IN THE SUPREME COURT OF GUAM

LAWRENCE S. YOSHIDA,
Plaintiff-Appellant,

v.

GUAM TRANSPORT AND WAREHOUSE, INC.,
Defendant-Appellee.

Supreme Court Case No.: CVA12-017
Superior Court Case No.: CV0012-10

OPINION

Cite as: 2013 Guam 5

Appeal from the Superior Court of Guam
Argued and submitted on October 29, 2012
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Plaintiff-Appellant Lawrence S. Yoshida lent money to his employer, Defendant-Appellee Guam Transport and Warehouse, Inc. ("GTW") in 1996-1999 and 2006. Claiming that GTW still owes him money for the loans, Yoshida filed a Complaint for Monies Owed in the Superior Court of Guam. In its Findings of Fact and Conclusions of Law, the trial court concluded that Yoshida could not recover any money from GTW because there were no written contracts evidencing valid loan agreements. Yoshida now appeals the trial court's judgment.

[2] We find that the loans were made and the money is owing, and we therefore vacate the judgment and remand the matter to the trial court to determine, in a matter consistent with this opinion, the amount GTW owes Yoshida on the 1996-1999 and 2006 loans.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Yoshida is a former assistant manager, corporate officer, and shareholder of GTW. Yoshida worked for GTW from April 7, 1995 through December 31, 2009. While Yoshida worked at GTW, GTW paid Yoshida's home mortgage and living expenses as part of his compensation plan. Aside from Yoshida's employee compensation plan, GTW made no express agreements with Yoshida to pay any of Yoshida's debts, except those related to loans that Yoshida made to GTW in 2006, as described below.

[4] During Yoshida's employment with GTW, GTW faced cash flow problems. To help with GTW's cash flow problems, Yoshida deposited money into GTW's account at the request of his friend, Barry Honda. Honda is a shareholder and the Chief Executive Officer ("CEO") of

GTW. Yoshida made a deposit into GTW's business account in 1996, another deposit in 1999, and two more deposits in 2006.

1996-1999 Deposits

[5] At Honda's request, Yoshida wrote two checks totaling $25,000 between 1996 and 1999. The first check for $15,000.00 was made on September 11, 1996. The second check for $10,000.00 was made on August 24, 1999.

[6] Both Yoshida and Honda characterized the money that Yoshida deposited into GTW's account in 1996 and 1999 as loans. At some point, Yoshida and Honda orally agreed to the general repayment of the 1996-1999 loans. But the parties made no express agreement as to a specific term of repayment or whether interest would accrue.

2006 Deposits

[7] Yoshida wrote two more checks to GTW in 2006 at Honda's request, totaling $45,000.00. On November 30, 2006, Yoshida wrote the first check for $15,000.00. Thereafter, on February 27, 2006, Yoshida wrote the second check for $30,000.00. Both checks were deposited into GTW's account for business purposes.

[8] Honda and Yoshida both characterize the 2006 deposits as loans. Again, Yoshida and GTW made no express agreements on terms of repayment or whether interest would accrue on the 2006 loans. GTW did, however, orally agree to make payments on Yoshida's Bank of Hawaii line of credit, which Yoshida had drawn upon to make the 2006 deposits into GTW's account.[1]

[1] Yoshida claimed that he took out a home equity loan from Bank of Hawaii in the amount of $45,000.00, putting his personal residence up for collateral.

[9] Beginning in April 2006, GTW made monthly payments on Yoshida's Bank of Hawaii line of credit to repay the 2006 deposits. GTW stopped making monthly payments on Yoshida's Bank of Hawaii line of credit in December 2009, the same month that Yoshida resigned.

[10] Yoshida then filed an Amended Complaint for Monies Owed ("Complaint"), setting forth two claims for relief. In his first claim for relief, Yoshida asserted that GTW owed him a total of $139,636.88 plus interest and costs for the 2006 loans.[2] In his second claim for relief, Yoshida alleged that GTW owed him $25,000.00 plus interest and costs for the 1996-1999 loans.

[11] GTW in its Answer denied the balance owed on the 2006 loans and also denied any obligation to repay the 1996-1999 loans. GTW also asserted the doctrine of unclean hands as an affirmative defense in an attempt to bar any recovery by Yoshida.

[12] GTW sought leave of court to file an amended answer and counterclaim, and the request was granted by the trial court. Notwithstanding, GTW subsequently notified the trial court that it would not amend as it had previously requested.

[13] GTW again requested leave of court to file an amended answer and counterclaim. Specifically, GTW sought to amend its answer to include a counterclaim alleging that Yoshida owed GTW money because Yoshida embezzled from GTW. The trial court denied GTW's second request for leave of court to amend its answer.

[14] The trial court then heard the matter by bench trial and issued its Findings of Fact and Conclusions of Law.

[15] The trial court concluded that Yoshida could not recover his 1996-1999 deposits nor any interest related to the deposits because Yoshida and GTW lacked an express or implied contract

[2] Yoshida claimed that the amount that GTW owed on the 2006 deposits was $39,636.88. Yoshida also claimed that GTW's failure to make timely payments to his Bank of Hawaii line of credit caused damages in the amount $100,000.00.

evidencing a valid loan agreement. Additionally, the trial court held that the statute of frauds barred Yoshida from any recovery. According to the trial court, the testimony established that the repayments of the 1996-1999 deposits were not to be completed within one year, and that, accordingly, the agreement would have to be reduced to writing to be enforceable.

[16] The trial court similarly found that Yoshida could not recover what remained owing on his 2006 deposits or on any interest related to his 2006 deposits.[3] The trial court determined that Yoshida could not recover what remained owing on his 2006 deposits because Yoshida and GTW lacked an express or implied contract regarding a repayment schedule for and the general terms of the 2006 loans. The trial court also found that the statute of frauds barred Yoshida from any further recovery of his 2006 deposits. According to the trial court, the loan agreement was required to be in writing because GTW agreed to pay Yoshida back over an undefined duration and because GTW promised to pay Yoshida back by making payments on Yoshida's Bank of Hawaii line of credit.

