F. KAZUO ASANUMA,
Appellant,

v.

GOLDEN PACIFIC VENTURES, LTD.
And KOROR STATE PUBLIC LANDS AUTHORITY,

Appellees.

CIVIL APPEAL NO. 12-017
Civil Action No. 09-065

Supreme Court, Appellate Division
Republic of Palau

Decided: December 18, 2012

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

A lower court's conclusions of law are reviewed de novo.

[2] **Civil Procedure:** Preservation

We do not reach that issue because Appellant failed to properly raise such a claim before the Trial Division.

[3] **Equity:** Restitution

The general rule is that one who improves the property of another does so at his own peril, and only under certain exceptional circumstances will a mistaken improver be entitled to restitution for the value of improvements.

[4] **Equity:** Restitution

A person who has been unjustly enriched at the expense of another is required to make restitution to the other. Restitution is awarded based on the value added by the improver, which may be measured by the lesser of the cost of the labor and materials or the resulting increase in market value.

[5] **Equity:** Restitution

The person entitled to restitution is the one who went to the expense to improve the land.

Counsel for Asanuma: Siegfried B. Nakamura
Counsel for Golden Pacific Ventures: William L. Ridpath
Counsel for KSPLA: Raynold B. Oilouch

BEFORE: KATHLEEN M. SALII, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

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

PER CURIAM:

This case concerns Appellant F. Kazuo Asanuma's claims for restitution for improvements made to land under the mistaken belief that he owned the premises. For the following reasons, the Trial Division's decision to not award restitution to Appellant is **AFFIRMED**.

BACKGROUND

All of the parties incorporate the factual findings by the Trial Division in its March 30, 2012, Decision. The Court, therefore, incorporates those facts by this reference but also offers the following summary of the facts and procedural history for purposes of setting out the relevant background.

I. Factual Background

This case concerns a piece of disputed property (Cadastral Lot 073 B 02, hereinafter, the Lot) along the main road in Medalaii Hamlet, Koror, on which the five-story Hanpa Building is currently located.[1] In 1949, Appellant's parents, Asao and Sechedui Asanuma, moved into a house across the road that runs behind the current Hanpa Building. Between 1949 and 1961, the Asanumas built a series of buildings on the Lot and on adjacent properties, including the Palau General Store (and, subsequently, Palau Wholesalers), a warehouse, and a residence. After an extended stay in the United States, Appellant returned to Palau in 1964, took over a portion of the family businesses on the Lot from his deceased father, and rented out some of the commercial space on the Lot.

Specifically, beginning in 1993, Appellant entered into a series of agreements with Soon Seob Ha and his company, Hanpa Industrial Development Corporation[2] (HIDC), under which Appellant represented he was the fee-simple owner of the Lot. Appellant first leased to HIDC the original buildings on the Lot and then reached an agreement with HIDC to demolish the old buildings and to build a new structure, the Hanpa Building. Under an agreement dated February 16, 1995, HIDC was to build a beauty shop and a residence for Appellant on the second floor of the Hanpa Building, and HIDC would occupy or sublease the rest of the building. In return, Appellant's significant debts to Ha would be forgiven, and HIDC would make escalating monthly rental payments to Asanuma for a term of 25 years (a date which Appellant and HIDC subsequently agreed to extend to 30 years). Accordingly, HIDC was scheduled to return the Hanpa Building to Appellant in 2025.[3]

In 2001, during the pendency of the lease agreements between Appellant and HIDC, ownership of the Lot and several surrounding parcels was disputed in the

[1] The Lot was one parcel among several that were the subjects of a 2001 return-of-public-lands case that was appealed to this Court. *See Idid Clan v. Olngebang Lineage*, 12 ROP 111 (2005). In that matter, the trial court considered the much-disputed claims of the parties to property that "spans an entire block south of the main road (where the Post Office, Fuji Restaurant, and the Seventh Day Adventist Office are located), to the area across the street (where the Internet Café, KR Hardware, and the Hanpa Building are located), and continuing north behind that block, all the way to the mangroves." *Id.* at 112. On appeal, this Court upheld the trial court's decision that, inter alia, Appellant did not own the "Hanpa Lot," which was awarded to Koror State Public Lands Authority. *Id.* at 120–24. Appellant does not dispute that holding here.

