IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Supreme Court Civil Appeal No.: 2007-002

MERCY KRAMER and PACIFIC INTERNATIONAL, INC.,
Plaintiff/Appellee,

vs.

STANLEY ARE and THERESA ARE,
Defendants/Appellants.

DECISION ON APPEAL

FILED

JUL 17 2008

BEFORE CADRA, C.J.; KURREN, A.J.;[1] and WALLACE, A.J.[2]

CADRA, C.J., with whom KURREN, A.J., and WALLACE, A.J., concur:

I. INTRODUCTION

Appellants, Stanley and Theresa Are, Defendants/Appellants, appeal a "Judgment and Order" of the High Court requiring them to vacate premises known as "Lojomwe weto." Appellants also appeal an order of the High Court dismissing their claim for damages arising out of negligence and/or intentional infliction of emotional distress. We conclude there is no reversible error and therefore AFFIRM the High Court's judgment.

[1] Barry Kurren, United States Judge-Magistrate, District of Hawaii, sitting by appointment of the Cabinet.

[2] J. Clifford Wallace, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

II. FACTS AND PROCEEDINGS BELOW

In 1998, Mercy Kramer entered into a written "Lease Agreement" for a portion of "Lojomwe weto" (aka Lajenwa, aka Lojomoe weto, aka Lajenwa) located in the Ajeltake District, Majuro Atoll from Iroij (edrik) Lanbo Kemoot and Alap and Senior Dri Jerbal Ruth Iaman. The portion of "Lojomwe weto" leased to Appellee Kramer is located on the lagoon and ocean side of the main road, between the Airport and Peace Park. The "Lease Agreement" was signed for the landowner-lessors by Timur Jorlang as representative of Leroij Lanbo Kamoot and signed by Esther Iamon as representative of Ruth Iamon who holds the Alap and Senior Dri Jerbal interests. Mercy Kramer signed as lessee.[3]

On October 23, 1998, Mercy Kramer assigned the "Lease Agreement" to Pacific International, Inc. (PII). The assignment of the "Lease Agreement" was in writing with Mercy Kramer signing as "Assignor" and PII signing as "Assignee" by its CEO, Jerry Kramer.[4]

Subsequent to the assignment, PII commenced its general operations on the leased premises. Those operations later expanded to include dredging and blasting on the reef and stockpiling of materials on the leased premises.

Appellee Theresa Are's stepfather, Domingo, had been living on the portion of Lojomwe Weto subject to the "Lease Agreement" prior to 1992. Domingo did not have a lease to the property but was present on the property because he was "like a brother to Mwejenleen."

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[3] The "Lease Agreement" was admitted at trial as Plaintiff's Exhibit P-1. Exhibit P-1 bears a date stamp indicating it was filed with the High Court on October 22, 1998 and was recorded as Instrument 134 on January 12, 2005 with the Land Registration Authority.

[4] The "Assignment of Lease Agreement by Lessee" was admitted at trial as Plaintiff's Exhibit P-1a.

In 1992, Appellants Theresa and Stanley Are, moved in with Domingo. Domingo and his wife, Jabjen, had asked Stanley to come live with them on Lojomwe so that Appellant's children could go to school. At some point in time, Appellants' son burned down Domingo's house. Domingo then left the area, relocating elsewhere.

In 2003, Appellant Stanley Are built a new house or structure for his family to live in at the same location where Domingo's house had been located. It is not disputed that Appellants do not have a lease for the portion of Lojomwe weto where their house is located. They claim they were present with the consent of the landowners.

At some point in time, PII dumped some piles of sand or rocks on the leased premises near Appellants house. Appellants presented testimony at trial that piles of rocks prevented ingress and egress from their house. Testimony was also presented that dust from PII's operations landed on Appellants' food. Appellant Stanley Are claims these acts were taken by PII in retaliation for his signing a petition against an asphalt plant being operated on the leased premises.

