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

DR. ALAN STUART MARKOFF, DDS, DBA TOOTHWORKS,
Plaintiff-Appellee,

v.

JUAN T. LIZAMA,
Defendant-Appellant.

Supreme Court No. 2015-SCC-0012-CIV

Superior Court No. 13-0075

OPINION

Cite as: 2016 MP 7

Decided June 16, 2016

Juan T. Lizama for Defendant-Appellant.

Michael A. White for Plaintiff-Appellee.

BEFORE: JOHN A. MANGLONA, Associate Justice; ROBERT J. TORRES, Justice Pro Tem; MICHAEL J. BORDALLO, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Defendant-Appellant Juan T. Lizama ("Lizama") appeals a judgment of the trial court, arguing the trial court erred by (1) finding that an enforceable contract existed, (2) hearing the case when it was without jurisdiction, and (3) failing to find the contract violated the Statute of Frauds. For the following reasons, we AFFIRM the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Lizama and Dr. Allen Stuart Markoff, DDS, ("Markoff") became acquainted through the Northern Marianas College Foundation. In June 2012, the parties dined together and discussed a number of topics, including the condition of Lizama's brother's teeth. At that meeting, Lizama allegedly told Markoff that he "felt that it was his responsibility . . . to take care of [his brother]." Tr. 9. On June 12, 2012, Lizama's brother, Antonio, went to Markoff's clinic and received a comprehensive dental evaluation. This evaluation was the first item charged to Antonio's dental account.

¶ 3 Markoff then prepared a treatment proposal and discussed the proposal with Lizama on June 19, 2012. During that discussion, Lizama allegedly told Markoff "Take care of my brother. He doesn't have any money and I will pay for it." Tr. 39. Markoff then commenced dental work on Antonio.

¶ 4 After treatment was complete, Markoff sent Lizama a bill for $6,381. Lizama visited Markoff's clinic and made a $1,000 payment on Antonio's account. While making the payment, Lizama discussed with Ruth Deleon ("Deleon") a potential payment plan for the remainder of Antonio's account. The potential payment plan was never realized, and after unsuccessful attempts to collect the remaining $5,381, Markoff filed suit for breach of contract.

¶ 5 The trial court determined that there was an enforceable contract between the parties because Markoff and Lizama mutually assented to the terms of the agreement and there was bargained-for consideration. Based on the testimony and evidence provided at trial, the court found that under the agreement, Markoff would provide dental care for Antonio, and Lizama would cover the corresponding costs. Further, the court concluded that there was valid bargained-for consideration because the contract did not concern a pre-existing debt. Lizama was ordered to pay the balance of the contract plus $1,123.28 in pre-judgment interest.

II. JURISDICTION

¶ 6 This Court has appellate jurisdiction over judgments and orders of the Superior Court of the Commonwealth. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 7 Lizama presents three issues on appeal: (1) whether the trial court erred by finding an enforceable contract, (2) whether the failure to join a necessary and indispensable party to the suit deprives the trial court of jurisdiction, and (3) whether the Statute of Frauds is applicable when an individual contracts with another for services that benefit a third party.

¶ 8 "We review the application of contract law under the de novo standard, and any findings based on extrinsic evidence under the clear error standard." *Camacho v. L & T Int'l Corp.*, 4 NMI 323, 326 (1996). We will not reverse findings of fact unless we are "left with a firm and definite conviction that clear error has been made," *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶ 14, and we will neither reweigh the evidence nor "second-guess the trial court's evaluation of a witness'[s] credibility." *Fitial v. Kim Kyung Duk*, 2001 MP 9 ¶ 18 (citing *Santos v. Santos*, 2000 MP 9 ¶ 14–15). "The test is whether the trial court could rationally have found as it did, rather than whether the reviewing court would have ruled differently." *In re Estate of Yong Kyun Kim*, 2001 MP 22 ¶ 9 (quoting *Rogolofoi v. Guerrero*, 2 NMI 468, 476 (1992)).

¶ 9 The second and third issues are questions of law, which are reviewed de novo. *See Rosario v. Quan*, 3 NMI 269, 276 (1992) (stating questions of law or mixed questions of law and fact are reviewed de novo).

IV. DISCUSSION

A. Enforceability of the Contract

¶ 10 "The essential elements of a contract are offer, acceptance, and consideration." *Isla Fin. Servs. v. Sablan*, 2001 MP 21 ¶ 13 (citing Restatement (Second) of Contracts § 17 (1981)). "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (Second) of Contracts § 17 (1981).[1] "Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance." *Id.* § 18 (1981).

