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

ANTONIO ARTERO SABLAN,
Plaintiff-Appellant,

v.

JESUS M. ELAMETO, ROSARIO M. ELAMETO, MARIA E. FITIAL, ESTANISLAO O. LANIYO, EI SOOK KIM LEE, H.S. LEE CONSTRUCTION CO., INC., LEE JAE HONG, FER DAVID, BANK OF SAIPAN, TERINA FITIAL SEMAN, and JOHN DOES I – IX,
Defendants-Appellees.

SUPREME COURT NO. 2012-SCC-0015-CIV
SUPERIOR COURT NO. 08-0039

OPINION

Cite as: 2013 MP 7

Decided June 3, 2013

Stephen J. Nutting, Saipan, MP, for Plaintiff-Appellant Antonio Artero Sablan
Douglas F. Cushnie, Saipan, MP, for Defendants-Appellees Jesus M. Elameto, *et al.*

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; JOSEPH N. CAMACHO, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Plaintiff-Appellant Antonio Artero Sablan ("Sablan") appeals the trial court's severance of a land conveyance on the basis of mutual mistake. In particular, Sablan disputes the Superior Court's decision to act sua sponte on the issue of mutual mistake, and seeks protection by citing to the Commonwealth Recording Statute, 1 CMC § 3711. Sablan also contends the trial court erred in the remedy it fashioned, as well as the court's refusal to award Sablan attorney's fees and costs. Defendants-Appellees ("Defendants") disagree. They also argue both that Sablan has lost his right to assert these claims due to laches, estoppel, and waiver as well as that the trial court wrongly admitted multiple exhibits into evidence. For the reasons set forth below, we find the decision to raise mutual mistake sua sponte constituted prejudicial error, so we VACATE the judgment of the trial court and REMAND this case for proceedings consistent with this opinion.

I. Factual and Procedural Background

¶ 2 This case turns on whether Sablan has any ownership interest in a few property parcels on Saipan: Lots 2003-3-2, 2003-3-3, 2003-3-4, and 2003-3-5. Sablan sued all of the named Defendants – Jesus M. Elameto ("Jesus E."), Rosario M. Elameto, Maria E. Fitial, Estanislao O. Laniyo, El Sook Kim Lee, H.S. Lee Construction Co., Inc., Lee Jae Hong, Fer David, Bank of Saipan, Terina Fitial Seman, and John Does I - IX – because, among other things, Sablan asserts he has not received his share of Lot 2003-3-5's rental income.

¶ 3 Following a probate action in September 1991, a Decree distributed two pieces of property in equal, undivided interests to siblings Jesus E., Rosario M. Elameto ("Rosario"), Maria E. Fitial ("Maria"), and Estanislao O. Laniyo ("Estanislao") (collectively "the Elameto siblings"). The first piece of property, Lot 2003-3, was subdivided into five parcels: 2003-3-1, 2003-3-2, 2003-3-3, 2003-3-4, and 2003-3-5. This subdivision occurred in September 1991, pursuant to the map shown in Exhibit 2A. The second piece of property is not at issue here.

¶ 4 The dispute at the center of this case began with a negotiation between Sablan and Jesus E. a few months prior to September 1991. They appeared to reach an agreement for only Lot 2003-3-2, with a sale price of $40,000.[1] Sablan received a draft deed including only this lot, as well as a subdivision map of Lot 2003-3 (Exhibit 2A). The trial court found that "[a]t no time was there any discussion about securing a 1/4th interest in the other three lots." *Sablan v. Elameto*, Civ. No. 08-0039 (NMI Super. Ct. May 11,

[1] The record does not contain any writing memorializing their agreement at the time it was allegedly made.

2012) (Findings of Fact and Conclusions of Law at 2) ("Order"). The other three lots referenced 2003-3-3, 2003-3-4, and 2003-3-5.

