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

BANK OF SAIPAN, Plaintiff, v. MA. MERCEDES GODINO AVANZADO, N.C. CONSTRUCTION COMPANY, MARY ANN MILNE, and ESTHER MILNE, Defendants.	Civil Action No. 94-619 **OPINION** AND **ORDER ON DEFENDANT MILNE'S MOTION FOR SUMMARY JUDGMENT**

This matter came before this Court on March 1, 1995, on Defendant Mary Ann Milne's (Milne) motion for summary judgment to quiet title to real property. Milne argues she is entitled to judgment as a matter of law because Plaintiff Bank of Saipan (BOS) lost any interest it may have had in the property when it failed, within the required time, to cure the default on the Lease agreement between Milne and Defendant Ma. Mercedes Godino Avanzado (Godino).

FOR PUBLICATION

I. FACTS

On January 7, 1987, Milne and Godino executed a fifty-five year Ground Lease (Lease) for EA 444-4, located in Chalan Kiya, Saipan. Godino was required to pay rent on a monthly basis, in escalated amounts, due "on or before the first day of each and every month." Lease at ¶ 3. According to the Lease, Godino would breach the Lease if she failed to pay the rent for sixty days after notice of default was provided to Godino by Milne.

Additionally, the Lease provided that Godino could encumber the leasehold interest providing that the encumbrance did not affect Milne's interest in the property. Lease at ¶ 7. According to Paragraph Eight of the Lease, both Godino and Milne were required to certify in a document referred to as an estoppel certificate, any modifications, defaults, or lack thereof, in the Lease. An estoppel certificate could be relied on by third parties.

Godino desired to obtain a loan, and in order to secure the loan she intended to mortgage the leasehold interest. Pursuant to Godino's request, on January 17. 1992, Milne executed an Estoppel Certificate (Certificate) on behalf of Godino.[1] The Certificate specified that a mortgage would cover only the leasehold interest in the property, and Milne agreed to give the Bank written notice of any default under the Lease, "specifying the nature and extent of such default." Certificate at ¶ 8. Moreover, the Certificate granted the Bank the right to maintain the Lease free from default, to cure any defaults and to foreclose on its mortgage. The Bank had sixty days from receipt of notice in which to remedy the default. On February 6, 1992, Godino borrowed $250,000 from BOS, and to secure this loan Godino signed a promissory note and executed a leasehold mortgage on her interest in the property.

From January 1, 1987, through December 1, 1993, Godino timely paid the rent due on the Lease. On February 1, 1994, after Godino failed to pay January and February 1994 rent, Milne sent Godino notice of default. No subsequent payments were made after this notice was given.

Moreover, Godino defaulted on its loan payments to BOS. BOS instituted foreclosure

[1] The Certificate was created from a form provided by BOS. *Plaintiff's Amended Opposition to Defendant's Motion for Summary Judgment.*

proceedings by filing a complaint against Godino on January 5, 1994. On the same day, BOS recorded a Notice of Lis Pendens. Because BOS was unable to locate Godino for service of process, it dismissed the suit without prejudice. BOS refiled the complaint on June 9, 1994, and notice of the lawsuit was published in the newspaper.

In a letter dated May 28, 1994, addressed to BOS's attorney Patricia Halsell, Milne's attorney Timothy Skinner, stated: "I am representing [Milne] with respect to a default on a lease agreement executed between [Milne] and [Godino] on January 7, 1987. The subject of the lease was a 1,000 square meter lot in Susupe, Saipan." The letter further stated that Milne questioned the validity of the Certificate. BOS received this letter on June 6, 1994, and four days later Halsell acknowledged receipt of the letter. In subsequent correspondence dated July 26, 1994, Halsell notified Skinner of the intention to cure any default. Specifically, Halsell obtained authorization to tender rental payments for July and August since, according to her declaration, she was unaware of which monthly payments were delinquent. Later that same day, Halsell received a facsimile from Skinner which indicated that Godino was in default of the Lease for the entire year to date. Halsell also stated in her declaration that sometime following the July 26, 1994 letter she telephoned Skinner to discuss settlement. Skinner indicated that once Milne returned from an off-island trip he would contact Halsell. On September 26, 1994, BOS delivered a check in the amount of $2,970 to Milne's attorney for payment of rent owed by Godino. Milne refused to accept the check on the grounds that the payment was tendered after the sixty day deadline of August 6, 1994.

On October 3, 1994, Milne, without terminating the Godino Lease, leased the property to her daughter, Defendant Esther Milne.

