

FOR PUBLICATION

**IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

IN THE MATTER OF THE ESTATE OF

YONG KYUN KIM,

Deceased.

RAN KIM and KYUNG-RAN KIM,

Appellants

v.

HYUNG GON KIM,

Appellee

Cite as: *In re Estate of Yong Kyun Kim*, 2001 MP 22

Appeal No. 99-023/Civ. Action No. 97-1178B

Argued and submitted December 12, 2000

Decided December 20, 2001

OPINION

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BEFORE: MIGUELS. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice;
and VIRGINIA SABLAN-ONERHEIM, Justice *Pro Tempore*

CASTRO, Associate Justice:

¶1 [1,2] Ran Kim [hereinafter Ran] and Kyung-Ran Kim [hereinafter Kyung-Ran] timely appeal the Superior Court's ruling regarding the estate of their father, Yong Kyun Kim [hereinafter Decedent]. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands and 1 CMC § 3102(a). We affirm.

ISSUE PRESENTED AND STANDARD OF REVIEW

¶2 The issue before this Court is whether the trial court erred in finding that Decedent's stock was effectively transferred to his sons during his lifetime.¹

¶3 [3] This is a question of fact, which we review for clear error. *See Rogolofoi v. Guerrero*, 2 N.M.I. 468, 474 (1992).

FACTUAL AND PROCEDURAL BACKGROUND

¶4 According to the trial court, Decedent died intestate on March 20, 1997, in Seoul, Republic of

¹ The parties presented additional questions pertaining to the alternative bases for the trial court's ruling. Because we affirm on this issue, we need not reach the others. We note for the record, however, that we disapprove the lower court's alternative reasoning. Its use of 5 CMC § 8307 is unsound. Section 8307 provides that if a certificated security is delivered without an indorsement, "against the transferor, the transfer is complete upon delivery," a provision which bears no relevance to the present case, wherein the transferor is Deceased. Furthermore, we do not ratify the trial court's implication that potential forgery is a mere technical defect.

Korea, leaving assets in Saipan, Commonwealth of the Northern Mariana Islands [hereinafter CNMI]. Decedent was a resident of Saipan. He was survived by his wife, Tae-Bong Kim [hereinafter Tae-Bong], their two sons, Hyung Gon Kim [hereinafter Hyung Gon] and Soo-Gon Kim [hereinafter Soo-Gon], and Decedent's two daughters, Kyung-Ran and Ran.

¶5 On February 5, 1998, Hyung Gon was appointed administrator of Decedent's estate. On September 22, 1998, Hyung Gon filed the First Inventory of Decedent's estate and a Petition for Final Distribution and to Close the Estate.

¶6 Ran objected to the First Inventory on the grounds that it did not include 378,000 shares of stock in MariSai, Inc. [hereinafter MariSai], which, she asserted, her father owned at the time of his death.² As administrator, Hyung Gon maintained that Decedent had transferred the shares during the Decedent's lifetime.

¶7 An evidentiary hearing was held on March 16, 1999. The trial court found that, after learning he was seriously ill in December of 1996, Decedent told his wife that they should transfer all of the MariSai shares to their sons. Decedent proceeded to place a telephone call to Hyung Gon to say that both parents were transferring their MariSai stock to Hyung Gon and Soo-Gon. At his father's request, Hyung Gon drew up several documents to memorialize and record the stock transfer. The documents were delivered to Decedent in Korea, Decedent signed the documents, and the documents were delivered back to Saipan.

¶8 Despite the efforts of Decedent's daughters to show otherwise, the trial court found that Decedent had indorsed his shares of MariSai stock in favor of his sons, and that the stock certificates had been

² MariSai is a CNMI corporation. In 1996, Decedent and his wife were the only shareholders of MariSai, with 378,000 and 12,000 shares, respectively.

delivered to Hyung Gon and Soo-Gon, thereby effecting a transfer.

ANALYSIS

¶9 [4,5] Pursuant to Commonwealth Rule of Civil Procedure 52(a), this Court cannot set aside the factual findings of the trial court unless such findings are clearly erroneous. “A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake. . . . The test is whether the trial court could rationally have found as it did, rather than whether the reviewing court would have ruled differently.” *Rogolofoi*, 2 N.M.I. at 476 (citation omitted); *see also In re Estate of Rofag*, 2 N.M.I. 18, 31 (1991). The burden is on appellant to convince this Court of such error. *See Cabrera v. Cabrera*, 3 N.M.I. 1, 8 (1992); *Pangelinan v. Unknown Heirs of Mangarero*, 1 N.M.I. 387, 393 (1990).

¶10 [6] Furthermore, Rule 52 states, “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Com. R. Civ. P. 52(a). As the United States Supreme Court instructs, with regard to the parallel Federal Rule, “when a trial judge’s finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story . . . that finding, if not internally inconsistent, can virtually never be clear error.” *Anderson v. City of Bessemer City*, N.C., 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985).

¶11 [7] Under the Uniform Commercial Code [hereinafter U.C.C.], which has been adopted in the CNMI, *see* Title 5 of the Commonwealth Code, transfer of a certificated security, such as the MariSai stock, is effectuated by indorsement and delivery. *See* 5 CMC §§§ 8102, 8307, 8309. Here, only indorsement is challenged. In any action on a security, “[i]f the effectiveness of a signature is put in issue, the burden of establishing it is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.” 5 CMC § 8105(3)(b).

