

**GOVERNMENT OF THE
NORTHERN MARIANA
ISLANDS
vs.
MICRONESIAN INSURANCE
UNDERWRITERS, INC., et al.**

**DCA No. 86-9027
CTC Civil No. 84-329
District Court NMI
Appellate Division**

Decided May 12, 1987

**1. Appeal and Error - Standard of
Review - Summary Judgment**

An appellate court reviews the propriety of a grant of summary judgment on a de novo basis.

**2. Civil Procedure - Summary
Judgment**

Summary judgment is appropriate where a trial court finds that there are no material issues of fact and, therefore, the moving party is entitled to judgment as a matter of law. Comm.R.Civ.P. 56.

**3. Civil Procedure - Summary
Judgment**

The party moving for summary judgment must demonstrate to the trial court through the pleadings, depositions, answers to interrogatories, affidavits, and exhibits that there are no genuine issues of material fact. Comm.R.Civ.P. 56.

**4. Civil Procedure - Summary
Judgment**

Generally, evidence submitted in support of a motion for summary judgment must comply with the rules governing admissibility of evidence in a trial. Comm.R.Civ.P. 56.

**5. Civil Procedure - Summary
Judgment - Affidavits**

Affidavits accompanying a motion must affirmatively show that the affiant is competent to testify to the matters therein and that the facts stated in the affidavit are based on affiant's personal knowledge. Comm.R.Civ.P. 56.

**6. Civil Procedure - Summary
Judgment**

The trial court views the evidence and inferences in a light most favorable to the non-moving party and the lack of a genuine issue of material fact results in a judgment in movant's favor as a matter of law. Comm.R.Civ.P. 56.

**7. Civil Procedure - Summary
Judgment - Particular Actions**

Where on a motion for summary judgment the trial court may have committed error by considering an exhibit to a deposition, not filed with the court, the fact that the exhibit was properly before the court through another deposition renders this error harmless. Comm.R.Civ.P. 56.

**8. Civil Procedure - Summary
Judgment - Particular Actions**

Where by implication trial court ruled on summary judgment motion that the one party's documentary evidence was more credible than another party's deposition testimony, court error in granting judgment. Comm.R.Civ.P. 56.

FILED
Clerk
District Court

1 UNITED STATES DISTRICT COURT MAY 12 1987
2 FOR THE
3 NORTHERN MARIANA ISLANDS ^{For The Northern Mariana Islands}

4 APPELLATE DIVISION

[Signature]
(Deputy Clerk)

5 GOVERNMENT OF THE NORTHERN)
6 MARIANA ISLANDS,)
7 Plaintiff-Appellee,)
8 vs.)
9 MICRONESIAN INSURANCE)
10 UNDERWRITERS, INC., et al.,)
11 Defendants-Appellants.)

DCA NO. 86-9027
CTC CIV.NO. 84-329

OPINION

12 Counsel for Appellee: MARCIA BELL
13 Law Office of Fennell
14 P. O. Box 49
Saipan, CM 96950

15 Counsel for Appellants: DOUGLAS F. CUSHNIE
16 Attorney-at-Law
17 P. O. Box 949
Saipan, CM 96950

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19 BEFORE: LAURETA, DUENAS, and FITZGERALD*, District Judges

20 LAURETA, District Judge:

21 The Commonwealth of the Northern Mariana Islands (CNMI)
22 filed suit against defendants Albert Camacho and the Commonwealth

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24
25 *The Honorable James M. Fitzgerald, Chief Judge, United States
26 District Court of Alaska, sitting by designation.

1 Bank (Bank), among others, to recover funds on deposit that were
2 lost when the Bank was forced into receivership.^{1/} The Bank
3 cross-claimed against Camacho alleging that pursuant to Title 37
4 Trust Territory (T.T.) Regulation Part 2.7 he was liable for the
5 losses suffered by the shareholders and creditors. The Bank's
6 motion for summary judgment was granted and Camacho appeals. We
7 reverse and remand for the following reasons.

