IN THE SUPREME COURT OF GUAM

SHOREHAVEN CORPORATION, ROSARIO CARPIO, RHODORA C. CARPIO, AND JOEL J. CARPIO
Plaintiffs-Appellants

vs.

JOSE MATEO TAITANO
Defendant-Appellee

Supreme Court Case No. CVA97-054
Superior Court Case No. CV0054-91

OPINION

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Appeal from the Superior Court of Guam
Submitted on the briefs on September 9, 1998
Hagåtña, Guam

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BEFORE: JOHN A. MANGLONA, Chief Justice (Acting)[1]; RICHARD H. BENSON, Designated Justice[2]; and FRANCES TYDINGCO-GATEWOOD, Designated Justice.

PER CURIAM:

[1] This is an appeal from a judgment dismissing an action to compel the specific performance of a contract for the sale of land. The owner of the subject land, Jose Taitano (hereinafter "Jose"), objects to the validity of the contract alleging he did not sign the power of attorney which allowed his brother Pedro Taitano (hereinafter "Pedro") to execute the contract as alleged by Shorehaven Corporation (hereinafter "Shorehaven"). The issue presented is whether the land sale contract is valid, and more particularly whether, as a matter of law, Jose overcame the presumption of validity of the contract in which the signature of Jose's attorney in fact was acknowledged before a notary public. We hold that Jose's uncorroborated testimony, that he had not signed the power of attorney, is insufficient to overcome the presumption. The decision of the trial court is reversed.

I.

[2] Shorehaven, under the supervision of its president Johnny Carpio (hereinafter "Carpio"), was in the midst of purchasing land in Sinajana from Pedro when it was discovered that the desired property was landlocked. Pedro informed Shorehaven that the property initially had a right of way on the adjoining land

[1]The full-time Justices, including the Chief Justice, disqualified themselves from hearing this matter. Justice Manglona, as the senior member of the panel, was designated as the Acting Chief Justice.

[2] Justice Benson heard oral arguments in this case but recused himself from deciding the matter prior to issuance of this opinion and, therefore, did not join in it.

and that both pieces of property could be bought together as soon as title to the property was finally probated to his brother Jose. The parties agreed to purchase this combined land for the price of eight ($8.00) dollars per square meter on February 3, 1985.

[3] On October 25, 1985, Shorehaven's attorney created a contract between the parties in which Pedro signed for himself and, with the alleged power of attorney, for Jose. That same day, the parties approached Vincente Chiong (hereinafter "Chiong"), a notary public for Guam, to certify their contract. Chiong viewed a document, notarized in California in 1985, giving Pedro power of attorney from Jose. He then notarized the contract between Shorehaven and Pedro. The parties recorded this contract with the Department of Land Management on April 7, 1986. Carpio paid Pedro five thousand dollars ($5,000.00) as an earnest money deposit for the transaction.

[4] From February to October 1985, Carpio alleges that Pedro made several attempts to receive a new power of attorney from his brother who was living in Oregon at the time. Jose testified that he returned, unsigned, a blank power of attorney that Pedro had sent him for his signature. Jose also testified that Pedro informed him that he intended to sell the property to Shorehaven and that he had already received a payment for the agreement. Displeased, Jose said he would work on selling the land directly. When Jose returned to Guam, he found a buyer who was willing to pay thirty-five ($35.00) dollars per square foot, approximately four times more money than would be received under the Shorehaven-Pedro deal. Transcript, vol.--, pp. 28-29 (Trial, June 11, 1996).

[5] The land in controversy had been in probate since 1948. By May 17, 1990, ownership of the property had been confirmed in Jose. The Agreement to Purchase Property between Shorehaven and

Pedro provided that the sale was to be closed by sixty (60) days after the confirmation of ownership. When Shorehaven learned of the confirmation in Jose, it pushed for consummation of the purchase. Both Jose and Pedro refused to go through with the sale. Thus, Shorehaven filed a suit for specific performance on January 22, 1991. Pedro is now deceased and is no longer part of the litigation.[3]

[6] On June 11, 1996, the trial court heard the case. It issued its Findings of Fact and Conclusions of Law on July 29, 1997. It stated that the defendant had to overcome two presumptions: (1) the presumption of regularity and validity attached to documents duly acknowledged and notarized by a notary public; and (2) the presumption that where the signature of a grantor is placed upon an instrument by another, absent clear and convincing evidence to the contrary, the grantor adopts the signature as his own. The trial court noted that Jose returned an unsigned power of attorney to Pedro in 1985, and found that Jose overcame both presumptions.