[17] The trial court also rejected GTW's unclean hands affirmative defense. In rejecting the affirmative defense, the trial court explained that Honda "did not prove that Yoshida embezzled, violated fundamental conscience, good faith, or other equitable principles of his prior employment" with GTW. RA, tab 51 at 4 (Finds. Fact & Concl. L., Feb. 8, 2012). Furthermore,

[3] The trial court determined that $22,218.56 remained owing after crediting GTW for payments made to Yoshida's Bank of Hawaii line of credit. The trial court credited GTW for the $22,781.44 in direct payments that GTW had made to Yoshida's Bank of Hawaii line of credit.

Notably, the trial court did not credit GTW for $21,128.31 in payments made to Yoshida's First Hawaiian Bank line of credit because of insufficient testimony for the trial court to determine to what loan these payments should be credited. Additionally, the trial court did not credit GTW for $106,000.00 in checks made payable to Yoshida. The trial court found that Yoshida cashed two checks amounting to $106,000.00, but later converted the funds into cashier checks in his name. Yoshida then used the cashier checks to deposit the funds back into GTW's account and to pay GTW's legal firm. The trial court did not credit GTW for the $106,000.00 payment to Yoshida because the related transactions were "evidence of the fluidity of money transactions between friends and the lack of mutual understanding in agreements relating to money." RA, tab 51 at 3 (Finds. Fact & Concl. L., Feb. 8, 2012).

the trial court found that Honda's assertions related to the unclean hands affirmative defense were baseless and motivated by a separate dispute between Honda and Yoshida.

[18] Yoshida timely filed a notice of appeal from the trial court's judgment rendered on March 26, 2012.

II. JURISDICTION

[19] This court has jurisdiction over an appeal from a final judgment of the Superior Court of Guam pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-207 (2012)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[20] Following a bench trial, the trial court's findings of fact, whether based on oral or documentary evidence, shall not be set aside by the reviewing court unless clearly erroneous, and "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Town House Dep't Stores, Inc. v. Ahn et al.*, 2000 Guam 32 ¶ 13 (internal citations omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.*

IV. DISCUSSION

A. Whether the 1996-1999 and 2006 Loans of Money are Contracts Under 18 GCA § 47101

[21] When determining whether Yoshida and GTW formed an enforceable contract with regard to Yoshida's deposits to GTW, the trial court did not apply the relevant statutory provision governing the loan of money, 18 GCA § 47101. *See* RA, tab 51 at 4-5 (Finds. Fact & Concl. L.) (omitting an 18 GCA § 47101 analysis). Title 18 GCA § 47101 provides: "*A loan of money* is a contract by which one delivers a sum of money to another, and the latter agrees to

return at a future time a sum equivalent to that which he borrowed." 18 GCA § 47101 (2005) (emphasis in original).

1. 1996-1999 Deposits are Loans of Money

[22] Yoshida asserts that his 1996-1999 deposits totaling $25,000.00 to GTW are loans of money, which by definition are "contracts" under 18 GCA § 47101. Appellant's Br. at 6 n.3 (July 19, 2012). We agree. The 1996-1999 deposits are loans of money because Yoshida delivered a sum of $25,000.00 to GTW, and GTW agreed to return Yoshida's $25,000.00 at a later time.

a. Yoshida Delivered a Sum of Money to GTW in the Amount of $25,000.00

[23] As Yoshida points out, the trial testimony established that Yoshida delivered $25,000.00 to GTW. Appellant's Br. at 3-4 (July 19, 2012). On direct examination, Yoshida testified that he loaned GTW $15,000.00 in 1996 and $10,000.00 in 1999 to help address GTW's financial problems:

> [Tarpley] Now, Mr. Yoshida, the second claim for relief in your complaint is a cause of action for $25,000.00 and other loans to GTW. Did you loan or had you loaned GTW $25,000.00, apart from the $45,000.00 loan?
>
> [Yoshida] Yes, I did.
>
> [Tarpley] Could you turn to Exhibit 6? Can you identify that?
>
> [Yoshida] Yes.
>
> [Tarpley] Would you describe it for the record?
>
> [Yoshida] It was a $10,000.00 loan that I loaned in 1999 to Guam Transport & Warehouse.
>
> [Tarpley] And the date of that is, what?
>
> [Yoshida] August 24, 1999.

[Tarpley] And why did you make that loan to Guam Transport & Warehouse?

[Yoshida] I was asked if I could loan the company the amount because of cash flow problems.

[Tarpley] Could you turn to Exhibit 7? Can you identify that?

[Yoshida] Yes. This is the same thing. Due to financial problems, I was asked for a loan for $15,000.00 on September 11, 1996.

[Tarpley] And have either of these loans been repaid?

[Yoshida] No, not -- it was not repaid.

Transcripts ("Tr."), tab 2 at 27 (Bench Trial, Feb. 3, 2012).

[24] On direct examination, GTW's CEO, Barry Honda, confirmed Yoshida's loans totaling $25,000.00 to GTW:

[Tarpley] And would you agree with that today, that he loaned you the $25,000.00?

[Honda] I would say, yes, because I saw the two checks and it was deposited in our account.

[Tarpley] But, didn't you say that you had cash flow problems and Mr. Yoshida loaned this, the money?

[Honda] Whenever he -- yes.

[Tarpley] You did say that?

[Honda] Yeah.

[Tarpley] All right. And would you agree with that today?

[Honda] That's a long time ago.

[Tarpley] Okay. But you agree, you said that in your deposition under oath; correct?

[Honda] Yes.

Id. at 61.

[25] On cross examination, Honda again acknowledged Yoshida's $25,000.00 loan to GTW:

[Terlaje] Okay. Are you confident that these were loans from Mr. Yoshida?

[Honda] Yes.

[Terlaje] Okay. And do you recall any conversations involving those loans?