It is not disputed that PII requested Appellants to vacate Lojomwe weto where their home was located. Appellants refused to vacate the premises. On March 28, 2006, Appellee Mercy Kramer filed a complaint against Appellants to evict them from the premises. Appellants filed an answer and counterclaim. Appellees did not answer the counterclaim.

Trial was held before the High Court on March 26 and March 30, 2007. Appellee PII was added or substituted as a party plaintiff at trial on March 30, 2007; the trial court finding Kramer lacked standing to pursue the action.

At the conclusion of the testimony and closing arguments, the trial judge ruled from the bench ordering Appellants to vacate the property and dismissing Appellants' counterclaim for

damages. The trial court issued a written "Judgment & Order" on April 11, 2007. A timely Notice of Appeal was filed by Appellants on May 4, 2007. The parties have agreed to disposition of this appeal on the written record and briefs.

III. DISCUSSION

A. Standard of Review

Findings of fact by the High Court will not be set aside unless "clearly erroneous." *Elmo v. Kabua*, 2 MILR 150, 153; *Lokken v. Nakap*, 1 MILR (Rev.) 69, 72. A finding of fact is "clearly erroneous" when review of the entire record produces a definite and firm conviction that the court below made a mistake. *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225; *Zaion, et al v. Peter and Nenam*, 1 MILR (Rev.) 228, 233. In determining whether the High Court has made a mistake in the finding of a fact, the Supreme Court will not interfere with the finding if it is supported by credible evidence. The Supreme Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision. *Elmo, supra*; *Les Nor. Boat Repair, et al v. O/S Holly, et al*, 1 MILR (Rev.) 176, 179.

Matters of law are reviewed *de novo*. *Jack v. Hisaiah*, 2 MILR 206, 209; *Lobo v. Jejo, supra*. The High Court's interpretation of the Marshall Islands Constitution is a question of law which is reviewed *de novo*. *Abija v. Bwijmaron*, 2 MILR 6, 15.

B. The High Court Did Not Err in Evicting Appellants From Lojeme weto.

1. The lease complies with the RMI Constitution, Art. X, Sec. 1(2).

Appellants argue that the High Court erred in concluding that the "Lease Agreement" and subsequent assignment of that lease valid under Article X, Section (1)(2) of the RMI Constitution. Appellants claim the lease did not have the proper approval of the landowners and

that the landowners did not consent to an assignment or transfer of the lease from Mercy Kramer to PII.[5]

The RMI Constitution requires that the "Iroijlaplap, Iroijedrik where necessary, Alap and Senior Dri Jerbal" approve any alienation of land, by lease or otherwise, to be valid. The RMI Constitution, Art. X, Sec. 1(2) provides:

> Without prejudice to the continued application of the customary law pursuant to Section 1 of Article XIII, and subject to the customary law or to any traditional practice in any part of the Republic, it shall not be lawful or competent for any person having any right in any land in the Republic, under the customary law or any traditional practice to make any alienation or disposition of that land, whether by way of sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroijedrik where necessary, Alap and the Senior Dri Jerbal of such land, who shall be deemed to represent all persons having an interest in that land

It is not disputed that the persons holding the Iroijedrik, Alap and Senior Dri Jerbal titles did not personally sign the lease; rather, the lease was signed by the landowners' purported representatives. It is also undisputed that the leased premises is located on "Jebdrik's side" for which there is no Iroijlaplap whose approval would be necessary to lease the premises.

