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

ESTATE OF SOLEDAD T. OGUMORO,
Plaintiff/Appellee,

v.

KO HAN YOON,
Defendant/Third-Party Plaintiff/Appellant,

v.

JUNG YOUNG BOO AND D.Y. CORPORATION,
Third-Party Defendants/Appellees.

Supreme Court No. 2016-SCC-0022-CIV
Superior Court Nos. 99-0655; 05-0065

OPINION

Cite as: 2019 MP 4

Decided June 21, 2019

Bruce L. Mailman, Saipan, MP, for Plaintiff/Appellee.

Joseph E. Horey, Saipan, MP, for Defendant/Third-Party Plaintiff/Appellant.

Thomas E. Clifford, Saipan, MP, for Third-Party Defendant/Appellee.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLOÑA, Associate Justice; WESLEY M. BOGDAN, Justice Pro Tempore.

MANGLOÑA, J.:

¶ 1 Defendant/Third-Party Plaintiff/Appellant Ko Han Yoon ("Ko") appeals the trial court's Judgment, Order Denying Ko's Cross-Motion for Judgment/Order Granting Plaintiff's Motion for Judgment for Unpaid Rent, and Findings of Fact and Conclusions of Law. Ko asserts the court erred by: (1) exceeding the appellate mandate; (2) exceeding the pleadings; (3) finding Ko's interest in the property terminated pursuant to the Holdover Tenancy Act ("HTA") and/or Restatement (Second) of Property: Landlord & Tenant § 12.1(2)(b) (1977) ("Restatement" or "Section 12.1(2)(b)"); and (4) awarding Plaintiff-Appellee Estate of Soledad T. Ogumoro ("the Estate") damages for unpaid rent. For the following reasons, we AFFIRM the trial court's Judgment.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 This matter is now before us for a second time, with facts that have not changed since we issued the opinion in *Estate of Ogumoro v. Ko*, 2011 MP 11 ("*Ogumoro I*"). In *Ogumoro I* we reviewed whether Ko could be held liable to the Estate for breach of contract under a ground lease. Because we found Ko was an assignee that was only in privity of estate with the original lessor, Soledad Ogumoro ("Ogumoro"), we determined he could not be held liable pursuant to any clause in the lease. We vacated the trial court's determination that Ko's interest in the lot was terminated pursuant to the lease and any damages awarded for lost rent stemming from such a determination. We also reviewed Third Party Defendant-Appellee Jung Young Boo's ("Jung") contention that the Restatement provided Ogumoro a right to terminate Ko's tenancy independent of any promises in the lease. Holding that "the Restatements are the operative rules of decision in the Commonwealth even when the relevant provision does not accord with United States common law," we directed the court to rely on reporter's note 13 "in determining whether Ko received notice of termination and a demand for rent." *Ogumoro I*, 2011 MP 11 ¶ 64. We remanded the case "for further proceedings on the applicability of Restatement (Second) of Property: Landlord & Tenant § 12.1(2)(b) (1977), and, if necessary, the issues of abandonment and the bona-fide purchaser rule." *Id.* ¶ 72.

¶ 3 On remand, the court reviewed whether the Estate properly terminated Ko's leasehold interest for non-payment of rent based on the Restatement. In doing so, it found that Ko only made one three-month rent payment after taking over the Jos' leasehold interest. *See* App. 585 (underscoring check receipt "for 3 months lease payment (December, 1998, January, 1999, and February, 1999)"). However, because the check was written from Ko's company, Glory Corporation, and delivered by a friend of Ko's, Ogumoro did not realize Ko had taken over the Jos' leasehold interest. Moreover, Ko never put Ogumoro on notice of his purchase of the interest himself. When no further rent payments were made by April 1999, Ogumoro sent a written notice demanding payment from the Jos for March and April. When no response or additional rent payments were received by October 1999, Ogumoro sent the Jos a second letter advising them that she was "terminating the lease for failure to pay rent." App. 586. Later

that month, Ogumoro sued the Jos for breach of contract, seeking termination of the lease.

¶ 4 Ko's interest in the lease was revealed to Ogumoro through a preliminary title report. As a result, she moved to add Ko as a defendant to the lawsuit in August of 2000. In addition to the notice of Ko's summons being published in the newspaper and posted at the courthouse in or around November of 2000, Ogumoro's sons also posted copies of the second amended complaint ("SAC") and its attached exhibits, as well as the summons, around the property. The SAC cited the two letters that had been sent to the Jos almost two years prior. It also identified that by that point rent was $38,000 in arrears and requested both that the rent be paid and premises be vacated. Ko did not respond to the summons or SAC and failed to take any action in the lawsuit until 2003.

¶ 5 In determining whether the Restatement's standard was met, the court acknowledged that Section 12.1(2)(b) allows for a lease's termination "if the rent that is due is not paid promptly after a demand on the tenant for rent . . . ." App. 590 (citation omitted). It also recited reporter's note 13's common law requirements of a demand for payment of the exact sum due on the day the rent is due and a notice of termination for nonpayment of rent. Instead of reviewing whether these standards were met, however, the court focused on language in reporter's note 13 stating that these requirements could be dispensed with by lease or statute. It decided that "the ultimate issue relies on whether there is an applicable Commonwealth statute" modifying the common law's notice and demand requirements. App. 591. In reviewing the statutory note to reporter's note 13, the court found a Florida statute mirroring 2 CMC § 40204(b) ("Section 40204(b)") of the HTA, a Commonwealth act providing a summary procedure for the eviction of holdover tenants. It determined the HTA applied to Ko and Ogumoro's dispute and reviewed whether Ogumoro followed the demand and notice procedures of Section 40204(b).[1] Focusing on the statute's instruction that

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[1] Section 40204 provides bases for the removal of tenants, with subsection (b) stating:

