FOR PUBLICATION
Appeal No. 00-035

IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

PAC UNITED CORP., LTD. (CNMI),
Plaintiff/ Appellant,

v.

GUAM CONCRETE BUILDERS,
Defendant/ Appellee.

OPINION

Cite as: *PAC United Corp. (CNMI) v. Guam Concrete Builders*, 2002 MP 15

Civil Action No. 99-0759
Argued and submitted March 29, 2001
Decided August 16, 2002

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and VIRGINIA SABLAN-ONERHEIM, Justice *Pro Tempore*

CASTRO, Associate Justice:

¶1 Defendant PAC United Corp, Ltd. (CNMI) [hereinafter PAC or Appellant] timely appeals a lower court order granting summary judgment in favor of Guam Concrete Builders [hereinafter Guam Concrete or Appellee]. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands and 1 CMC § 3102(a). For the reasons set forth below we affirm the lower court's granting of summary judgment.

ISSUE PRESENTED AND STANDARD OF REVIEW

¶2 The sole issue presented is whether summary judgment was properly granted. We review grants of summary judgment *de novo*. *See Aldan-Pierce v. Mafnas*, 2 N.M.I. 122, 131 (1991).

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The salient facts of this case are uncontested. On April 8, 1999, PAC entered into a Construction Subcontract [hereinafter Subcontract] with Guam Concrete. Included in the Subcontract was a provision under which any dispute between the two parties was required to be submitted to mediation and, if mediation proved unsuccessful, to binding arbitration. The Subcontract also included a choice of law clause designating Guam law as controlling.

¶4 When a dispute later arose between the two parties, Guam Concrete requested the initiation of mediation. On December 20, 1999, rather than entering into mediation, PAC filed a Complaint for Declaratory Relief and Breach of Contract and Demand for Jury Trial. Attached to its complaint was a copy of the Subcontract.

¶5 On February 1, 2000, Guam Concrete filed a motion in the alternative requesting either dismissal, summary judgment, or specific performance. Guam Concrete attached to its motion the affidavit of Thomas V.C. Tanaka, identified in the Subcontract as the President of Guam Concrete. In his affidavit, Mr. Tanaka stated that PAC had drafted the Subcontract and that Guam Concrete had requested mediation in compliance with the Subcontract, but had received no reply from PAC. PAC responded by filing its opposition to Guam Concrete's motion.

¶6 The trial court heard the motion on March 15, 2000, and issued its ruling on August 31, 2000. In its decision, the court noted that it was ruling on Guam Concrete's 12(b)(6) motion to dismiss, but because it had chosen to consider "matters outside the pleadings,"[1] was transforming it into 56(b) motion for summary judgment.[2] The court found that there were no material facts in question and that, as a matter of law, both the arbitration clause and the choice of law clause were valid. The court then reasoned that, because Guam law applied and, because Guam law recognizes written arbitration agreements as irrevocable and enforceable, PAC was prohibited from pursuing its complaint. The court then granted Guam Concrete's motion for summary judgment. PAC appeals this ruling.

ANALYSIS

¶7 PAC makes three arguments in support of its appeal. First, PAC claims that the trial court did not grant it an opportunity to submit evidence refuting Guam Concrete's position. PAC argues that in cases where a court chooses to treat a 12(b)(6) motion to dismiss as a 56(b)

[1] It appears that Tanaka's Affidavit was the only material, not included in the pleadings, considered by the court. The court used the affidavit for the sole purpose of establishing PAC's unwillingness to enter into arbitration.

[2] "[T]he court . . . will therefore examine the question presented in accordance with the summary judgment standard in Com. R. Civ. P. 56. *See* Com. R. Civ. P. 12(b)." *PAC United Corp. (CNMI) v. Guam Concrete Builders*, Civ. No. 99-0759 (N.M.I. Super. Ct. August 31, 2000) ([Unpublished] Order Granting Defendant's Motion to Dismiss/or in the Alternative Motion for Summary Judgment or, in the Alternative, Motion for Specific Performance Request for Sanctions at 2).

motion for summary judgment, the court is required to announce its intention to do so, thereby providing all parties with a chance to present arguments and evidence on the issue of summary judgment. PAC reasons that because the court failed to make this announcement, the dismissal of its complaint was invalid.

¶8 PAC's second argument involves the lower court's decision to enforce the choice of law provision contained in the Subcontract. PAC argues that neither it nor Guam Concrete has a substantial relationship to Guam justifying the choice of Guam law and that, even if there were such a relationship, the application of Guam law in this case is contrary to the Commonwealth of the Northern Mariana Islands' [hereinafter CNMI] fundamental public policy.