¶ 5 Following those negotiations, in December 1991, Jesus E. and his wife, Victorina L. Elameto, executed a warranty deed ("the first warranty deed") to Sablan (Exhibit 3). Inexplicably, the first warranty deed covered not only their purported 100 percent interest in Lot 2003-3-2, as apparently negotiated, but also all of their ownership shares in Lots 2003-3-3, 2003-3-4, and 2003-3-5. The parties properly recorded this deed later that month.

¶ 6 Despite that recording, the Elameto siblings challenged the first warranty deed's validity. They argued it was a fraud and a forgery and that, moreover, the family had already decided how to divide Lot 2003-3 in 1986 through a lottery, which they consummated in 1991.

¶ 7 The trial court, however, found no evidence to support these contentions. Instead, it found that in 1991, the Elameto siblings quitclaimed their shares of Lots 2003-3-2, 2003-3-3, 2003-3-4, and 2003-3-5, such that each solely owned one of the lots. As part of that process, Jesus E. received complete ownership of Lot 2003-3-2, which he recorded in January 1992 through a quitclaim deed.

¶ 8 One minute after recording the quitclaim deed for Lot 2003-3-2, Jesus E. recorded a second warranty deed that the trial court found invalid. This deed differed from the first warranty deed to Sablan in a single key respect: instead of conveying both Lot 2003-3-2 and Jesus E.'s ownership shares in the additional lots, the second warranty deed only conveyed a 100 percent interest in Lot 2003-3-2.

¶ 9 While the quitclaim deed for Lot 2003-3-2 was recorded in January 1992, it took until December 1992 before the Elameto siblings recorded the quitclaim deeds splitting up the remaining lots: Lots 2003-3-3, 2003-3-4, and 2003-3-5.

¶ 10 Several years later, in 1997, Sablan apparently attempted to survey some portion of Lot 2003-3, but had that effort stymied when someone chased the surveyor off the land. It appears that Sablan waited until 2008 to take legal action to claim this land.

¶ 11 When he finally did so, Sablan filed a complaint relying upon the first warranty deed executed in December 1991, which the trial court concluded was properly conveyed and recorded. Sablan sought to quiet title to his interests according to the terms in the first warranty deed. He also requested injunctive relief to allow him to possess those parcels in a manner that reflects his land interests, as well as restitution for a portion of the rental income generated by Lot 2003-3-5. Lastly, Sablan prayed for damages stemming from warranty breaches of the first warranty deed.

¶ 12 Citing to the differences in expectations regarding the December 1991 land conveyance to Sablan (as recognized in the first warranty deed), the trial court invalidated it and ordered Jesus to refund Sablan's payments made pursuant to the December 1991 property transaction. This decision was based on the doctrine of mutual mistake.

¶ 13 Sablan timely appealed the decision below.

II. Jurisdiction

¶ 14 The Supreme Court has appellate jurisdiction over final judgments and orders of the Superior Court of the Commonwealth. 1 CMC § 3102(a). Here, the Findings of Fact and Conclusions of Law were never set forth on a separate document and, consequently, this order did not constitute a "final judgment" when entered on May 11, 2012. This order became a "final judgment," however, 150 days after entry. NMI SUP. CT. R. 4(a)(7)(A)(ii). Therefore, this Court has jurisdiction.

III. Standards of Review

¶ 15 We review questions of law such as the trial court's decision to raise sua sponte the affirmative defense of mutual mistake de novo. *See Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 29 (finding the standard of review for a trial court's decision to award sua sponte liquidated damages de novo). We review evidentiary decisions for an abuse of discretion. *In re Estate of Malite*, 2011 MP 4 ¶ 36.

IV. Discussion

Mutual Mistake

¶ 16 Prior to addressing arguments regarding whether the Superior Court properly concluded that a mutual mistake occurred, we must first address whether, as Sablan contends, the trial court improperly rested its decision to rescind the first warranty deed on that basis.

