

**IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
APPELLATE DIVISION**

HAIROM E. LIVAIE,)	APPEAL CASE NO. K1-2003
)	
Appellant,)	
)	
v.)	
)	
BAOBAO WEILBACHER and WHITE)	
SAND CONSTRUCTION COMPANY,)	
)	
Appellee.)	
_____)	

OPINION

Argued: August 10, 2004
Decided: _____, 2005

BEFORE:

Hon. Andon L. Amaraich, Chief Justice, FSM Supreme Court
Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court

APPEARANCE:

For the Appellant:	Canney L. Palsis, Esq. Directing Attorney Micronesian Legal Services Corp. P.O. Box 38 Lelu, Kosrae FM 96944
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COURT’S OPINION

DENNIS K. YAMASE, Associate Justice:

This is an appeal by plaintiff-appellant Hairom E. Livaie from the trial court’s July 2, 2003 decision that there was no contract between Livaie and defendants-appellees Baobao Weilbacher and White Sand Construction Company (“White Sand”) because of a lack of definite terms and awarding

Livaie \$1,520.00 in restitution.

The appellant Livaie contends that the trial court erred in its findings of fact and conclusion of law that there was no contract. Livaie further contends that the trial court's assessment of restitution was not based on substantial evidence and was clearly erroneous. Appellees did not file a brief or appear for oral argument.

We conclude that there was adequate evidence in the record to support the findings of the trial court that there was no contract between the parties due to a lack of definite terms. We therefore affirm this part of the trial court's judgment. We find that the trial court's assessment of the amount of restitution was not supported by evidence properly before the trial court, but was instead supported only by a statement made by the defendant-appellee Weilbacher in the closing arguments. We therefore remand this portion of the judgment back to the trial court to allow it to properly determine the amount of restitution based on the evidence before it or to hold a further evidentiary hearing on this issue. We therefore affirm, in part, and vacate, in part, the trial court's judgment. Our reasons follow.

I. BACKGROUND

Livaie is the owner of land in the State of Kosrae called Saolung in Utwe Municipality. Weilbacher is the owner and president of White Sand Construction Company. In June, 2001, White Sand was awarded a contract by the Kosrae state government to work on the circumferential road from Isra, Utwe to Walung ("road project"). This work included construction of a dirt road with placement of sub-grade fill and sub-base materials on it.

Livaie and Weilbacher met sometime in 2001 to discuss an offer for the use of Saolung for quarry purposes. After an inspection of the site, Livaie allowed Weilbacher to use Saolung as a

quarry for the road project in exchange for Weilbacher's filling of another property owned by Livaie in Palusrik, Utwe. The details and the timing of the fill at Palusrik was never finalized and the agreement between the parties for the use of Saolung as a quarry was never reduced to writing.

In August 2001, White Sand began to make improvements to Saolung that included leveling and filling the land so that excavation and hauling equipment could access the site. Following this, quarrying and hauling activities began. Shortly thereafter, White Sand was informed by the Kosrae State Division of Construction and Engineering that the fill materials being excavated from the Saolung quarry did not meet the project's quality requirements. In response, White Sand built a screen to separate the fill materials that could be used for the road project. The cost of the screen was about \$2,000.

The excavation, screening, and hauling of the fill materials for the road project continued from the Saolung quarry for several months without White Sand supplying any fill at Livaie's Palusrik land. Due to this, Livaie contacted Weilbacher and both parties agreed to meet to discuss the matter. In December, 2001 both parties met by chance and discussed the Saolung quarry and related landfill issues.

Livaie claimed that their agreement had been breached as White Sand had failed to fill his land at Palusrik. Livaie demanded that Weilbacher pay him \$10,000 for the use of the Saolung quarry or pack up and leave. Weilbacher disagreed with Livaie's demand for \$10,000 for past use of the Saolung quarry, but did agree to pay that amount if White Sand could continue to use the quarry site until 2.5 miles of the road project was completed. Weilbacher promised to pay for the fill materials that had been hauled from the Saolung quarry, but never made any payment.

In March or May, 2002, Livaie went to the Saolung quarry and closed it. White Sand

removed all of its equipment from the quarry, except for the screen, which could not be removed because Livaie had blocked the access road. At the time of the quarry closing, approximately one mile of the road project had been worked on.

