court willing to consider issues not adequately presented on appeal only when the case raises "an issue of great public importance").

II. Implied License

In his brief, Appellant essentially contests the Trial Division's holding that PPUC held an implied license to maintain the utility pole on two related grounds: (1) the original Lot owner, Obeketang, did not consent to the installation of the pole; and (2) the initial construction of the pole constituted an unconstitutional taking.

Appellant's first argument regarding the trial court's finding of an implied license essentially boils down to an assertion that an implied license could not have arisen out of the original installation of the utility pole because that installation consisted of an unconstitutional taking. In his brief, Appellant writes: absent the consent of Takao Obeketang, "the installation and maintenance of the utility pole on the lot [is an unconstitutional taking] and [an] unconstitutional act creates no right or conferred upon PPUC's predecessor and PPUC to maintain its utility on the land." (Appellant's Brief at 7.) In this, Appellant fundamentally misconstrues the takings doctrine. It is not true, as Appellant insists, that an unconstitutional takings cannot convey title or right to land. To the contrary, a government takings does exactly that. Under the takings clause, as set forth in both the Palauan and United States Constitutions, private property may be taken by the government, for public use and for just compensation, against an owner's will. ROP Const. Art. IV, § 6 ("private property [shall not] be taken *except* for a recognized public use and for just compensation"); U.S. Const. Amend. V ("nor shall private property be taken for public use, without just compensation"). The corresponding remedy for an unconstitutional taking (that is, a taking that occurs without just compensation)[3] is,

[3] Generally, a taking may be unconstitutional in one of two ways: (1) for lack of just

in ⊥121 turn, the payment of such compensation, not, as Appellant appears to suggest, the return of full rights to the land to the original owner. 26 Am. Jur. 2d *Eminent Domain* § 112 (2004) ("The Fifth Amendment [prohibition against government takings] does not proscribe the taking of property; it proscribes taking without just compensation, and assures that the government may not force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. The policy underlying the constitutional provision for eminent domain is to make the landowner whole after his or her property is taken."). In this regard, the fact that the utility pole was installed without Obeketang's permission is irrelevant.

Nevertheless, the fact that Obeketang insists that he did not consent to the original installation of the pole may be relevant to the trial court's finding of an implied license. A license consists of permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein. 25 Am. Jur. 2d *Easements and Licenses* § 117 (2004). A license may be created by parol, writing, or implication, so long as the proper intent (to permit the particular actions) appears. *Id.* § 118. The Trial Division concluded that PPUC's predecessor obtained an oral license when Obeketang failed to object to the installation and maintenance of the utility pole on the Lot. The trial court thus concluded that "the absence of a record of objection by prior and current owners of the land creates the inference that the presence of the pole and the use of the property was permissive." Trial op. at 4.

This conclusion, however, conflicts with an affidavit submitted to the trial court by Obeketang, in which he expressly denies having given "any authorization, consent or permission to PPUC, the State of Ngarchelong or the Republic of Palau to construct and maintain a utility pole [on the Lot]." As noted above, when considering a motion for summary judgment, a trial court must consider all evidence and inferences "in the light most favorable to the nonmoving party." *Mesubed*, 10 ROP at 64. Thus, at least at the summary judgment phase, consent or permission cannot be legally inferred from Obeketang's failure to object, where he has expressly denied granting such permission.[4]

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compensation or (2) for non-public use. In the present case, the alleged taking clearly occurred for a public use. *See Banks v. Georgia Power Co.*, 481 S.E.2d 200 (Ga. 1997) ("[T]here can be no question that the provision of electrical power for distribution and sale to the general public is a public enterprise and the property used for such purposes is devoted to a public use."); 26 Am. Jur. 2d § 61 (2004) ("The taking of property necessary to the production and distribution of electric light and power to the public is a taking for a public use.").

[4] It is true that "[w]hen the owner of land, with full knowledge of the facts, tacitly permits another repeatedly to do acts upon the land, a license may be implied from his failure to object." *Morning Call v. Bell Atlantic-Pennsylvania*, 761 A.2d 139, 144 n.9 (Pa. 2000). However, an implied license is generally terminable at will. *Markstein v. Countryside I, L.L.C.* , 77 P.3d 389, 398 (Wyo. 2003) (citing *Coach House Restaurants, Inc. v. Coach and Six Restaurants, Inc.* , 934 F.2d 1551, 1563 (11th Cir. 1991)). Moreover, while a license may become irrevocable when followed by the expenditure of money in reliance thereon, *Morning Call*, 761 A.2d at 144 ("a license to do something on the licensor's land when followed by the expenditure of money on the faith of it, is irrevocable, and is to be treated as a binding contract"), we have been unable to find any cases in which an implied license was deemed to have been made irrevocable by subsequent expenditures. *See, e.g.*, *Shaw v. Profitt*, 110 P. 1092, 1093 (Or. 1910) ("a license implied from silence or acquiescence with knowledge of the expenditures is not made irrevocable by expenditures made in permanent improvements in reliance thereon"). Thus, even if we agreed with the

⊥122 **III. Estoppel**

The third basis of the Trial Division's summary judgment involved the principle of equitable estoppel. Specifically, the court held:

> . . . Obeketang had ample opportunity to object to the actions of PPUC's predecessor, but he neither objected to the installation nor requested that the pole be relocated. Based on these facts, Obeketang's silence amounted to acquiescence in the placement of the pole on his Lot and Plaintiff is now estopped from taking contrary action.

