Dilubech Clan v. Ngeremlengui State Gov't, et al., 8 ROP Intrm. 106 (2000)

DILUBECH CLAN, represented by Wataru Elbelau,
Appellant,

v.

NGEREMLENGUI STATE GOVERNMENT,
NGILITII IDESMANG, NGIRAMETUKER
IDESMANG, and JAMES N. REMARII,
Appellees.

CIVIL APPEAL NO. 49-97
Civil Action No. 500-93

Supreme Court, Appellate Division
Republic of Palau

Argued: November 1, 1999
Decided: January 24, 2000

Counsel for Appellant Dilubech Clan: Mariano W. Carlos

Counsel for Appellee Ngeremlengui State Government: J. Roman Bedor

Counsel for Appellees Ngiltii Idesmang, et al.: John K. Rechucher

BEFORE: LARRY W. MILLER, Associate Justice; JEFFREY L. BEATTIE, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice.

MILLER, Justice:

Appellant Dilubech Clan brought this trespass and quiet title action against Ngeremlengui State, contending that the State unlawfully built a Senior Citizens' Center on land belonging to the Clan, and against the individual Appellees Ngilitii Idesmang, ⊥107 Ngirametuker Idesmang, and James N. Remarii, contending that they had encroached on other parcels belonging to the Clan. The Trial Division entered summary judgment against the Clan, and the Clan appealed. For the reasons that follow, we vacate the judgment and remand for further proceedings.

I. Background

This appeal arises from a dispute over parts of an island known as Tab, which has historically belonged to Dilubech Clan. Although Tab was originally considered one parcel of land, when the Japanese administration built a causeway connecting Tab to nearby Ngermetengel village, it bisected the island into a northern lot, which was registered as Tochi Daicho Lot 510, and a southern lot, which was registered as Tochi Daicho Lot 511. The Tochi Daicho lists Dilubech Clan as the owner of both lots. The northern lot, Tochi Daicho Lot 510, was

subsequently assigned Cadastral Lot number 001 K 02, while the southern lot, Tochi Daicho Lot 511, was later assigned Cadastral Lot number 001 K 15. In 1993, the Land Claims Hearing Office issued the Clan certificates of title to both lots.

These certificates of title incorporate Cadastral Map 001 K 001, which was based on ground surveys, aerial surveys, and monumentation conducted during the Trust Territory Government's 1976-1977 land registration initiatives. The 1976-1977 surveys revealed lands north of the causeway, to the east of Tochi Daicho Lot 510 which had now become Cadastral Lot 001 K 02, that were not recorded in the Tochi Daicho. These previously unrecorded areas were registered as lots 001 K 03, 001 K 04, and 001 K 05. The Clan and the individual Appellees each claimed ownership of these newly recorded lots, but the State did not. The dispute over these parcels was still pending before the Land Court when this appeal was filed. [1] The Cadastral Parcel Index map that resulted from the 1976-1977 surveys did not reveal any previously unregistered land on the southern side of the causeway as it did on the northern side. The Clan contends, based on an aerial map produced during that period, that the index map is inaccurate, and fails to reflect additional lands abutting Lot 001 K 15.

In 1985, the State hired a company called Nishimatsu to build roads for the State. The Clan contends that it negotiated an oral agreement with the Governor of Ngeremlengui whereby the Clan, in exchange for allowing Nishimatsu to clear and level parts of Tab to store its equipment, would be entitled to retain any improvements Nishimatsu made on Tab.

The State began building a Senior Citizens' Center in the early 1990's. The Clan brought this action, contending that the Center is located on Clan land and seeking to eject the State therefrom and quiet title thereto. The Clan simultaneously sought to eject the individual Appellees from Lots 001 K 03, 04, and 05, which were the subject of the still-pending dispute before the Land Court regarding ownership of those lots.

