IN THE SUPREME COURT OF GUAM

ARASHI & CO., INC. and HIROYUKI IGARASHI,
Plaintiffs-Appellees,

vs.

NAKASHIMA ENTERPRISES, INC.,
Defendant-Appellant.

Supreme Court Case No.: CVA04-004
Superior Court Case No. CV0334-02

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on March 1, 2005
Hagåtña, Guam

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BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Presiding Justice;[1] F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; JOHN A. MANGLONA, Justice *Pro Tempore*.

TORRES, J.:

[1] Defendant-Appellant Nakashima Enterprises, Inc. appeals from the trial court's decision and order, as amended, granting a motion to dismiss Nakashima's counterclaim and granting summary judgment in favor of Plaintiffs-Appellees Arashi & Co., Inc. and its president, Hiroyuki Igarashi, on a Verified Complaint for Rescission. The trial court held that because Nakashima did not have a business license at the time of the execution of the lease or during the period in which it sought recovery of rent, that Nakashima had no right to maintain the counterclaim or defend against Arashi's and Igarashi's complaint for rescission. We affirm in part and reverse in part.

I.

[2] Arashi entered into a Commercial Lease Agreement (the "Lease") with Nakashima for stall "No. 4" in the food court of a beachside commercial building in Tumon, Guam which was being constructed by Nakashima. The Lease was for a period of three years and was to commence on August 1, 2001; however, if the construction of the building was not completed by then, the commencement date was to be "one (1) month following the date of the completion of the Commercial Building." Appellant's Excerpts of Record ("ER"), tab 6, Ex. A (Aff. of Peter J. Sablan in Supp. of Mot. for Summ J., Ex. A, Art. 3 § 3.01). Arashi deposited $10,000.00 to secure the space pursuant to § 5.06 of the Lease[2] and paid the first month's rent of $1,700.00 plus $150.00 in monthly

[1] Associate Justice Frances M. Tydingco-Gatewood, as the senior member of the panel at the time of the Status and Disqualification Conference, was designated Presiding Justice. John A. Manglona, Associate Justice of the CNMI, sits as Justice *Pro Tempore*.

[2] Although the Lease contains two sections, both entitled § 5.06, one requiring a security deposit in the amount of $10,000.00 and the other requiring a security deposit in the amount of $3,400.00, it is uncontradicted that Arashi deposited $10,000.00 with Nakashima, rather than $3,400.00. Appellant's ER, tab 6, Ex. A. (Lease ¶ 5.06).

common area fees. A "Guarantee of Lease" made by Arashi in favor of Nakashima was also executed by Igarashi ("Igarashi") as President of Arashi, unconditionally guaranteeing the payment of rent and performance of all the obligations under the Lease.

[3] The building was not ready for occupancy on August 1 because of construction delays, and by December 2001, the building was still not completed. Nakashima claims that he informed Arashi in December that Nakashima would deliver possession of the premises in January 2002; nonetheless, in a letter dated December 27, 2001, Arashi made a written demand for rescission of the Lease. Nakashima did not recognize Arashi's attempted rescission and the certificate of occupancy for the building was finally issued on January 11, 2002.

[4] In March 2002, Arashi and Igarashi filed suit against Nakashima for rescission of the Lease, cancellation of the guarantee, and return of the monies paid. In response, Nakashima counterclaimed for breach of the Lease alleging Igarashi was personally obligated under the guarantee, and demanding lease payments for the three years that the lease was to have been in effect.[3] Arashi's reply to the counterclaim raised numerous affirmative defenses but did not include the affirmative defense that Nakashima lacked a business license.

[5] On October 7, 2002, Arashi filed a Notice of Motion and Motion for Summary Judgment on the grounds "that there exist[s] no genuine issue of material fact and [that] Arashi [and Igarashi were] entitled to judgment as a matter of law. Appellant's ER tab 4, p. 2 (Notice of Mot. and Mot. for Summ. J.). While the summary judgment motion referenced a contemporaneously filed affidavit and memorandum of points and authorities in support of the motion, these additional documents were not filed until August 2003, and the motion as filed offered no explanation as to why summary judgment was appropriate. The later filed memorandum made clear, however, that Arashi was

[3] While Nakashima asserted Igarashi personally guaranteed the performance and rental payments, the prayer of relief contained in Nakashima's counterclaim did not specifically seek judgment against Igarashi pursuant to the guarantee.

