Marian ALDAN-PIERCE
vs.
Leocadio C. MAFNAS

Appellate No. 86-9030
District Court NMI
Appellate Division

Decided February 23, 1988

1. Appeal and Error - Standard of Review - Summary Judgment
The Appellate Division reviews the grant or denial of a motion for summary judgment de novo.

2. Appeal and Error - Standard of Review - Summary Judgment
A counsel's own failure to conduct discovery cannot be a basis for reversal of grant of summary judgment. Com.Tr.C.R.Civ.P. 56(c).

3. Civil Procedure - Summary Judgment - Burden of Proof
Once a party seeking summary judgment meets the initial responsibility of informing the court of the basis of the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions of file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact, the burden then shifts to the party opposing the motion to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. The moving party will be entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of their case. Com.R.Civ.P. 56(c).

4. Civil Procedure - Summary Judgment - Discovery
Where nonmoving party simply did not take advantage of the time within which discovery could and should have been conducted, motion for summary judgment was not prematurely granted. Com.R.Civ.P. 56(f).

5. Civil Procedure - Summary Judgment - Particular Actions
Where the defendant presented no facts on a motion for summary judgment which raised a genuine issue of material fact whether an agent/principal relationship continued beyond the time when a lease is granted by an NMI person who took fee title to non NMI persons, and any alleged control of a principle over an agent ceases, the grant of summary judgment was proper on the issue of whether the arrangement violated the land alienation restriction. Com.Tr.C.R.Civ.P. 56(c); NMI Const., Art. XII.

6. Contracts - Void - Undue Influence - Elements
Undue influence is available to void a contract only if the person asserting undue influence shows that the person was under the domination of another or was justified, by virtue of a relation with another, in assuming that the other will not act inconsistently with their welfare.

7. Contracts - Void - Unconscionability
Unconscionability is present in an agreement when it is such that no person in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.

8. Civil Procedure - Summary Judgment - Burden of Proof
A motion for summary judgment is no place for conjecture and speculation and where the defendant failed to provide evidence of the appraised value of property in support of claim of unconscionability, summary judgment was properly granted. Com.R.Civ.P. 56.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS
APPELLATE DIVISION

MARIAN ALDAN-PIERCE,
Plaintiff-Appellee,
vs.
LEOCADIO C. MAFNAS,
Defendant-Appellant.

Civ. Appeal No. 86-9030

OPINION

BEFORE: JUDGES DUENAS*, FITZGERALD**, and MIYAMOTO,*** District Judges

DUENAS and FITZGERALD, District Judges

FOR DEFENDANT-APPELLANT:

THEODORE R. MITCHELL
Nauru Building
P. O. Box Twenty Twenty
Saipan, CM 96950

FOR PLAINTIFF-APPELLEE:

LAW OFFICES OF
RANDALL T. FENNELL
Pangelinan Building
P. O. Box 49
Saipan, CM 96950
BY: MARCIA R. BELL, ESQ.

*The Honorable Cristobal C. Duenas, Chief Judge, District Court of Guam, sitting by designation.

**The Honorable James M. Fitzgerald, Chief Judge, U.S. District Court, District of Alaska, sitting by designation.

***The Honorable Richard I. Miyamoto, Associate Judge, Trust Territory High Court, Saipan, CNMI, sitting by designation.

Defendant-appellant Leocadio C. Mafnas (hereinafter "defendant" or "Mafnas") appeals from the decision of the Commonwealth Trial Court of the Commonwealth of the Northern Mariana Islands granting summary judgment in favor of plaintiff-appellee, Marian Aldan-Pierce (hereinafter "plaintiff" or "Pierce"). We affirm.

BACKGROUND

On March 5, 1986, plaintiff filed a complaint for equitable relief in which it is alleged that plaintiff is a resident of the Commonwealth of the Northern Mariana Islands (hereinafter "CNMI") and a person of Northern Marianas descent within the meaning of the CNMI Constitution. Mafnas, a resident of the CNMI, warranted to plaintiff that he has free and clear title in fee simple to a certain piece of real property (hereinafter "subject lot") situated in the CNMI. According to the complaint plaintiff's predecessor in interest Antonia Villagomez (hereinafter "Villagomez") entered into a written option agreement with Mafnas to purchase the subject lot. After exercising her option Villagomez assigned her rights to plaintiff. Defendant refuses to honor the option agreement despite Villagomez' and plaintiff's compliance with the terms and conditions of the option agreement.

