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

LUCIA C. DEL ROSARIO, *et al.,*
Plaintiffs-Appellees

v.

JUAN B. CAMACHO,
Defendant-Appellant

RITA B. CAMACHO
Plaintiff-Appellant

v.

JUAN B. CAMACHO, *et al.,*
Defendants-Appellees

JUDGMENT

Appeal Nos. 99-003 & 99-013 (Consolidated)

Pursuant to Rule 36 of the Rules of Appellate Procedure, the opinion of this Court has been issued and judgment is hereby entered.

The trial court's December 24, 1999 Order after trial of these consolidated actions is **AFFIRMED** in part; **REVERSED** in part; and **REMANDED** with further instruction consistent with this Court's opinion.

Entered this 14th , day of March, 2001.

CRISPIN M. KAIPAT
Clerk of Court

By:_____
Charlene C. Teregeyo, Deputy Clerk

FOR PUBLICATION

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OPINION

Cite as: *Rosario v. Camacho*, 2001 MP 3

Appeal Nos. 99-003 & 99-013 (Consolidated)
Argued and submitted September 15, 2000

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BEFORE: JOHN A. MANGLONA, Associate Justice, DAVID A. WISEMAN, Special Judge,[1] and VICENTE T. SALAS, Special Judge[2]

MANGLONA, Associate Justice:

INTRODUCTION

¶1 This is a consolidated appeal and cross-appeal involving a dispute among the twelve children and heirs of Gregorio C. Camacho, in which the parties essentially dispute their respective ownership interests in the decedent's property. Although a probate decree has divided Gregorio's property equally among the siblings, Juan B. Camacho claims to have acquired the interests of five siblings in property located in Garapan. Rita B. Camacho claims to have acquired this same property by virtue of a partida or, alternatively, by quitclaim deeds from four siblings.

¶2 Several siblings sued Juan for an accounting of the rent proceeds from Juan's use of the Garapan property. They subsequently sued Juan for breach of the settlement agreement disposing of the accounting lawsuit. Rita then sued several of the siblings, including Juan, to establish her ownership interest in the Garapan property, and for an accounting of rent from Juan's leasing of the property.[3]

¶3 Juan now appeals the trial court's December 24, 1999 Order after trial which declared void a deed of gift to him from his siblings, found him liable to his siblings under various tort theories and for breach of a prior settlement agreement, and awarded an accounting and punitive damages to his siblings. Rita appeals the trial court's April 12, 1998 Order denying summary judgment as to her claim that she owned property by virtue of a partida or alternatively by quitclaim deeds; she also appeals the December 24, 1999 Order declaring void her quitclaim deeds.

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[1] Honorable David A. Wiseman, sitting by designation.

[2] Honorable Vicente T. Salas, sitting by designation. On January 26, 2001, after oral argument but before this opinion issued, Special Judge Salas' term expired.

[3] Juan filed a counterclaim and cross-claim seeking to partition the property. The parties later stipulated that the property would not be partitioned.

¶4 We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended,[4] 1 CMC § 3102 and 8 CMC § 2206. Whether Rita satisfied the appellate procedural requirements so as to confer jurisdiction on this Court will be discussed below.

¶5 We **AFFIRM** in part and **REVERSE** in part, and **REMAND** with instructions. Specifically, we find that the deed of gift to Juan is valid, that Rita's quitclaim deeds have no effect on the siblings' ownership interests, and that Juan is only liable to his co-owner siblings for an accounting of the commercial rents he received from renting the Garapan property.

FACTUAL AND PROCEDURAL BACKGROUND

¶6 Gregorio C. Camacho died in approximately 1960. His children and heirs are: Lucia C. Del Rosario, Luise C. Villagomez, Maria C. Santos, Isabel C. Villagomez, Cecilia C. Cruz, Angelina C. Muna, Rosa C. Manglona, Augustine B. Camacho, Dionicio B. Camacho, Martin B. Camacho, Juan B. Camacho, and Rita B. Camacho. Due to the number of parties and name changes over the years through marriage, all parties will be identified by their first names only.

¶7 The properties in question are Lot Nos. 002 D 21, 002 D 22, 002 D 23 and 002 D 24, located in Garapan. For convenience, the lots will be identified as Lots 21, 22, 23, and 24, respectively, or collectively as "the Garapan property." Another lot, Lot 264, is located in Talofofo and will be referred to as "the Talofofo property."

¶8 Lucia, Luise, Maria, Isabel, Cecilia, Angelina, Rosa, and Augustine are the plaintiffs in Action 92-0550 on appeal herein, and will be referred to collectively as "Plaintiff-Siblings."

a. History of Conveyances

¶9 Before his death sometime in the 1960s, Gregorio may have conveyed all of his property to his sister, Rufina C. Reyes, with the intent that Rufina convey the property to Gregorio's second youngest child Rita. There is testimony in the record that Gregorio's land may have originally

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[4] 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.

belonged to Rita's grandmother, and that Gregorio hand-wrote a note conveying the land to his sister. Although Rita claims she was not permitted to participate in the probate proceedings to litigate this issue, the record indicates otherwise. Based on the evidence, the trial court concluded no partida had occurred.

¶10 In 1969, Gregorio's son Juan entered upon the Garapan property, and had moved onto it by 1973. In 1979, Juan leased a portion of the property for commercial use.

¶11 In 1983, Juan recorded a "Deed of Gift" signed by his siblings Isabel, Luise, Cecilia, Rosa, and Martin for Lots 23 and 24 of the Garapan property. Maria, Lucia, Augustine, Rita, Angelina and Dionicio did not sign the deed. Ramon G. Villagomez, who notarized each sibling's signature, testified he discussed the significance of the deed in Chamorro with each sibling, including those who did not sign. The deed itself recites as consideration "the love and affection, which we have and bear unto our brother, Juan B. Camacho, and for his maintenance, support, protection and livelihood." There was testimony at trial that Juan intended to give his siblings his share of the Talofofo property if they would give him their share of the Garapan property, because the exchange was more practical than physically dividing the property. This is not a stated term of the deed, and there is no record that Juan has ever conveyed his interest in the Talofofo property to any of his siblings.

¶12 In 1984, the siblings engaged in litigation over Juan's use of the Garapan property. We discuss the details of this litigation below.

¶13 In September 1986, a "Deed of Gift" was recorded in which Rufina conveyed Lots 21 through 24, among other properties, to Rita. Rosa signed the deed as a witness.

¶14 In October 1986 a hearing was held and in November of that year, the Superior Court issued a Decree of Distribution ("probate decree") which, among other things, ordered that the Garapan property be distributed equally among all twelve siblings as tenants in common, "subject to any pre-recorded conveyances." *In re Estate of Camacho*, Civ. No. 79-0130 (Super. Ct. Nov. 3, 1986) (Decree of Distribution at 3). The Talofofo property was also distributed equally among the siblings as tenants in common. *Id.*

¶15 The trial transcript is unclear as to whether Juan or Rita introduced their respective deeds into evidence during the probate proceedings. The Decree does not mention Juan's or Rita's deeds.