¶9 Finally, PAC argues that even if the court was correct in applying a summary judgment standard in this case, Guam Concrete failed to meet its burden of showing an absence of material fact.

I. PAC had adequate notice that the trial court could convert Appellee's motion for dismissal into a motion for summary judgment.

¶10 Commonwealth Rule of Civil Procedure 12(b) states:

> [i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings 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 and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Com. R. Civ. P. 12(b). The Ninth Circuit has found notice to be adequate if "the party against whom summary judgment was entered was fairly apprised that the court would look beyond the pleadings . . . ." *Mayer v. Wedgewood Neighborhood Coalition*, 707 F.2d 1020, 1021 (9th Cir. 1983) (citation omitted). "When a party is represented by counsel, formal notice may be unnecessary. Notice occurs when a party has reason to know that the court will consider matters

outside the pleadings." *Grove v. Mead School District No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985) (citations omitted).

¶11 PAC argues that if a court chooses to treat a 12(b)(6) motion to dismiss as a 56(b) motion for summary judgment, it is required to announce its intentions, and that a failure to make such an announcement should automatically void any grant of summary judgment subsequently made by the court. We disagree with PAC's strict interpretation of the notice requirement discussed in Commonwealth Rule of Civil Procedure 12(b).

¶12 PAC does not distinguish between formal and informal notice, but complains that it had no opportunity to "submit affidavits demonstrating that the choice of law provision selecting Guam law was accidentally left in the [Subcontract]." We agree that, from the record provided, it appears that PAC did not receive formal notice, however we disagree with the argument that it was not fairly apprised of the potential that the lower court might choose to look beyond the pleadings.

¶13 PAC was fully aware of the fact that Guam Concrete filed a motion to dismiss, or in the alternative, a motion for summary judgment. PAC knew that Guam Concrete had attached an affidavit and exhibit showing that its request for mediation had not been answered. PAC responded to Guam Concrete's motion with a motion in opposition and two attached exhibits. One of PAC's exhibits specifically related to the choice of law question and the failure to exhaust administrative remedies. Nothing we have seen in the record suggests that PAC was unaware that the March 15th hearing was to address the motion for dismissal and the motion for summary judgment. Furthermore, PAC does not allege, nor does the record indicate, that the lower court did anything during the hearing to suggest that it would not consider Guam

Concrete's motions and their exhibits once the case was under advisement.[3]

¶14 Because we find that PAC was obliged to respond to Guam Concrete's 56(b) motion and because PAC knew that the court had been presented with an affidavit and exhibits for its consideration, we reject PAC's claim that the granting of summary judgment was a complete and utter surprise.

II. Guam Concrete's domicile sufficiently demonstrates its substantial relationship to Guam, and represents a reasonable basis for choosing Guam law.

¶15 There is no specific law, statute or custom, in the CNMI governing arbitration between two parties. In the absence of written or local customary law we look to United States common law as expressed in the Restatements. *See* 7 CMC § 3401.

¶16 The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 218 (1971) directs that "[t]he validity of an arbitration agreement, and the rights created thereby, are determined by the law selected by application of the rules of §§ 187-188. This law determines whether a judicial action brought in violation of the provisions of an arbitration agreement can be maintained." Section 187 reads:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of

[3] Given that the lower court's statements as to what materials it was taking under advisement are, at the least, of issue in this appeal, we find it surprising that Appellant chose not to include a transcript of the March 15th hearing.

> the applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2)(a)-(b) (1971).

¶17 The test set out in section 187 requires that we examine the relationship between the parties and the jurisdiction they chose to govern their arbitration. While section 187 (2)(a) ostensibly sets out two requirements, "substantial relationship" and "reasonable basis," it is clear from the comments that demonstrating a substantial relationship with a state has the effect of demonstrating a reasonable basis for choosing its laws. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971) (parties who choose law based on a substantial relationship with a state will be held to have had a reasonable basis for their choice).

¶18 PAC urges this Court to compare the facts in this case to the facts presented by *Prows v. Pinpoint Retail Systems, Inc.,* 868 P.2d 809 (Utah 1993). In that instance, the Supreme Court of Utah found that, while one of the parties had a reasonable basis for choosing New York law ("to 'limit the number of forums in which it may be required to bring or defend an action'"), the parties involved had no "substantial relationship" to the state of New York. *Prows*, 868 P.2d at 811. The fundamental difference between the facts in this case and those in *Prows* revolve around the locations of the parties. In *Prows*,

> [a] *Utah plaintiff* [sued] a *Utah defendant* and a ***Canadian defendant***. The [contract] was to be performed in Utah. It was signed in Utah, and the alleged breach and tortious conduct occurred here [in Utah]. All relevant "contacts" occurred in Utah, and as a consequence, Utah [was] the only state with an interest in the action.

