Nakatani v. Nishizono, 2 ROP Intrm. 7 (1990)

NORIYOSHI NAKATANI and
NAKATANI CONSTRUCTION COMPANY,
Respondents,

v.

MASAO NISHIZONO and SEIBU DEVELOPMENT CORPORATION,
Appellants,

and

REPUBLIC OF PALAU,
Additional Appellant,

and

PACIFICA DEVELOPMENT CORPORATION, a Palau Corporation.

MASAO NISHIZONO, aka KWON BOO SIK CONSTRUCTION COMPANY,
Appellant,

v.

ROMAN TMETUCHL, MELWERT TMETUCHL, and NORIYOSHI NAKATANI,
Respondents,

and

⊥8 REPUBLIC OF PALAU,
Additional Appellant,

and

PACIFICA DEVELOPMENT CORPORATION a Palau Corporation,
Respondent.

CIVIL APPEAL NO. 5-86
Civil Action No. 25-85 and
Civil Action No. 73-85 (consolidated)

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: January 8, 1990

Nakatani v. Nishizono, 2 ROP Intrm. 7 (1990)

Counsel for Appellants Masao Nishizono and Seibu Development Corporation: James S. Brooks

Counsel for Respondents Noriyoshi Nakatani and Nakatani Company: John S. Tarkong

Counsel for Appellant Republic of Palau: Richard Brungard, Acting Attorney General.

Counsel for Appellee Pacifica Development Corp. and Melwert Tmetuchl and Respondents Roman Tmetuchl and Airai State Gov't.: Johnson Toribiong

BEFORE: ALEX R. MUNSON,[1] Associate Justice; ROBERT A. HEFNER,[2] Associate Justice; FREDERICK J. O'BRIEN, Associate Justice Pro Tem.
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PER CURIAM:

As will be seen, the issues presented for this appeal are limited in scope and therefore an extensive dissertation as to the factual and procedural history for this protracted litigation is unnecessary. Only the background necessary for the resolution of the issues raised for this appellate panel need be set forth in any detail.

BACKGROUND

Civil Action No. 73-85 was commenced on May 9, 1985, when plaintiffs Noriyoshi Nakatani and Nakatani Construction Co. (Nakatani) filed their complaint against Masao Nishizono, AKA Kwon Boo Sik (Nishizono), Seibu Development Corporation, Seibu Sohgo Kaihatsu, Hisayuki Kojima, Airai State, and Roman Tmetuchl, individually and as Governor of Airai State. There were several causes of action, but all dealt with Nakatani's claim that it had a contract with Nishizono to build the airport terminal building in Airai, that Nakatani had undertaken the construction and had almost completed the project when it was ordered by Nishizono to cease work and was, therefore, prevented from completing the contract even though it was ready, willing, and able to do so. Nishizono answered and counterclaimed on May 21, 1985, alleging, generally, that plaintiff had failed to complete the work within the time allotted by the contract and that, as a result, defendant had suffered a loss of income it anticipated from its concession to run the duty-free shop at the new airport terminal. Nishizono ⊥10 also cross-claimed against Roman Tmetuchl, individually and as governor. The cross-claim alleged that Tmetuchl had signed a guaranty, either individually or as governor of Airai State, on or about August 15, 1983, guaranteeing to either pay Nakatani or complete the project itself in case of Nakatani's default.

Roman Tmetuchl and Airai State cross-claimed against Nishizono, alleging breach of the Airai/Nishizono agreement (under which the actual construction was sub-contracted by

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[1] The Honorable Alex R. Munson, Presiding Judge, United States District Court for the Northern Mariana Islands, sitting by designation.

[2] The Honorable Robert A. Hefner, Presiding Judge, Superior Court for the Commonwealth of the Northern Mariana Islands, sitting by designation.

Nishizono to Nakatani) to complete the terminal within six months of November 2, 1984. The cross-claim prayed for damages of $3 million, plus $300,000, the amount alleged to be necessary to actually complete the "completed" terminal.

Pacifica Development Corporation (PDC) intervened with a claim against Nishizono, apparently for materials sold to Nishizono. Nishizono and Seibu answered and also filed a counterclaim against PDC and Roman Tmetuchl, essentially alleging that it had never been paid, apparently for the terminal contract, although this is unclear.

Civil Action 73-85 was consolidated for trial with Civil Action 25-85 which was a claim by Nishizono against various parties for certain building materials.