¶16 In 1987, Martin, Rosa, Cecilia and Maria signed quitclaim deeds conveying their interest in Lots 21 through 24, as well as Lot No. 001 D 26, to Rita. Rita testified that these siblings believed the property was intended for Rita. The consideration recited in each deed is: "the sum of TEN DOLLARS ($10.00) and [sic] along with other considerations [sic] to them in hand paid by [Rita]." Each sibling conveyed their respective interest in the property to Rita as tenants in common.

¶17 Juan has lived on the Garapan property since 1973, during which time he has spent approximately $75,000 on improvements to the property and rented it out. No other sibling has expressed a desire to occupy or build on the property.

¶18 In 1988 and 1992, the siblings engaged in further litigation over the Garapan property. We discuss the various lawsuits next.

b. Lawsuits Among the Siblings

i. Civil Action No. 84-0103 ("*Muna* action")

¶19 In 1984, Angelina, as the administratrix of Gregorio's estate, sued Juan to recover a share in the rent he received from renting the Garapan property. In December 1984 the court issued its memorandum opinion, finding in favor of Juan.

¶20 The court found Juan entered upon the Garapan property in 1969, built a residence and made various improvements to the property, including constructing a commercial shop building in 1978 which Juan leased the next year. None of the siblings objected to Juan's use of the property, nor did they demand a share of the rental payments. Only by the *Muna* action, filed five years after initiation of the probate proceedings distributing their father's estate, did the siblings make any formal claim against Juan. The opinion summarily states "A few years ago five of the siblings of Juan transferred their interests in the property to [Juan]." *Muna v. Camacho*, 2 CR 10, 12 (Trial Ct. 1984). The court concluded that an administratrix could not sue Juan on behalf of Gregorio's heirs, and that each sibling had to sue Juan in his or her individual capacity. *Id.* at 13.

¶21 Despite this dismissal for lack of standing, the court then proceeded to address the merits of the complaint by discussing the law of cotenancy and its applicability to Juan's deed. The court

concluded none of the siblings were entitled to rent from Juan for either his residential or commercial use of the property. *Id.* at 14-15.

ii. Civil Action No. 88-0868 ("Action 88-0868")

¶22 In November 1988, Plaintiff-Siblings sued Juan, Rita, Martin, and Dionicio. By their complaint, Plaintiff-Siblings sought to partition Lots 21 through 24 by sale as opposed to physical division. In their complaint, Isabel, Luise, Cecilia, and Rosa admitted they conveyed their interest in Lots 23 and 24 to Juan. They did not claim they were defrauded into signing the deed of gift to Juan.

¶23 After trial of, but before a verdict in Action 88-0868, the parties reached a settlement and asked that the court withhold from rendering a decision. Under the settlement, Juan agreed to sell Lots 21 through 24 and divide the proceeds among the siblings. However, Juan refused to sign the settlement agreement and Plaintiff-Siblings moved to enforce the settlement. In February 1990 the court issued an Order dismissing the case without prejudice pursuant to the settlement agreement, and requesting that the parties comply with the other terms of the settlement, subject to judicial intervention if necessary. *Rosario v. Camacho*, Civ. No. 88-0868 (N.M.I. Super. Ct. Feb. 7, 1990) (Order).[5] In their briefs, the parties apparently agree that the settlement agreement is as follows:

> The parties have agreed to authorize the sale or lease for 55 years [sic] the four subject Lots at a price of $680.00 per square meter. The parties further agreed that no sale or lease shall be made unless 60 days have expired and no higher offer is made by any prospective purchaser or lessee.

Stipulation for Dismissal and Order, Excerpts of Record, App. No. 99-013, at 63.

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[5] In its Order, the court did not explain why it did not simply order all parties to comply with the settlement agreement. Instead, the court stated in a footnote:

> The settlement reached herein is somewhat unique in that it calls for the court to dismiss the case and therefore the parties will, hopefully, comply with the other terms of the agreement outside the confines of judicial supervision. This is what the parties agreed to and these terms shall be observed. Should any party fail to live up to the terms of the compromise, recourse to the courts is still available.

Rosario v. Camacho, Civ. No. 88-0868 (N.M.I. Super. Ct. Feb. 7, 1990) (Order at 2). Thus, instead of immediate judicial intervention, the court simply dismissed the case with a warning that it would intervene in the future if the parties did not comply with the settlement agreement.

iii. Civil Action No. 92-0550 ("Action 92-0550")[6]

¶24 In May 1992, Plaintiff-Siblings again filed suit against Juan, alleging that in Action 88-0868, Juan refused to execute the settlement agreement or honor its terms. Specifically, Plaintiff-Siblings claimed Juan had leased Lot 24 but refused to share the lease proceeds with his siblings. Plaintiff-Siblings sought enforcement of the settlement agreement and damages. In his answer to the complaint, Juan claimed he was unable to find a buyer for Lots 21 through 24.

¶25 In January 1993, the court issued an order denying Plaintiff-Siblings' motion for summary judgment. The court ruled that since Action 88-0868 was not decided on the merits, it had no issue preclusive effect. The court also found that Plaintiff-Siblings' fifth cause of action for an accounting was precluded by the *Muna* action, in which Plaintiff-Siblings were adjudged not to be entitled to such accounting. *Rosario v. Camacho*, Civ. No. 92-0350 (N.M.I. Super. Ct. Jan. 11, 1993) (Order).

¶26 This action was consolidated with the following action for purposes of trial.

iv. Civil Action No. 93-0129 ("Action 93-0129")

¶27 In January 1993, Rita sued Plaintiff-Siblings, Juan, Dionicio, and Martin. She claimed to own Lots 21 through 24 and Lot 26, either by partida or by quitclaim deed from at least some of her siblings. Based on this ownership, she sought rent from Juan for leasing Lot 24 without her consent. Additionally, Rita claimed Angelina sold Lot 26 under court order, but never gave Rita the sale proceeds. In his answer, Juan admitted he occupied part of Lot 24, and that he rented a portion of the improvements thereto but did not share this rent with Rita.

¶28 In March 1993, Juan moved for summary judgment. In his moving papers, he claimed the probate action was res judicata as to the issue of Rita's ownership interest in the lots. Juan also claimed he only used, improved, and rented his proportional share of the property, therefore he owed no rent to any of his siblings. Finally, Juan claimed the *Muna* action was res judicata as to the issue of whether any siblings were entitled to an accounting. In her opposition, Rita countered that she owned the property through a partida performed before the probate action, and true ownership of the

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[6] Several documents in the record are from Action "92-0350". This appears to be a typographical error.

property could only be contested in a quiet title action, not in a probate action. The court granted Juan's summary judgment as to Rita's first cause of action regarding ownership of the lots, but denied summary judgment as to the cause of action for an accounting from Juan. The court order provides no detailed reasoning for its ruling.

¶29 It is undisputed that Juan built and leased three buildings on the lots in question, and that he did not share any rent with his siblings.