Id. (emphasis added).

¶19 In the present case, a CNMI plaintiff brought an action against a Guam defendant. The fact that Guam Concrete is domiciled in Guam establishes that it has a substantial relationship

with Guam. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971) (substantial relationship test met "where one of the parties is domiciled" in the chosen state). As already noted, because domicile meets the burden of establishing a substantial relationship with the Territory of Guam, it also represents a reasonable basis for choosing the Guam law. *See Id.* Thus, there is both a substantial relationship with Guam and a reasonable basis for the choice of Guam law in the Subcontract.

III. Application of Guam arbitration law is not contrary to fundamental policies of the CNMI.

¶20 Even if a court finds a reasonable basis for the parties' choice of law and that there exists a substantial relationship between the law of the state chosen by the parties and the parties or the transaction, the court will not apply the law of the state chosen by the parties if the application of the chosen states law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2)(b) (1971).

¶21 PAC argues that, should this court find a substantial relationship between the parties and Guam justifying the application of Guam arbitration law, we must still reverse the lower court because arbitration itself is against a fundamental policy of the CNMI. However, PAC has failed to offer any reasoning, persuasive or otherwise, as to how arbitration violates CNMI public policy.[4]

[4] In its Reply Brief, PAC explains its reasoning with the following sentences:

> It has been a long-standing requirement in the CNMI that all construction contracts with the CNMI Government be governed by CNMI law. As noted in the General Conditions – Construction Contract, which was not before the court below, "this contract shall be interpreted under the laws of the Commonwealth of the Northern Mariana Islands." When a company under a construction contract with the CNMI Government retains a subcontractor, it is a CNMI Government requirement that all subcontracts be interpreted under CNMI law.

(continued . . .)

¶22 While the CNMI has no arbitration statute, it has no law prohibiting arbitration either. Moreover, the Commonwealth Code contains no indication that the legislature favors the adjudication of contract claims in Commonwealth courts. A corporations is instructed that it has the right "to sue and be sued, complain and defend in its corporate name . . . [and] [t]o make contract[s]" with no mention of restrictions on adding choice of law clauses to its contracts. *See* 4 CMC § 4312(a) and (g). In fact, the CNMI government itself employs arbitration and mediation in disputes with its workers. *See* 1 CMC §§ 9708-9709. Thus we see no indication that arbitration is an affront to the legal system of the Commonwealth.[5] This is especially true when the parties themselves have agreed that the terms of their contract are to be governed by the arbitration statutes of another territory.

IV. Guam Concrete met its burden of demonstrating an absence of a genuine issue of material fact in the record before the lower court.

¶23 Finally we consider whether the evidence available to the lower court justified a grant of summary judgment.

(. . . continued)This argument might be persuasive but for several points. First, we were not provided with any document entitled "General Conditions – Construction Contract." Therefore we are unable to judge its supposed conclusions for ourselves. Second, even if such a document were included in the excerpts of record we would not be allowed to consider it; as PAC admits it was "not before the lower court," and therefore is not a part of the record. *See* Com. R. App. P 10(a); *See also Santos v. Santos*, 4 N.M.I. 206, 209-10 (1995). PAC's "fact" that any subcontract on a government contract must be interpreted under CNMI law would appear to be relevant; however, as it stands it is simply a conclusory statement without support.

[5] While PAC has failed to offer any substantiation of its argument that arbitration is against the fundamental policies of the CNMI, PAC does offer some justification for its argument that an arbitration agreement made in the CNMI and governed by CNMI law would not be enforceable. This is not the question addressed by the Court today as this case deals with the question of the enforceability of Guam law in the CNMI. However we feel it incumbent upon ourselves to make note of PAC's methodology in pursuing this argument.

PAC cites to the first RESTATEMENT OF CONTRACTS § 550 (1932) for the proposition that arbitration agreements are not enforceable under the common law. When PAC made a similar argument to the lower court, the lower court correctly noted that § 550 was left out of the RESTATEMENT (SECOND) OF CONTRACTS (1981). This intentional omission was due to "statutes relating to arbitration, which have now been enacted in so many jurisdictions that it seems likely that even in the remaining states, there has been a change in the former judicial attitude of hostility toward agreements to arbitrate future disputes." RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 8 (1981).

