IN THE SUPREME COURT OF GUAM

THE HONGKONG and SHANGHAI BANKING CORPORATION, LTD.,
Plaintiff-Appellant,

vs.

DR. GEORGE KALLINGAL and DR. MATILDA KALLINGAL,
Defendants-Appellees.

Supreme Court Case No.: CVA04-001
Superior Court Case No.: CV0089-03

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on October 29, 2004
Hagåtña, Guam

Appearing for the Plaintiff-Appellant:
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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, Jr., Associate Justice

CARBULLIDO, C.J.:

[1] This case arises from an agreement made during the pendency of a bankruptcy case and a lawsuit on personal guaranties of the assets held by the bankrupt estate. The issue on appeal is whether the Superior Court erred in granting a preliminary injunction stopping a private foreclosure sale on the basis of irreparable harm and likelihood of success on the merits. We find no error in the ruling of the Superior Court and we affirm.

I.

[2] George and Matilda Kallingal together own Kallingal P.C. ("Kallingal P.C." or "the P.C.") The P.C. was one partner of a joint venture that borrowed $1.4 million from the HongKong and Shanghai Banking Corporation Ltd. ("HSBC" or "the Bank") in 1995. The apparent purpose of the joint venture was to acquire a sublease of land and develop a commercial property adjacent to the Tamuning Cost-U-Less known as Monticello Plaza. The joint venture entered into a sublease with the lessee of the land, originally Tamuning Capital Investment. After many more unrelated transactions, the Baptist Foundation of Arizona ("BFA") succeeded to the Tamuning Capital Investment leasehold interest and became Kallingal P.C.'s landlord.

[3] HSBC lent the $1.4 million to the joint venture and it received mortgages on two of the Kallingal P.C. assets to secure the loan: (1) an apartment complex in Barrigada near Bello Road owned by Kallingal P.C., and (2) the joint venture's lease on the Monticello Plaza land. In addition, George and Matilda Kallingal executed personal guaranties of the loans.

[4] On January 24, 2001, BFA filed unlawful detainer against Kallingal PC because the PC had not been paying rent. Kallingal did not pay rent, however, because there emerged a sinkhole in the parking lot that caused financial loss to the PC. Kallingal wanted to litigate the liability for the parking problem. Around this time, however, BFA itself went into bankruptcy in Arizona, so any claims Kallingal P.C. would have brought against BFA were stayed. Kallingal P.C. could not litigate against BFA, and also fell behind on its payments due to HSBC on its $1.4 million loan. HSBC therefore began pursuing its remedies under the loan documents, including foreclosing on its security.

[5] While HSBC pursued its remedies against the Kallingals, and BFA sued Kallingal P.C. for back rent, Kallingal P.C. itself filed for Chapter 11 reorganization in the District Court of Guam Bankruptcy Division in Bankruptcy Case No. 01-00161. HSBC's foreclosure proceedings against the P.C. were thus stayed, but HSBC noticed signs of possible preferential transfers prior to the bankruptcy. Therefore, HSBC asked the bankruptcy judge to appoint a Chapter 11 trustee to operate Kallingal P.C.'s businesses, to protect against further loss to creditors. The bankruptcy judge appointed Robert Steffy, C.P.A., a panel trustee, as the Chapter 11 case trustee. Attorney George Butler represented BFA and had been their Guam counsel throughout the Arizona reorganization as well. The day-to-day affairs of Kallingal P.C. were managed by Mr. Steffy, and the creditors' efforts were spearheaded by the attorney for the largest creditor, who in this case was BFA.

[6] Immediately after Steffy was appointed trustee, the issue arose whether to assume or reject the lease. Under 11 U.S.C. § 365, a debtor has 60 days after the order for relief in which to assume the lease, or it is deemed rejected. The Kallingals had not attended to this after filing, so the trustee immediately asked for an extension of time within which to reject or deny the lease. Ultimately, the estate rejected the lease, however, before the lease was rejected, the bankruptcy judge ordered that

post-petition rent due to BFA under the lease was to become an administrative claim of the estate. At some point after the bankruptcy filing, the P.C. lost the benefit of counsel and the P.C. was unrepresented in the bankruptcy proceeding for some time. As trustee, Steffy collected approximately $120,000 in rents and other assets of the P.C.

