



FOR PUBLICATION



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

ZENG, JIN DONG AND HUANG, XIU
FANG DBA ZENG'S AMERICAN
CORPORATION,

Plaintiffs,

v.

LW WHOLESALE AKA TWINS
SUPERMARKET

Defendants.

CIVIL ACTION NO. 11-0318

ORDER GRANTING
MOTION TO DISMISS
THE COUNTER-CLAIM

I. INTRODUCTION

THIS MATTER came before the Court on August 27, 2012 on a motion to dismiss. Robert Torres appeared on behalf of Zeng, Jin Dong, Huang, Xiu Fang dba Zeng's American Corporation ("Plaintiff" or "Zeng's"). Gregory J. Koebel appeared on behalf of the Federated States of Micronesia Bank ("FSM") intervening plaintiff. Juan T. Lizama appeared on behalf of LW Wholesale aka Twins Supermarket ("Twins" or "Counter-Claimant").

On July 6, 2012, FSM filed a motion to dismiss Defendant's Counter-Claim ("Motion"). Based on the record, oral argument, and applicable law, the Court hereby **GRANTS** the Motion.

II. FACTUAL AND PROCEDURAL HISTORY

Tae Hyung Yoon and Kyung A. Yang dba L & Y Corporation ("L&Y") purchased a long term interest in land in As Lito and Lower Navy Hill where they operated two grocery stores. The Navy Hill property currently housing Twins Market is the subject of this case. On September 2, 2009, L&Y subleased that store to Twins for \$5000.00 per month. On November 29, 2010, L&Y secured their

By Order of the Court, Judge Joseph N. Camacho

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1 commercial loan with FSM through a Mortgage and Assignment of Leases and Rents. In February of
2 2011, L&Y sold their interest in both markets to Zeng's. Zeng's' agreement with L&Y gave Zeng's the
3 right to collect rents from Twins. Zeng's consolidated the loans on the property with FSM. On or about
4 March 29, 2011, FSM entered into a commercial loan with Zeng's for \$616,482.58. As security for the
5 loan FSM was given a mortgage and an assignment to the Navy Hill property occupied by Twins.
6 According to Plaintiffs Twins has failed to pay rent due under the lease, which Zeng's has continued to
7 pay to FSM.

8 On December 3, 2011 Zeng's filed a complaint against Twins for damages from breach of lease,
9 an order terminating lease agreement and declaratory relief. On December 30, 2011, Zeng's filed a
10 motion to terminate the lease and restore possession to it. Twins failed to respond and on January 18,
11 2012 the Clerk of Court entered default. On January 20, FSM filed a motion to intervene. On March
12 28, 2012, while FSM's motion to intervene was pending, the parties stipulated to set aside the entry of
13 default terminating the lease, withdraw their other motions and reset the filing deadlines, allowing Twins
14 time to answer. On May 10, 2012, Twins filed an answer and counter-claim ("Counter-Claim"). On
15 June 13, 2012 the Court granted FSM's motion to intervene. On July 6, 2012, Zeng's filed the instant
16 Motion to dismiss. FSM joins in the Motion.

17 **III. LEGAL STANDARD**

18 The Court must determine whether the Counter-Claim states a claim upon which relief can be
19 granted. A 12(b)(6) motion tests the legal sufficiency of the claim. *Camacho v. Micronesian Dev. Co.*,
20 2008 MP 8 ¶ 10. A claim is subject to dismissal where it lacks a cognizable legal theory or fails to
21 allege facts constituting a cognizable legal theory. NMI R. Civ. P. 12(b)(6); *Bolain v. Guam*
22 *Publications, Inc.*, 4 NMI 176 (1994). To be sufficient a claim must contain "either direct allegations on
23 every material point necessary to sustain a recovery on any legal theory . . . or contain allegations from
24 which an inference fairly may be drawn." *In re Adoption of Magofna*, 1 NMI 449, 454 (1990).

1 In deciding a motion to dismiss the court must assume the truth of all factual allegations in the
2 challenged pleading and construe them in the light most favorable to the non-moving party. *Cepeda v.*
3 *Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.* 2 NMI 482, 490 (1992).
4 However, “a trial court has no duty to strain to find inferences favorable to the non-moving party.”
5 *Cepeda*, 3 NMI at 127 (citing *In re Magofna*, 1 NMI at 454). Dismissal is improper unless the claimant
6 can prove no set of facts in support of his claim entitling him to relief. *Camacho*, 2008 MP 8 ¶ 10
7 (quoting *Govendo*, 2 NMI at 283.)