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9 STATEMENT OF THE FACTS

10 In 1981, Camacho leased real property in Garapan,
11 Saipan, to the Greenmount Development Mariana Corporation
12 (Greenmount) which in turn leased the property to the Bank.
13 Construction began on the 34,288 square meter tract of land by
14 leveling three 3-bedroom homes to provide space for the Bank's
15 building. Camacho was to receive \$6,000 monthly rental and three
16 3-bedroom houses to be built on separate land owned by him to
17 replace the three that were destroyed.

18 The Commonwealth Bank was chartered in 1982. The
19 amended Articles of Incorporation filed with the Registrar of
20 Corporations lists five directors, including defendant Camacho.

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25 ^{1/} The suit by the CNMI against Camacho is not pertinent to
26 this appeal. The issues in this appeal involve only the cross-
claim by defendant Bank against defendant Camacho.

1 The Bank was undercapitalized from its inception. The
2 Bank continued to have financial problems throughout its
3 existence. In April, 1984, it was forced into receivership.

4 The CNMI filed suit against the Bank and Camacho, as
5 well as several other defendants not relevant to this appeal.
6 The Bank filed a cross-claim against Camacho. The cross-claim
7 alleged that Camacho and the other bank directors engaged in
8 business without complying with Title 37, Part 2.7 of the
9 Corporate Regulations of the Trust Territory. Specifically,
10 it was alleged that:

- 11 1) The Bank failed to obtain subscriptions
12 of three-fourths of the authorized
 capital stock;
- 13 2) Ten percent of the authorized capital
14 stock was not paid in when the Bank
 commenced business; and
- 15 3) Affidavits setting out compliance with
16 these regulations as required by §2.5
 were not timely filed.

17 The Bank alleged that \$600,000 had been lost as a
18 result of the directors' mismanagement. It claimed that the
19 directors were jointly and severally liable for this amount
20 pursuant to Part 2.7.

21 The Bank moved for partial summary judgment against
22 Camacho on the issue of liability.^{2/} In support of its motion the
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25 ^{2/}The Bank's motion for partial summary judgment merely adopts
26 as its own the CNMI's earlier motion for the same relief.

1 Bank presented to the court the following:^{3/}

- 2 1) The Bank's application for a business
- 3 license dated June 11, 1984;
- 4 2) The Bank's business license issued June
- 5 14, 1984;
- 6 3) A certified copy of a Certificate of
- 7 Amendment of the Articles of
- 8 Incorporation listing Albert Camacho as
- 9 a director of the Bank, executed
- 10 September 24, 1982 and filed with the
- 11 Registrar of Corporations September 28,
- 12 1982;
- 13 4) The deposition, affidavit, and
- 14 accompanying exhibits of William Heston,
- 15 a C.P.A. who audited the Bank. Heston's
- 16 investigation revealed that (a) the Bank
- 17 was undercapitalized when it began
- 18 operating, (b) 10% of its authorized
- 19 capital stock was not paid in, and (c)
- 20 three-fourths of its authorized capital
- 21 was not subscribed.
- 22 5) A resolution of the board of directors
- 23 purportedly signed by Camacho on October
- 24 1, 1981;
- 25 6) The minutes of the February 3, 1983
- 26 board of directors' meeting in which
- Camacho was elected secretary and
- appointed to the Personnel Committee;
- 7) A representation by proxy of Camacho at
- a May 25, 1983 board of directors'
- meeting;
- 8) The minutes of a July 6, 1983, board
- meeting indicating Camacho was in
- attendance; and
- 9) The minutes of an October 16, 1983,
- board meeting indicating Camacho was in
- attendance.

25 ^{3/}These documents show that Camacho attended at least two board
26 meetings.

1 Camacho did not dispute the fact that the Bank was
2 undercapitalized when it opened. Nor did he dispute the fact
3 that Part 2.7 assessed liability on corporate directors who
4 operate an undercapitalized corporation.