[2] Soon Seob Ha, along with his wife and sons, also own Golden Pacific Ventures, Ltd., Appellee in this matter.

[3] In 2000, HIDC sued Appellant for control of the Hanpa Building. *See Hanpa Indus. Dev. Corp. v. Asanuma*, 10 ROP 4 (2002). Although it modified the applicable square-footage finding by the trial Division, this Court upheld the trial court's determination that Appellant was entitled to the second floor of Hanpa Building and did not disturb the trial court's conclusion that Asanuma owed Hanpa nearly $65,000 in rental credits. *Id.* at 4–10.

Trial Division of the Supreme Court. The trial court ultimately awarded ownership of the Lot to Koror State Public Lands Authority, and that decision was upheld on appeal to this Court. *See generally Idid Clan v. Olngebang Lineage*, 12 ROP 111 (2005). At no time prior to the Court's ownership determination did KSPLA expressly notify Appellant of its ownership interest in the Lot. Although Appellant twice sought KSPLA's approval in 2007 of a lease agreement that would permit Appellant to lease the Lot from KSPLA, KSPLA instead entered into a long-term lease in 2008 with Appellee Golden Pacific Ventures, Ltd.

In December 2008 and January 2009, GPV's counsel wrote letters to Appellant's counsel demanding Appellant vacate the premises or negotiate a new sublease with GPV. Appellant did neither, and GPV filed this action.

II. Procedural Background

On March 25, 2009, GPV filed its complaint in the Trial Division in which it alleged KSPLA was the rightful owner of the Lot and that GPV was the rightful lessor of the Lot and the Hanpa Building. GPV claimed Appellant was a trespasser and sought an injunction preventing Appellant from using the second floor of the Hanpa Building along with damages, costs, and attorneys' fees.

On June 12, 2009, Appellant filed an answer and counterclaim against GPV and a third-party complaint against KSPLA. Appellant asserted that he and his family had lived on the Lot since the 1950s, had mistakenly believed they were the rightful owners of the property, and had made substantial improvements to the Lot without any objection from the rightful owner, KSPLA. Appellant, therefore, sought damages against KSPLA for unjust enrichment and detrimental reliance; damages against GPV for unjust enrichment; foreclosure on an equitable lien against GPV and KSPLA; and pre-judgment interest, attorneys' fees, and costs.

On July 13, 2009, GPV filed an answer to Appellant's counterclaim in which it alleged it was an entity distinct from HIDC and, therefore, should not be liable for agreements between Appellant and HIDC. Furthermore, GPV argued Appellant received substantial benefits from the relevant agreements that should offset any liability to Appellant.

On March 11, 2011, KSPLA filed an amended answer and counterclaim in which it asserted that Appellant occupied the Lot with KSPLA's consent and had refused KSPLA's request to vacate the premises. KSPLA, therefore, sought a declaration that the Lot and the Hanpa Building belong to KSPLA; damages for lost benefits from the Lot during Appellant's occupation of the property; and punitive damages, attorneys' fees, and costs for Appellant's allegedly egregious refusal to vacate the second floor of the Hanpa Building.

The trial court held a five-day trial from February 27, 2012, to March 2, 2012, and heard the parties' closing arguments on March 5, 2012. The Trial Division issued its Decision and Judgment on March 30, 2012, in which it: (1) concluded the Lot and the Hanpa Building belong to KSPLA; (2) enjoined Appellant and his agents and

lessors from occupying the second floor of the Hanpa Building; (3) ordered Appellant and his agents to vacate the premises in an orderly and peaceful manner by April 30, 2012; and (4) denied each of the parties' requests for damages, fees, and costs.