8 **IV. DISCUSSION**

9 The Counter-Claim is based on an alleged oral sublease agreement between Counter-Claimant
10 and L&Y extending the sublease from August 3, 2017 until July 11, 2062. Counter-Claimant asserts
11 that Zeng’s as a successor in interest to L&Y was bound by the alleged sublease under which the
12 Counter-Claimant was to pay \$5,000.00 per month from July 2010 through August 2017 in exchange for
13 an extension of the sublease to July 2062. Defendant seeks an order declaring the validity of the alleged
14 oral sublease.

15 **A. STATUTE OF FRAUDS**

16 To withstand the motion Counter-Claimant must allege that there was an enforceable agreement
17 which was breached. Contract formation requires mutual assent and consideration. *See* Restatement
18 (Second) of Contract § 17 (1979). The Statute of Frauds is considered an affirmative defense. *See* NMI
19 R. Civ. P. 8(c); *Lucky Dev. Co. v. Tokai*, 3 NMI 343, 360 (1992) (“The statute of frauds is an affirmative
20 defense.”) Although a claimant in every case “need not show that facts exist to ward off the defense of
21 the statute of frauds.” *Tokai*, 3 NMI at 360. “[D]ismissal under rule 12(b)(6) may be appropriate based
22 on a successful affirmative defense [where the defense] appear[s] on the face of the complaint.” *EPCO*
23 *Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 470 (5th Cir. 2006).

1 Where an agreement is for the lease of real property for more than a year a writing which
2 comports with the statute of frauds is required. 2 CMC § 4912. A lease within the statute is valid only
3 if it is evidenced by a writing which (1) identifies the parties; (2) identifies the premises; (3) specifies
4 the duration of the lease; (4) states the rent to be paid; and (5) is signed by the party to be charged. *Ada*
5 *v. K. Sadhwanis, Inc.*, 3 NMI 303 (1992) (citing Restatement (Second) of Property 2.2 (1976)).

6 Counter-Claimant alleges that in July 2010 itself and L&Y orally agreed that the eight-year
7 written lease term would be extended from August 3, 2017 until July 11, 2062 for the property at issue,
8 in consideration of which Counter-Claimant would pay an additional \$5000 per month up to August 3,
9 2017, commencing in July of 2010. (Counter-Claim at 5-6.) Thus, a bilateral agreement is alleged.
10 Counter-Claimant consistently refers to the agreement as an “oral contract,” on the face of the complaint
11 and no writing whatsoever is alleged. The Counter-Claim rests entirely on the assertion of an oral
12 agreement for the lease of land beyond one year which violates the statute of frauds, and is therefore
13 unenforceable. 2 CMC § 4912; *see also Merci Corp. v. World Int’l Corp.*, 2005 MP 10, ¶ 18 (reasoning
14 that an oral promise to extend an existing lease for more than a year must be put into writing to be
15 enforceable). Consequently, dismissal is appropriate unless Counter-Claimant alleges facts sufficient to
16 show an exception to the statute of frauds.

17 **B. EQUITABLE DEFENSES**

18 Initially, the Court must determine whether Restatement sections 90 and 129, embodying
19 common law exceptions to the statute of frauds apply in the Commonwealth.

20 Counter-Claimant in its reply relies on the doctrine of promissory estoppel as embodied in
21 Restatement (Second) of Contracts § 90 and alternatively on the doctrine of part-performance as stated
22 in Restatement (Second) of Contracts § 129 (Opp’n at 7-8.) Counter-Claimant contends that the original
23 lease is fully paid, and additional payments of \$5000 per month from July 2010 until February 2011
24 totaling \$35,000 were made in reliance on the oral agreement for the lease extension, and as a result,

1 Defendant is entitled to specific performance (Opp'n at 9, 12, 13, 18.) Plaintiff urges that the
2 Restatement is not the operative law of decision under 7 CMC § 3401, because the statute of frauds
3 codified at 2 CMC § 4912 clearly governs (Reply at 5-6.)

