Ngirchehol v. Kotaro, et al., 14 ROP 173 (2007)

APOLONIA NGIRCHEHOL,
Appellant,

v.

CARTER KOTARO, ROCKEFELLER KOTARO, ZACHEUS KOTARO, MARTHA KOTARO RECHELLUUL, McCARTHY KOTARO, KASKO KOTARO ARTHUR, VERONICA KOTARO OMELAU, and KENNEDY KOTARO,
Appellees.

CIVIL APPEAL NO. 06-034
Civil Action No. 03-396

Supreme Court, Appellate Division
Republic of Palau

Decided: September 24, 2007[1]

Counsel for Appellant: Raynold B. Oilouch

Counsel for Appellees: Mark P. Doran

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

PER CURIAM:

Concurrent with the 2004 Appellate decision, *Kotaro v. Ngirchechol*, 11 ROP 235, which affirmed an order in aid of judgment awarding Zacheus Kotaro's 1/8th interest in land known as Metengal to Appellant Apolonia Ngirchechol, Appellees, siblings of ⊥174 Zacheus Kotaro, as well as Zacheus himself,[2] brought a claim to the Trial Division seeking declaratory judgment confirming their remaining 7/8 ownership of the land. Appellant counterclaimed seeking enforcement of the Conditional Deed to Metengal given to her by Appellees. The Trial Division found for Appellees, determining that Appellees had not properly transferred any of their interest in the land to Appellant.

BACKGROUND

[1]Upon motion by the parties, the panel finds this case appropriate for submission without oral arguments pursuant to ROP R. App. P. 34(a).

[2]Although Zacheus Kotaro is a named plaintiff in the complaint, his interest in Metengal has already been awarded to Appellant, pursuant to the Appellate Division decision, *Kotaro v. Ngirchechol*, 11 ROP 235 (2004).

The basic facts are the same as found by the court in *Kotaro v. Ngirchechol*, 11 ROP 235 (2004). On February 9, 1996, six of the Appellees[3] entered into an Option Agreement giving Appellant Ngirchechol the option to buy certain specified real property in return for consideration of $60,000. The Option Agreement included a provision regarding "Defective Title," acknowledging that the properties in the Option Agreement were currently the subject of litigation and stating that, "If Optionor is declared to have no interest in the [properties,] Optionor shall, within 5 years from the date of the final court judgment in the aforesaid civil case pay back to Optionee the full option price of $60,000 plus 18 percent interest per annum…." The agreement went on to state in the same paragraph:

> If Optionor fails to pay back to Optionee the option price within the five-year deadline provided herein, Optionor shall forfeit all of their interest in and to Lot No. 121-905-Tochi Daicho No. Part of 806 [Metengal] to Optionee.

On February 23, 1996, a trial court found that Appellees held no interest in the lands subject to the Option Agreement. *In the Matter of the Estate of Kotaro Kubarii*, Civ. Action No. 289-92. Appeals from this judgment were denied. See *In re Kubarii*, 7 ROP Intrm. 27 (1999). On July 28, 1997, seven of the Appellees[4] signed a conditional deed offering the land Metengal "pursuant to the Option Agreement." The Conditional Deed states that it:

> may be voided by grantors only if grantors have performed their duties and obligations to grantee set forth in the Option Agreement . . . otherwise grantee retains fee simple ⊥175 ownership of and title to the land Metengal.

When Appellees failed to either repay the option price or transfer ownership of Metengal to Appellant, Appellant filed suit against Zacheus Kotaro individually, rather than suing all of the siblings, and she was granted default judgment against him. After several years of attempting to enforce that judgment, Appellant was awarded an Order in Aid of Judgment stating that she was "entitled to enforce the terms of the Conditional Deed in lieu of seeking payment of the default judgment." The 2004 appeal of that order, *Kotaro v. Ngirchechol*, 11 ROP 235, noted that by failing to appear at the trial level, Zacheus Kotaro waived any of the arguments he might have advanced regarding the applicability of the Mortgage Act to the Conditional Deed. The Appellate Division continued:

> [W]e note one important limitation on our decision today. We were informed at oral argument that Kotaro's siblings have filed a separate action asserting that their interests in the property were improperly extinguished in that they were not named as parties to this case. With that in mind, it is appropriate to emphasize

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[3]Kasko Kotaro Arthur, Martha Kotaro Rechellul, Veronica Kotaro Omelau, McCarthy Kotaro, and Kennedy Kotaro signed the option agreement, in addition to Zacheus Kotaro. Two Appellees did not sign the option agreement: Carter Kotaro and Rockefeller Kotaro.

