IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN SIK CHANG, **Plaintiff,** **vs.** **JUAN Q. NORITA,** **Defendants.**	**Civil Action No. 97-~~0864~~ 846D** **ORDER AND DECISION FOLLOWING TRIAL**

INTRODUCTION

¶1 At issue in this case is a property line dispute between neighbors In Sik Chang and Juan Q. Norita. Appearing on behalf of Plaintiff In Sik Chang was Douglas F. Cushnie. Brien Sers Nicholas appeared on behalf of the Defendant, Juan Q. Norita. The court, having heard the arguments and reviewed all the evidence presented, now renders its written decision.

I. BACKGROUND

¶2 In March of 1997, Plaintiff In Sik Chang leased Lot E.A. 743-1-3 from Alfredo C. Pangelinan, court-appointed trustee for the heirs of Rosa C. Pangelinan.[1] Defendant Juan Q. Norita owns Lot E.A. 743-1-4, the adjacent property. Approximately three months after executing the lease, Plaintiff filed this action, asserting that a building, constructed by the **[p. 2]** Defendant on his property prior to the time that Plaintiff executed the lease, encroaches over and on to lot E.A. 743-1-

[1] The land comprising Plaintiff's leasehold interest is identified as E.A. 743-1-3 and contains an area of 1,681 square meters, more or less, as depicted on DLS Check No. 2065/86. *See* Lease of Real Property by and between Alfredo C. Pangelinan, as court-appointed trustee for all the heirs of Rosa C. Pangelinan (Ex. 1). The disputed area comprising the area of the alleged encroachment contains some 144 square meters, more or less, as depicted on Trial Ex. 2.

3. In this action, Plaintiff seeks damages as well as an injunction requiring Defendant to remove the offensive structure.

¶3 Defendant claims to have purchased Lot E.A.743-1-4 from Maria C. Castro, an heir of Juan De Castro, in 1967. Documents evidencing the sale consist of a statement in Chamorro made by Maria C. Castro, dated July 10, 1967 and witnessed by her son, Francisco C. Castro, along with an English translation (the "Statement"). *See* Ex. "A."[2] Although documents filed in the estate of Juan De Castro describe Lot E.A. 743-1-4 as a parcel consisting of some 1,235 square meters,[3] in her Statement, Maria C. Castro describes the property that she transferred to the Defendant as a parcel measuring "80 by 200 in length" that adjoins the land of Lorenza T. Duenas and Herman I. Castro "in the West." *See* Ex. A.[4] Based upon Maria Castro's description of the property, Defendant maintains that there is no encroachment, since a parcel measuring 80 feet by 200 feet computes to an area measuring 24.39 by 60.976 meters, which, in turn, comprises an area of 1,487.20 square meters, more or less, and not the 1,235 square meters that Plaintiff insists Lot E.A. 743-1-4 encompasses. **[p. 3]**

¶4 On September 6, 1967, Defendant petitioned the court for an order transferring ownership of three separate parcels purchased from the heirs of Juan De Castro to his name. *See In re Petition for Transfer of Ownership from Juan De Castro, Deceased, to Juan Norita, Petitioner*, Civil Action No. 219 (Trust Territory Trial Ct. Sept. 6, 1967) (Petitioner for Transfer of Ownership), attached to

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[2] The Statement and its English translation were filed and recorded with the Clerk of Courts for the Mariana Islands District on October 17, 1973 in Book 8, Page No. 310. *Id.*

[3] *See In re Estate of Juan De Castro*, Civil Action No. 88-875 (N.M.I. Super. Ct. May 4, 1990) (Amended Inventory of Estate) at 3 (Trial Ex. 5); *In re Estate of Juan De Castro* (Decree for Partial Distribution) at 7 (Trial Ex. 6). *See also In re Estate of Maria C. Castro*, Civil Action No. 91-849 (N.M.I. Super. Ct. Aug. 16, 1991)(Petition for Letters of Administration) at 2 (Trial Ex. 8) (describing Lot E.A. No. 743-1-4 as containing 1,235 square meters, more or less); *In re Estate of Maria C. Castro* (Entry of Appearance) at ¶ c (Trial Ex. 9) (describing Lot No. E.A. 743-1-4 in Chalan Piao as containing an area of 1,235 square meters).

[4] On September 5, 1967, District Court Judge Ignacio V. Benavente translated Maria C. Castro's Statement as follows:

I, Maria C. Castro, sold my land at Chalan Piao. My neighbor is Lorenza T. Duenas and Herman I. Castro in the West. The size of this land is 80 x 200 in length. I, Maria Castro, swear that I sold this size of land to Juan Q. Norita for the amount of Two Hundred ($200.00) Dollas [sic]. This amount I have received in full on this 10th day of July 1967.