¶ 17 The NMI Rules of Civil Procedure require parties to include any affirmative defenses in their responsive pleadings. NMI R. CIV. P. 8(c). If not, those defenses generally are waived. *Fitial v. Kim Kyung Duk*, 2001 MP 9 ¶ 29 ("[A]ffirmative defenses [need] to be raised in responsive pleadings or else, with narrow exceptions, they are waived."); *see also Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60 ("[W]hen our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance.") (citing *Ishimatsu v. Royal Crown Ins. Corp.*, 2006 MP 9 ¶ 7 n.3); FED R. CIV. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, . . ."); *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239 (11th Cir. 2010) ("Failure to plead an affirmative defense generally results in a waiver of that defense."). The exception to the general waiver rule occurs when a plaintiff either had notice of the unpled defense or was not prejudiced by the lack of notice ("the notice-prejudice exception"). *E.g., Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1350-51 (11th Cir. 2007). Notice can be delivered in a motion for summary judgment or a pre-trial conference. *See, e.g., Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) ("[I]f a plaintiff receives notice of an affirmative defense by some means other than pleadings, 'the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice.'").

¶ 18 Sablan contends that the trial court erred when it effectively amended Defendant's answer sua sponte to include mutual mistake. He notes that this affirmative defense never arose explicitly or

implicitly at any juncture during the trial. In fact, Sablan points out that the word "mistake" never came up at trial, and directs us to the only place in the transcript where the concept of mistake arose—and even then, in a vastly different context. Appellant's Br. 13-14. Further, Sablan asserts that such a post-trial introduction of an affirmative defense precluded Sablan from offering any responsive arguments, thereby prejudicing him.

¶ 19 Defendants do not dispute that neither the Superior Court, nor any of the parties or witnesses, discussed the doctrine of mutual mistake prior to or at trial. Defendants seem to contend, however, that the facts naturally give rise to such an affirmative defense, so they were not obligated to expressly raise it at an earlier point. Appellees' Br. 12. As a consequence, Defendants believe no prejudice to Sablan occurred—the strong implication being that Sablan should have known the trial court might decide the case based upon that affirmative defense, despite the general rule that Defendants must raise it in a responsive pleading. We find Defendants' arguments unpersuasive.

¶ 20 Defendants did not assert the affirmative defense of mutual mistake in a responsive pleading, thus it was waived at trial barring an exception. *Kim Kyung Duk*, 2001 MP 9 ¶ 29. These exceptions include either notice or a lack of prejudice to Sablan. *Proctor*, 494 F.3d at 1350-51.

¶ 21 Defendants cannot point to any notice Sablan received. Instead, they suggest, in essence, that Sablan should have known the trial court might decide the case based upon mutual mistake, despite the fact that no party explicitly raised it in any fashion.

¶ 22 Adopting such a rule would lead to a host of problems, one of which would place the Superior Court in the untenable (and unenviable) position of crafting arguments that counsel did not make. Unlike civil law legal systems, our adversarial system places the onus for raising argument on the parties, with only a few narrow exceptions. *See Saipan Achugao Resort Members' Ass'n v. Wan Jin Yoon*, 2011 MP 12 ¶ 50 ("Our adversarial system relies on advocates to inform the discussion and to bring issues to the Court's attention."). While we agree with Defendants that these facts give rise to an argument for mutual mistake, we disagree with the notion that this required them to do nothing more. It is not the proper province of the Superior Court to advocate on behalf of a party.[2]

¶ 23 Because Sablan did not possess notice of this new theory, we are left to consider whether Sablan suffered any prejudice. At the outset, we recognize that prejudice resulting from a lack of notice is amplified when the trial court, without ever mentioning an affirmative defense during or prior to trial, uses this ground to decide the case.

¶ 24 It is conceivable that Sablan could have marshaled other evidence to suggest no mutual mistake had occurred, e.g., the basis of the bargain had changed from the initial agreement, which the trial court

---

[2] As a general rule, a trial court raising issues sua sponte is inappropriate.

found included only Lot 2003-3-2, to property interests in four parcels. Or Sablan may have introduced other evidence at trial showing his intent to purchase property interests other than Lot 2003-3-2, which could force Defendants to prove a unilateral mistake had occurred – a much more difficult proposition. *See* RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981) (unilateral mistake).