4 The Commonwealth statute of frauds is codified at 2 CMC § 4912 and provides:

5 No estate or interest in real property other than for leases for a term not
6 exceeding one year, . . . can be created, granted, assigned, surrendered, declared
7 or otherwise transferred except by operation of law, or by written conveyance or
8 other written instrument subscribed by the party creating, granting, assigning,
9 surrendering, declaring, or transferring the same, or by the party's lawful agent
10 authorized in writing.

11 2 CMC § 4912.

12 There is one statutory exception to the statute of frauds that is inapplicable here. *See* 2 CMC §
13 4916.¹ The statute of frauds codified at 2 CMC §§ 4911-4916 took effect on October 28, 1983— prior
14 to 1983, there was no statute of frauds in the Commonwealth. *See* 2 CMC § 4911, commission cmt.²
15 Cases since then reflect an acknowledgement of common law exceptions to the statute of frauds. For
16 example, in *Merci Corp. v. World Int'l Corp.*, the Court reasoned that promissory estoppel may be
17 invoked to defeat the statute of frauds. 2005 MP 10 ¶ 31. Thus, promissory estoppel is applicable in the
18 Commonwealth to take a contract out of the statute.

19 In *Reyes v. Reyes* the Court stated “[The] purpose of the statute of frauds [is] to prevent
20 fraudulent enforcement of contracts that were never in fact made, and not to prevent performance of oral
21 contracts that have in fact been made.” *Reyes v. Reyes*, 2004 MP 1 ¶ 55. In that case the Court affirmed

22 ¹ 2 CMC § 4916 provides: “This article shall not apply to a partida performed pursuant to custom of the Northern Mariana
23 Islands.”

24 ² Before October 28, 1983, oral conveyances of land were permissible in the Commonwealth. *Guerrero v. Guerrero*, 2 NMI
61 (1991).

1 the trial court's reliance on an unexecuted written agreement and evidence of part-performance to
2 establish the character and value of marital property. *Id.* ¶ 52-55. The doctrine of part performance, like
3 equitable estoppel, evolved as an equitable response to the statute of frauds. *See* Restatement (Second)
4 of Contracts § 129, cmt. a (1981). This same rationale urges retention of the doctrine in the
5 Commonwealth. Moreover, there is no language in 2 CMC § 4912 expressly foreclosing application of
6 the equitable doctrine.³ Thus, the Court finds the doctrine of part performance applicable in the
7 Commonwealth.

8 **1. Promissory Estoppel**

9 The issue is whether Counter-Claimant's assertion of promissory estoppel renders his claim
10 legally cognizable. The doctrine of promissory estoppel is applicable in the Commonwealth. *See Merce*
11 *Corp.*, 2005 MP 10 ¶ 31. Where no legally enforceable contract exists, a promise may still be enforced
12 to avoid unjust enrichment. "Promissory estoppel can be invoked to defeat the defense of the statute of
13 frauds. Importantly, this defense requires evidence of a clear and definite promise. *Id.*

14 Restatement (Second) of Contracts § 90, embodying the common law doctrine, provides:

15 A promise which the promisor should reasonably expect to induce action
16 or forbearance on the part of the promisee or a third person and which
17 does induce such action or forbearance is binding if injustice can be
avoided only by enforcement of the promise. The remedy granted for
breach may be limited as justice requires.

18 Restatement (Second) of Contracts § 90(1) (1981).⁴

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20 ³ Other jurisdictions generally recognize the common law doctrines notwithstanding the existence of a codified statute of
21 frauds so long as the statute does not foreclose the traditional defenses. *See, e.g., Union Trust Company v. Jackson*, 42 Conn.
22 App. 413, 679 A.2d 421, 425 (Conn. App. Ct. 1996) (reversing trial court's grant of summary judgment where borrowers
23 presented evidence to create an issue of material fact regarding part performance; *Jackman v. Estate of Pitterson*, 2008 U.S.
Dist. LEXIS 65111 (D.V.I. 2008) (acknowledging doctrine of part performance as a valid common law defense to codified
statute of frauds); *Whirlpool Fin. Corp. v. Sevaux*, 96 F.3d 216, 226 (7th Cir. 1996) (recognizing that legislature intended to
foreclose the traditional common law exceptions to the Statute of Frauds where broad language of the Act unequivocally bars
actions on or in any way related to unwritten credit agreements).