5 Camacho, however, denied that he was a director of the
6 Bank. He submitted his deposition to contradict the Bank's
7 claims that he was a director. Basically, his deposition
8 testimony stated that he did not know that he was a director of
9 the Bank. He claimed that he only attended the board of
10 directors' meetings in an attempt to collect lease money for the
11 land that the Bank was leasing from him through Greenmount. He
12 indicated that he could not read, write, or speak the English
13 language. He claimed that he had never signed any Bank documents
14 as a director.

15 The trial court granted the Bank's motion for summary
16 judgment. Camacho appeals. He raises two issues on appeal:

- 17 1. WHETHER THE TRIAL COURT CORRECTLY
18 DETERMINED THAT THERE WAS NO GENUINE
19 ISSUE AS TO WHETHER CAMACHO WAS A
20 DIRECTOR OF THE BANK WHEN IT GRANTED THE
21 BANK'S MOTION FOR SUMMARY JUDGMENT.
- 22 2. WHETHER PART 2.7 WHICH IMPOSES LIABILITY
23 ON DIRECTORS OF AN UNDERCAPITALIZED
24 CORPORATION FOR LOSSES SUFFERED BY ITS
25 SHAREHOLDERS AND CREDITORS IS AN
26 UNCONSTITUTIONAL TAKING OF PROPERTY IN
CONTRAVENTION OF THE DUE PROCESS AND
EQUAL PROTECTION CLAUSES OF THE UNITED
STATES CONSTITUTION.

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1 was not a director. It also cites Celotex. Additionally, the
2 Bank points out that Camacho himself cited the Sablan deposition
3 and exhibits thereto in its opposition to the Bank's motion for
4 summary judgment. The Bank argues that this supports the trial
5 court's conclusion that Camacho was not surprised when the trial
6 court based its decision, in part, on these exhibits.

7 Camacho refers to pages of the transcript in which the
8 trial court stated that it would not rely upon the Sablan
9 deposition and the accompanying Exhibit H. For this reason the
10 court denied Camacho the opportunity to challenge Exhibit H with
11 a counter-affidavit.

12 Camacho also challenges what he characterizes as the
13 court's finding that he was a director of the Bank. He stands on
14 his deposition testimony, which refutes the fact that he acted as
15 a director of the Bank. His deposition testimony further sets
16 out that he never served the Bank in any capacity. Camacho
17 asserted throughout the proceedings that he attended Bank board
18 meetings because he was led to believe that that was how he could
19 be assured of payment for rental due him.

20 [2-6] Rule 56 of the Commonwealth Trial Court Rules of Civil
21 Procedure governs summary judgment in the trial court. It is
22 identical to the federal rule. Summary judgment is appropriate
23 where a trial court finds that there are no material issues of
24 fact and, therefore, the moving party is entitled to judgment as
25 a matter of law. Celotex, 91 L.Ed.2d at 273. The movant must
26 demonstrate to the trial court through the pleadings,

1 depositions, answers to interrogatories, affidavits, and exhibits
2 that there are no genuine issues of material fact. Id. at 274.
3 Generally, evidence submitted in support of a motion for summary
4 judgment must comply with the rules governing admissibility of
5 evidence in a trial. Munoz v. International Alliance of
6 Theatrical Stage Employees and Moving Picture Machine Operators,
7 563 F.2d 205 (5th Cir. 1977). Affidavits accompanying a motion
8 must affirmatively show that the affiant is competent to testify
9 to the matters therein and that the facts stated in the affidavit
10 are based on affiant's personal knowledge. Barber v. Norman, 651
11 F.2d 1107 (5th Cir. 1981). "[D]ocuments must be authenticated by
12 and attached to an affidavit that meets the requirements of Rule
13 56(e)..." 10 Wright and Miller, Federal Practice and Procedure:
14 Civil 2d §2722, pp. 58-59. "[T]he affiant must be a person
15 through whom the exhibit could be admitted into evidence." Id.
16 at 60. The trial court views the evidence and inferences in a
17 light most favorable to the non-moving party. Water West, Inc.,
18 788 F.2d at 629. The lack of a genuine issue of material fact
19 results in a judgment in movant's favor as a matter of law. Id.