[Honda] I asked Mr. Yoshida if he could loan us money and he said, yes.

Id. at 64.

b. GTW Agreed to Return Yoshida's $25,000.00 at a Later Time

[26] Honda further testified on cross examination that GTW agreed to return the $25,000.00 to Yoshida at a later time:

[Terlaje] Okay. And did GTW at that time agree to a repayment term?

[Honda] It never was brought up.

[Terlaje] Okay. Did GTW agree to pay interest on that loan?

[Honda] No.

[Terlaje] Okay.

[Honda] No.

[Terlaje] And so all that was said was GTW will pay back $25,000.00 at some point?

[Honda] Yes.

Id.

[27] Therefore, because Yoshida delivered a sum of $25,000.00 to GTW, and because GTW agreed to return Yoshida's $25,000.00 at a later time, there has been a loan of money as defined under 18 GCA § 47101. 18 GCA § 47101. Because "[a] loan of money is a contract" under section 47101, we hold that the 1996-1999 loans of money are enforceable as such. *Id.*

2. 2006 Deposits are Loans of Money

[28] There is no dispute that Yoshida's 2006 deposits to GTW totaling $45,000 are loans of money. *See* Appellant's Br. at 2; *see also* Appellee's Br. at 6 (Aug. 21, 2012). Accordingly, we also hold that the 2006 loans of money are enforceable as contracts pursuant to 18 GCA § 47101.

3. The Parties' Failure to Agree upon Repayment Terms Was Not Fatal to the Contract

[29] The trial court concluded, in part, that 1996-1999 and 2006 loans of money are unenforceable as contracts because the parties did not agree upon repayment terms. RA, tab 51 at 4-5 (Finds. Fact & Concl. L.). GTW asserts that the trial court's conclusion should not be disturbed because GTW never agreed to repayment terms with Yoshida. Appellee's Br. at 8.

[30] Still, this omission will not bar the lending party's recovery because when money is lent, the law implies a promise to repay the loan. *Brown v. Spencer*, 163 Cal. 589, 595 (Cal. 1912). In an action for recovery of money already lent, it is not necessary that the defendant had specifically agreed to repay the loan on any particular date. *Wallach v. Dryfoos*, 140 A.D. 438, 440 (N.Y. App. Div. 1910). It has generally been recognized that when no time for repayment of a loan is fixed, the loan of money becomes payable either on demand or within a reasonable time. *See, e.g.*, *Ricker v. Ricker*, 270 P.2d 150, 152 (Or. 1954) (finding that because the loan did not fix a specific time for repayment, it was repayable upon demand); *Helms v. Prikopa*, 275 S.E.2d 516, 519 (N.C. Ct. App. 1981) (finding that when money is lent and the parties fail to specify a time for repayment, the loan is repayable within a reasonable time).

[31] Two approaches to repayment exist: payment on demand or payment within a reasonable time. The reasonable time approach would be the better view in this instance for two reasons. First, repayment within a reasonable time is more consistent with the tenor of Guam's law. Title

18 GCA § 87123 provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." 18 GCA § 87123 (2005). *Cf. Hook v. Crary*, 142 N.W.2d 140, 145 (N.D. 1966) (referencing section 9-07-22 of the North Dakota Century Code, which is identical to 18 GCA § 87123, as support for adopting the reasonable time approach).[4] Second, nothing in the record indicates that the parties intended for payment to happen upon demand. *See, e.g., Grayson v. Crawford*, 119 P.2d 42, 45-46 (Okla. 1941) (allowing reasonable time for performance where the parties intended for payment to be made at some future date and where it was apparent that payment on demand was not contemplated).

[32] As such, the parties' failure to agree upon repayment terms did not bar Yoshida's recovery and was not fatal to the contract.

B. Whether GTW Waived the Statute of Frauds Affirmative Defense When It Failed to Assert It in Its Answer

[33] Yoshida argues that GTW waived the statute of frauds affirmative defense under Rule 8(c) of the Guam Rules of Civil Procedure ("GRCP") because GTW did not include it in its answer. Appellant's Br. at 5; *see also* RA, tab 12 at 1-2 (Appellee's Answer Am. Compl., Feb. 9, 2010) (omitting a statute of frauds affirmative defense in its Answer). GTW contends that it did not waive the statute of frauds affirmative defense because the issue was sufficiently implicated in the proceedings below such that it was tried by the implied consent of the parties under GRCP 15(b). Appellee's Br. at 10-16.

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[4] Section 9-07-22 of the North Dakota Century Code provides: "If no time is provided for the performance of an act required to be performed, a reasonable time is allowed." N.D. Cent. Code Ann § 9-07-22.

1. The Statute of Frauds Affirmative Defense Was Not Tried by the Implied Consent of the Parties.

[34] Generally, GRCP 8(c) requires that parties include affirmative defenses in their pleadings. *Citizens Sec. Bank (Guam), Inc. v. Bidaure*, 1997 Guam 3 ¶ 10. GRCP 8(c) provides: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . [the] statute of frauds [defense] . . . and any other matter constituting an . . . affirmative defense." Guam R. Civ. P. 8(c). "Courts have interpreted this rule to mean that affirmative defenses not included in the pleadings are waived." *Citizens Sec. Bank (Guam), Inc.*, 1997 Guam 3 ¶ 10.

[35] Various circuits have recognized GRCP 15(b) as an exception to the GRCP 8(c) pleading requirement. *Id.* ¶ 16. GRCP 15(b) provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." GRCP 15(b). Under GRCP 15(b), "courts may treat an affirmative defense that has been raised after the pleadings stage, but has been fully tried under the . . . implied consent of the parties, as if it had been raised in the original responsive pleading." *Citizens Sec. Bank (Guam), Inc.*, 1997 Guam 3 ¶ 16 (quoting *Fed. Deposit Ins. Corp. v. Ramirez-Rivera*, 869 F.2d 624, 626-27 (1st Cir. 1989)) (internal citations omitted).