STANDARD OF REVIEW

[1, 2] Appellant challenges the trial court's legal conclusion that Appellant is not a "mistaken improver" of the Lot and is, therefore, not entitled to restitution for improvements made on the Lot. A lower court's conclusions of law are reviewed de novo. *See Wong v. Obichang*, 16 ROP 209, 211-12 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Although Appellant also appears to contest the trial court's findings of fact by asserting the court failed to explicitly resolve Appellant's claim for restitution based on the value of the buildings on the Lot that HIDC destroyed in order to build the Hanpa Building, we do not reach that issue because Appellant failed to properly raise such a claim before the Trial Division.

ANALYSIS

On appeal, Appellant asserts two grounds of error by the Trial Division related to the trial court's denial of Appellant's counterclaim for unjust enrichment against GPV and KSPLA: (1) the trial court erred when it concluded Appellant was not a mistaken improver who is entitled to restitution for the value of the improvements to the Lot that he "caused," and (2) the trial court erred when it concluded Appellant was not entitled to restitution for the value of the buildings on the Lot that HIDC demolished to make way for the Hanpa Building.

I. Mistaken Improver

Appellant does not challenge the Trial Division's factual findings with respect to any aspect of his equitable claim for restitution based on his status as a "mistaken improver" of the Lot. Rather, Appellant limits his challenge to the trial court's definition of "improver" by arguing that the trial court erred as a matter of law when it relied on the Second Restatement of Restitution §§ 10 and 49 in reaching its conclusion that an "improver" may be entitled to restitution only to the extent that he is the person who actually improved the real property. Appellant contends that it was error to rely on the Second Restatement because it was "presumably adopted in 2011 [and cannot] define the rights and claims of the parties that arose in 2003." According to Appellant, the definition of "improver" under the first Restatement of Restitution § 42 permits an award of restitution to the "improver" who "causes" an improvement to the real property rather than to the person who actually improves the property.

The Court points out even though the trial court and the Appellant both reference the "Second" Restatement of Restitution, it does not appear that such a volume exists. The introduction to the Third Restatement of Restitution and Unjust Enrichment makes plain that a second restatement was drafted but never completed. Based on the Trial Division's citations to the "second" Restatement, it is apparent the Trial Division was actually citing to the Third Restatement of Restitution and Unjust Enrichment when

it referenced §§ 10 and 49 and the comments thereto.

With respect to Appellant's claim of unjust enrichment based on his alleged status as a "mistaken improver," the Trial Division concluded Appellant did not have notice of any competing ownership claims to the Lot until he received notice of the ownership dispute concerning the Lot on November 30, 2000. Accordingly, up to that point, the trial court concluded Appellant was mistaken in his belief that he owned the Lot and could be entitled to restitution if he improved the Lot, but the trial court concluded Appellant would not be entitled to restitution for the improvements made to the property after he received notice. Ultimately, the Trial Division decided Appellant was not a mistaken improver with respect to the Hanpa Building because, among other things, he did not actually improve the Lot. Instead, the trial court concluded HIDC expended its resources to build the Hanpa Building and that Appellant was not entitled to recover for those expenses.

The Court stresses Appellant does not dispute that HIDC paid for and built the Hanpa Building. Nevertheless, Appellant argues he is entitled as a mistaken improver to receive restitution damages for unjust enrichment of the full market value of the Hanpa Building (which Appellant asserts is approximately $1.75 million), because he permitted HIDC to build the Hanpa Building and therefore "caused" those improvements.

[3] In *Giraked v. Estate of Rechucher*, this Court quoted the first Restatement of Restitution §§ 40–42 for the general principles of restitution in the context of improvements made to land:

> The applicable law for this Court to apply is set forth in the Restatement, given that Palau has no governing written or customary law on this issue. 1 PNC § 303. If an owner knows of another's construction activities on his property but takes no steps to correct the improver's mistaken belief of ownership, then the improver is entitled to restitution. Restatement of Restitution § 40(c) (1937); *see also id*. *cmt.* d & illus. 7. If an owner does not know of another's improvements to the land, then as a general rule, the owner need not pay restitution, *id.* § 41(a)(i), except as provided in § 42. Section 42 explicitly governs improvements to land and provides:
>
> > [A] person who, in the mistaken belief that he . . . is the owner, has caused improvements to be made upon the land of another, is not thereby entitled to restitution from the owner for the value of such improvements, but if his mistake was reasonable, the owner is entitled to obtain judgment in an equitable proceeding or in an action of trespass or other action for the mesne profits only on condition that he makes restitution . . . .

