

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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SUPREME COURT
REPUBLIC OF PALAU

**ESTATE OF GEORGE KEBEKOL ALFONSO, rep. by TIKEI
KEBEKOL aka TANALYNN T. ALFONSO,**
Appellant,
v.
**KOROR STATE GOVERNMENT and BENEDICTA
KEBEKOL,**
Appellees.

Cite as: 2023 Palau 18
Civil Appeal No. 23-003
Appeal from Civil Action No. 22-061

Decided: August 25, 2023

Counsel for Appellant Brien Sers Nicholas
Counsel for Appellee Benedicta Kebekol Johnson Toribiong
Counsel for Appellee Koror State Government William L. Ridpath

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice, presiding
JOHN K. RECHUCHER, Associate Justice
FRED M. ISAACS, Associate Justice

Appeal from the Trial Division, the Honorable Antonio L. Cortés, Associate Justice,
presiding.

OPINION¹

PER CURIAM:

[¶ 1] Appellant Tikei Kebekol (“Tikei”), representing the Estate of George Kebekol Alfonso, appeals the Trial Division’s determination that Appellees Koror State Government and Benedicta Kebekol (“Benedicta”) did not breach any

¹ Although Appellant requests oral argument, we resolve this matter on the briefs pursuant to ROP R. App. P. 34(a).

contractual obligations arising from a submerged land lease by executing an amendment to the lease. Tikei additionally appeals the Trial Division's Order to Show Cause Why Sanctions Should Not Issue and Order Denying Disqualification.

[¶ 2] For the reasons set forth below, we **AFFIRM**.

BACKGROUND

[¶ 1] On November 15, 2019, George Kebekol ("Decedent") executed a Water/Submerged Land Lease ("the Lease") with the Koror State Government ("KSG") over 31,491 square meters of KSG property adjacent to land owned by Decedent, Cadastral Lot No. 133 B 01. Decedent passed away on May 26, 2021. His family held a *cheldecheduch* on July 10, 2021. During the *cheldecheduch*, the family appointed Benedicta to administer and determine the status of certain properties, including Cadastral Lot No. 133 B 01. Decedent's estate was opened in Civil Action No. 21-177, and on September 29, 2021, the Trial Division appointed Tikei as the Temporary Administratrix of the Estate.

[¶ 2] On January 10, 2022, Benedicta and Governor Franco Gibbons executed an Amendment to the Lease. The Amendment affected the Lease in two ways: (1) it confirmed that the Estate succeeded the Decedent's interest as lessee under the Lease, and (2) it changed the rent obligations under the Lease to commence in 2025 instead of 2022. The stated goal of the Amendment was to avoid potential default on the rental payments for the Lease prior to the closure of the Estate, by giving sufficient time for Decedent's heirs to be ascertained in the probate process.

[¶ 3] Benedicta and Tikei were later both appointed permanent co-administratrixes of the Estate on October 11, 2022. Civil Action No. 21-177 is still ongoing, and while both Benedicta and Tikei claim to be the proper heir to the Lease, neither of them had a superior claim to the Lease at the time of the appealed decision.

[¶ 4] On June 3, 2022, Tikei, representing the Estate, filed this action against KSG and Benedicta, alleging that KSG had breached the contract and the implied covenant of good faith and fair dealing, and that Benedicta had intentionally interfered with the contract.

[¶ 5] On August 8, 2022, Tikei further filed a motion to have Associate Justice Cortés disqualify himself in this case because of his prior employment as General Counsel for Appellee KSG. On August 12, 2022, the trial court denied the motion for disqualification.

[¶ 6] On December 5, 2022, Tikei submitted to the trial court an exhibit of the Lease Amendment, as well as a declaration from Tikei's counsel authenticating the exhibit. The declaration stated that the Lease Amendment "was entered into by and between Defendant KSG and Defendant Benedicta Kebekol." On January 12, 2023, the Trial Division issued an Order to Show Cause Why Sanctions Should Not Issue, stating this part of the testimony was false as the Lease Amendment confirmed that the Estate was the lessee, and not Benedicta.

[¶ 7] The Trial Division granted partial summary judgment to Appellees on January 12, 2023, holding that Tikei had not proved a breach of contract or of the covenant of good faith and fair dealing from KSG. The trial court found that Tikei did not prove that KSG breached the Lease by entering into the Amendment. It further found that KSG did not breach the covenant of good faith and fair dealing by accepting Benedicta's signature. Tikei now appeals this determination, as well as the Order Denying Disqualification dated August 12, 2022, and the Order to Show Cause dated January 12, 2023.

