IN THE SUPREME COURT OF GUAM

CHEN YU MACK,
Plaintiff-Appellee,

v.

DONALD B. DAVIS,
Defendant-Appellant.

Supreme Court Case No. CVA12-006
Superior Court Case No. CV0651-11

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted July 12, 2012
Hagåtña, Guam

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

CARBULLIDO, C.J.:

[1] Defendant-Appellant Donald B. Davis appeals the trial court's Decision and Order granting a preliminary injunction prohibiting Davis from voting his common stock in IHIAC, Inc. Plaintiff-Appellee Chen Yu Mack satisfied the requirements for grant of a preliminary injunction. Accordingly, the grant of preliminary injunction is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Donald B. Davis is a shareholder and director of StayWell Guam Inc. ("StayWell Guam"). Davis founded StayWell Guam in 1988 with Chen Yu Mack's former husband. Chen Yu Mack had been a shareholder of StayWell Guam, initially through her community interest in the stock of her ex-husband.

[3] Mack and Davis reached an agreement to purchase Zurich Insurance (Guam), Inc. ("ZIG") through a newly formed holding company, IHIAC, Inc. ("IHIAC"). StayWell Guam was the exclusive agent for ZIG. Davis wanted Narcisa Samonte, a former StayWell Guam employee who retired in 2004, to manage ZIG's operations. Mack and Davis agreed to offer a position to Samonte. In September 2008 and prior to IHIAC's formation, Mack e-mailed Samonte to offer her a management position at IHIAC and an opportunity to acquire a 10% ownership interest in IHIAC.

[4] On October 15, 2008, IHIAC was formed using money contributed and lent in equal amounts from Mack and Davis. Mack and Davis were each issued 1,999 shares of IHIAC as

incorporators, and the third incorporator, Francis Santos, was issued two shares.[1] Mack claims that she had trusted Santos to be a mediator in the event she and Davis were to disagree on issues relating to IHIAC. After the formation of IHIAC, Mack and Davis transferred their respective StayWell Guam stocks to IHIAC, as well as their StayWell Saipan stocks, and Mack estimated her stock in StayWell Guam and StayWell Saipan was worth about $3 million at the time of this transfer. Funding the purchase of ZIG, Mack and Davis contributed $1,525,000.00 of their own respective funds to the holding company, IHIAC. They used a loan from the Bank of Guam to pay off the balance of $6 million. They secured the loan using a mortgage on Davis' Guam residence as well as a mortgage on a commercial building Mack owns in Washington.

[5] On December 31, 2008, IHIAC acquired ZIG, and ZIG was subsequently renamed Island Home Insurance Company ("IHIC"). Mack continued to contact Samonte prior to and after the acquisition of ZIG, urging Samonte to accept the offer to join IHIAC. Samonte met with IHIC's staff to observe the work environment and decide whether to accept the offer. Samonte began working for IHIC on January 16, 2009.

[6] Mack claims she objected to Davis' proposal in 2009 to bring Samonte into IHIAC as a 10% shareholder because it would render Mack a minority shareholder. At a January 23, 2009 meeting, Mack claims she released her objection against the transfer of 10% of IHIAC stock to Samonte, supposedly in exchange for Davis' agreement to give her a proxy to vote his shares. Between January 16 and January 24, 2009, Mack, Davis, and Samonte met several times to negotiate the "fine details" of the Chief Operating Officer position and stock purchase. Record on Appeal ("RA"), tab 16 ¶ 11 (Narcisa M. Samonte Decl., July 29, 2011). The three had agreed

[1] Davis contends that it was 2,000 shares. The trial court found the number to be 1,999, and the actual number is not of particular concern on appeal.

on the main details of the job offer and stock purchase a few days prior to Mack's January 24 departure. In a March 20, 2009 e-mail from Davis to Mack, Davis acknowledged that he had, at some point, made an oral promise to give Mack a proxy.[2]

[7] After acquiring ZIG, Mack and Davis negotiated to buy out the shares of the other StayWell Guam shareholders, with the exception of Santos. They had to increase the loan from Bank of Guam to fund this buyout. Mack and Davis then transferred their shares of StayWell Guam and StayWell Saipan, Inc. to IHIAC. All shares were eventually transferred, apparently including those belonging to Santos, and StayWell Guam, StayWell Saipan, and IHIC (formerly known as ZIG) are now wholly owned subsidiaries of IHIAC, except for director qualifying shares. Mack conveyed to Samonte 4% of IHIAC common stock, whereas Davis conveyed to Samonte 6% of IHIAC common stock to fulfill the promise that Samonte would receive a 10% share of IHIAC common stock. As a result, Mack held less stock and control in IHIAC than she had before.