> Where such person holds over without permission as aforesaid, after any default in the payment of rent pursuant to the agreement under which the premises are held, and *three days' notice in writing requiring the payment of the rent or the possession of the premises* has been served by the person entitled to the rent on the person owing the same. The service of the notice shall be by hand delivery of a true copy thereof, or, *if the tenant is absent from the rented premises, by leaving a copy thereof at such place*.
>
> The three day notice required of this subsection shall contain a statement in substantially the following form:
>
> You are hereby notified that you are indebted to me in the sum of _____ dollars for the rent and use of the premises (address of the leased premises), CNMI, now occupied by you and that I demand payment of the rent or possession of the premises within 3 days (excluding Saturday, Sunday, and legal holidays) from the date of

the notice of default need only be in substantially the form specified, it found that the SAC satisfied Section 40204(b). It held Ko could reasonably interpret the SAC and its exhibits as a notice and demand for rent, putting him "on notice that rent was due and payment needed to be made." App. 593. It subsequently held the Restatement standard satisfied, allowing Ogumoro to terminate Ko and holding: "pursuant to [r]eporter's note 13, [Ko's] leasehold interest . . . was effectively terminated." App. 594.

¶ 6 In its Order Denying Ko's Cross-Motion for Judgment on All Issues and Claims, the court also addressed Ko's contention that the Estate could not recover damages for unpaid rent because neither the Restatement nor the HTA were pled in the SAC. The court found it was authorized to enter judgment because Ko had impliedly consented to litigating the Restatement and/or HTA. It pointed to the Estate's request for unpaid rent in the SAC and the comprehensive discussion of Ko's liability for unpaid rent on remand as evidence of his implied consent. As such, the court entered judgment for the Estate "for unpaid rent from March 1999 to February 2001 in the amount of $48,000.00 ($2,000 monthly x 24 months)," together with pre- and post-judgment interest. App. 602.

¶ 7 Ko appeals the trial court's determinations.

II. JURISDICTION

¶ 8 We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 9 We first consider whether the trial court properly followed our mandate from *Ogumoro I*. Whether a trial court properly followed the mandate of an appellate court is a question of law we review de novo. *Ishimatsu v. Royal Crown Ins. Corp.*, 2012 MP 17 ¶ 11. Next, we review whether the Estate satisfied the Restatement's provisions granting it a right to terminate Ko's leasehold for nonpayment of rent. This is a mixed question of law and fact which we review de novo. *In re Estate of Amires*, 1997 MP 8 ¶ 3 n.3; *see also Husyev v. Mukasey*, 528 F.3d 1172, 1178–79 (9th Cir. 2008) ("Mixed questions of law and fact are those 'in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard[.]'"). Finally, if Ko's interest was correctly found forfeited, we examine whether the trial court had jurisdiction to hold him liable for unpaid rent. "Jurisdictional issues are questions of law and are reviewed de novo." *Commonwealth v. Taitano*, 2017 MP 19 ¶ 13.

IV. DISCUSSION

A. Mandate

¶ 10 We first consider Ko's contention that the trial court exceeded our mandate from *Ogumoro I* in applying the HTA. Ko explains that in considering whether

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delivery of this notice, to wit: on or before the _____ day _____of _____, 19__.

2 CMC § 40204(b) (emphases added).

his interest in the property was forfeited in *Ogumoro I*, we instructed the court to rely specifically on the Restatement. He asserts that although we referenced a reporter's note in the Restatement which indicates that common law demand requirements may be modified by statute, we did not authorize the court to apply the HTA. On the contrary, he claims that our citing 7 CMC § 3401 ("Section 3401") and asking the court to apply the Restatement indicated that no Commonwealth law was applicable. He argues that as a result, the court had no jurisdiction to apply the HTA and its actions to the contrary are void.

¶ 11 A mandate consists of a copy of the judgment, the opinion, and any direction about costs. *See* NMI SUP. CT. R. 41(a). We have stated that "[t]rial courts have a duty to strictly comply with a mandate." *In re Cushnie*, 2012 MP 3 ¶ 16. Even if our mandate is erroneous, the court must "'obey the directions therein without variation'"—actions not in conformity are void. *Wabol v. Villacrusis*, 4 NMI 314, 317 (1995); *but see In re Cushnie*, 2012 MP 3 ¶ 17 ("[I]n some instances, the trial court orders following remand may diverge from the mandate but must be 'consistent with the spirit of the appellate decision.'" (quoting *Wabol v. Villacrusis*, 2000 MP 18 ¶ 16)). In interpreting a mandate, a court may determine its meaning by considering the opinion's text, case's procedural posture, and underlying substantive law. *In re Estate of Malite*, 2010 MP 20 ¶¶ 29–30; *In re Cushnie*, 2012 MP 3 ¶ 17 (mandate cannot be applied in a vacuum). Beyond executing the mandate's terms, the court may also consider issues not foreclosed by the mandate. *In re Estate of Malite*, 2010 MP 20 ¶ 33. "Accordingly, the trial court's 'ultimate task is to distinguish between matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not.'" *Id.* ¶ 33 (quoting United States v. Perez, 475 F.3d 1110, 1113 (9th Cir. 2007).

¶ 12 We have also provided instruction as to the proper application of Section 3401, our statute explaining the Commonwealth's hierarchy of applicable law.[2] In an earlier decision, we explained the purpose of Section 3401 in light of its predecessor, 1 TTC 103:

> The purpose of 1 TTC 103 was not to make laws of a foreign jurisdiction applicable as a *substitute* for laws of the Trust Territory but, rather, to provide substantive law *absent* "written law" covering the given subject.
>
> 1 TTC 103 adopts the law found in the Restatement. . . . Here, a body of law rather than specific laws are made applicable by reference. When a court is called upon to apply and pick and choose from such a large body of laws it in fact legislates, a function which

[2] Section 3401 provides: "[i]n all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . ." 7 CMC § 3401.

