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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOSEPHA B. ADA, CALISTRO C.)	Civil Action No. 93-644
ADA, MARTIN B. ADA AND JIN)	
JI TANSEY AND RUSSELL H. TANSEY)	
)	
Plaintiffs,)	
)	
v.)	<u>ORDER TO PARTIES</u>
)	<u>TO SUBMIT SUPPLEMENTAL</u>
J.J. ENTERPRISES, INC., AND)	<u>MEMORANDUM OF LAW</u>
YOUNG CHANG KIM)	
)	
Defendants.)	

The Defendants, J.J. Enterprises and Young Chang Kim, move to dismiss the Plaintiffs' amended complaint pursuant to Commonwealth Rules of Civil Procedure 12(b).

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs Josepha and Martin Ada (hereinafter Adas) have a fee simple interest in Lot No. 011 H 28, located in Chalan Kanoa (Chalan Kanoa property). The Adas entered into an agreement with J.J. Enterprises in which they agreed to lease the Chalan Kanoa property to Defendant J.J. Enterprises from October 1, 1987 to September 30, 1992. During the term of its lease, J.J. Enterprises constructed barracks which were purportedly capable of

1 housing more than twenty people.

2 The Plaintiffs' amended complaint alleges that: (1) on
3 September 11, 1992, Russell and Jin Ji Tansey agreed to lease the
4 Chalan Kanoa premises from the Adas and executed a lease agreement
5 to that effect; (2) the lease provides for a five-year term,
6 commencing on October 1, 1992; (3) the lease expressly allows the
7 Tanseys to sublet or assign the barracks; (4) the Defendants
8 committed waste on the Chalan Kanoa property sometime after
9 September 11, 1992; (5) the Defendants wilfully, oppressively and
10 maliciously "ordered and directed the substantial destruction by
11 backhoe and otherwise of the barracks" located on the Chalan Kanoa
12 property; (6) the Defendants acted contrary to the express terms
13 of their lease; and (7) the landlords did not consent to the
14 destruction.

15 On July 28, 1993, at 9:00 a.m., this Court held a hearing on
16 the Defendants' motion to dismiss the amended complaint. During
17 the hearing, the Court ruled on all but one of the grounds raised
18 by the Defendants in support of their motion. the Court took
19 under advisement the Plaintiffs' argument relating to waste.

20 21 II. ISSUES

22 The Court will consider the following issues: (1) whether a
23 former tenant may be liable to present tenants of a leasehold for
24 committing waste on the leasehold; and (2) whether a Rule 12(b)(6)
25 motion should be granted where the complaint may allege facts
26 which would support a claim for relief but where the memorandum in
27 opposition to the motion is solely premised upon an unviable legal
28 theory.

1 III. ANALYSIS

2 A. Tort of Waste

3 At common law, an action in the nature of waste refers to
4 "any unauthorized destruction or severance of improvements, trees,
5 minerals, or other corporeal hereditament on or from the land
6 belonging to another by one who did not have title, but who was
7 rightfully in possession." *Federal Deposit Ins. Corp. v. Mars*,
8 821 P.2d 826, 831 (Colo. App. Ct. 1991); *Moore v. Phillips*, 627
9 P.2d 831, 834 (Kan. App. Ct. 1981); see also BLACK'S LAW DICTIONARY
10 1425 (5th ed. 1979) (citations omitted). The doctrine of waste
11 serves to safeguard the interests of holders of a concurrent non-
12 possessory interest in land against harm committed by persons in
13 possession of the land. *Federal Deposit Ins.*, 821 P.2d at 831
14 (emphasis added). Therefore, only reversioners and remaindermen
15 may invoke this doctrine. *Id.* Given that the Tanseys have a
16 possessory interest in the land, they cannot invoke this doctrine.

17 The Tanseys attempt to escape the preclusive effect of the
18 common law restriction by relying on comment g to section 5.2 of
19 the *Restatement (Second) of Property*. Section 5.2 addresses
20 situations in waste occurs after the date of the lease and
21 delineates the remedies that are available to a tenant before
22 entry. *Restatement (Second) of Property*, § 5.2 (1977). Comment
23 g explains that the tenant may have a right to relief in an action
24 against a third party.^{1/} *Id.*, cmt. g.

