

IN THE SUPREME COURT OF GUAM

**ANDDY P. KIM,**  
Appellee,  
vs.  
**EDWARD SA YONG HONG,**  
Appellant.

Supreme Court Case No. CVA97-007  
Superior Court Case No. CV1031-94  
Filed: October 17, 1997  
Cite as: 1997 Guam 11

Appeal from the Superior Court of Guam  
Argued and Submitted 20 August 1997  
Agana, Guam

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**OPINION**

BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, and JOSE LEON GUERRERO, Associate Justices.

WEEKS, J.:

[1] This is an appeal from a grant of summary judgment in favor of Appellee Kim resulting in an award to Kim of \$29,437.00, plus interest and costs. The Superior Court

found that the signature of Appellant Hong on a written document promising to pay Kim \$29,437.00, coupled with Hong's signature on a check payable to Kim for that amount, was

sufficient to eliminate any triable issue of fact as to Hong's liability to Kim for the amount of the check. We reverse.

### BACKGROUND

[2] On 13 March 1993, Appellant Hong signed a hand written document which stated that he had borrowed \$29,437.00 from Appellee Kim, and that he promised to pay that amount back to Kim on 31 August 1993. Also on 13 March 1993, Hong signed a check payable to Kim in the amount of \$29,437.00. The check was post-dated to 31 August 1993. Because of insufficient funds in Hong's bank account, Kim was unable to receive payment on the check.

[3] According to Kim, the hand written document and the check are negotiable instruments given to Kim by Hong in satisfaction of a series of loans Kim had previously made to Hong. Hong, on the other hand, claims that he never actually borrowed money from Kim. According to Hong, Kim had invested funds in a Korean Money Club run by Hong's wife, and had lost his

[6] Generally, the moving party bears the burden of showing the court those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party is not required to negate each element of the non-moving party's case. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). The moving

investment. Hong claims he signed the writing and the check because of pressure from Kim, and not to satisfy a pre-existing debt.

[4] On 12 July 1994, Kim filed a complaint in Superior Court demanding \$29,437 plus interest and costs. On 7 February 1997, the Superior Court granted summary judgment in favor of Kim awarding all of the relief requested in his complaint. This appeal followed.

### DISCUSSION

[5] We review the Superior Court's granting of summary judgment de novo. *Iizuka Corp. v. Kawasho International Inc.*, CVA96-003, p.3 (Sup. Ct. Guam, July, 24 1997). Rule 56(c) of the Guam Rules of Civil Procedure authorizes summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

party satisfies and discharges its burden by establishing the absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 325.

[7] If the moving party establishes a lack of evidence, the non-moving party must present specific facts showing there is a genuine issue for trial. *Id.* The non-moving party may not rely on unsupported or conclusory allegations of his pleadings, but must present some

significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

**[8]** If, after adequate time for discovery, the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,<sup>6</sup> then Rule 56(c) requires entry of summary judgment. *Celotex*, 477 U.S. at 2552; *Lujan*, 497 U.S. at 884. Under those circumstances, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element renders all other facts immaterial.<sup>6</sup> *Celotex*, 477 U.S. at 323. The moving party, is, therefore, entitled to judgment as a matter of law. *Id.* Stated simply, there is a trial issue if there is sufficient evidence for a jury to return a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 250.

**[11]** Payments into the Korean money club, according to Appellant, are distributed to members of the club who are expected to pay the money back into the club. If, however, members who have received money from the club fail to return the money, then there may not be money left in the club to pay back those who made the original payments. Appellant claims that this situation occurred in this case, causing Kim to lose his money, and prompting Kim, on 13 March 1993, to pressure Appellant into signing the documents in question.

**[12]** To support his version of the facts, Appellant presented his own deposition

**[9]** We now turn to the record and in reviewing the judgment of the Superior Court we will view the evidence and draw inferences in the light most favorable to the non-movant. *Iizuka Corp. v. Kawasho International, Inc.*, CVA96-003, p.4 (Sup. Ct. Guam, July 24, 1997).

