FOR PUBLICATION

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

JOSE C. MAFNAS, Plaintiff, v. ALFRED LAURETA, et al., Defendants.	CIVIL ACTION NO. 88-696 MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter arises out of a quiet title action implicating Article XII of the Commonwealth Constitution. On December 7, 1994, this Court heard Plaintiff's motion for summary judgment and Defendants' cross-motion.[1/] Plaintiff argued that a non-NMD's financing of the purchase of real property violates Article XII of the Commonwealth Constitution. Plaintiff also asserted that a change of law provision contained in a lease to a non-NMD violates Article XII. Defendants countered that such a lease is consistent with Article XII; and, alternatively, that if the change of law provision is invalid, it must be stricken and the remaining lease enforced, pursuant to 2 CMC § 4982(a) & (b). Plaintiff replied that 2 CMC § 4982 is unconstitutional.

1/ In addition, this Court heard motions to strike Defendants' counterclaims and affirmative defenses, to compel, and to disqualify attorney Theodore Mitchell. However, this decision concerns only the summary judgment motions involving Plaintiff's causes of action.

I. FACTS

On September 28, 1988, Jose C. Mafnas initiated a quiet title action regarding real property known as Lot 031 E 09. The complaint names Hon. Alfred Laureta, E. Evelyn Laureta, Hedwig V. Hofschneider, Daniel T. Villagomez, Kenneth W. Coward and Conception B. Coward as defendants. Defendants Hofschneider, Villagomez, and Third-Party Defendant Jesus C. Santos are persons of Northern Marianas descent ("NMD"). The remaining Defendants are non-NMDs.[2/]

On January 22, 1986, Santos sold the property to Hofschneider for $16,000, financed by Laureta. Prior to this, Laureta and Hofschneider had agreed that Hofschneider would purchase the property with money supplied by Laureta in order to lease it to him. Laureta Deposition, pp. 260-261. On May 2, 1986, Hofschneider leased the property to Laureta for 55 years. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 3. The lease agreement provides that in the event of a change in law, removing the restriction against ownership of property by non-NMDs, Hofschneider will grant title to the premises to Laureta. Id. The lease also provides for severance of any unlawful provisions and ,enforcement of the remainder.

Approximately a year and a half later, the Cowards paid Laureta $22,000 for the cancellation of the lease and the transfer of the fee from Hofschneider to Villagomez. Thereafter, the Cowards, also non-NMDs, leased the property from Villagomez. Id. at 177. Laureta offered Hofschneider $500 out of the $22,000, however, Hofschneider accepted only $100. ***Id.*** at 179.

[2/] Article XII of the CNMI Constitution restricts ownership of Commonwealth land to NMDs. Article XII permits non-NMDs to hold leases of up to 55 years.

II. ISSUES

A) Whether a non-NMD's financing of the purchase of real property violates Article XII.

B) Whether a lease to a non-NMD containing a change of law provision violates Article XII of the Commonwealth Constitution.

C) If yes, whether it is constitutional to sever the provision pursuant to 2 CMC § 4982(a) & (b).

III. ANALYSIS

Summary judgment is granted if, viewing the facts in the light most favorable to the non-moving party, the court finds that as a matter of law the moving party is entitled to the relief requested. Cabrera v. Heirs of De Castro, 1 N.M.I. 172, 175 (1990). Once the moving party meets its initial burden, the burden shifts to the non-moving party to demonstrate a genuine issue of material facts. Id.

A prima facie case establishing an Article XII violation must demonstrate that an acquisition of NMI land by a non-NMD was made and that the acquisition is a permanent and long-term interest. *Ferreira* v. *Borja*, 2 N.M.I. 514, 523 (King, S.J., dissenting). In the present case, the material facts - that a non-NMD wholly financed the purchase of land by a NMD who became his lessor under an agreement containing a change of law provision - are undisputed. Whether such a provision constitutes a long term interest in contravention of Article XII is a question of law. Thus, the instant case is ripe for summary judgment.

A. Agency Theory

This case involves a *55* year lease containing a change of law provision whereby the lessor is obligated to transfer fee simple to the lessee, a non-NMD. Plaintiff contends that Laureta's payment to Santos of the money for Hofschneider to buy the property at issue contravened Article XII. Plaintiff relies upon the Restatement of Agency 2d, § 14B for the proposition that Hofschneider took title to the property as Laureta's agent and that Laureta, a non-NMD, was the true freehold owner. *Plaintiff's Nov.* 25, *1988 Memo,* 21-28.