> is traditionally reserved to the people or the legislature. . . . [Section 3401] appl[ies] if the court determines there is no "written law" in the Northern Mariana Islands applying to the subject matter of the case and controversy at issue.

Borja v. Goodman, 1 NMI 225, 247–48 (1990) (Hillblom, J., concurring). Consistent with such an explanation, prior to *Ogumoro I* we repeatedly stated that application of Restatement or common law principles is only justified where no applicable Commonwealth law exists. *See, e.g.*, *Tan v. Younis Art Studio, Inc.*, 2007 MP 11 ¶ 14 (finding Restatement (Second) of Torts controlling in absence of Commonwealth law on defamation); *Ito v. Macro Energy, Inc.*, 4 NMI 46, 55 (1993) ("Because we have no statute or local customary law regarding express releases, Restatement (Second) of Torts § 496B (1965) is applicable.").[3] Thus, Section 3401 requires us to thoroughly survey local law prior to turning to the restatements. *Tan*, 2007 MP 11 ¶ 14.

¶ 13 We review the instructions provided in *Ogumoro I* in light of the issues discussed in the opinion. There, Ko argued that the Restatement standard was not applicable under Section 3401's hierarchy of applicable law because Section 12.1(2)(b) does not comport with United States common law. We agreed with Ko that Section 12.1(2)(b) was taken from statutory provisions, finding that the "the relevant Restatement provision is not based on common law principles." *Ogumoro I*, 2011 MP 11 ¶ 60. We rejected Ko's argument, however, based on the unreasonable and unjust results that would follow if we only applied restatements that were based on the common law. As such, we interpreted Section 3401 to find that "the [r]estatements are the operative rules of decision in the Commonwealth, even when the relevant provision does not accord with United States common law." *Id.* ¶ 64.

¶ 14 Pursuant to our interpretation and following the import of Section 3401, we held:

> [Section 12.1(2)(b)] provides Ogumoro with a right to terminate Ko for non-payment of rent, even though Ko was not bound by a leasehold promise. We remand this matter for detailed factual

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[3] To date, we have explained and applied the same bedrock principle of Commonwealth law numerous times. *See, e.g.*, *Commonwealth v. Lot No. 353 New G*, 2015 MP 6 ¶ 22; *Commonwealth v. Sanchez*, 2014 MP 3 ¶ 16; *Commonwealth v. Quitano*, 2014 MP 5 ¶ 18; *Shinji Fujie v. Atalig*, 2014 MP 14 ¶ 13; *Aurelio v. Camacho*, 2012 MP 21 ¶ 10; *Bd. of Trs. of the N. Mariana Islands Ret. Fund v. Ada*, 2012 MP 10 ¶ 15; *In re Buckingham*, 2012 MP 15 ¶ 12; *Manglona v. Baza*, 2012 MP 4 ¶ 33; *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 11*; Saipan Achugao Resort Members' Ass'n v. Wan Jin Yoon*, 2011 MP 12 ¶ 26; *Marine Revitalization Corp. v. Dep't of Land & Nat. Res.*, 2010 MP 18 ¶ 36; *Kabir v. CNMI Pub. Sch. Sys.*, 2009 MP 19 ¶ 39; *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2008 MP 2 ¶ 5; *Commonwealth Dev. Auth. v. Guerrero Bros.*, 2007 MP 32 ¶ 12; *Manglona v. Gov't of the Commonwealth of the N. Mariana Islands*, 2005 MP 15 ¶ 19; *Bolalin v. Guam Publs., Inc.*, 4 NMI 176, 182 (1994); *Repeki v. Mac Homes Co.*, 2 NMI 33, 49 (1991).

> findings consistent with the above-cited Restatement provision. On remand, the trial court shall rely upon [reporter's note 13] in determining whether Ko received notice of termination and a demand for rent.

Id. Consistent with this instruction, we remanded the case for "further proceedings on the applicability of [Section 12.1(2)(b)] . . . ." *Id.* ¶ 72. Importantly, our analysis of Section 3401 and reliance on the Restatement occurred only after we acknowledged that restatement law could only apply in the absence of Commonwealth written law. *Id.* ¶ 59. Indeed, following Section 3401's hierarchy of applicable law, we first determined that "[*t*]*here is no Commonwealth written law applicable in this case*, nor is there local customary law related to termination of leases." *Id.* ¶ 59 n.21 (emphasis added).

¶ 15 On remand, the trial court sought to follow our instructions as to Section 12.1(2)(b) and reporter's note 13. It recited the Restatement standard and explained that "[i]n evaluating this subsection, the Supreme Court directs this Court to [reporter's note 13] . . . ." App. 590. The court stated that reporter's note 13 requires both a demand for payment and a notice of termination and acknowledged that the note adopts the common law rule. After mentioning reporter's note 13's notice and demand requirements, however, it instead focused on language in the note indicating that these requirements may be dispensed with by statute. Framing the issue before it as "whether there is an applicable Commonwealth statute that is relevant to the present case that has modified the notice and demand requirements of the common law," the court found the HTA applicable. App. 591. It then applied the HTA's requirement of a notice in writing demanding payment of rent or possession of the premises. *See* 2 CMC § 40204(b). Despite its application of the HTA, the court concluded by finding the Estate's actions sufficient to terminate Ko's leasehold pursuant to reporter's note 13.