II. ISSUES

This motion presents the following issues:

1. Whether the Certificate was supported by valid consideration;

2. Whether the Certificate is an option or alternatively a unilateral contract;

3. Whether Milne provided BOS with adequate notice;

4. Whether BOS breached a material term of the Certificate by tendering the check on September 26, 1994.

III. ANALYSIS

A: Summary Judgment Standard

A court will enter summary judgment against a party if after viewing the facts in the light most favorable to the non-moving party, it finds as a matter of law that the moving party is entitled to the requested relief. *Cabrera* v. *Heirs of De Castro*, 1 *N.M.I.* 172, 176 (1990). Once the moving party has met the initial burden of showing entitlement to judgment as a matter of law, the burden then shifts to the non-moving party to show a genuine dispute of material fact exists. *Id.* at 176.

B: Sufficient Consideration

Milne argues that she received no consideration for executing the Certificate despite the fact that duties were required of her other than those stated in the Lease.[2] *Defendant's Memorandum in Support of Motion for Summary Judgment* at 3, 5. BOS, on the other hand, claims that the mutual promises contained in the Lease were adequate consideration for the Certificate.

> 1) To constitute consideration, a performance or a return promise must be bargained for. . . .
> 4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

[2] The additional duties required of Milne are: 1) give the bank notice of any future default (¶ 8); 2) the bank's right to cure any defaults arising under the Lease (¶ 9); 3) the Lease cannot be modified or canceled without the bank's consent (¶ 10); 4) in the event of default, the bank may elect to demand a new lease under the same conditions as the original lease (¶ 4); 5) the Certificate is binding on Milne's heirs and assigns. (¶ 13).

RESTATEMENT (SECOND) OF CONTRACTS § 71; *cited in Bufton* v. *Ha*, 3 C.R. 776, 783 (1989) (lessor's "agreement to extend the option to [lessees] resulted in a promise by the (bank] to loan money to [lessees]"); *see also Phelps v. Blome*, 35 *N*.W.2d 93, 97 (Neb. 1948). As long as the consideration is bargained for and given in exchange for a promise, it does not matter from whom the consideration moves or to whom it goes. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. e (1981). Milne's agreement to provide BOS with notice of default and time within which to cure resulted in a promise by BOS to loan money to Godino. Therefore, as a matter of law, the Certificate was supported by valid consideration.

C: Option or Unilateral Contract

In its Reply Brief for the first time, Milne claimed that the Certificate is an option or alteratively a unilateral contract.' *Defendant's Reply* at 7. Milne argues that sixty days after she provided BOS with notice of Godino's default the offer expired, and BOS could no longer accept by attempting to cure.

Milne claims that the language, the Bank had the "right but not the obligation" to cure, is determinative that the Certificate is an option or unilateral contract. Terms used in an instrument are not always indicative of its legal effect. *Guss* v. *Nelson*, 26 S.Ct. 260, 261 (1906); *Gompart* v. *Frost*, 177 *N.W.* 71, 72 (Iowa 1920). Since legal rights and duties of parties differ with various contracts there is danger in applying generic terms. ARTHUR CORBIN, 1 CORBIN ON CONTRACTS § 21 (1963). A Court must first determine the type of contract an instrument is before it can establish the legal duties of the parties. Id. To do this, the language contained in the document must be analyzed in light of the surrounding circumstances. *Joseph* v. *Wilson*, 372 N.E.2d 1110, 1113 (Ill. 1978) (citations omitted).

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[3] This Court would like to note that in the future it will not tolerate counsel addressing legal arguments without first providing the opposing party the requisite time and manner in which to respond.

The legal effect of an option contract is that acceptance of the option must be made within the allotted time or the option is extinguished. RESTATEMENT OF (SECOND) CONTRACTS § 41(1) (1981). Accordingly, "option contracts do not come within the equitable rule against forfeiture because failure to comply strictly with the conditions of the option deprives no party of any right and abrogates no contract." *Cillessen v. Kona*, 387 P.2d 867 (N.M. 1964).

An option contract is "a promise which meets the requirements for a formation of a contract and limits the promisor's power to revoke an offer." RESTATEMENT (SECOND) CONTRACTS § 25; see *also* SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 61 (rev. ed. 1938). There are two elements to an option contract: "1) the underlying contract which is not binding until accepted; and 2) the agreement to hold open to the optionee the opportunity to accept." *Plantation* Key *Developers v. Colonial Mortg., Etc.*, 589 F.2d 164, 168 (5th Cir. 1979) (citations omitted). Both these elements should be supported by consideration. Id. Once the consideration for the option contract is paid, the offer becomes a binding contract. RESTATEMENT (SECOND) CONTRACTS § 25 (1981).