[7] During the bankruptcy, no plan of reorganization was ever put forth. HSBC could still not proceed against its security for the loan because both parcels were tied up in bankruptcy, so it was left with only the personal guaranties of the $1.4 million loan executed by the Kallingals.

[8] In December of 2001, HSBC proposed a settlement with the Kallingals. Under this proposed settlement, the Kallingals would mortgage their personal residence over to HSBC and dismiss the P.C.'s bankruptcy. The Kallingals were agreeable to this and it became known as the "first workout agreement." Although the first workout agreement contemplated that the bankruptcy would be dismissed, the bankruptcy judge denied the dismissal because the problem of preferential transfers had not been resolved. Thus, the first workout agreement between HSBC and the Kallingals failed.

[9] In October of 2002, HSBC offered a second workout agreement to the Kallingals. HSBC offered the following terms to the Kallingals: (1) HSBC would discount the outstanding balance of the loan by ten percent, (2) the Kallingals would begin payments two months after dismissal of the bankruptcy case, (3) the Kallingals could keep the funds that had been recovered by Steffy subject to approval by the bankruptcy court, and (4) the Kallingals would make the following payments: $8000 per month for the first year, $12,000 per month for the next four years, and after the fifth year the parties would renegotiate the payment terms of the loan.

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[10] In a November 22, 2002 letter, Attorney Moroni, who by then had been hired to represent both the Kallingal P.C. and the Kallingals personally, agreed to the terms of what is now called the "second workout agreement." The letter stated, "[t]his is to confirm our conversation indicating we have a settlement with respect to the above matter based on your letter of October 24, 2002." Appellant's Supplemental Excerpts of Record ("SER"), Ex. 22 (Letter from Attorney Moroni to Attorney Tang of 11/22/02). On January 22, 2003, Attorney Tang presented Attorney Moroni with a "Forbearance Agreement" for the Kallingals to sign. Appellant's Excerpts of Record ("ER"), Ex. 12 (Letter from Attorney Tang to Attorney Moroni of 01/22/03). It outlined the terms by which the bank agreed not to foreclose on the Bello Road apartments. In transmitting the Forbearance Agreement, Attorney Tang stated "[i]f we are unable to sign the forbearance agreement this week the HongKong and Shanghai Banking Corp. Ltd., will immediately begin pursuing its remedies, including filing a motion to lift the stay." ER, Ex. 12 (Letter from Attorney Tang to Attorney Moroni of 01/22/03).

[11] Attorney Moroni responded with letters dated January 24, 2003 and January 28, 2003, questioning whether the Kallingals should sign on behalf of a P.C. in bankruptcy, asking for slight modifications in terms, and requesting the original loan documents. In a third letter of February 18, 2003, Attorney Moroni stated that the Forbearance Agreement contained terms that were not in the original settlement agreement. In this same letter, however, Attorney Moroni asserted that the Kallingals were operating under the assumption that there was a settlement agreement in place.

[12] Because the Kallingals did not sign the Forbearance Agreement, Attorney Tang filed suit against the Kallingals in the Superior Court of Guam against their personal guaranties under Civil Case No. CV0089-03, while the bankruptcy of the P.C. was ongoing. In the Superior Court action, t

he Kallingals counterclaimed, alleging breach of contract -- the "contract" being the "settlement agreement" that HSBC disavowed. Meanwhile, HSBC filed a Motion to Lift Stay on January 29, 2003. The Kallingals did not oppose the Motion to Lift Stay. On February 28, 2003, the Motion to Lift Stay was granted.