¶ 11 Lizama asserts there is no enforceable contract because three issues remained unclear: the exact amount he would pay, the services that were to be provided, and the costs of those services. Lizama argues that oral contracts outside the Statute of Frauds should state with specificity the promises in the contract. In support of his argument, he cites to § 131 of the Restatement of the Law, Second, Contracts ("Restatement"), which states that oral contracts within the Statute of Frauds are enforceable if they are evidenced by writing that indicates "with reasonable certainty the essential terms of the unperformed promises in the contract."

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[1] "Restatement provisions [are] applicable only when, and to the extent, 'written law' or 'local customary law' is silent." *Tan v. Younis Art Studio, Inc.*, 2007 MP 11 ¶ 14 (citing 7 CMC § 3401).

¶ 12 Lizama also argues that no evidence supports the finding of an enforceable contract. He asserts that at the meeting prior to June 12, 2012, he merely stated that he was responsible for taking care of Antonio—not that he would pay Antonio's dental bills. Lizama also asserts the testimonies provided by Caroline Marzan ("Marzan") and Markoff, which suggest he entered into a contract, were not credible because the statements were not identical.

¶ 13 In *Melstad v. Kovac*, the appellant argued that the trial court erred by finding mutual assent on all essential terms of a settlement agreement because the parties did not specify whether the $325,000 settlement agreement would be partially satisfied by a $5,000 payment that had already been made as a result of mediation. 2006 SD 92 ¶ 20. The trial court's order concluded that the settlement agreement was valid and provided the appellant "$325,000 plus the costs of mediation in exchange for a full release executed by [the appellant]." *Id.* ¶ 21. The Supreme Court of South Dakota held that the trial court's order was not clearly erroneous because its "finding of mutual assent to the material terms of the settlement agreement was based on the words and conduct of the parties." *Id.* ¶ 22. Moreover, it stated that "[a]lthough the agreement did not specify whether the $325,000 was partially satisfied by the previous $5,000 payment, the parties did mutually assent to the essential terms of the agreement," noting the court based its finding on deposition testimony, the settlement agreement, and communications between the parties. *Id.* ¶ 21–22; *see also In re the Estate of Eberle*, 505 N.W.2d 767, 770 (S.D. 1993) (stating that a contract is specific enough to evidence mutual assent of the parties if "the material terms of the agreement were addressed in definite and certain language").

¶ 14 Further, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." NMI R. CIV. P. 52(a). For example, in *In re Estate of Olopai*, the appellant contended that an individual's testimony lacked credibility because "all the other testimony" indicated otherwise. 2015 MP 3 ¶ 34. There, we stated that "deference [was] due to the trial court's assessment of witness's credibility," and "the trial court was in the best position to assess contradictory testimony." *Id.* Likewise, in *Rebuenog v. Aldan*, we granted deference to the trial court's credibility findings, stating that "[c]redibility determinations are reviewed under the 'clearly erroneous' standard because the trial judge . . . ha[s] the best opportunity to observe the demeanor of the witnesses." 2010 MP 1 ¶ 62.

¶ 15 Here, the parties mutually assented to the essential terms of the contract. The essential terms of the contract were that Markoff would provide dental services for Antonio, and Lizama would pay for the services rendered. Moreover, like *Melstad*, the trial court's finding that Lizama and Markoff mutually assented to the essential terms of the contract is supported by testimony. For example, Markoff testified that Lizama stated he would be responsible for paying for Antonio's treatment. Marzan testified that the parties discussed the proposed treatment; the costs of the treatment; and that in

exchange for the treatment, Lizama would pay for Antonio's dental costs. Deleon testified that Lizama promised to pay the balance of Antonio's dental bill in full. Furthermore, although Marzan's and Lizama's testimonies were not identical, they remain credible as to the material issues and support the trial court's finding of an enforceable contract. In fact, the trial court stated that Lizama's contrary testimony lacked credibility. Thus, the trial court could rationally have found an enforceable contract because the testimonies from Markoff, Marzan, and Deleon indicated that Lizama made a promise to pay for Antonio's dental services in exchange for those services.

