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SUPERIOR COURT
SAN JUAN, P.R.

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

ROBERT A. HEFNER as)	Civil Action No. 93-0007
administrator of the Estate)	
of Mamoru Nakamura,)	
)	
Plaintiff,)	
)	
v.)	<u>ORDER DENYING MOTION TO</u>
)	<u>DISMISS AND MOTION FOR</u>
BILLY NAPOLEON)	<u>JUDGMENT ON THE PLEADINGS</u>
)	
Defendant.)	
)	

The Plaintiff, Robert A. Hefner, moves for a dismissal of Defendant Billy Napoleon's counterclaim for breach of contract and also moves for a judgment on his complaint for ejectment of the Defendant.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff is the administrator of the *Estate of Mamoru Nakamura*, Probate Action 92-606. He is seeking the ejectment of the Defendant from Lot No. 551, a parcel of land owned by the estate of the decedent, Chief Justice Mamoru Nakamura. On July 30, 1992, the decedent, Mamoru Nakamura, was adjudged to be the owner of Lot No. 551 in *Estate of Nieves P. Babauta*, Civil Action 92-203.

FOR PUBLICATION

1 It is undisputed that, on November 2, 1992, the Defendant was
2 served with a notice which stated that he must deliver possession
3 of the land to the Plaintiff by December 1, 1992, and must vacate
4 the premises. *Plaintiff's Complaint*, ¶ VI (Jan. 4, 1993);
5 *Defendant's Answer, Affirmative Defenses and Counterclaims*, ¶ 1
6 (Feb. 1, 1993) (hereinafter "Defendant's Answer"). To date,
7 however, the Defendant has continued to possess the land.
8 *Plaintiff's Complaint*, ¶ VI; *Defendant's Answer*, ¶ 2.

9 The procedural history of the case is fairly straightforward.
10 On behalf of the estate, the Plaintiff brought this action for
11 ejectment and claims as damages the amount of reasonable rental
12 value from December 1, 1992, until such time as the Defendant
13 vacates the premises. The Defendant answered the complaint for
14 ejectment and counterclaimed for breach of contract. The
15 Plaintiff then filed motions to dismiss the Defendant's
16 counterclaim and for judgment on the pleadings.

17

18 II. ISSUES

19 The Court will consider the following issues: (1) whether
20 the decedent and the Defendant entered into a binding contract or
21 merely engaged in preliminary negotiations; (2) whether alleged
22 agreement gave rise to a leasehold interest in the land or a
23 license; and (3) whether the Plaintiff is entitled to judgment on
24 his complaint for ejectment where the Defendant has alleged that
25 he is a licensee who made substantial improvements to the land.
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III. ANALYSIS

A. Motion to Dismiss Defendant's Counterclaim

1. The Motion is Not Converted Pursuant to Rule 12(b)

The Plaintiff moves to dismiss the Defendant's counterclaims for breach of contract. According to the Plaintiff, the Defendant is attempting to convert the Plaintiff's Rule 12(b)(6) motion into a motion for summary judgment by attaching the following documents to his opposition memorandum: (1) a power of attorney; and (2) a letter purportedly written by the decedent and addressed to the Defendant.

In pertinent part, Rule 12(b) states that "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment" Com. R. Civ. Pro. 12(b) (emphasis added). In the instant case, the letter and the power of attorney are not admissible because they are neither authenticated by nor attached to an affidavit as required by Rule 56(e). See 5 *Wright and Miller, Federal Practice and Procedure*, § 2722; *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1990). Therefore, the Court would not be able to rely upon the Defendant's extra-pleading material if the motion were converted into a summary judgment motion. Given that these materials would not facilitate the disposition of this action, the letter and the power of attorney are hereby excluded. For these reasons, the Court will not convert the Plaintiff's motion to dismiss the Defendant's counterclaims, and will treat it as a Rule 12(b)(6) motion.

