

IN THE SUPREME COURT OF GUAM

BANK OF HAWAII

Plaintiff-Appellee,

vs.

**ALEXANDER CHAN and MICHELLE CHAN
and Doe Occupants 1-10**

Defendants-Appellants.

OPINION

Supreme Court Case No.: CVA02-011

Superior Court Case No.: CV0433-01

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Appeal from the Superior Court of Guam

Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice, PETER C. SIGUENZA, JR., Justice Pro Tempore, RICHARD H. BENSON, Justice Pro Tempore

BENSON, J.:

[1] Defendants-Appellants Alexander and Michelle Chan (“Chans”) appeal a Superior Court judgment that amended the complaint of Plaintiff-Appellee Bank of Hawaii (“Bank”) from unlawful detainer to forcible detainer and found the Chans guilty of forcible detainer. Because the Bank did not submit any evidence that the Chans unlawfully kept possession of property through threatened or actual force, as required for a finding of forcible detainer, we reverse the trial court’s judgment. We further hold that the trial court erred in amending the complaint to forcible detainer because the Bank failed to produce evidence supporting forcible detainer.

I.

[2] This case resulted from the Chans’ default on a mortgage held by the Bank. The Bank foreclosed on the property by private power of sale on February 6, 2001 and purchased the property at the foreclosure sale. On February 23, 2001, the Bank served the Chans with a five-day notice to vacate. The Chans did not respond to the demand letter and remained on the property. No one from the Bank had any direct contact with the Chans, and no further communication took place.

[3] On March 7, 2001, the Bank filed a complaint against the Chans for unlawful detainer. The Chans moved to dismiss the complaint on the basis that the unlawful detainer statute is inapplicable to a non-judicial foreclosure. The trial court denied the Chan’s motion after a hearing on May 5, 2001 and held a bench trial on May 16, 2001. On March 21, 2002, the trial court issued a Finding of Facts and Conclusions of Law in which the trial court *sua sponte* amended the Bank’s unlawful

detainer action to forcible detainer and ruled that the Chans were guilty of forcible detainer. The court issued its Judgment in favor of the Bank on April 30, 2002. The Chans filed a timely notice of appeal on May 22, 2002.

II.

[4] This court has jurisdiction over this appeal from a final judgment. Title 7 GCA § 3107 (1994).

III.

[5] The Bank originally brought its complaint in unlawful, rather than forcible, detainer. Guam's unlawful detainer statute provides:

In either of the following cases, a person who holds over and continues in the possession of real property, after a three (3) day written notice to quit the same shall have been served upon him ... may be removed therefrom as prescribed in this Chapter.

(a) Where the property has been duly sold by virtue of an execution against him, or a person under whom he claims, and the title under the sale has been duly perfected.

(b) Where the property has been duly sold upon the foreclosure, by proceedings taken as prescribed in the Code of Civil Procedure, of a mortgage, and the title under the foreclosure has been duly perfected.

Title 21 GCA § 21104 (1994). “[B]ecause an unlawful detainer action is a summary remedy, the unlawful detainer statute must be complied with strictly.” *Archbishop of Guam v. G.F.G. Corp.*, 1997 Guam 12, ¶ 10; *see also Berry v. Soc’y of St. Pius X*, 81 Cal. Rptr. 2d 574, 579 (Cal. Ct. App. 1999). Section 21104 does not expressly allow unlawful detainer after a non-judicial foreclosure, thus that

remedy is not available to the Bank.¹ *Baugh v. Consumers Assocs.*, 50 Cal. Rptr. 822, 823 (Cal. Ct. App. 1966) (“The remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property. Since it is purely statutory in nature, it is essential that a party seeking the remedy bring himself clearly within the statute.”).

[6] Based on the inapplicability of unlawful detainer, the Chans brought a motion to dismiss. The trial court agreed that unlawful detainer was inapplicable but denied the motion to dismiss and, pursuant to 21 GCA § 21114, permitted the Bank to proceed under a forcible detainer theory over the Chans’ objection. Section 21114 provides in part:

When, upon the trial of any proceeding under this Chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs...

Title 21 GCA § 21114 (1994).

[7] The trial court’s amendment of pleadings to conform to proofs “rests largely in the discretion of the trial court and its determination will not be disturbed on appeal unless it clearly appears that such discretion has been abused.” *Trafton v. Youngblood*, 442 P.2d 648, 657 (Cal. 1968); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802 (1971); *Hurn v. Ret. Fund Trust of Plumbing, Heating and Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981). However, some evidence must be presented before the court can amend the pleadings. *North 7th Street Assocs. v. Constante*, 111 Cal. Rptr. 2d 815, 818-19 (Cal. App. Dep’t Super. Ct. 2001).