See Trial Ex. A.

Request for Judicial Notice as Ex. "A."[5] Consistent with the position he asserts in this case, in Civil Action No. 219, Defendant described the property acquired from Maria C. Castro as measuring 80 feet by 200 feet. *Id.* at ¶ 7. When none of the heirs filed an objection to the petition, the court granted the request to transfer ownership in an oral order on July 10, 1973 and ordered counsel for the petitioner to draft a proposed judgment transferring the property from Juan De Castro to the Defendant. *See In re Petition for Transfer of Ownership*, Order to Show Cause (Feb. 2, 1977), attached to Request for Judicial Notice as Ex. "B"; Judgment *Nunc Pro Tunc*, Trial Ex. 7.

¶5 For whatever reason, no final judgment was entered. Some ten years after the court's ruling, however, the heirs of Juan De Castro objected to the transfer and on February 2, 1977, the court issued an order directing interested parties to show cause why the transfer should not occur. *See Id.* (Order to Show Cause) (Feb. 2, 1977). In response to the Order to Show Cause, the heirs, including Maria C. Castro, filed an Objection to the Defendant's Petition. *See* Objection to Intervene and Compliance with Court Order (filed April 16, 1977).[6] Ruling that the July 10, 1973 Minute Order was valid, the court found no legal basis to set it aside and denied the heirs' motion in 1979. *See* Order Denying Motion for Relief from Order dated April 13, 1979, attached to Request for Judicial Notice as Ex. "H." The court again ordered counsel for **[p. 4]** both parties to submit a written order formalizing the July 10, 1973 Order, and indicated that the agreed order would be entered *nunc pro tunc*. *Id.*[7]

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[5] This court takes judicial notice of documents filed in Civil Action 219 pursuant to Com. R. Evid. 201.

[6] In their Objection, the heirs contended that the sale of one of the parcels was illegal and invalid because Juan C. Castro, the individual who purportedly conveyed the property, was only a land trustee. *See* Objection to Intervene and Compliance with Court Order (April 11, 1977), attached to Request for Judicial Notice as Ex. "D" at ¶ ¶ 1-2. They also asserted that the 80'x200'parcel of land conveyed by Maria C. Castro to Juan Q. Norita on February 5, 1967was invalid as the heirs of Juan De Castro did not convey the property. Aff. of David S. Terlaje in Support of Motion for Relief from Minute Entry Order (May 12, 1977), attached to Request for Judicial Notice as Ex. "G."

[7] The Latin phrase *nunc pro tunc* means "now for then" and describes the inherent power of the court to make its records speak the truth. *See West Shield Investigations and Sec. Consultants v. Superior Court*,82 Cal.App.4th 935, 98 Cal.Rptr.2d 612 (Cal.App. 2000). In other words, a judgment *nunc pro tunc* permits the court to correct now what the record reflects had occurred at a time in the past. Accordingly, the purpose of a *nunc pro tunc* order is to reflect in the records of the trial court the judgment it actually made, but which, for whatever reason, it did not enter of record at the proper time. The *nunc pro tunc* entry may be made to correct a judgment to reflect the actual order, but may not be used to modify or add provisions to an order previously entered. *Hamilton v. Laine*, 57 Cal.App.4th 885, 891, 67 Cal.Rptr.2d 407 (1997) ("[I]t is not proper to amend an order *nunc pro tunc* to correct judicial inadvertence, omission, oversight or error, or to show what the court might or should have done as distinguished to what it actually did.")

¶6 On or about May 10, 1979 and pursuant to the agreed order, the court entered judgment transferring one of the parcels, identified as EA No. 743-3 of 4, to Defendant Juan Q. Norita *nunc pro tunc* July 10, 1073. *See* Ex. 7. In the *nunc pro tunc* judgment, the court made no mention of the other parcels named in Norita's petition, including the 80 by 200 parcel acquired from Maria Castro.

¶7 Defendant took no action to amend or otherwise correct the judgment, but subsequently hired Juan I. Castro, Jr. to prepare a survey of his property. Defendant also hired Mr. Takai, a professional land surveyor, to prepare a second survey of the northern side of the property and to mark the boundaries with red stakes. Without objection, Defendant introduced a map of Lot E.A. 743-1-4 at trial that depicts the area encompassed by Castro's survey, superimposed onto the area encompassed by the purchase agreement. *See* Trial Ex. B. Consistent with Defendant's testimony, the Pangelinan Map illustrates that according to the measurements described in Maria Castro's Statement, there is no encroachment onto Lot 743-1-3.