1 **2. Standard for Rule 12(b)(6) Motion**

2 Rule 12(b)(6) sets forth the means by which a court may
3 ascertain whether a complaint sets forth a claim upon which relief
4 can be granted. The complaint must be construed "in the light
5 most favorable to the [non-moving party]" and all allegations in
6 the complaint must be accepted as true. *Cepeda v. Hefner et al.*
7 *and Reyes v. Millard*, Appeal Nos. 90-057 & 90-058, slip op. at 5
8 (N.M.I. 1992); see, e.g., *Bolalin v. Guam Publications, Inc.*,
9 Civil Action No. 92-902 (Super. Ct. 1992). The ultimate question
10 that must be addressed is whether the allegations of the complaint
11 constitute a "statement" of a claim under Rule 8(a). Com. R. Civ.
12 Pro. 8(a)(2). *Ada v. J.J. Enterprises*, Civil No. 93-644, slip op.
13 at 6 (Super. Ct. Aug. 11, 1993). To that end, the CNMI Supreme
14 Court has established the following test:

15 [a] complaint must contain either direct allegations on
16 every material point necessary to sustain a recovery on
17 any legal theory, . . . or contain allegations from
 which inference fairly may be drawn that evidence on
 these material points will be introduced at trial.

18 *In the Adoption of Magofna*, Appeal No. 90-012, slip op... at 4
19 (N.M.I. Dec. 5, 1990).

20 **2. Breach of Contract Counterclaim**

21 **a. Binding Contract or Preliminary Negotiations?**

22 The Defendant's counterclaim is premised upon the allegation
23 that the decedent "permitted the Defendant to use a portion of
24 decedent's property to build a house for the Defendant and his
25 family." *Defendant's Answer*, ¶ 7. The decedent allegedly
26 promised to draft a "Use Agreement" to that effect and failed to
27 do so before his death. In light of this agreement, the Defendant
28 claims that the Plaintiff's efforts to eject him from the premises

1 constitute a breach of contract.^{1/}

2 The Plaintiff counters by asserting that the decedent merely
3 agreed to agree to enter into a "Use Agreement" with the
4 Defendant. In light of Mr. Nakamura's failure to execute the use
5 agreement, the Plaintiff claims that the decedent and the
6 Defendant never entered into a contract.

7 The question of whether the contract will become legally
8 binding before it is memorialized and executed turns upon the
9 manifestations of mutual assent by the parties. The mere fact
10 that the parties intended to reduce their agreement to writing but
11 failed to do so does not preclude the contract from becoming
12 legally operative. *Restatement (Second) of Contracts* § 27;
13 *Warrior Constructors, Inc. v. International Union of Operating*
14 *Eng'rs*, 383 F.2d 700, 708 (5th Cir. 1967). The manifestations of
15 assent, however, must be sufficient to conclude a contract. The
16 determination as to the intent of the parties presents a question
17 of fact. *Warrior*, 383 F.2d 708.

18 For purposes of this motion, this Court must accept as true
19 the Defendant's allegation that he and the decedent did, indeed,
20 conclude a contract. See *Defendant's Counterclaim*, ¶ 7.
21 Therefore, the Plaintiff's argument must fail.

22
23 ^{1/} This Court rejects Mr. Napoleon's contention that
24 Palauan custom governs the substantive issues in the present case.
25 Title 7 CMC § 3401 states that "the rules of the common law, as
26 expressed in the restatements of the law . . . , shall be the
27 rules of decision in the courts of the Commonwealth, in the
28 absence of written or local customary law to the contrary; . . ."
7 CMC § 3401 (emphasis added). The phrase "local customary law"
cannot be interpreted to include the customary practices of a
citizen of a foreign country such as Palau who happens to reside
in the Commonwealth. Although Palauan custom does not provide the
governing law in the instant case, the custom of the parties may
ultimately be considered as evidence of the *intent* of the parties
to the contract.

1 **b. What Type of Estate or Interest in Land Was**
2 **Created by this Agreement: Leasehold or a**
3 **License?**

4 The Defendant asserts that the "Use Agreement" created a
5 leasehold or, alternatively, an irrevocable license. The
6 Plaintiff contends that the Defendant is a licensee whose
7 privilege to use the land may be revoked at any time.

8 Given that the "Use Agreement" shares some characteristics of
9 leases and some characteristics of licenses, it is essential to
10 examine both theories. The legal consequences that flow from the
11 this agreement will differ depending upon the type of interest
12 which was created.

13 **i. Leasehold**

14 A lease is an "agreement which gives rise to [the]
15 relationship of landlord and tenant or lessor and lessee." BLACK'S
16 LAW DICTIONARY at 800 (5th ed. 1979). Occasionally, it may be
17 difficult to determine whether a given agreement for the use of
18 real property is a lease or a license. The two property interests
19 may be distinguished in the following way: where a contract gives
20 "exclusive possession of the premises against all the world,
21 including the owner" is a lease; where a contract "merely confers
22 a privilege to occupy under the owner," it is a license. *Cal-Am*
23 *Corp. v. Department of Real Estate*, 163 Cal. Rptr. 729, 732 (Cal.
24 Ct. App. 1980) (emphasis in original); *Restatement (Second) of*
25 *Property* at § 1.2 and cmt. a.