[8] Mack also alleged that she and Davis agreed that they would each receive $10,000.00 per month in compensation from IHIAC. IHIAC's only income comes from advances or distributions from its subsidiaries, and IHIAC's ability to declare dividends is controlled by the terms of the Bank of Guam loan, to which Mack is a party. Davis claimed that Mack does not provide services to IHIAC or its subsidiaries, which limits IHIAC's ability to provide Mack $10,000.00 per month in "compensation." RA, tab 17 ¶¶ 32-34 (Donald B. Davis Decl., July 29, 2011). However, StayWell Guam and IHIC did pay Mack consulting fees for the times she spent in Guam performing services benefiting the companies. Because Mack was not satisfied with

[2] While Davis never provided Mack with a written proxy, Mack claims the e-mail satisfied the requirement that the proxy be in writing.

these fees paid, she demanded to receive the full $10,000.00 per month allegedly agreed upon. Mack was also not satisfied with the dividends that IHIAC's board of directors issued to her, as a preferred stockholder, on November 13, 2010. At the board meeting on November 13, 2010, a motion was made to approve the $10,000.00 monthly compensation to Mack, but because nobody seconded the motion made by board member George Lostracco, the motion failed. After this request was denied at the meeting, Mack began complaining that the compensation received by Davis from StayWell Guam and IHIAC was excessive. Mack, however, had earlier voted to provide Davis this compensation.

[9] Mack brought the underlying lawsuit against Davis personally, seeking the $10,000.00 monthly compensation, even though the compensation was supposed to come from IHIAC or one of its subsidiaries. Mack argued in the trial court that she was entitled to a preliminary injunction against Davis, enjoining Davis from exercising his rights arising from ownership of IHIAC shares. The trial court granted the preliminary injunction. Davis timely appealed.

II. JURISDICTION

[10] This court has jurisdiction to review the decision and order of the trial court granting the preliminary injunction pursuant to 7 GCA § 25102(f) (2005). *See Sule v. Guam Bd. of Exam'rs for Dentistry*, 2011 Guam 5 ¶ 7.

III. STANDARD OF REVIEW

[11] The trial court's grant of preliminary injunction is reviewed for abuse of discretion. *See HongKong & Shanghai Banking Corp., Ltd. v. Kallingal*, 2005 Guam 13 ¶ 17. Interpretation of legal principles is reviewed *de novo*. *Sule*, 2011 Guam 5 ¶ 8 (citing *Sananap v. Cyfred, Ltd.*, 2009 Guam 13 ¶ 13). Issues of law underlying the trial court's grant of a preliminary injunction

are reviewed *de novo*. *See Kallingal*, 2005 Guam 13 ¶ 17 (citation omitted). The trial court's finding of either irreparable injury or likelihood of success on the merits is reviewed for abuse of discretion. *See id.* (citation omitted). Under this standard, the trial court's decision will not be reversed unless it was based on clearly erroneous findings of fact or an erroneous legal standard. *See Sule*, 2011 Guam 5 ¶ 8 (citations omitted).

IV. ANALYSIS

A. Whether Mack's Asserted Injury Has an Adequate Remedy at Law

[12] A preliminary injunction is a "drastic remedy," which serves to maintain the status quo ante litem. *See Benavente v. Taitano*, 2006 Guam 20 ¶ 16 (citations omitted); *Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶ 22 (citations omitted). "[B]efore [a preliminary] injunction may issue, the plaintiff must show that he will suffer irreparable injury and that he otherwise lacks an adequate remedy at law." *Marangi v. Gov't of Guam*, 319 F. Supp. 2d 1179, 1186 (D. Guam 2004) (citations omitted). Plaintiffs seeking such remedy have the task of proving they are entitled to such an extraordinary remedy. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010); *Fleishman v. Superior Court*, 125 Cal. Rptr. 2d 383, 388 (Ct. App. 2002). In Guam, the test for obtaining a preliminary injunction is for a movant to show: "(1) irreparable injury, and (2) the likelihood of succeeding on the merits." *Cyfred*, 2009 Guam 13 ¶ 14 (citation omitted).