25
26 ^{1/} Comment g states that:

27 A third party may damage the leased property,
28 particularly the buildings thereon, thereby rendering
the premises unsuitable for the use contemplated by the
parties. . . . If the tenant terminates the lease when
(continued...)

1 The Plaintiffs contend that comment *g* modifies the common law
2 restriction concerning who may bring suit for waste. They claim
3 that the doctrine of waste now protects their leasehold interest
4 in light of comment *g*.

5 This argument must fail for three reasons. First, the text
6 of section 5.2 itself only identifies the remedies that a tenant
7 may have as against the *landlord* and omits any reference to the
8 availability of remedies as against a *third party*. This section,
9 therefore, does not apply to a situation in which the present
10 tenant brings an action in the nature of waste against the former
11 tenant, rather than the landlord. Second, comment *g* fails to
12 expressly modify or amend the common law rule governing waste, let
13 alone refer to the common law restriction as to who may bring
14 suit. The Court thus concludes that comment *g* merely acknowledges
15 that legal theories may exist which may impose liability upon
16 third parties and afford relief to the tenant. *See, e.g., Chubb*
17 *Group of Ins. v. C.F. Murphy & Assoc.*, 656 S.W.2d 766 (Mo. App.
18 Ct. 1983) (negligent interference with tenant's right to possess
19 leasehold); *England v. Ally Ong Hing*, 459 P.2d 498 (Ariz. 1969)
20 (trespass); *see also Shaw v. Greathouse*, 296 S.W.2d 151, 153 (Mo.
21 App. Ct. 1956) (tenant may recover for injury to his or her use
22 and enjoyment), and cases cited therein. Finally, this Court is
23

24 ^{1/}(...continued)

25 he is entitled to do so, though he cannot recover
26 damages from the landlord because the changed condition
27 was not the fault of the landlord, the tenant may be
28 entitled to recover damages from the third person.
Similarly, if the tenant does not elect to terminate the
lease, the third person may be liable to him for
damages.

Id. (emphasis added).

1 not aware of any case law in which a tenant was allowed to sue a
2 former tenant for waste and counsel has not directed to the
3 Court's attention to any case law to this effect.^{2/} For these
4 reasons, Count Two of the Plaintiffs' complaint fails to state a
5 claim for waste upon which relief can be granted.

6
7 **B. Must a Complaint Be Dismissed if the Legal Theory**
8 **Contemplated and Espoused in the Memorandum in**
9 **Opposition to the Rule 12(b)(6) Motion is not Viable?**

10 Rule 12(b)(6) allows for the dismissal of a complaint which
11 fails to state a claim upon which relief can be granted. Com. R.
12 Civ. Pro. 12(b)(6). A motion made pursuant to this rule
13 challenges the plaintiff's right to any relief based upon the
14 allegations stated in the complaint. See *McLain v. Real Estate*
15 *Board of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511
16 (1980) (emphasis added). In determining the propriety of a Rule
17 12(b)(6) motion, the court must construe the complaint "in the
18 light most favorable to the plaintiff" and must accept as true all
19 of the allegations in the complaint. *Cepeda v. Hefner et al. and*
20 *Reyes v. Millard*, Appeal Nos. 90-057 & 90-058, slip op. at 5
21 (N.M.I. 1992); see, e.g., *Bolalin v. Guam Publications, Inc.*,
22 Civil Action No. 92-902 (Super. Ct. 1992).

23 The ultimate issue is whether the allegations compose a

24 _____
25 ^{2/} In explaining the doctrine of waste, the Plaintiffs
26 merely cited to AmJur as support for some of their propositions.
27 This Court reminds Mr. Tansey, counsel for the Plaintiffs, that
28 all citations to AmJur and the propositions for which AmJur is
cited are ignored where counsel uses them in lieu of primary
sources of authority. Memorandum of the Superior Court of the
Commonwealth of the Northern Mariana Islands (March 23, 1992).
This rule applies to all types of secondary authority. If counsel
is unclear on what the primary sources of civil law are in the
Commonwealth, counsel should consult 7 C.M.C. § 3401. This Court
will not conduct legal research for Mr. Tansey.