¶ 25 After Defendants counterclaimed for fraudulent misrepresentation regarding their allegation that Sablan forged the 1991 warranty deed, Sablan responded by presenting contrary evidence, which the trial court ultimately found persuasive. There is no principled reason why the trial court should not have afforded Sablan the same opportunity to reply to the affirmative defense of mutual mistake. Sablan sustained significant prejudice as a result, unless Defendants successfully argue that Sablan consented to try this unpled issue under NMI Rule of Civil Procedure 15(b).

¶ 26 Under NMI Rule of Civil Procedure 15(b), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." All parties must consent, otherwise no amendment may occur. *See, e.g.*, *Prieto v. Paul Revere Life Ins. Co.*, 354 F.3d 1005, 1013 (9th Cir. 2004) (reversing a district court's sua sponte finding of waiver because waiver had not been affirmatively pled and references at trial to a party's delay "only inferentially" supported a waiver theory, but there was "no indication that [the party against whom waiver was applied] recognized waiver was being raised or consented to the issue being tried").

¶ 27 Defendants assert the parties tried the issue of mutual mistake by consent. Defendants, however, cannot point to any indicia of consent in the trial transcript. Defendants merely point to facts that could potentially support a claim for mutual mistake. Appellees' Br. 13. Defendants are mistaken, because whether those facts exist is irrelevant to the question of consent. *Prieto* case is analogous. The *Prieto* court recognized that facts, which by inference suggest an affirmative defense may exist, do not somehow create mutual consent to try an unpled issue where consent is not definitively given. *Prieto*, 354 F.3d at 1012-13. Much like here, the district court raised sua sponte an affirmative defense—waiver—not pled by a party. *Id.* at 1012. The party who benefited from such judicial action claimed the parties tried the issue of waiver by implied consent. *Id.* The *Prieto* court disagreed, noting not only that waiver as an affirmative defense "was never directly addressed," but that nothing evidenced actual consent by the other party to try the issue. *Id.* at 1013. Facts merely suggesting a party could argue the issue do not automatically give rise to consent by both parties to try the issue. *Id.* That is all we have in this matter, and it is not enough to find Sablan's consent to try mutual mistake as an affirmative defense.

¶ 28 Therefore, Defendants did not properly plead mutual mistake pursuant to Rule 8(c), nor did the Superior Court properly amend the pleadings under Rule 15(b). The Superior Court, as a result, erred when it raised mutual mistake sua sponte under these circumstances.[3]

The Commonwealth Recording Statute, 1 CMC § 3711

¶ 29 When a purchaser of property fails to record the deed, the Commonwealth Recording Statute, 1 CMC § 3711(a),[4] protects subsequent purchasers of real property so long as they acquire property in good faith and without notice of the previous unrecorded purchase. Sablan argues that the trial court "threw the Commonwealth's own recording statute out the window." Appellant's Br. 23. We find a much less colorful explanation likely. The trial court did not address this issue because neither party raised the issue in their pleadings. Our search of the pleadings turns up not a single mention of the Commonwealth Recording Statute. The failure to assert a factual issue below results in a waiver of the issue on appeal. *In re Estate of Deleon Castro*, 4 NMI 102, 106 (1994). As a result, this issue has been waived, and we instruct the trial court not to address it on remand.

Evidentiary Decisions

¶ 30 This Court reviews "a trial court's decision to exclude or admit evidence for an abuse of discretion." *In re Estate of Malite*, 2011 MP 4 ¶ 36. "A trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or princip[le]s of law and practice to the substantial detriment of a party or litigant." *Kim Kyung Duk*, 2001 MP 9 ¶ 2. To preserve an evidentiary ruling on appeal, Defendants must also show: (1) a timely objection or motion to strike; and (2) a substantive right of the objecting party was affected. *Commonwealth v. Peters*, 1 NMI 466, 475 (1991); NMI R. EVID. 103(a)(1). The Defendants argue against admission of three exhibits, contending that the lower court abused its discretion in admitting these exhibits. We disagree.