[13] Mack asserts that because she is entitled to the $10,000.00 monthly compensation, and because Davis will not provide her with $10,000.00 per month, Davis is in breach of their agreement. *See* Transcript ("Tr.") at 23 (Hr'g Mot. Prelim. Inj., Aug. 15, 2011). In support of this argument, Mack testified at the preliminary injunction hearing that she has "no alternative"

except going after the proxy Davis allegedly promised to give her. *Id.* Irreparable injury typically focuses on categories of injury that "do not easily lend themselves to monetary compensation." *Sule*, 2011 Guam 5 ¶ 12 (citation omitted); 7 GCA § 20302(4) (2005) (providing that "[a]n injunction may be granted . . . [w]hen pecuniary compensation would not afford adequate relief."). Davis argues that Mack has adequate remedies at law for her breach of contract claims and that this forecloses Mack's ability to obtain injunctive relief. *See* Appellant's Br. at 12-13, 17 (May 14, 2012); 7 GCA § 20302(4). Consequently, Davis asserts that the trial court abused its discretion in issuing the injunction. *See* Appellant's Br. at 13.

[14] In response, Mack argues that injunctive relief should be granted when needed to "enforce a contract of agency coupled with an interest[.]" Appellee's Br. at 9 (June 13, 2012). Mack cites the California Court of Appeal case of *Lane Mortgage Co. v. Crenshaw* for the proposition that "the receipt of an agency power coupled with an interest cannot be revoked or otherwise rescinded after a conveyance supported by consideration." *Id.* (citing *Lane Mortg. Co. v. Crenshaw*, 269 P. 672, 676 (Cal. Ct. App. 1928)). *Crenshaw*, however, involved different circumstances. In that case, the lessee Hotel Company had agreed to pay the Lane Mortgage Company for services, where such employment and agency was irrevocable unless willful misconduct occurred. *Crenshaw*, 269 P. at 676. The case involved the question of whether the power to revoke agency remains in the principal after the agency has been coupled with an interest. *See id.* at 681. Such are not the facts present in the instant case.

[15] Mack also cites a California treatise for the proposition that a preliminary injunction is proper when, in the case of breach of contract, monetary damages might not afford adequate relief or it would be challenging to ascertain the amount of damages. Appellee's Br. at 9 (citing

38 Cal. Jur. 3d, Injunctions § 55 (2006)). Mack maintains that, contrary to what Davis contends, she seeks not only the $10,000.00 monthly compensation but also other goals, "including the termination of Davis' unilateral operation of the companies, access to the books and records of the companies, and a reduction of Davis' unauthorized salary to a reasonable amount." *Id.* at 10.

[16] Mack proceeds to argue that because there is only one IHIAC in the world, the right to control this company is "unique." *Id.* Indeed, the uniqueness of certain corporate shares may suggest that legal remedies are inadequate. *See Street v. Vitti*, 685 F. Supp. 379, 384 (S.D.N.Y. 1988). Mack also cites the case of *Haft v. Haft*, analogizing that the plaintiff therein had an interest in remaining CEO of the company, which the court found sufficient to render the lifetime proxy irrevocable. *See* Appellee's Br. at 11 (citing *Haft v. Haft*, 671 A.2d 413, 423 (Del. Ch. 1995)). In addition, Mack argues that the denial of the right to vote by proxy—which can include significant issues such as voting for employee promotion or termination—cannot be quantified in monetary terms. *See id.* at 12.

[17] Davis maintains that the lawsuit is really about Mack's insistence on garnering the $10,000.00 monthly salary rather than the other nonmonetary concerns she asserts. *See* Reply Br. at 2-3 (June 27, 2012). Davis argues that Mack's testimony at the preliminary injunction hearing proves that the adequate legal remedy here is the request for $10,000.00 compensation. After she was asked what terms of her contract were breached, her response was "Ten Thousand Dollars ($10,000)." Tr. at 44 (Hr'g Mot. Prelim. Inj.). Davis essentially contends that Mack only wanted the monetary compensation and does not care about the business consequences to IHIAC or its subsidiaries. *See* Reply Br. at 2. Davis' argument that Mack's hearing testimony regarding the $10,000.00 is sufficient to prove she is exclusively concerned about money

damages is not persuasive—especially in light of Mack's discussion concerning, *inter alia*, her loss of corporate control. *See* Appellee's Br. at 12-17.

[18] We must determine whether Mack's various nonmonetary relief sought would render money damages an inadequate remedy. The right to continue a business is not entirely measureable in monetary terms. *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970). When the monetary value of an injury is not quantifiable, there may be no adequate remedy at law. *See, e.g.*, *Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) (finding that plaintiff's alleged equal protection injury is very difficult to assign monetary value to, and thus, plaintiff did not have an adequate remedy at law); *Cash v. Surf Club*, 436 So. 2d 970, 971-72 (Fla. Dist. Ct. App. 1983) (reversing denial of injunctive relief after finding the monetary value of alleged injury was difficult to ascertain and plaintiffs demonstrated lack of an adequate remedy at law); *Inner-Tite Corp. v. Brozowski*, No. 20100156, 2010 WL 3038330, at *21 (Mass. Super. Ct. Apr. 14, 2010) (observing that there was "no adequate remedy at law because of the extreme difficulty in putting a monetary value" on the injury).