20 The trial court did rely on Exhibit H to the Sablan
21 deposition. Exhibit H purports to be corporate minutes of a Bank
22 board of directors' meeting which contains a resolution by the
23 board of directors that was allegedly signed by Camacho. The
24 Sablan deposition, however, was not before the trial court. See
25 CNMI v. M.I.U., CV 84-320, Summary Judgment Re: Albert Camacho,
26 July 18, 1986, p. 3, fn.2 (By the court: "Thus, the [Sablan]

1 deposition has not been filed with the Court and any testimony
2 therein is not considered by the Court.") Nevertheless, Exhibit
3 H of the Sablan deposition was attached to the affidavit of
4 Camille Pangelinan, an employee of a secretarial firm that
5 transcribed the deposition.

6 Camacho objected to the court's reliance on Exhibit H
7 for the reason that Pangelinan could not provide a proper
8 foundation for the admissibility of Bank documents. While the
9 trial court informed Camacho that it would not rely on the
10 exhibit, it did later base its decision, in part, on that very
11 document. The court attempted to remedy this apparent
12 contradiction by pointing out that Camacho was aware of Exhibit
13 H, and therefore he was not surprised by it surfacing at the
14 hearing. Camacho argues that his knowledge of the document is
15 irrelevant and that the court should not have relied upon it.

16 Camacho's argument is persuasive but he overlooks one
17 fact. Exhibit H had been filed with the court on December 24,
18 1985, as Exhibit 12 to the deposition of Norman Chan.^{5/} Chan
19 signed the minutes as a member of the Board of Directors. His
20 signature appears directly above the one purported to be
21 Camacho's.

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25 ^{5/}Parties to this appeal apparently overlooked this also since
26 no reference was made to Chan's deposition in the briefs or
arguments.

1 [7] Though Exhibit H was not before the court via the
2 Sablan deposition, nor properly before the court via the
3 Pangelinan deposition, it was properly there via the Chan
4 deposition. The document could have been introduced into
5 evidence through Chan who signed it as a member of the Board of
6 Directors. Though the trial court may have committed error by
7 considering Exhibit H to the Sablan deposition, the fact that
8 this was properly before the court through the Chan deposition
9 renders this error harmless.

10 [8] The issue remaining is whether there was a question of
11 fact as to whether Camacho was a Bank director. Camacho said he
12 was not. He said that he never acted for the Bank and that he
13 never signed anything for the Bank. The Bank argued that he was.
14 It introduced exhibits to support its position. But for the
15 court to rule in favor of the Bank, it had to weigh Camacho's
16 deposition testimony against the Bank's documentary evidence. By
17 implication, it ruled that the Bank's documentary evidence was
18 more credible than Camacho's deposition testimony. This it
19 cannot do in a summary judgment proceeding. Camacho's deposition
20 testimony raises a question of fact as to whether he was ever a
21 director or whether he attended board meetings as a director, or
22 whether he ever signed documents as a director. This can only be
23 determined after a full hearing.

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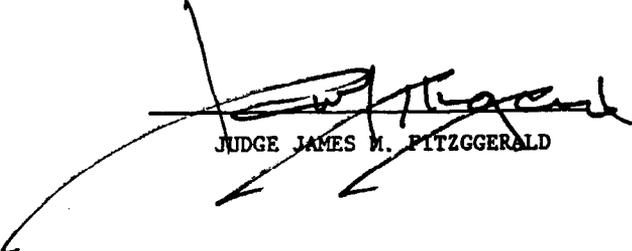
For these reasons the trial court's ruling is REVERSED
and this matter is REMANDED for trial on the merits.



JUDGE ALFRED LAURETA



JUDGE CRISTOBAL C. DUENAS



JUDGE JAMES M. FITZGERALD