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IN THE SUPREME COURT OF GUAM

EIE GUAM CORPORATION, et al.)
)
Plaintiff-Appellee,)
)
vs.)
)
THE LONG TERM CREDIT BANK,)
OF JAPAN, LTD., et al.,)
)
Defendant-Appellant.)

Supreme Court Case No. CVA96-017
Superior Court Case No. CV1190-95

OPINION

THE LONG TERM CREDIT BANK,)
OF JAPAN, LTD., et al.,)
)
Counterclaimant-Appellant,)
)
vs.)
)
EIE GUAM CORPORATION, et al.)
)
Counterdefendants-Appellees.)

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Cite as: 1998 Guam 6
On Appeal from the Superior Court of Guam
Argued and Submitted on February 18, 1998
Hågatña, Guam

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

4 SIGUENZA, CJ.:

5
6 *I. Background*

7 [1] In the 1980's, Long Term Credit Bank of Japan (LTCB), a Japanese corporation, made
8 loans to another Japanese corporation, EIE International (EIEI), in order to finance various
9 construction projects. Consequently, EIE Guam (EIEG) was specifically incorporated to develop
10 and hold the now Guam Hyatt Hotel.

11 [2] EIEI and EIEG initially invested \$70 - \$150 million to develop the construction project.
12 As security for the loans, LTCB obtained a mortgage on the hotel as well as interests in the
13 hotel's equipment, accounts receivable, inventory, bank accounts, and contract rights. The loan
14 transaction was made and approved in Japan, administered in Japan, and made payable in Japan.
15 In 1992, an additional loan of \$103 million was made directly to EIEG for purposes of
16 completing the hotel. It is undisputed that this loan was also negotiated, approved, and executed
17 in Japan and the amounts denominated in yen; nor is it disputed that performance, as well as the
18 availability of the funds would be in Japan.

19 [3] On August 2, 1995, a suit arose over the loan agreements. LTCB and four other Japanese
20 banks were named as defendants.¹ EIEG filed the complaint to set aside the mortgages and the
21 other security interests, maintaining that the mortgages were fraudulently executed in favor of
22 LTCB upon instruction of LTCB when it took over EIEI's operation. EIEG also asserted LTCB
23 refused both to complete the financial restructuring it had earlier begun or to extend its loans to
24 EIEG although they were not in default. LTCB answered the complaint and filed counterclaims
25 for foreclosure on the mortgages securing the construction loan used to develop the hotel.

26 [4] EIEG moved for summary judgment on LTCB's counterclaims asserting LTCB did not
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28 ¹The four other banks were later dismissed from the case.

2 have a Guam foreign corporation license, a Guam business license, nor a statement of exemption.
3 These assertions were not disputed.

4 [5] At hearing, the lower court orally granted the motion for summary judgment and
5 dismissed the counterclaims. A written Decision and Order was later issued supporting the trial
6 court's earlier order. The court then certified the dismissal of the counterclaim as a final
7 judgment which was entered on the docket on November 21, 1996. LTCB timely filed a Notice
8 of Appeal on November 26, 1996.

9
10 **II. Analysis**

11 [6] A review of the grant or denial of a motion for summary judgment is reviewed *de novo*.
12 *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10, ¶7.

13 [7] Title 11 of the Guam Code Annotated encompasses the Financial and Tax laws of Guam .
14 This Title is divided into four divisions, including Division 3, entitled "Business License Law"
15 and Division 4 entitled "Banks and Banking." The Banks and Banking division includes Chapter
16 106 on Banks which sets out statutes, located within Article 7, governing the operations of
17 foreign banks on Guam.

18 [8] Essentially all of Guam's current foreign banking provisions were enacted into law on
19 December 11, 1975 via Guam Pub. L. 13-111:5. These foreign banking laws were added to
20 Article III of the Title XXXI of the Government Code, adopted as an entirely new chapter, and
21 did not expressly amend existing statutes. The Chapter resulted in an area of law not previously
22 addressed and mirrors almost exactly California's foreign banking laws.