[19] Because a shareholder's right to corporate control is considered a nonmonetary right, and because Mack's case is not only concerned with the disputed $10,000.00 monthly compensation, Mack's asserted injury of losing her power to control IHIAC does not have an adequate remedy at law by merely obtaining money damages for the disputed compensation. Therefore, a preliminary injunction may issue under these circumstances. We now must determine whether Mack satisfied the requirements for issuance of a preliminary injunction.

B. Preliminary Injunction Standard

[20] Upholding the preliminary injunction requires finding both (1) irreparable injury to the plaintiff, and (2) likelihood of success on the merits. *See Cyfred*, 2009 Guam 13 ¶ 14 (citation omitted). We review both of these prongs in turn.

1. Irreparable Injury

[21] Davis argues that the trial court analyzed this prong without acknowledging certain facts from the preliminary injunction hearing and the supporting documents. *See* Appellant's Br. at 13. These include Davis' investment of the same amount of cash as Mack, using his personal property as collateral for the same loan as Mack, and having the same desire as Mack to ensure the continued functioning of IHIAC. *See id.* (citing RA, tab 17 ¶ 14-15 (Donald B. Davis Decl.)). The trial court noted that Davis' salary was "far beyond what was originally agreed upon," and was concerned that Davis was now in a position to put IHIAC in a direction that Mack was "uncomfortable with or adversely affected by" if no preliminary injunction were granted. RA, tab 39 at 4 (Dec. & Order, Jan. 12, 2012). Davis takes issue with the trial court's language of "[u]ncomfortable direction," which he believes mischaracterizes the legal standard for preliminary injunctions. *See* Appellant's Br. at 14. Rather, the correct standard to apply when determining whether to grant a preliminary injunction is to consider whether irreparable injury is "likely" if the injunction were denied. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("We agree . . . that the . . . 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."). Based on this language in the trial court's decision and order, Davis argues that the trial court abused its discretion by rendering its decision

based on "clear error in its findings of fact . . . in contravention of uncontradicted facts." Appellant's Br. at 15.

[22] In response, Mack cites the trial court's explanation of why it decided to grant the injunction. *See* Appellee's Br. at 22. The decision and order states, in relevant part: "Although money is an aspect of her claim, her interests in control over IHIAC are the crux of the irreparable injury Plaintiff would receive if injunction is not given by this [c]ourt." RA, tab 39 at 4 (Dec. & Order). The decision and order further states that "the [c]ourt believes injunction is warranted as it applies to this issue to save Plaintiff from irreparable injury of her business interests which go far beyond mere monetary damages." *Id.*; *see also* Appellee's Br. at 22. Thus, we must determine whether losing control in a business qualifies as irreparable injury.

[23] Diluting a party's ownership in a company, which results in loss of control of a business, may constitute irreparable injury. *See, e.g.*, *Vitti*, 685 F. Supp. at 384 (finding irreparable injury when forced sale of plaintiffs' shares would destroy their "voice in management"); *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, No. 03 Civ. 4148, 2003 WL 22909149, at *4 (S.D.N.Y. Dec. 10, 2003) (finding plaintiffs demonstrated irreparable injury because plaintiffs would have lost their shares in, and ability to participate in, the company); *Gitlitz v. Bellock*, 171 P.3d 1274, 1280 (Colo. App. 2007) (concluding that loss of the right to manage and control a business may constitute irreparable injury in the preliminary injunction context). Courts have also recognized irreparable injury when a plaintiff's status as shareholder diminishes. *See, e.g.*, *Rebell v. Muscat*, 272 N.Y.S.2d 478, 480 (App. Div. 1966); *Clark v. Pattern Analysis & Recognition Corp.*, 384 N.Y.S.2d 660, 661 (Sup. Ct. 1976). On the facts here, Mack transferred 4% of her shares to Samonte, which resulted in dilution of her ownership interest in IHIAC. RA, Exhibit Book, ex.

20 (Record of Certificates Issued and Transferred); *see also* Tr. at 59 (Hr'g Mot. Prelim. Inj.) (indicating admission of exhibit 20). Consequently, Mack's voice in management diminished when she fulfilled her promise to transfer stock to Samonte, and this constituted irreparable injury.

