

TMETUHL v. WESTERN CAROLINES TRADING CO.

ROMAN TMETUHL, Representing the Heirs of
Toribiong Uchel, Deceased, Plaintiff
v.
WESTERN CAROLINES TRADING CO., Represented
by Rubasch Fritz, Its President
and
BAULES SECHELONG, Defendants
and
HIDEYOS ORRUKEM, Cross-Defendant
Civil Action No. 368
Trial Division of the High Court
Palau District
July 25, 1969
See, also, 2 T.T.R. 392

Action for recovery of property and damages. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that plaintiff had waived his right to proceed against corporate defendant but had a right of recovery against individual defendant and amount of recovery was limited by amount fixed in contract in question.

1. Waiver-Generally

A waiver is a voluntary and intentional abandonment or relinquishment of a known right and it may be inferred from conduct.

2. Estoppel-Waiver

Estoppel and waiver are frequently confused, but they are distinctly different.

3. Waiver-Conduct

That true owner waived his right to assert his ownership against purchaser was evidenced by the contract of sale between third party seller and purchaser, which true owner read before it was executed, and which asserted erroneously that the seller was the owner of the property.

4. Contracts--Construction

The court will not amend or revise a written contract.

5. Contracts--Cancellation-Generally

The court may, upon a proper showing, cancel or set aside a contract due to mutual mistake or upon a showing of fraudulent inducement or for other lawful reason.

6. Contracts--Cancellation-Mutual Mistake

Where both parties were aware of a mutual mistake as to ownership of property and both intentionally proceeded with the contract, court would not cancel contract on grounds of mutual mistake.

7. Estoppel-By Deed

As against the purchaser of property who knew seller did not own property, the seller was estopped by his deed from rescinding the sale of the property on the grounds he mistakenly represented he owned it.

8. Contracts--Rescission

Party's attempt to rescind contract, coming two years after entering into it, came too late to effectively rescind the contract.

9. Palau Custom-Family Obligations--Father Under the Custom

The question of what damages should be allowed for a breach of manners toward a father under the custom is a matter for determination with the custom and the court will not decide the question.

10. Corporations--IDtra Vires

Where purported cancellation of stock by corporation was not in accord with the procedure on the face of the stock, it was ultra vires the corporate authority and not effective.

<i>Assessor:</i>	JUDGE PABLO RINGANG
<i>Interpreters:</i>	KAZUMOTO H. RENGULBAI AND SINGICHI IKESAKES
<i>Reporter:</i>	NANCY K. HATTORI
<i>Counsel for Plaintiff:</i>	In pro per
<i>Counsel for Defendant Western Carolines Trading Company:</i>	KALEB UDUI
<i>Counsel for Defendant Sechelong:</i>	WILLIAM O. WALLY
<i>Counsel for Defendant Orrukem:</i>	FRANCISCO ARMALUUK

TURNER: *Associate Justice*

FINDINGS OF FACTS

1. Toribiong owned the house, the use value of which plaintiff sought to recover from the defendants.

2. Plaintiff succeeded to Toribiong's estate as representative of the heirs.

3. Defendant Baules sold the house, while Toribiong was living, by contract, which included a five-year lease of the land on which the house was situated and was owned by Baules, to the defendant Western Carolines Trading Company. The sale and lease were made in consideration of defendant Western Carolines Trading Company cancelling the judgment debt held against their defaulting former employee, the defendant Hideyos Orrukem. The house value was placed at three thousand dollars (\$3,000.00) and the land rental in the amount of three thousand two hundred fifty-seven dollars and twenty cents (\$3,257.20), the balance of the judgment debt.

4. Defendant Baules entered into the contract at the request of Western Carolines Trading Company and Hideyos to cancel Hideyos' debts because of his relationship to Hideyos and consequent obligations under Palauan custom.

5. Plaintiff's predecessor, Toribiong, waived his right to recover the house or its value from defendant Western Carolines Trading Company by his consent to its sale by

defendant Baules to whom he was related. He did not waive his right of recovery for the value of the house from Baules and expected to receive, in accordance with Baules' promise, a parcel of land and fifty (50) shares of Western Carolines Trading Company corporate stock having \$10.00 par.

6. Baules' attempted rescission of the sale and lease contract with Western Carolines Trading Company because of Hideyos' failure to transfer land and the corporate stock was not effective.

7. Hideyos' obligation to Baules because of their relationship under the custom has not been fulfilled and although it would have justified Baules initially to refuse to pay Hideyos' debts, Hideyos' conduct subsequent to the contract and Baules' delay of two years before attempting to rescind the contract made the attempt ineffective.

8. The attempted cancellation of its stock by Western Carolines Trading Company held by Baules and belonging to Hideyos was not effective.