23 [9] LTCB asserts that, as a foreign bank, it need not comply with Guam's business licensing
24 laws because of the language set forth in 11 GCA § 106730. This provision states:

25
26 Nothing in this Chapter shall be deemed to prohibit a foreign banking corporation which
27 does not maintain an office in this Territory for the transaction of business from making
28 loans in this Territory secured by mortgages on real property or from accepting
29 assignments of mortgages covering real property situated in this Territory.

11 GCA § 106730 (1994). In order to understand this provision properly, it must be read in

2 context with the other provisions set forth in the Article 7. Essentially, each statute is linked to
3 another by specific reference. The applicable statutes are listed below.

4 **§106722. Right of Foreign Banking Corporation to Engage in Business.** A foreign
5 banking corporation shall not engage in the banking or trust business in this Territory
6 unless it is licensed to do so pursuant to the provisions of §106725 and unless it first
7 complies with all the provisions of this Chapter and then only to the extent expressly
8 permitted in this Chapter or by regulations of the Board. In transacting such business a
9 foreign banking corporation shall comply with all applicable provisions of this Title and
10 of the laws of this Territory.

11 **11 GCA § 106721 (1994).**

12 **§106722. Requirements to Do Business in Territory.** A foreign banking corporation
13 shall not commence to do business in this Territory until it has met the following
14 requirements:

- 15 (a) It is authorized by its charter to transact the character of business described in
16 §106727 and has complied with the laws of the country under which it is
17 incorporated.
- 18 (b) It has filed with the Commissioner a certified copy of its charter or articles of
19 incorporation and of its by-laws and a copy of an application for a commercial
20 license pursuant to §72104 and §72105 of this Code.
- 21 (c) It has furnished to the Commissioner such proof of the nature and character of its
22 business and its financial condition, stock ownership and managements as he may
23 require.
- 24
- 25 (e) It has complied with all applicable requirements of the Title 18 Guam Code
26 Annotated relating to foreign corporations **except matters specifically otherwise
27 provided for in this Title.** (Emphasis added.)
- 28
- (i) It has received from the License Board of the Department a commercial license
pursuant to §72102.

29 **11 GCA § 106722 (1994).**

30 **§106725. Approval of Application; Issuance of License; Transfer; Display.** The
31 Commissioner shall convey to the Board his recommendation as to whether the
32 application of a foreign banking corporation should be approved. The Board may, in its
33 discretion, direct License Division of the Department to issue such license to such
34 corporation when it is satisfied that the corporation has met all the requirements of this
35 Chapter. The license shall authorize the corporation **to transact the business permitted
36 by §106727 at the location specified therein.** No such license shall be transferrable or
37 assignable. Each such license shall be conspicuously displayed at all times in the, [sic]
38 place of business specified therein. (Emphasis added.)

39 **11 GCA § 106725 (1994).**

40 **§106727. Business Which May be Transacted in Territory.** A foreign banking
41 corporation which is authorized by license under §106725 may transact in this Territory
42 the business of buying, selling, paying or collecting bills of exchange, or issuing letters of

2 credit, of receiving money for transmission by draft, check, cable or otherwise, and of
3 making loans. It may transact in this Territory the business of accepting deposits only as
4 provided in §106728.

5 **11 GCA § 106727 (1994).**

6 **§106728. Accepting Deposits from Foreign State or Pperson, Etc.**

7
8 (b) A foreign banking corporation may transact in this Territory the business of accepting
9 deposits from any foreign state or from any person which resides, is domiciled, and
10 maintains its principal place of business outside the territory [sic]of Guam, if: (1)Such
11 foreign banking corporation has complied with all of the requirements of §106722; and
12 (2) Such foreign banking corporation has received from the Commissioner his written
13 approval to transact such business in this Territory.

14 (c) A foreign banking corporation which transacts such business in this Territory shall,
15 with respect to business transacted by it in this Territory, comply with and be subject to
16 the provision of this Title.