¶30 In response to Rita's lawsuit, Juan filed a counterclaim against her and a cross-claim against his remaining siblings, seeking to partition the property. In their answer, Plaintiff-Siblings and Rita claimed the deed was void for failure of consideration and fraud.

¶31 In November 1996, the parties stipulated and the court ordered that the property in issue would not be partitioned.

¶32 In December of that year, the court issued its post-trial Order in Actions 92-0550 and 93-0129. The court first denied Juan's claim for partition based on the November stipulation. The court then denied Rita's claim of title to all property in question, and ruled that all deeds held by Rita and Juan were void or otherwise unenforceable. Accordingly, the court found each sibling possessed a one-twelfth (1/12th) interest in the property. The order does not explain or cite facts to support this conclusion. Plaintiff-Siblings were entitled to recover from Juan on their claims of breach of settlement agreement, intentional misrepresentation, conversion, and intentional interference with expectation of economic advantage and opportunity. Plaintiff-Siblings were also entitled to an accounting from Juan of all rental income received from the property at issue. The court denied Plaintiff-Siblings' claim for specific performance of the settlement agreement. Since all siblings owned a 1/12th interest in the property, they were all entitled to 1/12th of the commercial rent received by Juan, less the amount of non-rental income Juan expended in improving the property. Finally, the court awarded Plaintiff-Siblings $27,000 in punitive damages from Juan for intentional misrepresentation, conversion, and intentional interference with Plaintiff-Siblings' expectation and economic opportunity. *Rosario v. Camacho*, Civ. No. 92-0550 and 93-0129 (N.M.I. Super. Ct. Dec. 24, 1998) (Order).

¶33 On January 20, 1999, Juan timely appealed the post-trial Order. Rita filed her own notice on February 3, 1999. Rita appeals not only the post-trial Order, but also the summary judgment Order finding no partida.

¶34 Whether Rita timely appealed will be discussed below.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶35 The issues before this Court are:

¶36 I. Whether Rita's appeal must be dismissed for lack of jurisdiction. Jurisdiction is a question of law, reviewed *de novo*. *Office of the Att'y Gen. v. Rivera*, 3 N.M.I. 436, 441 (1993).

¶37 II. Whether the decree of distribution is res judicata as to the issue of property ownership. Res judicata is a legal question which we review *de novo*. *Santos v. Santos*, 3 N.M.I. 39, 46-47 (1992). This issue was decided on summary judgment; a trial court's ruling on such a motion is likewise reviewed *de novo*. *Manglona v. Kaipat*, 3 N.M.I. 322, 329 (1992).

¶38 III. Whether Juan holds a valid and enforceable deed of gift to the Garapan property. Deed interpretation is a question of law, reviewed *de novo*. *Pangelinan v. Itaman*, App. No. 95-013 (N.M.I. Sup. Ct. July 10, 1996) (Opinion at 2).

¶39 IV. Whether Plaintiff-Siblings are entitled to rent from Juan. This is a legal question which we review *de novo*. *Santos*, 3 N.M.I. at 46-47.

¶40 V. Whether Juan breached the settlement agreement in action 88-0868. Mixed questions of law and fact are generally reviewed *de novo*, although the trial court's findings of fact are reviewed for clear error. *Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 2).

¶41 VI. Whether Juan's conduct was tortious and, consequently, whether Plaintiff-Siblings are entitled to punitive damages. This also appears to be a mixed question subject to *de novo* review, except for the trial court's findings of fact, which are reviewed for clear error. *Id.* We review a trial court's grant of punitive damages for abuse of discretion. *Pangelinan v. Itaman*, 4 N.M.I. 114, 117 (1994).

¶42 VII. Whether Rita presented any meritorious ownership claims to the property. As to Rita's claim of ownership by virtue of a partida, a trial court's application and interpretation of the customary law of partida is reviewed *de novo*. *In re Estate of Seman*, 4 N.M.I. 129, 130 (1994). The trial court's findings of fact are subject to the clearly erroneous standard, and this Court will not reverse such findings unless it is left with a firm and definite conviction that a mistake has been made. *Santos v. Santos*, App. No. 98-029 at 2. This issue was also decided on summary judgment, and the trial court's ruling on such a motion is likewise reviewed *de novo*. *Manglona v. Kaipat*, 3 N.M.I. at 329. The

validity of the quitclaim deeds is a question of law reviewed *de novo*. *Pangelinan v. Itaman*, App. No. 95-013 at 2.[7]

ANALYSIS

I. Rita's Appeal Is Not Fatally Defective

¶43 Plaintiff-Siblings raise the issue that Rita did not timely appeal the order as it applied to Siblings, and that this Court therefore lacks jurisdiction over the appeal with respect to Siblings.

¶44 An appellant must file a notice of appeal in the Superior Court within 30 days of entry of the appealable judgment or order. Com. R. App. P. 4(a)(1). If a party timely files such notice, any other party has 14 days after the first notice was filed to file its own notice of appeal, if the extra time extends the 30-day limit. Com. R. App. P. 4(a)(3). The court in *Lucky Dev. Co., Ltd. v. Tokai U.S.A., Inc.*, 2 N.M.I. 450 (1992), explained the reason for the 14-day rule:

> The 14 day requirement in Rule 4(a)(3) makes sense only if it is interpreted as giving a party a minimum of 14 days in which to file an appeal if another party has already filed an appeal and the first appeal was filed during the last 14 days of the original 30 day period. There are times when a party decides to file a notice of appeal at the last minute of the 30 day period. If such occurs, the other parties should have the opportunity to file an appeal.
>
> We interpret Rule 4(a)(1) & (3) as stating that every party has a minimum of 30 days to file an appeal. Once a party has filed a timely notice of appeal, all other parties have either the balance of 30 days, or 14 days, whichever is greater.

Id. at 456. The court further commented "Our rules of procedure 'should never be used as a game of skill'. . . . We should avoid interpretations of our rules 'which would defy common sense [or] lead to absurd results.'" *Id.* at 456-57 (noting appellant's interpretation of rule could result in one party strategically cutting off another party's right of appeal).

¶45 Here, the Order from which Rita appeals was issued on December 24, 1998. Juan first filed a timely notice of appeal on January 21, 1999. Rita filed her notice of appeal on February 3, 1999, less than 14 days after Juan filed his notice but more than 30 days after the Order was entered.

¶46 Plaintiff-Siblings contend that Rule 4(a)(3) does not apply to Rita's appeal as to them, because the notice of appeal constituted a cross-appeal with respect to the only pending appeal, filed by Juan. Plaintiff-Siblings cite no case law to support their position. Plaintiff-Siblings' reasoning implies that,

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[7] Standards of review for any sub-issues will be set forth within the discussion of each sub-issue.

after the first notice of appeal is filed, any subsequent notice of appeal only constitutes a cross-appeal. The language of Rule 4(a)(3) does not specifically limit subsequent appeals in this manner.[8]

¶47 Moreover, Rita's appeal is meaningless unless taken against all parties, because a successful appeal would necessarily affect the rights of all parties to the property at issue herein. Juan's notice of appeal may have affected or even prompted Rita's decision to appeal. According to *Lucky Development*, Rita was entitled to wait until the last minute to make her decision to appeal any part of the Order as it applied to any of the parties. Under Rule 4(a)(3), that last minute was extended past the 30-day period so Rita could consider the effect of Juan's appeal in making her own decision to appeal. To deprive her of these extra 14 days would be to defy common sense and lead to an absurd result.