24 ⁴ In the absence of written or local customary law to the contrary the Restatements are the operative rules of decision in the
Commonwealth. 7 CMC § 3401; *Estate of Ogumoro v. Ko*, 2011 MP 11 ¶ 64.

1 Counter-Claimant asserts that in July of 2010 it orally agreed with L&Y to an extension of the
2 sublease. Counter-Claimant characterizes the agreement as an “oral promise,” offers the terms of the
3 agreement but fails to offer any factual details whatsoever about the promise itself. Here, the allegations
4 are little more than legal conclusions. Without more, the Court is unable to address the character of the
5 promise or the reasonableness of the reliance. *See id.* illust. 1(b). (“The promisor is affected only by
6 reliance which he does or should foresee.”). Counter-Claimant apparently bargained for a commercial
7 sublease extending the written term for more than forty years and is thereby in a unique position to know
8 supporting facts related to its claim. No discovery should be necessary in order to state the claim with
9 some detail.

10 Finally, to invoke promissory estoppel enforcement of the promise must be necessary to avoid an
11 injustice. *See id.* Whether enforcement is necessary to avoid an injustice in a given case “may depend
12 on the reasonableness of the promisee’s reliance, on its definite and substantial character in relation to
13 the remedy sought, on the formality with which the promise is made,” and other factors. *Id.* Defendant’s
14 claim does not contain enough factual support for the Court to address any of these factors.
15 Accordingly, the allegations do not state a claim entitling Counter-Claimant to relief.

16 **2. Part Performance**

17 The next issue is whether Counter-Claimant’s assertion of part performance saves the claim.
18 Restatement Section 129 provides:

19 Action in Reliance; Specific Performance

20 A contract for the transfer of an interest in land may be specifically
21 enforced notwithstanding failure to comply with the Statute of Frauds if it
22 is established that the party seeking enforcement, in reasonable reliance on
23 the contract and on the continuing assent of the party against whom
24 enforcement is sought, has so changed his position that injustice can be
avoided only by specific enforcement.

Restatement (Second) of Contracts § 129 (1981).

1 Counter-Claimant asserts that it spent \$35,000 in reliance on an oral promise with Zeng's
2 predecessor, which "Counter-Defendants were duty bound to perform." (Counter-Claim at 6.) Here, as
3 previously noted the Court lacks sufficient facts to address whether the reliance was reasonable.
4 Counter-Claimant has not asserted facts tending to show that Zeng's continued to assent to an oral
5 extension of the written lease. Moreover, the change in position which Counter-Claimant relies on is
6 simply the payment of money. Thus, injustice can be avoided without specific performance and an
7 equitable remedy is not justified. Restatement (Second) of Contracts § 129, cmt. a (1981) ("Payment of
8 purchase-money, without more, was once thought sufficient to justify specific enforcement, but a
9 contrary view now prevails, since in such cases restitution is an adequate remedy.") In the light most
10 favorable to Counter-Claimant the facts do not state a claim which would take the alleged oral
11 agreement out of the statute of frauds.

12 **D. LEAVE TO AMEND – 15(a)**

13 Pursuant to Rule 15(a), leave to amend should be freely granted "when justice so requires." NMI
14 R. Civ. P. 15(a). On a motion to dismiss, the Court must grant leave to amend unless it "determines that
15 the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122,
16 1127 (9th Cir. 2000) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (holding that leave
17 should be granted unless defect cannot be cured).

18 Cross-Claimant consistently refers to the alleged contract as an "oral agreement," indicating that
19 there is not likely any written documentation of an oral sublease agreement which would satisfy the
20 statute of frauds. However, given the assertion of two equitable defenses to the statute, the Court is not
21 prepared to find that the pleading could not possibly be cured by the allegation of other facts. Therefore
22 the Court allows leave to amend the Counter-Claim consistent with this order.

1 **V. CONCLUSION**

2 For the aforementioned reasons the Court hereby **GRANTS** the Motion, with **LEAVE TO**
3 **AMEND.**

4 **VI. ORDER**

- 5 1. Defendant/Counter-Claimant may file an amended Counter-Claim within 20 days of this order.
6 2. Responsive pleadings are due pursuant to applicable rules of civil procedure.

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8 **IT IS SO ORDERED** this 19th day of November, 2012.
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11 /s/
12 _____
13 **HON. JOSEPH N. CAMACHO,**
14 Associate Judge
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