[13] Also in February of 2003, the Kallingals pursued dismissal of the bankruptcy, operating under the assumption that the second workout agreement was going forward. The Kallingals proceeded toward dismissal of the bankruptcy case, ready to begin the settlement outlined by the bank. It took several months to secure the dismissal, however, because of protracted litigation over some $70,000 that the trustee had collected. A stipulated distribution was finally approved by the bankruptcy court. The hearing on this proposed distribution of post-petition assets was held in June 2003, and the Order of Dismissal was finally signed on August 15, 2003.

[14] The Kallingals maintained throughout this case that their duties under the "Settlement Agreement" did not arise until that dismissal order was signed. The Bank, however, was operating under different assumptions. HSBC had pursued its collection remedies with the understanding that, since the Kallingals had refused to sign the Forbearance Agreement, there was no settlement. Since the stay was no longer in place, the bank initiated a non-judicial sale of the Bello Road apartments.

[15] The Bank scheduled the non-judicial sale for May 2003. Attorney Moroni, on behalf of the Kallingals as 100 percent owners of the P.C., filed an Ex Parte Motion for a Temporary Restraining Order and a Preliminary Injunction, seeking to restrain the foreclosure sale. The Bank opposed this. Judge Bordallo (the TRO judge) heard the motion on May 30, 2003 and issued the TRO on June 2, 2003, on the basis that the Kallingals faced irreparable harm. Two weeks later, the parties agreed to stipulate to continue the mandatory hearing on the preliminary injunction and they filed briefs in

anticipation of an August 2003 hearing. This hearing was rescheduled and heard on October 30, 2003. A continued hearing was set but was rescheduled four times. The hearing on the preliminary injunction concluded on November 6, 2003, and closing briefs were filed on November 20, 2003. Judge Manibusan (the preliminary injunction judge) issued a decision on December 3, 2003, granting the preliminary injunction. That order is on appeal to this court.

II.

[16] Though a preliminary injunction is essentially interlocutory in nature, there is proper appellate jurisdiction in this case.

> [W]e have jurisdiction over this interlocutory appeal pursuant to Title 7 GCA § 25102 which states that "[a]n appeal in a civil action or proceeding may be taken from the Superior Court . . . [f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction," and Title 7 GCA § 3108(b) which states that "[o]rders other than final judgments shall be available to immediate appellate review as provided by law."

Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp., 2004 Guam 15, ¶ 14 (citation omitted).

III.

[17] "[A] lower court's grant of a preliminary injunction is generally reviewed for an abuse of discretion." *Carlson v. Guam Tel. Auth.*, 2002 Guam 15, ¶ 15 n.3. Issues of law underlying a trial court's grant of a preliminary injunction are reviewed *de novo. Guam Fresh, Inc. v. Ada*, 849 F.2d 436, 437 (9th Cir. 1988). The issue of whether the trial court abused its discretion in finding either irreparable harm or a likelihood of success on the merits is reviewed for abuse of discretion. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). The trial court abuses its discretion when it "misapprehend[s] the law with respect to the underlying issues in the litigation." *Id*.

IV.

[18] The issue before us is whether the trial court abused its discretion in granting the preliminary injunction. In order to grant a preliminary injunction, it is necessary that the movant show: (1) irreparable injury and (2) likelihood of success on the merits. *Carlson*, 2002 Guam 15 at ¶ 8.

[19] While only the preliminary injunction is on appeal, (because the temporary restraining order expired by operation of law under Rule 65(b) of the Guam Rules of Civil Procedure), we note that the Order Granting Preliminary Injunction incorporated the finding made by the TRO judge into the order granting the preliminary injunction. The order granting the preliminary injunction stated: "Judge Bordallo [the TRO judge] noted that, 'real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm.'" Appellant's ER, Tab 46, p. 7 (Decision and Order, Dec. 3, 2003). This court reviews the TRO court's finding only as it is incorporated into the Decision and Order on the preliminary injunction.