The "Lease Agreement" was signed by Timor Jorlang on behalf of his sister, Leroij Lanbo Kemot, and Esther Iaman on behalf of her mother, Alap and Senior Dri Jerbal Ruth Iaman. Appellants did not challenge below and do not challenge on appeal that Leroij Lanbo

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[5] The issue of whether the "Lease Agreement" complies with the Constitution, Art. X, Sec. 1(2) was not specifically raised by Appellants in their opening brief. In the opening brief, Appellants apparently concede that Mercy Kramer had the right to possession of that portion of Lojomwe which she had leased and had the right to dispose of that property but not way of what Appellants characterize as a sublease. In their "Replying Brief," Appellants argue that the "court erred in concluding that Mercy's lease and assignment valid against Article X, Section 1(2) of the Constitution." Generally, issues raised for the first time in a reply brief are waived. *See, e.g., Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996). We nevertheless address the issue of Constitutionally validity of the lease because it is relevant to the issue of whether the assignment to PII is Constitutionally valid.

Kemot and Alap and Senior Dri Jerbal Esther Iaman hold the interests necessary to effectuate a valid lease of the subject weto. Instead, appellants argue that Timor Jorlang did not have a power of attorney to sign for Leroij Lanbo Kemot and they objected to admission of the "Lease Agreement" as an Exhibit at trial.

In response to Appellant's objection, Appellees introduced into evidence a "Special Power of Attorney" dated June 26, 1997, written in both English and Marshallese, signed by Leroij Lanbo Kemot authorizing Timor Jorlang to exercise the rights, title and interests of Iroij Erik on her behalf and on behalf of the bwij for various wetos including Lojomwe.[6] .

Appellants introduced no evidence that the " Special Power of Attorney " was not, in fact, signed by Lanbo Kemot or that the "Special Power of Attorney" had been revoked prior to Jorlang signing the "Lease Agreement." Likewise, Appellants introduced no evidence that the "Special Power of Attorney" was invalid under Marshallese custom and/or traditional practice. We hold there was no error by the High Court in admitting the "Special Power of Attorney" and conclude that Timor Jorlang had the authority to sign the "Lease Agreement" on behalf of Leroij Lanbo Kemoot representing the Iroijedrik interest.

Appellants do not challenge the authority of Esther Iamon to have signed the "Lease Agreement" on behalf of Ruth Iamon. Ruth Iamon holds the alap and senior dri jerbal interests to the leased weto. Esther Iamon testified at trial that she entered into the "Lease Agreement" with Mercy Kramer in 1998 and that she had permission and a power of attorney from her mother, Ruth Iaman, to sign for the alab and senior dri jerbal interests on the lease. We, accordingly, conclude that the consent of all landowners required by the Constitution consented

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[6] Exhibits P-2 and P-3.

to the "Lease Agreement" and that the "Lease Agreement" complies with the requirements of the Constitution, Art. X, Sec. 1(2).

2. Kramer's assignment of the lease to PII is not invalid under the Constitution, Art. X, Sec. 1(2) because the landowners, through their representatives, consented to an assignment of the lease when they signed the "Lease Agreement."

Appellants claim that Mercy Kramer's October 23, 1998 assignment of the lease to PII (Exhibit P-1a) is invalid because it did not have the Constitutionally required consent of the landowners. The "Lease Agreement" signed by the landowners through their authorized representatives, however, specifically authorized the lessee Mercy Kramer to "mortgage, pledge, or otherwise encumber or assign Lessee's interest."[7] There was no requirement imposed by the lease that the lessors review and approve an assignment.

There was no evidence introduced before the High Court that the landowners and/or their representatives ever objected to Mercy Kramer's assignment of the lease to PII and/or ever attempted to cancel the lease to Kramer due to an improper assignment.

Based on the evidence which was before it at trial, the High Court's finding of a valid assignment was not "clearly erroneous." We, therefore, conclude that the assignment comports with the Constitution, Art. X, Sec. 1(2) because the landowners consented to the assignment when they signed the "Lease Agreement."

3. Appellants failed to introduce any evidence regarding an alleged custom or traditional practice which would allow Appellants to remain on the land leased; the "Lease Agreement" is not invalid under the Constitution, Art. X, Sec. 1(1).

Appellants argue that the "trial court erred in not applying the customary approval by the landowners for appellants to remain on the premises." Appellants assert that a custom or

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[7] "Lease Agreement," Exhibit P-1, Section 6.