¶ 16 We review whether the trial court correctly applied our mandate in light of the opinion's text and underlying substantive law. At the outset, we acknowledge that our directing the trial court to both a restatement standard and a reporter's note based on the common law presented the court with a dilemma—whether to base its decision off the common law rule or restatement. Reading the mandate in the context of the opinion's discussion, however, clarifies our instructions. Our analysis evinces that we found Section 12.1(2)(b)'s standard applicable due to our application of Section 3401. In particular, we found the Restatement standard governed our decision in the absence of Commonwealth law even if it conflicted with United States common law. Thus, although we directed the court to rely upon reporter's note 13 in its determination, its application was limited to the extent that it conflicted with Section 12.1(2)(b) or the discussion in *Ogumoro I*.

¶ 17 The trial court focused on reporter's note 13 without considering the confines of Section 12.1(2)(b) or *Ogumoro I*. First, because Section 12.1(2)(b) only requires a demand on the tenant for rent, a notice of termination was not

necessary to satisfy the applicable standard. However, because our mandate specified that the court review "whether Ko received notice of termination and a demand for rent," it is our mandate that was erroneous to the extent that it guided the court in making this determination. *Ogumoro I*, 2011 MP 11 ¶ 64. But the court's analysis was not limited to reviewing this standard; it also erroneously applied the HTA, replacing the common law and Restatement standards altogether. Crucially, its application of the HTA was not in conformity with our mandate finding *no Commonwealth law applicable*. *See Ogumoro I*, 2011 MP 11 ¶ 64 n.21.[4] As such, the HTA's application was beyond the court's jurisdiction. Thus, in executing the mandate, the court was bound to apply the Restatement standard, and, to the extent it did not conflict, the direction provided in reporter's note 13. It could also potentially have found Section 12.1(2)(b) inapplicable and applied another Restatement provision, or, if it concluded that none applied, employed United States common law. However, even if the court felt our determination that the HTA was inapplicable was erroneous, it was bound to comply with it. Thus, the court exceeded our mandate in reverting to Commonwealth law and applying the HTA.[5]

¶ 18 Because the court exceeded our mandate, its decision applying the HTA is void. We must thus review the court's factual findings and determine whether the Estate's actions satisfied Section 12.1(2)(b).[6]

B. Restatement

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[4] Our decision to apply the Restatement and implicit conclusion that the HTA did not apply followed directly from our determination that the leasehold clauses at issue were not applicable to Ko. *See Ogumoro I*, 2011 MP 11 ¶ 57 (reviewing whether the Estate had a right to terminate the lease independent of the leasehold promises). Because Ko's acquisition of the property through a judicial sale placed him *only* in privity of estate with the Estate, we found that any right to terminate Ko's interest must therefore stem from principles of property law, not contract law. The HTA, on the other hand, encompasses evictions of tenants due to "termination of the lease or breach of the lease agreement." PL 10-67, § 2. Due to the unique legal relationship between Ko and the Estate, however, the lease did not govern Ko's liability. As a result, neither of the circumstances encompassed in the HTA were at issue. *Cf. Ogumoro I*, 2011 MP 11 ¶ 56 n.20 (cautioning that it is Ogumoro's "failure to include a provision requiring the lessee to notify the landlord in the event of a mortgage or assignment that is at the heart of the problem. Ogumoro's failure to bargain for contractual provisions protecting her interests, and not the law, is the cause of the Estate's present difficulty.").

[5] The concurrence would hold the court properly followed our mandate and that it was our oversight that led the court to render its findings in light of reporter's note 13. However, as we just discussed, reporter's note 13 was to be relied on only to the extent it did not conflict with Section 12.1(2)(b) of the Restatement or our discussion in *Ogumoro I*. Furthermore, *Ogumoro I* dictated that no Commonwealth law applied—and implicitly even the HTA; thus, insofar as the trial court relied on Commonwealth law, it was directly contravening our mandate, thereby voiding its reliance on the HTA.

[6] Because we find the court's application of the HTA exceeded the mandate, we need not consider whether its action also exceeded the pleadings.

¶ 19 Ko argues that if the Restatement applies, its provisions were not met. He claims there is no evidence that either a demand for rent or a notice of termination was given to him. Even if some demand was provided, however, Ko urges it did not satisfy the Restatement's requirement of a demand "for the exact sum due at a notorious place on the leased premises between sunrise and sunset on the day the rent was due . . . ." Op. Br. 20. Rather, he contends that the Estate was looking only to evict him, not to demand rent.

¶ 20 In evaluating Ko's argument, we must carefully review our instructions from *Ogumoro I*. There, we concluded that even if Ko was not bound by the lease's forfeiture clause, he was responsible for the payment of rent due to privity of estate with the Estate by virtue of his status as an assignee. *See Ogumoro I*, 2011 MP 11 ¶¶ 34–56. Thus, even if the Estate could not avail itself of the forfeiture clause, it nonetheless had a right to hold Ko liable for his failure to make rent payments. *See id.* ¶¶ 53–64. We based our conclusion on the well-founded principle that payment of rent is a real covenant that runs with the land, obligating a tenant irrespective of lease promises. *See id.* ¶¶ 46–47, 55; RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 16.3 cmt. b, illus. 3 (1997) (illustrating that assignee "is not liable to [landlord] for the rent in arrears at the time of the assignment, but he is liable for the rent that becomes due after the assignment"); *see., e.g., Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A.*, 740 F.3d 972, 982 (5th Cir. 2014) ("[T]he landlords seek to recover damages arising only out of [the tenant's] breach of the covenants to pay rent and taxes, both of which are standard in commercial leases and therefore, 'run with the land.'"). As a result, we held that the Restatement provided the Estate "with a right to terminate Ko for non-payment of rent, even though Ko was not bound by a leasehold promise." *Ogumoro I*, 2011 MP 11 ¶ 64.