moving for summary judgment on the rescission of the Lease and cancellation of the guarantee and dismissal of all of the counterclaims on the grounds that (1) summary dismissal of Nakashima's counterclaim was required because Nakashima did not have a business license at the time it executed the Lease or when it sought remedies in the Superior Court; (2) rescission was appropriate given the five-month delay in delivering possession of the leased premises; and (3) Igarashi did not become personally liable as a result of signing the guarantee on behalf of Arashi. Nakashima opposed the summary judgment motion, asserting that Arashi had waived the business license issue when it failed to plead it as an affirmative defense in its reply and that Nakashima had substantially complied with the business license law. Nakashima further argued summary judgment on the rescission claim was not appropriate because the parties contemplated the commencement date could be delayed, the Lease specifically contained language to that effect, and whether the delay in the commencement date was unreasonable is a question of fact precluding summary judgment.

[6] After oral argument the trial court, in a *Disision yan Otden* dated December 29, 2003, granted Arashi's motion to dismiss Nakashima's counterclaim on the basis that Nakashima only obtained its rental license in September 2003 and did not have the appropriate business license at the time it leased the property or when it filed its counterclaim. The court's decision was, however, contradictory on whether it meant to also grant summary judgment on Arashi's rescission claim, and Igarashi's liability under the guarantee. In its introduction, the court stated it would "grant in part Plaintiff's motion for summary judgment (dismissing defendant's counterclaim) and deny the remaining request," Appellant's ER, tab 11, p. 3 (*Disision yan Otden*). Later in the *Disision yan Otden*, the Court found "that Plaintiff's second and third grounds for summary judgment may also be appropriately granted based upon a lack of a business license for rent" and the Court granted "summary judgment on the Plaintiff's rescission complaint." Appellant's ER, tab 11, pp. 10-11 (*Disision yan Otden*).

[7] Arashi then presented a proposed judgment on all three claims to the trial judge to sign, but Nakashima lodged an objection. He claimed that the trial court had entered judgment only on the counterclaim, but had not ruled on the rescission or personal guarantee claims. Nakashima sought clarification of the court's decision by objecting to Plaintiff Arashi's proposed judgment, noting the inconsistency on page 3 of the *Disision yan Otden* of December 29, 2003 (granting judgment on one claim) and pages 10-11 (granting judgment on all three claims).

[8] In response, the trial court entered a second *Disision yan Otden* conceding that its first order was contradictory. The court resolved the inconsistency by saying:

> When initially writing this decision, the Court, while it had decided to dismiss Defendant's counterclaim, was inclined to limit its summary judgment application solely to the counterclaim issue. However, after it reviewed the matter further, it came to a subsequent conclusion, that summary judgment was proper in all respects. When it arrived at this subsequent conclusion, the Court failed to correct its prior writing. In its final analysis, however, the Court concluded and decided that summary judgment was proper in total and that judgment should be entered in Plaintiff's favor pursuant thereto.

Appellant's ER tab 12, p. 2 (*Disision yan Otden*). The court then amended its order accordingly and granted Plaintiff's Motion for summary judgment in its entirety. A final judgment was entered on the docket and this appeal followed.

II.

[9] We have jurisdiction over this appeal from a final judgment pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw through P.L. 109-76 (2005)), and Title 7 GCA § 3107(b) and § 3108(b) (Westlaw through Guam P.L. 28-037(2005)).

III.

[10] "A trial court's decision granting a motion for summary judgment is reviewed *de novo*." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7. "The court may grant summary judgment pursuant to

Rule 56 of the Guam Rules of Civil Procedure when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* ¶ 8 (citing *Manvil Corp. v. E.C. Gozum & Co.*, 1998 Guam 20 ¶ 6).

[11] A trial court's decision to allow a party leave to amend to raise defenses is reviewed for abuse of discretion. *Executive View Estate, Inc. v. Look*, No. CV-93-00062A, 1994 WL 129748 (D. Guam App. Div. March 15, 1994).

IV.

[12] Nakashima contends on appeal that the trial court erred when it dismissed the counterclaim and granted summary judgment in Arashi's favor for rescission of the Lease and cancellation of the guarantee on the basis that Nakashima did not have a business license. Nakashima maintains that it should not be barred from seeking enforcement of the Lease because Nakashima substantially complied with the business license law. Furthermore, Nakashima asserts that Arashi neglected to plead Nakashima's failure to have a business license as an affirmative defense and the trial court should not have permitted Arashi to amend its answer or to raise the defense in a motion for summary judgment. The failure to have a business license, Nakashima contends, does not prevent the corporation from defending itself against the original complaint or asserting a cause of action by counterclaim. Finally, Nakashima submits that summary judgment was not an appropriate way to decide whether there was an unreasonable delay in the commencement of the Lease entitling Arashi to rescission.