The subject matter of an option contract may be the same as that of any other contract. ARTHUR CORBIN, 1 CORBIN ON CONTRACTS § 259 at 461 (1963). However, the most common situation involving an option contract is where consideration is paid to the owner of property in exchange for the privilege to buy the property at his election. The option contract secures the privilege to buy and is not a contract to purchase. *Western Union v. Brown*, 40 S.Ct. 460, 463 (1920) (citations omitted). Before acceptance, an option to purchase land does not vest in the holder of the option an interest in the land.

Relying on the Certificate, BOS loaned Godino $250,000, and Godino conveyed to BOS a promissory note and a mortgage on the leasehold premises. The mortgage provided that if Godino defaulted on its loan payments BOS had the right but not the obligation to foreclose on the leasehold interest. Once Godino conveyed a note and a mortgage to BOS in exchange for the loan, BOS obtained an interest in the leasehold in the form of a lien. *See* 2 CMC § 4513 (e). Accordingly, BOS received the right to foreclose if Godino defaulted on the loan. Moreover, in the event Godino defaulted on the Lease, BOS could chose to protect its interest by curing the default within sixty days

of Milne's notice of Godino's default.

The Certificate is not an "option" contract. First, there is no underlying contract which is binding until acceptance. BOS acquired a right to the leasehold when Godino granted BOS the mortgage in exchange for the loan. Specifically, BOS acquired the right to foreclose on the leasehold interest if Godino defaulted. As with any mortgage, BOS had the right and not the obligation to protect its interests at stake. See *Scheeper* v. *Inmar* Estates, *Inc.*, 60 N.Y.S.2d 423 (1946), cited in 59 C.J.S. MORTGAGES § 298 (1949) (mortgagee is not required to protect the interests of the mortgagor; but to protect its interests, must perform the necessary acts). It was not contingent upon Milne's actions for BOS to obtain its interest in the leasehold. Second, there is no "option" to hold open BOS's rights to the leasehold. BOS had the right to protect its interests thereby maintaining the status quo of the leasehold or to forfeit its rights to use the leasehold as a lien. Third, Milne did not show that separate consideration was given for the option and the underlying contract. In fact, Milne argued no consideration was given for the Certificate. Furthermore, since option contracts are an agreement to hold open acceptance and not contracts in which a party receives a particular right or interest, they did not come within the equitable rule against forfeiture. Thus, it is clear that BOS has an interest in the leasehold and if the equitable rule against forfeiture is not applied, BOS would lose that interest.

Finally, the Certificate is not a unilateral contract. With a unilateral contract, "acceptance is performance." Pine Builders, Inc. v. U.S., 413 F.Supp. 77, 83 (E.D. Va. 1976). Contract rights arise in a unilateral contract only when the contracting party completes performance. The contracting party is, at no point, "bound to perform nor does it have any contractual rights prior to completion." Id. Here, BOS has a real interest in the leasehold. BOS has the right to foreclose on the leasehold because Godino defaulted on its loan. Therefore, BOS does have a contractual right to protect the interests in which it has at stake. If BOS did not act it would lose its interest. Therefore, this Court finds that as a matter of law the Certificate is not an option or unilateral contract.

D: Adequate Notice of Default

BOS argues that Milne's May 28, 1994 letter was not adequate notice of default because it failed to furnish the details of the default nor did it demand BOS to cure. Alternatively, BOS claims its delay in tendering payment is too insignificant to justify a forfeiture. Conversely, Milne argues that the May 28, 1994 letter provided sufficient notice required under the Certificate; and furthermore, that this case does not fall under the traditional setting of a forfeiture.

Contrary to Milne's belief, this is a forfeiture situation. The typical case of a forfeiture is where a purchaser forfeits her rights to a vendor under a contract for the sale of land. *Roth Development, Inc. v. A.R. John Gen. Contr., Inc.*, 503 P.2d 493, 497 (Or. 1972). Nevertheless, a forfeiture is defined as the divestiture of property without compensation as a result of default. *Julian* v. *Burrus*, 600 S.W.2d 133, 141 (Mo. Ct. App. 1980). Forfeitures include situations where a party loses property or some right in property because of its failure to perform under a contract. *Roth*, 503 P.2d at 496-7 (although not the usual case, is a forfeiture because party could lose rights as a purchaser upon execution of the contract provision). If BOS did not cure Godino's default within sixty days as required under the Certificate BOS would lose its rights to an interest in property, the right to foreclose on the leasehold. Therefore, this Court considers this a forfeiture case.

Courts do not favor forfeiture of rights under contracts. *Norton* v. *Van Voorst*, 231 P.2d 947, 950 (Or. 1951). They liberally construe contract provisions which may result in forfeitures in the favor of the party against whom the forfeiture may be claimed. *Id.* In order for a forfeiture notice to be effective, it must be clear and unequivocal and must strictly comply with the requirements of the contract. *Stretcher v. Gregg*, 542 S.W.2d 954 (Tex. 1976). The purpose of notice of default is to give the defaulting party an opportunity to remedy the default. Thus, where a party has actual notice of a default and has not suffered prejudice, perfected notice is not required. *Wickahaney* v. *Sewell*, 273 F.2d 767, 770 (9th Cir. 1959).

