

**FOR PUBLICATION**

**APPEAL NOS. 01-026-GA and 01-043-GA  
CONSOLIDATED**

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

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**KTT CORP.,**

**Plaintiff-Appellee,**

**v.**

**MARIA DLG. TOMOKANE,**

**Defendant-Appellant.**

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**OPINION**

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**Cite as: *KTT Corp. v. Tomokane*, 2003 MP 17**

Civil Case No. 97-0349

Argued February 21, 2003

Decided December 4, 2003

Attorney for Appellant:  
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BEFORE: DEMAPAN, Chief Justice; BELLAS and ONERHEIM, Justices *Pro Tempore*.

DEMAPAN, Chief Justice:

¶1 Appellant Maria Dlg. Tomokane (“Maria”) appeals the trial court’s grant of summary judgment on the issue of whether she unreasonably withheld her consent to the transfer of a lease. Maria also appeals the trial court’s award of damages. 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 the trial court’s grant of summary judgment, and reverse and remand the damages award.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 The facts in this case are undisputed. In August 1990, Jose (“Jose”) and Maria Tomokane, husband and wife, leased a parcel of property - Tracts No. 21073 and 21074, in Garapan - to KTT Corporation (“KTT”). Jose and Maria each signed the lease, which contained a clause - Paragraph 13 - giving KTT the right to “assign or sublet this Lease” only with the written consent of Lessors, and provided that “written consent by Lessors may not be unreasonably withheld.” Excerpts of Record (E.R.) at 13.

¶3 Jose died intestate in August 1995. Maria was made Administratrix of Jose’s estate, and at the end of March 1997, Maria was found to be the sole owner of the property leased to KTT.

¶4 In August 1996, KTT requested Maria’s consent to assign the lease to Nakamoto Development, Inc. (“Nakamoto”), a Japanese company which was interested in building a hotel on the leased property. Maria declined to consent to the assignment. She explained that she did not want to consent to the transfer while her husband’s estate was

in probate. In September 1996, KTT again requested Maria’s consent to the lease assignment. Maria again declined to consent, and instructed KTT that Frances Borja (“Frances”) would henceforth represent her in this matter. Twice in March 1997, and once in early April 1997, KTT asked Frances for consent to the assignment and each time Frances refused to consent to the lease. KTT and Nakamoto were informed by Frances, as well as by Maria’s lawyer, Juan T. Lizama, that Maria would not consent to the assignment because she believed that the original lease violated Article XII of the NMI Constitution.

¶5 On April 3, 1997, KTT filed suit against Maria for damages arising out of her refusal to consent to the lease assignment. On June 10, 1997, KTT moved for partial summary judgment, and this motion was granted on September 21, 1998. (Part of the court’s summary judgment order required Maria to consent to the assignment, which she did on September 29, 1998.) The trial court issued a judgment of \$4,667,349.86 against Maria on August 9, 2001. Maria timely appeals this judgment, and the trial court’s denial of her post-trial motions. The two appeals have been consolidated.

#### **ISSUES PRESENTED AND STANDARD OF REVIEW**

¶6 The issues presented for our review are:

1. Did the trial court err in granting partial summary judgment? We review grants of summary judgment *de novo*. *Furuoka v. Dai-Ichi Hotel*, 2002 MP 5 ¶3.
2. Did the trial court improperly admit Exhibit 20 and the post-trial evidence on supplemental damages? We review a trial court’s decision to admit or exclude evidence for abuse of discretion. *Norita v. Norita*, 4 N.M.I. 381, 383 (1996).

3. Is KTT barred from recovering any damages from Maria as a matter of law?

We review *de novo* a court's conclusion that damages are available as a matter of law. See *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001).

4. Was the trial court's award of damages proper? We review a trial court's award of damages to see whether the award is clearly erroneous. *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 54 (1993).

5. Did the trial court err in denying Tomokane a new trial? We review the court's denial of a motion for a new trial for manifest or gross abuse of discretion. *Santos v. Nansay Micronesia, Inc.*, 4 N.M.I. 155, 160 (1994).