[13] Arashi insists that the trial court was correct in dismissing Nakashima's counterclaim and rescinding the Lease because of Nakashima's failure to comply with the business license law and in any event, rescission was reasonable as a matter of law. Moreover, Arashi argues that the trial court's decision to allow Arashi to amend the pleadings and assert the business license law was not

an abuse of its discretion. We now address these arguments in turn.

A. Nakashima's Failure to Have a Business License

1. Arashi Could Raise the Failure to have a Business License as Affirmative Defense.

[14] Nakashima submits that the trial court granted Arashi an unfair procedural advantage and erred when it permitted Arashi to raise Nakashima's failure to have a business license. The failure to have a business license is an affirmative defense under Title 11 GCA § 70130 (Westlaw through Guam Pub. L. 28-037 (2005)), but Arashi did not plead it as an affirmative defense in the reply to the counterclaim or in a motion to amend the pleadings, raising it only upon filing of the memorandum in support of the motion for summary judgment. Appellant's ER, tab 3 (Mem. of Points and Authorities in Supp. of Mot. for Summ. J.).

[15] Nakashima argues that Rule 12(b) of the Guam Rules of Civil Procedure requires that affirmative defenses must be raised in a "responsive pleading" and such defenses are waived if not timely raised. Guam R. Civ. P. 12(b). In opposition, Arashi points out that affirmative defenses may be raised for the first time in a summary judgment motion since there was no prejudice to Nakashima, and pursuant to *Foman v. Davis* 371 U.S. 178 (1962), the trial court did not abuse its discretion in allowing Arashi to include the affirmative defense. Nakashima states that the *Foman* case does not support this result.

[16] *Foman v. Davis*, 371 U.S. 178, is an often-cited case holding that in matters of pleading, leave to amend should always be liberally granted. Rule 15(a) of the Guam Rules of Civil Procedure, which is identical to Federal Rule of Civil Procedure 15(a), provides that leave to amend "shall be freely given when justice so required." Guam R. Civ. P. 15(a). *Foman* reminds that "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182. While leave to amend pleadings should be liberally granted, *Foman* directs courts to review whether certain factors are present which may mitigate

against leave to amend. The factors *Foman* instructs are to be considered are: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Id.*

[17] As part of this court's *de novo* review, it is permissible to examine the record to see if any of these factors are present. Nakashima believes that Arashi is guilty of two of the above-listed mitigating factors: undue delay and prejudice to opponent.

[18] Nakashima complains that he was prejudiced by the long delay between Arashi's filing of the reply to the counterclaim and raising the business license-defense. Nakashima claims prejudice because if it had known earlier of the oversight in obtaining the business license, the lower court may "not have interpreted the delay in the way it did." Appellant's Opening Brief, p. 10 (July 10, 2004). However, no one debates that it is Nakashima's responsibility to know of its licensing requirements, not Arashi's. Nakashima did not have a business license during part of the three-year lease period and the affirmative defense would still have been available to Arashi up to the point that a license was secured. Therefore, an examination of the record reveals no bad faith, no dilatory motive, no repeated failure to cure deficiencies, and no futility of amendment on Arashi's part. It was never Arashi's responsibility to remind Nakashima of the licensing requirement and we cannot agree Nakashima was unduly prejudiced by virtue of the allowance of the amendment.

[19] None of the mitigating factors from the *Foman* case have therefore been established by Nakashima. Moreover, it is permissible to raise an affirmative defense in a motion for summary judgment as long as there is no prejudice. *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993); *but see Harris v. Secretary,* 126 F.3d 339, 344-45 (D.C. Cir. 1997). There is no reason that the trial judge should not have granted Arashi's motion for leave to amend to raise this affirmative defense and the trial court's decision does not constitute an abuse of discretion.

