**NGARAMETAL ASSOCIATION,**
**Appellant,**

**v.**

**KOKICH INGAS,**
**Appellee.**

CIVIL APPEAL NO. 09-018
Civil Action No. 02-286

Supreme Court, Appellate Division
Republic of Palau

Decided: March 9, 2010

[1] **Appeal and Error:** Standard of Review

The Appellate Division reviews a lower court's grant of summary judgment *de novo*.

[2] **Civil Procedure:** Summary Judgment

In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. Summary judgment is not appropriate when genuine issues of material fact persist. The same standard applies to cross-motions for summary judgment.

[3] **Property:** Landlord/Tenant

A tenant-at-will is incapable of assigning its tenancy interest.

[4] **Appeal and Error:** Preserving Issues

As a general rule, an issue that is not raised in the trial court is waived and may not be raised on appeal.

Counsel for Appellant: William L. Ridpath

Counsel for Appellee: David F. Shadel

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Ngarametal Association challenges the Trial Division's decision granting summary judgment in favor of appellee Kokich Ingas and denying Ngarametal Association's cross-motion for summary judgment.[1] Although not originally a party to the suit below—a suit in which Ingas sued defendants Crystal Palace, Inc. ("CPI") and Frank Ho—Ngarametal Association intervened below and timely appealed the Trial Division's summary judgment decision.[2] After reviewing the record below and briefs on appeal, we affirm.

## BACKGROUND

This appeal pertains to a three-story building ("the Building"). Before we get to the Building, however, we must trace the possession of the land on which the Building stands. Ingas occupied the land for years, and, on September 19, 1996, he entered into an agreement to lease the land from Koror State Public Lands Authority ("KSPLA"). Civ. No. 02-286, Decision at 6 (Tr. Div. Apr. 28, 2009). In late 1996, Ingas and Ho talked about Ho constructing a three-story building on Ingas's leasehold to serve as quarters for employees of his business, CPI. *See id.* Ingas and Ho came to some sort of understanding, but no written sublease was ever executed.

Ingas and Ho jointly applied for (and received) building permits. Ho constructed the Building on Ingas's leasehold in early 1997 and made use of it. *See id.* at 7. Neither CPI nor Ho ever paid rent for use of the Building. (*See* Ngarametal Ass'n Br. at 1.) On September 3, 2002, Ingas filed a complaint seeking, *inter alia*, ejectment of CPI/Ho from the land.[3] CPI and Ho abandoned the Building in November 2004. (*See id.* at 2.)

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[1] Although a trial court's denial of a motion for summary judgment is generally not directly appealable, "[w]hen an appeal from denial of summary judgment is raised in tandem with appeal of an order granting a cross-motion for summary judgment, [an appellate court] has jurisdiction to review the propriety of the denial of summary judgment by a district court." 4 Am. Jur. 2d *Appellate Review* § 161 (2007).

[2] Ngarametal Association's status as intervenor confers proper standing to appeal. *See* 5 Am. Jur. 2d *Appellate Review* § 234 ("One who was not initially named as a party to the case may acquire standing to appeal by intervening in the trial court."); *see also Tmetbab Clan v. Gibbons*, 5 ROP Intrm. 295, 297 n.3 (Trial Div. 1995).

[3] Ingas filed an amended complaint on October 3, 2003.

Separately, CPI/Ho entered into a lease agreement with Ngarametal Association on June 3, 1996 for a building owned by Ngarametal Association on a neighboring property. (*See id.*) When CPI/Ho fell behind on the rental payments, Ngarametal Association negotiated for repayment of the debt. (*See id.*) As part of the agreement, dated April 6, 2004, CPI/Ho agreed to a repayment plan and assigned its "rights and interests" in the Building to Ngarametal Association as collateral. Ngarametal Association would only assume the rights and interests upon CPI/Ho's default of the new agreement. CPI/Ho again fell behind and Ngarametal Association sent a notice of default to CPI/Ho stating its intent to take possession of the Building on October 6, 2004. (*See id.*) It was shortly thereafter that CPI and Ho abandoned the Building.