[24] Mack's second claimed injury is her inability to inspect the corporate records. The loss of the right to inspect corporate books has also been recognized as an irreparable injury. *See, e.g.*, *Brenner v. Hart Sys., Inc.*, 493 N.Y.S.2d 881, 884 (App. Div. 1985). Davis contends, however, that Mack was *not* actually denied access to the company records. *See* Reply Br. at 8-9. Rather, access to the confidential company records was denied to Mack's accountant and attorney, who were asked to submit to confidentiality agreements prior to inspection. *See id.* at 9 (citing RA, tab 11, ex. 16 (E-mail from David W. Dooley to Daniel J. Berman (May 5, 2011))). Moreover, Mack's testimony at the preliminary injunction hearing confirmed that she herself had access to the corporate records, but that her accountant and her attorney were not allowed to view the records directly without Mack. *See* Tr. at 50 (Hr'g Mot. Prelim. Inj.). Davis and IHIAC have not acted improperly because neither has impinged upon the right of Mack, the shareholder herself, to inspect the company records. Thus, Davis correctly argues that Mack's assertion that she was denied the right to inspect the records does not support Mack's need for a preliminary injunction. *See* Reply Br. at 9. A preliminary injunction seeking to enjoin Davis from voting his shares is irrelevant to Mack's access to the corporate records.

[25] Although the inspection of corporate records argument is not relevant, Mack's loss of control in the company—by virtue of transferring her shares, but not receiving the disputed proxy for voting purposes—does constitute irreparable injury. Mack has therefore satisfied the

first prong for issuance of the preliminary injunction. We now examine whether she has met the second prong of the preliminary injunction test—likelihood of success on the merits.

2. Likelihood of Success on the Merits

[26] "The appellate court may affirm the trial court's grant of an injunction as long as the record produces *any* ground on which it may appear that the seeking party may recover on the merits." *Kallingal*, 2005 Guam 13 ¶ 27 (emphasis added) (citation omitted). The "likelihood of success on the merits" prong depends on whether the trial court properly concluded that Mack might be able to prove Davis either properly executed a proxy or promised to give the disputed proxy in exchange for Mack giving up some of her shares.

a. Error in Law Used by the Trial Court

[27] As a preliminary matter, we find that the trial court erred when it relied on the wrong law, 18 GCA § 28718—in the new corporations code—for the purposes of analyzing irrevocable electronic proxies. *See* RA, tab 39 at 6 (Dec. & Order) (citing 18 GCA § 28718 (added by Guam Pub. L. 29-144:2 (Jan. 30, 2009))). The new business code, the Guam Business Corporation Act, enacted by Guam Public Law 29-144:2 (Jan. 30, 2009), only applies to corporations formed after the effective date of the Act, which was 90 days after enactment. *See* 18 GCA § 1101.1 (as added by P.L. 29-144:3 (Jan. 30, 2009)); 18 GCA § 281701 (as added by P.L. 29-144:2 (Jan. 30, 2009)). IHIAC acquired ZIG on December 31, 2008, which means these subsidiaries were formed prior to the April 30, 2009 effective date of the new Code. RA, tab 17 ¶ 22 (Donald B. Davis Decl.). The old business code, 18 GCA § 2203(4), governs in the instant case. It states that the corporation's bylaws will provide "[t]he mode of securing proxies of stockholders or members and voting them." 18 GCA § 2203(4) (2005).

b. E-mail Correspondence Did Not Constitute Proxy Execution

[28] Thus, we must look to IHIAC's bylaws to determine if any of the parties' e-mail correspondence resulted in the proper execution of a proxy. IHIAC's bylaws regarding proxies state:

> Every person entitled to vote or execute consents shall have the right to do so, either in person or by one of more agents authorized by a written proxy executed by such person or his duly authorized agent, and filed with the Secretary of the corporation. Any proxy duly executed is not revoked and continues in full force and effect until an instrument revoking it or a duly executed proxy bearing a later date is filed with the Secretary of the corporation. All proxies must be executed in accordance with all provisions of Section 2207 of Title 18 of the Guam Code Annotated.

RA, Exhibit Book, ex. 10 (IHIAC First Am. By-Laws, Jan. 28, 2009); *see also* Tr. at 59 (Hr'g Mot. Prelim. Inj.) (indicating admission of exhibit 10). In order to be effective, any proxy must be in writing and filed with the Secretary of the Corporation.

[29] In support of his argument that there was not a valid proxy, Davis notes that the trial court doubted that the March 20, 2009 e-mail effectuated Davis' grant of the proxy to Mack. *See* Appellant's Br. at 15-16; RA, tab 39 at 6 (Dec. & Order). Further, the trial court found there was inadequate evidence to prove Davis granted such an irrevocable proxy. *See id.* at 7 ("[T]he email is hardly concrete evidence that Defendant's promise to Plaintiff was effectuated."). Davis argues that, contrary to these findings, the trial court still proceeded to hold that Mack's "probability of success on the merits is high enough and that irreparable injury is great enough such that preliminary injunction is warranted." *Id.* at 7. Davis' contention is that the trial court misapplied the law when it stated "[j]ust because the probability of winning on the merits is not tremendous does not preclude injunction." Appellant's Br. at 17 (alteration in original) (quoting RA, tab 39 at 7 (Dec. & Order)). Davis also takes issue with the fact that the trial court used the

language that Mack was "fairly likely to succeed" on her two counts of breach of contract. *See id.*; RA, tab 39 at 7 (Dec. & Order).