Seven CMC § 3401 directs the CNMI courts to apply the common law as expressed in the restatements, only in the absence of local law. Here, the Commonwealth possesses law germane to the issue. *Diamond Hotel Co., Ltd., v. Matsunaga,* Appeal No. 93-023, *slip op.* at 6,7, (N.M.I. Jan. 19, 1995). Therefore, this Court is not at liberty to advance Plaintiff's theory, stemming as it does from the Restatement of Agency 2d, § 14B.

Further, Plaintiff asserts that his claim was not vitiated by *Ferreira v. Mafias,* 1 F.3d 960 (9th Cir. 1993) (rejecting resulting trust theory), as it is not based upon the resulting trust theory. While Plaintiff's claim does rely in part on trust doctrine, *Plaintiff's Memo* at 28, it is essentially based upon agency theory; a theory struck down in *Ferreira v. Mafias Borja, 2* N.M.I. 514 (1992), *reversed, Ferreira v. Mafnas,* 1 F.3d 960 (9th Cir. 1993), *remanded, Ferreira v. Mafnas Borja*, Appeal No.90-047, *slip op.* (N.M.I. Jan. 3, 1995). On remand, the Commonwealth Supreme Court was provided with the opportunity to resuscitate the agency theory. It did not. Therefore, this Court must grant Defendants' cross-motion for summary judgment that no agency trust arose from these transactions.

B. Change of Law Provision

Plaintiff contends that the change of law provision constitutes a long term interest in land, transgressing Article XII. The precise wording of the provision is as follows:

> At anytime during the term of this lease should the applicable law in the Commonwealth of the Northern Mariana Islands allow ownership in the Northern Mariana Islands by persons other than of Northern Marianas descent, then the Lessor acknowledges the sufficiency of the advanced lease payment as consideration for the purchase of the leased premises by Lessee and will, by deed, grant title to the premises to the Lessee.

Plaintiffs Exhibits in Support of Supplemental Motion for Summary Judgment, filed November 23, 1994, at "Exhibit B", p. 3, para. 6.

Defendants suggest that the subject lease does not contravene Article XII since the interest conveyed is within the permissible 55 year period, and any transfer of the fee would not occur until such a time as the law permits. However, our Commonwealth Supreme Court has held to the contrary. *Diamond Hotel Co., Ltd.,* v. *Matsunaga,* Appeal No. 93-023, *slip op.* at 6,7, (N.M.I. Jan. 19, 1995).

In *Diamond Hotel,* the Court scrutinized a 55 year lease to a non-NMD corporation containing a 35 year option to renew contingent upon a change in law. There, the Court held that "[a]ny agreement by which a non-NMD is given, receives, or obtains a right, *conditional* or otherwise, to acquire title to or an interest in land longer than a 55 year leasehold, would violate Article XII." *Diamond, supra.* at 12 (emphasis added). In arriving at this conclusion, the Court reviewed the *Analysis of the Constitution of the Northern Mariana Islands,* 166-67 (Dec. 1976), and noted that Article XII's prohibition against land ownership by non-NMDs during its effective period extends to the actual *decision* to alienate land. Whether such a decision could ever become manifest is immaterial; such decisions are not to be made until the expiration of Article XII's probationary period. Thus, *Diamond Hotel* found critical the fact that, although the 35 year option could not be realized unless Article XII had been repealed, the decision to convey the option had been entered into while Article XII was in full force and effect. *Diamond Hotel, supra.* More specifically, *Diamond Hotel* stated that:

> Article XII was designed not only to prevent a non-NMD from actual acquisition of a leasehold interest beyond 55 years, but also to prohibit a non-NMD from holding any right or power that would allow it to later acquire a leasehold interest in land in excess of 55 years.

Id. at 10.

Hence, the time when such a decision would be acted upon is irrelevant. What is relevant is the time when the decision was made. Following this logic, the change of law provision in the Hofschneider-Laureta lease is undeniably invalid: it embodies a decision in contravention of existing law to grant title in the future to a non-NMD.

Further, Special Judge King, in a dissenting opinion favorably commented upon by the 9th Circuit, arrived at a like conclusion in a similar case. Ferreira v. Borja, 2 N.M.I 514, 551 (1992)(lease stipulating transfer of title to non-NMD lessee in event of Article XII modification), cited in Ferreira v. Mafnas, 1 F.3d 960 (9th Cir. 1993). In that case, Special Judge King found that conveyance of fee simple absolute to a non-NMD conditioned upon a change in law ran afoul of Article XII because the contingency was outside of the control of the NMD. Id. Thus, the test put forth by King is whether the NMD has control over the conditioned event.