17 **11 GCA § 106728 (1994).**

18 **§106729. Accepting Domestic Deposits.** (b)A foreign banking corporation may transact
19 in this Territory the business of accepting deposits from any person who is domiciled and
20 maintains its principal place of business within the Territory if: (1) Such foreign banking
21 corporation has complied with all of the requirements of §106722; and (2) Such deposits
22 may only be accepted from persons who are or were borrowers from a bank accepting the
23 deposit, provided

24 **11 GCA § 106729 (1994).**

25 [10] The law is clear that a foreign bank can engage in business only if it is properly
26 authorized to do so. 11 GCA § 106721 (1994). A foreign bank is properly authorized to do
27 business on Guam when it holds two licenses: 1) a Banking Business licensed issued pursuant to
28 11 GCA § 106725; and a Foreign Corporation License issued pursuant to 11 GCA § 106722(e).
Id. When these licenses are obtained, a foreign bank may conduct the following specifically
enumerated business transactions: buying, selling, paying or collecting bills of exchange, issuing
letters of credit, or receiving money for transmission by draft, check, cable or otherwise, and
making loans. 11 GCA § 106727. If the criteria of 11 GCA §§ 106728 and 106729 are met, a
foreign bank can also accept deposits from both foreign and domestic persons. Specifically **not**
enumerated in §§106727, 106728 or 106729 is the securing of a loan with a mortgage on real
property located in Guam by a foreign bank. The omission of this type of transaction from the
activities requiring licensing evidences an intent by our legislature to exempt it from the

2 licensing statutes. 2A *Sutherland Statutory Construction* § 47.23 (Rev. 5th ed. 1992).

3 [11] The legislature’s enactment of a specific statute distinguishing the transaction at issue is
4 another compelling indication of the intent to exempt a foreign bank that enters into such a
5 transaction from the licensing laws. The language of 11 GCA § 106730 states that “[n]othing in
6 this Chapter shall be deemed to prohibit” a foreign bank from engaging in this type of mortgage
7 transaction. This statute, coupled with the specifically listed business transactions in §106727,
8 shows that this type of transaction apparently does not require a license.

9 [12] The state of California, from which Guam adopted its statute, has addressed the same
10 issue now before us. In *Sondeno v. Union Commerce Bank*, 71 Cal.App.3d 391 (1977), a
11 California appellate court had to decide whether an Ohio bank had charged a usurious interest
12 rate. The issue dealt with the same statutory language limiting a foreign bank from doing
13 business within the state without a license. *Id.* at 394. California law also contained a statute,
14 similar to Guam’s, permitting a foreign bank to make a loan secured by real property within the
15 state without a license. The *Sondeno* court read the statute permitting the loan secured by real
16 property as “express permission for the transaction of such business.” *Id.* at 395. Further, the
17 requirements to otherwise conduct the other enumerated transactions of a licensed foreign bank
18 were removed by this language. *Id.*

19 [13] Likewise, in *Skylake State Bank v. Solar Heat and Insulation of Central Utah, Inc.*, 559
20 N.Y.S.2d 930 (Sup.Ct. 1990), a New York court made the same ruling when confronted with a
21 similar situation. An out of state bank, not licensed in the state, loaned money to the defendants
22 and secured the loan with a mortgage on New York property. *Id.* at 931. The defendants had
23 opposed a summary judgment motion based on the bank’s lack of authorization to do business in
24 the state. *Id.* at 931. They asserted that the bank could not bring an action in court pursuant to
25 state law. *Id.* The court held that “[a]n analysis of the regulatory scheme shows that the
26 common-sense result must follow: a lender may enforce its rights in New York collateral.” *Id.*
27 The regulatory scheme applied primarily to banks maintaining offices within the state in order to
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2 protect consumers. *Id.* The *Skylake* court also addressed New York’s general statute that
3 prevented a foreign corporation not authorized to do business from bringing suit in the state
4 courts. *Id.* at 932. This law was, on its face, applicable to banks. *Id.* However, New York had a
5 specific statute expressly permitting a foreign bank which obtained a mortgage secured by real
6 property to enforce its rights. *Id.*

7 [14] The banking laws addressing the conduct and activities of foreign banks do not require
8 foreign banks, without offices on Guam, to obtain licenses, necessary for broader financial
9 activities, in order to enter loans secured by Guam real property. This transaction is specifically
10 exempted from such licensing requirements under 11 GCA § 106730.