Trial op. at 6.[5] Appellant challenges this holding on the grounds that Obeketang never consented to the installation of the pole on the Lot.

"A person who stands by and sees another purchase land in which he or she has an undisclosed interested, or enter upon it under a claim of right, and permits that person to make expenditures, or improvements under circumstances which would call for notice or protest cannot afterward assert his or her own title or interest against the person making expenditures or improvements." 28 Am. Jur. 2d *Estoppel and Waiver* § 127 (2004). *See also Erie-Haven v. First Church of Christ* , 292 N.E.2d 837, 842 (Ind. Ct. App. 1973) ("silence and acquiescence, when good faith requires a person to speak or act, are, in the matter of estoppel, equivalent to express affirmation."); *Conley v. Warne* , 236 N.W.2d 682, 685 (Iowa 1976) ("A neighbor who observes in silence and without objection as an adjoining landowner expends large sums toward property improvement may become bound by his silence."); *Longley v. Knapp* , 713 A.2d 939, 943 (Me. 1998) ("Equitable estoppel precludes an owner from asserting his legal title when, by his own action or inaction, he has caused another person to act or alter her position to her detriment."). Estoppel cannot be established, however, "unless the one making the improvement does so in the good-faith belief that by doing so, he or she is within his or her rights." 28 Am. Jur. 2d *Estoppel and Waiver* § 127.

In the present case, Appellees have presented evidence that Ngarchelong State ⊥123 (PPUC's predecessor) obtained permission "in the Palauan customary way," that is, from a committee of older men within Ngarchelong. Trial op. at 5. In the court's words, "PPUC is not making the argument that Obeketang granted some kind of express consent. Rather, PPUC's

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trial court's conclusion that PPUC maintained the pole under an implied license, this would still be insufficient to sustain a grant of summary judgment in light of the fact that Ulechong, as Obeketang's successor, can be said to have revoked any implied license to maintain the pole on the Lot by filing the present lawsuit.

[5] While both holdings are rooted in Obeketang's failure to object to the installation of the pole, the logic supporting the Trial Division's finding of estoppel differs from that supporting its finding of an implied license in one key way. In holding that an implied license had been created by Obeketang's failure to object, the court inferred permission or consent to the placement of the pole on the Lot from Obeketang's silence. In finding that Obeketang's silence estopped Ulechong from seeking the removal of the pole, the court did not infer permission from Obeketang's silence, but rather held that equity barred challenge to the pole in light of Obeketang's failure to object to either the original placement or later upgrade to the pole.

argument is that Obeketang is estopped from objecting to the placement of the pole on the Lot, which occurred around 1994, because when installation of the utility poles in Ngarchelong was done 'in the Palauan customary way' rather than through written agreements, there were no objections to the placement of the poles by the residents, including Obeketang." *Id.* Appellant submitted to the trial court an affidavit from Obeketang denying that PPUC or Ngarchelong State ever contacted or requested permission of him prior to the installation of the pole. Yet Appellant has submitted no evidence contracting the numerous affidavits submitted by Appellees regarding the committee's work to obtain the consent of all landowners for the placement of the utility poles.[6] Moreover, Appellant has not denied the existence of this committee, nor challenged the evidence, submitted by Appellees, demonstrating that Ngarchelong State relied in good faith on the work of the committee when it entered onto private land (including Obeketang's Lot) to install the original utility poles.

In light of this undisputed evidence that Ngarchelong State (PPUC's predecessor) entered onto the Lot in good faith reliance on the permission granted by the committee of Ngarchelong elders, Appellant's insistence that he never consented to the installation of the pole is irrelevant to the application of estoppel. Since 1994, the presence of the utility pole on the Lot has been open and obvious. Neither Appellant, nor Obeketang, objected to the placement of the pole in 1994. Again, in 1998, PPUC employees entered the Lot to upgrade the pole without objection or incident. Having remained silent for so long, we agree with the trial court's conclusion that equity prevents either Obeketang or Appellant from now complaining about the presence of the pole.

CONCLUSION

For the above reasons, we affirm the Trial Division's grant of summary judgment

[6] Among the affidavits submitted by Appellees is an affidavit from the Chairman of the Committee of elders, as well as affidavits from a number of landowners who were contacted by the committee and gave permission for the placement of utility pole(s) on their land.