B. Indispensable Party and Trial Court Jurisdiction

¶ 16 Lizama asserts that Markoff's failure to join Antonio as a necessary and indispensable party to the suit deprives the trial court of jurisdiction. He argues Antonio is an indispensable party to the suit because Antonio benefited from the treatment; Lizama had no knowledge of what services were rendered; and at trial, Lizama completely denied liability for the costs of the dental treatment. Last, he argues "[t]he absence of Antonio in this case . . . subject[s] the appellant to a substantial risk [of] incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Opening Br. 18.

¶ 17 NMI Rule of Civil Procedure 19(a) requires that persons materially interested in an action be joined as parties if feasible. *See* FED. R. CIV. P. 19 advisory committee's note on 1996 amendment ("Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.").[2] If joinder is not feasible, then Rule 19(b) allows a court to dismiss the case if the absent party is "indispensable." *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968) (stating that Federal Rule of Civil Procedure 19 allows a court to dismiss if it determines the individual is indispensable). However, a court does not divest itself of jurisdiction if it proceeds without a materially interested individual. *See* FED. R. CIV. P. 19 advisory committee's note on 1996 amendment ("Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process."); *Washington v. United States*, 87 F.2d 421, 427 (9th Cir. 1986) ("In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as 'jurisdictional.' The defect is not, properly speaking, a jurisdictional one . . . ."). Indeed, the NMI Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the

[2] Because NMI Rule of Civil Procedure 19 is patterned after Federal Rule of Civil Procedure 19, we look to the federal interpretation of the rule for guidance. *See Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60. *Compare* NMI R. CIV. P. 19, *with* FED R. CIV. P. 19.

court." NMI R. CIV P. 82. Thus, even if Antonio was a necessary and indispensable party to the suit, that fact alone would not deprive the trial court of jurisdiction.

C. Statute of Frauds

¶ 18 Lizama argues that the contract between him and Markoff is subject to the Statute of Frauds because it falls under the suretyship provision as "a contract to answer for the duty of another." Restatement (Second) of Contracts § 110(b) (1981). However, the suretyship provision applies only when an individual promises to pay the principal obligor the debt or default of another. *Id.* § 112 cmt. c. ("The suretyship provision applies only if there is a principal obligation 'of another' than the promisor. The promisor must promise as a surety for the principal obligor."). In other words, the suretyship provision does not apply if a party orally promises to pay for services that benefit a third party who is under no duty to pay for those services. *See id.* illus. 6 ("In consideration of the delivery of goods by C to D at S's request, S orally promises to pay the price of them. S's promise is not within the Statute of Frauds, since D is under no duty.").

¶ 19 In *Meyers v. Arm*, the plaintiffs contracted with defendants, Price Arm ("Arm") and Isaac Cohen ("Cohen"), for the rebuilding of two stores. 13 A.2d 507, 508 (Conn. 1940). Prior to executing the contract, the plaintiffs discovered that Arm would unlikely be able to pay. *Id.* Plaintiffs were then assured by Cohen's attorney that Cohen would pay the contract price. *Id.* At Cohen's request, Arm drafted an "order" directing Cohen to pay for the repairs. *Id.* Cohen's attorney then assured the plaintiffs that the order was binding. *Id.* at 509. Around the time the plaintiffs commenced work, Cohen provided a $200 check that was held in escrow but eventually delivered. *Id.* Plaintiffs then sought additional funds from Cohen to complete the rebuilding, and Cohen stated that he would pay plaintiffs "directly for the full contract price." *Id.* After the work was completed to the satisfaction of all parties, Cohen reaffirmed his promise to pay the plaintiffs—a promise that was not conditioned on Arm's failure to pay. *Id.* The trial court entered judgment against Cohen, and Cohen appealed, arguing, amongst other things, that his promise to pay for the work was unenforceable because it was orally made and within the Statute of Frauds. *Id.* The Connecticut Supreme Court rejected Cohen's contention, stating that Cohen's oral agreement was "not a collateral contract within the Statute of Frauds" because Cohen's promise was "a direct promise to the plaintiffs and not in any way conditioned on the failure of the defendants Arm to make payment." *Id.*

¶ 20 Here, the suretyship provision does not apply because Antonio was under no duty to pay and Lizama's promise was a direct promise to Markoff without conditions. Thus, the suretyship provision of the Statute of Frauds is inapplicable, and the trial court did not err by failing to require a written contract between Markoff and Lizama.

V. CONCLUSION

¶ 21 For the preceding reasons, we AFFIRM the judgment of the trial court.

SO ORDERED this 16th day of June, 2016.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ROBERT J. TORRES
Justice Pro Tem

/s/
MICHAEL J. BORDALLO
Justice Pro Tem