¶8 In 1986, Defendant commenced construction of the two-story building at issue without first obtaining a permit. In or about 1990, Defendant also filed a claim against the estate of Juan De Castro to clear title to Lot 743-1-4, but later withdrew his claim upon the stipulation that he would file his claims against the separate estates of Rita C. Castro, Maria C. Castro, and Antonio C. **[p. 5]** Castro.[8] As a result, and based upon the parcel survey plat prepared by Juan I. Castro, Jr., Lot EA 743-1-4, containing an area of 1,235 square meters, more or less, was not awarded to the Defendant but to Maria C. Castro's heirs. *See In re Estate of Juan De Castro*, Civil Action No. 88-875 (N.M.I. Super. Ct. Sept. 26, 1990) (Decree for Partial Distribution) at 7, ¶ 3(f) (Trial Ex. 6).

¶9 Juan C. Castro, an heir of Maria C. Castro, then transferred Lot 743-1-4 to Vicente and Frances Attao on or about March 3, 1987.[9] One Felisa Baza also claims that Juan C. Castro

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[8] *See In re Estate of Juan De Castro*, Civil Action No. 99-875 (N.M.I. Super. Ct. Sept. 26, 1990) (Decree for Partial Distribution) at 7, ¶ 3(f); 9, ¶¶ 4,6 (Trial Ex. 6). *See also Amended Inventory of Estate* (filed May 24, 1990), Trial Ex. 5 (listing Lots EA 743-1-3 and 743-1-4 as property of the estate).

[9] *See In re Estate of Maria C. Castro*, Civil Action No. 91-849 (N.M.I. Super. Ct. Aug. 28, 1997) (Attao Entry of Appearance, Demand for Notice, and Claim of Interest) (Trial Ex. 9). Vicente T. Attao claimed that he acquired the property consisting of 1,235 square meters from Juan C. Castro, the sole surviving heir of Maria C. Castro, in March of 1987. *See* Trial Ex. 9. As evidence of the acquisition, Attao attached a warranty deed executed by Juan C. Castro to Vincente Torres and Frances Benavente Attao on September 17, 1986, filed with the Clerk and Recorder on March 3, 1987 as File No. 87-0552 in Book 2, Page 30.

transferred Lot 743-1-4 to her. *See In re Estate of Maria C. Castro*, Civil Action No. 91-849 (Aug.16, 1991) (Petition for Letters of Administration) (Trial Ex. 8). In 1991, Defendant, along with the other claimants to Lot 743-1-4, filed his claim for interest in the estate of Maria C. Castro. *See Id.* (Norita Entry of Appearance, Demand for Notice, and Claim of Interest) (Trial Ex. 10); Trial Ex. 9. Contrary to the position Defendant asserts in this case, however, Defendant represented in the Maria C. Castro probate proceeding that Lot 743-1-4 contained only 1,235 square meters. *See* Trial Ex. 9. Although a hearing on all claims was held in July of 1991, the matter is still pending.

¶10 In 1997, Plaintiff leased adjacent lot E.A. 743-1-3 to construct an office and an apartment building. According to Plaintiff, Lot E.A. 743-1-3 contains an area of 1,681 square meters, as more particularly depicted on DLS Check No. 2065/86. (Exs. 1 and 2). At the time Plaintiff executed the lease, he knew that the Defendant's building was encroaching onto his property, but was told by the Lessor that he could claim against the person owning the encroaching building. Thus, with full knowledge of the alleged encroachment, Plaintiff proceeded to lease the property, **[p. 6]** to draw up plans for two apartment buildings, and to commence construction of the mixed-use apartment building where he currently resides. Plaintiff claims that the completion of the first structure, as well as commencement of a second apartment building, have been delayed pending the resolution of this boundary dispute.

II. QUESTIONS PRESENTED

¶11 Whether a deed is fatally defective when it only describes the size of the parcel in question and names two adjoining property owners.

¶12 Whether the doctrines of *res judicata* and/or estoppel bar the parties from contesting the measurements of Lot E.A. 743-1-4 in this proceeding.

¶13 Assuming, *arguendo*, that there is an encroachment, whether the Plaintiff is entitled to a mandatory injunction as well as damages for increased construction costs and lost profits.