¶ 21 The Restatement standard provides a right to terminate a lease for a tenant's breach of his or her obligation to pay rent. It states:

> (2) Except to the extent the parties to a lease validly agree otherwise, if there is a breach of the tenant's obligation to pay the rent reserved in the lease, the landlord may:
> (a) recover from the tenant the amount of the rent that is due; and
> (b) terminate the lease if the rent that is due *is not paid promptly after a demand on the tenant for the rent*, unless equitable considerations justify extending the time for payment.

RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1(2)(b) (1977) (emphasis added). Comment n elaborates on this requirement, explaining that "[t]he landlord has the right to terminate the lease, even if there is no provision in the lease reserving the right to do so, if the rent due is not paid promptly after a demand for the same by the landlord . . . ." *Id.* § 12.1 cmt. n.

¶ 22 We thus review what a demand for rent pursuant to the Restatement standard entails. As explained above, the standards provided in Section 12.1(2)(b) and reporter's note 13 differ; the Restatement standard is not based on

common law principles. *See Ogumoro I*, 2011 MP 11 ¶ 60; RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1 (1977). Although reporter's note 13 states that both a demand for rent and a notice of forfeiture were required for termination of a leasehold interest at common law, the requirement of a notice of forfeiture is noticeably absent from the black letter law of the Restatement.[7] Following our decision that the restatements are the "'operative rules of decision' in the absence of written or customary law even when the relevant provision does not accord with United States common law," we apply the Restatement standard as stated in Section 12.1(2)(b). *Manglona v. Baza*, 2012 MP 4 ¶ 33 (citing *Ogumoro I*, 2011 MP 11 ¶¶ 57–62) (applying Restatement's requirement of demand). To the extend they do not conflict, we use the common law rules in reporter's note 13 to expound the standard in Section 12.1(2)(b).

¶ 23 Generally, "'[i]n order to show a forfeiture of an unexpired term of a leasehold estate, for nonpayment of rent, the lessor must prove demand of payment of the lessee when due.'" *Board of Park Commissioners v. Key Tr. Co.*, 764 N.E.2d 509, 514 (Ohio Ct. App. 2001) (citing Restatement § 12.1(2)(b)); *see Hindquarter Corp. v. Prop. Dev. Corp.*, 631 P.2d 923, 928 (Wash. 1981) (Rossellini, J., dissenting) (explaining Restatement permits landlord to terminate lease when prompt payment is not received after demand). The demand must traditionally be made at "a notorious place on the leased premises between sunrise and sunset on the day the rent [is] due." RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1 reporter's note 13 (1977). Additionally, the landlord must identify the precise sum due. *Manglona*, 2012 MP 4 ¶ 33; *see also*

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[7] Both the language of the reporter's note and the role of the reporter's notes in interpreting restatement provisions generally support the notion that the requirement of a notice of termination was not adopted by Section 12.1. First, the note repeatedly states that the protections it discusses stem from the common law, particularly the "old common law." RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1 reporter's note 13 (1997). Although it mentions that notice to quit was required at common law, and cites cases to that effect, it goes no further in discussing its relevance. *Id.*; *see also Independence Flying Service, Inc. v. Abitz*, 386 S.W.2d 399, 404 (Mo. 1965) ("It is the well-established rule . . . that [to] work a forfeiture of a leasehold estate at common law for non-payment of rent there must be a notice of forfeiture and a demand for the payment of the rent."). Secondly, speaking more broadly, the reporter's notes only purport to "discuss the legal and other sources relied upon . . . in formulating the black letter [law] and Comments, and enable the reader better to evaluate these formulations . . . ." *How the Institute Works*, https://www.ali.org/about-ali/how-institute-works/; *see also* Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 454 n.126 (1997–98) (noting that the "reporter's notes describe the research base supporting the reporter's formulation of a provision or comment"). Thus, although reporter's note 13 contains information considered by the reporters compiling the Restatement standard, unlike the black letter law provisions and comments, they are not statements of the law provided by the American Law Institute. *Capturing the Voice of the American Law Institute*, 45, https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf.

Valov v. Tank, 168 Cal. App. 3d 867, 872 (Cal. Ct. App. 1985) (explaining that demanding the precise sum "is required by 'elementary fairness . . . so that the tenant will know what he must do to avoid the forfeiture.'") (quoting Budaeff *v.* Huber, 194 Cal. App. 2d 12, 18 (Cal. Ct. App. 1961). "[A] demand in excess of the judgment will not support the judgment." *Manglona*, 2012 MP 4 ¶ 33; *see, e.g.*, *Johnson v. Sanches*, 132 P.2d 853, 853 (Cal. Ct. App. 1942) (improper demand where $1,551.38 was $750 in excess of actual amount due). The purpose of the demand for rent, underlying its specificities, "is to afford the tenant a reasonable opportunity to make payment . . . ." *Elizabethtown Lodge, Loyal Order of Moose v. Ellis*, 137 A.2d 286, 290 (Pa. 1958). Finally, even though the obligation to pay rent is the tenant's most obvious duty, the provision allowing the landlord to terminate the lease for the tenant's default "will be strictly construed against the landlord." RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1 reporter's note 2 (1977).

¶ 24 As a mixed question of law and fact, the trial court's factual findings constitute the basis for our determination. First, Ko failed to notify Ogumoro of his acquisition of the Jos' leasehold interest, despite having years to do so. At the same time, Ko understood his obligation to pay rent: he is a "sophisticated business man" with at least 14 properties on Saipan. App. 586. Ko demonstrated this understanding when he, through a friend, delivered a check to Ogumoro covering the first three months of his rental obligation. After a single payment, however, Ko stopped paying rent. Because Ogumoro was still unaware of Ko's acquisition, she sent the Jos notices of default and termination in April 1999 and October 1999, respectively. She also sued the Jos for breach of contract, seeking termination of the lease, unpaid rent, and attorney's fees. Ogumoro finally learned of Ko's interest in the property through a preliminary title report conducted in 1999, approximately two years after Ko's acquisition. Following this realization, she added Ko as a defendant to the lawsuit.