The State moved for summary judgment, contending that the Center is situated on formerly submerged land that Nishimatsu elevated through backfilling, making it the property of the State. *See Palau Pub. Lands Auth. v. Salvador,* 8 ROP Intrm. ⊥108 73, 75 (1999); *Protestant Mission of Ponape v. Trust Territory* , 3 TTR 26 (Tr. Div. 1965). The Clan, in response, asserted that there were genuine issues of material fact as to whether the Center was located within Lots 001 K 02 and 15, to which the Clan held certificates of title, or on adjacent land. Furthermore, the Clan contended, even if the Center were outside Lots 001 K 02 and 15, there remained genuine issues of material fact as to whether the site where it was located was backfilled land belonging to the State, was pre-existing, unsurveyed land belonging to the Clan based on its historical ownership of Tab island, was naturally accreted land belonging to the Clan as owner of the adjacent parcels, *see Peretiw v. Meriam* , 3 TTR 495 (Tr. Div. 1968), or was backfilled land that had become the Clan's property through the oral agreement granting the Clan title to any improvements Nishimatsu made to Tab.

The trial court entered judgment in favor of the State. Citing a court-ordered survey that

[1] The dispute was initially filed in the Land Claims Hearing Office, the Land Court's predecessor.

located the Center outside Lots 001 K 02 and 15, the court found no genuine issue of material fact as to whether the Center was located inside those parcels. Furthermore, the court reasoned, the Clan's certificates of title to those parcels precluded it from claiming title to any land outside of them, because certificates of title are binding and conclusive as to the location of the parcel's boundaries, foreclosing any claim of title to additional land beyond those boundaries. The court also found no genuine issue of material fact as to whether any additional lands abutting Lots 001 K 02 and 15 were naturally accreted rather than backfilled, or as to whether the Clan was entitled to enforce the oral agreement granting it title to filled land. Finally, relying on its holding that the certificates of title were binding and conclusive as to the Clan's claims to land on Tab, the court rejected the Clan's claim to eject the individual Appellees from Lots 001 K 03, 04, and 05. After the trial court denied the Clan's motion to amend the judgment, the Clan brought this appeal.[2]

II. Analysis

We review the trial court's entry of summary judgment *de novo*, applying the same standards that govern at the trial level. *See Akiwo v. ROP*, 6 ROP Intrm. 105, 106 (1997). In accordance with these standards, summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ROP R. Civ. P. 56; *Rechelulk v. Tmilchol,* 2 ROP Intrm. 277, 281-82 (1991). In reviewing a motion for summary judgment, all doubts must be resolved against the movant, and the motion must be denied if the non-movant identifies some evidence in the record demonstrating a genuine factual dispute on a material issue. *Estate of Olkeriil v. Ulechong*, 4 ROP Intrm. 43, 51 (1993). Thus, we may affirm the entry of summary judgment only if we find no genuine issue of material fact as to whether either the State or the individual Appellees encroached on Clan land.

⊥109 A. The Clan's Claim to Eject the State

1. Location of the Senior Center

The trial court found no genuine issue of material fact as to whether the Center encroached on the boundaries of Tochi Daicho Lots 510 and 511, which had subsequently become Lots 001 K 02 and 15. In reaching this conclusion, the court relied on a map derived from a court-ordered survey, which placed the Center outside the boundaries of these parcels.[3] The Clan, however, submitted an aerial map which the trial court recognized "conflicts with the survey conducted pursuant to the court's order." The Clan also submitted affidavits that aver, based on the affiants' personal knowledge, that the Center is located "on Tab," not on "filled

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[2] Justice Hoffman entered the initial summary judgment order. After he resigned, the case came before Justice Michelsen, who denied the motion to amend the summary judgment order and held a hearing on some remaining issues that are not pertinent to this appeal.

[3] The map resulting from the court-ordered survey does not appear in the appellate record. However, even accepting the State's characterization of the map, we find that other evidence in the record raised a genuine issue of material fact.

land."

Considering this evidence in the light most favorable to the Clan and drawing all reasonable inferences in its favor, as we must do in reviewing the entry of summary judgment against it, *see Ulechong*, 4 ROP Intrm. at 51, we find that this evidence created a genuine issue of material fact as to the location of the Senior Center. The trial court found that this evidence failed to raise a genuine issue of material fact because, in asserting that the Center was located on Tab, the affiants were referring only to "historical boundaries of the Clan's lands," and not to present boundaries.