Trial of both actions began September 9, 1985. It was adjourned from October 18, 1985, to February 3, 1986, due to the illness of Nishizono's lead counsel, and concluded February 20, 1986. An amended opinion and judgment was filed May 9, 1986.

The trial court entered judgment on the various claims ⊥11 and cross claims. Essentially, the trial court found that Nakatani had substantially performed its contract with Nishizono and was awarded the contract amount less $198,000 which was the amount the court found was necessary to complete the building. A judgment of Y416,628,596 was then awarded Nakatani. The trial court also found that no guaranty liability existed between Tmetuchl and Nishizono. A timely notice of appeal was filed by Nishizono.

ISSUES PRESENTED

The appellate issues designated by the appellant Nishizono for consideration by the court are:

1. Did the Trial Court err in concluding the Terminal Building was substantially complete when the Court expressly found the structure defective and required numerous corrective measures to make it safe and functional?

2. Did the Trial Court err in adopting the wrong criteria for measuring damages when it erroneously concluded substantial performance had occurred or, in the alternative, when Nakatani's services under the doctrine of substantial performance were not properly valued?

3. Did the Trial Court err in making an award under the Terminal Building contract when findings of fact were not made upon the material issue of Nakatani's defective and incomplete performance?

4. Did the Trial Court err in failing to allow three payments in Japan by Nishizono to R. Tmetuchl totaling Y330,000,000?

5. Did the Trial Court err in rejecting Nishizono's claim against Airai State when

the contract underlying the claim constituted a valid guaranty?

⊥12 DISCUSSION

The court finds it necessary to note at the outset that issues on appeal are identified and chosen by the parties. Except for issues of constitutional magnitude, an appellate court is limited in its deliberations by the record on appeal and the issues framed by the parties. The scope of appellate review is generally limited to matters complained of or points raised in the appeal. Am.Jur.2d, Appeal & Error § 723.

Thus, it is important to state what this appeal is not about. None of the judgments relating to Civil Action 25-85 are before this court nor are the judgments relating to other construction contracts or business transactions between the parties.

A. THE SUBSTANTIAL PERFORMANCE ISSUE

Some time prior to July of 1983, Roman Tmetuchl, in his capacity as governor of Airai State entered into an agreement with defendant Nishizono for construction of the airport terminal building located in Airai State. [3] On July 7, 1983, defendant sub-contracted actual construction to plaintiff Nakatani, using a "standard form" Japanese Building contract. By the terms of this contract, plaintiff was to receive Y500 million, [4] plus ⊥13 Yl00 million for transportation costs from Japan to Palau. Construction was to be completed by December 31, 1984.

When plaintiff Nakatani failed to meet the original completion deadline of December 31, 1984, defendant granted time extensions. Finally, defendant Nishizono terminated the contract with Nakatani on July 16, 1985, and thereafter denied plaintiff access to the work site. Defendant Nishizono then hired Guam contractor H.D. Lee to "complete" the building, which he did for U.S. $198,000.

The terminal remains in some respects unfinished. To quote from the decision:

> [T]he Court . . . finds it necessary to accept the structure with all its faults as being a Terminal Building completed in relatively substantial conformity to the original plans and specifications. Admittedly, installation of counters, baggage conveyors, and other items (most of which appear to be on hand in the Casabelau warehouse), and the shoring up or buttressing of certain areas, remains to be done.
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> So it is that the Court, in this Opinion, treats of the Terminal Building as erected by the combined efforts of Plaintiff and one H.D. Lee, as a completed structure,

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[3] The agreement apparently was intended by the parties to be a joint venture. *See*, Plaintiff's Exhibit M, Letter of July 23, 1984, from Masao Nishizono to President Haruo Remeliik.

[4] The trial court used Y240 = U.S. $1.00 as the conversion rate throughout the trial.

> which like most buildings of its size and complexity, requires some as-built modifications and changes to make it safe and functional.
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> Opinion, pp. 5-6.

The doctrine of substantial performance is an equitable doctrine that allows a contractor who has substantially ⊥14 completed a construction contract to sue on the contract rather than being relegated to a cause of action for quantum meruit. *See, e.g., Vance v. My Apartment Steak House, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984); *Moore's Builder and Contractor, Inc. v. Hoffman*, 409 N.W.2d 191 (Ia. 1987) (recognizing the historical adoption by Iowa courts of the "substantial performance" concept).

The doctrine does not permit the contractor to recover the full consideration provided in the contract; recovery is decreased by the cost of remedying defects for which the contractor is responsible. Substantial performance is the condition precedent to the owner's duty to pay. *Moore's Builder and Contractor, Inc., supra*.