[36] A GRCP 15(b) determination of whether there was implied consent emphasizes fairness to the opposing party as the primary consideration. *Id.* ¶ 18-20. As such, we decline to find implied consent if the nonmoving party would be prejudiced by the injection of the new issue. *See, e.g., U.S. for Use and Benefit of Seminole Sheet Metal Co. v. SCI, Inc.*, 828 F.2d 671, 677 (11th Cir. 1987). A party will suffer prejudice "if the [party] had no notice of the new issue, if the [party] could have offered additional evidence in defense, or if the [party] in some other way was denied a fair opportunity to defend." *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982).

2. Yoshida Suffered Prejudice from GTW's Injection of the Statute of Frauds Affirmative Defense at Trial

[37] Yoshida argues that he suffered prejudice because he did not have notice of the statute of frauds issue at trial until it was too late to have a fair opportunity to defend himself. Appellant's Reply Br. at 3-4 (Aug. 30, 2012). GTW contends that this is not the case because the parties had sufficiently implicated the statute of frauds issue throughout trial. *See* Appellee's Br. at 13-15.

a. Yoshida Had No Notice of the Statute of Frauds Issue until Closing Arguments

[38] GTW highlights five instances to suggest that "the affirmative defense of statute of frauds[] was an ever-present issue throughout trial." Appellee's Br. at 15.

[39] GTW claims that it first addressed the statute of frauds issue at trial during its opening statement. *Id.* at 13. During GTW's opening statement, GTW's attorney stated: "Your Honor, the testimony you will hear today will be both from Barry Honda and Larry Yoshida, and you will hear that these parties did not put any agreement of a loan in writing." *Id.* (citing Tr., tab 2 at 9 (Bench Trial)).

[40] Second, GTW indicates that it addressed the statute of frauds issue when its attorney cross-examined Yoshida:

> [Terlaje] Okay. Mr. Yoshida, this agreement on the loan, you never put this in writing; correct?
>
> [Yoshida] No.

Id. at 13-14 (citing Tr., tab 2 at 29 (Bench Trial)).

[41] Third, GTW states that it addressed the statute of frauds issue when its attorney questioned Honda on direct examination:

> [Terlaje] Okay. Was there an agreement of when GTW would actually repay the loan, the term of repayment? And, is it your recollection that there is also no agreement in writing?
>
> [Honda] No.

Id. at 14 (citing Tr., tab 2 at 91 (Bench Trial)).

[42] Finally, GTW asserts that it directly addressed the statute of frauds issue during its closing statement:

> And so, Your Honor, this is the very reason why loans, agreements, must be in writing. This is why there is a statute of frauds. If the Court finds that this $25,000 is valid, we would ask the Court to consider the applicable statute of limitations in that instance. We have an oral contract that was not reduced to writing. The applicable statute of limitations on that type of obligation is three years, no more. Mr. Yoshida waited, and waited, and waited, until GTW was without the ability to completely and competently defend itself against an allegation of a loan.

Id. (citing Tr., tab 2 at 198 (Bench Trial)).

[43] GTW also claims that, on at least one occasion, Yoshida's attorney addressed the statute of frauds issue when he questioned Honda on direct examination:

> [Tarpley] All right, did you have any agreement with GTW at all regarding the payment of interest?
>
> [Honda] No.
>
> [Tarpley] Okay. And did you come to any agreement with GTW as to how the loan would [be] repaid?
>
> [Honda] Again, actually I don't have any written agreement . . . [.]

Appellee's Br. at 13; Tr., tab 2 at 20 (Bench Trial).

[44] Despite GTW's assertions, the parties' references to the lack of written agreements were insufficient to put Yoshida on notice that GTW was injecting the statute of frauds affirmative defense until it was too late for Yoshida to defend himself.

[45] The Fifth Circuit has previously declined to find that a party recognized the significance of the evidence when the evidence that was introduced was relevant to an issue already in the case and there was no indication that the party who introduced the evidence was seeking to raise a new issue. *Jimenez v. Tuna Vessel Granada*, 652 F.2d 415, 421 (5th Cir. 1981). If a party did not recognize the significance of the evidence, that party "cannot realistically be said to have given his implied consent to the trial of [the] unpled issue . . . always assuming that his failure to grasp its significance was reasonable." *Id.* "[I]t must appear that the party understood the evidence was introduced to prove the unpleaded issue." *Citizens Sec. Bank (Guam), Inc.*, 1997 Guam 3 ¶ 19 (citation omitted).

[46] We cannot say that Yoshida recognized that GTW was raising a statute of frauds affirmative defense prior to GTW's closing statement. The references throughout the trial testimony indicating that there were no written agreements were relevant to an issue aside from the statute of frauds affirmative defense. Specifically, the testimonial evidence concerning the lack of written agreements was offered to show the lack of an express contract. Reply Br. at 4. Given that the testimonial evidence introduced was relevant to an issue already in the case, we cannot say that Yoshida recognized that such references were offered to raise a statute of frauds affirmative defense.

[47] Moreover, we cannot say that Yoshida recognized that GTW was raising a statute of frauds affirmative defense because GTW had never before referenced the statute of frauds issue at any point prior to trial. In *Citizens Security Bank (Guam), Inc.*, we considered whether the newly injected issue was presented at any time prior to the trial to determine if a party had impliedly consented to trying the newly injected issue. *Citizens Sec. Bank (Guam), Inc.*, 1997 Guam 3 ¶ 20.