In his answer Mafnas admits that he entered into the option agreement, but asserts that he is not fluent in the English language; he has been advised that the contract is illegal, against public policy and unenforceable; and denies being the owner of the subject lot. Furthermore, Mafnas asserts that

plaintiff has no real interest in the option agreement, plaintiff merely being an agent for Randall T. Fennell (hereinafter "Fennell") and Brian McMahon (hereinafter "McMahon"), attorneys not of Northern Marianas descent.

According to defendant, Fennell and McMahon engaged Villagomez as an agent for the sole purpose of attempting to acquire for themselves a permanent and long term interest in real property in contravention of the restrictions on alienation of land contained in Article XII of the Commonwealth Constitution.

In August 1986, plaintiff filed a motion for summary judgment addressing the following three issues raised by defendant in his answer and counterclaim, title to the subject lot, undue influence and the constitutionality of the transaction. Attached to the moving papers were the affidavits of McMahon, Fennell, Villagomez and plaintiff (hereinafter collectively "August Affidavits").

Defendant filed his opposition to the motion for summary judgment on October 8, 1986, the morning of the hearing. With the court's permission plaintiff filed a supplemental memorandum on October 9, 1986. Attached to the supplemental memorandum are three affidavits one each from McMahon, Fennell and plaintiff (hereinafter "Supplemental Affidavits").

On October 10, 1986, defendant filed a motion to strike the supplemental affidavits and a motion for continuance in order to provide defendant an opportunity to complete discovery of the evidence possessed by Fennell, McMahon and plaintiff. In support

of his motion counsel for defendant filed an affidavit which contains in relevant part the history of his attempts to contact plaintiff for purposes of discovery. According to the undisputed affidavit of Theodore R. Mitchell

> ... Shortly before the filing of the Plaintiff's Motion for Summary Judgement, I notified counsel to the plaintiff that I intended to take depositions upon oral examination of Messrs. Fennell and McMahon, Ms. Villagomez, and Mrs. Aldan-Pierce and that I would like to arrange a mutually convenient time to do so.
> ... At the time of the foregoing conversation, counsel to the plaintiff explained that she was presently involved in the Commonwealth Bank case, but after that matter was concluded, we could discuss further the scheduling of the depositions.
> ... Before those arrangements could be made, for the taking of the deposition, plaintiff filed her Motion for Summary Judgment.

Defendant's motion was not acted upon by the trial court. Instead, judgment was rendered on October 15, 1986, in favor of plaintiff. The trial judge found the following facts.

Fennell and McMahon provided the funds for the option agreement between Villagomez and Mafnas. It was agreed that Fennell and McMahon would provide the money to exercise the option; Villagomez would accept the money from Fennell and McMahon; pay it to Mafnas; take fee simple title; and lease the property to Fennell and McMahon for the longest period allowed by law.

Upon instruction from Fennell and McMahon, Villagomez timely exercised the option to purchase the property for the agreed upon $10 per square meter, but Mafnas refused to convey title or to

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comply with the terms of the option. Thereafter Villagomez assigned her rights in the option to Pierce.

Counsel for defendant acknowledged at the hearing on plaintiff's motion for summary judgment that the constitutional issue was properly resolved through a motion for summary judgment. Defendant's position has apparently changed in light of the three supplemental affidavits filed on October 9, 1986. 1/

The trial court found that there is nothing unconstitutional about the transaction and that based on the affidavits and the pleadings on file that summary judgment was mandated on his counterclaim for undue influence. The court further found that Pierce was in fact Fennell and McMahon's agent prior to the execution of the option agreement, but that the agent/principal relationship terminates when the lease is executed. Finally, on the claim of unconscionability the court noted that the defendant presented no evidence to raise a genuine issue of material fact.

STANDARD OF REVIEW

[1] We review the grant or denial of a motion for summary judgment de novo. Fidelity Financial Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1437 (9th Cir. 1986); Lone Ranger Television v. Program Radio Corp., 740 F. 2d 718, 720 (9th Cir. 1984).