¶ 25 Ogumoro's sons posted the SAC, which named Ko as a defendant, throughout the property. In particular, the complaint and attached exhibits were posted on the door to the house, entrance to the property, and wall by the garage. It identified Ko as the owner of the leasehold interest and explained that although "the Lease contains [Ogumoro's] address for all notices . . . [Ko] failed to notify [Ogumoro] of his acquired interest . . . ." App. 5. The prior notices of default and termination sent from Ogumoro to the Jos were attached to the complaint. The complaint also identified the amount of rent due as $38,000. As remedies, the complaint requested $38,000 for nonpayment of rent, continuing rent until Ko vacates the premises, and various other costs and damages. It remained posted throughout the property for several days. Although a vendor whom Ko allowed on the property was residing there while the notices were posted, Ko took no action to maintain his title to the property until March of 2003, almost three years after the complaint was posted. As of the date of this opinion, Ko has failed to cure his default in rent; his last rental payment was in February of 1999.

¶ 26 We review whether Ogumoro's actions in response to Ko's breach of his obligation to pay rent terminated his leasehold interest. First, Ogumoro demanded rent from the Jos in April 1999, soon after rent was due. The demand was sent to the Jos and not Ko due to his failure to inform Ogumoro of his leasehold acquisition, even after making an initial rent payment. Where the original demand was inadequate due to its failure to notify Ko personally, however, the amended complaint mitigated the deficiency. It listed Ko as a defendant and detailed, in its facts section, why Ko was not provided with the earlier demand. With copies placed by the door, entrance, and garage, the complaint was certainly placed at multiple notorious places on the property. And because the copies of the SAC and exhibits remained on the property, they were there during the period when rent became due. Next, the amended complaint specifically and correctly identified the amount of rent due as of September 2000: $38,000. It did not demand payment in excess of the amount due, and, to the extent it demanded less than the amount due by the time it was posted on the property, we find that payment of the amount stated would satisfy the demand. Finally, we are persuaded that the SAC satisfied the Restatement's formulation of the purpose of a demand—it notified Ko of his breach, specified how the breach could be cured, and provided Ko a reasonable opportunity to do so. We thus find the Restatement's standard satisfied. As such, Ko's interest in the property was terminated as a result of his failure to pay rent in response to the complaint's demand.

¶ 27 Moreover, we find equitable considerations that might otherwise justify forgiving forfeiture unpersuasive. Although the Restatement standard states that equities may justify extending the time for payment and, more generally, relieving a tenant from forfeiture for nonpayment of rent, RESTATEMENT (SECOND) OF PROP: LANDLORD & TENANT § 12.1 (1997), such considerations are not always applicable. Particularly, "[w]here a default in the payment of rent under a lease occurs and subsists without apparent justification or legal excuse or a showing that it would be inequitable to enforce a forfeiture of the lease . . . the lessee is not entitled to relief." *Groendycke v. Ellis*, 470 P.2d 832, 835 (Kan. 1970) (quoting H.D. Warren, Annotation, *Relief against forfeiture of lease for nonpayment of rent*, 31 A. L. R. 2d 321); *see, e.g.*, *Manglona*, 2012 MP 4 ¶ 42 (missing thirty rent payments over seven years while collecting rent from sub-tenant evinced, lack of justification); *Cabrera v. Young Sun Rae*, 2001 MP 19 ¶¶ 11, 24 (finding "chronic failures to make timely payments" over a five-year period showed lack of good faith and warranted forfeiture).

¶ 28 Ko's behavior after acquiring the leasehold interest demonstrates that his default was unjustified. Namely, Ko was experienced with leasehold obligations generally, evinced by his multiple other leaseholds on Saipan. As evinced by his having made the judicial sale purchase with the help of an attorney, his payment of the first three months of rent—and his own admission—Ko was aware of his rental obligation. Despite Ko's awareness and ability to pay, however, he repeatedly failed to do so. Having found the Restatement standard satisfied and equitable considerations unwarranted, we conclude Ko's leasehold interest was

properly terminated for nonpayment of rent. Because we find Ko's leasehold interest terminated pursuant to the Restatement, we are left to consider whether the trial court properly awarded damages for unpaid rent to the Estate under this theory.

C. Damages

¶ 29 Ko argues that even if his interest in the property was forfeited, the court improperly awarded damages for unpaid rent. He asserts that while judgment was entered based on the Restatement and/or HTA, the Estate's SAC only asserted claims pursuant to the lease and abandonment. Ko claims that because the Estate did not amend its complaint, it cannot recover on a cause of action that it did not assert and he did not consent to. Furthermore, he contends that his admission of unpaid rent does not imply his consent to litigate his liability pursuant to the Restatement standard and/or HTA, as the evidence of unpaid rent is also relevant to the abandonment claim.

¶ 30 Although a party typically may not recover on a theory not asserted in their complaint, NMI Civil Procedure Rule 15(b)(2) ("Rule 15(b)(2)") provides an exception.[8] *See Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 983 (4th Cir. 2015) ("Rule [15(b)] sets forth 'an exception to the general rules of pleading . . . when the facts proven at trial differ from those alleged in the complaint, and thus support a cause of action that the claimant did not plead.'" (quoting *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 901 (4th Cir. 1996))). The rule provides two bases on which an issue not pleaded may be adjudicated: express and implied consent. *See* NMI R. CIVCIV. P. 15(b)(2). "Implied consent exists where a party has actual notice of an unpleaded issue and has been given an adequate opportunity to cure any surprise resulting from the change in the pleadings." *Trip Mate, Inc. v. Stonebridge Cas. Ins. Co.*, 768 F.3d 779, 784 (8th Cir. 2014) (quoting *Am. Family Mut. Ins. Co. v. Hollander*, 705 F.3d 339, 348 (8th Cir. 2013); *see Fustolo v. Patriot Grp., LLC (In re Fustolo)*, 896 F.3d 76, 86 (1st Cir. 2018) ("[T]rial of unpleaded issues by implied consent is not lightly to be inferred under Rule 15(b) . . . in light of the notice demands of procedural due process." (quoting *Triad Elec. & Controls, Inc. v. Power Sys. Eng'g, Inc.*, 117 F.3d 180, 193–94 (5th Cir. 1997))). Importantly, a party's