III. ANALYSIS

¶14 The principal issue in this case concerns the ownership of the land under Defendant's building. For his claim that the land he purchased encompasses the "encroaching" property,

Defendant relies on the minute order in Civil Action 219, brought by the Defendant in 1967 to sort out the ownership of the three properties he purchased from the heirs of Juan De Castro. Defendant essentially argues that under principles of *res judicata*, Plaintiff is precluded from challenging his ownership of a parcel measuring 80 by 200 feet in length.[10]

¶15 Plaintiff, on the other hand, maintains that the outcome of Civil Action 219 has nothing to do with this case. According to Plaintiff, the final judgment in Civil Action 219 only addresses Lot 743-3 of 4 and not Lots 743-1-3 and 743-1-4, the properties at issue.[11] Plaintiff maintains that under the "last in time rule," even if Defendant's petition to transfer ownership in Civil Action **[p. 7]** 219 was granted in the oral minute order, it is the later *nunc pro tunc* judgment rendered by Judge Heffner which controls. *See, e.g.*, RESTATEMENT OF JUDGMENTS (SECOND) § 15 (1980).[12]

¶16 As further proof that Civil Action 219 is not dispositive, Plaintiff points to Defendant's subsequent filings in the estates of Juan De Castro, Civil Action No. 88-875, and Maria C. Castro, Civil Action 91-849. According to Plaintiff, these filings establish, first, that the parcel which Defendant acquired from Maria C. Castro contained an area of 1,235 square meters, and not the 1,487.20 which Defendant claims he received in this case. Plaintiff therefore maintains that Defendant's prior filings in the estates of Juan de Castro and Maria C. Castro, wherein Defendant filed a claim to the 1,235 square meters comprising Lot E.A. 743-1-4, essentially preclude him from claiming some mathematical error here. Second, Plaintiff argues that regardless of what she may have attempted to convey to the Defendant, Maria C. Castro could not have transferred any more than she owned. In that Maria C. Castro only inherited 1,235 square meters from her father Juan De Castro, Plaintiff maintains that she could only have sold Defendant 1,235 square meters. *See In re*

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[10] The parties have not addressed whether Defendant could have acquired title to the allegedly encroaching property by estoppel, adverse possession, or through boundary by agreement. Consequently, the court will not concern itself with these issues.

[11] *See In re Petition for Transfer of Ownership*, Judgment Nunc Pro Tunc (May 16, 1979 *nunc pro tunc* July 10, 1973) (granting Defendant's petition for transfer of Lot EA No. 743-3 of 4) (Trial Ex. 7).

[12] Section 15 provides, in material part, that when two or more courts render inconsistent judgments on the same claim or issue, a subsequent court is normally bound to follow the most recent determination that satisfies the requirements of *res judicata*.

Estate of Juan De Castro, Civil Action No. 88-875 (N.M.I. Super. Ct. Sept. 26, 1990) (Decree for Partial Distribution) at 7, ¶ 3(f) (Trial Ex. 6).

¶17 Finally, Plaintiff contends that the deed transferring the property from Maria Castro to the Defendant was so vague and ambiguous that it fails as a matter of law to effect a transfer. According to Plaintiff, the absence of a legal description of the property or even any reference to trees, the ocean, or any discernable markers renders the Statement invalid because it prevents the court from ascertaining precisely what piece of earth has been transferred.

¶18 The court disagrees. As an initial matter, the parties do not dispute that Maria C. Castro acquired the property that she sold to the Defendant by partida, and that the property which Maria C. Castro acquired was subsequently subject to probate in Civil Action 88-875. *See In re Estate of Juan De Castro*, No. 88-875 (May 24, 1990) (Amended Inventory of Estate) (Trial Ex. 5); *In re Estate of Juan De Castro*, No. 88-875 (Sept. 26,1990) (Decree for Partial Distribution) (Trial Ex. 6). **[p. 8]** Nor do the parties dispute that Maria C. Castro sold her property to the Defendant.[13] Both Defendant and his daughter testified to the transfer; the Defendant duly recorded the transfer; and since 1967, Defendant and his family have apparently possessed, used, and controlled the land. *See* Ex. A.

¶19 While a legal description can be sufficiently ambiguous so as to render the deed invalid,[14] the court does not find the description in Maria Castro's Statement to be so indefinite as to render it impossible to locate the land at issue and defeat the conveyance. In construing an instrument, the court attempts to give effect to the intent of the parties. *See In re Estate of Juan T. Camacho*, 4 N.M.I. 22, 26 (1993). Thus, a deed should not be declared void for uncertainty when it is at all possible to ascertain from the description, along with extrinsic evidence, what property the parties

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[13] The parties concede that Maria C. Castro was an heir of Juan de Castro who could transfer her interests in that certain parcel of property located in Chalan Piao to the Defendant, since the land devolved to her on the death of Juan de Castro. This does not mean, however, that Defendant acquired complete title, free of claims of other heirs, other claimants to the property, or creditors of the deceased. *See In re Estate of de Castro*, 3 CR 28, 33 (Trial Ct. 1987). Vicente T. Attao's claim to Defendant's property is not before this court. Attao is not a party to this action, and the dispute between Defendant and Attao to Lot 743-1-4 is awaiting disposition in probate action 91-849. Accordingly, the court is not at liberty to decide the dispute between Defendant and Attao, or to determine who actually owns the property.