Under Rule 56(c) summary judgment is proper "if 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 judgment as a matter of law."

Celotex v. Catrett, __ U.S. __, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

DISCOVERY

One of the issues raised by defendant is whether the trial court erred by failing to either grant his motion to strike the supplemental affidavits, or in the alternative, grant defendant's motion for a continuance of the summary judgment hearing in order to permit defendant to take depositions.

Defendant argues that the supplemental affidavits, all phrased in substantially the same terms, are intended to resolve in the plaintiff's favor one of the critical issues presented by the defendant on the unconstitutionality of the option agreement. He argues that the purpose of the affidavits is to establish that as of the present time, there is no agreement between Fennell and McMahon and plaintiff which would permit Fennell and McMahon to exercise control over plaintiff; leaving unanswered the question whether the agent/principal relationship is "open-ended".

[2] Under other circumstances this Court might be inclined to agree with defendant that a request for further discovery is warranted. Yet, this Court will not allow a counsel's own failure to conduct discovery to be a basis for reversal.

Between counsel for defendant's original request, sometime prior to the filing of the motion for summary judgment on August 28, 1986, and the hearing on the motion on October 8, 1986, the record reveals no attempt by counsel to take the depositions of McMahon, Fennell, Villagomez or plaintiff. The

supplemental affidavits raise no novel issue which counsel for defendant should not have anticipated by the filing of the August affidavits or the complaint itself. In fact, the August affidavits embrace the sole fact addressed in the supplemental affidavits. 2/

Counsel had over one month to depose the affiants, or if necessary, the same amount of time within which to file a request for continuance on the motion for summary judgment to allow for the taking of depositions. Counsel for defendant did neither. We note that the original hearing date motion was continued at defendant's request from September 10, 1986 to September 19, 1986, and was further continued, by stipulation, to October 8, 1986.

[3] Under Celotex once a party seeking summary judgment meets the initial responsibility of informing the court of the basis of the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions of file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact, the burden then shifts to the party opposing the motion to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. The moving party will be entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of their case.

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Rule 56(e) requires the nonmoving party to go beyond the pleadings and their own affidavits and designate specific facts showing that there is a genuine issue for trial. Rule 56(e) permits a summary judgment motion to be opposed by any of the kinds of evidence listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that a court expects the nonmoving party to make the showing of a genuine issue of material fact. 3/

If this Court felt that the motion for summary judgment was premature, under Rule 56(f) we could either find that the court should properly have denied the motion for summary judgment, or remand for a continuance on the hearing of the motion for summary judgment to provide the nonmoving party with an opportunity to make full discovery.

[4] In light of the history of this case we cannot say that the nonmoving party was not provided with an opportunity to make full discovery. Instead, it appears that the nonmoving party simply did not take advantage of the time within which discovery could and should have been conducted.

Restraint on Alienation of Land

Defendant contends that despite the facade of a lessor/lessee relationship between plaintiff and Fennell and McMahon, the latter two are in reality acquiring a fee simple interest in land in contravention of Article XII, Section 1 of the CNMI Constitution which restrict permanent and long-term interests in real property to persons of Northern Marianas

damages. 4/ This argument is premised on the theory that Fennell and McMahon are principals and plaintiff is their agent.

Affidavits submitted by plaintiff establish an agent/principal relationship, as alleged by defendant, between Fennell and McMahon, and Villagomez and later plaintiff from the inception of the deal until the execution of the lease agreement.

The August affidavits state that upon execution of the option agreement plaintiff will retain a fee interest in the subject lot. Thereafter, in exchange for their having provided the money to execute the option agreement Fennell and McMahon will receive a 55 year lease. The only issue necessary for this Court to determine is whether a fact is presented which raises a genuine issue of material fact whether the agent/principal relationship continues during the term of the lease agreement or thereafter.

To successfully oppose plaintiff's motion for summary judgment defendant must present some fact to dispute the evidence presented by plaintiff that she retains a fee simple interest in the subject lot.