PAC has again chosen to argue that the common law disfavors arbitration. While PAC is free to make this argument, we find it inexplicable that PAC would not only fail to address the concerns raised by the lower court, but would fail to even mention that such concerns had been expressed.

¶24 The moving party bears the "initial and the ultimate" burden of establishing its entitlement to summary judgment by demonstrating the absence of a genuine issue of material fact in the record before the court. *See Santos v Santos*, 4 N.M.I 206, 210 (1995) (*citing Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1516 (1st Cir. 1991)). A fact in contention is considered material only if its determination may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986). After the moving party meets the initial burden, it falls to the non-moving party to show that a genuine issue of material fact is still in question. *See Castro v. Hotel Nikko, Saipan, Inc.*, 4 N.M.I. 268, 272 (1995). A determination regarding the existence of genuine issues of material fact is made viewing the evidence in a light most favorable to the non-moving party. *See Estate of Mendiola v. Mendiola,* 2 N.M.I. 233, 240 (1991).

¶25 There are no disagreements over the material facts in this case. In its pleadings, PAC submitted a copy of the Subcontract containing the mandatory arbitration and choice of law clauses. PAC makes much of supposed defects in the affidavit of Mr. Tanaka, however we find these objections insincere.[6]

¶26 PAC argues that there are still two material facts in question that should have precluded the granting of summary judgment. The first is the "lingering question as to why the parties would have selected Guam law." As we noted above, Guam Concrete's domicile alone makes the choice of Guam law reasonable. We don't view this as a question and can imagine numerous

[6] PAC's complaint that Tanaka fails to explicitly state that he is the president of Guam Concrete or that he was the president at the time the Subcontract was signed appears at least intellectually dishonest when the Subcontract, submitted by PAC, clearly identifies him as the president. The same is true of PAC's argument that "the contract clearly states that 'this agreement is contingent on Guam Concrete Builders signing an agreement with Sablan Construction Company, LTD.' There is no evidence in the record that Guam Concrete fulfilled this contingency. If this contingency was not fulfilled, the contract is void . . . ." Were we to follow this argument to its logical conclusion we would be forced to find that PAC knowingly filed a frivolous complaint with the court when it based its complaint on a contract it knew to be void. We assume that this is not the case.

reasons for making such a choice, not the least of which might have been to assure the workability of the Subcontract's arbitration clause.

¶27 PAC argues that a second material fact in question is that the arbitration and choice of law clauses were "copied from PAC United Corp.'s sister corporation in Guam and that the at issue provisions were most likely inadvertently left in . . . ."[7] Here PAC is apparently relying on its own mistakes to void the arbitration clause, if not the whole contract. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971) does indicate that "[a] choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake."

¶28 While it may be true that PAC failed to proofread its own contract, this would not be a material fact. A fact is material only if its determination may affect the outcome of the case. *See Anderson*, 477 U.S. at 248-49, 106 S. Ct. at 2510, 91 L. Ed. 2d at 211. "Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. b (1981). No matter how strong PAC's proof that it had, through its own carelessness, mistakenly included the arbitration and choice of law clauses in the Subcontract, the outcome of this case would remain unaltered. PAC and Guam Concrete entered into a contract governed by the law of the Territory of Guam. The contract between the parties called for the mandatory arbitration of disagreements. Guam law holds arbitration agreements to be irrevocable and enforceable. *See* 7 GCA § 42101.

[7] PAC suggests that had they been given proper notice, they would have be able to show, through affidavits, that the contract "was copied from [PAC's] sister corporation in Guam and that the at issue provisions were most likely inadvertently left in from a previous contract . . . ."

CONCLUSION

¶29 PAC and Guam Concrete entered into a contract governed by the law of the Territory of Guam. The contract between the parties called for the mandatory arbitration of disagreements. Guam law holds arbitration agreements to be irrevocable and enforceable. We have been presented with nothing to indicate that enforcing such a contract would offend a fundamental policy of the CNMI. The lower court was correct in treating Guam Concrete's motion for dismissal as a motion for summary judgment and, given the circumstances, PAC had sufficient notice that the lower court might choose to take just such a course of action. Finally, because there were no questions of material fact presented to the lower court, granting summary judgment was appropriate in this case. ACCORDINGLY, we affirm the trial court's granting of summary judgment.

SO ORDERED this 16th day of August 2002.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN, Chief Justice

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ Virginia Sablan - Onerheim
VIRGINIA SABLAN-ONERHEIM, Justice *Pro Tempore*