[14] *See generally City of Kellogg v. Mission Mountain Interests Ltd., Co.*,16 P.3d 915 (Idaho 2000).

intended to convey. *See* 9 D. Thomas, THOMPSON ON REAL PROPERTY ["THOMPSON"] § 82.08(c) (1994) The absence of exact boundaries, while regrettable, is not critical. *See Town of Brookhaven v. Dinos*, 431 N.Y.S.2d 567 (N.Y.1980).

¶20 From the face of the Statement, it is clear to the court that Maria C. Castro intended to convey to the Defendant a parcel measuring 80 x 200 which adjoined the property of Lorenza T. Duenas and was bounded on its western side by the property of Herman I. Castro. *See* Map attached to Trial Ex. 1; Ex. B. Although Defendant testified that there were no markers to measure the boundary between his property and that of Herman Castro, Defendant's daughter testified that when she lived on the property, there were coconut trees planted along the boundary, and there was, at one time, a spike demarcating the property line. The court therefore concludes that at the time of the transfer, all parties understood where the property was located. Accordingly, the court finds that the **[p. 9]** Statement transferring the property contained sufficient information to permit the parcel purchased by the Defendant to be identified.

¶21 Under Commonwealth law, however, where the grantor of a deed does not possess (and does not later acquire) title to the property in question, a deed transferring the property is void and unenforceable. *See In re Estate of Castro,* Civil Action No. 89-1041 (N.M.I. Super.Ct. Nov. 16, 1993) (Decision and Order). A grantor can only pass whatever estate he or she actually owns. *See In re Estate of Juan T. Camacho*, 4 N.M.I. at 26. Where, as here, a grantor conveys land to a grantee which he does not own in part, the operative effect of the conveyance is nevertheless valid as to the area that the grantor does own. *Id.* At the time she transferred her property to the Defendant, Maria C. Castro only held an interest in the 1,235 square meters comprising Lot E.A. 743-1-4 as an heir of Jose De Castro. *See In re Estate of Juan De Castro*, Civil Action No. 88-875 (N.M.I. Super. Ct. Sept. 26, 1990) (Decree for Partial Distribution) at 7, ¶ 3(f), Trial Ex. 6. This court therefore holds that regardless of the measurements of the property set forth in Maria C. Castro's Statement (Ex. A), to the extent that the Defendant acquired any property, he could have only acquired the 1,235 square meters comprising Lot E.A. 743-1-4.

¶22 Contrary to the position advanced by the Defendant, principles of *res judicata* are entirely consistent with this result. *Res judicata,* in terms of claim preclusion, applies when a plaintiff's

present claim, as distinguished from the distinct issues previously litigated, has been extinguished by a final adjudication in a prior proceeding in which the parties, or those in privity with them, were the same as in the action presently before the court. *See generally In re Estate of Juan T. Camacho*, 4 N.M.I. 22 (1993); RESTATEMENT OF JUDGMENTS (SECOND) §§17-19 (1982). The doctrine bars a party from re-litigating a matter that the party has already litigated and from re-litigating a matter that the party had the opportunity to litigate in an prior case. *E.g., Sablan v. Iginoef*, 1 N.M.I 190, 203 (1990). Although the minute order in Civil Action 219 apparently granted Defendant's request to transfer, the cardinal feature of *res judicata* is a final judgment disposing of the claim. Accordingly, principles of *res judicata* are of no help to the Defendant here. **[p. 10]**

¶ 23 The only final judgment entered in Civil Action 219 is the Judgment *Nunc Pro Tunc*, and it fails to address the parcel in question. *See* Trial Ex. 7. Notwithstanding the passage of nearly twenty years, moreover, Defendant never bothered to amend the judgment, correct the judgment, or obtain clarification of its terms. Nor did Defendant take any action to obtain relief from the judgment, but instead engaged in conduct tending to recognize the ruling as valid. *See, e.g.*, Trial Ex. 10. Because the written judgment controls over the prior oral pronouncement, the *nunc pro tunc* judgment in Civil Action 219 does not bar Plaintiff from challenging the dimensions of Lot 743-1-4 in this case. *See, e.g., In re Marriage of Lustig*, 118 Or. App. 718, 848 P.2d 1253, 1254 (1993) (in case of conflict or discrepancy between the oral pronouncement of the court or the minute order entered by the clerk, on the one hand, and the written judgment on the other, the written judgment shall control); *Allen v. Bussell*, 558 P.2d 496 (Alaska 1976) (discrepancy between superior court's oral finding that defendant was indebted to plaintiff-wife and written default judgment which ran in favor of both spouses did not justify re-opening of default judgment, especially in light of defendant's failure to contest validity of default judgment and attempt to reopen default subsequent to its entry).

