

Juan B. BLANCO, et al
vs.
NAURU LOCAL GOVERNMENT
COUNCIL

Appellate Action No. 83-9002
District Court NMI
Appellate Division

Decided November 19, 1985

1. Arbitration - Stay of Court Proceedings

The trial court did not err in denying a motion to stay proceedings and compel arbitration when the moving party did not proceed with arbitration as required by the lease.

2. Attorneys Fees - Appeal and Error

In order to reverse the trial court's award of attorney's fees and costs, the Appellate Division must find an abuse of discretion.

3. Jury - Civil Actions

The trial court did not err in denying plaintiff right to a jury trial in action to recover possession of real property where the forfeiture issue was correctly disposed of by the court as a matter of law and where, additionally, the plaintiffs waived the breach and forfeiture issue by accepting rental payments and continuing with the terms and conditions of the lease.

1 DISTRICT COURT FOR THE
2 FOR THE
3 NORTHERN MARIANA ISLANDS

4 APPELLATE DIVISION

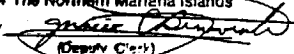
4 JUAN B. BLANCO, et al.,)
5 Plaintiffs-Appellees,)
6 vs.)
7 NAURU LOCAL GOVERNMENT)
8 COUNCIL,)
9 Defendant-Appellant.)

DCA NO. 83-9002

OBINLOH
Clerk
District Court

NOV 19 1985

For The Northern Mariana Islands

By 
(Deputy Clerk)

11 BEFORE: DUENAS, LAURETA and WEIGEL*, District Judges

12 DUENAS, District Judge:

13
14 STATEMENT OF THE CASE

15 Plaintiffs Juan B. Blanco, Josephine B. Akiyama, Juana
16 B. Borja and Maria Kamiyama filed a complaint against Nauru Local
17 Government Council on September 29, 1982, alleging breach of a
18 lease agreement entered into by the parties for land on which the
19 Nauru building in Saipan is situated. Plaintiffs requested that
20 said lease agreement be terminated, and that they be entitled to
21 recovery of the leased property in question, reasonable
22 attorney's fees, costs of suit and a jury trial.

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26 *Hon. Stanley A. Weigel, United States District Judge, Northern
District of California, sitting by designation.

1 Defendants, represented by Attorney George Allen, filed
2 a motion for a preliminary injunction to enjoin Plaintiffs from
3 any interference in the operation of the Nauru Building pending
4 this litigation. The court heard and denied said motion on
5 October 14, 1982, stating that Defendant had not shown
6 irreparable injury.

7 In the beginning of the hearing on October 14, 1982,
8 Defendant's counsel represented that a motion to compel
9 arbitration or in the alternative, for the court to appoint an
10 appraiser, would be brought at a later date. Later in this
11 hearing, Defendant's counsel stated:

12 "I would suggest, I don't think it matters
13 greatly whether the mechanism for resolution
14 of this value question is appraisal, is arbi-
15 tration, or is determination by citizens of
16 the Northern Mariana Islands as represented by
a jury. My client is perfectly happy to take
its chances with a jury of people of this
community . . ." (Transcript, p.25).

17 Defendant's counsel, Mr. Allen, then stated toward the end of
18 this hearing that

19 "[w]e're quite prepared to go bypass
20 appraisal, arbitration, all of that
21 and just go right in and determine
with the jury what the value is. . . ."
(Transcript, p.31)

22 Defendant's counsel stated that he would just as soon
23 set a trial date at that time, and the court set the trial for
24 December 13, 1982. (Transcript, p.34).

25 On October 27, 1982, Defendant filed its answer.

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1 On December 9, 1982, Defendant, represented by Attorney
2 Artabane, filed a Motion to Stay Suit and Compel Arbitration
3 pursuant to Article 3 of the lease agreement. A hearing on said
4 motion was held on December 10, 1982, and the court denied
5 Defendant's motion to stay suit and compel arbitration on the
6 following grounds:

7 1) that the Federal Arbitration Act (Title 9
8 U.S.C. § 1 et seq.) does not apply since Article 3
9 in the lease agreement is clearly an appraisalment
10 clause, not an arbitration clause; and there is no
11 evidence in the contract showing that this is a
12 transaction involving commerce;

13 2) that over two years has elapsed since the
14 provisions in Article 3 were to be complied with
15 and there is no evidence that either party appointed
16 or relied on an appraiser until a suit was filed;
17 and

18 3) that there was a direct waiver of arbitra-
19 tion by Mr. Allen, counsel for Defendant, at the
20 hearing on October 14, 1985, when he stated twice
21 in open court that Defendant was agreeable to submit
22 it to the jury. (Transcript: December 10, 1982,
23 Motion to Compel, pp. 27-34).