Here, as in Ferreira, this Court is presented with a lease putatively conveying an impermissible interest dependent upon the happening of an event - a change of law - wholly beyond the control of the NMD. Therefore, the change of law provision is unconstitutional and is hereby declared void ab initio.

C. Severability

I. 2 CMC § 4982(a).

Having found the change of law provision violative of Article XII, this Court addresses the issue of severability. Defendants claim that the change of law provision, if invalid, must

be severed from the lease and the remainder enforced pursuant to 2 CMC § 4982(a)("the section"). In opposition, Plaintiff claims that section is unconstitutional because it conflicts with the meaning of Article XII as interpreted by the judiciary. The section reads:

> §4982. Severability of Contractual Provisions Violating Article XII of the Constitution.
>
> (a) If a court determines that any provision of an agreement would, if enforced, result in acquisition of a permanent or long-term interest in real property by a person not of Northern Marianas descent, the court shall enforce any or all remaining provisions of the agreement if it can be enforced without unjust enrichment or prejudice to either party to the agreement, regardless of whether the party seeking enforcement of the agreement engaged in serious misconduct or acted in good faith within the meaning of section 183 or section 184 of the Restatement (Second) of Contracts.

Plaintiff asserts that the section at issue effects an unconstitutional repeal of Article XII by attempting to narrow the scope of Article XII's enforcement section, which states that: "[a]ny transaction made in violation of Section 1 shall be void ab initio." *Commonwealth* Constitution ***Art.*** *XII* § 6. Plaintiff argues that under Commonwealth case law the "transaction" to be voided under Article XII encompasses all actions having a single purpose, a common origin and related in time. *Plaintiff's* Reply at 16. Plaintiff does not cite case law to corroborate his definition of "transaction". Instead, he turns to the Restatement (Second) of Judgments §24(2), *Plaintiff's* Reply at 16, despite the existence of local case law on point.[3/]

Had Plaintiff turned to case law, his theory would have forestalled. Diamond Hotel Co., Ltd., v. Matsunaga, Appeal No. 93-023, slip op. at 6,7, (N.M.I. Jan. 19, 1995); Manglona v. ***Kaipat***, **3** N.M.I. 322 (1992). Manglona v. Kaipat challenged a grant of fee simple absolute through a tenancy in common to two grantees, one being a NMD and the other

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[3/] Seven CMC § 3401 directs the CNMI courts to apply the common law as expressed in the restatements, only in the absence of local law.

a non-NMD.[4/] The contestants, like Plaintiff here, advocated a broad reading of the term "transaction", whereby the entire grant would be declared void ab initio. The Supreme Court rejected this expansive interpretation, declaring void only the interest conveyed to the non-NMD. *Id.* at 335. *In* so doing, the Court reasoned thus:

> [a]lthough we agree that the deed of gift at issue is technically one transaction in the sense that it is one instrument, we are not persuaded that the entire deed violates Article XII's restriction on land alienation.

Id. at 334.

Article XII's enforcement provision was applied more selectively still in *Diamond Hotel, supra.* There, the Supreme Court vitiated Plaintiff's position by reading Article XII to permit the enforcement of a severability clause in a lease after it was determined that the offending provision was not an integral part of the agreement. The *Diamond Hotel* Court opined that severance was appropriate because the invalid provision was not an integral part of the lease. To determine whether the provision was severable, the Supreme Court first asked whether "the agreement would have been made were the parties not under the impression that it would be performed in its entirety." *Diamond*, *supra.* at 18 (citing, *Bonnco Petrol, Inc. v. Epstein,* 560 A.2d 655, 662 (N.J. 1989)). Second, the Court asked "whether [the parties] would have entered into the agreement absent the illegal parts." Id. at 18, (citing, *Panasonic Co., Div. of Matsushita Elec. Corp. of America v. Zinn*, *903 F.* 2d 1039, 1041 (5th Cir. 1990)) (brackets in original).