[7] In contrast, the trial court opined that Shorehaven did not prove its claim by a preponderance of the evidence. It questioned the validity of a power of attorney coming from California when Jose last visited that state in 1979. It remained skeptical that none of the parties had a copy of the power of attorney, even though at least four people said that they had seen it back in 1985. The trial court also frowned upon the fact that neither Carpio nor Chiong could remember some of the specifics of the power of attorney, such as the Californian who notarized it or the county in which it was notarized. Consequently, the trial court

[3] Nevertheless, he filed an answer to the Shorehaven's Complaint. Pedro claimed that Shorehaven's purchase price was too low. *Shorehaven Corp. v. Taitano,* CV0054-91 (Super. Ct. Guam Aug. 19, 1991) (Answer from Pedro Taitano). However, Pedro neither denied making the agreements in 1985, nor receiving a power of attorney from Jose. Jose, on the other hand, denied ever having given power of attorney to his deceased brother.

ruled in favor of Jose. Shorehaven timely filed a notice of appeal in accordance to Rule 4(a) of the Guam Rules of Appellate Procedure.

II.

[8] This court has jurisdiction over this appeal pursuant to Title 7 GCA § 3107(a) and § 3108(a) (1994). The question of whether a party may successfully challenge the validity and execution of a contract that had been acknowledged by a notary public is a question of law. We review questions of law *de novo*. *Guam Econ. Dev. Auth. v. Island Equip. Co.,* 1998 Guam 7, ¶ 4; *Camacho v. Camacho,* 1997 Guam 5, ¶ 24.

A. Evidentiary Effect of Lost Documents.

[9] Title 6 GCA § 1002 (1994) requires that the original document or recording must be presented to the court if a party wants its contents to be brought into evidence. This provision, commonly known as the "best evidence rule," seems to have served as a foundation upon which the lower court came to its decision, despite not citing the rule explicitly.[4] However, lawmakers created exceptions to the rule. The exception most relevant to this case states:

> **Admissibility Other Evidence of Contents.** The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if - -
> (1) **Originals lost of destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.

[4]The lower court opined, "With at least four copies of this purported power of attorney floating around, none of which can be produced, it makes it difficult for this Court to believe, by a preponderance of the evidence, that it truly exists." *Shorehaven Corp. v. Taitano,* CV0054-91 (Super. Ct. Guam July 29, 1997) (Findings of Fact and Conclusions of Law).

Title 6 GCA § 1004(1) (1994). This exception persuades this court to disagree with the tacit belief of the lower court. Shorehaven presented enough evidence to circumvent the demands of the best evidence rule.

[10] Federal case law illustrates the expansive basis of this evidentiary exception.[5] Secondary evidence is admissible to prove the contents of a writing if the terms of Rule 1004(1) are satisfied. *See United States v. Ross,* 33 F.3d 1507, 1513 (11 th Cir. 1994). "[T]he Rules of Evidence do not establish a hierarchy of secondary evidence; anything that tends to demonstrate the writing's contents may constitute secondary evidence." *United States v. McGaughey,* 977 F.2d 1067, 1072 (7th Cir. 1993); *see also United Cable Television of Jeffco, Inc. v. Montgomery LC, Inc.,* 942 P.2d 1230, 1234 (Colo. Ct. App. 1996). Oral testimony may serve as secondary evidence to missing written or recorded items. *Klein v. Frank,* 534 F.2d 1104, 1107-08 (5th Cir. 1976) (allowing plaintiff's wife to testify to the contents of a missing letter). Oral testimony and other secondary evidence is especially admissible if multiple parties acknowledge that the best evidence existed at some point. *See, e.g., Wiley v. United States,* 257 F.2d 900, 909 (8th Cir. 1958). A party must allege bad faith immediately and emphatically if they want secondary evidence excluded. *See, e.g., United States v. Harney,* 306 F.2d 523, 533-34 (1st Cir. 1962).

[11] The record shows that Shorehaven has met each requirement of Rule 1004(1). It is undisputed that the original power of attorney is lost and there is no showing that the document was destroyed in bad faith. Jose himself does not allege or prove that any party has destroyed the 1985 power of attorney

[5]Federal case law is persuasive in this matter because Guam's evidentiary rules are identical to the Federal Rules of Evidence. *See People v. Salas,* 2000 Guam 2, ¶ 14; *People v. Santos,* 1999 Guam 1, ¶ 17.

document or is unconscionably hiding that document. Therefore, Chiong's testimony about viewing the 1985 power of attorney and the new contract that he notarized after seeing the 1985 document function as an adequate replacement to the missing best evidence. The fact that Pedro, Chiong, and Shorehaven acknowledged that the document existed when they were contracting and that Jose knew of these procedures counteracts the evidentiary effect of the lost power of attorney. Consequently, our view that Chiong's testimony and his notarized document as an acceptable substitution for the lost 1985 power of attorney influences our conclusions on the two presumptions to be discussed.