[4]Kasko Kotaro Arthur, Martha Kotaro Rechellul, Veronica Kotaro Omelau, McCarthy Kotaro, and Kennedy Kotaro signed the conditional deed, as well as Carter Kotaro, who did not sign the underlying option agreement. Zacheus Kotaro also signed the conditional deed, but Rockefeller Kotaro did not.

> that the issues raised in that litigation are not before us today and that our affirmance of the order below relates solely to the interest of [Zacheus] Kotaro, who was named as a party and who, as we have found, has forfeited his challenges to that order by failing to raise them below.

The current appeal is from the civil action mentioned in that opinion and was initiated by the siblings on December 4, 2003.

The trial court determined that the Conditional Deed was, in effect, a mortgage and therefore governed by the provisions of the Mortgage Act. *See* 39 PNC § 601 *et seq*. Under the Mortgage Act, Appellees were entitled to notice of default thirty (30) days prior to the commencement of legal action, a step which Appellant failed to take. 39 PNC § 642. Appellees were also entitled to the right of redemption. 39 PNC § 645. The trial court found that Appellant could not yet acquire any rights to Appellees' land because she had failed to comply with the Mortgage Act by not giving Appellees the required notice.

In her cross-claim, Appellant sought enforcement of the Option Agreement and the return of the $60,000 she paid for the option plus interest. The trial court found that Appellant had already been awarded that amount in 2002 when she had been given a $125,310.42 monetary judgment against Zacheus. The 1/8th interest in Metengal Appellant had been awarded in lieu of that monetary judgment fully satisfied any debt owed by the siblings to Appellant, the trial court determined. The court, however, specifically refrained from determining the actual value of that 1/8th interest, though two very different appraisals were introduced into evidence.
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STANDARD OF REVIEW

This Court reviews the trial court's findings of fact for clear error. *Masters v. Adelbai*, 13 ROP 139, 140-41 (2006). Under this standard, the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion. *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 46 (2006). In particular, the Court reviews findings that a document functions as a mortgage under a clearly erroneous standard. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 319 (2001). The trial court's conclusions of law are reviewed using the *de novo* standard. *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 46 (2006).

ANALYSIS

Appellant first argues that the trial court erred in determining that the Conditional Deed functioned as a mortgage. In determining whether a deed is, in fact, a security instrument, this Court examines: (a) the existence of a debt to be secured; (b) the survival of the debt after execution of the deed; (c) the previous negotiations of the parties; (d) the inadequacy of consideration for an outright conveyance; (e) the financial condition of the purported grantor; and (f) the intentions of the parties. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 319 (2001). Here, the Conditional Deed clearly functioned as a mortgage. The Option Agreement specifies that Metengal acts "as security for the full payment of the Option price plus interest," and, after the court determined that Appellees did not own the lands subject to the

Option Agreement, Appellees owed Appellant a continuing debt. Moreover, the Conditional Deed also states that it may be voided upon performance of the duties described in the Option Agreement, namely repayment of the option price. The trial court was not clearly erroneous in determining that the Conditional Deed is actually a mortgage.

The trial court also did not err in its determination that Appellant had failed to comply with the notice requirements of the Mortgage Act. The Mortgage Act, 39 PNC § 642, provides that:

> In the event of default by the mortgagor in the performance of his duties under the mortgage or underlying obligations, the mortgagee shall serve on the mortgagor a notice of default which shall contain: the legal description of the real property, the date of the mortgage, the amount due for principal and interest, separately stated, and a statement that if the amount due is not paid within 30 days from the date of service proceedings shall be commenced pursuant to section 644 of this chapter.