"traditional practice of approving other people to build their house and remain on the premises has evolved lately due to unavailable space to construct residential homes." The trial court's failure to recognize this alleged custom, according to appellants, violates the Constitution, Art. X, Sec. 1(1).

Appellants correctly point out that every inquiry into the custom involves two factual determinations. First, "is there a custom with respect to the subject of the inquiry?" And, if so, "the second is: What is it?" *Lobo v. Jejo*, 1 MILR (Rev.) 222, 226.

To the extent, however, that Appellants are relying on a recently evolved traditional custom or practice to establish their legal right to be on the subject weto, Appellants bore the burden of making the two showings required by *Lobo, supra*, before the trial court. There was no evidence of this alleged custom or traditional practice introduced by Appellants. The general rule is that issues not raised below are waived on appeal unless necessary to prevent manifest injustice. *See, e.g., Int'l Union of Bricklayers Allied Craftsmen v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1995). In the absence of such evidence and in the absence of any showing of manifest injustice, we conclude the trial court did not err in failing to recognize the alleged custom in violation of Art. X, Sec. 1(1) of the Constitution.

4. Esther Iamon's understanding that Appellants would be permitted to stay on Lojomwe does not alter the language of the "Lease Agreement" and does not create a right of Appellants to remain on the premises.

Esther Iamon Lokboj testified that she signed the "Lease Agreement" but there was an understanding that "nobody would be kicked out or nobody would be required to leave the land." The written "Lease Agreement," however, does not reserve or mention the right of persons residing on the premises under a license or permission of one of the landowners to remain after execution of the lease.

Esther Iamon's understanding that persons living on the weto would be allowed to remain cannot be used to explain the parties' intentions in entering into the "Lease Agreement." The long recognized general rule is that "[w]here language used in a lease is controverted, the controlling factor is the intent expressed in the language of the written document itself, not the intention of which may have existed in the minds of the parties at the time they entered into the lease, nor the intention the court believes the parties ought to have had." 49 Am.Jur.2d, Landlord and Tenant, Sec. 48.; *see also, Western Assets Corp. v. Goodyear Tire & Rubber Co.*, 759 F.2d 595, 599 (7th Cir. 1985). If there is a written lease, "the provisions of the lease are conclusive and govern the rights of the parties." *Id.* The general rule is also that "all pre-contract negotiations and oral discussions relating to a lease of land are deemed to be merged into, embodied, and superceded by the terms of the executed written lease, and in the absence of fraud or mistake, may not be considered as evidence of the terms and conditions upon which the property was demised." 49 Am.Jur.2d, Landlord and Tenant, Sec. 52; *see also, Mercury Inv. Co. v. F.W. Woolworth Co.*, 706 P.2d 523, 529 (Okla. 1985).

In this case, the "Lease Agreement," Sec. 11 clearly states that:

> This lease constitutes the entire agreement between the parties and may be altered, amended or replaced only by a duly executed written instrument. No prior oral or written understanding or agreement with respect to the Lease shall be valid or enforceable.

Esther Iamon's understanding that Appellants would be permitted to stay on the land after it was leased to Kramer is irrelevant to a determination of the parties' rights under the written "Lease Agreement" and does not establish the right of Appellants to be on the land. If the landowners or their representatives desired to lease the land subject to the rights of licensees or persons having permission, but not a lease, to remain on the land they should have made that

intention clear in the "Lease Agreement." They did not and we are not at liberty to add or create rights of third persons, such as Appellants, to be on the leased land.