On April 14, 2005, Ingas moved for summary judgment in his lawsuit against CPI/Ho. Ngarametal Association, realizing that its rights and interests in the Building could be impacted by the outcome, moved to intervene in the action below on August 4, 2005 and filed an Intervenor's Complaint on September 21, 2005. After the Trial Division granted the motion to intervene, Ngarametal Association simultaneously filed a cross-motion for summary judgment and an opposition to Ingas's motion for summary judgment. Neither CPI nor Ho responded to either motion for summary judgment.[4] The Trial Division issued an April 28, 2009 decision granting Ingas's motion for summary judgment and denying Ngarametal Association's cross-motion. That decision was amended as to the damage calculation and judgment was entered on May 22, 2009.

The Trial Division found that, because no lease was entered into, CPI/Ho was a tenant-at-will of Ingas. The court below further found that the parties had agreed that the Building would revert to Ingas at the end of the leasehold and that the tenancy was terminated by the filing of Ingas's complaint against CPI/Ho. Therefore, the Trial Division reasoned, CPI/Ho owed Ingas back rent and neither CPI/Ho nor Ngarametal Association had any interest in the Building. Ngarametal Association filed a timely appeal of the Trial Division's summary judgment decision.

## STANDARD OF REVIEW

**[1, 2]** We review a lower court's grant of summary judgment *de novo*. *See Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. *See Obeketang v. Sato*, 13 ROP 192, 194 (2006). Summary judgment is, therefore, not appropriate when genuine issues of material fact persist. *See id.* The same standard applies to cross-motions for summary judgment. *See House of Traditional Leaders v. Seventh Koror State Legislature*, 14 ROP 52, 54 (2007).

## DISCUSSION

Ngarametal Association's appellate brief asserts that Ingas is unjustly enriched by the Trial Division's award of the Building to

[4] It appears that Ho died shortly before Ingas's motion for summary judgment and CPI became defunct sometime during the pendency of the lawsuit below.

him. Ngarametal Association argues that Ingas is overcompensated by the award of both back-rent and the Building. (*See* Ngarametal Ass'n Br. at 4.) Ngarametal Association contends that a tenant (here, CPI/Ho) should recover the value of improvements made on a landlord's land under the theory of unjust enrichment. (*See id.* at 4-5.) Following that logic to its conclusion, Ngarametal Association reasons that it should be the one to recover the value of the Building from Ingas by way of its assumption of CPI/Ho's rights and interests in the Building. (*See id.* at 6.) Ngarametal Association asks us to grant it a lien on the Building equivalent to the value of the Building at the time of CPI/Ho's abandonment of the property. (*See id.*) Ngarametal Association does not otherwise address the Trial Division's decision.

Ingas's primary response is that Ngarametal Association failed to bring these arguments before the Trial Division and is therefore barred from arguing them before this Court. (*See* Ingas Br. at 2-4.) A review of the record before the lower court confirms the merit of this argument. Ngarametal Association's combined opposition to Ingas's motion for summary judgment and brief in support of its own motion for summary judgment says nothing of the theories of "unjust enrichment" or "restitution" for improvements on the land of another that it presses now. Ngarametal Association's brief to the Trial Division employs the following logic: (1) CPI/Ho owned the Building; (2) CPI/Ho assigned its rights and interests in the Building to Ngarametal Association as collateral for a debt; (3) CPI/Ho defaulted on its debt to Ngarametal Association; and therefore (4) Ngarametal Association owns the Building. Ngarametal Association stated only that Ingas could not own the Building because no document shows that Ingas had an interest in the Building and because Ingas wrote a letter to his landlord, KSPLA, seeking permission to sublet land to CPI/Ho.[5]

**[3]** The Trial Division properly decided the issues brought before it in the summary judgment briefing by Ingas and Ngarametal Association. It found that, without a written lease agreement to satisfy the statute of frauds, CPI/Ho was a (sub)tenant-at-will on Ingas's leasehold. *See* Trial Div. Decision at 8-9 (citing Restatement (Second) of Property, *Landlord & Tenant* § 2.3(1) (1976)). Because a tenant-at-will is incapable of assigning its tenancy interest, the Trial Division was correct in finding that Ngarametal Association had no possessory interest in the Building. *See id*. at 13 (quoting Restatement (Second) of Property: *Landlord & Tenant* § 15.1, cmt. b ("An attempt by the landlord or the tenant to transfer his interest under the tenancy at will passes nothing to the transferee.")).