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[8] Rule 15(b)(2) provides:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, *it must be treated in all respects as if raised in the pleadings.* A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. *But failure to amend does not affect the result of the trial of that issue.*

NMI R. CIV. P. 15(b)(2) (emphases added). Because Rule 15(b)(2) mirrors its federal counterpart, we turn to federal law for guidance. *See Commonwealth v. Crisostomo*, 2018 MP 5 ¶ 14; *compare* NMI R. Civ. P. 15(b)(2) *with* FED. R. CIV. P. 15(b)(2).

awareness of evidence relating to an unpleaded claim does not indicate implied consent where that evidence is also applicable to a claim being tried. *Olaitiman v. Emran*, 2011 MP 8 ¶ 11 n.10 ("[W]e cannot infer implied consent from the mere fact that the pled and unpled grounds for divorce overlap. Implied consent to litigate an unpled issue cannot be found solely in the introduction of evidence directly related to a pleaded issue."); *see, e.g.*, *Manglona v. Tenorio*, 2004 MP 17 ¶ 16 ("[Party] could not have reasonably thought that the evidence she was introducing on a failed land sale in the first trial would be used to try an unjust enrichment claim in a second trial, so there was no consent to try this issue.").

¶ 31 In *Antilles Cement Corp. v. Fortuño*, the First Circuit reviewed whether the appellant had provided implied consent to litigate the issue of preemption where appellee had failed to amend its complaint to assert such a claim following remand. 670 F.3d 310, 319 (1st Cir. 2012). It explained that "[a] party can give implied consent to . . . an unpleaded claim in two ways: by treating a claim introduced outside the complaint 'as having been pleaded, either through [the party's] effective engagement of the claim or through his silent acquiescence'; or by acquiescing during trial 'in the introduction of evidence which is relevant only to that issue.'" *Id.* (quoting *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995)). The First Circuit found the trial court properly considered preemption, even without a formal amendment, because the parties "had fair warning that BAA preemption would be litigated." *Id.* Specifically, it noted the parties did not object "when it became clear that BAA preemption would be at the heart of the remanded proceeding." *Id.* Moreover, following remand, it found the parties did not object to the discussion of preemption during a scheduling conference on the scope of the appellate mandate, extensive discovery, and parties' briefing. *Id.* As such, it found the parties had notice that preemption would be litigated upon remand and, as a result, impliedly consented. *Id.*; *see also In re Zweibon*, 565 F.2d 742, 747 n.20 (D.C. Cir. 1977) (explaining that plaintiff may demand a jury for new trial on "new issues that may be introduced by amendment of the pleadings pursuant to the appellate court's mandate").

¶ 32 Because the parties acknowledge Ko did not provide express consent, we focus on whether Ko impliedly consented to adjudicating the case pursuant to the Restatement and/or HTA. We first point out that Ko's implied consent is not found from the fact that "the issue of unpaid rent was comprehensively discussed and argued by the parties, and [Ko] himself, acknowledged his liability for unpaid rent," as the Estate contends. Appellee's Br. 7 (quoting App. 601). The issue of unpaid rent, a question of fact, is insufficient to put Ko on notice that his liability under the Restatement was being determined, especially where his default in rent was also directly relevant to his liability under the theory of abandonment. *Compare* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1(2)(b) (1977) (premising relief on whether "there is a breach of the tenant's obligation to pay the rent reserved in the lease), *with Atalig*, 2014 MP 14 ¶ 11 (" [A]bandonment requires the tenant . . . 'default[] in the payment of rent.'") (quoting RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1 cmt. i (1977)). The pleaded and unpleaded grounds for termination of Ko's

leasehold, namely abandonment and the Restatement, overlap in that both require evidence of unpaid rent. Thus, Ko's failure to object to the introduction of evidence relating to unpaid rent is insufficient, in and of itself, to conclude that Ko impliedly consented to litigating his loss of title pursuant to the Restatement standard.

¶ 33 The discussion of unpaid rent, however, was not the only notice Ko had of his potential liability under the Restatement. The issue of Ko's liability pursuant to the Restatement standard was first raised on appeal in *Ogumoro I*. Not only was Section 12.1(2)(b) discussed in parties' briefing and our opinion, we also specifically directed review of the Restatement standard in our mandate. Following our mandate, the trial court announced at the start of trial that the "main issue" on remand was whether the Restatement standard was met. App. 79. The attorneys also argued whether the Restatement and, to a certain extent, HTA standards permitted terminating Ko's interest, with no objection from Ko. *See, e.g.*, App. 118 ("They refer us to the Restatement standard on termination. . . . [O]ur landlord tenancy or summary eviction statute has a provision for posting on the land and it's undisputed . . . the notice was posted on the land . . . ."); App. 599 ("[T]he Restatement was discussed and argued at length . . . on remand and was not objected to by [Ko]. . . . For [Ko] to take issue now is perplexing."). Such facts lead us to conclude that Ko impliedly consented to litigating the case pursuant to the Restatement standard by, at the very least, his silent acquiescence to the issue. Like in *Fortuño*, Ko did not object when it became clear that the Restatement standard would be at the heart of the remand proceeding. Moreover, he also did not object when his liability under the standard was argued on remand. Thus, we conclude that because Ko had fair warning and opportunity to object to adjudication of his liability pursuant to Section 12.1(2)(b), his silent acquiescence indicates his implied consent. As a result, damages pursuant to the Restatement standard may be awarded. Although amendment of the Estate's complaint to further clarify the issues on remand may have been preferable, its failure to add a Restatement claim does not bar its ability to recover.[9]

[9] We clarify, however, that we do not find that Ko consented to litigation of his liability under the HTA, either expressly or impliedly. As explained above, our mandate, read in context, indicated that no Commonwealth law was applicable to the proceedings. Thus, Ko was not on notice that the court could terminate his leasehold for nonpayment of rent under Commonwealth law. But because we find Ko's interest was properly terminated without reliance on the HTA, the damage award was proper insofar as it was awarded based on the Restatement.