26 In addition to the requirement of exclusive possession, the
27 leasehold must meet other requirements. First, the landlord-
28 tenant relationship must be restricted to a space that has a fixed

1 location for the duration of the lease. *Restatement (Second) of*
2 *Property* at § 1.1. Second, the contracting parties must have the
3 legal capacity or the requisite authority to enter into the
4 landlord-tenant relationship. *Id.* at § 1.3. Third, the estate in
5 the tenant "may be created to endure for any fixed or computable
6 period of time" or it may be a tenancy at will.^{2/} See *id.* at §§
7 1.4 - 1.8.

8 With respect to a tenancy at will, the lease is terminable at
9 the will of either party. *Id.* at § 1.6 cmt. a. A tenancy at will
10 is *presumed* where the lease does not state its duration and where
11 "no periodic rent is reserved or paid." *Id.* at § 1.6 cmt. b.

12 In the present case, the Defendant has sufficiently pleaded
13 a lease agreement. The property in question is located at the
14 northeast portion of Lot No. 551. *Defendant's Answer, Affirmative*
15 *Defenses and Counterclaims*, ¶ 1. Based upon the Defendant's
16 admission that the decedent owned the property in fee simple, it
17 may be inferred that the decedent had the authority to enter into
18 a landlord-tenant relationship with the Defendant. Further, he
19 claims that he constructed a dwelling house for himself and for
20 his family. See *id.* at ¶ 9. Viewing this allegation in the light
21 most favorable to the Defendant, it is reasonable to infer that no
22 one else may enter the house without his or his wife's consent.
23 The Defendant has thus alleged that he has exclusive possession of
24

25 ^{2/} Ordinarily the statute of frauds would bar an oral lease
26 under these circumstances. See 2 CMC § 4912; *Restatement (Second)*
27 *of Property* §§ 2.1 and 2.2. Here, however, the Defendant has
28 alleged part performance of the agreement by claiming that he
constructed his house in reliance on his contract with the
decedent. Upon adequate proof of part performance, the alleged
lease would be given full effect. *Restatement (Second) of*
Contracts § 2.3(3) and cmt. a and e.

1 the premises. Finally, while the counterclaim states that the
2 decedent "did not require the Defendant to pay any rent," *id.* at
3 ¶ 8, it is silent on the issue of the stated duration of the
4 lease. Based upon the allegations, this Court concludes that the
5 decedent and the Defendant may have entered into a tenancy at
6 will.^{3/} See *Restatement (Second) of Property*, § 1.6 cmt. b
7 (presumption of tenancy at will where no duration is mentioned and
8 where no rent is paid).

9 If the agreement between Mr. Nakamura and the Defendant
10 created a tenancy at will, then Mr. Nakamura's death terminated
11 the tenancy. See *id.* at § 1.6 cmt. e. In light of the ejectment
12 action, the heirs of the estate clearly have not approved a new
13 tenancy. See *id.* For these reasons, this theory would not
14 support a breach of contract action by the Defendant. It is,
15 therefore, necessary to examine whether a license theory would
16 support his counterclaim.

17
18 **ii. License**

19 The Defendant contends that he has an irrevocable license
20 which estops the Plaintiff from revoking his interests created by
21 the "Use Agreement."

22 In real property law, a license is defined as:

23 an interest in land in the possession of another which

- 24 (a) entitled the owner of the interest
25 to a *use of the land*, and

26
27 ^{3/} The "Use Agreement" could not have given rise to a
28 periodic tenancy in light of the statement that the Defendant was
not required to pay rent to the decedent. See *Defendant's Answer*,
¶ 8; *Restatement (Second) of Property*, §§ 1.5 cmt. d, 2.2 cmt. d,
and 2.3 cmt. a.

- 1 (b) arises from the consent of the one
2 whose interest in the land used is
3 affected thereby, and
4 (c) is not incident to an estate in the
5 land, and
6 (d) is not an easement."^{4/}

6 *Restatement of Property, Servitudes* § 512 (emphasis and footnote
7 added); see *Hubbard v. Brown*, 256 Cal. Rptr. 430, 435 n. 3 (Cal.
8 App. Ct. 1989). Therefore, a license arises where the contract
9 only "confers a privilege to occupy under the owner." *Cal-Am*, 163
10 Cal. Rptr. at 732; see *Restatement of Property, Servitudes* § 512
11 (1944). A license may be conferred by writing or by parol.
12 *Belmont County Water Dist. v. State of Cal.*, 135 Cal. Rptr. 163,
13 166 (Cal. Ct. App. 1976).