This, however, is only one interpretation of the evidence. Evidence in the record indicates that the land historically known as "Tab" became Tochi Daicho Lots 510 and 511, which in turn became Cadastral Lots 001 K 02 and 15. Thus, the averments in the affidavits could be construed as assertions that the Center is located within Lots 001 K 02 and 15. Because the affiants had personal knowledge of where the Senior Center was located, a reasonable trier of fact could credit their testimony, and would not be compelled to credit the contrary testimony of the court-appointed surveyor, particularly in light of the conflicts between the court-ordered survey map and the aerial map. Although the surveyor's conclusion may be entitled to significant weight, such weighing of the relative weight and plausibility of each side's evidence is properly conducted only by a trier of fact, and is inappropriate on a motion for summary judgment. *See R.B. Ventures, Ltd. v. Shane* , 112 F.3d 54 (2d Cir. 1997). Where, as here, a reasonable trier of fact could draw more than one inference from the evidence, and could resolve the issue in favor of the nonmoving party, summary judgment must be denied. *Jeffery v. Sarasota White Sox, Inc.* , 64 F.3d 590, 594 (11th Cir. 1996). We thus reverse the entry of summary judgment on the issue of whether the Senior Center encroached on Lots 001 K 02 and 15.

2. Certificates of Title

The Clan contended below that even if the Senior Center were situated outside Lots 001 K 02 and 15, it might be situated on adjacent land that properly belonged to the Clan but was erroneously omitted from the Cadastral map. In entering summary judgment against the Clan on this issue, the trial court reasoned that the Cadastral map, which is incorporated by reference into the certificates of title to Lots 001 K 02 and 15, is ⊥110 binding and conclusive as to the boundaries of those lots, and thus precludes the Clan from claiming title to adjacent lands erroneously excluded from the Cadastral map. We disagree.

The Palau National Code provides that certificates of title "shall be conclusive." 35 PNC § 1313(a)(2). As the trial court recognized, this provision generally precludes all parties to a prior adjudication of ownership from contesting the boundaries identified in the resulting certificate of title "even if the certificates are mistaken in their description of the boundaries of the land covered." [4] But while the conclusiveness of a certificate of title precludes further

[4] We have, however, recognized an exception to this general rule where the certificate "relied on an erroneous survey that did not reflect the [undisputed] boundary" of the land in question. *Ngirasibong v. Adelbai*, 4 ROP Intrm. 95, 100 (1993).

litigation regarding previously adjudicated property, it does not preclude a party from claiming title to previously unsurveyed land merely because it has been adjudged to own an adjacent parcel. Thus, contrary to the trial court's conclusion, the existence of the certificates of title did not conclusively resolve as a matter of law whether the Clan had a legitimate claim of title to surrounding lands.[5] Here, therefore, absent a showing that the Clan's current arguments were raised and decided adversely to it in the proceedings leading to the issuance of the earlier certificates of title, the Clan should be permitted to argue either that lands outside the boundaries of those certificates are additional portions of Tab whose ownership has not yet been determined or are other lands that the Clan also owns.