[5] We agree with the court below no fact has been presented to raise a question as to plaintiff's ongoing duty as an agent. Upon the facts presented to the trial court the granting of a lease to Fennell and McMahon transforms the agent/principal relationship to that of a lessor/lessee. The alleged control of the principal over the agent ceases. Although defendant suggests

that plaintiff remains the agent of Fennell and McMahon no fact is presented to substantiate this claim. 5/

The granting of plaintiff's motion for summary judgment is proper only because defendant failed to present a fact upon which the court could find a genuine issue of material fact, after plaintiff met her initial burden. 6/

On the facts presented on the constitutional issue we cannot say the court erred in granting plaintiff's motion for summary judgment.

UNDUE INFLUENCE

In order to support a claim of undue influence the defendant must set forth a genuine issue of material fact of an element upon which defendant will bear the burden at trial. At trial defendant would have to show that he was unfairly persuaded and was under the domination of Fennell, the person allegedly exercising the persuasion, or who by virtue of the relation between Fennell and defendant, defendant was justified in assuming that Fennell would not act in a manner inconsistent with defendant's welfare. Restatement of Contracts, Second, §177.

[6] The Comment to §177 states that undue influence is available to void a contract only if the required relation is found. That is, undue influence "protects a person only if he is under the domination of another or is justified, by virtue of his relation with another in assuming that the other will not act inconsistently with his welfare."

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In his first counterclaim, defendant alleges:

> ...Attorney Fennell is a highly educated person. He possesses extraordinary powers of pursuasion (sic) and influence.
> ...The defendant is a man of limited education. He cannot speak or read the English language. He is a man of modest financial means.
> ...Because Attorney Fennell is an attorney, defendant Mafnas was justified in assuming that Attorney Fennell would not act in a manner inconsistent with defendant Mafnas' welfare...
> ...Defendant Mafnas was further justified in assuming that Attorney Fennell would not act in a manner inconsistent with his welfare, because Attorney Fennell had previously represented three sisters of defendant Mafnas in connection with a matter involving family land.

Relevant portions of the August affidavits set forth Fennell's role in negotiating the option agreements. The option agreement was executed over a period of many years. At all times defendant utilized a translator of his choice. Fennell represented defendant's three sisters in an action to recover family land, but attests he was specifically instructed not to represent defendant.

Under Celotex we turn to the evidence presented by defendant, by affidavit or otherwise, to show that a genuine issue of material fact exists. The defendant's affidavit filed in opposition to the motion for summary judgment does not rebut the relevant portions of Fennell's affidavit regarding undue influence. We will not rely on the pleadings themselves to find a genuine issue of material fact. Celotex, supra. There is no showing that the required relation between Fennell and defendant existed to support a claim for undue influence.

We affirm the court's granting of summary judgment on defendant's counterclaim for undue influence.

UNCONSCIONABILITY

[7] Finally, on the issue of unconscionability, the court citing Restatement of Contracts Second, §208, Comment B, noted that defendant presents no fact to establish that the option agreement is unconscionable in that it is "such as no man in his senses and not under delusion will make on the one hand, and as no honest and fair man would accept on the other."

According to the terms of the option agreement the purchase price is $10 per square meter. In his affidavit defendant states that he is informed and believes that an anticipated appraisal report will indicate the value of the property to be "greatly in excess" of $10 per square meter.

[8] A motion for summary judgment is no place for conjecture and speculation. Once again plaintiff has met her initial burden. Defendant presents no fact to show that there is a genuine issue of material fact. We affirm the court's order granting summary judgment on the issue of unconscionability.

CRISTOBAL C. DUEÑAS, District Judge

JAMES M. FITZGERALD, District Judge

(See Dissenting Opinion attached.)
RICHARD Y. MIYAMOTO, Designated Judge

F O O T N O T E S

1/ Looking closely at the supplemental affidavits this Court notes that they do nothing more than reiterate the substance of the August affidavits. See Footnote 2, infra.

2/ The supplemental affidavits all state that "No agreement exists concerning the property which is the subject of this case which compels (plaintiff) to hold or dispose of title at the direction of (Fennell or McMahon). While (plaintiff) will give (Fennell and McMahon) a lease, she is free to disposed of title at her pleasure."