STANDARDS OF REVIEW

[¶ 8] We review the trial court's entry of summary judgment *de novo*. *Republic of Palau v. Reklai*, 11 ROP 18, 21 (2003). A motion for summary judgment should only be granted when the pleadings, affidavits, and other papers show that no genuine issue of material fact remains, and the moving party is entitled to judgment as a matter of law. ROP R. Civ. P. 56(c). Additionally, the court must view all evidence and inferences in the light most favorable to the nonmoving party. *Rechelulk v. Tmilchol*, 2 ROP Intrm. 277, 281 (1991).

[¶ 9] We review a court's imposition of sanctions pursuant to its inherent powers for an abuse of discretion. *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219 (1994).

DISCUSSION

[¶ 10] Tikei's arguments are threefold. First, Tikei asserts that the trial court erred in denying her motion for partial summary judgment and granting summary judgment in favor of Appellees. Second, that the trial court should not have issued an order to show cause why sanctions should not issue. Third, she alleges that Associate Justice Cortés should have disqualified himself in this matter.

I. Summary Judgment

[¶ 11] The Trial Division granted summary judgment to Appellees on the basis that Tikei failed to carry her burden of proof and prove the existence of a breach of contract, of a breach of covenant of good faith and fair dealing, and of intentional interference with the contract. Tikei further contends that the Trial Division erred in construing KSG's Motion to Dismiss as a Motion for Summary Judgment.

[¶ 12] First, this section of Tikei's argument, although rather prolix, is entirely unsupported by citation to case law. We have repeatedly held that we will not consider arguments unsupported by legal citation. *See Aimeliik State Pub. Lands Auth. v. Rengchol*, 17 ROP 276, 282 (2010); *Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 164 (2006). Thus, we need not consider this argument. But even if we did, we do not find any breach of contract or the covenants of good faith and fair dealing in this case.

A. Breach of Contract

[¶ 13] A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract. *See* 17A Am. Jur. 2d Contracts § 669; 23 Williston on Contracts § 63:1 (4th ed.). A material breach involves an essential and inducing feature of the contract, defeats the object of the parties entering into an agreement, or makes it impossible for the other party to substantially perform under the contract. 17A Am. Jur. 2d Contracts § 670. It can, for instance, deprive the nonbreaching party of a benefit that he or she reasonably expected. *Id.*

[¶ 14] To prove a breach of contract the non-breaching party must prove the existence of a contract, performance by the plaintiff, failure of performance by a defendant, and consequential damages. *Reklai*, 11 at 22. The Trial Division found

that two of these elements were not met: the failure of performance by the defendant, and the consequential damages.

[¶ 15] The Trial Division found that neither confirming the Estate as a successor lessee nor extending the rent-free period constituted a failure to perform. Further, there is no language in the Lease imposing a specific obligation on KSG to deal with the future court-appointed temporary administratrix of lessee's estate in the event of his death. Tikei avers that she, as the court-appointed administratrix of the Estate, "stepped into the shoes of Decedent as a matter of law" and that by accepting Benedicta's signature, KSG essentially "removed" Tikei as the lawful Estate representative and thus breached the lease.

[¶ 16] A review of the Lease and its Amendment confirms that KSG did not breach the Lease. The Lease Amendment essentially preserved the Lease by confirming that the Estate is the successor lessee to Decedent, and by delaying the Estate's rent obligations. Neither of these new contractual terms constituted a failure on the part of KSG to perform its obligations. Furthermore, KSG could not fail to perform solely by accepting Benedicta's signature instead of Tikei's. As the Trial Division explained, no specific provision in the Lease prohibited KSG from accepting Benedicta's signature.

[¶ 17] In addition, the personal representative of an estate stands in a fiduciary relationship to those beneficially interested in estate, and has a duty to act in the best interest of the estate. 34 C.J.S. Executors and Administrators § 209; § 210. Therefore, an estate administrator has a duty to protect and safeguard the assets entrusted to them. *Id.* The first rental payment was due on January 1, 2022, and had not been paid by the time the Amendment was executed on January 10, 2022. Tikei did not act to ensure that these obligations were timely paid or to otherwise preserve the Lease. Without the Amendment, the Estate would have lapsed into rent default, thus giving KSG the right to terminate the Lease. Under these circumstances, KSG and Benedicta's decision to execute the Lease Amendment cannot constitute a failure to perform.