¶24 The "last in time" rule, which requires a court to give conclusive effect to the most recent judgment when two inconsistent judgments have been rendered, [15] mandates an identical result.

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[15] "The formal rationale behind this rule is that the implicit or explicit decision of the second court to the effect that the first court's judgment is not *res judicata*, is itself *res judicata* and therefore binding on the third court. The decision is not binding because it is correct; it is binding because it is last." *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1530 (9th Cir.1985). "If an aggrieved party believes that the second court erred in not giving *res judicata*

Although the "last in time rule" generally applies to inconsistent judgments rendered in entirely separate actions, in *Valley National Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1336 (9th Cir. 1997), the Ninth Circuit expressly ruled that the "last in time" rule also applies to judgments entered in a given case.[16] Thus, even assuming that the minute order had awarded a parcel of property **[p.11]** measuring 80 by 200 feet to the Defendant, it is the *nunc pro tunc* judgment, and not the minute order, that controls.

¶25 This court possesses ample remedial power to correct clerical errors in its own judgments.[17] That power, however, is not unlimited. *See* 11 C. Wright, A. Miller, M. Kane, FEDERAL PRACTICE AND PROCEDURE ["WRIGHT & MILLER"] § 2857 (1995) (addressing relief under Rule 60(b)); *Bussell*, 558 P.2d at 499, *and R. v. J.*, 2000 WL 3320095 (Del. Fam.Ct. Dec. 28, 2000) (addressing requirements for relief under Rule 60(a)).[18] While there are certain instances when a judgment may appropriately be attacked in a subsequent action, [19] the circumstances giving rise to such a challenge are not present in this case. Defendant was a party to Civil Action 219 and thus had every opportunity to pursue relief from the court that rendered the judgment, or appeal the erroneous ruling. Alternatively, Defendant could have raised the judgment in the two subsequent probate proceedings or challenged the Juan I. Castro survey in the Juan De Castro probate litigation. He chose not to act. As a result, a subsequent judgment was entered in Civil Action 88-875, awarding

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effect to the first court's judgment, then the proper redress is appeal of the second court's judgment, not collateral attack in a third court." *Id.* (citations omitted).

[16] *See* 121 F.3d at 1336: "The rationale behind the rule applies equally where the second judgment is entered by the same court that entered the first; the second judgment contains an implicit decision that the first judgment is not *res judicata* which is itself *res judicata*, binding on a subsequent court."

[17] *See, e.g.*, Com. R. Civ. P. 59(e); Com. R. Civ. P. 60.

[18] A number of authorities acknowledge that under Rule 60(a), a clerical mistake in a judgment or other error arising from oversight or omission may be corrected by the court "at any time." *See* 11 WRIGHT & MILLER § 2854. The concept implied is that Rule 60(a) (which is unlimited in time) deals with mechanical corrections that do not alter the operative significance of the judgment and thus cannot affect a party's interest in taking an appeal. Thus, if the error involves language that did not correctly convey the intention of the court, or the correction supplies language that was inadvertently omitted from the original judgment, it is clerical and may generally be corrected at any time. Where a party seeks to alter or amend the substantive rights of the parties, however, the error is not clerical, and therefore must be corrected by motion under Rules 59(e) or 60(b). *Id.*

[19] See RESTATEMENT JUDGMENTS (SECOND) § 80.

a parcel, comprised of 1,235 square meters, to Maria C. Castro's heirs. Accordingly, under principles of *res judicata*, Defendant's reliance upon the judgment in Civil Action 219 to prove his claim to piece of property measuring 80 feet by 200 feet is misplaced.

¶26 In ruling that *res judicata* does not bar Plaintiff from proving his claim, the court does not address who owns Lot 743-1-4, for the parties necessary to dispose of this issue are not before the court. *See* Note 13, *supra*. The court only rules that with respect to the area comprising the encroaching property, Civil Action 219 does not dispose of Plaintiff's claim. **[p. 12]**