The August affidavits all state in relevant part that Fennell and McMahon would provide the money for the purchase of the subject lot in return for a lease for the maximum length allowed by law.

3/ In his dissent Judge Miyamoto lists factual issues which he believes may be present or implied. It is the opinion of the majority that the issues raised by Judge Miyamoto are either irrelevant or if relevant, were not raised by the appellant below. A court may not look to the pleadings themselves to find genuine issues of material fact.

4/ Article XII Section 3, as amended, provides that person not of Northern Marianas descent may acquire leasehold interests for 55 years including any term of renewal.

5/ Defendant's continuing agency theory is based on sections 143 and 385 of the Restatement of Agency. These sections are inapposite to the relationship created under the lease because the evidence presented does not support defendant's claim that plaintiff agreed to hold title to the subject lot for the benefit and subject to the control of Fennell and McMahon.

6/ For this reason the holding in this case does not reach the merits of the constitutional challenge to the transaction presented here.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS
APPELLATE DIVISION

MARIAN ALDAN-PIERCE,	)	Civil Appeal No. 86-9030
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
LEOCADIO C. MAFNAS	)	DISSENT
	)	
Defendant-Appellant	)	
	)	

MIYAMOTO, District Judge[1]

The undersigned disagrees with the decision of the other two judges of this appellate panel to affirm the trial court's granting of plaintiff's motion for summary judgment.

At the outset, it should be noted that this is a case of paramount importance to persons of Northern Marianas descent since the case involves the constitutionality of the practice in the Commonwealth of the Northern Mariana Islands, hereinafter referred to as the "Commonwealth," wherein persons of non-Northern Marianas descent acquired what may be considered permanent long-term interests in real estate in the Commonwealth contrary to

[1] The Honorable Richard I Miyamoto, Associate Justice, Trust Territory High Court, Saipan, CM, sitting by designation.

the provisions of the Constitution of the Northern Mariana Islands, hereinafter referred to as the "Constitution."

Section 1 of Article XII of the Constitution provides that "[t]he acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent."

Section 2 of Article XII of the Constitution provides, in part, that "[t]he term acquisition used in Section I includes acquisition by sale, lease, gift, inheritance or other means."

The original Section 3 of Article XII of the Constitution executed on December 5, 1976, provides, in part, that "[t]he terms permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests or more than forty years including renewal rights..." At the 1985 constitutional convention, this section was amended to leaseholds of more than fifty-five years. The present Section 3 goes on to say that "[a]ny land transaction in violation of this provision shall be void."

Sections 4 and 5 of Article XII of the Constitution define who is a person of Northern Marianas descent and when a corporation is considered a person of Northern Marianas descent, respectively.

Section 6 of Article XII of the Constitution provides, in part, that "[a]ny transaction made in violation of Section I shall be void ab initio."

The constitutional question was raised by the defendant (appellant) in the Third Affirmative Defense to his Answer that "[a]ny agreement between Attorney Fennell and Antonia C. Villagomez or between Attorney Fennell and Marian Aldan-Pierce, for the purpose of circumventing the restrictions on land alienation contained in Article XII of the Constitution of

the Commonwealth of the Northern Mariana Islands is illegal, void, and against public policy," This position was continually advanced by the defendant in his pleadings, including his response to the plaintiff's motion for summary judgment. Despite this position, the trial court treated this case as an ordinary one, however, the following authorities require the trial court to do otherwise.

CASES INDICATING CONSTITUTIONAL,
PUBLIC, OR COMPLEX ISSUES SHOULD BE TRIED

In Pacific American Fisheries v. Mullaney, 191 F.2d 137 (9th Cir. 1951), where the constitutionally of the Alaska statute imposing a higher license fee for non-resident commercial fishermen than for resident fishermen was the issue, the court held.

> Because of the importance of the issues presented in this suit, we think that it was not one to be disposed of by Summary judgment, even if proper motion for such judgment had been made or proper opportunity accorded for appropriate showing by affidavit or otherwise.... (citing Kennedy v. Silas Mason Co., 334 U.S. 249)

In Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S.Ct. 1031, 921 L.Ed. 1347 (1948), involving the overtime provisions of the Fair Labor Standards Act, the court stated.