In opposing the State's motion for summary judgment, the Clan introduced a 1976 aerial photographic map of the island, and superimposed thereon a Bureau of Lands and Surveys survey map. Construed in the light most favorable to the Clan, this evidence indicates that there are land areas adjacent to the surveyed lots that were not surveyed or assigned Cadastral lot numbers. The trial court refused to consider this evidence because the aerial photographic map had not been authenticated. However, the record does not reflect any objection to the document's authenticity. In reviewing a motion for summary judgment, a court may consider "any material that would be admissible or usable at trial," 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* ? 2721 at 40 (2d ed. 1983), and otherwise inadmissible documents "may be considered by the court if not challenged." *Id.* ? 2722 at 60. Thus, absent a challenge by the State, the photographic and superimposed survey map submitted by the Clan should have been considered. *See H. Sand & Co. v. Airtemp Corp.* , 934 F.2d 450, 455 (2d Cir. 1991); *Catrett v. Johns-Manville Sales Corp.* , 826 F.2d 33, 37-38 & n.10 (D.C. Cir. 1987). Without offering any view as to their ultimate admissibility at trial, we find these maps sufficient to create a genuine issue of material fact as to whether the Center, if outside Lots 001 K 02 and 15, was located on unsurveyed land that might also belong to the Clan. Because the certificates of title did not preclude the Clan as a matter of law from establishing its ownership of land outside Lots ⊥111 001 K 02 and 15, and because the aerial map created a genuine issue of material fact as to whether the Center was built on unsurveyed land beyond Lots 001 K 02 and 15, we reverse the entry of summary judgment on this issue.

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[5] This is not to say that the certificates of title are irrelevant. They may, of course, be highly probative evidence, particularly if the sizes of the lots described therein, when compared with the size of the land mass identified by aerial photographic survey, reveal little or no unsurveyed land.

3. Accretion

The trial court held that even if there were newly created, unsurveyed land abutting Lots 001 K 02 and 15, it must be filled land, which would belong to the State as a matter of law. *See Salvador,* 8 ROP Intrm. at 75; *Protestant Mission of Ponape* , 3 TTR at 33. The Clan contends that summary judgment regarding the nature and ownership of any newly created land was improper, because there were genuine issues of material fact as to whether such land was filled, making it State property, or was naturally accreted, making it the property of the Clan as the owner of the abutting land. *See Peretiw*, 3 TTR at 498. We reject this contention.[6]

Although the Clan presents an accretion theory in its appellate brief, it did not plead this theory in its complaints or its brief opposing the State's summary judgment motion. Nor did it present evidence of accretion to refute the State's evidence that the additional lands on Tab resulted from backfilling. We find that its submissions on this issue were insufficient to create a genuine issue of material fact as to whether any newly created lands on Tab resulted from backfilling rather than accretion. *See Little v. Cox's Supermarkets* , 71 F.3d 637, 641 (7th Cir. 1995) (holding that trial court is neither "required to scour the record looking for factual disputes," nor "required to scour the party's various submissions to piece together appropriate arguments") (citations and internal quotations omitted).[7]

4. Oral Agreement

The trial court entered summary judgment against the Clan on its claim that the Clan owned any backfilled land abutting Tab because of an oral agreement with the former Governor of Ngeremlengui whereby the Clan would retain any improvements resulting from ⊥112 Nishimatsu's activities on Tab. The court found that there was no genuine factual dispute as to whether the agreement was valid and enforceable, because the land in question belonged to the Ngeremlengui State Public Lands Authority ("NSPLA") rather than the State itself, and because

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[6] In analyzing whether there is a genuine factual dispute as to the nature and origins of any newly created land, we do not hold that any land outside Lots 001 K 02 and 15 must have been newly created rather than originally existing. In this analysis, we hold only that *if* any lands abutting these lots are found to have been subsequently created, there is no genuine issue of fact as to whether they were created by accretion rather than by backfilling.

[7] To the extent that the 1976 aerial map reveals land outside Lots 001 K 02 and 15, it arguably raises an inference that any subsequently created land did not result from backfilling, as Nishimatsu's backfilling operations did not commence until the 1980's. However, the Clan did not identify this evidence in support of any claim of ownership based on accretion and the trial court was under no duty to do so. Nonetheless, a trial court may re-examine its pre-trial rulings up through the time of final judgment as long as there is good cause for doing so and the parties are given fair notice of any alterations of those rulings. *See Federal Deposit Ins. Corp. v. Masingill*, 24 F.3d 768, 775 (5th Cir. 1994); *Algie v. RCA Global Communications, Inc.*, 891 F. Supp. 875, 883 (S.D.N.Y. 1994), *aff'd on other grounds*, 60 F.3d 956 (2d Cir. 1995). In finding no reversible error in the trial court's determination on the accretion issue, we do not intend to preclude the trial court from revisiting this determination if it finds good cause for doing so in light of this opinion or subsequent developments.

the State legislature never ratified the agreement as required under the State Constitution. We agree.