¶12 [8,9,10] By definition, such a presumption means that “the trier of fact *must find* the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.” 5 CMC § 1201(31) (emphasis added). The rebuttable presumption is an evidentiary tool, “attaching to proven evidentiary facts certain procedural consequences as to the opponent’s duty to come forward with other evidence.” *Legille v. Dann*, 544 F.2d 1, 5 (D.C. Cir. 1976). It does not shift the burden of proof in the sense of the risk of nonpersuasion, but only reassigns the initial burden of production. *See* Com. R. Evid. Rule 301; *Gay v. Waiters’ and Dairy Lunchmen’s Union, Local No. 30*, 694 F.2d 531,543 n.11 (9th Cir. 1982). Consequently, once rebuttal evidence is introduced the presumption disappears. *See Nunley v. Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995) (explaining the “bursting bubble” approach, embodied in Rule 301 of the Rules of Evidence). At that juncture, the party claiming under the signature must establish its validity “by a preponderance of the total evidence.” U.C.C. § 3-307, comment 1.³

¶13 [11] The strength of evidence required to rebut the presumption differs among jurisdictions. *See, e.g., Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F. Supp. 208, 211 (S.D.N.Y. 1985); *Looman v. Rockingham Nat’l Bank*, 265 S.E.2d 711, 712 (Va. 1980); *Freeman Check Cashing, Inc. v. State*, 412 N.Y.S.2d 963, 965 (N.Y. Ct. Cl. 1979). The Official Comment to the U.C.C. states that the evidentiary showing by the party denying a signature’s validity “need not be sufficient to require a directed verdict in his favor, but it must be enough to support his denial by permitting a finding in his favor.” U.C.C. § 3-307, comment 1. In other words, the rebuttal evidence must be sufficient to

³ Comment 1 to U.C.C. § 8-105, regarding securities, instructs that “the particular roles stated in section 3-307 for the negotiable instruments governed by Article 3 are adapted to securities.” Thus, to construe the “presumption” established by § 8-105(2)(b), the analog to 5 CMC § 8105(3)(b), it is helpful to refer to U.C.C. § 3-307 and its comments.

permit, yet not require, a finding of forgery or deceit. *See First Nat'l Bank in Marlinton v. A.A. Blackhurst*, 345 S.E.2d 567, 572 (W. Va. 1986); *Bates & Springer, Inc. v. Stallworth*, 382 N.E.2d 1179, 1186 (Ohio Ct. App. 1978).

¶14 [12] Appellants contend that Decedent's signature on the MariSai stock is not genuine. A genuine signature is one which is "free of forgery or counterfeiting." *See* 5 CMC § 1201(18). This means that any party contesting an indorsement on a security must furnish some evidence of falsification or deceit. *See United Pacific Ins. Co. v. Idaho First Nat'l Bank*, 378 F.2d 62, 69 (9th Cir. 1967) (the essence of a counterfeit is that it purports to be something which it is not). By presenting signed certificates, Appellees established a prima facie case of genuineness. It was, therefore, incumbent upon Ran and Kyung-Ran to convince the trial court of the possibility of a forgery or counterfeit in order to force Hyung Gon and Soo-Gon to prove the authenticity of the signatures.

¶15 Appellants themselves testified, and they presented the testimony of a handwriting analyst. The trial court weighed this evidence, but reasoned that Ran and Kyung-Ran did not have first-hand knowledge of the events surrounding the stock transfer. Additionally, while the handwriting analyst demonstrated that the signatures on the stock certificates did not match Decedent's signature on earlier documents, he could not say that the signatures were forged, particularly in light of Decedent's failing health at the time. Tae-Bong, on the other hand, testified that she witnessed Decedent's indorsement of the certificates. The trial court found Tae-Bong's testimony persuasive.

¶16 [13] Notwithstanding the trial court's failure to analyze this issue within the framework of 5 CMC § 8105(3)(b), its decision is not in doubt. Having considered all of the evidence, the court chose to credit the testimony of Tae-Bong. Appellants may have been successful in rebutting the presumption that Decedent's indorsement of the stock certificates was genuine. Nevertheless, in the judgment of the trial

court, the preponderance of the evidence showed the signatures free of forgery or counterfeiting. Therefore we must affirm. To do otherwise would be to impermissibly substitute our own findings for those of the trial court.

CONCLUSION

¶17 Ran and Kyung-Ran appeal the trial court's finding that Decedent indorsed the MariSai certificates, thereby effecting a transfer to Hyung Gon and Soo-Gon. The court considered Appellants' evidence, but concluded that the challenged signatures were genuine. Because the trial court's findings are rational and consistent, we cannot say that the decision was clearly erroneous.

¶18 ACCORDINGLY, we AFFIRM the trial court's decision in favor of Appellees.

SO ORDERED this 20th day December 2001.

/s/ _____
MIGUEL S. DEMAPAN, Chief Justice

/s/ _____
ALEXANDRO C. CASTRO, Associate Justice

/s/ _____
VIRGINIA SABLAN-ONERHEIM, Justice *Pro Tempore*