[20] Nakashima then argues that case law prohibits Arashi from moving to amend his complaint in a brief rather than in a formal motion to amend. However, the authority that Nakashima relies on does not support this argument. Instead, the cases cited involve the situation where a trial court is asked to rule on the pleadings as they currently exist. For instance, in *Samson Committee v. Lynn*, 366 F. Supp. 1271 (E.D. Pa. 1973), there was a Rule 12(b)(6) motion which required that the trial court, in deciding whether the plaintiffs had stated a valid claim, to take the allegations in the complaint as true. The *Samson* court determined that a party should not be permitted to merely amend his complaint in an opposition to defeat the Rule 12(b)(6) motion and the proper means of raising claims that have inadvertently not been raised in the complaint is an amended complaint. *Id.* at 1278. Likewise, in *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), the issue was that the complaint itself had to stand or fall on its allegations, not its proposed amendments. This is not the situation here. In this case, the issue before the court is a motion to dismiss, not based on whether the allegations stand or fall as alleged, but whether an affirmative defense can be raised after an opposition is filed. Therefore, Nakashima's cases are distinguishable and the trial court did not err in allowing Arashi to raise without a formal motion the affirmative defense that Nakashima did not have a business license.

[21] We must now decide how Nakashima's claims and rights are affected by this affirmative defense.

2. Dismissal of Nakashima's Counterclaim was Proper

[22] In the first argument in support of the motion for summary judgment (Appellant's ER, tab 5 p. 1), Arashi argued that Nakashima's lack of a business license prevents him from pursuing this counterclaim against Arashi. Arashi relied upon Title 11 GCA § 70130, which provided, in pertinent part, (at the time that the cause of action was filed and when the motion was argued)[4] that:

[4] Title 11 GCA § 70130 was amended on December 18, 2003 by Guam Public Law 27-57:7, and now reads as follows:

> It shall be contrary to public policy for the courts to enforce leases for Guam land for which there is no business license held by the lessor . . . [and] rental payments . . . during periods for which the person seeking to collect said rents had no business license . . . may not be collected through the courts . . . [and] no commercial activity (including operating or leasing of real property) ...without a business license may file suit in Guam courts until such time that a business license is obtained.
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> . . . .
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> The courts shall liberally construe [the law] in favor of the landlord . . . and shall ignore technical deficiencies if the courts find there has been substantial compliance with the business license laws . . . and if the courts find that the landlord . . . has filed . . . gross receipts tax returns . . . .

11 GCA § 70130 (2003).[5]

> It is the policy of the government of Guam that all persons engaging in, transacting, conducting, continuing, doing, or carrying on a business have business licenses. Unless otherwise specifically exempted by law, no person shall engage in, transact, conduct, continue, do, or carry on a business in Guam until it obtains a business license. The requirement to obtain a business license shall be independent of and in addition to a requirement for a certificate of authority from the Director of Revenue and Taxation or other applicable regulating agency or board, pursuant to applicable Guam laws, including, but not limited to, Title 22 GCA § 15307, 22 GCA § 15102, 18 GCA § 7102 and 11 GCA § 106213.

Title 11 GCA § 70130 (Westlaw through Guam Pub. L. 28-037 (2005)).

[5] The entire text of Title 11GCA § 70130 before amendment by Public Law 27-57 provided:

> **§70130. Restriction of Activities on Persons Without Licenses.**
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> It is the policy of the government of Guam that all businesses have business licenses. Therefore:
>
> (a) any person engaged in any commercial activity or money-making activity which does not require a business license (such as professionals, religious organizations, political candidates, etc.) shall obtain a statement from the Department of Revenue and Taxation indicating the name of the applicant, that no business license is required, and the nature of the activity involved, which may be used in lieu of a business license for the nature of their business for purposes of this Section. The term "business license" as used in this Section shall include such statements from the Department of Revenue and Taxation that the activity is exempt from the requirement for a business license;
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> (b) no lease of real property may be recorded without a copy of the current business license of the Landlord (Lessor) attached;
>
> (c) It shall be contrary to public policy for the courts to enforce leases for Guam land for which there is no business license held by the lessor of a lease or his or her successor in interest. Therefore, rental payments for Guam land accrued after the effective date of this Section during periods for which the person seeking to collect said rents had no business license for such lease or rental activity may not be collected through the courts, and no person may be evicted from any leased real property for which rent is to be paid for any breach occurring or for any non-payment of rent during any period after the effective date of this Section when

[23] Nakashima argues the lower court should have found that Nakashima substantially complied with the business license law because the company had other business licenses and paid gross receipts taxes on all revenues collected from the leased property. The trial judge relied primarily on *Taijeron v. Kim,* 1999 Guam 16, in dismissing Nakashima's counterclaim. In that case, a landlord sought to enforce rental obligations during a period of time within which that landlord did not have a business license. *Id.* ¶ *4.* The trial judge in *Taijeron* granted summary judgment for the tenant because the landlord did not have a business license. *Id.* ¶ *5.* It was undisputed that the landlord did not have a business license, but the landlord argued that she had "substantially complied" with Title 11 GCA § 70130(f), as she had paid gross receipts taxes (as had Nakashima), and otherwise complied with Guam law in doing business. *Id.* ¶ 14.