¶27 Estoppel, on the other hand, is an equitable doctrine designed to protect the legitimate expectations of those who have relied to their detriment upon the conduct of another. *See Pangelinan v. Castro*, 2 CR 366 (Dist. Ct. 1985), *aff'd sub nom., De Mesa v. Castro*, 844 F.2d 642 (9th Cir. 1988). It is not actual fraud that triggers the doctrine of estoppel, but unconscientious or inequitable behavior that results in injustice. *Id.* Plaintiff essentially contends that Defendant's prior filings in the estates of Juan de Castro and Maria C. Castro, wherein Defendant filed a claim to the 1,235 square meters comprising Lot E.A. 743-1-4 and in which he failed to challenge the Juan I. Castro survey, essentially preclude him from challenging the dimensions of Lot 743-1-4 in this proceeding. For estoppel to apply, however: (1) the party to be estopped must know the facts; (2) he must intend that his conduct be acted upon or must act in a manner that would lead the party seeking estoppel to believe that he intends to induce such reliance; (3) the party asserting estoppel must be ignorant of the inducing factors; and (4) the party asserting estoppel must rely to his detriment on the actions of the party to be estopped. *See In re Blankenship*, 3 NMI 209, 214 (1992).

¶28 Defendant admits that in the Juan De Castro probate proceeding as well as in the probate proceeding of one of his heirs,[20] Juan I Castro's parcel survey plat was presented to the court, and the court relied upon it in issuing its decrees of final distribution. *See* Def. Trial Mem. of Points and Authorities at 3-4 (filed Aug. 31, 1998). In the De Castro probate proceedings, moreover, Defendant withdrew his claim on stipulation and never challenged the survey, despite the opportunity and incentive to do so. Nor did the Defendant ever challenge the survey in subsequent probate

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[20] *See Estate of Rosa C. Pangelinan*, Civil Action No. 88-845

proceedings, but represented to the court in his pleadings that its dimensions were correct. *See* Trial Ex. 10. Plaintiff, therefore, had no reason to question the description of Lot 743-1-3 appearing in his lease or the dimensions of the property appearing on the map appended to the lease, both of which appear to be consistent with the Juan I. Castro survey. *See* Trial Exs. B and 1. Defendant's failure to challenge the *nunc pro tunc* judgment in Civil Action 219, his failure to challenge the survey in any of the probate proceedings, and his apparent **[p. 13]** adoption of the dimensions of the property in his Claim of Interest (Ex. 10) lead the court to conclude that, notwithstanding the oral stipulation permitting Defendant to assert ownership of the parcel against the estate of Mario C. Castro (Trial Ex. 6), he should be estopped from challenging the survey here. *See Kingsbury v. Tevco, Inc.*,79 Cal.App.3d 314, 144 Cal.Rptr. 773 (1978) (where a judgment had been entered on the merits of a boundary dispute and was based on the accuracy and validity of a survey, the judgment carried implicit findings that the survey was neither negligently, fraudulently, deceitfully nor mistakenly made and collaterally estopped the landowner from attacking the survey in a later action).[21]

¶29 The court therefore finds that Lot E.A. 743-1-4 consists of 1,235 square meters, and as reflected on Trial Exs.2 and B, Defendant's building is encroaching onto Plaintiff's land.

¶30 Notwithstanding the encroachment, the court finds that Plaintiff is not entitled to the damages he seeks. An encroachment is a "continuing" trespass or nuisance. *See Estate of Taisican v. Hattori*, 4 N.M.I 26, 30 (1993). A trespass, in turn, "consists of a physical entry upon the lands of another and taking possession thereof under such circumstances." *Id.* Generally, a mandatory injunction is the proper remedy for an adjoining landowner who seeks to compel the removal of an encroachment. *See, e.g., Hanson v. Estell*, 100 Wash.App.281, 997 P.2d 426, 430-431 (2000). Because this

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[21] Since there has been no decision rendered by the court in Civil Action 91-849, judicial estoppel would not preclude Defendant from representing to the court that the property in question measures 1,487.20 square meters. *See Bank of America Nat. Trust and Sav. Ass'n v. Maricopa County*, 196 Ariz. 173, 993 P.2d 1137, 1140 (1999). Nor would the Defendant's representation in Civil Action No. 91-849 unequivocally bind him in this action as a judicial admission. A judicial admission is "an express waiver made in court by a party or his attorney conceding the truth of an alleged fact." *See, e.g., DeMars v. Carlstrom*, 285 Mont. 334, 337, 948 P.2d 246, 248 (1997). A judicial admission has a conclusive effect upon the party who makes it, and prevents that party from introducing further evidence in a particular proceeding to 'prove, disprove, or contradict the admitted fact.' " *DeMars*, 285 Mont. at 337, 948 P.2d at 248. When a party seeks to use a statement made by an adverse party in a *different* proceeding, however, that use, if admissible at all, is not conclusive but evidentiary only. *See Fox v. Weissbach*, 76 Ariz. 91, 95, 259 P.2d 258, 260 (1953).

extraordinary injunctive relief is equitable in nature, however, the court may refuse to enjoin on equitable principles. *Id.* at 430. In particular, the court may withhold a mandatory injunction as oppressive when (1) the encroacher did not simply take a calculated risk, or did not negligently or willfully locate the encroaching structure; (2) the damage to the landowner is slight and the benefit of removal is equally small; (3) there is ample **[p. 14]** room remaining to construct a suitable structure, and no real limitation to the property's future use; (4) it is impractical to move the encroaching structure; and (5) there is an enormous disparity in the resulting hardships. *Id.* at 431. Nothing requires the court to grant an injunction where, as here, the balance of the equities clearly and convincingly tips in the Defendant's favor.