#### ANALYSIS

1. The trial court did not err in granting summary judgment.

¶7

Maria advances three arguments in support of her contention that the trial court erred in granting summary judgment: that the issue of whether Maria's refusal to consent to the lease assignment was unreasonable is a question of fact, and should thus have been left to the trier of fact; that the trial court erred in finding that Maria had the authority to consent to the lease assignment; and that KTT failed to prove that it sought Maria's written consent to the lease. As discussed below, we find that the trial court did not err in granting summary judgment on the issue of whether Maria unreasonably withheld consent to the lease transfer.

¶8

Maria contends that "the court wrongly decided the issue of whether [Maria] unreasonably withheld consent as a matter of law. The issue is one of fact." Opening Brief ("O.B.") at 12. In support of this contention, Maria lists four cases from other

jurisdictions in which state courts have held that the question of whether a landlord unreasonably withheld consent to the assignment of a lease is a question of fact. However, the cases Maria cites for the proposition that summary judgment may never be granted on the issue of whether a landlord's refusal to grant consent to a lease transfer are not dispositive. While questions of reasonableness are generally left to the trier of fact, courts have also held that a landlord behaves unreasonably as a matter of law when consent to a lease transfer is withheld for subjective, personal concerns, and not for objectively reasonable commercial grounds. *See, e.g., Toys "R" Us, Inc. v. NBD Trust Co. of Illinois*, No. 88-C10249, 1995 U.S. Dist. LEXIS 14878, at \*109-12 (N.D. Ill. Sep. 29, 1995). *See also Economy Rentals, Inc. v. Garcia*, 819 P.2d 1306, 1313-17 (N.M. 1991); *Stern's Gallery of Gifts, Inc. v. Corp. Property Investors, Inc.*, 337 S.E.2d 29, 38 (Ga. Ct. App. 1985). Thus, we disagree with Maria's contention that question of reasonableness may never be decided by a court entertaining a summary judgment motion.

¶9

Maria next contends that consent to the lease transfer was reasonably withheld because at the time KTT requested consent, Maria did not possess the “[a]uthority and power to consent to the assignment of the Property.” O.B. at 10. In support of this contention, Maria argues that “Jose Tomokane has heirs other than his wife. KTT never sought to obtain the consent of all of Jose Tomokane’s heirs. KTT only contacted [Maria] Tomokane. [Maria] Tomokane could not consent to the assignment or take any action on behalf of the heirs in connection with the Property prior to it being distributed by the probate court. (citations to the record omitted)” E.R. at 10. We disagree with Maria’s characterization of her power to consent to the lease assignment.

¶10 At the time KTT first sought Maria’s consent to the lease transfer, Maria was administratrix of Jose’s estate, and as such, it was her duty to consent to the lease transfer unless there was a valid commercial reason for withholding that consent. “Contractual obligations which survive the death of the obligor are binding on his executor in his representative capacity and enforceable against the estate, and it is the duty of the executor to carry out such contracts and compliance may be enforced unless they are personal in nature and personal performance by the decedent is of the essence of the contract.” *In re Estate of Spann*, 520 S.W.2d 286, 290 (Ark. 1975) (citing 31 AM. JUR. 2D *Executors and Administrators* § 158 (1989); 33 C.J.S. *Executors and Administrators* § 189 (1942)).

¶11 Additionally, even were it necessary to secure the other heirs’ consent, KTT was specifically informed by Maria not to seek the consent of Jose’s other heirs. On August 7, 1996, Mr. Masaji Nakamoto – President of KTT – was sent a letter by then-attorney Juan T. Lizama, Maria’s legal representative, asking him “[t]o cease communicating with Mrs. Tomokane with respect to the properties in Garapan described as Tract No. 21073 and 21074 . . . [M]rs. Tomokane and her children are not prepared to consent to the assignment of the lease at this time.” E.R. at 833. When Maria stood squarely in the way of consent being granted by Jose’s other heirs, it is the epitome of disingenuousness for her later to claim that KTT did less than it could to secure the consent of the heirs.