Here, the trial court found that “based on the evidence presented at trial, there was a show of proof

¹ Guam’s unlawful and forcible detainer statutes are derived from a previous version of California’s unlawful detainer statutes. *Archbishop of Guam v. G.F.G. Corp.*, 1997 Guam 12, ¶ 10. In California, unlawful detainer is an available remedy after either a judicial or a non-judicial foreclosure. Cal. Code Civ. Proc. § 1161a(b). Title 21 GCA § 21104 differs from the corresponding California statute in that section 21104 does not contain the provision that allows unlawful detainer after a private power of sale. *Compare* 21 GCA § 21104 *with* Cal. Code Civ. Proc. § 1161a(b).

that the Chans were guilty of forcible detainer.” Appellants’ Excerpt of Record, tab 20, p. 4 (Findings of Facts and Conclusions of Law, Mar. 21, 2002). We disagree.

[8] A person is guilty of forcible detainer if he “[b]y force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise.” Title 21 GCA § 21102(a) (1994). Like unlawful detainer, forcible detainer is also a summary remedy, and the statute must be strictly construed. *See Archbishop*, 1997 Guam 12 at ¶ 10; *Berry*, 81 Cal. Rptr. 2d 574, 579 (Cal. Ct. App. 1999).

[9] Some jurisdictions find forcible detainer only where actual force or threats are present. *See Patterson v. Dombrowski*, 60 N.W.2d 456, 459 (Mich. 1953) (“[N]o actual force or violence occurred when the defendants took possession of the property nor during the time that they remained in possession. At no time was there a breach of the peace. Under such circumstances we are constrained to find that there was no forcible entry or detainer as contemplated by the statute....”). Other jurisdictions, while not requiring an actual breach of the peace, require at a minimum “conduct tending to create such breach.” *State v. Galen*, 487 P.2d 273, 276 (Wash. Ct. App. 1971) (interpreting Wash. Rev. Code § 59.12.230, which defines forcible detainer as the unlawful use of “any force or violence in entering upon or detaining any lands or other possessions of another”). Conduct supporting a forcible detainer action can include “threats or actions that give ... just reason to think violence will be used.” *Simhiser v. Farber*, 71 N.W.2d 412, 425 (Wis. 1955) (interpreting Wis. Stat. § 291.03 (repealed 1971), in effect at the time, which defines forcible detainer as “forcibly hold[ing] the possession [of real property]”); *see also Jordan v. Talbot*, 361 P.2d 20, 26 (Cal. 1961) (implying force from the defendant owner’s removal of plaintiff renter’s property and his admonishment to plaintiff to “Get the hell out of here. You’re out.”); *Grenfell v. Anderson*, 56 P.3d

326, 335 (Mont. 2002) (“The word ‘force’ is generally interpreted as including not only actual application of physical force, but such threats or display of physical force as are reasonably calculated to inspire fear of death or bodily harm.”) (citations omitted) (also noting its own interpretation of “force” as meaning “unlawful violence”).

[10] The facts of this case, however, do not support forcible detainer under either the “actual force or threat” or the “conduct tending to create such force” standards. The only contact whatsoever between the Bank and the Chans was the Bank’s notice to vacate. The Bank concedes that the Chans did nothing but remain on the property. The Chans’ conduct clearly did not amount to actual force or violence. *See Patterson*, 60 N.W.2d at 459. Nor did their conduct give reason to believe that violence would result. *See Simhiser*, 71 N.W.2d at 425. We find that the Bank produced no evidence of force, menace, or threat and accordingly hold that the Chans could not be guilty of forcible detainer. Thus, the trial court abused its discretion in amending the complaint.

[11] We note the Bank’s argument that refusing to define force to include remaining on the property, thus denying a summary remedy in the present situation, would reward those who illegally holdover on property after a non-judicial foreclosure. This concern is properly addressed through the legislature and not the courts. *See, e.g. Castro v. Peck*, 1998 Guam 2, ¶¶ 15-16. Although the present statutory scheme does not permit a summary remedy after a non-judicial foreclosure, other remedies, such as an ejectment or quiet title action, remain available.

IV.

[12] Section 21104 requires a showing of force, menace, or threats of violence for a person to be guilty of forcible detainer. The Bank made no such showing. The mere failure to vacate property is

insufficient to sustain a judgment for forcible detainer. We also hold that in the absence of evidence of force or violence, the trial court abused its discretion in amending the complaint from unlawful to forcible detainer. The trial court's decision is **REVERSED** and **REMANDED** for proceedings consistent with this opinion.