V. CONCLUSION

¶ 34 For the foregoing reasons, we AFFIRM the trial court's Judgment.

SO ORDERED this 21st day of June, 2019.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

BOGDAN, J.P.T., concurring:

¶ 35 I concur in the judgment finding Ko's leasehold terminated for nonpayment of rent. However, what should be stressed is that the procedural history of this decades-long dispute involving numerous parties claiming conflicting leasehold interests in real property is seriously complex. There should be, but are not, clear rules of law allowing an owner of property, or a landlord, to regain possession of their property if rent or lease payments are not made. Despite this, regaining possession of property for non-payment is a substantial legal issue in the CNMI. Adding third parties acquiring property rights through mortgage foreclosure sales and redemption rights further complicates when leases may be terminated for nonpayment. Ultimately, I believe the Restatement supports the trial court's conclusion that Ko's rights to the lease were properly terminated with notice of nonpayment of rent and *effective* notice of termination. I would therefore hold the trial court properly followed the remand instructions and affirm the court's conclusion on that basis.

¶ 36 The mandate in *Ogumoro I* provided specific instructions for the trial court to follow. After finding the Restatement allows Ogumoro to terminate Ko's leasehold interest for nonpayment of rent—regardless of his liability to other claims for damages under the lease—we directed the trial court to make detailed factual findings consistent with the standard recited in the Restatement. We subsequently and explicitly added that "[o]n remand, the trial court *shall rely upon Restatement (Second) of Property § 12.1 reporter's note 13* (1977) in determining whether Ko received notice of termination and a demand for rent." *Ogumoro I*, 2011 MP 11 ¶ 64 (emphasis added).

¶ 37 The trial court's Findings of Fact and Conclusions of Law demonstrate that it strictly adhered to these instructions and abided by our precedent regarding mandates. Most importantly, the court on remand provided multiple pages of detailed findings of fact specifying Ogumoro's actions in response to Ko's nonpayment of rent. These findings support the conclusion that Ko had received a demand for unpaid rent and that he also received notice of termination. As directed on remand the trial court next recited and relied on Section 12.1(2)(b), which allows termination for nonpayment of rent "if the rent that is due is not paid promptly after a demand on the tenant for the rent . . . ." App. 590 (quoting Restatement (Second) of Property 12.1(2)(b)).

¶ 38 Following our instruction, the court looked further to reporter's note 13 and acknowledged the general rule that to ensure the common law's protections against forfeiture, a "landlord must have made a demand for payment from the tenant *and the tenant must have received notice of termination* for nonpayment of rent." App. 590 (emphasis added). However, the trial court also found in that although reporter's note 13 "adopts the common law rule . . . . [it] may be overcome if the notice and demand requirements are modified or dispensed with by (1) lease; or (2) statute." App. 590–91.

¶ 39 The CNMI's Holdover Tenancy Act ("HTA") is such a statute modifying the common law rule which is identical to and verbatim of a Florida statute discussed in reporter's note 13 as an example of statutes modifying or doing away with the common law strict notice of termination requirement. *Compare* 2 CMC § 40204(b) *with* FLA. STAT. §§ 83.20(2), 83.56(3). This meant that the HTA—under the very unique facts and circumstances of this case—could be a basis for terminating the lease. Therefore, not only did the trial court recite sufficient facts to establish that Ko had not paid rent and had received the necessary termination notice, the trial court found that the Restatement trumped the common law requirements that the landlord must have made a demand for payment from the tenant *and given formal notice of termination for nonpayment of rent*. Accordingly, in reliance on reporter's note 13's instruction, it found that under the specific facts before the bench "the Holdover Tenancy Act applies in this case." App. 592. The court thus found the common law rule modified by Section 40204(b) of the HTA and subsequently applied the HTA to the facts and concluded the requirements of the Restatement and Section 40204(b) were met. As a result, the court found that "pursuant to [r]eporter's note 13, [Ko's] leasehold interest on the property was effectively terminated." 594. The court's analysis demonstrates conscientious observation of and thoughtful work under the terms of the mandate.

¶ 40 I therefore respectfully disagree with the majority's suggestion that the court was only to be guided by the mandate's reference to reporter's note 13 or that its application was somehow to be limited to the extent it conflicted with Section 12.1(2)(b) or the discussion in *Ogumoro I*. As we have stated, the lower court must obey the directions in a mandate without variation "*even though the mandate may be erroneous*." *Wabol*, 4 NMI at 317. Although I do not believe there was any error, to the extent that the standard or modifications to the common law described in reporter's note 13 of the Restatement were not the proper standard for evaluating whether Ko's leasehold interest was terminated, it was this Court's oversight in explicitly specifying the application of reporter's note 13 in the remand instructions, not an error of the trial court in considering it. The trial court was instructed that it *shall rely upon* reporter's note 13, and the court's analysis evinces that it did just that in determining that Ko's leasehold interests had been properly terminated for nonpayment of rent.

/s/
WESLEY M. BOGDAN
Justice Pro Tempore