II. The Decree of Distribution Is Not Res Judicata as to the Issue of Property Ownership

A. Effect of Probate Proceeding on Land Ownership

¶48 We must next determine whether the doctrine of res judicata bars either Juan's or Rita's ownership claims based on their respective deeds. Rita appeals the summary judgment Order and post-trial Order because she claims Gregorio conveyed his interest in the Garapan property while he was alive. If the property was not part of Gregorio's estate, then the probate court had no jurisdiction over it. Consequently, Rita was not barred from suing Juan for ownership of the property, notwithstanding the probate decree. Plaintiff-Siblings respond that since Rita did not appeal the final distribution of Gregorio's estate, the decree of distribution is now res judicata, because the doctrine applies to probate proceedings.

¶49 The general rule is:

> [W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for

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[8] Indeed, Com. R. App. P. 3(c) expressly provides that an appeal need not be dismissed for informality of form or title of the notice of appeal. In compliance with Rule 3(c), Rita attached a copy of the Order she was appealing to her notice of appeal. The Order specified all parties in its caption, and adjudicated the rights of all parties with respect to each other. Thus, Rita's intent that her appeal apply to all parties affected by the Order was clear, and her notice was adequate.

> that purpose." The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

Santos v. Santos, 3 N.M.I. at 48 (1992) (internal citation omitted).

¶50 A recent Commonwealth case has already held that a probate court's decree of distribution does not necessarily adjudicate a third party's interest in a decedent's property. In *Piteg v. Piteg*, App. No. 98-002 (N.M.I. Sup. Ct. Feb. 18, 2000) (Opinion), three siblings signed a deed relinquishing their interest in their mother's property to their brother Antonio. Antonio remained silent as to this deed, despite the fact several family members subsequently leased the property, received rent payments, and later amended the lease. Antonio then petitioned for final distribution of his mother's estate, including this property. At no time did he mention the deed his siblings had signed. Eight years later, Antonio filed suit to quiet title based on the deed. The trial court found Antonio's suit barred by res judicata. The court further found Antonio had waived his right to enforce the deed, and was estopped from doing so by his silence during the probate proceeding and in leasing the property with other family members, who relied on this conduct in believing Antonio would never enforce the deed. *Id.* at 2-3.

¶51 On appeal, this Court clarified that a probate court identifies heirs and distributes what interest the decedent had in the property, but does not determine ownership in cases where title is contested. *Id.* at 4. While a decree of distribution is conclusive as to the rights of heirs, legatees, or devisees insofar as they claim in such capacities, the decree does not determine the validity of the deceased's interest in the property; it merely determines the succession or testamentary disposition of such title as the decedent may have had. *Id.* Because Antonio based his claim of title on a contract with his siblings and not with the estate, this Court determined the probate court could not have addressed the ownership issue during the probate proceedings. *Id.* Accordingly, the issue was not addressed and decided so as to be res judicata. *Id.*

¶52 Plaintiff-Siblings rely on *Santos v. Santos*, 3 N.M.I. 39 (1992) to support their contention that res judicata applies to probate proceedings. *Santos* is distinguishable because in that case, there was no third party claim of ownership. In *Santos*, plaintiff essentially made a belated collateral attack on a probate court's determination of what property to include in decedent's estate. Because the probate

court would have necessarily determined the decedent's own property interests so as to properly distribute the estate, plaintiff's silence during the probate proceeding, despite knowledge of facts relevant to this inquiry, barred his subsequent lawsuit.

¶53 Here, *Piteg* compels our conclusion that the probate decree cannot be res judicata as to Juan's or Rita's ownership interests in the Garapan property based on their respective deeds. *Piteg* involved a probate proceeding in which the court determined heirs but not ownership. Here, the probate decree for Gregorio's estate recognizes its limitations by specifying that it is "subject to any pre-recorded conveyances. In *Piteg*, appellant did not expressly disclaim an interest in the property; he merely remained silent and had no duty to speak. Similarly, here, both Rita and Juan were silent during the probate proceedings, and neither expressly disclaimed any interest in the Garapan property. According to *Piteg*, this silence does not preclude Rita from raising the partida issue now.

B. Laches or Waiver

¶54 Juan contends Rita's failure to make a claim to the property during the probate proceeding precludes her from making such a claim now, according to the doctrine of laches. Rita claims she was not allowed to participate in the probate proceeding to raise this issue, despite evidence to the contrary.

¶55 We find neither doctrine applies here. The elements of laches are (1) plaintiff delayed filing suit for an unreasonable and inexcusable length of time from when she knew or reasonably should have known of her claim against the defendant, and (2) the delay operated to the prejudice or injury of the defendant. *Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 524 (1993). Laches presents a mixed question of law and fact, and is therefore reviewed *de novo*. *In re Estate of Deleon Guerrero*, 3 N.M.I. 253, 264 n.11 (1992).

¶56 Waiver is a voluntary relinquishment of a known right, with knowledge of its existence and intent to relinquish it. Mere silence does not constitute a waiver unless there is an obligation to speak. *Piteg*, App. No. 98-002 at 5. Waiver or estoppel is generally a question of fact, and becomes a question of law only when the undisputed facts could reasonably compel only one inference. *Platt Pac., Inc. v. Andelson*, 862 P.2d 158, 166 (Cal. 1993).

¶57 In *Piteg*, under facts similar to those in this case, the court found no waiver. *Piteg*, App. No. 98-002 at 5-6. Moreover, even though it expressed concern that Antonio did not introduce the deed during the probate proceedings, it held Antonio's conduct did not rise to the level of fraud. *Id.*

¶58 Here, neither Juan nor Rita served as administrator for the estate so as to give rise to any fiduciary duty, nor did they have any greater duty to their siblings to produce any deed which the siblings themselves signed. Because *Piteg* does not require Juan or Rita to come forward with their claims, we find the doctrine of laches similarly inapplicable.

¶59 Because we hold that the decree of distribution is not res judicata as to any claims of ownership made by the siblings in their own right, we must next review the trial court's rulings regarding Juan's and Rita's claims to the property.

III. The Deed of Gift to Juan Is Valid and Enforceable

A. Issue Properly Before the Court

¶60 The parties agree that at one time, the issue of the validity of Juan's deed of gift was properly before the court. Juan presents his argument, that this issue was withdrawn before trial, without citing any legal authority. Plaintiff-Siblings do not respond. We need not address an issue in the absence of cited authority regarding an argument raised on appeal. *Roberto v. De Leon Guerrero*, 4 N.M.I. 295, 297-98 (1995).