The Certificate provides:

> That in the event of any default under said Lease by Lessee, *Lessor shall give written notice thereof (specifying the nature and extent of such default) to Bank.* Lessor agrees that at all time when any written notice of any nature is required to be given to Lessee under any

provision of the Lease, Lessor shall concurrently therewith provide a written copy of said notice to Bank.

Certificate at ¶ 8 (emphasis added). Moreover, the Certificate states in paragraph 9:

> That the Bank shall have the right but not the obligation to maintain the Lease free from default and to cure, on its own behalf or on behalf of Lessee, any and all defaults and, at the option of Bank to foreclose its mortgage. *Upon receipt of any notice of default, termination or other similar notice,* Bank shall thereupon have [sixty days] within which to remedy or cure to be remedied the default which have been noticed . . . .

(emphasis added)

Milne was required to give written notice of default, specifying the nature and extent of such default. The May 28, 1994 letter stated in relevant part:

> As I explained during our phone conversation on May 28, 1994, I am representing Mrs. Mary Ann S. Milne with respect to a default on a lease agreement executed between Mrs. Milne and N.C. Godino Construction Company ("Godino") on January 7, 1987. The subject of the lease was a 1,000 square meter lot in Susupe, Saipan.

It appears that this letter provided BOS with notification that Godino defaulted on the lease: however, did not provide BOS with the nature and extent of the default. The May 28th letter did not literally comply with the requirements of the contract, specifically how many months Godino was in default on her rental payments. Therefore, BOS was unable to determine the exact amount of the default. Accordingly, the May 28th letter did not effectively notify BOS of Godino's default on the Lease.

On July 26, 1994, Halsell, according to her declaration, received a facsimile from Skinner indicating that rent was owned for the entire year to date. Upon receipt of the facsimile BOS had actual notice of the nature and extent of the default since Skinner provided Halsell with the number of months Godino was delinquent. Therefore, BOS was required to cure Godino's default by September 24, 1994, sixty days from BOS's receipt of actual notice of Godino's default.

E: Material Breach

Forfeiture implies part performance, and sometimes substantial performance, followed by a material breach. The parties are not restored to their precontract position. The breaching party

forfeits both what he contracted for and payments previously made. *Raker* v. *Stidham*, 561 P.2d 1103 (Wash. 1977). Courts will enforce forfeiture clauses in contracts unless they find that forfeiture would be so grossly excessive in relation to the loss contemplated by the parties. *Bellon* v. *Malnar*, 808 P.2d 1089 (Utah 1991); *see also Craig Food Indus. v. Taco Time Intern. Inc.*, 469 F. Supp. 516 (1979). Courts favor compensation over forfeiture. *Clanton* v. *Oregon Kelp-Ore Products Co.*, 296 P. 30 (Or. 1931) (citations omitted).

On September 26, 1994, BOS tendered to Milne a check in the amount $2,970, payment intended to cure Godino's default of the Lease. Since BOS was required to cure any default by September 24, 1994, sixty days from the date actual notice was given, it tendered payment two days late. BOS had invested $250,000 in the leasehold interest of the property in the form of a loan to Godino, and Godino had defaulted on its loan to BOS. If forfeiture occurred BOS would stand to lose the remaining money due on the $250,000 loan and its right to foreclose on the leasehold interest. Milne on the other hand, did not show that she would suffer any harm as a result of the two-day delay. The only harm this Court can fathom is the loss of accrual of interest of the money which BOS has already agreed to pay. Although it appears from the present facts that the two-day delay was not a material breach of the Certificate, the determination of whether equitable relief against forfeiture should apply is factual issue. The parties have not provided this Court with the sufficient facts nor have they had the opportunity to fully address this issue.[4] Therefore, the parties must present the additional facts which are necessary to fairly balance the interests at stake.

[4] For instance, this Court is unaware of the outstanding balance of the loan when Godino defaulted.

IV. CONCLUSION

For the foregoing reasons, this Court finds that:

1. The Certificate was supported by adequate consideration;

2. The Certificate is not an option or unilateral contract;

3. Defendant Milne provided BOS with adequate notice of default on July 26, 1994;

4. The question of whether the equitable rule against forfeiture should apply should be reserved for later proceedings.

This Court hereby ORDERS that Defendant's Motion for Summary Judgment is DENIED.

So ORDERED this 24 day of May, 1995.

ALEXANDRO C. CASTRO, Presiding Judge