Lu Rent N Lease v. Ngchesar State Gov't, 16 ROP 199 (2009)
**LU RENT N LEASE, represented by Laurentino Ulechong,
Appellant,**

v.

**NGCHESAR STATE GOVERNMENT AND NGCHESAR STATE PUBLIC LANDS AUTHORITY,
Appellees.**

CIVIL APPEAL NO. 07-055
Civil Action 03-343

Supreme Court, Appellate Division
Republic of Palau

Decided: July 2, 2009

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice

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

PER CURIAM:

Appellant, LU Rent N Lease (hereinafter "Appellant"), challenges the trial court's calculation of damages resulting from its finding that Appellant materially breached a coral-dredging contract between Appellant and Appellees. Appellant does not contest the finding that it materially breached the contract, but rather argues that the damages were calculated in such a way as to result in unjust enrichment to Appellee. Appellee argues that Appellant's contentions are inappropriate issues for appeal, and that the damages were calculated correctly. We agree with Appellant and reverse the trial court's damage calculations for the reasons set forth below.
p.200

BACKGROUND

The undisputed findings of fact by the trial court are as follows. The parties entered into a contract in September, 1998, for a ten year term, with a renewable second ten-year term option. In exchange for exclusive dredging rights in Ngchesar State, Appellants agreed to pay Appellees a $600/month royalty fee, in addition to 30% of the coral sales proceeds for the first ten years, and 35% for the next five years after that. The first year of $600 royalty payments was to be made up front, and was. In addition, Appellant was to provide 50 cubic yards ("CY") of coral to Appellees every month free of cost. Beyond that, if Appellee chose to purchase coral, the price was set at $10/CY. [1] Moreover, Appellant was to provide a 100 feet x 200 feet platform of dredged coral and maintain records of its coral sales. Notably absent from the contract was a

[1]This price was "subsequently increased" to $13/CY, although neither the trial court's findings of fact nor the Appellants/Appellees briefs state when the price increased.

provision for Appellees to buy coral from Appellant for use on the reconstruction of their roads, although both parties refer to it as an assumed fact. Termination of the contract before the expiration of the first 10-year term was only provided for by mutual agreement of the parties.

Appellant began dredging coral in June, 1999, and continued to do so until April, 2000. In April, 2000, Appellant had stockpiled 2,816 CY of coral, created the platform, and paid the $600/month royalty fees up until June, 2000. Because coral sales were low, and there was no non-compete clause in the contract, Appellant decided to begin dredging in Melekeok in April, 2000, to attempt to get more business. Appellees then used the entire stockpile of coral for its roads. Without immediately notifying Appellant that the stockpile had been depleted, [2] Appellees assumed that Appellant had breached the contract by leaving the site, and began their own dredging for more coral.[3]

Appellees spent $28,708.23 to dredge their own coral, but otherwise did not pay for the coral they dredged. Appellees continued to dredge, and took an additional 642 CY of coral between and May, 2000, and January, 2001, for a total of 3,858 CY of coral. The contract was terminated in May, 2002, although according to Appellees' Exhibit Q, between April, 2000 and May, 2002, they used a total of 11,831 CY of coral for their roads and "other state projects." Presumably, the additional 11,189 CY [4] of coral used was dredged between January, 2001 and May, 2002. Appellant never returned to the site to continue dredging, as the contract was terminated just after Appellant was notified that its stockpile had been depleted. Appellant did p.201 not pay monthly royalty fees beyond June, 2000, and Appellees did not make full payment for the coral it dredged from the site, less the 50 free CY per month. Appellant likewise failed to make any of its 30% royalty payments to Appellees.

Appellants filed a claim for breach of contract, seeking to recover the amount of money owed to it, at $10/CY for coral taken by Appellees between November, 1999 and May, 2002, as well as expectancy damages. Appellees counterclaimed for breach of contract, and sought to recover unpaid royalty fees up until the date of termination, unpaid 30% shares of coral sales, expenses incurred in dredging, and lost income for the remainder of the contract, including royalty fees and shares of sales.