In June, 2002, Livaie's counsel wrote to Weilbacher to demand payment for the fill materials that had been removed from the Saolung quarry. No payment was made. The amount of fill material hauled from the Saolung quarry was disputed with Livaie claiming that 600 loads had been removed, while White Sand claimed that only 150 loads had been removed due to limitations imposed by bad weather and the screening of the material to meet the project's quality requirements.

During trial there was testimony from Lorenzo Sovilla who was qualified as an expert witness in civil engineering by the plaintiff. Based upon the calculations made by Sovilla, which relied upon area and slope information provided by the plaintiff, approximately 3,040 cubic yards of material were excavated from the Saolung quarry. Weilbacher stated during closing arguments that after screening only 25% of the excavated material was taken for the road project. The remaining 75% of the excavated material, which did not meet the project specifications after screening, remained at the Saolung quarry site. Transcript at 53-54 (June 25, 2003). The market price on Kosrae during the relevant time period for common fill was \$2.00 per cubic yard.

The trial court found that no enforceable contract existed between the parties for failure to establish definite terms. Since no enforceable agreement was found, the trial court determined that restitution was the best equitable remedy available. In determining the amount of restitution due Livaie, the trial court used the statement from Weilbacher during the closing arguments on the amount of fill material removed from the Saolung quarry. The trial court awarded \$1,520 in restitution to Livaie. The trial court calculated this by taking 25% of 3,040 or 760 cubic yards of fill

material that Weilbacher's statement indicated he removed from the quarry times the market price for such fill in Kosrae at the time at \$2.00 per cubic yard. Livaie v. Weilbacher, 11 FSM Intrm. 644, 648 (Kos. S. Ct. Tr. 2003). This appeal followed.

II. ISSUES

The two issues raised by the appellant Livaie are as follows:

1. Did the trial court err in its judgment that there was no contract due to a lack of definite terms?
2. Did the trial court err in its assessment of restitution as it was not based on substantial evidence and was clearly erroneous?

III. DISCUSSION

1. The trial court's finding that there was no contract due to a lack of definite terms was not clearly erroneous.

A contract is a promise between two parties for the future performance of mutual obligations. For the promise to be enforceable there must be an offer, acceptance, consideration, and definite terms. Malem v. Kosrae, 9 FSM Intrm. 233 (Kos. S. Ct. Tr. 1999); Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 123 (Pon. 1993). Where the existence of a contract is at issue, the trier of fact determines whether the contract did in fact exist. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613 (App. 1996). In this case, the trial court found that no contract existed for a lack of definite terms with regard to Weilbacher's obligation to fill Livaie's land at Palusrik.

For an appellate court to find that a trial court's finding is in error it must determine that the finding was clearly erroneous. In making this determination the appellate court must view the evidence in the light most favorable to the appellee. The trial court's finding will only be set aside

if there is no credible evidence in the record to support that finding, in part because the trial court had the opportunity to view the witnesses and the manner of their testimony. If, upon viewing all the evidence in the record, the appellate court is left with the definite and firm conviction that a mistake has been made, it may then conclude that the trial court's finding was clearly erroneous, but it cannot substitute its judgment for that of the trial court. Kinere v. Kosrae, 6 FSM Intrm. 307, 309 (App. 1993); Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367 (App. 2003).

The trial court found that the parties failed to agree on definite terms for the landfill of Livaie's Palusrik land. This was critical for the formation of a contract because the initial oral agreement between the parties was for Weilbacher to use the Saolung quarry in exchange for filling Livaie's land at Palusrik. The trial court found that there was no agreement about the amount, location, scope, timing or deadline to complete the fill at Palusrik. Livaie, 11 FSM Intrm. at 647. A review of the record confirms that these details were not discussed by the parties and that the agreement was never reduced to writing.¹ The parties had anticipated that they would meet later to further discuss the details and reduce the agreement to writing, but that meeting never took place. We, therefore, find that the record supports the trial court's finding that the parties failed to agree on definite terms and we are not left with the definite and firm conviction that a mistake has been made.

2. The trial court's assessment of restitution was not based on substantial evidence properly before the trial court and was clearly erroneous.

¹ The court is not aware of any Kosrae law that would require this agreement to be reduced to writing in order to be enforceable. Generally, an oral agreement is as enforceable as a written one. Reducing an agreement to writing, however, can assist the parties in assuring that all the necessary terms have been agreed to and are definite, or later assist a court in ascertaining what those terms were.