B. Deed Validity

1. The *Muna* Decision

¶61 Juan first argues the Superior Court's judgment in the *Muna* action, which granted judgment in his favor, precludes re-litigation of this issue. In *Muna*, Plaintiff-Siblings unsuccessfully sought the same relief they now seek, a share in the proceeds Juan received from renting the property, based on their respective ownership interests. Plaintiff-Siblings respond that the *Muna* action was decided on the grounds that Angelina could not sue on behalf of her siblings, and that each sibling had to sue in his or her individual capacity. As any discussion of ownership interest was unnecessary to the outcome of that action, Plaintiff-Siblings contend such discussion is merely dicta.

¶62 Res judicata consists of two preclusion concepts. Issue preclusion, also called collateral estoppel, refers to the effect of a judgment in foreclosing relitigation of a matter that has been already litigated and decided. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that has not been litigated, because it should have been raised in an earlier suit. *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 730 (N.D. Ohio 1999); *see Santos v. Santos*, 4 N.M.I. 206, 209 (1994). Issue preclusion requires that the issue in the previous action be identical to the one raised in the pending action, and that it was actually litigated, directly determined, and essential to the judgment in the prior action. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980); *Simmons-Harris*, 54 F. Supp. 2d at 731. Res judicata does not apply where an issue was not previously litigated. *In re Estate of Deleon Castro*, 4 N.M.I. 102, 111 (1994).

¶63 The *Muna* decision addressed the validity of the deed of gift to Juan. Therefore, the inquiry here is whether this issue was actually litigated, directly determined, and essential to the *Muna* decision so as to preclude the issue from being raised in the lawsuit on appeal herein.

¶64 In this respect, the *Muna* decision is unclear because part of it is dicta. Dicta refers to language in an opinion which is not necessarily involved nor essential to determination of the case in hand; such language is not binding as a rule of law. *Ruggles v. Ruggles*, 860 P.2d 182, 190 n.8 (N.M. 1993). The *Muna* court apparently dismissed that case for lack of standing, because the administratrix of Gregorio's estate was not the proper plaintiff. *See* Com. R. Civ. P. 41(b)(3) (stating dismissal for lack of jurisdiction does not operate as adjudication upon merits); *Taman v. Marianas Pub. Land Corp.*, 4 N.M.I. 287, 291 (1995). As such, there was no need for the court to discuss the deed of gift to Juan, and such discussion was therefore dicta. The *Muna* decision left the door open for an identical lawsuit by the proper plaintiffs, which is exactly what happened in the case on appeal.

¶65 Both the *Muna* decision and the record are unclear as to what stage of litigation the parties reached before the decision issued, and whether there was a hearing or trial or any adjudication of facts. The decision does not identify the five siblings or the facts supporting the conclusion that these five siblings deeded their property interests to Juan. We therefore have insufficient evidence to determine whether the parties actually litigated the validity of Juan's deed. Nevertheless, from the

record before us, we agree that the five siblings deeded their interests to Juan, for the reasons discussed below.

2. Plain Language

¶66 Where the language of a deed is plain, certain and unambiguous, it should be given its plain construction. An unambiguous instrument conveying property must be construed to its terms. *Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 7); *Tarope v. Igisaiar*, 3 CR 242, 246 (Trial Ct. 1987) (rejecting claim that plaintiff relinquished interest in property, where deed clearly listed plaintiff only as witness to transaction). Where the language of a writing is plain and precise, a court can, as a matter of law, establish the intentions of the parties as declared in the writing. *Santos*, App. No. 98-029 at 7.

3. Parol Evidence Rule

¶67 The parol evidence rule states:

> (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
>
> (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
>
> (3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

¶68 The parol evidence rule is a rule of substantive law which excludes evidence of prior or contemporaneous agreements or negotiations to change or modify the terms of a binding integrated agreement. RESTATEMENT (SECOND) OF CONTRACTS §§ 213 cmt. a, b, 215 (1981); *Seol v. Saipan Honeymoon Corp.*, App. No. 96-011 (N.M.I. Sup. Ct. Apr. 12, 1999) (Opinion at 4). The court considers parol evidence, not to determine that a party meant something other than what he said, but only to show what he meant by what was said. *Sablan v. Cabrera*, 4 N.M.I. 133, 140 n.40 (1994). Agreements or negotiations prior to or contemporaneous with the written agreement are admissible

only to show (1) whether the writing is an integrated agreement, (2) the extent to which the agreement is integrated, (3) the meaning of the writing, (4) other invalidating causes, such as fraud or lack of consideration, or (5) grounds for granting or denying rescission, reformation, specific performance, or other remedy. RESTATEMENT (SECOND) OF CONTRACTS § 214 (1981).

¶69 Here, the parol evidence in question was testimony that Juan promised to convey the Talofofo property to his siblings in exchange for their interest in the Garapan property. By this testimony, Plaintiff-Siblings attempt to add a condition not stated in the deed. The deed itself clearly recites the consideration supporting the conveyance. Thus, there is no need to go beyond the four corners of the deed to add a term not stated in the deed.

4. Integration

¶70 Plaintiff-Siblings cite no authority to support the conclusory assertion that the deed to Juan was not an integrated document and therefore requires the use of extrinsic evidence to interpret it.

¶71 The Restatement provides:

> (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
>
> (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
>
> (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981).

¶72 Accordingly, this Court has held that a completely integrated contract is one which the parties have adopted as a complete and exclusive statement of the terms of the contract. An agreement is integrated unless other evidence establishes the writing did not constitute a final expression. *Seol Saipan Honeymoon Corp.*, App. No. 96-011 at 3-4 (citing RESTATEMENT (SECOND) OF CONTRACTS § 210(1) (1979)).

¶73 Here, Plaintiff-Siblings have the burden of producing evidence that the deed to Juan is not an integrated document. They claim that the deed's language shows there was no complete and final

agreement between Juan and his siblings. They cite the deed provision that "[W]e and each of us, further agree and affirm that if any of us listed above does not sign this DEED, then as to those of us who do sign it, this deed is valid and constitutes our gift and conveyance herein." Plaintiff-Siblings cite no authority, nor do they explain why the above language suggests the deed was not an integrated document. The quoted language does not suggest that any term of the conveyance is yet to be decided. Indeed, this language indicates each individual sibling agrees to be bound by his or her signature, regardless of any other sibling's decision to sign or not sign the deed.

5. Consideration

¶74 The issue of whether a deed of gift is void for lack of consideration is reviewed *de novo*. *Santos v. Matsunaga*, 3 N.M.I. 221, 225 (1992).

¶75 Again, the parol evidence rule precludes the use of Ramon G. Villagomez's testimony to interpret the deed. Villagomez's testimony as to the intent behind this transaction, and the siblings' failure to achieve the stated objective, is of no consequence where the deed clearly recites valid consideration. A deed of gift executed in favor of one related to the grantor by blood or marital affinity is valid if the recited consideration is love and affection. *Id.* at 230. A grantor may convey an interest in real property as a gift, without receiving consideration. *Dillin v. Alexander*, 576 P.2d 1248, 1252 (Or. 1978). Plaintiff-Siblings cite no contrary law, but only offer the conclusory assertion that consideration was lacking. The issue of lack of consideration requires a factual inquiry. The trial court must specifically find that no consideration was paid, and that the parties in fact are not related by blood or affinity. *Santos v. Matsunaga*, 3 N.M.I. at 232.