[30] Mack argues that the facts in the record are strong, and the trial court did not abuse its discretion when basing its decision on those facts. *See* Appellee's Br. at 18. In particular, Mack "had a proxy agreement with Davis to 'vote his common stock' in IHIAC in exchange for her release of her objection to Davis' proposal to transfer 10% of IHIAC stock to Narcisa Samonte as incentive for Narcisa Samonte to work for the company." *Id.* (citation omitted); *see also* Tr. at 11 (Hr'g Mot. Prelim. Inj.). Mack also contends that the March 20, 2009 e-mail from Davis to Mack was sufficient confirmation of this proxy agreement. *See* Appellee's Br. at 19 (citing Tr. at 13 (Hr'g Mot. Prelim. Inj.); RA, tab 11, ex. 4 ¶ 6 (E-mail from Donald B. Davis to Chen Yu Mack)). At the preliminary injunction hearing, Davis' counsel did not object to Mack's evidentiary exhibits, which included the IHIAC Stock Transfer Ledger documenting the stock transfer from Mack and Davis to Samonte. Tr. at 59 (Hr'g Mot. Prelim. Inj.). Mack proffers that at the evidentiary hearing for the preliminary injunction, Davis did not testify, did not offer exhibits, and did not call any witnesses. *See* Appellee's Br. at 20; Tr. at 59 (Hr'g Mot. Prelim. Inj. Hr'g).

[31] Nevertheless, we hold there was no valid proxy executed because the March 20, 2009 e-mail did not comply with IHIAC's bylaws and 18 GCA § 2203. The March 20, 2009 e-mail did not constitute a "written proxy" by the terms set in the corporation's bylaws in part because the writing was not filed with IHIAC's corporate secretary. Thus, by virtue of its noncompliance with the corporation's bylaws, the e-mail correspondence also failed to comply with the applicable Guam law regarding proxies.

c. Oral Promise of Proxy as an Alternative Theory of Success on the Merits

[32] Even though we have determined that the March 20, 2009 e-mail correspondence did not constitute a properly executed proxy, there still might have been an oral promise by Davis to grant a proxy to Mack, which may be enforceable. Mack argues that the trial court noted that even if there was no proxy made in writing, it is possible for Mack to prove at trial that Davis made an oral promise to grant the proxy. *See* Appellee's Br. at 23-24 (citing RA, tab 39 at 7-8 (Dec. & Order)). Instead of proving there was an irrevocable proxy, Mack could put forth evidence at trial showing that Davis promised to make a proxy, but has since failed to perform his end of the agreement because he did not provide Mack with a written proxy under their purported oral agreement. *See* RA, tab 39 at 7-8 (Dec. & Order). Essentially, Mack argues the trial court recognized alternative means by which Mack could have succeeded on the merits. *See* Appellee's Br. at 24.

[33] Davis asserts that there is not yet enough evidence to prove that he promised to grant a proxy to Mack. According to Davis, the terms and details of the promise were "unknown" and undefined, and there "simply are not enough details to enforce any purported proxy." *See* Reply Br. at 4 (citing Tr. at 26 (Hr'g Mot. Prelim. Inj.); RA, tab 17 ¶ 24 (Donald B. Davis Decl.)). There Davis cites *Mobil Oil Guam, Inc. v. Tendido* for the proposition that an offer may only be accepted if it was "reasonably definite in its terms and must sufficiently cover essentials of the proposed transaction so that, with an expression of assent, there will be a completed and definite agreement on all essential details." Reply Br. at 4 n.2 (quoting *Mobil Oil Guam Inc. v. Tendido*, 2004 Guam 7 ¶ 35). Indeed, "three recognized elements of a contract are an offer, acceptance, and consideration." *Mobil Oil Guam*, 2004 Guam 7 ¶ 34 (citation omitted); *see also* 18 GCA §

85102 (2005) ("It is essential to the existence of a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and 4. A sufficient cause or consideration."). Generally, in the case of alleging a defendant's breach of an oral contract, definite contractual terms are necessary to make the contract enforceable. *See Nat'l Underground Constr. Co. v. E.A. Cox Co.*, 576 N.E.2d 283, 287 (Ill. App. Ct. 1991). While there are exceptions to this rule, we have found such promises enforceable in a case involving a loan of money where terms of repayment had not been set, because in such a circumstance, "the law implies a promise to repay the loan." *Yoshida v. Guam Warehouse and Transp., Inc.*, 2013 Guam 5 ¶ 30. As this case involves an oral promise to grant a proxy, the exception does not apply here.