[20] The preliminary injunction judge also addressed the likelihood of success on the merits, holding that "the Defendants [Kallingals] may likely prevail at a trial on their application for a permanent injunction." Appellant's ER, Tab 46, p. 10 (Decision and Order, Dec. 3, 2003). Upon examination of the two factors for granting preliminary injunctions, this court finds the trial court's finding to be supported by the facts and law. Under the standard of review noted above, it is appropriate to affirm the findings of the trial court in this case.

A. Whether loss of property is irreparable harm

[21] In issuing the initial TRO, the court found, "[w]hile it is not clear that the Kallingals will probably prevail on the merits, failure to grant the temporary restraining order will result in irreparable harm to the Kallingals." Appellant's ER 24, p. 1 (Decision and Order, June 2, 2003). In

reaching this conclusion, the court cited *Dixon v. Thatcher*, 742 P.2d 1029 (Nev. 1987), a case in which the mortgagors were about to lose their residence. The court in *Dixon* stated that "real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm." *Id*. at 1030. However, the homeowners in *Dixon* stood to lose a self-built log home. We must examine whether the uniqueness-of-property rule applied in *Dixon* was appropriately relied on in this case.

[22] Whether loss of property to a foreclosure sale is irreparable is not settled on Guam. Loss of property is generally considered to be irreparable but it is not presumed to be so. *Mitchell v. Century 21 Rustic Realty*, 233 F. Supp. 2d 418 (E.D.N.Y. 2002). "Irreparable harm is not assumed; it must be demonstrated." *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991). Even where real property is involved, "[s]peculative injury does not constitute a showing of irreparable harm." *Pub. Serv. Co. v. Town of W. Newbury*, 835 F.2d 380, 383 (1st Cir. 1987). While "real property is often judicially perceived as unique, in this case plaintiffs are faced with the loss of commercial, and not residential, property. They are thus threatened with an economic loss which is compensable in large part, if not entirely, in damages." *Geneva Ltd. Partners v. Kemp*, 779 F. Supp. 1237, 1241 (N.D. Cal. 1990).

[23] There is a presumption on Guam that loss of real property in a contract for sale of real estate is irreplaceable.[1] This statute, however, does not translate into a rule that loss to foreclosure is irreparable. The California Supreme Court, interpreting a law identical to Title 20 GCA § 3222,

[1] The presumption is stated as follows:

> **§ 3222. Distinction between real and personal property.** It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved.

Title 20 GCA § 3222 (West, WESTLAW through Guam Pub. L. 28-037 (April 22, 2005)).

held that where the foreclosure is against investment property, it is not sufficiently unique to justify a finding of irreparability. In *Jessen v. Keystone Sav. & Loan Ass'n*, 191 Cal. Rptr. 104 (Ct. App. 1983), the court held that investment units could be adequately compensated in damages because their price would be fixed by the open market. *Id.* at 106-07. This case turned on the factual circumstances surrounding the units that were at issue; two were occupied by the mortgagor, and two were investment units; the two types of units were treated differently. *Id.* at 106-109.

[24] Determining whether loss of real property is irreparable injury depends on the factual circumstances. This court agrees with the court in *Medgar Evers Houses Assoc., L.P. v. Carro*, No. 01-CV-6107, 2001 WL 1456190 (E.D.N.Y. Nov. 6, 2001), that "whether real property loss creates irreparable injury is a fact-sensitive inquiry, and that such loss cannot be said to constitute irreparable harm as a matter of law." *Id.* at *4.

[25] The record in this case adequately shows that the Kallingals depended on the Bello Road apartments in order to emerge from Chapter 11 bankruptcy proceedings and enter into this, or any, settlement agreement with the bank. In seeking to introduce evidence of irreparability, counsel for the Kallingals argued to the court:

> (by Mr. Moroni): Our position is that he agreed to make these payments. One of the assumptions would be that he would have this property to help him make these payments. And they're saying he'd still make the payments even if we take the property; it doesn't really matter, we can still continue with the agreement. We're saying no. This was -- this was an important thing, it's got a lot of potential value.