**[10]** Appellant argues that a triable issue of fact exists on the question of whether the documents Appellant executed on 13 March 1993 were given in satisfaction of a debt owed to Appellee. According to Appellant, these documents, though they appear as evidence of a debt, were actually signed in response to pressure from Appellee Kim because Kim had lost money he had payed into a Korean money club. Therefore, Appellant argues, no consideration was given to him by Kim which would support Kim's claim.

testimony, as well as an affidavit from his wife, both of which describe the circumstances surrounding issuance of the two documents signed on 13 March 1993. In the following excerpt from his deposition, Appellant Hong explains why he post-dated the check payable to Kim:

Because the C Some person already took the money person. They promise until this date they're going to bring back the money, the Korean club. And then that's why I make the post day check, because I promise these people, they're going to bring back the money this date. That's why

I'm asking somebody to bring the money until this day. . . . But they C As long as they don't bring any kind money, so how do I pay him?

money, because I was putting extra money into the club to cover for those who did not meet their monthly obligations.

**[13]** The record also contains an affidavit signed by Appellant Hong's wife, Yong Ok Hong, to the effect that the only money received from Kim was for the money club. Paragraph 2 of her affidavit appears as follows:

2. I was the organizer of the Korean money club that plaintiff Kim's money went into. Neither my husband nor I borrowed any money from Mr. Kim. The money club broke when some members took the money and ran away, or had their businesses go bad, and then did not put back into the club the money they had taken. That is why Mr. Kim lost the money he had put into the club. Even I lost

**[15]** Kim argues, in the alternative, that even if there is a factual dispute on the question of consideration, he is nonetheless immune from Hong's failure of consideration defense. According to Kim, based upon 13 G.C.A. ' 3302, he meets the definition of a holder in due course of the documents signed by Appellant on 13 March 1993. As a holder in due course, Kim argues citing 13 G.C.A. ' 3305, he takes free of Appellant's failure of consideration defense.

**[16]** We need not address the question of whether Appellee Kim meets the definition of a holder in due course. Even if Kim were correctly defined as a holder in due course of

**[14]** Appellee Kim, on the other hand, argues that the two signed documents and Hong's deposition testimony to the effect that he intended to pay Kim back establish that there is no factual dispute on the question of whether Hong received consideration from Kim for the documents Hong signed. The Superior Court was persuaded by this argument and relied upon the two signed documents in granting summary judgment to Kim. We find the documents, however, to be insufficient to support the conclusion that no triable issue exists. To the contrary, the deposition testimony and affidavit cited above establish a triable issue of fact.

both documents, under the undisputed facts of this case, he would still be subject to Appellant's failure of consideration defense. 13 G.C.A. ' 3305, which Appellee Kim relies upon, provides in pertinent part:

**' 3305. Rights of a Holder in Due Course.** To the extent that a holder is a holder in due course he takes the instrument free from

- (1) All claims to it on the part of any person; and
- (2) All defenses of any party to the instrument **with whom the holder has not dealt** except ... (Emphasis added).

[17] It is clear from the express language of ' 3305 that the section is not intended to allow the holder of an instrument, even a holder in due course, to take free from common defenses, such as failure of consideration, raised by the party with whom the holder dealt. Because there is no dispute that in executing the instruments in question, Appellant Hong is the party with whom Kim dealt, section ' 3305 does not provide Kim immunity from Hong's failure of consideration defense.

[18] Kim further contends that the failure of consideration defense raised by Hong fails because the hand written document and check were given by Hong in satisfaction of an antecedent debt. Appellant cites 13 GCA ' 3408 in support of the contention that **ANo JANET HEALY WEEKS,**  
Associate Justice

consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.<sup>@</sup> However, this argument underscores the fact that summary judgment was not proper in this case. There are serious factual disputes as to whether the promissory note and check were in payment of a prior debt. Kim swears that Hong was paying back a debt; Hong attests that Kim was investing the money in a Korean money club. This is at the very heart of the dispute. It is the factfinder's duty to determine who is telling the truth.

#### CONCLUSION

[19] For the foregoing reasons, the judgment of the Superior Court is REVERSED.

**JOSE LEON GUERRERO,**  
Associate Justice

**PETER C. SIGUENZA,**  
Chief Justice

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