The Hofschneider-Laureta lease contains a severability clause. However, *Diamond Hotel* and the tests it promulgated were handed down after the parties filed their papers on this issue. As a result, the factual issues regarding intent implicated by the *Diamond Hotel* tests

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[4/] A tenancy in common creates a one-half undivided interest in both grantees or co-tenants. Id. at 326

have not been briefed and may be a source of contention. Thus, summary judgment based upon *Diamond* ***Hotel*** is inappropriate on the issue of severability.[5/]

ii. conclusive presumption

Defendants maintain that they are entitled to sever the unconstitutional provision of the lease under 2 CMC § 4982(b). Subsection b calls for the automatic enforcement of severability clauses in agreements found to transgress Article XII.[6/] However, this provision conflicts with, *Diamond Hotel, supra,* which held that severability clauses are not enforceable, per se. Specifically, the Court held that "if the [offending provision] is an integral part of the entire Lease Agreement, then we must declare the entire Agreement void ab initio notwithstanding the severability clause." *Id.* at 13. Since the Supreme Court has enunciated a severability test grounded in Art. XII of the Constitution, this test prevails over the statute. 2 CMC § 4982(b) is therefore declared unconstitutional insofar as it mandates severability of "integral" provisions within a transaction.

iii. retroactive application

[5/] Plaintiff also claims that the Restatement (second) of Contracts § 183 comment b precludes severance where "the entire agreement is part of an integrated scheme to contravene public policy. However, as stated above, the restatements apply only in the absence of local law; and, here, *Diamond Hotel* controls.

Additionally, Plaintiff maintains that severance is prohibited by *Wabol* v. *Muna*, *958* F.2d 1463 (9th Cir. 1992), which held that reformation of a contract void at law is beyond the equitable powers of a court. Conversely, however, *Diamond Hotel* declared that it was not reforming the lease, but rather was realizing the intent of the parties as expressed in the severability clause.

[6/] Two CMC § 4982(b) reads:

(b) If the parties to the agreement have provided in the agreement that its provisions are to be considered severable in the event any provision is determined to be void, it shall be conclusively presumed for purposes of this article that any provisions which is not so void can be enforced without unjustly enriching or prejudicing either party, and any such provision shall be enforced.

Two CMC § 4982(c) explicitly provides that the section be applied retroactively. Plaintiff contends that retroactive application of the statute would infringe upon his due process rights under Article § 5 of the Commonwealth Constitution and the Fifth Amendment of the United States Constitution, incorporated under the Fourteenth Amendment.

This Court rejects Plaintiffs argument. Plaintiff does not have a vested property right in an Article XII cause of action. A property right in any cause of action does not vest " 'until a final unreviewable judgment is obtained.'" *Atmospheric Testing,* 820 F.2d at 989 (quoting *Hammond* v. *United States,* 786 F.2d 8, 12 (1st Cir. 1986). *See also Austin v. City of Brisbee*, 855 F.2d 1429 (9th Cir. 1988).

In the case at bar, Plaintiff claims that "by virtue of the operation of Article XII, § 6, a transaction which violates Article XII has no legal effect. Thus, the original landowner remains vested with title to his or her land." *Plaintiff's Reply* at 17. This reasoning is unsound. Only a court of law can declare a transaction to be violative of Article XII, and until that is done, no voiding takes place. Thus, the alleged rights of the original landowner can not vest until after there has been a "final, unreviewable judgment." *Garcia* v. *San Antonio Metro Transit Auth.*, 105 S.Ct. 1005 (1985). Clearly that is not the situation here in this pending case. Thus, Plaintiff's due process claim is denied.

iv. equal protection

Plaintiff contends that because the 2 CMC § 4982 is designed to discriminate against Article XII plaintiffs, retroactive application would deny them the equal protection guaranteed by Article I § 6 of the Commonwealth Constitution and the Fourteenth Amendment of the United States Constitution.

A viable equal protection claim requires that the plaintiff either belong to a suspect classification, or have suffered an infringement of a fundamental right. *See In re Blankenship,*

3 N.M.I. 209, 219 (1992). Here, plaintiff falls within neither category. Hence the claim is denied.

IV. CONCLUSION

For the foregoing reasons, this Court finds that the change of law provision violates Article XII. Further, this Court finds that 2 CMC § 4982(b) is unconstitutional. However, this Court upholds 2 CMC § 4982(a) & (c), and reserves for later proceedings the question of whether the violative provision is an integral part of the lease. If it is not so found, the provision is severable under 2 CMC § 4982(a) & (b).

So ORDERED this 22nd day of May, 1995.

ALEXANDRO C. CASTRO, Presiding Judge