In support of its motion for summary judgment, the State presented a 1980 quitclaim deed transferring all public land within Ngeremlengui from the Palau Public Lands Authority to the NSPLA's predecessor, the Ngeremlengui State Municipal Lands Authority ("NMPLA"). The Clan, in response, failed to present any evidence that title rested with the State itself rather than with the Public Lands Authority, or that the Governor had obtained the titleholder's approval before conveying an interest in publicly held land. [8] The Public Lands Authority is a separate legal entity from the State itself, *see* 35 PNC 215, and thus is a necessary party to any conveyance of public lands to which it holds title. Absent some evidence that the NSPLA authorized the purported agreement with the Governor, there was no genuine issue of material fact as to whether there was an enforceable agreement to convey an interest in public lands to the Clan.

Moreover, the Ngeremlengui State Constitution provides that the State Legislature must ratify by majority vote any agreement negotiated by the Governor. *See* Art. X, ? 4(c). The State produced an affidavit by its present Governor attesting that the State Legislature never ratified the asserted agreement to convey improvements on Tab to Dilubech Clan, and the Clan did not submit any evidence to the contrary. Thus, even if the land in question had belonged to the State rather than the NSPLA, any agreement to convey an interest therein would have been invalid without the requisite ratification.

The Clan submitted two affidavits in an attempt to raise a genuine issue of fact as to whether the agreement was enforceable. The affidavit of the Clan's counsel Mariano Carlos does not attest to any facts within the affiant's personal knowledge, but merely states the Clan's legal arguments. Such affidavits that are devoid of facts based on personal knowledge cannot raise a genuine factual issue. *See Rechelulk,* 2 ROP Intrm. at 283-84. Although the affidavit of Wataru Elbelau is based on Elbelau's personal knowledge of the oral agreement, Elbelau attests only that he "understood" and "believes" that the former Governor had authority to convey the lands in question. His subjective understandings and beliefs are not material to the Governor's actual legal authority to enter the asserted agreement. As the trial court found, these affidavits failed to raise a genuine issue of material fact as to whether the asserted agreement was enforceable.
⊥113

B. The Clan's Claim to Eject the Individual Appellees

The trial court also entered summary judgment against the Clan on its claim to Lots 001 K 03, 04, and 05, which were the subject of the pending Land Court action between the Clan and the individual Appellees. Although the trial court deferred to the Land Court to determine the "ultimate ownership" of the parcels as among the multiple claimants, it proceeded to "resolve the

[8] The record is unclear regarding the transfer of ownership from the NMPLA to its successor NSPLA. However, because the record adequately demonstrates that title rested with the relevant Public Lands Authority rather than the State itself, the precise mechanism of transfer from predecessor to successor is not material to the issue of whether the Governor was authorized to convey public lands.

issue of ownership of these lots between the Clan and the other parties." In resolving this issue against the Clan, the court found, as it did in relation to the Clan's claim against the State, that the Clan's certificates of title to Lots 001 K 02 and 15 had a "preclusive effect" that foreclosed the Clan from claiming any additional lands outside those lots.

For the reasons discussed above, *see supra* Part II.A.2, we disagree with the court's holding that the certificates of title were necessarily preclusive under the circumstances of this case, and find that there were genuine issues of material fact regarding the Clan's claim to any surrounding, previously unrecorded lands, despite the Clan's certificates of title to Lots 001 K 02 and 15. Because the Clan was entitled to litigate its claim to Lots 001 K 03, 04, and 05 against the other claimants in the pending Land Court action, we remand this issue with the understanding that the ultimate ownership of these lots will be determined in due course by the Land Court.

III. Conclusion

For the foregoing reasons, the judgment of the Trial Division is VACATED and the case REMANDED for further proceedings consistent with this Opinion.