> *Id*. § 42(1). The comments to this section note that the rule is harsh to the person making improvements and that it is "not wholly consistent with the principles of restitution for mistake." *Id*. § 42 *cmt.* a. Section 42, however, does not apply to a landowner who had "notice of the error and of the work being done [and] stands by and does not use care to prevent the error from continuing." *Id*. § 42 *cmt.* b.

12 ROP 133, 139–40 (2005). Thus, the general rule is that one who improves the property of another does so at his own peril, and only under certain exceptional circumstances will a mistaken improver be entitled to restitution for the value of improvements.

Appellant contends the language "has caused improvements" under § 42 is sufficiently broad to warrant the Court's grant of $1.75 million in restitution for a building that Appellant did not expend any money or labor to build. Appellant, however, is wrong both as a matter of law and as a matter of sound reason.

[4] First, as the trial court observed, the principle of restitution as damages for unjust enrichment is based on equity and is awarded when one person is enriched "at the *expense* of another." Restatement of Restitution § 1 (1937) (emphasis added). The most basic statement of the law relating to unjust enrichment in the first Restatement and the present third Restatement refers to and relies upon enrichment at the expense of another. *See* Restatement of Restitution § 1 (1937); Restatement (Third) of Restitution § 1 (2011). Indeed, this Court has recently cited the first Restatement for the very same principle. *See Isechal v. Umerang Clan*, 18 ROP 136, 147–48 (2011)("[A] person who has been unjustly enriched at the expense of another is required to make restitution to the other."). Moreover, the comments to § 42(1) make clear that restitution is awarded based on the value added by the improver, which may be measured by the lesser of the cost of the labor and materials or the resulting increase in market value. Restatement of Restitution § 42(1) *cmt.* c. (An improver is entitled to the value of his "labor and materials or to the amount which *his improvements* have added to the market value of the land, whichever is smaller.") (emphasis added).

[5] As the trial court pointed out, §§ 10 and 49(3) of the third Restatement (cited by the trial court as the "second" Restatement) and the comments thereto also clarify that the person entitled to restitution is the one who went to the expense to improve the land. *See* Restatement (Third) of Restitution § 10 *cmt.* h (recovery limited to "the cost to the improver or the value realized by the owner, whichever is less"); *id*. § 49(3)(b) (also measuring restitution by the "cost to the claimant of conferring the benefit"). Here where the evidence does not show Appellant expended any labor or resources to improve the Lot, neither law nor equity nor justice demand that he be reimbursed for any benefit conferred on the actual landowner.

Second, if we were to adopt Appellant's view of an entitlement to restitution based on a mere causal connection to the improvements made, it could be the case that several persons might allege he or she "caused" the improvements

to a property, whether that person might be a builder or one who issued a permit or one who merely opened the gate to the property for the actual improver. Any of those persons might claim they were a "cause" of the improvements, but only one who paid for or made the improvements by their labor would have a basis in justice and equity to seek reimbursement from the owner of the property. The Court will not reward one windfall with another.