OPINION

As originally filed in December, 1966, this action sought recovery by the plaintiff of the house in question together with damages for its use and occupancy by the defendants Baules and Western Carolines Trading Company. Less than three months later the house was destroyed by typhoon Sally. At the pre-trial, the parties agreed the salvage value of materials retained by Western Carolines Trading Company was two thousand dollars (\$2,000.00). Plaintiff also claimed damages for use and occupancy of seven thousand dollars (\$7,000.00).

In accordance with Finding No.4, plaintiff's predecessor (and plaintiff stands in the same position as his predecessor) waived any right of recovery against Western Carolines Trading Company, the purchaser from Baules.

[1] A waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be inferred from conduct. 28 Am. Jur. 2d, Estoppel and Waiver, § 30, 158, 160.

[2] Defendant Western Carolines Trading Company suggests plaintiff is estopped from asserting his claim against it. Estoppel and waiver are frequently confused, but they are distinctly different. A comparison of these differences is found in detail in *Glendale v. Coquot*, 52 P.2d 1178, 102 A.L.R. 837 at 841.

[3] That Toribiong waived his right to assert his ownership against Western Carolines Trading Company is evidenced by the contract, which Toribiong read before it was executed, which asserted, erroneously that the seller, Baules, was the owner of the house. There was no waiver as against Baules because of Baules' testimony admitting he had promised and Toribiong expected to receive a parcel of land and the Western Carolines Trading Company stock for the house.

As far as the plaintiff is concerned, this leaves him with a right of recovery solely against Baules. The amount of such recovery is limited to the promised parcel of land and shares of stock or in the alternative the value of the house fixed by the defendants in their contract, Le., the sum of three thousand dollars (\$3,000.00).

A great deal of the trial testimony was concerned with Baules' rights of recovery against Western Carolines Trading Company and Hideyos.

[4,5] Even though officers of Western Carolines Trading Company admittedly prepared the contract between itself and Baules and that the contract erroneously stated Baules was the owner of the house in question and further mistakenly failed to recite the terms of the conditions under which Baules entered into it, except in passing reference

to Palauan custom, nevertheless, Baules, by his signature is bound by it. This court will not amend or revise a written contract. It may, upon a proper showing, cancel or set aside a contract due to mutual mistake or upon a showing of fraudulent inducement or for other lawful reason.

[6] We do not find a sufficient showing in the evidence to warrant a cancellation. **If** there was mutual mistake as to ownership both parties were aware of it (although Western Carolines Trading Company claimed not to be) and both intentionally proceeded with the contract.

[7,8] As against Western Carolines Trading Company, Baules is estopped by his deed from rescinding the sale of the house on the grounds he mistakenly represented he owned it. The failure to include the condition of inducement to the contract, that is, that Baules entered into the contract to satisfy Hideyos' debt to Western Carolines Trading Company because of the custom, but that he also, contrary to custom, expected reimbursement for the house by the transfer of stock and land, that omission did not concern Baules until he became convinced, two years after entering the contract, that Hideyos was not going to perform. It was only then he wrote a letter to Hideyos and Western Carolines Trading Company that he would not pay Hideyos' debts. The attempt was too late to effectively rescind the contract.

Baules' testimony that Hideyos promised to transfer stock and land to be used to compensate Toribiong as owner of the house, was denied by Hideyos. As to whether there was an oral agreement which Hideyos breached the proof was inconclusive and consequently, this claim by Baules against Hideyos must be denied.

[9] It is, however, established that Hideyos did not from the time his debts were paid by his "father under the custom" conduct himself toward Baules in the manner that

traditional custom requires. What damage Baules should be allowed for this breach of custom is a matter for determination in accordance with the custom and this court, without further inquiry into the question, will not decide it.

One final point remains to be decided, ownership of the fifty shares of Western Carolines Trading Company stock which the corporation cancelled at Hideyos' request without requiring him to surrender the shares. On the face of the stock it is provided:-

"This is to certify that Hideyos O. is the owner of one share of the capital stock of the Western Carolines Trading Company, transferrable only on the books of the company by the said owner in person or by duly authorized attorney, *upon surrender of this certificate properly endorsed.*"

[10J The purported cancellation was ultra vires the corporate authority and not effective. As the matter stands, Hideyos remains the owner on the company books but possession is in Baules and unless he surrenders the shares or unless Hideyos transfers them to him the entitlement of either one cannot be resolved. In any event, the purported cancellation by Western Carolines Trading Company is set aside.

JUDGMENT

It is ordered, adjudged, and decreed as follows:-

1. That plaintiff shall have and recover the sum of three thousand dollars (\$3,000.00) from the defendant Baules, together with interest at six percent per annum from and after the date of entry, together with his costs allowed by law.
2. That plaintiff is denied recovery against the defendant Western Carolines Trading Company and the defendant Hideyos Orrukem and they shall have their costs allowed by law.

3. That the defendant Baules is denied recovery on his contract against co-defendant Western Carolines Trading Company.

4. That the defendant Baules is denied recovery upon an oral agreement against co-defendant Hideyos but such denial is without prejudice to any right of recovery he may have against the defendant Hideyos under Palauan custom.