24 A pretrial conference was held on December 10, 1982,
25 and the court determined that it would not submit the issues of
26 breach or material breach of the covenants of the lease agreement
to the jury. The court determined as a matter of law that
forfeiture of the land would not be granted. The parties
stipulated to the following facts:

1 1) On March 10, 1981, the parties agreed to
2 increase the monthly rental by \$1,000. per month
3 from May 1, 1980, and to effectuate this agreement
4 Defendant paid \$11,000. for the 11 months
5 from May 1, 1980 to April 1, 1981, and agreed to
6 pay \$3,000. per month from April 1, 1981, until
7 such time as ongoing negotiations between the
8 parties resulted in a permanent rental increase.
9 (Transcript: Dec. 10, 1982, p.52 and 53).

1 2) That the second term (10 years) of the
2 lease agreement commenced May 1, 1980.
(Transcript: December 10, 1982, p.68).

3 On December 13, 1982, Plaintiffs moved to amend their
4 complaint to set forth the bad faith of Defendant and the court
5 denied the motion.

6 A jury trial was conducted from December 13-15, 1982.
7 The issues presented to the jury were as follows:

8 1) The monthly rental value of the property
9 in question;

10 2) the date the monthly rental rate shall
11 commence; and

12 3) the date interest, if any, shall accrue
13 on the payments due Plaintiffs.

14 (Transcript: December 15, 1982, p. 135-143).

15 The jury rendered the following verdict on December 15, 1982:

16 Defendant was to begin paying rent as of
17 January 1, 1983, in the amount of \$3,902.
18 (No back rent or interest was awarded by the
19 jury.)

20 On December 22, 1982, a hearing was held for the
21 setting of attorney's fees and costs. The court, in an order
22 dated December 27, 1982, awarded Plaintiffs attorney's fees and
23 costs as the prevailing party in the amount of \$8,953.85.

24 Timely notices of appeal and cross appeal were filed.

25 STATEMENT OF THE FACTS

26 This action concerns the ground lease of the land on
which the Nauru Building in Saipan is situated. A lease
agreement was executed by and between Plaintiffs and Defendant,
whereby Plaintiffs leased certain real property on Saipan to

1 Defendant for a sixty (60) year term. After execution of the
2 lease, Defendant constructed at its own cost the seven-story
3 Nauru Building now situated on the subject leased property.

4 By the terms of the lease, it was to commence and
5 become effective at midnight on the day it was approved by the
6 High Commissioner of the Trust Territory of the Pacific Islands.
7 The lease was approved by the High Commissioner on December 16,
8 1975, and this was the commencement date of the first term. The
9 lease provided for rental payments of \$2,000. per month for the
10 first five years and for the next 10-year term, i.e. December 17,
11 1980 to December 16, 1990, the rental was to be "equal to the
12 prevailing rental rates for comparable properties. . . ." The
13 rental value for intervals of ten and five years over the
14 remaining 45-year lease were to be similarly determined.

15 The parties have been unable to agree upon a permanent
16 rental rate for the 10-year term from December 17, 1980, to
17 December 16, 1990. The parties did, however, enter into an
18 agreement on March 10, 1981, to increase the monthly rental by
19 \$1,000. per month from May 1, 1980, and to effectuate this
20 agreement Defendant paid \$11,000. for the 11 months from May 1,
21 1980 to April 1, 1981, and agreed to pay \$3,000. per month from
22 April 1, 1981, until such time as ongoing negotiations between
23 the parties resulted in a permanent rental increase.

24 Plaintiffs then filed suit on September 29, 1982, for
25 termination of the lease agreement and forfeiture.
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I.

The first issue to be addressed by this Court involves Article 3 of the Lease Agreement. Article 3 provides in pertinent part as follows:

"The lease rents for the thirty (30) year renewal period shall be as follows:

a. For the first five (5) years of the renewal term, the monthly rental shall be the same as the last five (5) years of the initial term as stated in (c) above.

b. For the next ten (10) years of the renewal term, the monthly rental shall be equal to the prevailing rental rates for comparable properties; provided, however, that said monthly rental shall not be less than the monthly rental as set forth in the preceding five year renewal term.

Comparable properties shall be defined and determined according to the standards recognized by one of the various professional societies of real estate appraisers; namely, SRA (Senior Realty Appraiser), SREA (Senior Real Estate Analyst), MAI (Member of American Institute of Real Estate Appraisers).