> We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however

> salutary where issues are clear-cut and simple, present a treacherous records for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present in a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of judicial process to provide. (underscoring added)

In Hawaii Housing Authority v. Castle, (653 P.2d 781 (1982), the Supreme Court of Hawaii decided that the constitutionality of the eminent domain statute would not be decided without a trial, in the following language.

> The Supreme Court of the United States said over 30 years ago [b]ut summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record of deciding issues of far-flung import...
>
> Our decisions have constantly been in accordance with that statement [citing a number of Hawaii cases] Since, as we have said, the case is, with respect to the "public use" issue, one of first impression, we are unwilling to decide the constitutionality of the statute without a trial, pursuant to the statute, being held.

In Eccles v. People's Bank of Lakewood Village, Cal, 333 U.S. 426, 68 S.CT. 641, 92 L.Ed. 784 (1948), the court, in ruling upon a membership in the Federal Reserve System, decided:

> Its [the bank's] claims of injury were supported entirely by affidavits. Judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts through use of a declaratory summary judgment. Modern equity practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies.

Complex cases where the questions are not, and often cannot be, conveniently isolated as pure questions of law, are not appropriately disposed of by summary judgment, as in this case. Elliott v. Elliott, 49 F.R.D. 283 (S.D. N.Y. 1970).

Professor Moore states in his treatise, 6 Moore's Federal Practice, q 56.15 (L-O) at 56-398 (2d ed 1984), that:

> The motion for summary judgment may be made by any partly in any type of action. But by its nature summary judgment is apt to be ill-adapted to cases of a complex nature or to those that involve constitutional or other large public issues, which often need the full exploration of trial. (underscoring added)

RIGHT TO TRIAL WHERE GENUINE ISSUES EXIST

Reading the pleadings carefully, it is clear that, apart from the complex legal issues involved, the factual issues are equally complex, and these factual issues have not been fully brought out in the course of the

proceedings. The trial court, in an endeavor to resolve this case, simply looked at the bare legal issues, without determining if there were any genuine issues still to be resolved. To this extent, I feel that the trial court was in error.

The plaintiff alleged in the complaint and other pleadings a simple set of facts, reduced to the legal issues of trust and agency relationships. But defendant viewed the situation differently. He sees this case as being one of:

(a) an attempt by two attorneys of non-Northern Marianas descent to acquire freehold interest in th lands of the commonwealth for resale to non-Marianas citizens contrary to the Constitution, hereinafter referred to as the "scheme," and

(b) by the vehicle of option agreements and by using persons of Northern Marianas descent as intermediaries or "straw persons," to carry out the scheme.

Thus, there were patent disagreements as to the facts and their significance. Looking at the defendant's position in the best possible light, the factual issues that may be present or implied are the following:

a. What was the intent and motive of those who devised the scheme?

b. Why was the scheme devised when long-term leases were permitted by the Constitution?

c. How prevalent is the use of the scheme in the Commonwealth?

d. How much control did the two attorneys exercise over the "straw persons" of Northern Marianas descent in the carrying out of the scheme?

e. Was it the intent of the parties to the scheme that the intermediaries have full control or rights over the acquisition and disposition of the acquired lands, or were the intermediaries simply to be inert unobjecting persons who could be easily manipulated for some valuable consideration?

f. Did the owners of the lands in question (Northern Marianas citizens) fully understand the nature of the transaction that they were entering into, or were they taken advantage of by virtue of their lack of knowledge or sophistication as to what the entire scheme was about?

In Colby v. Klune, 178 F.2d 872 (2d Cir. 1949), a stockholder's suit, the court declared

> We have in this case one more regrettable instance of an effort to save time by an improper reversion to "trial by affidavit," improper because there - is involved an issue of fact, turning on credibility Trial on oral testimony, with the opportunity to has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor, and that demeanor - absent, of course, when trial is by affidavit or deposition - is recognized as an important clue to witness credibility. When, then as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error. (underscoring added)

In Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016 (3d Cir. 1942), the court stated.