¶76 In *Almeida v. Almeida*, 669 P.2d 174 (Haw. Ct. App. 1983), plaintiff conveyed property to herself and defendant, her son, as joint tenants. The deed itself did not recite a covenant or condition that defendant care for plaintiff in her old age. Defendant argued the conveyance was therefore a gift with no such condition. The trial court found defendant's promise was consideration for the conveyance, and divested defendant of the property. *Id.* at 179. In affirming, the Hawaii Court of Appeal found clear and convincing evidence of defendant's promise in the testimony of plaintiff and one of her sons. *Id.* The court noted that where the consideration for a deed depends upon a promise

of support, courts have shown more leniency toward the grantor, "particularly where the grantor is of advanced years." *Id.* at 181. Here, in contrast, Juan made no promise of continued support; at most, he made a promise to transfer property.

¶77 Juan contends that when there is no promise of continued support, then *State v. Thom*, 563 P.2d 982 (Haw. 1977) sets forth the applicable law: intent is based on the deed, and delivery passes title regardless of any conditions or contingency. *See id.* at 987. In *Thom*, landowners entered into a contract with the government to deliver their deed in exchange for the purchase price. Landowners delivered the deed, but the government did not deliver the purchase price until almost one year later, violating an express provision of the contract that it would be terminated for failure of payment upon transfer of the property. On appeal, landowners claimed the deed delivery was a conditional delivery, subject to the receipt of payment. The court held the deed itself was absolute and unconditional, with no language limiting or qualifying the fee simple estate it conveyed. *Id.* at 987. The court further held that delivery of a deed, absolute on its face, will pass complete title regardless of any condition or contingency on which its operative effect is made to depend:

> It is a well-settled rule of law that, if the grantor does not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself, or leave it with some other person as an escrow to be delivered at the proper time.

Id. (internal citation omitted). The court finally held that, as between a grantor and grantee, absent fraud, any sum paid or contracted to be paid is sufficient consideration to validate a conveyance of realty. *Id.* at 988. The rationale behind this decision is that, if a vendor of real property could repudiate a deed and recover the property upon the vendee's failure to pay, such a result would render real estate titles "dangerously uncertain with ensuing unfortunate consequences." *Id.* at 989.

¶78 We find this reasoning persuasive, and we reject Plaintiff-Siblings' claim that a deed that clearly and plainly recites consideration to Juan is void.

6. Fraud

¶79 One who fraudulently makes a misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or refrain from acting in reliance thereupon is liable for loss caused

by justifiable reliance on the misrepresentation. *Ada v. K. Sadhwani's, Inc.*, 3 N.M.I. 303, 312 (1992) (citing RESTATEMENT (SECOND) OF TORTS § 525 (1977)). To establish a fraudulent misrepresentation, plaintiffs have the burden of proving (1) a representation, (2) its falsity, (3) its materiality, (4) defendants' knowledge of or recklessness as to its falsity, (5) defendants' intent that plaintiffs act on it in the manner reasonably contemplated, (6) plaintiffs' ignorance of its falsity, (7) their reliance on its truth, (8) their right to rely on it, and (9) their resulting damage. *Lawrence v. Underwood*, 726 P.2d 1189, 1191 (Or. Ct. App. 1986). Plaintiffs' burden is to prove the above by clear and convincing evidence. *Id.* We review the trial court's finding of fraud under the clearly erroneous standard. *Pangelinan v. Itaman*, 4 N.M.I. 114, 120 n.33 (1994).

¶80 Failure to perform a promise alone does not constitute a fraudulent misrepresentation; there must be evidence that, *at the time defendant made the promise*, he made it with the intent not to perform, or with reckless disregard as to whether he could perform. *Underwood*, 726 P.2d at 1191. Fraudulent intent or reckless disregard cannot be inferred from the mere fact of nonperformance. Additional circumstances of a substantial character must be shown before an inference may be drawn. *Id.*

¶81 Plaintiff-Siblings have presented no evidence of intent, at the time of the promise, never to convey the property. They merely point to the testimony that Juan made a promise to convey the Talofofo property to his siblings in exchange for their signature, and the fact that the promise was never carried out. Again, they are undaunted by the fact that the deed does not require such a transfer. This argument is similar to that made in *Rogolofoi v. Guerrero*, 2 N.M.I. 468 (1992), which Plaintiff-Siblings cite in their brief. Rogolofoi, administrator of decedent's estate, sued Guerrero to invalidate a quitclaim deed by which decedent's children released their interest in the property to Guerrero, in exchange for Guerrero's conveyance of 3000 square meters of the property back to the children. Rogolofoi also accused Guerrero of fraudulently inducing decedent's widow to deed the property to him based on his representation that he would return the land to the widow and children. Guerrero allegedly knew at the time he made this representation that it was false. The trial court found that the children agreed to transfer the property to Guerrero so he would lease or sell it and return 3000 square meters of the property to the children.

¶82 In finding no fraud, the *Rogolofoi* court noted the rule:

> (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
> (a) knows or believes that the assertion is not in accord with the facts, or
> (b) does not have the confidence that he states or implies in the truth of the assertion, or
> (c) knows that he does not have the basis that he states or implies for the assertion.

Id. at 476-77 (citing RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (1981)). One of the elements of fraudulent misrepresentation is that the misrepresentation must be consciously false, intended to mislead another. *Id.* at 477 n.4. The court found that, based on the trial court's factual finding that there was no false representation because Guerrero did intend to return some land to the children, there could be no fraud. *Id.*

¶83 Here, as there was no evidence of intent when the deed was signed, we decline the invitation to invalidate the deed as being fraudulently obtained. We further hold that there was no other ground for invalidating the deed of gift to Juan.

IV. Plaintiff-Siblings Are Entitled to Rent Based on Their Respective Ownership Interests

A. The *Muna* Decision

¶84 Again, Juan seeks to rely on the *Muna* decision, which denied Plaintiff-Siblings the same relief they now seek, a share in the proceeds Juan received from renting the property because (1) the plaintiff did not have standing to bring suit on behalf of the individual siblings, and/or (2) as a matter of law, Juan would not be required to share any rent proceeds with his cotenants.

¶85 Although the *Muna* action was dismissed on procedural grounds, it did not stop its analysis there. Instead, it presented an alternative ruling:

> Even if [the court's conclusion regarding lack of standing] may not be so, if ordinary real estate principles are applied, it becomes clear that what is presented here is the occupancy and use of the property for a number of years by one of the co-tenants in a co-tenancy.