[¶ 18] Tikei also takes issue with the trial court's finding that she failed to prove damages.² Having found that neither Benedicta nor KSG breached any of

² Tikei argues in her Opening Brief that the issue was not properly before the trial court. We disagree inasmuch that *Reklai* clearly establishes that proving damages is an essential

the terms of the submerged lease, it was not necessary for the trial court to determine the issue of damages. Thus, even if the trial court erred in finding that Tikei failed to prove damages and we do not believe it did, such error was harmless.

[¶ 19] Consequential damages are those damages that do not flow directly and immediately from the breach, but only from some of the consequences or results of the breach. 24 Williston on Contracts § 64:16 (4th ed.). These damages must be reasonably foreseeable or contemplated by the parties at the time the contract was entered into. *Id.* Damages are only recoverable to the extent that they can be proven with a reasonable degree of certainty. *See Palau Marine Indus. Corp. v. Seid*, 9 ROP 173 (2002); *NECO v. Rdialul*, 2 ROP Intrm. 211, 220 (1991). A review of the record indicates that Tikei proffered evidence of permit applications submitted for a potential hotel investment project valued around \$40,000,000, for zoning purposes and conformity under the Palau Environmental Quality Protection Act. The trial court properly found that the likelihood of this project coming to fruition was far too remote to properly ascertain the existence or value of damages. *See Lu Rent N Lease v. Ngchesar State Gov't*, 16 ROP 199, 203 (2009) (“[D]amages that cannot be established without a reasonable certainty may not be awarded.”).

[¶ 20] Because Tikei failed to prove a failure to perform, she did not meet her burden to prove a breach of contract. The Trial Division did not err in granting summary judgment to KSG.

B. Breach of the Covenant of Good Faith and Fair Dealing

[¶ 21] Generally, there is an implied covenant of good faith and fair dealing in every contract, where “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” 17A Am. Jur. 2d Contracts § 362; *see also Ngotel v. Duty Free Shoppers Palau, Ltd.*, 20 ROP 9, 18 (2012) (finding no breach of the implied covenant in an employment contract). “Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and

element to proving a breach of contract, and this issue was clearly in front of the trial court. *Reklai*, 11 ROP at 22.

consistency with the justified expectations of the other party.” Rest. 2d Contracts § 205, cmt a. Further, the scope of conduct prohibited by this implied covenant,

is circumscribed by the purposes and express terms of the contract A duty of good faith must relate to performance of an *express term of the contract* and is not an abstract and independent term of a contract. . . . In other words, the implied covenant of good faith and fair dealing attaches to existing contractual obligations; it does not add new contractual duties [and] may not be invoked to create rights and duties not otherwise provided for in the existing contractual relationship.

Id. (emphasis added).

[¶ 22] The Lease Amendment preserved the agreed common purpose of the contract, and did not go against an express term within the contract. As previously mentioned, without the Amendment, the Estate would have lapsed into rent default. Therefore, neither KSG nor Benedicta acted in bad faith or breached the covenant of fair dealing.

C. Intentional Interference with a Contract

[¶ 23] “One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability.” *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 110 (1995). There are seven elements to such a claim:

First, there must be a valid, enforceable contract between the claimant and a third-party. Second, defendant must have knowledge of the existence of the contract, or knowledge of facts which should lead the defendant to inquire about the existence of the contract. Third, the third-party must actually breach the contract with the claimant. Fourth, defendant's action must have been the proximate cause of the third-party's breach of the contract. Fifth, at the time of defendant's action, defendant must have

intended his or her action to induce the third-party to breach the contract. Sixth, defendant's actions must have been improper. Seventh, claimant must have suffered a pecuniary loss as a result of the breach by the third-party.

Id. (internal citations omitted).

[¶ 24] We have explained above the reasons why KSG did not breach the Lease. Therefore, Tikei did not bring sufficient proof that the third requirement is met. The trial court did not err in finding that Benedicta did not intentionally interfere with the contract.

D. Construction of the Motion to Dismiss

[¶ 25] Tikei finally asserts that by construing KSG's Motion to Dismiss under Rule 12(b)(6) first as a Rule 12(c) Motion for Judgment on the Pleadings, then as a Motion for Summary Judgment under Rule 56, the trial court tried to "salvage" the motion's shortcomings. Tikei argues that KSG's Motion to Dismiss was filed on December 5, 2022, after the close of pleadings, and that as such, a Rule 12(b)(6) Motion to Dismiss was inappropriate.