Even assuming that Appellants had the permission of the landowners to be present on the leased premises, that permission would be terminated by the landowner's subsequent lease to Kramer. The general common law rule is that a tenancy at will cannot be conveyed or assigned; it does not pass with the alienation of the underlying estate. When title to property is passed by deed or lease, the tenancy is terminated, and the tenant becomes a tenant at sufferance. *See, e.g., Irving Oil Co. v. Maine Aviation Corp.*, 704 A.2d 872, 873 (Me. 1998); *see, generally*, 49 Am.Jur.2d. Landlord and Tenant, Sec. 122 (2006 ed.). Tenancies by sufferance are "terminated by a proper demand for possession and can be put to an end whenever the landlord, acting promptly, wishes." 49 Am.Jur.2d, Landlord and Tenant, Sec. 124 (2006 ed.); *see also. Roth v. Dillavou*, 835 N.E.2d 425, 429 (Ill. App. 2003). Appellants became tenants at sufferance of Kramer when the "Lease Agreement" was executed by the landowners and became tenants at sufferance of PII when the "Lease Agreement" was assigned. Appellants were given notice to quit or vacate the land by PII and no longer had a right to remain when that notice was given.

5. Appellants lack standing to allege a breach of the "Lease Agreement" by Appellees.

Appellants argue that Appellees breached their lease with the landowners by quarrying sand and rock, drilling and blasting the ocean side reef, and selling sand and aggregate without the landowner's consent.

The general rule is that a non-party to a lease lacks standing to challenge noncompliance with a lawful lease. *See, e.g., Iowa Coal Mng. Co. v. Monroe Co.*, 555 NW2d 418, 429 (Iowa 1996), *citing* 49 Am.Jur.2d, Landlord and Tenant, sec. 80 at p. 108 (1995 ed.).

Appellees are not parties to the "Lease Agreement." We therefore do not reach these issues.

6. Conclusion.

Appellants admit that they have no lease to Lojemwe weto. Appellants failed to establish any legal or customary right to remain on the property after the landowners leased it to Kramer and after Kramer's subsequent assignment of the lease to PII. Appellants received notice to vacate the land. We conclude that the trial court did not err in its finding that PII had the legal authority to request Appellants to leave Lojemwe weto, that Appellants were only able to stay on Lojemwe with permission of PII and that permission had been withdrawn. We, therefore, AFFIRM the trial court's order evicting the Appellants.

C. The High Court Did Not Err in Dismissing Appellant's Counterclaim for Negligence/Intentional Infliction of Emotional Distress.

1. The High Court found that PPI owed a duty to appellants.

Appellants claim that the trial court erred in not concluding that PII had a legal duty owed them. Appellants argue that the lease imposed a duty on the lessee (and assignee) to care for the occupants or visitors to the leased premises. Appellees respond that the appellants are trespassers to whom no legal duty is owed and that the lease imposes no such duty. The trial court held that a duty was owed by appellees to appellants not to cause them harm.

2. The High Court did not clearly err in finding that the duty owed Appellants was not breached and did not clearly err in finding that Appellants suffered no damages.

The breach of a duty is usually a fact issue for the trier of fact. The question of whether a breach of duty caused damages is also a fact issue. *See, e.g., Musgrove v. Ambrose Properties*, 87 Cal.App.3d 44, 53, 150 Cal.Rptr. 722 (Ca. App. 1978).

The trial court heard evidence regarding Appellants' claim for negligence and intentional infliction of emotional distress caused by the creation of dust, dumping loads of sand and debris near Appellant's house and transporting burning asphalt near Appellant's home. Appellees stipulated that PII was responsible for transporting and dumping loads of sand and debris near the Appellants' home. There was conflicting evidence, however, as to whether PII was responsible for the fire which Appellants claim was an attempt to "smoke them out like coconut crabs" and whther Appellants actually suffered any damages as a result of PII's conduct. Appellant Theresa Are testified that on one occasion she saw Lotijar, an employee of PII, burn some debris near her house but Jiata Tiem, Lotijar and Mija testified that it was Mija who had cleaned the area and lit a fire to burn the debris. There was testimony that PII had not instructed Mija to burn the debris and that she put out the fire when someone complained about it. Theresa Are also testified that PII dumped piles of rocks, sand or debris so close to their house that there was no way to go in or out. Stanley Are testified as to his belief that PII was retaliating against him since he had signed a petition against the asphalt plant but aside from his belief there was no evidence of an improper motive to harm Appellants by PII. Stanley Are testified he is seeking $200,000 in damages but did not introduce any evidence regarding medical expenses and extent of damages suffered by Appellants.