To establish the prevailing rental rates as set forth above, the parties shall meet at least ninety (90) days prior to the end of each of the five (5) or ten (10) year periods to determine the prevailing rental rates. If the parties are unable to agree to the prevailing rental rates at least seventy-five (75) days prior to the end of the applicable period, then the matter shall be submitted to arbitration. The matter shall be arbitrated by three (3) persons. One person shall be appointed by the Lessor and one person appointed by the Lessee, and these two (2) persons appointed by the Lessor and the Lessee shall then appoint a third person to complete the necessary board. The arbitrators shall be instructed to determine the prevailing rental rates for comparable lots according to the standards as set forth above. A majority ruling of the arbitrators, as to the prevailing rental rates, shall then establish the rent for the following term. In the event the

1 arbitrators are unable to agree as to the prevailing
2 rental rates at least forty-five (45) days prior
3 to the end of the applicable term, then the
4 prevailing rental rates shall be determined by
5 a qualified real estate appraiser who is a
6 member of one of the various professional
7 societies for real estate such as SRA, SREA and
8 MAI; or by a qualified real estate appraiser
9 whose opinions and appraisal reports are
10 acceptable to at least three (3) financial
11 institutions on Saipan, Mariana Islands. The
12 appraiser shall be instructed to determine the
13 prevailing rental rates by the end of the
14 applicable term of the lease. In the event the
15 appraiser is unable to complete the report within
16 the time frame then the lease rents for the
17 previous period shall continue, subject to
18 completion of the appraiser's report. Any
19 underpayment, if any, shall be paid immediately
20 by Lessee. All costs and expenses relating to
21 the arbitrators and the appraisers shall be
22 shared equally between the parties.

23 Defendant-Appellant argues that the trial court should
24 have stayed proceedings and compelled arbitration pursuant to
25 Article 3 of the Lease Agreement to determine the appropriate
26 rental value for the 10-year term commencing May 1, 1980, and
ending May 1, 1990. We disagree.

18 In addressing this issue, we shall assume, for the
19 purposes of this opinion, that Article 3 of the Lease Agreement
20 contains an arbitration clause.¹

21 Defendant-Appellant maintains that the trial court
22 erred in not compelling arbitration under the common law and/or
23 pursuant to the provisions of the Federal Arbitration Act, Title
24 9 U.S.C., Section 1, et seq. We again disagree. Upon careful
25 review of the record in this case, we determine that not only is
26 Defendant-Appellant in default in not complying with the Article

1 3 provisions of arbitration but that counsel for Defendant-
2 Appellant twice made a direct waiver of arbitration in open court
3 at the October 14, 1982 hearing before the trial court.

4 [1] As the Court in C.P. Robinson Construction Co., et al.
5 v. National Corporation for Housing Partnerships, 375 F. Supp.
6 446, 450 (M.D. N.C., 1974), stated:

7 "9 U.S.C. §§ 2 and 3 provide for a stay
8 of judicial proceedings when four conditions
9 are met. First, there is a written provision
10 for arbitration in the contract. Second,
11 the contract evidences a transaction involving
12 commerce. Third, the Court is satisfied that
13 the issue involved in suit is referrible (sic)
14 to arbitration under the written agreement.
15 Fourth, the applicant for the stay is not in
16 default in proceeding with such arbitration."

17 Without addressing any other conditions, it is clear that
18 condition number four has not been met. Pursuant to the
19 arbitration clause the parties to the lease agreement and to this
20 lawsuit were to meet 90 days prior to the end of the first
21 five-year term, that is, 90 days prior to December 15, 1980, to
22 determine the prevailing rental rates for the next 10 year term.
23 Then, if the parties were unable to reach an agreement as to the
24 prevailing rates at least 75 days prior to December 15, 1980, the
25 matter was to be submitted for arbitration to three arbitrators,
26 one appointed by lessor, one appointed by lessee and the third
appointed by the first two arbitrators. If the three arbitrators
were unable to agree as to the prevailing rental rates at least
45 days prior to December 15, 1980, then the prevailing rental
rates were to be determined by a qualified real estate appraiser.

1 The parties to this action certainly did not comply with this
2 provision; they neither appointed an arbitrator nor relied on the
3 arbitration clause until after this suit was filed on
4 September 29, 1982.

5 We, therefore, determine that the trial court did not
6 err in denying Defendant-Appellant's motion to stay proceedings
7 and compel arbitration.

8

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II.

10 The second issue raised by Defendant-Appellant is that
11 the trial court improperly rewrote the parties' lease agreement
12 by changing the commencement date for valuation purposes from
13 December 16, 1980, to May 1, 1980.

14 This issue can be easily disposed of since the parties
15 stipulated that the commencement date for the second term would
16 be May 1, 1980, and also stipulated to having the jury determine
17 the valuation issue as of that date. (Transcript, December 10,
18 1982, p.68).

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III.

21 Defendant-Appellant's last issue deals with attorney's
22 fees and costs. Defendant-Appellant argues that Plaintiffs are
23 not the prevailing party and are not entitled to attorney's fees
24 in the amount of \$6,500. and costs in the total amount of
25 \$2,453.85.