[¶ 26] First, a motion to dismiss under Rule 12(b)(6) must be made *before* pleading if a further pleading is permitted, and it is technically impermissible to file afterwards. On the other hand, a party may move for judgment on the pleadings under Rule 12(c) *after* the pleadings are closed. Nevertheless, the two rules are functionally identical and the same standard of review applies to motions brought under either rule. *See e.g., Cafasso, United States ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011); *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987); *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994). In other words, the main difference between these two motions is the time of filing.

[¶ 27] As a result, a court faced with a Rule 12(b)(6) motion filed after close of pleadings may exercise its discretion and convert such a motion into a timely Rule 12(c) motion. *See e.g., Patel v. Contemp. Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). Therefore, the trial court had the authority to construe a Rule 12(b)(6) motion filed after the pleadings closed as a timely Rule 12(c) motion.

[¶ 28] Second, Rule 12(c) of the Rules of Civil Procedure provides that “[i]f . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”³ The Trial Division explained that it had decided to treat the motion as one for summary judgment and gave all parties a reasonable opportunity to present all pertinent material. The Trial Division was empowered to do so pursuant to Rule 12(c) and did not err in its construction.

II. Order to Show Cause

[¶ 29] Tikei argues that the trial court committed an error when it issued an order to show cause why sanctions should not issue against the Estate’s counsel. Tikei specifically quarrels with the Trial Division’s finding that her counsel gave false testimony to the court when he represented that the Lease Agreement was “entered into and between” KSG and Benedicta. Counsel now argues on appeal that there is “nothing false whatsoever” in his statement and that it was “taken out of context.” The record shows that no sanctions were issued after counsel explained that his testimony was mistaken and that he would be more accurate in the future. *See* Order after Hearing, *Estate of George Kebekol v. Koror State Gov't*, Civil Action No. 22-061, at 1 (Jan. 18, 2023).

[¶ 30] Once again, this argument is entirely unsupported by citation to case law and we will not consider arguments unsupported by legal citations. *See Aimeliik State Pub. Lands Auth. v. Rengchol*, 17 ROP 276, 282 (2010). Nonetheless, a court may impose sanctions upon attorneys or litigants pursuant to a statute, a rule, or by its inherent powers. *See Redd v. ROP*, 2018 Palau 8 ¶ 13. While we may review a court’s imposition of sanctions pursuant to its inherent powers for an abuse of discretion, there were no such sanctions imposed here. *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219 (1994). This unsupported argument is wholly moot and borders on frivolous where there were no sanctions imposed, and counsel admitted on the record that his testimony was mistaken. We find that the trial court did not err in issuing the Order to Show Cause.

³ We also note that Rule 12(b) provides that exact same opportunity, which only reinforces the trial court’s decision.

III. Disqualification

[¶ 31] Canon 2.5 of the ROP Code of Judicial Conduct provides, in relevant part, that “[a] judge shall disqualify himself . . . from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.” The Canon also provides a non-exhaustive list of situations when disqualification is required.

[¶ 32] Associate Justice Cortés determined that he was able to decide the matter impartially, and we do not see any reason why it may appear to a reasonable observer that he would have been unable to do so. Neither the Canon nor our precedents forbids a judge from presiding over an action involving a government entity for which the judge formerly served as counsel. We have previously stated that “[p]rejudice growing out of business, political, or social relations generally is insufficient to disqualify a judge[,]” *Yano v. Yano*, 20 ROP 24, 26 (2012) (quoting 46 Am. Jur. Judges § 141), and emphasized that this general rule carries particular weight when a judicial district lies in a rural or sparsely populated area where a judge is likely to interact frequently with attorneys and potential litigants. *Id.* Further, “the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality.” *Id.*

[¶ 33] The trial court correctly pointed out that it is relatively common in Palau to allow judicial officers to preside over actions involving former governmental employers, and that this comports with United States practice. *See* Order, *Estate of George Kebekol v. Koror State Gov't*, Civil Action No. 22-061, at 4-5 (Aug. 24, 2022). Moreover, Associate Justice Cortés worked for KSG over twenty-five years ago for a duration of four years, and now resides in California. A reasonable observer would not find that he is unable to decide the matter impartially. Therefore, the trial court did not err in denying disqualification.

CONCLUSION

[¶ 34] We **AFFIRM** the Trial Division’s judgment.

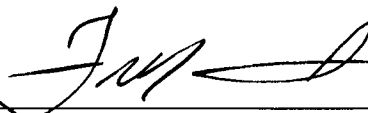
SO ORDERED, this 25th day of August 2023.



OIDIAS NGIRAIKELAU
Chief Justice, presiding



JOHN K. RECHUCHER
Associate Justice



FRED M. ISAACS
Associate Justice