[48] Here, GTW never indicated that it intended to raise the statute of frauds affirmative defense prior to trial. GTW moved the trial court twice for leave of court to amend its answer to include additional affirmative defenses and counterclaims. RA, tab 51 at 2 (Finds. Fact & Concl. L.). Notwithstanding, GTW did not amend its answer to include a statute of frauds affirmative defense, nor did GTW ever indicate to the trial court that it planned to include the statute of frauds affirmative defense.

b. Yoshida Was Denied a Fair Opportunity to Defend Against the Statute of Frauds Affirmative Defense

[49] Yoshida also indicates that he suffered prejudice because he lacked the opportunity to defend against the statute of frauds issue at trial. Reply Br. at 3. We agree that Yoshida lacked the opportunity to mount a meaningful defense because Yoshida was unaware that the statute of frauds issue had been injected into the case until GTW quickly made a mere mention of the issue in passing during its closing statement. *See* Tr., tab 2 at 198 (Bench Trial). If GTW had timely raised the statute of frauds affirmative defense prior to its closing statement, Yoshida could have addressed the issue. GTW, however, denied Yoshida this opportunity in this instance.

[50] Yoshida was prejudiced by the injection of the statute of frauds affirmative defense because he lacked notice of the issue until it was too late for fair opportunity to defend against it. As such, we hold that the GRCP 15(b) exception to the pleading requirement does not apply here because there was no implied consent to try the statute of frauds issue. GTW therefore waived the statute of frauds affirmative defense by failing to include it in its pleadings. *See* GRCP 8(c).

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C. The 1996-1999 and 2006 Loans of Money Do Not Need to be in Writing

[51] Even assuming, *arguendo*, that GTW did not waive the statute of frauds by failing to plead it as an affirmative defense in its answer to the amended complaint, the statute of frauds does not require the loans to be in writing

1. Title 18 GCA § 86106(1) Does Not Require the 1996-1999 or 2006 Loans of Money to be in Writing

[52] The trial court held that 18 GCA § 86106(1) required the 1996-1999 and 2006 loans of money to be in writing in order to be enforceable. RA, tab 51 at 4-5 (Finds. Fact & Concl. L.).

[53] Although generally "[a]ll contracts may be oral," 18 GCA § 86104 (2005), section 86106(1) of title 18 requires that a contract "that by its terms is not to be performed within a year from the making thereof" must be in writing and signed by the party to be charged. 18 GCA § 86106(1) (2005). Section 86106(1) is modeled after section 1624(1) of the California Civil Code. In interpreting section 1624 of the California Civil Code, the California Supreme Court has held:

> [T]he courts have been perhaps even less friendly to this provision (the "one year" section) than to the other provisions of the statute (of frauds). They have observed the exact words of this provision and have interpreted them literally and very narrowly . . . . To fall within the words of the provision, therefore, the agreement must be one of which it can truly be said *[a]t the very moment it is made*, 'This agreement is not to be performed within one year'; in general, the cases indicate that *there must not be the slightest possibility that it can be fully performed within one year.*

White Lighting Co. v. Wolfson, 438 P.2d 345, 349 n.2 (Cal. 1968) (emphasis added).

[54] Section 86106(1) does not apply in this instance. Yoshida and GTW never discussed terms that prohibited the repayment of the 1996-1999 or 2006 loans of money within one year.

[55] At trial, Yoshida and GTW both indicated that there were no exact terms of repayment on the 1996-1999 loans of money or on the 2006 loans of money. Tr., tab 2 at 27, 64, 90-91 (Bench

Trial). As to the 1996-1999 loans of money, Yoshida testified that he expected that GTW would repay him when he left the company. Tr., tab 2 at 27, 64 (Bench Trial). GTW testified that all that was said with regard to repayment of the 1996-1999 loans of money was that GTW would pay Yoshida back at some point. *Id.* at 64. As to the 2006 loans of money, GTW and Yoshida only agreed that GTW would pay Yoshida's monthly Bank of Hawaii line of credit statements as a form of repayment. Tr., tab 2 at 20, 91 (Bench Trial).

[56] The testimony of Yoshida and GTW cannot be extrapolated to mean that repayment of the 1996-1999 or 2006 loans of money were not to happen within one year. Without any agreement prohibiting GTW's repayment of the 1996-1999 or 2006 loans of money, there remained a possibility that repayment of the 1996-1999 or 2006 loans of money could have been fully performed within one year. This possibility removes the loans from section 86106(1). The loans are not therefore required to be in writing to be enforceable under section 86106(1).

2. Title 18 GCA § 86106(2) Does Not Require the 2006 Loans to be in Writing Simply Because GTW Made Payments to Bank of Hawaii

[57] The trial court held that 18 GCA § 86106(2) also required the 2006 loans of money to be in writing. RA, tab 51 at 5 (Finds. Fact & Concl. L.). The court concluded that section 86106(2) required a writing because GTW promised to pay Yoshida back on the 2006 loans by paying Yoshida's line of credit with Bank of Hawaii. *Id.*

[58] Under 18 GCA § 86106(2), "[a] special promise to answer for the debt, default, or miscarriage of another" must be in writing and signed by the party to be charged to be enforceable, with a limited exception. 18 GCA § 86106(2) (2005). Section 86106(2) is modeled after section 1624(2) of the California Civil Code. In interpreting section 1624(2), the California Supreme Court has found that "there is not a contract to answer for the debt of another within the

statute of frauds where the alleged guarantor promises the debtor, rather than the creditor to pay the former's debt." *King v. Smith*, 199 P.2d 308, 310 (Cal. 1948).

[59] In this case, there is no contract to answer for the debt of another as required under section 86106(2) because Yoshida (the debtor) was indebted to Bank of Hawaii (the creditor), and GTW (the alleged guarantor) made a promise to Yoshida, rather than to Bank of Hawaii to pay Yoshida's debt. As a result, this cannot be said to be a contract to answer for the debt of another. Consequently, this agreement falls outside of section 86106(2), and a writing is therefore not required.

[60] In sum, neither 18 GCA § 86106(1) nor (2) require that the 1996-1999 or 2006 loans be in writing to be enforceable. Even assuming, *arguendo*, that these statutes do require that the loans be in writing to be enforceable, GTW is nevertheless precluded from asserting a statute of frauds defense for several reasons, each of which we will now discuss in turn.

3. The Doctrine of Full Performance Prevents GTW from Using a Statute of Frauds Defense

[61] Yoshida argues that the doctrine of full performance precludes GTW from using the statute of frauds as a defense. Appellant's Br. at 9.