Exhibit 3

¶ 31 Defendants argue that the trial court should not have admitted Exhibit 3 into evidence due to a lack of foundation. Exhibit 3 is the December 1991 warranty deed that Sablan received, which conveyed a 100 percent interest in Lot 2003-3-2, as well as Jesus' entire interests in Lots 2003-3-3, 2003-3-4, and

---

[3] We do not express an opinion regarding the merits of mutual mistake as an affirmative defense in this matter.

[4] Section 3711 declares:

> No transfer of or encumbrance upon title to real estate or any interest therein, other than a lease for a term not exceeding one year, shall be valid:
>
> (a) Against any subsequent purchaser or mortgagee of the same real estate or interest, or any part thereof, in good faith for a valuable consideration without notice of such transfer or encumbrance, or against any person claiming under them, if the transfer to the subsequent purchaser or mortgagee is first duly recorded . . . .

2003-3-5. Defendants claim Jesus did not sign this deed and they timely objected to its admission as a fraudulent deed. *See* Trial Tr. 38-40 (objecting to the deed as fraudulent when the Appellant moved to admit it into evidence). The Superior Court, however, found "an abundance of evidence to prove that the signatures of the Elametos were genuine and authentic . . . ." Order at 3. This evidence included the ledger of a notary public, which indicated that the parties executed the December 1991 warranty deed in the notary public's presence. *Id.* This ledger also helped demonstrate that the signatures of Jesus and Victorina Elameto were consistent with those on this deed. *Id.* The trial court also pointed to numerous other sources to match the consistency of their signatures on this deed, including a $5,000 check Jesus and Victorina Elameto cashed from Sablan with the annotated phrase: "'Purchase of Lot #2003-3-2/5 San Jose (Oleai) Saipan.'" *Id.* On that basis, it concluded Exhibit 3 was "neither forged nor fraudulent." *Id.* at 4. The trial court also noted the negotiations leading up to the land sale, as well as the consideration exchanged. *Id.* at 2. Because there is ample foundation for the trial court to establish the origins of Exhibit 3, we do not find an abuse of discretion in admitting this exhibit into evidence.

Exhibit 18

¶ 32 Defendants assert the trial court abused its discretion when it admitted into evidence portions of a notary ledger belonging to Jean Barnes. More specifically, they allege that proper foundation was not laid for admitting this exhibit and they made a timely objection. *See* Trial Tr. 34-35 (objecting to excerpts from a notary book when the Appellant moved to admit it into evidence). The trial court found that this notary ledger recorded the execution of the December 1991 warranty deed, or Exhibit 3. Order at 2. It did so after hearing that Sablan received both a certified copy and the original (from the Guam Attorney General's Office) of this portion of the notary ledger, as well as other authenticating materials that matched the signatures of Jesus and Victorina Elameto to the pages in question. Trial Tr. 36-37. Given the official nature of this record book, as well as its proffering source and the established connection to Jesus and Victorina Elameto, the trial court was well within its discretion to admit it. Moreover, Defendants do not explain how admitting Exhibit 18 affected any of their substantive rights.

¶ 33 Defendants also raise a relevance objection to admitting this exhibit in their brief. Review of the transcript surrounding the discussion of Exhibit 18, however, discloses no timely relevance objection. Much like an objection that is withdrawn, an objection not made cannot be raised on appeal. *See In re Estate of Dela Cruz*, 2 NMI 1, 17 (1991) (finding that following a withdrawn objection during trial, a party waives its right to raise the issue on appeal). But even if it could, a notary ledger showing that Jesus and his wife signed the December 1991 warranty deed is relevant to the property ownership determination of the parcels in Lot 2003-3 because it has a tendency to suggest that the Defendants intentionally conveyed the contents of the December 1991 warranty deed to Sablan. As a result, relevance is not a

ground to exclude this Exhibit, and the trial court did not abuse its discretion in admitting this exhibit into evidence.