Where no contract exists for lack of definite terms, the court may use its inherent equity power to fashion a remedy under the doctrine of restitution. Restitution is the proper remedy when no enforceable contract exists. Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 195 (Kos. S. Ct. Tr. 2001). It requires the benefitted party to return what was received or to pay the other party for it. Id. See also, Jim v. Alik, 4 FSM Intrm. 199, 200 (Kos. S. Ct. Tr. 1989).

The trial court determined that White Sand had excavated fill materials from the Saolung quarry and used a portion of those excavated materials, after screening, for the road project. Livaie was entitled to restitution for the value of the fill materials used by White Sand which were hauled from Saolung and used for the road project.

The trial court found that 3,040 cubic yards of fill had been excavated at the Saolung quarry. Of that amount, 25% or 760 cubic yards was the amount of fill that, after screening, was hauled from the site, and was used for the road project. The court found that the market value of the fill materials in Kosrae at the time was \$2.00 per cubic yard and used this figure to come up with the total restitution calculation of \$1,520.

Livaie contends that the amount of material that was removed from the Saolung quarry by White Sand was 3,040 cubic yards. Livaie contends that there was no evidence that only 25% of the 3,040 cubic yards was removed from the quarry and that the 25% figure should be disallowed because it was not brought up by the parties, but was only brought up through questioning by the court.

Our review of the record indicate that the only statement made with regard to the 25% figure for the amount of fill that was screened and removed from the Saolung quarry by White Sand for the road project was made by Weilbacher during the closing arguments. Weilbacher's statements were

made in response to questioning by the trial judge during defendant's closing argument.²

Weilbacher's statement on this point was not properly in evidence before the trial court as it was made during the closing arguments. Weilbacher's statement was, therefore, not made under oath, not subject to cross-examination, and not subject to any rebuttal testimony by any witness of the plaintiff. Argument does not constitute evidence. Cf. In re Attorney Disciplinary Proceeding, 9 FSM Intrm. 165, 172 (App. 1999); Ponape Constr. Co., 7 FSM Intrm. at 619. Since the trial court's assessment of restitution was specifically calculated using the 25% figure based on Weilbacher's statement during closing argument we find that it was not supported by evidence properly before the trial court. As such, the amount of restitution assessed by the trial court is clearly erroneous and must be vacated.

IV. CONCLUSION

We find that there was adequate evidence in the record to support the trial court finding that there was no contract between the parties due to a lack of definite terms. We find that the trial court's determination of the amount of restitution was not supported by evidence properly before the

² COURT: . . . The part that this Court is not really clear with is, what you have said as to the experience of screening. If you put up one (1) cubic yard and put on that screen, what percentage of that is taken as useful materials for your purpose. Is there an estimate?

DEFENDANT WEILBACHER: Our screen was two inches wide . . .

COURT: Question is when you average when you put one cubic yard, put it on that screen.

DEFENDANT WEILBACHER: Depends on the materials that . . .

. . .

COURT: Depends on the materials, but you can not count each time.

DEFENDANT WEILBACHER: Yeah.

COURT: Average, is it fifty percent (50%) of the materials is taken or seventy five percent (75%) or twenty-five (25%) or thirty five percent (35%), what is your estimate?

DEFENDANT WEILBACHER: It's gonna be twenty five (25%) is what we take.

COURT: So that seventy-five (75%) left?

DEFENDANT WEILBACHER: left, yeah.

Transcript at 52-53 (June 25, 2003)

trial court and was clearly erroneous. We, therefore, affirm the trial court's finding that there was no contract and that restitution is the proper remedy. We vacate the trial court's assessment of restitution at \$1,520 and remand to the trial court to determine the amount of restitution based on the evidence properly before it or to hold a further evidentiary hearing on this issue. We therefore affirm, in part, and vacate, in part, the trial court's judgment. The matter is remanded to the trial court for further proceedings consistent with this opinion.

SO ORDERED this _____ day of February, 2005.

_____/s/_____
Andon L. Amaraich
Chief Justice

_____/s/_____
Martin G. Yinug
Associate Justice

_____/s/_____
Dennis K. Yamase
Associate Justice

ENTERED this _____ day of February, 2005.

_____/s/_____
Kohsak M. Keller
Clerk of the Appellate Division