Muna v. Camacho, Civ. No. 84-0103 (N.M.I. Super. Ct. Dec. 12, 1984) (Memorandum Opinion at 14). The court then set forth its legal reasoning why Plaintiff-Siblings were not entitled to share rent with Juan.

¶86 The doctrine of stare decisis does not compel one district court to follow the decision of another. *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977). Juan responds that, even though this Court is not bound by a previous Superior Court judgment, it would be inequitable to reverse a judgment on which Juan relied and which was not appealed. However, an appellate court is not bound by the decision of a trial court, especially where the trial court made an erroneous conclusion of law. Because we conclude that Isabel, Luise, Cecilia, Rosa and Martin deeded their interest in Lots 23 and 24 to Juan in 1983, and because we hold that the law of cotenancy requires a cotenant in possession to share rent proceeds with other cotenants under certain circumstances, we hold that Juan must share the proceeds from rental of Lots 23 and 24 with some, but not all, of his siblings.

B. Cotenant's Liability for Rent

¶87 Juan next contends he was not required to share rent with his siblings because he rented only his interest in the property. Alternatively, he claims he should at least be reimbursed for the improvements he made to the property using his own money.

¶88 We dispense with the first argument by noting that Juan cites no supporting case law. Moreover, there is no evidence in the record as to how much of the property was suitable for commercial lease, so as to exclude the possibility that there was no other useable portion of the property left for the siblings to lease if they were so inclined. Given this uncertainty, we decline to address this issue.

¶89 As to the second argument, we agree that Juan is entitled to some reimbursement. Cotenancy gives each tenant equal rights of use and possession of the commonly owned property, so that each has the right to enter upon and occupy the entire property, but none can be excluded from any portion thereof. *Fazzio v. Rarick*, 180 B.R. 263, 268 (E.D. Cal. 1995).[9] Each cotenant in common has the

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[9] It is well established that the Commonwealth may look to the law of other United States jurisdictions where the Commonwealth's written law, local customary law, and the Restatements do not provide guidance. 7 CMC § 3401; *I.G.I. Gen. Contr. & Dev., Inc. v. Pub. Sch. Sys.*, App. No. 97-031 (N.M.I. Sup. Ct. Apr. 28, 1999) (Opinion at 3).

It should also be noted that the trial court in the *Muna* action relied on a range of cases cited in 20 AM. JUR. 2D, *Cotenancy and Joint Ownership*, § 54 (2d ed. Rev. 1995), whereas the above-cited case law is limited to states

same right to possess the entire property, regardless of his or her respective percentage of ownership. *Garcia v. Andrus*, 692 F.2d 89, 92 (9th Cir. 1982). For this reason, a cotenant out of possession is not entitled to rent or other reimbursement for a cotenant's exclusive use and possession. *Fazzio*, 180 B.R. at 269; *Cummings v. Anderson*, 614 P.2d 1283, 1289 (Wash. 1980). However, a cotenant is entitled to an accounting of rents and profits derived from a third person for that person's use and occupancy of the commonly owned property. *Fazzio*, 180 B.R. at 269. As with other benefits other than the right of possession, cotenants must share the rent proceeds according to their respective percentages of ownership. *Garcia*, 692 F.2d at 92.

¶90 When one cotenant makes payments for the benefit of the property, he may seek reimbursement from other cotenants for their proportionate share of the expenses. *Fazzio*, 180 B.R. at 269. For example, the possessing cotenant can deduct expenses incurred for the preservation and protection of the property, such as taxes and other common obligations, and necessary repairs and additions made during the period the rents were collected. *Id*; *Cummings*, 614 P.2d at 1289 (finding cotenant not entitled to offset for improvements to house which did not increase market value).

¶91 Juan argues that when a cotenant in possession derives profits from the common property, the cotenant out of possession has no right to a proportion of the profits. However, this rule has been narrowly construed to protect only those profits derived from the possessing cotenant's own capital, labor and skill. *Fazzio*, 180 B.R. at 269.

¶92 In light of the foregoing, we hold that the trial court correctly found the siblings entitled to an accounting. Any rent proceeds Juan earned before 1983 must be distributed equally among the twelve siblings. However, after Isabel, Luise, Cecilia, Rosa and Martin deeded their interest in Lots 23 and 24 to Juan in 1983, Juan was only obligated to share the rent proceeds with the remaining siblings, based on their proportionate interest in the property. Juan is entitled to reimbursement of his costs in improving the property in connection with any commercial lease thereof, and we therefore

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within the jurisdiction of the Ninth Circuit, which we cite with approval.

remand with instructions that the trial court determine the amount of rent at issue and the amount of reimbursement to which Juan is entitled.[10]

V. Juan Did Not Breach the Settlement Agreement in Action 88-0868

1. Juan Himself Did Not Breach the Settlement

¶93 We first dispense with Plaintiff-Siblings' claim that Juan's failure to sign the settlement agreement constituted a breach of contract, by noting that a trial court has already found the agreement enforceable without Juan's signature. Plaintiff-Siblings cite no authority to support their argument that Juan's refusal to sign the settlement agreement constituted a breach. *See Hay v. Pacific Tastee Freez, Inc.*, 555 P.2d 1256, 1261 (Or. 1976) (finding oral contract enforceable under statute of frauds by writing authenticating its existence and contract terms, even though writing was prepared and signed after making of contract).

¶94 The next argument is that the settlement agreement in Action 88-0868 placed a duty on Juan to find a buyer for Lots 21 through 24. Juan responds that no specific party had a duty to find a buyer. Moreover, the finding of a buyer was a condition precedent to selling the property and sharing the proceeds; no buyer having been found, the duty to sell and distribute the proceeds obviously could not arise.

¶95 Breach of contract occurs upon the non-performance of a contractual duty of immediate performance. *Bradshaw v. Camacho*, 1 CR 165, 175 (Dist. Ct. 1981). However, if non-performance is justifiable, then there is no breach. *Id.* at 176. Breach of a settlement agreement is breach of a contract. *Sharpe v. F.D.I.C.*, 126 F.3d 1147, 1153 (9th Cir. 1997).

¶96 A condition is an event, not certain to occur, which must occur unless it is excused before performance under a contract becomes due. RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981). Non-occurrence of a condition is not a breach unless the party is under a duty that the condition occur. RESTATEMENT (SECOND) OF CONTRACTS § 225(3) (1981). An event may be made a condition

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[10] We note that, on remand, Juan may receive reimbursement only in the form of a deduction from the rental proceeds. Our holding does not extend to a situation where a cotenant in possession unilaterally decides to improve the property's market value, but does not receive rent and instead seeks reimbursement from his cotenants' own pockets.

either by the agreement of the parties or by a term supplied by the court. RESTATEMENT (SECOND) OF CONTRACTS § 226 (1981).

¶97 Neither Juan nor Plaintiff-Siblings cite any authority specific enough to address the issue of whether any of them had a contractual duty to find a buyer for the Garapan property, or whether finding a buyer was a condition precedent to Juan's duty to pay Plaintiff-Siblings. The settlement agreement itself does not place the burden of finding a buyer or lessor on any particular party. It merely states that the parties authorize the sale or lease of the property. In selling the property, all siblings presumably had to sign the deed because of the contested ownership. We see no reason to impose a duty where none is clearly indicated or contemplated by the contracting parties.