[34] At this point of the appeal, however, we have only the preliminary injunction hearing testimony and Davis' and Mack's respective declarations to review, albeit no deposition testimony. Davis' declaration alleges that at some point in 2008 while riding in a car, he once told Mack he would give her a proxy to vote his stock; he uttered something to the effect of "Ok, I'll give you a proxy," but did not inquire as to why Mack wanted the proxy. RA, tab 17 ¶ 24 (Donald B. Davis Decl.). Mack, on the other hand, alleges in her declaration that "Davis agreed to convey to me his proxy to vote his stock in IHIAC," an agreement that "occurred on January 23, 2009 at the Hilton Hotel, Guam[.]" RA, tab 11 ¶ 20 (Chen Yu Mack Decl.). She also declared that the bargained-for exchange for Davis' proxy was her agreement to transfer 4% of her IHIAC stock to Samonte, which constituted legal consideration. *See id.* ¶ 22. She further declared her belief that the e-mail from Davis sent on March 20, 2009 confirms Davis' prior

agreement to give Mack his proxy. The only reference to the proxy in the March 20, 2009 Davis e-mail to Mack states:

> I remember your asking me to give you my proxy in the new company. At that time I figured the only reason you would ask for it was because you didn't trust me. I let it go and agreed because I wanted the business to move forward and figured you would begin to trust me at some point, I guess I was wrong about that.

RA, tab 11, ex. 4 ¶ 6 (E-mail from Donald B. Davis to Chen Yu Mack).

[35] Thus, the content and nature of the purported promise by Davis to give Mack a proxy for his shares is disputed. That is, it appears that the two declarations are conflicting in that Davis declared he agreed to give Mack "a proxy" during a car ride in 2008, whereas Mack declared that Davis agreed to give her "his proxy to vote his stock in IHIAC" during a meeting at the Hilton in 2009. RA, tab 17 ¶ 24 (Donald B. Davis Decl.); RA, tab 11 ¶ 20 (Chen Yu Mack Decl.).

[36] With conflicting declarations, the trial court would need to take into account the credibility of the respective declarants' testimonies, especially when the purported contract is an oral one. *Cf. Craftworld Interiors, Inc. v. King Enters., Inc.*, 2000 Guam 17 ¶ 11 (the appellate court must give deference to the trial court's "opportunity to judge the credibility of the witnesses"). Nevertheless, taking into consideration basic contract principles, we cannot state that the trial court relied on clearly erroneous law to arrive at its conclusion that Mack will likely succeed on the merits of her case, if and when it proceeds to trial.

[37] Insofar as the trial court based its decision on the contents of Davis' declaration, Mack's declaration, and Davis' March 20, 2009 e-mail, which would likely be admissible at trial, it does not appear that the trial court relied on clearly erroneous findings of facts. It was proper for the trial court to reason that even if the e-mail does not suffice as a written proxy—which is required to make it irrevocable—it is possible that Davis made an oral promise to give a proxy to Mack.

See RA, tab 39 at 5 (Dec. & Order). The breach of this oral promise would constitute a breach of contract, which would be an alternative means of succeeding on the merits—in lieu of finding that Davis granted Mack an irrevocable proxy. Furthermore, the trial court did not use a clearly erroneous standard of law simply by using the term "fairly likely to succeed" when discussing the merits of Mack's two breach of contract counts. *See id.* at 7. Using this language does not suggest that the trial court relied on the wrong legal standard when determining the likelihood of success on the merits. As cited above, when establishing the likelihood of success on the merits, a court may rely on the record so long as it produces "*any* ground on which it may appear that the seeking party may recover on the merits." *Kallingal*, 2005 Guam 13 ¶ 27 (emphasis added) (citation omitted); *see also* discussion *supra* Part IV.B.2.

[38] Therefore, the trial court did not abuse its discretion in granting the injunction because it did not rely on clearly erroneous law or erroneous findings of fact to arrive at the conclusion that Mack might likely succeed on the merits of her case regarding the purported oral promise by Davis and subsequent breach of that contract.