The trial court found that Appellant breached the contract when it abandoned the site in April, 2000. Notwithstanding, it awarded Appellant $15,054 for the cost of the coral taken between November, 1999 and April, 2000. The remaining cost of the coral taken was not awarded to Appellants, as the trial court held that the coral was already in existence when the parties entered in to the contract, making it public land. The trial court awarded to Appellees $21,135 in unpaid royalty fees up until the actual termination of the contract, $28,708 for the actual cost of dredging more coral, and $47,400 for the $600/month royalty fees for the remainder of the entire 10-year contract term.

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[2]Appellees finally notified Appellant on April 15, 2002.

[3]While this was a violation of Appellant's exclusive right to dredge at the site until the contract was officially terminated, Appellant does not contest the legal conclusion by the trial court that Appellant was the first to breach the contract by abandoning the project for one in Melekeok.

[4]11,831 minus the 642 CY the trial court found was dredged between January, 2001, and May, 2002.

Appellant appeals the decision of the trial court, conceding the findings of fact and the legal conclusion that it materially breached the contract, but arguing that the calculation of damages was incorrect, resulting in unjust enrichment to Appellees.

STANDARD OF REVIEW

This Court reviews the trial court's findings of fact for clear error. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002). The trial court's conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

DISCUSSION

A. Value of Coral Taken

Appellant contends that the trial court erred in failing to award it the value of the coral taken by Appellees between April, 2000 and May, 2002. Because, Appellant argues, the contract was still intact until May, 2002, Appellant continued to retain exclusive dredging rights over the berm in Ngchesar. Contrary to the trial court's conclusion that the coral was public land because it existed before the contract was formed, Appellant asserts that any coral taken from the berm while the contract was still in effect was Appellant's coral. Thus, Appellant claims that Appellees were unjustly enriched, and in fact, put in a better position than they would have been in had the contract been performed because they were given all but $15,054 worth of coral for free, in addition to the damages they received for the cost of dredging.

Appellant relies on Defendant's Exhibit Q, which shows that Appellees used 11,831 CY of coral between April, 2000 and May, 2002. If the contract had been performed as planned, this coral, minus 50 CY per month, would have cost Appellees $105,811.10. Because of Appellant's p.202 breach of the contract, however, Appellees never paid any of this amount for the coral taken. They also received damages for the cost of dredging, in addition to $600/month in royalties for the remainder of the contract term of ten years, despite its termination by Appellees in May, 2002. Thus, because the contract was not performed, Appellant asserts that Appellees were given their coral, and were able to keep their money as well, putting them in a better position than they would have been in had the contract been performed. This, Appellant contends, violates the principle set forth in the Restatement of Contracts, which states that damages are intended to put the non-breaching party in as good a position as he would have been had the contract been performed. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a. Appellant does not now seek to recover this amount, but rather argues that it should be used to offset the damages awarded to Appellees.

Appellees respond that these arguments should be barred because they are being raised for the first time on appeal. In addition, Appellees contend that the coral they took was pre-existing, and that they were not unjustly enriched by the trial court's award in their favor.

We agree with Appellant. We first dismiss Appellees' argument that the issue of damages

based on Exhibit Q is barred. This evidence was presented at trial by Appellees themselves. There is no new argument, nor new evidence that supports Appellant's contention that damages should be mitigated. Appeals addressing incorrect damage calculations are, in fact, commonly made. *See e.g. WCTC v. Leonard, et al.,* Civil App. No. 07-042, slip. op. at 7 (Jan. 9, 2009) (addressing the amount of damages awarded in a contract action).

Moreover, we find that Appellees' awarded damages must be reduced by the costs they saved as a result of Appellant's breach. Palauan case law dictates that the purpose of awarding damages in a breach of contract case is to put the non-breaching party in as good a position as if the contract had been performed. *Palau Marine Indus. Corp. v. Seid*, 9 ROP 173, 177 (2002). In addition, the non-breaching party may not recover for losses which could reasonably have been avoided. *Id*. (citing RESTATEMENT (SECOND) OF CONTRACTS at § 350(1) (stating that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation")). When the breaching party has failed to perform, the court may award damages to the non-breaching party to compensate for the loss resulting from such non-performance, but they must be reduced by the loss that the non-breaching party has avoided as a result of being excused from performing its side of the contract. RESTATEMENT (SECOND) OF CONTRACTS at § 347.