We are bound to accept the trial court's findings of fact unless clearly erroneous. If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed. 518 (1985); *see also, Cooter & Gell v. Hartmax*

Corp., 496 U.S. 384, 400, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)("In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions.").

While we may have viewed the evidence differently, we hold that the trial court's finding that there was no breach of the duty and no damages suffered by Appellants is permissible given the evidence before it. We, therefore, cannot find the trial court's findings "clearly erroneous" and affirm the trial court's order dismissing Appellants' negligence and intentional infliction of emotional distress claims.

D. Appellants' Other Claimed Procedural Errors and Evidentiary Rulings by the High Court do not Warrant Reversal or Remand.

Appellants assign a number of errors to the trial court, none of which we hold are sufficient to warrant a remand or reversal.

1. Admission of Exhibits P1(a), P2 and P3.

Appellants claim the trial court abused its discretion "in admitting Exhibits P1(a), P2 and P3 on just the trial date and after closure of the case in chief." Appellants claim they objected at trial to admission of these exhibits on grounds of "surprise, authenticity of the exhibits and that said exhibits were not approved by the lessors or the sub-lessor." Our review of the transcript, however, reveals that the objection to these exhibits was limited to the claim that there was no sublease clause and Mercy Kramer could not unilaterally assign the lease to PII. This issue has been addressed above.

Our review of the transcript also indicates that the trial judge raised the issue of the authenticity of Exhibits P1(a), P2 and P3 on its own, found those exhibits were notarized and admitted those documents as self-authenticating. Appellants did not object to the judge's finding

of self authentication and admission of the exhibits on the ground of authenticity. Generally, a failure to object to admission of evidence on a specific ground constitutes a waiver to assert the alleged error on appeal. *See, e.g., United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990), *cert. denied*, 498 U.S. 947, 111 S.Ct. 363, 112 L.Ed.2d 326 (1990).

Regarding appellants' claim of "surprise," an objection was not specifically made to the trial court on that ground and is consequently waived. We further note that the Civil Rules allow a party to engage in discovery prior to trial. If Appellants had made a timely request for production of the documents Appellees intended to rely upon at trial Appellants would not have been "surprised" when appellees moved for their admission. There is no indication in the record that Appellants were denied discovery or that appellees failed to comply with any pretrial order requiring production of exhibits prior to trial.

Finally, the record reveals that the appellees moved for admission of these exhibits and the trial judge admitted them prior to close of appellees' case in chief. Appellants have failed to show how they were unfairly prejudiced by admission of these exhibits. The trial court's admission of these exhibits was not an abuse of discretion.

2. ***Calling of Mercy Kramer as a witness.***

In their "Notice of Appeal," appellants claim the trial court erred in "not allowing appellants to call plaintiff (appellee Mercy Kramer) as their first witness because no subpoena was served upon her." Appellants, however, have not briefed the issue and we, consequently, hold it to be waived. Issues insufficiently briefed are deemed abandoned on appeal. *See, e.g., Dresden v. Detroit Macomb Hospital Corp.*, 553 NW2d 387 (Mich. App. 1996).

IV. CONCLUSION

For the reasons stated above, we AFFIRM the High Court's Judgment & Order directing Appellants to leave Lojemewe weto and dismissing Appellants' counterclaim.

Dated: 7/15, 2008

Daniel Cadra, Chief Justice

Dated: 7/15, 2008

Barry Kurren, Associate Justice

Dated: 7/15, 2008

J. Clifford Wallace, Associate Justice