C. Whether the Trial Court's Injunction Remedy Was Too Vague and Overbroad

[39] The purpose of a preliminary injunction is to preserve the status quo ante litem. *See Benavente*, 2006 Guam 20 ¶ 16 (citation omitted); *Shin*, 2008 Guam 15 ¶ 22 (citation omitted). Nevertheless, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . by allowing the parties to take proposed action that the court finds will minimize the irreparable injury." *Shin*, 2008 Guam 15 ¶ 22 (citation omitted).

[40] Davis argues that a preliminary injunction ought to be narrowly tailored to remedy the specific injury alleged. *See* Appellant's Br. at 18 (citing *United States v. BNS, Inc.*, 858 F.2d 456, 464 (9th Cir. 1988)); *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) ("Injunctive relief . . . must be tailored to remedy the *specific harm alleged*.") (citation omitted). He further contends the injunction should not be "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Appellant's Br. at 18 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)) (internal quotation marks omitted). Here, the preliminary injunction ordered Davis to "desist from voting his share of the IHIAC stock until the resolution of this matter at trial." RA, tab 39 at 8 (Dec. & Order). Davis seems to suggest that the injunction is vague and overbroad because it is not limited to "the minimum number of Davis' shares in IHIAC to preserve [Mack's] purported need to control the company and its subsidiaries." Appellant's Br. at 20. Moreover, Mack interprets the language to include Davis' shares acquired after the March 20, 2009 e-mail that allegedly granted Mack a proxy and Davis feels these shares cannot be subject to the injunction. *See id.* at 18. Consequently, Davis can no longer participate in the management of IHIAC and its related companies. *See id.* Davis therefore requests this court to limit the scope of the injunction, which granted Mack voting rights for all of Davis' outstanding shares.

[41] However, Mack contends that Davis' arguments about the vagueness and breadth of the injunction should not be entertained because Davis failed to raise these arguments in the trial court. *See* Appellee's Br. at 28. Mack argues that Davis is attempting to raise, for the first time on appeal, the issues of subdividing or parsing his 3,560 shares and limiting the injunction to only the minimum number of shares necessary for Mack to have control of the company. Mack

points out that at the preliminary injunction hearing, the stock ledger with all of Davis' common stock was presented as evidence, yet Davis did not object to Mack placing all of his common stock at issue. *See* RA, Exhibit Book, ex. 20 (Record of Certificates Issued and Transferred); Tr. at 59 (Davis' counsel did not object to the admission of exhibit 20, which is the stock transfer ledger).

[42] We agree that the split of Davis' shares to pre- and post- proxy shares and the minimum number of shares necessary for Mack to have control are issues brought up for the first time on appeal. Generally, we do not address issues raised for the first time on appeal. *See Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶¶ 78-79. Nevertheless, this court has recognized a few discretionary exceptions for newly raised issues on appeal, namely: "(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n.1 (citation omitted). The issue of the number of shares that should be subject to the injunction does not appear to fall under any of these enumerated exceptions for reviewing an issue raised for the first time on appeal.

[43] Therefore, based on the facts in the record, the trial court did not abuse its discretion in ordering Davis to desist from voting *all* of his IHIAC common stock, as it was an issue Davis abandoned upon his failure to object to the stock ledger being presented as evidence at the preliminary injunction hearing, which listed all of Davis' shares in their entirety. As a consequence, because the issue of the number of shares subject to the injunction is not properly before us, we have no basis for considering Davis' arguments concerning the overbreadth and

vagueness of the injunction. Such argument is predicated upon the notion that the court should have treated some of the stock differently, either based on the pre- or post-proxy division or upon the number of shares necessary for control. With any argument as to reclassifying the shares foreclosed because of Davis' failure to raise it prior to this appeal, there is no basis to consider whether the injunction is overbroad or vague as Davis argues, because the only way to do so would be to revisit those findings.

V. CONCLUSION

[44] Contrary to Davis' contention, the case is not solely about the $10,000.00 monthly compensation that Mack seeks. Thus, we hold that Mack did not have an adequate remedy at law because the right to control IHIAC, which Mack also seeks, is not quantifiable in purely monetary terms. We further hold that the preliminary injunction was appropriate because Mack has satisfied both prongs for granting a preliminary injunction in Guam. That is, (1) Mack would suffer irreparable injury through the loss of her control in IHIAC; and (2) there is a likelihood that Mack can prove at trial that Davis promised to give her a proxy. We hold that the current status quo—Mack's loss of corporate control—was causing Mack irreparable injury and, therefore, the trial court's injunction was appropriate.

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[45] Thus, the trial court did not abuse its discretion in issuing the preliminary injunction because it did not rely on erroneous findings of fact or erroneous legal standards. For the foregoing reasons, we **AFFIRM** the trial court's decision and order granting the preliminary injunction.

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

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

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