**[4]** What Ngarametal Association seeks in appeal however, is a restitutionary interest in the Building under an equitable doctrine. As a general rule, "an issue that is not raised in the trial court is waived and may not be raised on appeal." *Nebre v. Uludong*, 15 ROP 15, 25 (2008); *see also Kotaro v. Ngirchechol*, 11

[5] In response to Ingas's letter, KSPLA stated it would approve the sublease contingent on its review and approval of the sublease agreement. Ngarametal Association freely admits that no sublease agreement ever existed. These letters between Ingas and KSPLA therefore do nothing to demonstrate that a sublease actually existed between Ingas and CPI/Ho.

ROP 235, 237 (2004) ("No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue."); *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998) (stating that, for the sake of stability of land titles, the rule is especially strong in cases deciding interests in land).

In sum, Ngarametal Association only argued to the Trial Division that CPI/Ho owned the Building and that it assumed the rights of CPI/Ho in the Building. That is a very different question from what Ngarametal Association now asks us to decide: whether Ingas owes restitution to its tenant's assignee for the improvement to its leasehold under the theory of unjust enrichment.[6]

[6] Based on a footnote in the Trial Division's opinion, it appears that Ngarametal Association may have argued some aspect of restitution at the summary judgment hearing before the Trial Division. *See* Trial Div. Decision at 13 n.17 ("At oral argument, Intervenors cited *Giraked v. Estate of Rechucher*, 12 ROP 133 (2005), to argue that Defendants, and by extension Intervenors, should be awarded either the Building or just compensation for the Building."). The Trial Division went on to briefly examine and distinguish *Giraked*. Because Ngarametal Association did not order a copy of the audio recording or transcript of the summary judgment hearing pursuant to ROP R. App. P. 10(b), we do not know what it argued there. Attempting to reverse engineer the Trial Division's footnote, it seems that Ngarametal Association's *Giraked* argument may have been that CPI and Ho mistakenly believed that they had rented the land directly from KSPLA. But on appeal, Ngarametal Association's *Giraked* argument seems to be that CPI and Ho mistakenly believed that they had entered into a long-term sublease with Ingas. (*See* Ngarametal Ass'n Br. at 6.) Ngarametal Association cites Restatement of Restitution § 53 to us as support for its argument that such a mistaken belief is sufficient to support a claim for restitution (*see id.*), but nothing indicates to us that Section 53 was presented to the Trial Division below (it was not mentioned in *Giraked* or any of the summary judgment papers). It is the appellant's responsibility to provide an adequate record for our review. *See Obakerbau v. Nat'l Weather Serv.*, 14 ROP 132, 135 (2007) ("[T]he duty to provide an adequate record rests on the appellant."); *see also Pedro v. Carlos*, 9 ROP 101, 102 (2002) ("Without the transcript or counsel's informed representation of the events at the hearing, we see no reason to question how the Land Court treated the plaintiff."). We can only review what is before us, namely, the written record of the trial court. If Ngarametal Association wished for us to review the arguments presented at the summary judgment hearing, it should have provided us with a record of that hearing (or at very least filed an appellate reply brief explaining the deficiency).

In its answer to the amended complaint, CPI/Ho did plead the affirmative defense of unjust enrichment. (*See* Answer, Affirmative Defenses, ¶ 11 (Nov. 6, 2003) ("Plaintiff's claim for eviction would result in plaintiff's unjust enrichment.").) But unjust enrichment was only raised there as a defense for the eviction portion of the action, and, upon CPI/Ho's abandonment, eviction no longer was a going issue in the case. Regardless, unjust enrichment was not, on the record before us, argued as a defense in the summary judgment proceedings before the Trial Division. The Trial Division briefly addressed—and disposed of—what appears to be only a hypothetical unjust enrichment argument in a footnote to its opinion. *See* Trial Div. Decision at 12 n.16. We cannot fairly find fault in the Trial Division's treatment of the issue, and we will not permit Ngarametal

Because we refuse to "review" issues not raised below, we affirm the Trial Division's decision.

## CONCLUSION

As explained above, the Trial Division's grant of Ingas's motion for summary judgment and denial of Ngarametal Association's cross-motion for summary judgment is AFFIRMED.

Association to argue the issue for the first time on appeal.