[62] The doctrine of full performance "provides that where one party completely performs a contract, the contract is enforceable and the statute of frauds cannot be used as a defense." *Anderson v. Kohler*, 922 N.E.2d 8, 19 (Ill. App. Ct. 2009) (quoting *Greenberger, Krauss & Tenenbaum v. Catalfo*, 687 N.E.2d 153, 159 (Ill. App. Ct. 1997); *see also Dallman Co. v. Southern Heater Co.*, 68 Cal. Rptr. 873, 876 (Ct. App. 1968) (recognizing that full performance by a party to a contract was sufficient to take it out of the statute of frauds). As to the 1996-1999 loans of money, Yoshida rendered full performance by depositing a sum of $25,000.00 into

GTW's account. Tr., tab 2 at 27, 61, 64 (Bench Trial). Similarly, Yoshida rendered full performance on the 2006 loans of money by depositing a sum of $45,000.00 into GTW's account. *Id.* at 18-19, 89-90. Therefore, because Yoshida rendered full performance as to both the 1996-1999 and 2006 loans of money, the doctrine of full performance precludes GTW from using the statute of frauds as a defense.

4. The Doctrine of Estoppel Prevents GTW from Using a Statute of Frauds Defense

[63] Yoshida asserts that the doctrine of estoppel precludes GTW from asserting a statute of frauds defense. Appellant's Br. at 6-8.

[64] It is well recognized that:

> The doctrine of estoppel to assert the statute of frauds applies [1] where *unconscionable injury* would result from denying enforcement of the oral contract after one party has been induced by the other *seriously* to change his position in reliance on the contract or [2] where there would be *unjust enrichment* of a party who has received the benefit of the other's performance.

Isaac v. A & B Loan Co., 201 Cal. App. 3d 307, 313 (Cal. Ct. App. 1988) (emphasis in original). Here, the doctrine of estoppel to assert the statute of frauds applies because if the 1996-1999 and 2006 loans of money are not enforced (1) Yoshida would suffer from unconscionable injury, and (2) GTW would be unjustly enriched.

a. Yoshida Would Suffer from Unconscionable Injury

[65] Yoshida would suffer from unconscionable injury if the 1996-1999 and 2006 loans of money are not enforced because he would be deprived of recovering money that he personally lent to GTW.

[66] As to the 1996-1999 loans of money, Honda induced Yoshida to change his position in reliance on their agreement. Honda confirmed at trial that he had asked Yoshida to loan GTW $25,000.00, and that GTW would pay back the $25,000.00 at some point. Tr., tab 2 at 64 (Bench

Trial). It is therefore reasonable to conclude that this assurance induced Yoshida to lend GTW a total of $25,000.00 of his personal funds. Denying enforcement of this agreement would certainly result in unconscionable injury to Yoshida because Yoshida would be deprived of recovering the $25,000.00 that he loaned to GTW at Honda's request.

[67] As to the 2006 loans of money, Honda again induced Yoshida to change his position in reliance on their agreement. Honda confirmed at trial that he asked Yoshida to loan GTW a sum of $45,000.00, and agreed that GTW would repay the $45,000.00 by making monthly payments to Yoshida's Bank of Hawaii line of credit, from which Yoshida drew upon to lend GTW the money. Tr., tab 2 at 20, 90 (Bench Trial); RA, tab 6 at 1 (Am. Compl.). Denying enforcement of this agreement would certainly result in unconscionable injury to Yoshida because Yoshida would be deprived of recovering what remains owing on the 2006 loans of money.[5]

b. GTW Would be Unjustly Enriched

[68] Yoshida also suggests that the doctrine of estoppel to assert the statute of frauds applies because GTW would be unjustly enriched. Appellant's Br. at 6-8.

[69] We have recognized that a person is unjustly enriched if the person receives a benefit at another's expense. *Tanaguchi- Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 29 (2005) (quoting *First Nationwide Sav. v. Perry*, 15 Cal. Rptr. 2d 173, 176 (Ct. App. 1992)). A benefit generally means any form of advantage. *Id.* ¶ 31.

[70] Here, GTW would be unjustly enriched because it received the benefit of the 1996-1999 and 2006 loans of money at Yoshida's personal expense. As to the 1996-1999 loans of money, GTW received $25,000.00 from Yoshida to help with GTW's cash flow problems, and Yoshida

[5] The trial court determined that the principal amount unpaid on the 2006 loans of money is $22,218.56 after crediting GTW in the amount of $22,781.44 for GTW's direct payments to Yoshida's Bank of Hawaii line of credit. RA, tab 51 at 3-4 (Finds. Fact & Concl. L.).

received nothing in return. Tr., tab 2 at 27, 61, 64 (Bench Trial). This transaction came at Yoshida's expense, as he drew upon his personal checking account to make the $25,000.00 worth of loans to GTW to help it with its financial problems. *Id.* As to the 2006 loans of money, GTW similarly received $45,000.00 from Yoshida to help with GTW's cash flow problems, and GTW has not yet fully repaid Yoshida. Tr., tab 2 at 18, 90-91 (Bench Trial). Again, the 2006 loans of money benefiting GTW came at Yoshida's expense, because Yoshida drew upon his personal equity line of credit to make the loans of money to GTW in order to help GTW with its financial problems. Tr., tab 2 at 19 (Bench Trial).

[71] As such, the doctrine of estoppel precludes GTW from asserting the statute of frauds defense in this instance because Yoshida would suffer an unconscionable injury and GTW would be unjustly enriched if the 1996-1999 and 2006 loans of money are not enforced.

D. Whether Yoshida Can Recover Interest on the 1996-1999 and 2006 Loans of Money

[72] Yoshida asserts that interest is allowed on the 1996-1999 and 2006 loans because loans of money are presumed to be made upon interest under 18 GCA § 47103, unless it is otherwise expressly stipulated at the time in writing. Appellant's Br. at 11-12. GTW contends that the trial court correctly determined that interest cannot be applied because the parties did not expressly or impliedly agree upon the payment of interest. Appellee's Br. at 16.