Exhibit 4

¶ 34 Defendants claim that a proper foundation did not exist for admitting Exhibit 4. Naturally, Sablan disagrees with that conclusion, but he does not state why. *See* Appellant's Reply Br. 14-15 (describing only the probative value of Exhibit 4, before observing that it was admitted). This Exhibit purportedly represents a quitclaim deed showing how Rosario, Maria, and Estanislao conveyed their interests in Lot 2003-3-2 to Jesus the day after he executed the December 1991 warranty deed to Sablan. Curiously, Defendants themselves note that "[i]t does not appear that th[is] exhibit was received into evidence." Appellees' Br. 24. A review of the trial transcript seems to confirm this observation. At oral argument, Defendants' counsel again made this contention. As a consequence, it is unclear whether we have an issue to review regarding the admissibility of Exhibit 4. On remand, we ask the trial court to clarify whether the court admitted Exhibit 4 into evidence.

Laches, Waiver, and Estoppel

¶ 35 Defendants pled laches, waiver, and estoppel below and appealed the Superior Court's decision not to address those affirmative defenses. Nonetheless, while the parties have attempted to brief these issues,[5] the trial court is most fit to decide these questions in the first instance, so we leave these issues for consideration on remand.

Issues Not Decided

¶ 36 We have no occasion to address either the propriety of the remedy fashioned below, or Sablan's entitlement to fees or costs. Therefore, we leave these decisions for another day.

V. Conclusion

¶ 37 We VACATE the judgment of the Superior Court and REMAND this matter for proceedings consistent with this opinion. On remand, we first instruct the trial court to rule on whether laches, waiver, or estoppel is an affirmative defense to enforcing the first warranty deed. We also instruct the trial court to address whether it admitted Exhibit 4 into evidence.

---

[5] In their brief, Defendants treat the concepts of estoppel and waiver as a singular doctrine of waiver. That is technically incorrect. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a. (1981) ("Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation."); *Del Rosario v. Camacho*, 2001 MP 3 ¶ 56 ("Waiver is a voluntary relinquishment of a known right, with knowledge of its existence and intent to relinquish it."). If a party wishes to argue estoppel as an affirmative defense, they must actually articulate arguments for it.

SO ORDERED this 3rd day of June, 2013.

/s/_____
ALEXANDRO C. CASTRO
Chief Justice

/s/_____
JOHN A. MANGLONA
Associate Justice

/s/_____
JOSEPH N. CAMACHO
Justice Pro Tem

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

ANTONIO ARTERO SABLAN,
Plaintiff-Appellant,

v.

JESUS M. ELAMETO, ROSARIO M. ELAMETO, MARIA E. FITIAL, ESTANISLAO O. LANIYO, EI SOOK KIM LEE, H.S. LEE CONSTRUCTION CO., INC., LEE JAE HONG, FER DAVID, BANK OF SAIPAN, TERINA FITIAL SEMAN, and JOHN DOES I – IX,
Defendants-Appellees.

SUPREME COURT NO. 2012-SCC-0015-CIV
SUPERIOR COURT NO. 08-0039

JUDGMENT

¶ 1 Plaintiff-Appellant Antonio Artero Sablan ("Sablan") appeals the trial court's decision to void a land conveyance on the basis of mutual mistake. For the reasons set forth in the accompanying opinion, we find that the trial court's decision to raise mutual mistake sua sponte constituted prejudicial error, so we VACATE the judgment of the trial court and REMAND this case for proceedings consistent with the accompanying opinion.

ENTERED this 3rd day of June, 2013.

/s/
NORA V. BORJA
Acting Clerk of the Supreme Court