B. Validity and Regularity of Notarized Documents.

[12] Documents acknowledged by a notary public are presumed regular and valid. The trial court asserted that when four parties have seen a document but no one can produce it and few details can be recalled from it, then such a notarized document cannot be deemed regular and valid. However, in our consideration of this presumption, we have looked at the notarized documents of Chiong and we hold that this document, certified in Guam, must be considered regular and valid for the aforementioned real property transaction.

[13] Shorehaven refers to several Guam laws indicating the authority of Chiong's notarization. Title 5 GCA § 33301 (1994) empowers notaries to perform certain acts, such as producing acknowledgments and certifications. Title 21 GCA § 33102(c) (1994) states that proof of acknowledgment may be made before a notary public. In addition, 21 GCA § 33119 (1994) demands that a notary public must have at least some information about the names, whereabouts, and desires of each party involved in document

before authenticating that document.

[14] Case law reveals that contracts not precisely authenticated by a notary public, but followed nonetheless, may still be held enforceable. In *Jones v. Minton*, 141 So.2d 564 (Miss. 1962), parties disputed a deed that was signed twenty years earlier by their forebears. The appellants in that case argued that the contract could not be valid because one of the signers was illiterate and the document did not contain the markings she usually placed upon contracts. *Id.* at 565. Nevertheless, the court disfavored this claim because two witnesses attested to the contract and because no other evidence was presented to suggest the contract was a forgery. *Id.* The court declared, "There is a presumption against bad motive, dishonesty and fraud, and fraud is not a thing to be taken lightly charged and most emphatically not a thing to be lightly established. . . .The certificate of acknowledgment to the deed in question imports verity and presumptively states the truth." *Id.*

[15] In *Butler v. Encyclopedia Britannica, Inc.,* 41 F.3d 285 (7th Cir.1994), a widower admitted that he signed a contract allowing his deceased wife's death benefits to be passed along to her daughter. However, he claimed that the document should be invalid because he did not sign it in front of the notary public who later authenticated it. *Id.* at 293. The court disagreed. *Id.* It proclaimed, "A notary public's certificate of acknowledgment, regular on its face, carries a strong presumption of validity." *Id.* at 294 (citation omitted).

[16] In the instant case, Chiong declared that he saw a document from Jose giving attorney-in-fact status to Pedro. *Shorehaven Corp. v. Taitano,* CV0054-91 (Super. Ct. Guam Apr. 11, 1991) (Affidavit of Vincente P. Chiong). In his affidavit, Chiong stated: "I . . . personally viewed the original Power of

Attorney done by Jose M. Taitano in favor of Pedro M. Taitano, and authorizing Pedro M. Taitano to act as Attorney in Fact for Jose M. Taitano to execute . . . the [A]greement to Purchase Property . . . ." *Id.* Chiong further stated that he would not have notarized the Agreement to Purchase Property that one party signed in the name of another without seeing if the signer had permission to do so, in other words, without determining whether Pedro was authorized to sign as Attorney in Fact for Jose. *Shorehaven Corp. v. Taitano,* CV0054-91 (Super. Ct. Guam Jan. 25, 1993) (Deposition of Vincente P. Chiong). In his deposition testimony, Chiong emphasized that he viewed a "special power of attorney with regard to the authority that Jose Taitano gave to Pedro about the sale of property which was described in th[e] Agreement to Purchase." *Id*. The Agreement to Purchase Property executed by Shorehaven and Pedro, and notarized by Chiong, was then submitted to the Department of Land Management.

[17] Given Guam's laws on notaries public and relevant case law, we hold that a document that has been notarized by an impartial Guam Notary Public and submitted to a Guam agency creates a high standard for any third party who wants to challenge the agreement at a much later date. The disappearance of the original power of attorney does not negate the land sale agreement which Chiong authenticated. Notarized documents are presumed to be regular and valid. Accordingly, the Agreement to Purchase Property executed by Pedro acting as Attorney in Fact for Jose, as acknowledged by a notary public in the agreement itself, is binding on Jose *as a matter of law*.

C. Clear and Convincing Evidence.

[18] The trial court stated that Jose must provide clear and convincing evidence that he did not adopt

his brother's transactions. As with the first presumption, both the trial court as well as this court agree about the wording and existence of the second prong, but disagree as to its application and consequences. According to the trial court, by not signing the power of attorney that Pedro had mailed to him and by seeking another buyer for the property, Jose showed convincing evidence that he did not obligate himself to follow that contract. Based on the discussion below, this court holds the opposite position.