> When we use the term "substantial performance of a promissory duty," we always mean something less than full and exact performance of that duty . . . . [S]ubstantial performance is not a complete discharge of duty. It is not a defense in a suit against the building contractor for damages. Judgment will not be prevented from going against him in such a suit by his averring and proving that he performed almost in full, that his deviations have been small, . . ., or that the value to the owner is very nearly as great as it would have been had exact performance been rendered.
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> A.L. Corbin, 3A Corbin on Contracts, § 702 (2d ed. 1960)

> Substantial performance allows only the omissions or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damage to other portions of ⊥15 the building, and may be compensated for through deductions from the contract price.
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> *Littell v. Webster County*, 131 N.W. 591, 694 (Ia. 1911).

When the contractor has substantially complied with his contract he is entitled to recover the contract price with deductions for any defects or incompletions. *S. Hanson Lumber Co. v. DeMoss*, 111 N.W.2d 681, 684 (Ia. 1961). The burden of proof regarding performance of the contract lies with the contractor; that of showing defects or incompletions with the owner. *Corbin on Contracts*, § 710, *supra*.

> It is settled, especially in the case of building contracts, where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been substantial performance

> thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions or deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may . . . recover the unpaid amount of his contract less the amount allowed as damages for the failure in strict performance.
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> *Thomas Haverty Co. v. Jones*, 197 P. 105, 107 (1921) (the first recognition of the doctrine of substantial performance by a California court).

What constitutes substantial performance "is always a question of fact, a matter of degree, a question that must be ⊥16 determined relatively to all the other complex factors that exist in every instance." 3A *Corbin on Contracts*, § 704 (1960).

> The guiding principle is that there is substantial performance where the variance from the specifications of the contract does not impair the building or structure as a whole, and where after it is erected the building is actually used for the intended purpose, or where the defects can be remedied without great expenditure and without material damage to other parts of the structure, but that the defects must not run through the whole work so that the object of the owner to have the work done in a particular way is not accomplished, . . . nor be so substantial as not to be capable of a remedy, and the allowance out of the contract price will not give the owner essentially what he contracted for." *Haverty*, 197 P. at 108.

The question of whether there has been substantial performance of a contract depends upon the pertinent facts and circumstances in the light of the language of the contract and what has been done or omitted under it.

Nakatani did not complete the air terminal on time. Although time extensions had been given by Nishizono beyond the contract completion date, (December 31, 1984), by July 16, 1985, the termination date, Nakatani had no further time extensions granted it to complete the work. The trial court found the reason Nishizono terminated Nakatani's contract was because of some difficulties the former was having with Tmetuchl. However, the fact remains that Nishizono had the right to terminate the contract, and thus pull Nakatani off the job, because Nakatani had failed to meet several contract ⊥17 extension deadlines. Where a contract specifies the period of its duration, it terminates on the expiration of such period. Am.Jur.2d, *Contracts*, § 486. Here, Nishizono agreed to waive the obligation of Nakatani to meet the deadlines and extended the time for completion, but this does not mean that it waived its right to demand termination after the last extension was exceeded.

With Nakatani in default, the air terminal being in the condition as found by the trial court and the fact that another contractor had to come in to perform $198,000 worth of work on a building which is still, in the opinion of the trial court, a "sow's ear" leads this panel to conclude that the evidence and facts as found by the trial court do not and didn't meet the legal requirements of the doctrine of substantial performance. In such a case, the conclusion of the

trial court finding substantial performance is reversible error. *Tolstoy Construction Co. v. Minster*, 78 Cal.App.3d 665, 143 Cal. Rptr. 570 (Cal. 1978); See also, *Shell v. Schmidt*, 330 P.2d 817 (Cal. 1958); *Williams v. Elliot*, 273 P.2d 953 (Cal. 1954).

The appellee Nakatani argues that this panel may not re-weigh the evidence presented in the trial court nor is it proper to discard the findings of fact of the trial court unless they are clearly erroneous. 14 PNC § 604(b). This argument, of course, is sound and correct. However, this panel is not altering or rejecting any of the trial court's findings of fact. What is concluded, as a matter of law, that with the ⊥18 evidence and facts as found by the trial court, the application of the doctrine of substantial performance is not proper and error resulted.

This conclusion does not leave Nakatani without recourse for the labor and material invested in the airport terminal.