> Upon a motion for a summary judgment, it is no part of the court's function to decide issue of fact, but solely to determine whether there is an issue of fact to be tried.... All doubts as to the existence of A genuine issue as to a material fact must be resolved against the party moving for a summary judgment. (underscoring added)

In an action challenging gasoline price increases under the Emergency Petroleum Allocation Act, the court, in McWhirter Distributing Co., Inc. v. Texaco, Inc., 668 F.2d 511 (1981), held:

> If the nonmoving party has raised by pleadings a genuine issue of material fact and the evidentiary matter in support of the motion for summary judgment does not establish the absence of such issue, summary judgment must be denied even though no opposing evidentiary matter is presented... (citing cases)
>
> The very nature of a controversy may render summary judgment inadvisable. "[S]ummary procedures should be used sparingly... where motive and intent play leading roles..." (citing Poller v. Columbia Broadcasting, 388 U.S. 464, 82 S.CT. 486, 7 L.Ed.2d 458 (1962))

In Peckham v. Ronrico Corporation, 171 F.2d 653 (1st Cir. 1948), the court, in ruling upon a suit based on alleged fraud of insolvent debtor in furnishing capital for corporation of which defendants were stockholders, declared:

> It is well settled that "Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial" (case citation omitted). A litigant has a right to trial here there is the slightest doubt as to the facts (case citations omitted) (underscoring added)

WHERE DEMAND FOR JURY TRIAL EXISTS

The defendant in this case filed a request for jury trial on the same day that he filed the answer.

While it is true that the rule on summary judgment does not infringe upon the right to jury trial, in Whitaker v. Coleman, 115 F.2d 305 (1940), involving a suit against the owner and driver of an automobile for death damages, the Fifth Circuit Court of Appeals explained.

> The invoked [Summary] procedure, valuable as it is for striking through sham claims and defences which stand in the way of a direct approach to the truth of the case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial...
>
> To proceed to summary judgment it is not sufficient then that the judge may not credit testimony professed on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in is nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force...
>
> Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiry and determining whether such evidence exists. (underscoring added)

ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW

The trial court found that there were no genuine issues of fact either as to the allegations in plaintiff's complaint or any of defendant's affirmative defenes and counterclaims.

In Shahid v. Gulf Power Co., 291 F.2d 422 (5th Cir. 1961), an action against electric power supplier for fire damage to hotel, Judge Rives stated.

> Before rendering summary judgment the district court must determine both (1) that there is not a genuine issue as to any material fact and (2) that the moving party is entitled to a judgement as a matter of law... Requisite (2) does not automatically follow from requisite (1).

Judge Rives quoted with approval the ruling in Palmer v. Chamberlin, 191 F.2d 532, 27 A.L.R.2d 416 (5th Cir. 19510,

> ...before rendering judgment the court must be satisfied not only that there is no issue as to any material fact, but also that the moving party is entitled to a judgment as a matter of law where, as in this case, the decision of a question of law by the Court depends upon inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for a summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law. (underscoring added)

THE "RELUCTANT APPROACH"

For a case of this importance, there appears to have been a marked desire by the court to expedite the resolution of the cause. A number of technical objections were raised by the plaintiff's counsel to frustrate the attempt by the defendant to obtain sufficient time to prepare his case. Obeisance to the technicalities of the rules of the court was quite evident in the court's rulings.

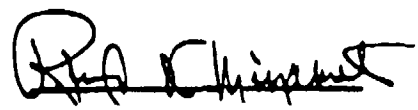
In S.J. Groves & Sons Company v. Ohio Turnpike Commission, 315 F.2d 235 (6th Cir. 1962), cert. denied, 375 U.S. 284 (1963), where a contractor brought suit against the Turnpike Commission for the Construction of a turnpike, Judge Miller commented:

> This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment, that while such a judgment widely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop the case by witnesses and a trial, when the issues involved make such procedure the appropriate one. (underscoring added)
>
> It is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist should be drawn from such facts. Under such circumstances, the case is not one to be decided by the Trial Judge on a motion for summary judgment. (cases cited)....

CONCLUSION

From the foregoing, it is my opinion that the summary judgment for the plaintiff be vacated and that the case be remanded to the Trial Court for a jury trial.

DATED: December 28, 1987



RICHARD I. MIYAMOTO
Designated Judge