[24] In reviewing the record *de novo*, this court found "the record is devoid of any facts that show [landlord] making any effort to timely secure a business license to lease the property." *Id.* ¶ 21. Relying on the Appellate Division case of *Archbishop of Guam v. G.F.G. Corp.*, No.CV-95-00007A, 1995 WL 604383 (D. Guam App. Div. October 2, 1995),[6] the court held, "[w]here, as it is

> the person seeking to enforce the terms of the lease did not have a valid business license to rent said premises;
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> (d) no commercial activity (including operating or leasing of real property) doing business on Guam without a business license may file suit in Guam courts until such time that a business license is obtained. No person engaged in commercial activity without a business license may use the courts to enforce, directly or indirectly, any obligation, lien, or contract incurred during the period of such commercial activity without a business license;
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> . . . .
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> (f) The courts shall liberally construe subsections (b) through (e) of this Section in favor of the landlord or business person and shall ignore technical deficiencies if the courts find there has been substantial compliance with the business license laws, rules, and regulations and if the courts find that the landlord or business person has filed on a timely basis (within 30 days of the due date) gross receipts tax returns fully reporting all accountable revenues from the activity concerned for the periods in question.

11 GCA §70130 (1994).

[6] Westlaw notes the District Court of Guam case number as "CR-95-00007A." However, District Court records reveal that the proper case number is "CV-95-00007A."

here, [landlord] made no immediate attempt to remedy the statutory violation, it cannot be said that [landlord] substantially complied with the licensing requirement by acquiring it several months after her duty to do so arose." *Taijeron*, 1996 Guam 16 ¶ 21.

[25] The holding of this court in *Taijeron* compels the same result in this case: "[W]e hold that [landlord]'s procurement of a business license well after the lease obligations have incurred cannot be said to be a mere technical deficiency that should be ignored by the court below." *Id.* ¶ 22. The trial judge in this case relied on this statement from *Taijeron*, and held that Nakashima's undisputed actions did not constitute substantial compliance. Accordingly, it was not possible for Nakashima to maintain his counterclaim for rent during the period of time within which he did not have a business license. The trial judge's ruling was based on sound precedent and was not in error. Nakashima has presented no ground to disturb this ruling, based on *Taijeron*.

[26] Although Nakashima's counterclaim is dismissed as a result of its failure to have a business license at the time it filed its counterclaim, Nakashima may pursue any remaining remedies during the period it was in possession of a business license. *Taijeron* does not compel the conclusion that Nakashima cannot maintain a counterclaim for rents due under the contract for the time after he received the business licenses.[7] Borrowing language from *Taijeron*, we conclude that "although [Nakashima] can certainly maintain an action for a breach of the lease that occurred during the time [it] was in possession of a business license, [it] cannot sue for those breaches that occurred prior." *Taijeron*, 1999 Guam 16 ¶ 26. Whether Nakashima is successful on any counterclaim for rents during the period it had a business license, is, of course, dependent on whether rescission of the lease was legally permissible. If the lease has been lawfully rescinded, then there is a discharge of the contractual duties and no breach of contract action remaining. This is the next issue we must examine.

[7] Nakashima would still need to seek leave to file an amended counterclaim and Arashi would be able to assert any defenses available against this counterclaim.

B. Rescission of the Lease

1. Nakashima Could Defend Against Rescission Even Without a Business License.

[27] In the second argument in support of Arashi's motion for summary judgment, Arashi argued that it was entitled to rescind under Guam law because there was a failure of consideration and that the delay was unreasonable as a matter of law.[8] This is not, however, the basis on which the trial judge granted summary judgment. In ruling on whether rescission was legally permissible, the trial court noted simply that the same statute which prevented Nakashima from bringing its counterclaim also prevented it from defending its lease in court. The court found that the second (rescission) and third (cancellation of guarantee) grounds for summary judgment may also be appropriately granted based upon a lack of a business license for rent and concluded that it was "compelled to grant summary judgment on Plaintiffs' rescission complaint." Appellant's ER, tab 11, p. 11 (*Disision yan Otden*).

