

Lucia P. **Hemley**,
Plaintiff/Appellee,
v.
James L. **Hemley**,
Defendant/Appellant,
FKG, Inc.,
Intervenor/Appellee.
Appeal No. 96-052
Civil Case No. 85-0599
September 7, 1999

Submitted on the Briefs September 25, 1998

Counsel for Appellant: David A. Wiseman, Saipan.

Counsel for Appellee: Eric S. Smith, Saipan.

BEFORE: DEMAPAN, Chief Justice, TAYLOR¹, and LIZAMA, Justices *Pro Tem*.

DEMAPAN, Chief Justice:

¶1 [1] Appellant, James L. Hemley, appeals the Superior Court's Order and Accounting of Trust Fund dated October 30, 1996. We have jurisdiction pursuant to Article IV, § 3 of the Commonwealth Constitution, as amended.²

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 The Appellant raises three issues for our review:

1) Whether the Superior Court erred in finding that FKG made the total payment of \$399,891.34 on the Ground Lease and its amendment.

2) Whether the Superior Court erred in holding that the Law Offices of David A. Wiseman received the amount of \$156,096.26 in trust, but has accounted only for \$

¹ The Honorable Marty W.K. Taylor was sitting as Chief Justice when this appeal was submitted, and has subsequently been appointed to the panel as Justice *Pro Tem* as a result of his retirement effective December 5, 1998.

² N.M.I. Const., art. IV, § 3, was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

153,740.51 in the manner as provided by the court.

3) Whether the Superior Court erred in finding and holding that James L. Hemley still has an unaccounted balance of \$ 23,663.56 in rental payments from FKG.

¶3 [2,3,4] The foregoing involve findings of fact, and shall not be set aside unless clearly erroneous. *In re Estate of Deleon Guerrero*, 3 N.M.I. 253, 263 (1992).³ After a review of the entire record below, we will not disturb the lower court's factual findings, or re-weigh the evidence presented below unless we are convinced that a mistake was clearly made. *Id.* (citing *In re Estate of Rofag*, 2 N.M.I. 18, 30-31 (1991)).

FACTUAL AND PROCEDURAL BACKGROUND

¶4 The case originates from a divorce action filed by Lucia P. Hemley, against James L. Hemley and granted on September 24, 1986. *Hemley v. Hemley*, Civ. No. 85-0599 (N.M.I. Super. Ct. Sept 24, 1986) ([Unpublished] Decree of Divorce). The property in the marital settlement agreement, recorded as part of the divorce decree, included two lots in Garapan which were partially held in trust for the couple's four children. At the time of the divorce, the Garapan lots were encumbered by two mortgages, held by the Mariana Islands Housing Authority and the Bank of Guam.

¶5 Lucia Hemley and the four children brought various court actions against the Ground Lease. On June 1, 1995, the lower court directed FKG to submit all payments for rent on the Garapan property, leased to FKG and held by James L. Hemley for the benefit of his children, to the Law Offices of David A. Wiseman. *Hemley v. Hemley*, Civ. No. 85-0599 (N.M.I. Super. Ct. June 1, 1995) ([Unpublished] Interim Order Instructing FKG, Inc. re Payments of Rental). All lease payment made for the benefit of the children were placed in a trust account, established by David A. Wiseman, until such time as the court would decide to whom the payments should be made.

¶6 In October 1995, the parties were ordered to submit their respective accountings of disbursement of funds, prior to the hearing on the motion. The court set a hearing on January 29, 1996. The court issued its Order and Accounting of Trust Funds on October 30, 1996, finding that FKG was owed the amount of \$77,994.79 in credit; James L. Hemley had an unaccounted balance of \$23,663.56, for which

³ "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Com. R. Civ. P. 52(a).

reimbursements must be made; and that David A. Wiseman should disburse \$2,355.75, which had not been accounted for. *Hemley v. Hemley*, Civ. No. 85-0599 (N.M.I. Super. Ct. Oct. 30, 1996) ([Unpublished] Order and Accounting of Trust Fund).

¶7 On July 14, 1997, James L. Hemley filed a motion for relief from the Order and Accounting of Trust Fund on the ground the order contained errors and mistakes caused by the court's oversight or omission. The Superior Court denied Hemley's motion. *Hemley v. Hemley*, Civ. No. 85-0599 (N.M.I. Super. Ct. Aug. 14, 1997) ([Unpublished] Order After Hearing). James L. Hemley timely appealed.

ANALYSIS

¶8 The confusion arises from the tangled payments made over the course of a Ground Lease and its amendments. From 1987 through 1995, in addition to hiring counsel, FKG retained the services of a Certified Public Accountant to review all payments made, to ensure that FKG was properly being credited with payments made to James L. Hemley and the sources other than James L. Hemley. The accounting report was introduced into evidence, without objection.

¶9 [5,6,7] Findings of fact shall not be set aside unless clearly erroneous. *In re Estate of Deleon Guerrero*, 3 N.M.I. 253, 263 (1992). Commonwealth Rules of Civil Procedure 52(a) requires that in all actions tried upon the facts without a jury, the court shall find the facts specially. Com. R. Civ. P. 52(a). Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court. *Lundgren v. Freeman*, 307 F.2d 104, 113-14 (9th Cir. 1962). The mere fact that on the same evidence, the appellate court might have reached a different result, does not justify it in setting the findings of fact aside. *Amadeo v. Zant*, 486 U.S. 214, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988). The court's findings will not be disturbed on appeal unless they are clearly erroneous and are not based on substantial evidence. *Diamond Enters., Inc. v. Lau*, 951 P.2d 73, 74 (Nev. 1997).

¶10 From the accounting report, the Superior Court found that FKG had paid, over the course of the term of the Ground Lease through the year 1995, the sum of \$399,891.34 when only \$312,500.00 was due. The difference that FKG paid out, \$77,994.79, would be gradually credited to FKG. *Hemley v. Hemley*, Civ. No. 85-0599 (N.M.I. Super. Ct. Oct. 30, 1996) ([Unpublished] Order and Accounting of

Trust Fund).

¶11 The court computed that payments made by FKG to the Law Offices of David A. Wiseman should have been in the amount of \$156,096.26. The court found that David A. Wiseman had accounted for only \$153,740.51, resulting in the difference of \$2,355.75. *Id.* at 11.

¶12 [8] Looking at the trial court's findings of fact and the evidence upon which they were based, the figures are not clearly erroneous and should not be second guessed by an appellate court. This Court can ascertain from the record the manner in which the court arrived at its judgment. We can assume that the trial court, in allowing certain items, did not make a mathematical error.

¶13 Since this case involves a detailed financial accounting, the possibility exists that the lower court arithmetically miscalculated some of the figures. However, this Court runs the risk of further entangling the accounting by supplanting the figures of the lower court with new computations.

CONCLUSION

¶14 For the foregoing reasons, this Court will **AFFIRM** the lower court's judgment in the findings of fact. However, this Court will **REMAND** to the lower court for a recalculation of the figures, using the same facts and reasoning from the lower court's opinion, to ascertain if any arithmetical mistakes or miscalculations were made, and a determination whether FKG made the total payment of \$399,891.34 on the Ground Lease and its amendment; whether the Law Offices of David A. Wiseman has accounted for \$156,096.26; and whether James L. Hemley still has an unaccounted balance of \$ 23,663.56 in rental payments from FKG.