14 As a general rule, a license is revocable. *Restatement of*
15 *Property, Servitudes* § 519(1) and cmt. a; accord *Hubbard*, 256
16 Cal. Rptr. at 435 n. 3; *Colvin v. Southern Cal. Edison Co.*, 240
17 Cal. Rptr., 143, 146 (Cal. Ct. App. 1987). Revocation, however,
18 is not without its consequences for the licensor. *Id.*, at § 519
19 cmt. b. Although termination will cause the licensee's interest
20 in land to disappear, the licensor may be contractually bound not
21 to do so. *Id.* If the licensor is bound, he or she will be liable
22 for breach of contract. *Id.*

23 One of the exceptions to the general rule of revocability
24

25 ^{4/} Although licenses are, by definition, interests in land,
26 the *Restatement* expressly states that they are not interests in
27 land for purposes of the statute of frauds. *Colvin v. Southern*
28 *Calif. Edison Co.*, 240 Cal. Rptr. 142, 146 (Cal. App. Ct. 1987)
(citing *Restatement of Property, Servitudes* § 512, cmt. c).
Therefore, if the Defendant is, in fact, a licensee, then the
Commonwealth's statute of frauds does not apply to the instant
case.

1 involves executed licenses. CHESTER SMITH & RALPH BOYER, SURVEY OF LAW
2 OF PROPERTY, at 420 (2nd ed. 1971) (citing *Restatement of Property,*
3 *Servitudes* §§ 512-521). According to the doctrine of equitable
4 estoppel, where the licensee "has made expenditures of capital or
5 labor in the exercise of his license in reasonable reliance upon
6 *representations by the licensor as to the duration of the license,*
7 [the licensee] is privileged to continue the use permitted by the
8 license to the extent reasonably necessary to realize upon his
9 expenditures." *Restatement of Property, Servitudes* §§ 519(4) and
10 cmt. e, and 524 (emphasis added); see *Belmont County*, 135 Cal.
11 Rptr. at 166. Under these circumstances, the disputed license,
12 though ordinarily revocable, will become irrevocable. *Belmont*
13 *County*, 135 Cal. Rptr. at 166.

14 Viewing the allegations in the light most favorable to the
15 Defendant, this Court holds that the Defendant has alleged the
16 elements required by section 512 of the *Restatement of Property,*
17 *Servitudes*. In so doing, he gave notice to the opposing party
18 that he would be proceeding under a theory of licenses.^{5/} If, in
19 fact, the Defendant had a revocable license, then the decedent's
20 estate may be liable for breach of contract. *Restatement of*
21 *Property, Servitudes*, § 519 cmt. b. Alternatively, if the
22 Defendant had an executed license, he may be able to continue to
23

24 ^{5/} Admittedly, the Defendant has not alleged all material
25 points concerning the exception relating to executed licenses.
26 Although he stated that he made the improvements in reliance the
27 decedent's representations, he failed to allege that there were
28 representations by the licensor as to the duration of the license.
This omission is not, however, fatal to the Defendant's
counterclaim for breach of contract. The legal theory to support
the counterclaim is that he obtained a license; whether it is a
revocable or irrevocable license merely effects the remedy
available to him.

1 use the land "to the extent reasonably necessary to realize upon
2 his expenditures." See *id.* at § 519(4).

3 For these reasons, the Court rejects the Plaintiff's argument
4 that the Defendant's counterclaim for breach of contract fails to
5 state a claim upon which relief can be granted^{6/} and thus DENIES
6 the Plaintiff's motion to dismiss.

7
8 **C. Motion for Judgment on Plaintiff's Claim for Ejectment**
9 **1. Standard Under Com. R. Civ. Pro. 12(c)**

10 Rule 12(c) provides that any time "[a]fter the pleadings are
11 closed but within such time as not to delay the trial, any party
12 may move for judgment on the pleadings." Com. R. Civ. Pro. 12(c).
13 As a general rule, the pleadings are closed upon the filing of a
14 complaint and answer. Com. R. Civ. Pro. 7(a); see, e.g.,
15 *Hofschneider v. H.O. Lee, Inc.*, Civil Action No. 91-232, slip op.
16 at 2.(Super. Ct. 1992). Where, however, "a counterclaim, cross-
17 claim, or third-party claim is interposed, then the filing of a
18 reply, cross-claim answer, or third-party answer normally will
19 mark the close of the pleadings. 5 *Federal Practice and*
20 *Procedure*, § 1367; Com. R. Civ. Pro. 7(a).