¶31 Unrefuted facts establish that rightly or wrongly, Defendant believed he had title to the encroaching property. Of particular significance to the court is that he has possessed and used the encroaching property for thirty four (34) years. Up until this action was commenced in 1997, no one bothered to disturb him or take any action to prevent him from using the property. Although the encroaching structure was erected eleven years ago, until 1997, there was no evidence indicating that the owner of Lot 743-1-3 ever protested the construction or even made a request to tear it down. Although one does not lose his or her right to land simply because another elects to build upon it, there has been no testimony presented at trial establishing that, at the time Defendant built his building, he knew or should have known it encroached.

¶32 No evidence suggests, moreover, that prior to leasing Lot 743-1-3, Plaintiff made any inquiry of the Defendant concerning the boundary line, despite his awareness of the concrete structure. In that the admitted harm resulting from the encroachment is, at best, several parking spaces, the court finds that the damages caused by the encroachment are minimal, and do not prevent the Plaintiff from the rightful use of his property. Balancing the negligible impact of the encroaching building against the likely prohibitive costs of moving a concrete building, the equities support rejection of mandatory injunction, leaving Plaintiff to his remedy at law. *See Vossen v. Forrester,* 155 Or.App. 323, 963 P.2d 157 (1998); *Adamec v. McCray,* 63 Wash.2d 217, 386 P.2d 427 (1963).

¶33 Although the encroachment has not interfered with the completion of the first of the two planned multi-dwelling units,[22] with respect to the second structure, Plaintiff claims that he has not even applied for a building permit because there is insufficient space to construct a parking **[p. 15]** lot. Plaintiff further contends that the encroaching structure impedes access to the degree that the heavy equipment necessary to construct the second building cannot enter the site. Predicated on the assumption that he is losing $10,000 per month as a result of his inability to construct the second unit, Plaintiff is seeking some $80,000 in damages. Plaintiff also seeks increased construction costs in the approximate amount of thirty percent of the construction price or an additional $600,000.

¶34 The correct measure of damages for a trespass is the difference in fair market value before and after the occurrence of the trespass, or the value of the land on which the encroaching structure sits. *See, e.g., Kratze v. Independent Order of Oddfellows, Garden City Lodge No. 11*, 500 N.W.2d 115 442 Mich. 136 (1993) (correct measure of trespass damages for building's encroachment onto adjoining property was diminution in value of adjoining property itself as represented by value of property without encroachment, minus the value of property with encroachment or, alternatively, the value of the strip of land on which encroaching building sat). In this case, there was no evidence indicating what it would cost to remove the existing encumbrance, and aside from Plaintiff's testimony outlining the rents he hoped to collect from the completed units, and what he believed would be increased construction costs, there was no evidence of specific damages, such as the cost involved in moving the structure. The court is not faced, moreover, with a situation where a purchaser elected to proceed under some contract and adjusted the purchase price downward because of the existence of the encumbrance. Nor does the court find Plaintiff's estimates of potential rental income from a building yet to be constructed particularly persuasive, in light of current economic conditions. Thus, the court finds that the proper measure of damages in this case is the difference between the value of the property with the encroachment and its value without the encroachment.

¶35 Here, the area of the encroachment consists of 144 square meters, and that 144 square meters comprises 11.673 percent of Plaintiff's leasehold interest. *See* Note 1, *supra*. In that the **[p. 16]** rent

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[22] Plaintiff testified that the building was not completed because of the weather. He also complained that Saipan construction workers were tardy, and thus not like people in Korea.

for the entire term of the lease amounts to $100,000,[23] the court therefore rules that $11,673.00 would be fair and just compensation for the encroachment.

CONCLUSION

¶36 Based upon the foregoing, the court rules in favor of Plaintiff, In Sik Chang, and against Defendant, Juan Q. Norita in the amount of $11,673.00. Judgment shall hereby enter accordingly.

SO ORDERED this 27 day of April, 2001.

BY THE COURT:

/s/
TIMOTHY H. BELLAS, Associate Judge

[23] *See* Trial Ex. 1.