26 /////

1 [2] In order to reverse the trial court's award of
2 attorney's fees and costs, this court must find an abuse of
3 discretion. However, no such abuse is present in this case.

4 Plaintiffs prevailed on two issues. The first involved
5 the lessee's compliance with Article 9 of the lease agreement.
6 Article 9 requires the lessee to procure and deliver to the
7 lessor a liability insurance policy for the leased premises. The
8 court below correctly determined that compliance with the
9 provisions of Article 9 was solely due to Plaintiffs' commence-
10 ment of this action. The second issue involved the rental value
11 for the second term of the lease which the jury determined would
12 be increased by \$902. effective January 1, 1983.

13 The trial court took all matters into consideration and
14 awarded attorney's fees to only one of the three attorneys
15 representing Plaintiffs, and only for the work counsel performed
16 on the above two issues. There was clearly no abuse of
17 discretion by the trial court.

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19 IV.

20 On cross-appeal, Plaintiffs argue that the trial court
21 erred in not permitting the jury to determine the issues of
22 whether Defendant Nauru allegedly breached the lease agreement by
23 failing to provide Plaintiffs with a copy of the liability
24 insurance policy of the premises, in accordance with Article 9 of
25 the lease agreement, and whether such breach amounted to a
26 forfeiture of the leased premises pursuant to Article 13² of the

1 lease agreement. Article 9 of the lease agreement states as
2 follows:

3 Lessee covenants and agrees to save and keep
4 harmless the Lessor against all liabilities,
5 damages and claims to persons or property; and
6 in connection therewith, Lessee agrees to
7 procure and maintain in force during the term
8 of this lease, and any extension thereof, at its
9 expense, public liability insurance in companies
10 and through brokers authorized to do business on
11 Saipan in a minimum amount of one hundred thou-
12 sand dollars (\$100,000) for each person injured,
13 three hundred thousand dollars (\$300,000) for any
14 one accident, and fifty thousand dollars (\$50,000)
15 for property damage. Copies of such policies
16 shall be delivered to Lessor and shall contain
17 a clause stating that at least thirty (30) days
18 notice shall be given to Lessor prior to
19 cancellation or refusal to renew any such policies.
20 Lessee agrees that, if such insurance policies are
21 not kept in force during the entire term of this
22 lease, Lessor may procure the necessary insurance,
23 pay the premium therefor, and said premium shall
24 be repaid by Lessee to Lessor immediately upon
25 Lessor's demand.

26 [3] Plaintiffs maintain that they are entitled to a jury
trial on the forfeiture issue and rely on the U.S. Supreme Court
case Pernell v. Southall Realty, 416 U.S. 363, 94 S.Ct. 1723, 40
L.Ed. 2d 198 (1974). In Pernell, Id., a landlord brought an
action against its tenant seeking to evict him from the premises
for alleged nonpayment of rent and the tenant Pernell demanded a
jury trial in his answer. The trial judge struck the jury
demand, tried the case himself, and entered judgment for
Plaintiff landlord Southall. The U.S. Supreme Court held that
the right to recover possession of real property was a right
ascertained and protected at common law and hence, is entitled to
a trial by jury under the Seventh Amendment to the U.S.

1 Constitution. In the case at bar, however, the trial court ruled
2 prior to trial that as a matter of law under the facts and
3 circumstances of this case, forfeiture was not the appropriate
4 remedy. The U.S. Supreme Court even stated in Pernell, Id. at
5 p.384, that:

6 "And, of course, the trial court's power to
7 grant summary judgment where no genuine
8 issues of material fact are in dispute
9 provides a substantial bulwark against any
possibility that a Defendant will demand
a jury trial simply as a means of delaying
an eviction."

10 It is clear that the issue of forfeiture should not
11 have gone to the jury. This Court determines as a matter of law
12 that the asserted violation of Article 9 does not constitute a
13 default under Article 12³ of the lease agreement since Article 9
14 contains its own remedy, that is, in the event Defendants fail to
15 procure and deliver the required liability insurance policy,
16 Plaintiffs can purchase their own and obtain reimbursement for
17 the cost from Defendant Nauru.

18 Additionally, Plaintiffs have effectively waived this
19 breach and forfeiture issue by accepting rental payments
20 and continuing with the terms and conditions of the lease.
21 Highland Plastics, Inc. v. Enders, 167 Cal. Rptr. 353, 359, 109
22 Cal. App. 3d Supp. 1 (1980).

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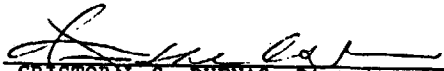
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The trial court was correct in disposing of the forfeiture issue as a matter of law.

On the basis of the foregoing, the judgment of the Commonwealth Trial Court is affirmed.


CRISTOBAL C. DUENAS, District Judge


ALFRED LAURETA, District Judge


STANLEY A. WEIGEL, District Judge