Appellant is correct to point out that Appellees saved over $100,000 by being excused from performing as a result of Appellant's breach. Under the contract, they would have had to pay for the coral they took, which they did not, as a result of the breach. In effect, the trial court's award of damages gave Appellees the coral they expected under the contract, at no cost to them, and with the added bonus of saving them the money to dredge on their own. If the contract had been performed as p.203 planned, however, they would have received the coral at a cost of $10/CY, for a total of $105,811.10. Because of Appellant's breach, and the trial court's award, Appellees were unjustly enriched and put in a much better position than had the contract been performed. This was in error.

Furthermore, Appellees could easily have avoided the cost of dredging themselves, had they written to Appellant with the information that the stockpile had been depleted. Two years later, long after Appellees expended the $28,708 to dredge their own coral, Appellees wrote to inform Appellant that the stockpile was gone. Instead of attempting to avoid the costs of dredging anew, accrued two years earlier, the letter including the information was merely a reason to call for termination of the contract. Appellees could have attempted to mitigate their damages without "undue risk, burden or humiliation," but failed to do so. It was therefore in error that they were awarded these damages. Both the damages that could have been avoided and those in excess of the contractual benefits to Appellees, must be used to offset the award of damages that the trial court granted Appellees.

Lastly, Appellees' argument that the coral they took was pre-existing and the trial court's conclusion that the coral was public land are likewise incorrect. According to the parties' own contract, Appellant was given the exclusive right to dredge coral in the state of Ngchesar. As long as the contract was in effect, the only party permitted to dredge coral in Ngchesar was Appellant. This included Appellees. Simply because Appellees owned the land that they leased

does not permit them to access it after signing away their rights to do so. The contract was in effect until May, 2002, and until that time, Appellant had the exclusive right to any coral dredged in the state of Ngchesar. The assumption that this coral was Appellees for the taking is incorrect, and does not excuse them from the contract which they signed.

B. Future Royalty Fees

Appellant further argues that the future royalty fees awarded to Appellees should likewise offset the costs they avoided as a result of Appellant's breach. Appellees offers no argument against this particular contention. Although Appellant is correct that the fees should offset the award of damages to Appellees, the fees should not have been awarded in the first place.

As previously discussed, contract damages should seek to put the non-breaching party in as good a position as he would have been had the contract been performed. *Palau Marine Indus. Corp.*, 9 ROP at 177. However, damages must be offset by the costs avoided as a result of the breach. RESTATEMENT (SECOND) OF CONTRACTS at § 350(1). Moreover, damages that cannot be established without a reasonable certainty may not be awarded. RESTATEMENT (SECOND) OF CONTRACTS at § 352. In the instant matter, these three principles yield the conclusion that Appellees cannot recover damages for the remainder of the ten-year contract term.

Had the contract been performed, the $600/month royalty fees would have been paid by Appellant. However, they would have been offset by Appellees' role in the contract, which p.204 was to purchase coral. Had this not been an essential part of the contract, the contract would have been wholly one-sided, as was the award of damages. Because we have no way of knowing how much coral Appellees would have purchased over the course of ten years, there is no way to properly guess the value saved by Appellees as a result of the breach. Thus, Appellees cannot simply recover $600/month for the rest of the term under the assumption that they would have had no offsetting costs. They cannot receive the benefit of their bargain without any of the offsetting costs. Because this award is far too speculative, the Restatements advises against such an award of damages. Thus, in addition to Appellant's stated basis for reducing these damages, we find that awarding them in the first place was in error.

CONCLUSION

We find that the trial court erred in awarding damages that Appellees could have avoided by notifying Appellant of its need to dredge more coral. The $28,708.23 award is thus **REVERSED**. We find that the trial court erred in failing to offset Appellees' damages with the costs they avoided as a result of Appellant's breach. The costs avoided were $105,811.10, and must offset the $21,135 awarded to Appellees by the trial court. The $21,135 award is thus **REVERSED**. Further, we find that the trial court erred in awarding Appellees future royalty fees without a reasonable certainty as to their existence, and **REVERSE** the award of $47,400 to Appellees. Because Appellant does not seek to recover any damages, and because the damages that should have been awarded to Appellant exceed the damages the trial court awarded to Appellees, there is no need to remand this issue for further determination.