[73] "The general rule is that the matter of the payment of interest must be made the subject of an express agreement, otherwise it cannot be charged; *excepting, of course, a case of a loan of money which by [statute] is made subject to the payment of interest by presumption.*" *Young v. Canfield's Estate*, 164 P. 1134, 1135 (Cal. Dist. Ct. App. 1917) (construing Cal. Civ. Code § 1914) (emphasis added). In Guam, a loan of money is made subject to the payment of interest by presumption. Section 47103 of Title 18 of GCA, modeled after California Civil Code section

1914, provides: "Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time of writing." 18 GCA § 47103 (2005).

1. Title 18 GCA § 47103 Makes a Loan of Money Subject to the Payment of Interest by Presumption

[74] Applying the general rule, GTW contends that because the parties did not expressly or impliedly agree upon the payment of interest, interest cannot be charged. Appellee's Br. at 16, 19. GTW asserts that "[a]n award of interest contrary to intent of the parties at the time of contract formation would be erroneous." Appellee's Br. at 20 (citing *Guam United Warehouse Corp. v. DeWitt Transp. Servs. of Guam, Inc.*, 2003 Guam 20 ¶¶ 23-25). Yet, GTW's reliance on *Guam United Warehouse Corporation* is misplaced. In *Guam United Warehouse Corporation*, we considered whether the trial court correctly awarded interest on a security deposit rather than a loan, and applied the general rule for whether interest can be charged. *Guam United Warehouse Corp.*, 2003 Guam 20 ¶ 24.

[75] This case, however, falls under the exception to the general rule because it involves loans of money, which by statute are made subject to the payment of interest by presumption under section 47103. Therefore, there is a presumption that Yoshida's loans of money to GTW were made upon interest.

2. Title 18 GCA § 47106 Imposes a 6% per Annum Interest Rate on Loans

[76] Yoshida asserts that the interest rate upon each of his loans to GTW should be set at 6% per annum pursuant to 18 GCA § 47106 because the parties did not discuss or set an interest rate. Appellant's Br. at 12. Section 47106 provides that "[t]he rate of interest upon the loan . . . shall be six percent (6%) per annum," unless the parties set their own legally permissible interest rate in writing. 18 GCA § 47106 (2005).

[77] GTW counters by arguing that section 47106 is inapplicable because it "was intended only to govern the rate of interest payable on loans after a judgment enforing [sic] the same has been duly rendered by a court." Appellee's Br. at 17. GTW contends that we previously held this in *Rinehart v. Rinehart*, 2000 Guam 14. Appellee's Br. at 17 (citing *Rinehart*, 2000 Guam 14 ¶¶ 24-25). However, GTW misinterprets our holding in *Rinehart*. Nowhere in *Rinehart* did we conclude that section 47106 was only intended to govern the rate of interest payable on loans after a judgment enforcing the loan has been rendered by a court.

[78] In *Rinehart*, a judgment was at issue, not a loan as in this case. *See Rinehart*, 2000 Guam 14 ¶¶ 24-27. We cited to section 47106 as the applicable statute governing the rate of interest to be paid on judgments, specifically highlighting the relevant provision related to judgments that we sought to interpret:

> *The rate of interest upon* the loan or forbearance of any money, goods or things in action, or on accounts after demand or *judgment rendered in any court of the territory, shall be six percent (6%) per annum* but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding the rates of interest specified in Title 14 of this Code.

Rinehart, 2000 Guam 14 ¶ 25 (quoting 18 GCA § 47106) (emphasis in original). Discussing only the specific provision within section 47106 referring to a "judgment rendered in any court of the territory," we held that the trial court decision to allow installment payments without interest was in error. *Id.* ¶¶ 24-27 (quoting 18 GCA § 47106). In that discussion, we did not address the separate clause within section 47106 dealing with "the loan or forbearance of any money, goods or things in action" -- the specific and relevant provision within section 47106 we are concerned with today. 18 GCA § 47106. Based on a plain reading of this clause within the

statute, we hold that section 47106 applies a 6% per annum interest rate on a loan unless the parties set their own legally permissible interest rate in writing.

3. Calculating Interest

[79] GTW asserts that even if 18 GCA § 47106 applies, imposing a 6% per annum interest rate on the 2006 loans of money runs contrary to our earlier decisions requiring damages to be capable of being made certain by calculation pursuant to 20 GCA § 2110.[6] Appellee's Br. at 20-21 (citing *Duenas v. George and Matilda Kallingal, P.C.*, 2012 Guam 4 ¶ 44). It asserts that "[s]everal facts create a level of uncertainty" as to how much GTW owes Yoshida. Appellee's Br. at 21.

[80] More specifically, GTW first argues that there is uncertainty as to how much it owes Yoshida on the 2006 loans of money because Yoshida's Bank of Hawaii line of credit included payments that GTW made to Yoshida as a part of his employee compensation plan. Appellee's Br. at 21; RA, tab 51 at 3 (Finds. Fact & Concl. L.). It next argues that uncertainty exists because a balance existed on Yoshida's Bank of Hawaii equity loan at the time Yoshida drew upon his equity line of credit to make the 2006 loans of money to GTW. Appellee's Br. at 21; RA, tab 51 at 3 (Finds. Fact & Concl. L.). GTW further argues that uncertainty would exist until a determination is made as to the application of the $21,128.31 that GTW paid to Yoshida's First Hawaiian Bank line of credit. Appellee's Br. at 21; RA, tab 51 at 3 (Finds. Fact & Concl. L.). Finally, GTW argues that uncertainty would exist until a determination is made on the

[6] Title 20 GCA § 2110 (2005) provides:

> Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him, upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

application of the $106,000.00 that Yoshida received from GTW and later converted into cashier's checks. Appellee's Br. at 21-22; RA, tab 51 at 3 (Finds. Fact & Concl. L.).