[28] Nakashima urges reversal of this ruling on the basis that the business license law does not compel this result. We review *de novo* whether it was the proper application of the business license law to deny Nakashima access to the Courts to defend its rights under the Lease.

[29] The trial court reasoned that Nakashima had no defense to rescission: "It is clear that the courts of Guam may not be used to enforce a lease held by a lessor for which there is no business license to rent." Appellant's ER, tab 11, p. 10 (*Disision yan Otden*). The trial court concluded that summary judgment would be appropriate to prevent "[d]efendant from retaining the said rentals it received from Plaintiffs when it was unlicensed to enter into a lease agreement and in allowing

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[8] Title 18 GCA § 89202 (Westlaw through Guam Pub. L. 28-037 (2005)) states:

> A party to a contract may rescind:
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> . . .
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> (2) If, through the fault of the party as to whom he rescinds, the consideration of his obligation fails, in whole or in part;
>
> . . .
>
> (4) If such consideration, before it is rendered to him, fails in a material respect, from any cause; . . . .

Plaintiffs the return of the monies they paid for in rent as part of their prayed for rescission." Appellant's ER, tab 11, p. 10-11 (*Disision yan Otden*). The trial judge's conclusion that Nakashima was prevented from *defending* a lease due to a lack of a business license is, however, not supported by law.

[30] In *Guam Tai-Pan Dev. & Constr., Inc. v. Yigo Alta Estates, Inc.*. 2002 Guam 20, this court addressed the issue whether failure to have a business license makes the contract void *ab initio* and whether an unlicensed party could defend against a suit. The defendant in *Tai-Pan* had filed a motion seeking summary adjudication that failure to secure a business license would not void the underlying obligation. *Id.* ¶ 5. This court agreed, holding that though an unlicenced business is prevented from using the courts to enforce an obligation, the same law does not void the underlying contract altogether. Finding the substantial compliance language in the statute to be indicative of the legislature's intent, ("we find that the legislature's inclusion of a substantial compliance clause in the License Law further evidences the legislative intent not to make such contracts automatically void due to non-compliance"), this court held, "a contract executed by a non-licensed party under the License Law is not void per se." *Id.* ¶¶ 13, 15. Further, "the License Law while precluding the *enforcement* of a contract in court, does not expressly deny the party from *defending* their claims." *Id.* ¶ 17. The license law "removes an unlicensed [party's] power to *sue* not the power to *defend*. *Id.*

[31] On the basis of the Guam *Tai-Pan* case, we find that the underlying Lease retains its validity despite the fact that Nakashima did not have a business license. In this case, Nakashima cannot sue to enforce the lease during the time he was not in possession of a business license but the Lease remains valid. It is not automatically void, nor is it automatically rescinded, and Nakashima is entitled to defend against the claims for rescission and cancellation of the guarantee.[9]

[9] The amendment of the business license law on December 18, 2003, though not applicable to the case *sub judice*, now expressly provides "the failure of a person to obtain a business license . . . does not impair the validity of

[32] The trial court's finding that Nakashima's lack of a business license prevented it from defending against the rescission claim is not supported by law and was therefore in error. Notwithstanding this result, we may, on a *de novo* review, determine if there is another ground on which the trial court could have granted summary judgment on the rescission count.

2. The Reasonableness of the Delay in the Lease Commencement Date is a Material Fact In Dispute

[33] Arashi believes that the delay in the Lease commencement date was unreasonable, entitling it to rescind the contract because, even though the Lease contemplated a commencement date of August 1, 2001 or one month after the completion of the building, the law implies a reasonable time for performance.[10] Arashi acknowledges that what constitutes a reasonable time for performance is normally a question of fact. Nakashima was, however, unable to deliver the premises until more than five months after August 1, 2001, and it did not earlier provide adequate assurances concerning the completion of the construction to support a finding of performance within a reasonable period of time, therefore rescission of the Lease, Arashi submits, is required as a matter of law.

[34] Nakashima argues, on the other hand, that because he was on the verge of turning over possession of the premises to Arashi, Arashi had no automatic right to rescission. Moreover, the trial court never addressed the reasonableness of the delay in delivering possession. The court simply decided the rescission issue based on the lack of a business license. Therefore, summary judgment was inappropriate without resolution of the factual issues in dispute.