While Appellant claimed notice was given to Zacheus by a letter dated February 14, 2001, the trial court found that Appellant's letter fell "far short of the notice requirements of the Act." Furthermore, the letter was sent to Zacheus only and not to the other Appellees. The trial court ultimately found that to prevail in any claim to Metengal, Appellant would ⊥177 have to comply with the Mortgage Act and "go through default and foreclosure proceedings." The trial court did not err in this respect.

Although Appellant makes a compelling argument that notice was effectively given by Appellant's compulsory counterclaim against Appellees as required by Rule 13(a) of the ROP Rules of Civil Procedure, Appellant overlooks the availability of Rule 13(e), which specifically provides for counterclaims maturing after pleading. This rule allows late maturing counterclaims to be filed by supplemental pleadings, if granted permission by the court. Appellant could have provided the notice required by the Mortgage Act and then counterclaimed pursuant to the provisions of Rule 13(e) rather than choosing to rely solely on her counterclaim. Importantly, the Trial Division did not extinguish the availability of Appellant's remedies under the Mortgage Act, but merely found that Appellant will have to go through default and foreclosure proceedings in order to obtain the property interests of the remaining siblings.

Finally, Appellant claims that the trial court erred by finding that she had failed to comply with the Mortgage Act, but nevertheless proceeding to determine that her counterclaims had been satisfied by the 1/8th interest in Metengal previously awarded. Appellant argues that the trial court's inquiry should have stopped with its determination that she had failed to comply with the notice requirements of the Mortgage Act. We agree that the Trial Division might have appropriately discontinued its consideration of the matter once it determined that the requirements of the Mortgage Act had not been met, but it was not an abuse of discretion for the trial court to continue on to consider Appellant's cross-claim seeking enforcement of the Option Agreement. However, the trial court did err by refraining from making the factual findings necessary to support its ultimate conclusion that Appellant had been fully satisfied under the

Option Agreement.

Although provided with two very different appraisals regarding the value of Metengal, the trial court withheld judgment on the value of Appellant's 1/8th interest in Metengal. The court stated that it "need not make a determination as to which of the two appraisals is the more acceptable valuation of the property….because whether the value of the land was $13.30 or $3.20 per square meter, Defendant [Ngirchechol] has received her share of the value of any monetary judgment owing to her from Zacheus." This is true as it relates to Zacheus because Appellant, in enforcing the default judgment against Zacheus, opted to take his 1/8th interest in Metengal in lieu of the money she was owed. However, without making a finding regarding the value of Metengal, the trial court could not have determined whether Appellant Ngirchechol received her share of value owed to her from the other Appellees.

Even while explicitly refraining from making a determination as to the correct valuation of the property, the court still used the higher $13.30 per square meter figure compared with the different parcel sizes to determine that Appellant had received, at a minimum, land with a value of $166,915 when she was awarded Zacheus' 1/8th interest in Metengal. However, the trial court did not evaluate the value of the land using the lower $3.20 per square meter estimate. Had the ⊥178 court done that, using the smaller size estimate of the land, the value of the land would have been only $40,160, much less than the $170,000 the trial court found due to Appellant. As such, the court's determination that awarding Appellant return of the option payment "would award her more than what she paid to Zacheus," is clearly erroneous.

CONCLUSION

For the foregoing reasons, we remand to the Trial Division for further findings in accordance with this opinion. The trial court failed to make the factual findings necessary to support its conclusion that awarding Appellant return of the option payment would result in awarding her more value than she was due. Moreover, Appellant's remedies under the Mortgage Act are not wholly extinguished by the trial court's finding that she failed, at this point in time, to comply with the Act. Appellant's failure to comply with the Act does not mean that she cannot continue to pursue her interest in Metengal; it merely means that she must follow the statutory guidelines in order to succeed in any such claim.