21 In essence, a motion for judgment on the pleadings seeks a
22 substantive decision on the merits of the action. *Federal*

23
24 _____
25 ^{6/} Further, the argument that the Defendant is not entitled
26 to specific performance must also fail. First, assuming arguendo,
27 that the "Use Agreement" is a license, the Plaintiff's contention
28 that the agreement is not supported by consideration is unavailing
because a license may or may not be based upon consideration.
SURVEY OF LAW OF PROPERTY, at 5. Second, it is premature to assert
that the allegedly "vague" nature of this agreement defeats a
prayer for specific performance. The Defendant will be allowed to
present parol evidence to determine the terms of the "Use
Agreement" with some degree of certainty.

1 *Practice and Procedure*, § 1369. It must be clear that the court
2 is able to fairly and completely decide the merits of the dispute.
3 *Id.*

4
5 **2. Ejectment**

6 In support of his complaint for ejectment, the Plaintiff
7 emphasizes that the Defendant has "admitted all of the essential
8 allegations of the complaint" and his defenses to the action are
9 "groundless."

10 The term "ejectment" refers to "an action to restore
11 possession of property to the person entitled to it. Not only
12 must the plaintiff establish a right to possession in himself, but
13 he must also show that the defendant is in wrongful possession."
14 BLACK'S LAW DICTIONARY at 464 (5th ed. 1979); see, *Dusbabek v. Board*
15 *of Com'rs of Blaine County*, 111 P.2d 1071, 1071 (Okla. 1941)
16 (customary to allege plaintiff's title or ownership, plaintiff's
17 right to immediate possession and defendant's wrongful withholding
18 of possession of property)..

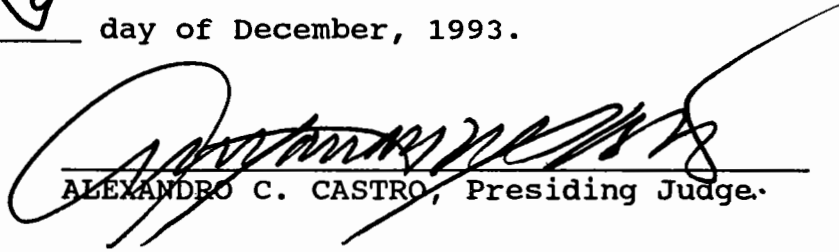
19 In the present case, the Defendant has admitted that Mr.
20 Nakamura owned the disputed property in fee simple. Further, Mr.
21 Napoleon admits that he is in possession of a portion of the land
22 and that he received a notice to quit. Despite these admissions,
23 the Court cannot rule, at this juncture, that the Defendant
24 wrongfully possesses the land in question. If the Defendant
25 ultimately proves that he has an irrevocable license, then he is
26 entitled to remain on the land "to the extent reasonably necessary
27 to realize upon his expenditures." See *Restatement of Property*
28 *(Servitudes)* § 519(4); cf. *Bigler v. Baker.*, 58 N.W. 1026, 1029

1 (Neb. 1894) (in an oral agreement for purchase of land, where
2 possession and improvements of land by purchaser constituted a
3 defense to ejectment action). It would be incongruous to grant
4 judgment on the complaint for ejectment while holding that the
5 Defendant may be entitled to remain on the land under a theory of
6 equitable estoppel. However, if the Defendant merely has a
7 tenancy at will, the Plaintiff's action for ejectment may succeed.
8 Given that the Court cannot fairly and completely decide the
9 merits of the dispute, the Plaintiff's motion for judgment on the
10 pleadings is DENIED.

11
12 **IV. CONCLUSION**

13 The Plaintiff's motion to dismiss the Defendant's
14 counterclaim for breach of contract is DENIED. The Plaintiff's
15 motion for judgment on his complaint for the ejectment of the
16 Defendant from the premises in question is also DENIED.

17 So ORDERED this 9 day of December, 1993.

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20 ALEXANDRO C. CASTRO, Presiding Judge.

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