Finally, Appellant's argument that the Court must make reference solely to the first Restatement of Restitution because the "second" Restatement was published after the dispute between the parties arose is unsupported by any reference to legal authority and is based on flawed reasoning. Again, it appears Appellant is referring to the Third Restatement, which was published in March 2011. Appellant, nevertheless, contends that the Trial Division's reference to that Restatement is akin to a Court applying a criminal statute ex-post facto to an action that was not unlawful before the statute was passed. This analogy fails. The Restatements are a compilation of general common-law principles derived from decades and sometimes centuries of case law from across various jurisdictions. *See* Restatement on Restitution, Ch. 1 Introductory Matters, Topic 1: Underlying Principles 11 (1937) ("The rules stated in this Restatement . . . depend for their validity upon certain basic assumptions in regard to what is required by justice . . . . [T]hese are stated in the form of principles. They cannot be stated as rules . . . . They are distinguished from rules in that they are intended only as general guides for the conduct of the courts . . . ."). Thus, the Restatements are not statutes and do not constitute any sort of formal code. They are a guide to the case law that discusses the principles presented. In any event, the analogy to a criminal-law setting in which there are heightened constitutional protections at play is inappropriate. This is a civil matter in which Appellant has invoked the Trial Division's equitable discretion based on certain common law principles of restitution. The Court finds no error in the Trial Division's reliance on the Third Restatement of Restitution and Unjust Enrichment to provide an understanding of the principles that govern restitution damages resulting from claims of unjust enrichment. Having found no error in the Trial Division's statement of those principles or their application to this matter, Appellant's argument fails.

II. Destroyed Buildings

Appellant also contends the trial court erred when it failed to award Appellant restitution damages for the value of the buildings on the Lot that HIDC destroyed to clear the Lot for construction of the Hanpa Building. Specifically, Appellant contends the Court should award him between $120,000 and $155,144 in damages based on the evidence at trial of the value of the second floor of the Hanpa Building, which Appellant now asserts is the value of the destroyed buildings.

In its Response KSPLA contends Appellant did not raise this argument below. The Court is inclined to agree. Although Appellant notes that he made reference in his complaint to the improvements his family made to the Lot before they were destroyed in order to make way for the Hanpa Building, Appellant did not at any

stage of the underlying proceedings expressly argue that he was entitled to restitution for the value of the destroyed buildings, nor did he assert that their value should be determined by the value of the second floor of the Hanpa Building.[4] In fact, in his closing argument before the Trial Division, Appellant did not make any argument related to his claim for restitution based on the value of the destroyed buildings. "Merely mentioning a claim in a complaint, but failing to advance any argument on that claim, does not preserve that issue." *Tulop v. Palau Election Comm'n*, 12 ROP 100, 106 (2005) (citing *Badureang Clan v. Ngirchorachel*, 6 ROP Intrm. 225, 226 n.1 (1997)).

As GPV points out in its Response, Appellant did not present any evidence at trial as to the cost of the destroyed buildings or of the value they added to the current market value of the Lot, which, as noted, are the two measures for restitution damages. *See* Restatement of Restitution § 42(1) *cmt.* c. Appellant only now contends that the value of those buildings must be equal to the second floor of the Hanpa Building. Appellant, however, does not address either of GPV's arguments in his Reply, choosing instead to dwell at length on the evidence of the value of the second floor of the Hanpa Building.

Ultimately, the Court concludes the trial court properly weighed the equities in this matter and determined that, in the balance, none of the parties was entitled to damages or to attorneys' fees and costs. The Court will not disturb the Trial Division's Decision now based on Appellant's new and poorly developed theory of recovery.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

[4] We note Appellant's failure to raise and to develop this argument at trial has its consequences on appeal. First, it is far from evident that the destroyed buildings enriched anyone. The evidence at trial does not show that the demolished structures contribute to the present value of the Lot in any way or otherwise benefitted GPV or KSPLA specifically. Second, it is also not plain on this record that there was anything unjust about the destruction of Appellant's buildings. In the relevant lease agreement Ha forgave significant debts Appellant owed to him for the right to destroy the existing buildings on the Lot to make way for the Hanpa Building. Thus, it appears Appellant was compensated for the buildings that HIDC destroyed. Moreover, as GPV points out, the evidence at trial demonstrated Appellant stayed nearly three years rent-free on the second floor of the Hanpa Building after he was asked to vacate the premises at a rental value established at trial of more than $51,000 per year, which would offset any recovery to which Appellant is entitled.