¶98 Plaintiff-Siblings next point out that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). However, this implied covenant only requires that one party not injure another party's right to receive the benefits of the agreement. *Ellingstad v. Department of Natural Resources*, 979 P.2d 1000, 1009 (Alaska 1999). Thus, if the settlement does not place an affirmative duty on Juan to find a buyer, then his duty under the implied contract is to refrain from interfering with any other party's ability to find a buyer. Although Juan's answer in Action 92-0550 suggests he had found a buyer or lessor, Plaintiff-Siblings point to no evidence that would prove Juan intentionally defeated a potential sale or lease simply because the deal did not go through.

2. Juan Did Not Fraudulently Induce a Settlement Agreement or Breach Thereof

¶99 Again, the rule is that:

> (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
> (a) knows or believes that the assertion is not in accord with the facts, or
> (b) does not have the confidence that he states or implies in the truth of the assertion, or
> (c) knows that he does not have the basis that he states or implies for the assertion.

Rogolofoi v. Guerrero, 2 N.M.I. 468, 476-77 (1992) (citing RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (1981)).

¶100 Juan notes that the misrepresentation must be intentional. *Id.* at 477. He points to his testimony that he thought he had found some potential buyers or lessees who would pay more than $680 per square meter for the Garapan property, and that he took a risk in not selling the property at the settlement price because he thought he could do better. He urges that he should not be found liable for breach of contract because he took a risk and was subsequently unable to sell or lease the property.

¶101 Plaintiff-Siblings claim they relied on Juan's false representation of intent to settle the case to their detriment. Juan points out that, as one of the elements of fraud is injury to the defrauded party, this element is not met if the defrauded party suffers no damage. *Nentwig v. United Indus., Inc.*, 845 P.2d 99, 105 (Mont. 1992). Plaintiff-Siblings originally brought suit to partition the property, the settlement agreement was to sell the property, a court has ruled the agreement enforceable, and this is exactly what Plaintiff-Siblings sought. The fact that the property has yet to be sold because no one has found a buyer does not impose liability solely on Juan.

VI. Juan's Conduct Was Not Tortious

A. Intentional Interference with Prospective Economic Advantage

¶102 There are no facts in the record or in the trial court's judgment supporting this claim.

¶103 One who intentionally and improperly interferes with the performance of a contract between two parties, by inducing or otherwise causing a contracting party not to perform the contract, is liable for resulting loss to the other contracting party. *Lucky Dev. Co., Ltd. v. Tokai U.S.A., Inc.*, 3 N.M.I. 79, 93-94 (1992) (citing RESTATEMENT (SECOND) OF TORTS § 766 (1979)). A party to a contract cannot tortiously interfere with its own contract. *Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho, Inc.*, 851 P.2d 946, 950 (Idaho 1993); *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 301 (Utah 1982). There must be a prospective contractual relationship between the plaintiff and a third party. *Kutcher v. Zimmerman*, 957 P.2d 1076, 1088 (Haw. Ct. App. 1998). Additionally, the prospective economic advantage must have been reasonably probable to occur, but for defendant's interference. *Youst v. Longo*, 729 P.2d 728, 733 (Cal. 1987).

B. Conversion of Property

¶104 Because Plaintiff-Siblings' interest in property or rent cannot be considered chattel, there is no basis for this tort claim.

¶105 Conversion is an intentional exercise of dominion or control over a **chattel** which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965) (emphasis added). A conversion may be committed by intentionally dispossessing of, destroying, using, receiving, disposing of, misdelivering, or refusing to surrender a chattel. RESTATEMENT (SECOND) OF TORTS § 223 (1965). Conversion applies only to things that are capable of being lost or stolen. RESTATEMENT (SECOND) OF TORTS § 242, cmt. d (1965); *see Hartford Fin. Corp. v. Burns*, 158 Cal. Rptr. 169 (Cal. App. 1979) (defining "conversion" as "any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein"); *Lun v. Mahaffey*, 185 P. 746, 749 (Or. 1919) (holding leasehold interest in building is not chattel and therefore not subject to action for trover or conversion).

¶106 Plaintiff-Siblings cite no contrary legal authority, and we therefore decline to further address this issue. *See Roberto v. Deleon Guerrero*, 4 N.M.I. 295, 297-98 (1995). Because there is no basis for awarding tort relief, there is no need to discuss damages or punitive damages.

VII. The Trial Court Correctly Rejected Rita's Ownership Claims

A. Partida

¶107 The record on appeal does contain some evidence in support of Rita's claim of ownership by virtue of a partida. While there may have been sufficient evidence to defeat summary judgment, we must defer to the trial court's consideration of what appears to be sufficient evidence and an adequate opportunity to litigate this issue once the matter went to trial. *Santos . Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 2). We therefore affirm the trial court's finding that no partida had been made.

B. Quitclaim Deeds

¶108 We may easily dispense with the quitclaim deeds to Rita. Each sibling conveyed nothing to Rita that Rita did not already have. The plain language of each deed conveys an interest to Rita as tenants in common. According to the probate decree, the siblings already share equally in the property as tenants in common, subject to any pre-recorded conveyances. Therefore, the quitclaim deeds have no practical effect on any of the siblings' property interests.

CONCLUSION

¶109 Based on the foregoing, we **AFFIRM** in part and **REVERSE** in part the December 24, 1999 Order after trial of these consolidated actions on the following grounds[11]:

¶110 1. We AFFIRM the trial court's rejection of Rita's claim of ownership by partida. We REVERSE the trial court's invalidation of the deed of gift to Juan;

¶111 2. The trial court's ruling regarding Rita's quitclaim deeds has no effect on the parties' respective ownership rights and is therefore moot;

¶112 3. We REVERSE the trial court's award of all property in question equally to the siblings, because the deed of gift to Juan was valid and enforceable;

¶113 4. We REVERSE the trial court's finding that Juan was liable in tort to his siblings on any ground;

¶114 5. We AFFIRM the trial court's finding that all siblings are entitled to an accounting from Juan with respect to all rental income he has received and continues to receive from his commercial rental of the Garapan property. However, we **REMAND** this issue to the trial court to determine the amount of commercial rent received and the amount of reimbursement to which Juan is entitled, consistent with this opinion;

¶115 6. We REVERSE the trial court's award of punitive damages against Juan.

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[11] There is no need to specifically rule on the April 12, 1998 summary judgment Order on Civil Action No. 93-0129, as it was superseded by the December 24 Order.

¶116 We decline to review any rulings in the trial court's orders that were not raised on appeal.

Dated this 12th day of March 2001.

JOHN A. MANGLONA, Associate Justice

DAVID A. WISEMAN, Special Judge

VICENTE T. SALAS, Special Judge[12]

[12] As previously noted, Special Judge Salas' term expired before this opinion issued.