[19] *Jones v. Minton* provides the rule that the evidence to overcome the presumption of veracity or of documents duly acknowledged by a notary must be "clear, strong, and convincing." *Jones,* 141 So.2d at 565 (citation omitted). Clear and convincing evidence must be of "extraordinary persuasiveness." *State v. Gjerde,* 935 P.2d 1224, 1226 (Or. Ct. App. 1997) (citation omitted); *State v. Sea*, 904 P.2d 182, 184 (Or. Ct. App. 1995). "Clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Chiovero,* 570 A.2d 57, 60 (Pa. 1990).

[20] Cases that examine questionable documentation from notaries public firmly uphold this high burden. The plaintiffs in *In Re Piazza,* 181 B.R. 19 (E.D.N.Y. 1995), claimed that their signatures on a contract had been forged, yet they followed the contract for thirty-eight (38) months. The court stressed that oral testimony of the interested parties alone would not suffice to rebut the presumption. *Id.* at 22. It ruled that the plaintiff did not provide a handwriting expert's testimony or offer any other evidence which would encourage a reversal in their favor. *Id.* In *Meltzer v. Meltzer*, 662 So.2d 58 (La. Ct. App. 1996), a woman on the verge of her third divorce argued that her antenuptial agreement was not valid because she did not sign it in front of witnesses. The court refused to favor her claim because she had no clear proof

of her contention. *Id.* at 61-62.

[21] In the instant case, Jose's self-serving testimony is the only evidence that he offers to rebut this strong presumption. Jose's statements are simply not enough to meet the clear and convincing evidence burden. Regardless of whether Jose signed a power of attorney in California for his brother Pedro, he knew that Pedro had made an agreement to sell the land based upon the supposed power of attorney. Transcript, vol.--, p. 21 (Trial, June 11, 1996). Pedro told Jose that he had been paid $5,000.00 for the transaction. Transcript, vol.--, p. 26 (Trial, June 11, 1996). As a matter of law, Jose's testimony is insufficient to contradict an acknowledged document authorized by a notary public.

[22] As mentioned before, there is a strong presumption against fraud or bad motive in these cases. *See Jones*, 141 So.2d at 565. A corollary to this holding is that the claims of self-interested parties will be met with a certain degree of skepticism. For example, in *Son Fong Lum,* a mother who wanted to sell real property to a bank sued her son and daughter-in-law in order to have the title returned to her. *Son Fong Lum v. Antonelli*, 476 N.Y.S.2d 921 (N.Y. App. Div.1984). She argued, that though her husband's signature was genuine, the mark used for her signature was a forgery. *Id.* at 922. The trial court found that the notary public negligently assumed her signature was real, instead of investigating the truth of such an assumption. *Id.* at 923. The trial court agreed, but the appellate court reversed. *Id.* The court ruled that the presumption of validity was not overcome when five witness, including the notary public, testified to the contract's authenticity and when the veracity of the husband's signature was not in dispute. *Id.* at 924. Additionally, the court held that if the plaintiff could not read the contract, then she was at fault for not having it read to her. *Id.* at 925. The court emphasized that "a certificate of acknowledgment should not

be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses. . . ." *Id.* at 923; *see also Meltzer,* 662 So.2d at 62.

[23] We detect no fraud in the validation of the documents notarized in Guam. When questioned, Chiong mentioned that he had never met either Jose or Pedro before notarizing the document. *Shorehaven Corp. v. Taitano,* CV0054-91 (Super. Ct. Guam Jan. 25, 1993) (Deposition of Vincente P. Chiong). Chiong was able to recollect at least some of the details of the Californian power of attorney he reviewed before validating documents in 1985. *Id.* Therefore, this court has not seen any evidence to suggest that Chiong had any stake in this litigation and would find fraud or error on his part unlikely.

[24] On the contrary, this court finds that Jose's argument fails for the same reason as the plaintiff's in *Son Fong Lum*. The testimony of one interested party cannot overcome the truth assumed from a document validated by a notary public. Jose's new agreement to sell the property at thirty-five dollars ($35.00) per square meter with a third party suggests that his actions in court reflect a pecuniary motivation, rather than legal. Additionally, Jose admitted that he would be willing to sell the property to Shorehaven for a higher price. Transcript, vol.--, pp. 33-34 (Trial, Jun. 11, 1996). The appellee's desires are just as questionable as the production and loss of the Californian power of attorney. Consequently, his testimony cannot meet the certainty and unambiguous barrier that the clear and convincing standard demands.

[25] As a result, we find that Shorehaven proved its case by a preponderance of the evidence because Jose Taitano did not produce clear and convincing evidence to rebut the presumptions that notarized documents are regular and valid.

III.

[26] In conclusion, we hold that Jose failed to rebut either of the presumptions that the trial court described. Therefore, we **REVERSE** the trial court's holdings and **REMAND** the matter to the trial court for the entry of a judgment consistent with this opinion.

JOHN A. MANGLONA
Designated Justice

FRANCES TYDINGCO-GATEWOOD
Designated Justice