1 "statement" of a claim for purposes of Rule 8(a).^{3/} As the
2 C.N.M.I. Supreme Court stated in the case of In the Adoption of
3 Magofna, Appeal No. 90-012 (N.M.I. 1990):

4 [a] complaint must contain either direct
5 allegations on every material point necessary
6 to sustain a recovery on any legal theory,
7 even though it may not be the theory
8 suggested or intended by the pleader, or
contain allegations from which an inference
fairly may be drawn that evidence on these
material points will be introduced at trial.

9 Id. at 4 (emphasis added) (citing 5 C. Wright & A. Miller, Federal
10 Practice and Procedure: Civil 2d § 1216 (1990) (citations
11 omitted)).

12 It is, therefore, essential to determine whether a legal theory
13 exists which would support the imposition of liability on the
14 Defendants based on the allegations contained in the complaint.
15 *Magofna*, slip op. at 4; see also *Taisacan v. Hattori*, Appeal No.
16 92-031, slip op. at 8 (N.M.I. 1993) (after trial based upon
17 complaint for *encroachment*, party's failure to plead quiet title
18 claim for relief did not prevent grant of declaratory relief
19 *quieting title on appeal*) (emphasis added).

20 Where wrongful conduct harms property under lease, both the
21 landlord and the tenant may be entitled to relief. *Chubb*, 656
22 S.W.2d 766; *Binder*, 516 P.2d 1012. Although the landlord and the

23 ^{3/} Rule 8 states, in pertinent part, that:

24 A pleading which sets forth a claim for relief,
25 whether an original claim, counterclaim, cross-claim, or
third-party claim, shall contain

26 . . .

27 (2) a short and plain statement of the claim
28 showing that the pleader is entitled to
relief; . . .

Com. R. Civ. Pro. 8(a)(2).

1 tenant may bring separate lawsuits based on the same wrongful
2 conduct, the interest protected differs. *Chubb*, 656 S.W.2d at
3 776. The landlord may recover for permanent injury to the
4 property itself. *Id.* By comparison, the tenant's relief is based
5 upon his or her possessory right and thus recovery is limited to
6 the injury to the tenant's use and enjoyment of the property.^{4/}
7 *Id.*, and cases cited therein.

8 In the instant case, the complaint alleges the existence of
9 a landlord-tenant relationship between the Adas and the Tanseys.
10 Therefore, the Tanseys ostensibly have a protectible interest for
11 purposes of this motion. The Court, however, finds that the
12 *Magofna* court did not contemplate that this Court would be
13 *obligated* to conduct extensive research for the Plaintiffs in an
14 effort to *identify* a viable legal theory for them. *Magofna*, slip
15 op. at 4; *see also Taisacan*, slip op. at 8. Consequently,
16 judicial economy dictates that the parties submit supplemental
17 memorandum of law on the following issues:

- 18 (1) whether the complaint contains allegations on
19 every material point necessary to show the
20 existence of a landlord-tenant relationship;
21 and
22 (2) whether any legal theory would render the
23 Defendants liable to the Tanseys on the
24 grounds that the Defendants' allegedly
25 destroyed the barracks, and thus injured the
26 Tanseys' leasehold interest.

27 Upon receiving the parties' memoranda, this Court will determine
28 whether the complaint contains allegations on every material point
29 necessary to sustain recovery.

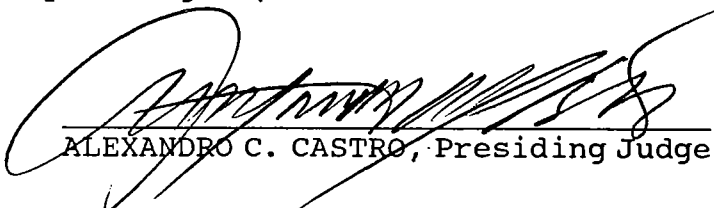
30 ^{4/} Under these circumstances, the tenant could only recover
31 damages for the injury suffered during the term of the lease.
32 *Binder v. Perkins*, 516 P.2d 1012 (Kan. 1973).

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IV. CONCLUSION

For the foregoing reasons, the Tanseys cannot invoke the doctrine of waste in an effort to protect their leasehold interest. Furthermore, it is hereby ordered that the Plaintiffs submit a memorandum of law in which they identify a viable legal theory or theories within 14 days from the date of this order. The Defendants shall respond to the Plaintiffs' brief within 21 days from the date of this order.

So ORDERED this 11 day of August, 1993.


ALEXANDRO C. CASTRO, Presiding Judge