¶12 Finally, Maria argues that while it is uncontested that KTT repeatedly requested Maria’s consent to the assignment, “KTT failed to prove that it sought to obtain Tomokane’s *written* consent.” O.B. at 11 (emphasis added.). Maria posits that “this failure precluded KTT from establishing entitlement to partial summary judgment.” OB.

at 12. This argument fails for two significant reasons. The first is factual: the evidence clearly shows that at least once, Maria was asked for her written consent to the lease transfer. E.R. at 470-78. But even had Maria not been specifically asked for her written consent, KTT would still have been entitled to summary judgment. There is no legal requirement that a tenant specifically ask for written consent (as opposed to any other kind of consent) to a lease transfer when it has already made explicitly clear that any effort to secure the landlord's consent is in vain. *See, e.g., Stern's Gallery of Gifts, Inc.*, 337 S.E.2d at 28.

2. The trial court erred in admitting Exhibit 20.

¶13 Exhibit 20 is a non-itemized compilation of literally hundreds of documents, including restaurant receipts, lawyers' bills, airline tickets, untranslated documents written in Japanese, and much more. E.R. at 216-391. The exhibit also includes a summary, prepared by KTT's expert on the issue of damages, David J. Burger ("Burger"), in connection with his expert testimony. *See* E.R. at 216, 219, 220-21, 267-68, 372, & 389-90. The documents contained in Exhibit 20 formed the basis of Burger's expert opinion on the issue of damages and were examined in creating his report on losses sustained by KTT as a result of Maria's unreasonable withholding of consent to the lease transfer. During the trial, Burger testified at length about the documents in Exhibit 20 and how he used them to arrive at his damages calculation.

¶14 At trial, Maria objected to the admission of Exhibit 20 on the grounds that KTT had not:

established that these documents are accurate records of KTT kept in the ordinary course of business. So we don't object to the testimony but to the documents themselves coming in that's what we have a problem with. There's not been an accurate foundation laid for the authenticity of the

documents themselves to be admissible, your Honor . . . [Burger] is relying on out of court representation made to him concerning the veracity of these documents. We have not had the testimony in court concerning the veracity of these underlying documents, your Honor. That's my objection to all these documents coming in. Nobody has testified who works with the corporation stating they were true and accurate documents. They were prepared, they were kept in the ordinary course of business and the person is the custodian of these documents and they were produced to Mr. Burger in that form. We have nothing like that your Honor, before this court.

E.R. at 714-15, 753-54.

¶15 There was, in fact, no testimony as to the validity of the documents contained in Exhibit 20. Burger, the only witness who testified about Exhibit 20, admitted that he had no way of knowing whether Exhibit 20 contained valid documents, but rather relied on KTT's representations to him that the documents are valid. E.R. at 724-26. Despite this, the trial court admitted Exhibit 20 in its entirety, without explanation. E.R. at 758.

¶16 Were the court to have admitted Exhibit 20 for the sole purpose of providing the foundation of Burger's testimony, its admission would not have been in error. However, the trial court clearly relied extensively – if not solely – on Exhibit 20 in determining the amount of damages to award to KTT. In its Conclusions of Law, the trial court wrote:

The losses incurred by KTT as detailed in Exhibit 20, for legal expenses, lost investment income, travel expenses, management expense and professional fees expenses, in the total amount of \$4,620, 166.46, are reasonable, they are the result of Tomokane's breach of the terms of paragraph 13 of the KTT/Tomokane Lease and Tomokane is therefore liable to KTT Corporation for the full amount of those losses, the sum of \$4,620,166.46.

E.R. at 47.

¶17 Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted.” Com. R. Evid. 801(c). Hearsay is inadmissible except as provided by the rules or by law. Com. R. Evid. 802; *Tropical Isles Cable TV Corp. v. Mafnas*, 1998 MP 11 ¶11, 5 N.M.I. 174, 176. In this case, Exhibit 20, consisting of many hundreds of documents, purportedly the record of KTT’s losses incurred as a result of Maria’s failure to consent to the lease transfer, is clearly hearsay. It was error for the trial court to admit Exhibit 20 without establishing its admissibility under a hearsay exception.<sup>1</sup>

3. KTT is entitled to damages as a matter of law.

¶18 Maria advances four arguments in support of her contention that KTT is not entitled to any damages as a matter of law. We will address each in turn.