Tr. vol. II, p. 90 (Hr'g on Continued Prelim. Inj., Oct. 30, 2003). Testimony was also given regarding the importance of the Kallingals' keeping this property:

> Q (by Mr. Moroni): Let me ask you this. So, why is keeping this property important to you to be able to keep this settlement?

A (by Mr. Kallingal): The property was worth at the time 800,000. Prior to that, we were offered 1.2 Million Dollars for sale. It's a big property. It is a standard property, prime location, therefore, if they won't settle this at $250,000, severe damage, irreparable damage will be done to me.

Q: So, what if you kept it, how would you be able to –

A: I would certainly repair it, and I would be able to make 6 - $7,000.00 easily in rent.

Q: And is that money important to you in order to be able to carry out this settlement?

A: To pay off -- That's correct. Each month to pay -- right now it's $8,000; starting next year it's $12,000. *I certainly need that apartment to make that money.*

Tr. vol. II, pp. 92-93 (Hr'g on Continued Prelim. Inj., Oct. 30, 2003) (emphasis added). The record thus supports the finding that the loss of this property would irreparably injure the Kallingals in this case.

[26] While the loss of real property does not result in a presumption of irreparable harm, *see supra*, there was evidence that the Kallingals' loss of this property would irreparably damage them. *See Varsames v. Palazzolo*, 96 F. Supp. 2d 361, 367 (S.D.N.Y. 2000) (holding that deprivation of the movants' ability to make productive use of their own property rises to the level of irreparable injury). The TRO court properly found that loss of this property of the Kallingals presented irreparable injury to them. We agree that the finding is proper because it was factually supported by the record, which we hold is required when evaluating whether loss of real property to a foreclosure constitutes irreparable harm. It was also not an abuse of discretion for the trial judge to integrate this finding of irreparable injury in his Decision and Order. Therefore, the trial court did not err in finding that the Kallingals faced irreparable harm.

B. Probability of success on the merits

[27] The appellate court may affirm the trial court's grant of an injunction as long as the record produces any ground on which it may appear that the seeking party may recover on the merits. *S.E.C. v. Fife*, 311 F.3d 1, 8 (1st Cir. 2002). In this case, the trial court found that the Kallingals had established a likelihood of success on the merits. *See* Appellant's ER, Tab 46, p. 7 (Decision and Order, Dec. 3, 2003). This finding was predicated on the following specific rulings: (1) there had been an offer and acceptance; (2) the "Second Workout Agreement" was not conditioned on the further execution of the Forbearance, and moreover, the Forbearance Agreement contained time limits that materially altered the original contract between the parties; (3) the Kallingals could not be criticized for unreasonably delaying their pursuit of the dismissal of the bankruptcy; and (4) they wanted the $70,000 because HSBC itself suggested to the Kallingals that they would get the entire amount. As a result of the foregoing findings, the facts indicated that the Bank breached the Settlement Agreement, and therefore the Kallingals had shown a likelihood of success on the merits. The Bank has not alleged that the trial court misapplied the law, and so the grant of this preliminary injunction is reviewed for an abuse of discretion. *Carlson*, 2002 Guam 15 at ¶ 15.