[35] This court agrees that there is no clear demarcation of "reasonableness" in this case. The lease specifically contemplated that the occupancy would begin on August 1 *or later* "[I]n the event

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its corporate acts or prevent it from defending any proceeding in Guam." Title 11 GCA § 70131(e) (as amended by Guam Sess. Law 27-57 (2003)).

[10] Title 18 GCA § 87123 (Westlaw through Guam Pub. L. 28-037 (2005)) provides, in relevant part:

> **Time of performance, contract.**
> If no time is specified for the performance of an act required to be performed, a reasonable time is allowed.

the construction of the Commercial Building is not completed on the said commencement date, as stated above, the term of this Lease shall commence on the date one (1) month following the date of the completion of the Commercial Building." Appellant's ER, tab 6, p. 4 (Aff. of Peter J. Sablan in Supp. of Mot. for Summ J., Ex. A (Art. 3 § 3.1)). The court finds that this provision in the lease was clearly meant to cover the possibility that the occupancy would not begin on August 1, but sometime later. Given this provision in the lease, it cannot be said that Arashi had an automatic legal right to rescind if there was a delay. To so hold would ignore this conspicuous provision addressing a later-beginning occupancy.

[36] The law generally does not permit one party to rescind before another party has performed unless time is of the essence, or there is material and substantial frustration of purpose, not a "slight, casual or technical breach." *O'Herron v. S. Tier Stores, Inc.*, 189 N.Y.S.2d 323, 325 (Ct. App. 1959). If the date of performance is fixed, time is essential, and failure to perform on the day indicated is ground for rescission. *John F. Trainor Co. v. G. Amsinck & Co.* 140 N.E. 931, 931 (Ct. App. N.Y. 1923); *see also Rein v. Robert Metrik Co.* 105 N.Y.S.2d 160, 162 (Ct. App. 1951) (whether the delay was reasonable analyzed according to the facts). This case fits none of these situations. There was no clear frustration of purpose in this case. The time for commencement of the lease was not of the essence. Thus, whether the delay was reasonable needed to have been addressed by the trial judge.

[37] There is no legal theory applicable in this case under which Arashi could have rescinded the contract without going into a fact analysis of reasonableness. Since the law does not provide a clear legal remedy of rescission, the trial judge could not have granted summary judgment except on a finding that there was no material fact in dispute surrounding the reasonableness of the delay. Whether more than five months was an unreasonable period of delay is a material factual issue in dispute, so summary judgment was not appropriate.

C. Cancellation of the Guarantee

[38] The final issue is whether there exists an independent basis to grant summary judgment on the validity of the Guarantee. *See* Appellant's ER, tab 6, Exhibit B, (Aff. of Peter J. Sablan in Supp. of Mot. for Summ J., Ex. B). The Guarantee clearly states that it is made by Arashi in favor of Nakashima and signed by Igarashi, as President of Arashi. Igarashi asserts that he did not intend to be personally bound by the guarantee and the identification of Arashi as the party to the contract and Igarashi's signature on the guarantee is an objective manifestation of that intent. By adding the title "President" to his signature when he signed the Guarantee, Igarashi contends he was signing in a representative capacity only, on behalf of Arashi, making the Guarantee unenforceable against him personally. Nakashima on the other hand, did not address the Guarantee in the opposition to the summary judgment but alleges in its counterclaim that the Guarantee was to be enforced against Igarashi personally. Neither of the parties addressed the Guarantee in their briefs on appeal.[11]

[39] If the trial court on remand determines that Arashi may rescind the Lease and the parties are restored to their precontractual positions, then it will not be necessary to decide the proper construction of the Guarantee. We therefore decline to decide the issue at this time.

V.

[40] We **AFFIRM** the finding that Nakashima was not permitted to pursue his counterclaim during the period of time during which he had no business license, but Nakashima may be able to amend his counterclaim to include a claim for rents due during the period of time during which it held a business license. We **REVERSE** the finding that Arashi had a legal right as a matter of law to rescind the Lease. Neither the business license law, nor the undisputed facts, support a right on Arashi's part to rescind without a factual review of whether the delay in completing the construction

[11] The failure of the parties to address the proper construction of the guarantee in their briefs on appeal further supports our decision *infra*, to not resolve the guarantee at this time.

of the building was reasonable. We therefore **REMAND** the complaint and the counterclaim to the trial court for further proceedings consistent with this Opinion.