¶19 First, Maria argues that under the doctrine of judicial estoppel, KTT is precluded from any award of damages at all. As discussed below, we disagree.

¶20 Under the doctrine of judicial estoppel, courts may disregard a party’s argument when it contradicts an argument that party has previously made. In *Saipan Lau Lau Development Corporation*, the only case in which this Court has invoked the doctrine of judicial estoppel, we relied on a California case to explain this doctrine in further detail:

In *Hayley v. Dow Lewis Motors, Inc.*, 5 Cal. Rptr 2d 352, 360 (1999), a California appellate court explained the doctrine of judicial estoppel:

Judicial estoppel, sometimes called the doctrine against the assertion of inconsistent positions, is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding. It is designed to prevent litigants from playing fast and loose with the courts.

....

Asserting inconsistent positions does not trigger application of judicial estoppel unless intentional self-contradiction is used as a means of obtaining unfair advantage. Thus, the doctrine of judicial estoppel does not apply when the prior position was taken because of a good faith mistake rather

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<sup>1</sup> The possibility exists that on remand, KTT will establish that Exhibit 20 should be admitted under a hearsay exception.

than as part of a scheme to mislead the court. An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing.

*Saipan Lau Lau Dev. Corp. v. Superior Court*, Org. NO. 00-001 (N.M.I. Sup. Ct. Dec. 1, 2000) (Opinion at 9).

¶21 More recently, in *New Hampshire v. Maine*, 532 U.S. 742, 749-51, 121 S. Ct. 1808, 1814 149 L. Ed. 2d 968, 978 (2001), the United States Supreme Court has further discussed the doctrine of judicial estoppel:

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

....

Courts have observed that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

(Citations and quotations omitted.)

¶22 In this case, Maria contends that the evidence of KTT's playing "fast and loose" with the courts is a 1992 declaration of Kazou Kobayashi ("Kobayashi"), President of KTT, in which Kobayashi declared that KTT could not assign its lease with Maria until and unless KTT was successful in another lawsuit, this one against Yoshida.

Given the sworn representation of KTT in *Yoshida*, KTT can not [sic] maintain in this case that successful resolution of the *Yoshida* lawsuit was not a condition to or prerequisite of the assignment taking place. Such inconsistent positions require invocation of the judicial estoppel as KTT is simply ‘playing fast and loose’ with the courts on the same issue in two different lawsuits.

O.B. at 16 (citations omitted).

¶23 To begin, we note that it is not even clear whether the assignment in question in the *Yoshida* case and the assignment in question in this case are the same assignment. Maria claims that they are the same assignment, and KTT claims that they are not; however, neither party presents citations to the record to support one position or the other. And even if this case and *Yoshida* concern the same lease assignment, Maria has utterly failed to prove the *New Hampshire* elements. We will not apply the equitable doctrine of judicial estoppel where a party has merely shown that an inconsistent statement may have been uttered, but has not shown that the other elements counsel in favor of applying the doctrine.

¶24 Maria next argues that KTT is not entitled to damages as a matter of law because the verification of purchase did not constitute a contract.

Kobayashi, [sic] testified that KTT and Nakamoto believed the consent of Jose and Maria Tomokane was needed prior to KTT having a contract with Nakamoto to assign the property . . . [T]hus, the ‘Certificate of Purchase’ was not an offer as Nakamoto and KTT both believed that KTT had to do more than accept the offer in order to formulate a bargain with Nakamoto.

O.B. at 19.

¶25 This argument is to no avail. While no one doubts that Maria’s consent was necessary in order for the actual lease transfer to take place, she is legally obligated to

pay damages for the harm she caused in unreasonably withholding that consent. Maria has presented no evidence or case law which would lead to any other conclusion.

¶26           Considering Maria’s previous argument concerning judicial estoppel, it is ironic that Maria next argues that KTT is not entitled to damages as a matter of law because her consent was not required in order for KTT to assign the lease to Nakamoto. Maria’s dubious argument is that had the assignment taken place without her consent, it would not have been voidable, but merely – in the words of one of the non-precedential cases she cites to bolster this absurd argument: “may render the assigning party liable in damages to the non-assigning party.” *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 442 (3rd Cir. 1999). “Paragraph 13 does not contain the mandatory language required to invalidate an assignment made without the Tomokanes’ consent. Thus, the KTT Lease could be validly assigned without the consent of Jose and Maria Tomokane.” O.B. at 21-22.