[28] In determining whether there was a contract, the first issue is formation. "The three recognized elements of a contract are an offer, acceptance and consideration." *Mobil Oil Guam, Inc. v. Tendido* , 2004 Guam 7, ¶ 34. There is no dispute that there was an offer, evidenced by HSBC's October 24, 2002 letter offering a settlement on terms. Further, there is no dispute that there was an acceptance, Kallingal P.C.'s November 20, 2002 letter accepting the terms of the offer. The next correspondence came after Typhoon Pongsona, on January 22, 2003. At that time, HSBC asked Kallingal P.C. to sign a "Forbearance Agreement." This is where the dispute arises: HSBC asserts

that the Forbearance Agreement merely embodied the terms of the settlement agreement that the parties had already agreed upon, while Kallingal P.C. contends that the Forbearance Agreement contained materially different terms such as to materially alter the agreement between the parties. Kallingal P.C. argues it was simply complying with the terms of its version of the Settlement Agreement, which the Bank then breached. However, the Bank asserts that since Kallingal P.C. did not agree to the terms of the Forbearance Agreement, there was no settlement agreement and the Bank was at liberty to pursue collection of their loan.

[29] The trial court was not persuaded by the Bank's position that there was no settlement until the Forbearance Agreement was signed. The preliminary injunction judge ruled that the "Defendants accepted the terms of an offer contained in a letter dated October 24, 2002 from Plaintiff." Appellant's ER, Tab 46, p. 5 (Decision and Order, Dec. 3, 2003). HSBC presented no evidence that the settlement of the matter was conditioned on the Forbearance Agreement, except testimony of a banker who stated a forbearance agreement would not be unusual. Tr. vol. II, pp. 211-38 (Hr'g on Prelim. Inj., Oct. 30, 2003); Tr. vol. III, pp. 3-46 (Continued Hr'g on Prelim. Inj., Oct. 30, 2003). The banker's testimony, though, does not compel the conclusion that it was a requirement of the consummation of this particular settlement. In fact, the record reveals that shortly after the P.C. accepted the Bank's offer, Guam endured Typhoon Pongsona on December 8, 2002. Causing a complete loss of electricity, water, and fuel for days, this storm interrupted normal business on Guam for no less than five weeks. The parties' next communication, on January 22, 2003, was relatively early in the typhoon recovery process, but explains the five-week hiatus in communications.

[30] The record supports the conclusion that the Kallingals were diligent in responding to the bank's offer, given such extreme circumstances. The trial court's findings that the parties had made

a contract with the October 24, 2002 offer and the November 20, 2002 acceptance is therefore not an abuse of discretion.

[31] Further, it was not an abuse of discretion for the trial court to find that many terms of the Forbearance Agreement were inconsistent with the original offer and acceptance. The following terms, found in the Forbearance Agreement, had not been contained in the original offer of October 24, 2002: (1) the appointment of a receiver; (2) a stipulation that the bankruptcy stay would be lifted; (3) the call for financial operating statements from the P.C. each month; (4) a balloon payment at the end; and (5) modified or newly imposed time limits (that the P.C. had until February 1, 2003 to file its Motion to Dismiss the bankruptcy, and also that HSBC would forebear only until March 31, 2003). Given these material changes to the original offer, and given the fact that the Forbearance Agreement was never a requirement in the first place, the trial court did not err when it found that the Bank had no right to rely on it.

[32] In conclusion, the trial court's finding that the settlement agreement was not conditioned on the execution of the Forbearance Agreement was not in error. There was no mention of a Forbearance Agreement in Attorney Tang's original offer. The proposed Forbearance Agreement later added these terms. Therefore, the Bank's insistence on the Forbearance Agreement was a proposed material alteration of an already existing settlement agreement. Since the Kallingals never agreed to these supplemental terms, they were not binding on the Kallingals.

[33] It is also not consequential that the Kallingals' bankruptcy case was dismissed so much later than the Bank expected. Under the facts of this case, there was no deadline by which the bankruptcy case had to be dismissed. This deadline could have been added by the Bank in its offer, but it was not. When the offer was accepted by the Kallingals, the Bank did not have any legal right to go back

and impose time and date limitations. The Kallingals were under no obligation to meet any deadlines.

[34] For the foregoing reasons, we find no error in the trial court's finding of likelihood of success on the merits. There was no error in granting this injunction.

V.

[35] For these reasons, the grant of a preliminary injunction below was not an abuse of discretion, and it is therefore **AFFIRMED**.