11 [15] We next address whether a statement of exemption must otherwise be obtained. The
12 Government of Guam, as a policy, requires all businesses to have a business license. 11 GCA §
13 70130 (1994). If the commercial activity or money-making activity is not required to obtain a
14 business license, the statute then requires a business to obtain a statement of exemption stating
15 no business license is required. 11 GCA § 70130(a). This exemption then can be used in lieu of
16 a business license. *Id.*

17 [16] If neither a business license nor exemption is obtained, a non-complying business’s legal
18 recourse is also limited. 11 GCA § 70130. The relevant provisions of the statute state:

19 (d) no commercial activity (including operating or leasing of real property) doing
20 business on Guam without a business license may file suit in Guam courts until such time
21 that a business license is obtained. No person engaged in commercial activity without a
22 business license may use the courts to enforce, directly or indirectly, any obligation, lien,
or contract incurred during the period of such commercial activity without a business
license;

23 (f) The courts shall liberally construe subsection (b) through (e) of this Section in favor of
24 the landlord or business person and shall ignore technical deficiencies if the courts find
25 there has been substantial compliance with the business license laws, rules, and
26 regulations and if the courts find that the landlord or business person has filed on a timely
basis (within thirty (30) days of the due date) gross receipts tax returns fully reporting all
accountable revenues from the activity concerned for the periods in question;

27 11 GCA § 70130.

2
3 [17] This statute, however, is not applicable to a foreign bank engaging in a transaction listed
4 in 11 GCA § 106730. The purpose of 11 GCA § 70130 is to obtain compliance and collection
5 of gross receipts taxes. 11 GCA § 70130(f) requires a court to “liberally construe subsections (b)
6 through (e) of this Section in favor of . . . the business person and . . . ignore technical
7 deficiencies if the courts find there has been substantial compliance with the business license
8 laws, rules, and regulations and if the courts find that the landlord or business person has filed on
9 a timely basis . . . gross receipts tax returns fully reporting all accountable revenues from the
10 activity concerned for the periods in question”

11 [18] However, a foreign bank conducting a transaction pursuant to 11 GCA § 106730 is not
12 subject to gross receipt taxes. A review of 11 GCA § 26202(f) indicates that banks must pay
13 gross receipts tax equaling 4% of the net income received from business. This is calculated by
14 the following:

- 15 a. Gross Income of the bank from all sources; less,
- 16 b. Salaries or bonuses paid or other compensation; less,
- 17 c. Rents paid; less,
- 18 d. Interest or discount paid; less,
- 19 e. Ordinary operating expenses such as supplies, utility services, insurance
20 premiums other than for life insurance, provided that any deductible insurance
21 expense shall be allowable only to the extent that such a premium is applicable to
22 the tax period against which it is claimed; less,
- 23 f. Loans or obligation charged off the books of the bank as losses unless charged
24 against reserves then in existence; less,
- 25 g. Losses other than loan losses, such as those occasioned by fire or other casualty,
26 theft, embezzlement, and the like, but only to the extent not covered by insurance
27 proceeds collected; less,
- 28 h. Transfers from earnings to reserve for bad debts or other contingencies provided
for; less,
- i. Miscellaneous direct expenses such as legal, advertising, auditing, and the like;
less,
- j. Loss on property sold and depreciation on property owned.

11 GCA § 26202(f)(1995).

25 [19] It is apparent the types of banks required to pay gross receipts taxes would be those
26 located on island including foreign banks licensed pursuant to § 106725. A foreign bank so
27 licensed would be required under 11 GCA § 106724 to keep separate accounting records of
28

2 assets, liabilities, income, expenses, etc. to enable the determination of the gross receipts tax.