¶27           Maria’s argument is preposterous. Even if KTT could have assigned the lease without Maria’s consent, merely opening itself up to liability from both the assignee and Maria, but successfully transferring the lease, we cannot conceive of any corporation’s shareholders or directors permitting it to enter into such a lease, fraught with financial pratfalls. Given that no reasonable person could expect a corporation to open itself up to such liability, Maria is still liable for the actual damages she caused by unreasonably withholding her consent to the lease transfer, thus causing the deal between KTT and Nakamoto to fall through.

¶28           Maria’s final argument that KTT is not entitled to damages because any harm that came to it from Maria’s failure to consent was brought about by its own actions when it

chose not to assign the lease without her consent – relies on Maria’s contention that the lease assignment was valid even absent Maria’s consent. As stated above, we find this argument disingenuous and wrong, and do not agree with Maria’s attempt to pin blame on KTT for her own unreasonable failure to consent to the lease assignment.

4. The trial court’s award of damages was clearly erroneous.

¶29 For the reasons discussed above in section 2, we find that the trial court improperly awarded KTT damages in the amount of \$4,667,349.86.

¶30 On review of the trial court’s award of damages, we look to see whether the award is clearly erroneous. *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 54 (1993). In this case, the only evidentiary support for the trial court’s substantial award is the expert opinion of a witness who cannot testify as to the veracity of the documents on which his opinion is based. With this scant basis, we cannot find there is any factual basis for the trial court’s award of damages.

¶31 We remand the issue of damages because the trial court based its damages award on improperly admitted evidence. However, in remanding the damages portion of the trial court’s decision, we note that the trial court should not merely examine Exhibit 20 to see whether it ought to be admitted as evidence under an exception to the hearsay rule. The trial court should begin its damages calculations anew and grant KTT sufficient damages to remedy Maria’s failure to consent to the lease. The damages should be calculated for breach of contract, with evidence presented by both KTT and Maria. *See, e.g., Dornfeld v. Hom*, No. SPH0101-58760HD, 1991 Conn. Super. Ct. LEXIS 1218 (1991) (A breach of a lease by a landlord’s unreasonable failure to grant consent to a

transfer or assignment is governed by contract law, and damages should be calculated for breach of contract.).

5. The trial court did not err in denying Maria a new trial.

¶32

Maria argues that:

it can not be disputed that Tomokane has been actually prejudiced by the denial of her motion for a new trial. For sure, the record shows that partial summary judgment on the liability issue was incorrect and as a result she is facing a judgment in excess of \$4 Million Dollars [sic]. Even more so, the basis for the award of damages was clear error . . . [S]ince the prejudice stems from an incorrect application of law, the admitting of inadmissible evidence over objection, and from the verbatim adoption of KTT's proposed findings of fact and conclusion of law, Tomokane could not have prevented the prejudice. The Superior Court should have granted Tomokane a new trial.

O.B. at 39-40.

¶33

It is impossible for this court to say whether the trial court manifestly abused its discretion in denying Maria's motion for a new trial for two reasons. First, Maria has failed to include in her Excerpts of Record a copy of the motion or of the trial court's denial of it. Second, we disagree that partial summary judgment on the issue of liability was incorrect; to the contrary and for reasons discussed in the first part of this Opinion, we find that partial summary judgment on this issue was plainly warranted.

#### **CONCLUSION**

¶34

For the foregoing reasons, we **AFFIRM** the trial court's partial summary judgment order, and **REVERSE** the trial court's award of damages. We hereby remand for further proceedings consistent with this opinion.

**SO ORDERED** this 4 th day of December, 2003.

/S/

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MIGUEL S. DEMAPAN, CHIEF JUSTICE

/S/

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TIMOTHY H. BELLAS, JUSTICE *PRO TEMPORE*

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VIRGINIA SABLAN ONERHEIM, JUSTICE *PRO TEMPORE*