[81] In response, Yoshida contends that interest can be calculated because "the dates of the loans, the amounts paid on them, and when, makes the amount owed on them with interest simply a matter of arithmetic." Reply Br. at 6.

[82] We find that the amount of interest GTW owes to Yoshida can be determined. Notably, the trial court has already determined how much GTW repaid Yoshida.[7] The trial court made this determination after considering the facts GTW now raises in its abovementioned arguments. *See* RA, tab 51 at 3 ¶ 9 (Finds. Fact & Concl. L.) (considering inclusion of employee compensation payments on Yoshida's Bank of Hawaii line of credit); *see also id.* ¶ 10 (considering GTW's direct payments to Yoshida's Bank of Hawaii line of credit); *see also id.* ¶ 11 (considering the application of the $21,128.31 that GTW paid to Yoshida's First Hawaiian Bank line of credit); *see also id.* ¶¶ 12-14 (considering the application of the cashier's checks).

[83] As such, because (1) there has been a determination as to how much GTW already repaid Yoshida, (2) the dates the loans of money were made are known, and (3) the due dates of the loans are to be determined by the trial court, damages -- which in this case are the loan amounts due on the specific dates to be determined by the trial court -- are capable of being made certain. Thus, a determination of interest can be made.

[84] Interest in this case is to be calculated as follows: interest on the 1996-1999 and 2006 loans accrue at a rate of 6% per annum (pursuant to 18 GCA § 47106) beginning from the time the money was lent until the due dates of the loans, which in this case are the dates to be determined by the trial court under the reasonable time standard adopted in our opinion. *See Bott*

[7] The trial court found that $22,781.44 has been repaid on the 2006 loans of money through direct payments to Yoshida's line of credit with Bank of Hawaii. RA, tab 51 at 3 (Finds. Fact & Concl. L.).

v. American Hydrocarbon Corp., 458 F.2d 229, 232 (5th Cir. 1972) (finding that when a loan of money has been made and no writing at the time expressly stipulating that interest was not to be paid, interest at the legal rate is presumed to begin from the time money was loaned). Prejudgment interest thereafter accrues at a rate of 6% per annum on the damages amount determined, beginning on the day the damages become due and owing until judgment. *See* 20 GCA § 2110.

E. Whether GTW Can Renew Its Doctrine of Unclean Hands Affirmative Defense Absent a Cross Appeal

[85] GTW attempts to "renew[] its affirmative defense of unclean hands" by raising the issue for the first time in its Opposition Brief without first filing a cross appeal on the issue. Appellee's Br. at 22. Yoshida contends that because GTW did not appeal the trial court's rejection of GTW's doctrine of unclean hands affirmative defense, "this smoke screen is no longer at issue."[8] Reply Br. at 7.

[86] "Rule 4(a) explicitly provides that subsequent to a timely notice of appeal, any other party may file a cross-notice of appeal within fourteen (14) days *from the filing date of the first notice*." *Sky v. Kobayahsi*, 2002 Guam 24 ¶ 19 (citing Guam Rules of Appellate Procedure ("GRAP") Rule 4(a)) (internal quotation marks omitted). "Because a cross-appeal is a separate attempt by an appellee to enlarge his own rights or lessen the rights of his adversary . . . the time requirements for filing a cross-appeal pursuant to [Rule] 4(a) are mandatory . . . ." *Sky*, 2002 Guam 24 ¶ 20 (quoting *Kaplysh v. Takieddine*, 519 N.E.2d 382, 386-87 (Ohio 1988)).

[8] GTW first raised the doctrine of unclean hands affirmative defense in its initial pleading filed with the trial court. RA, tab 12 at 2 (Answer to Am. Compl. for Monies Owed). After considering the issue, the trial court rejected GTW's affirmative defense. RA, tab 51 at 4 (Finds. Fact & Concl. L.) ("The [c]ourt finds that none of the evidence presented relating to the doctrine of unclean hands was persuasive. Hence, the [c]ourt rejects [GTW's] defense of the doctrine of unclean [hands] in this case.").

[87] Here, GTW has not filed a notice of cross-appeal as required by GRAP 4(a) to raise its doctrine of unclean hands affirmative defense. GTW must have filed a notice of cross-appeal within fourteen days from the filing date of the first notice, which Yoshida filed on April 24, 2012. RA, tab 57 (Notice of Appeal, Apr. 24, 2012). Absent GTW's timely cross-appeal pursuant to GRAP 4(a), GTW cannot renew its doctrine of unclean hands affirmative defense.

V. CONCLUSION

[88] We hold that the 1996-1999 and 2006 loans of money are enforceable contracts because loans of money are contracts under 18 GCA § 47101.

[89] We further hold that GTW waived the statute of frauds affirmative defense by failing to include it in its pleadings.

[90] Additionally, we hold that Yoshida can recover interest in addition to the principal amount of money lent to GTW on the 1996-1999 and 2006 loans of money. Interest on the 1996-1999 and 2006 loans accrue at a rate of 6% per annum beginning from the time the money was lent until the due dates of the loans, which in this case are the dates to be determined by the trial court under the reasonable time standard adopted in our opinion. Prejudgment interest thereafter accrues at a rate of 6% per annum on the damages amount determined, beginning on the day the damages become due and owing until judgment.

[91] Finally, we hold that GTW cannot renew its affirmative defense of unclean hands in this instance absent a cross-appeal.

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[92] For the foregoing reasons, we **VACATE** the trial court's judgment and **REMAND** this matter to the trial court to determine, in a matter consistent with this opinion, the amount GTW owes Yoshida on the 1996-1999 and 2006 loans of money, and to enter judgment accordingly.

Original Signed: Robert J. Torres
By
ROBERT J. TORRES
Associate Justice

Original Signed: Katherine A. Maraman
By
KATHERINE A. MARAMAN
Associate Justice

Original Signed: F. Philip Carbullido
By
F. PHILIP CARBULLIDO
Chief Justice