Without substantial performance, the builder is entitled to recovery under a quantum meruit theory which does not allow suit on the contract (and any profit) but which provides for compensation for labor and materials expended for the owner. *See, e.g., United States of America for use by N. Maltese and Sons, Inc. v. Juno Construction Corp.*, 759 F.2d 253, 255-256 (2d Cir. 1985).

Thus, this matter will be remanded to the trial court for the sole purpose of allowing Nakatani to prove the cost of labor and material it put into the Airai air terminal. Upon arriving at the amount, the trial court shall enter judgment for Nakatani against Nishizono for said amount less any sums the latter can show it paid Nakatani for labor and materials for the air terminal.

B. THE ISSUE OF THE YEN PAYMENTS TO TMETUCHL

During the trial, considerable time was expended in presenting testimony about several large payments of Japanese yen and United States dollars by Nishizono to Roman Tmetuchl. Tmetuchl admitted that he did receive some money from Nishizono. ⊥19 These payments appear to be nothing more than flat-out bribes in exchange, ostensibly, for political or economic rewards Tmetuchl could or would bestow on Nishizono.

Be that as it may, we find this "issue" raised on appeal to fit the appellation of a "red herring."

A review of the pleadings reveals that the alleged payments of Y713 million and $500,000 were never claimed by Nishizono as a separate claim or offset against Tmetuchl or Airai State. It has never been articulated by Nishizono as to what is the purpose of proving up the yen and dollar payments. Indeed, at argument, Nishizono was unable to enlighten this panel as to the matter.

Obviously, it has nothing to do with the claims between Nakatani and Nishizono. The only possible connection could be to offset some claim Tmetuchl (as an individual) has against

Nishizono. Yet, Nishizono has not appealed any money judgment entered against it by any entity except Nakatani. Additionally, the trial court expressly dismissed Roman Tmetuchl as a defendant in his individual capacity. This ruling is not appealed by Nishizono.

C. THE AIRAI STATE GUARANTY

A transaction of guaranty involves at least three parties: a promisor (here argued to be Airai State), a creditor (the person to whom the promise is made; here alleged to be defendant Nishizono), and a debtor (here, Nakatani). 38 AmJur2d, *Guaranty* § 1. The usual guaranty situation arises when the ⊥20 promisor makes a promise to the creditor either as to the solvency of the debtor or as to payment of the debt. *Id.*

Nishizono argues on appeal that Airai State signed a guaranty, shortly after the July 13, 1983, Nishizono/Nakatani contract was entered into, guaranteeing to Nishizono/Nakatani's performance of the contract. The trial court found that there was no such guaranty. The court held, first, that a valid guaranty requires three parties and that, since in this claimed guaranty Airai would be both the owner and guarantor, there would be only two parties, because Airai would be the beneficiary of its own guaranty. Second, the trial court determined after examination of all the evidence that neither the building contract itself nor any subsequent correspondence between Airai and the plaintiff could be construed, either singly or together, as making Airai a guarantor. Therefore, Nishizono's claim against Airai State on this theory was denied.

It is difficult to characterize this arrangement as a guaranty. There would be no reason for Airai State to guarantee to the prime contractor, Nishizono, that it would either pay Nakatani or complete Nakatani's performance if Nakatani defaulted. That is, it would make no sense for Airai State to guarantee an obligation or a benefit owed to itself. Even defense counsel, when queried at oral argument as to why Airai State would possibly enter into such an arrangement, could offer only that occasionally parties enter into agreements "which make no sense." This may be so, but it is hardly a ⊥21 persuasive argument for overturning the decision of the trial court.

CONCLUSION

This matter is REMANDED to the Trial Division solely for consideration of Nakatani's claim based on a theory of quantum meruit for labor and material expended for the Airai air terminal.

Finally, this court would be remiss were it not to note two things for the record. First, these comments of the trial court:

> The case was marked with far more rancor and recrimination than, as a purely contract matter, it deserved.
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> * * *
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> Contributing to the difficulty and length of time necessary to finalize this opinion was the attempt by [all counsel] to mislead the Court by the practice of introducing duplicative evidence to establish the same payment or point.
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> Opinion, pp. 64-65.

On remand, the parties are admonished to confine themselves to the issues.

Second, the Republic of Palau now has an air terminal which may or may not be safe. The issues as framed on appeal do not allow this court to address the relative degree of culpability of any of the parties for the current state of affairs. The court offers no opinion as to the responsibility ⊥22 of any party to complete the structure, or the potential liability of any party for injuries which may result from any defects in the terminal.