3 Moreover, such a bank maintains accounting records locally that permit the audit and verification
4 of calculations of gross tax receipts. *Id.*

5 [20] The statute also requires that the gross tax calculation be based on income from all
6 sources. It is highly unlikely that Guam would undertake the collection of taxes on all income
7 sources of a foreign bank because of its loan secured by mortgage property. Equally difficult to
8 imagine would be allowing a bank such as LTCB to deduct from income all of its worldwide
9 expenses.

10 [21] Next, 11 GCA § 70130 does not apply to an entity doing business under 11 GCA §
11 106730 because the purpose of licensing, pursuant to 11 GCA § 70102, is to ensure “that all
12 necessary and reasonable control and regulation thereof may be practiced by the Government of
13 Guam for the protection of the health, safety and morals of the people of Guam.” However, as
14 addressed in *Skylake*, these public interest concerns are not implicated by lending of a foreign
15 bank which is secured by in state property. *Skylake*, 559 N.Y.S.2d at 932.

16 [22] In addition, the legislature included specific language in 11 GCA § 106731, not included
17 in 11 GCA § 106730, that exempts the transaction at issue from the business licensing
18 requirements of 11 GCA § 70130. The language of both statutes state, “Nothing in this Chapter
19 shall prohibit . . .” foreign corporations from conducting certain transactions. *See id.* However,
20 11 GCA § 106731 further states: “subject to compliance with any applicable laws of this
21 Territory pertaining to foreign corporations and any other applicable law, . . .” This language is
22 not present in the mortgage provision of the chapter. Because the legislature enacted these two
23 provisions at the same time, we must assume an intent by the legislature to insulate a mortgage
24 transaction from other laws, including the licensing laws. *2A Sutherland Statutory Construction*
25 § 47.23 (Rev. 5th ed. 1992).

26 [23] As stated earlier, a foreign bank wanting to conduct business specified in
27 11 GCA § 106727 must obtain both a business license and a foreign corporation license.
28

2 11 GCA § 106722(e)(stating that the bank must comply with Title 18 requirements). The
3 conditions for a foreign corporation license are set forth in 18 GCA § 7101.

4 [24] The business license requirement is set forth in 11 GCA § 106722(i). This statute
5 specifically requires that a commercial license be issued pursuant to 11 GCA § 72102. This
6 provision states:

7
8 Every person engaging in or carrying on business in Guam of banking or receiving the
9 money of others on deposit shall be required annually to obtain a commercial license;
10 provided, however, that in addition to the requirements of this Subchapter, a license shall
11 not be issued to a foreign banking corporation ***unless its application has first been
12 approved by the Banking Board pursuant to 22 [sic] GCA §106725 [GC §30924] and
13 the license is in the form prescribed by that Section.***

14 Thus, it is clear from § 72102, coupled with the language of § 106725 (the Banking
15 Board directs the Licensing Division)(listed above), that a license will be issued only by the
16 Banking Board's authority. The Licensing Division has therefore no discretion in this matter. It
17 must carry out the directives of the Banking Board. Likewise, the Licensing Division has no
18 discretion as to whether to issue an exemption to a foreign bank. That authority also lies with the
19 Banking Board.

20 [25] Finally, this Court finds that having to get an exemption in order to make a loan secured
21 by Guam real property is simply not reasonable. When a bank gets the two licenses required
22 under 11 GCA § 106722, it may engage in the transactions set forth in § 106727 and, if the bank
23 qualifies, engage in transactions set forth in §§ 106728 and 106729. The business license does
24 not include the transaction set forth in § 106730, the securing of a mortgage loan with Guam real
25 property. Consequently, because it is not included within the scope of the license, then the
26 foreign bank, licensed here on Guam, would still need to get an exemption under § 70130.

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3 *III. Conclusion*

4 [26] Based on the foregoing, we **REVERSE** the judgment of the Superior Court.

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7 _____
8 PETER C. SIGUENZA
9 Chief Justice

7 _____
8 JANET HEALY WEEKS
9 Associate Justice

10 _____
11 JOSE I. LEON GUERRERO
12 Associate Justice