Ordered, reinstated and continued in full force and effect.

T. H. ODELL, Plaintiff
v.
MICRONESIAN CONSTRUCTION COMPANY, INCORPORATED, A CORPORATION, Defendant

Civil Action No. 860

Trial Division of the High Court

Mariana Islands District

October 13, 1972

Suit for balance due under promissory note and agreement for exchange of plaintiff's stock in defendant for certain of defendant's assets. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, granted recovery of the balances found by the court to be due, after disposing of issues relating to offsetting credits.

1. **Bills and Notes—Promissory Notes—Construction**

   Promissory notes are to be construed like other contracts; they are to be interpreted in the light of what the parties intended.

2. **Bills and Notes—Promissory Notes—Construction**

   In interpreting promissory note and agreement for exchange of stock for assets, the court's duty was to ascertain not what the parties may have secretly intended as distinguished from what the words used in their agreement and note expressed, but rather, the meaning of the words used.

3. **Contracts—Construction—Particular Contracts**

   In suit on promissory note issued by defendant corporation, and for balance due under agreement whereby plaintiff exchanged stock in defendant for certain of defendant's assets, court would not rewrite a contract for the parties by following defendant's suggestion that stock's fair value be recalculated downward and thus wipe out the remaining indebtedness on the note.

4. **Contracts—Rescission**

   Rescission is permissible for mutual mistake in the terms, or fraud in the inducement, of a contract.

5. **Contracts—Rescission**

   Rescission requires that the parties be restored to their original position, and promissory note plaintiff held against defendant, together

with agreement whereby plaintiff would exchange stock in defendant for certain of defendant's assets, would not be rescinded where it could not be said that assets received were still intact and returnable.

6. **Bills and Notes—Promissory Notes—Burden of Proof**

   In a suit on a promissory note, claimant has burden of proving an affirmative balance.

7. **Bills and Notes—Promissory Notes—Weight of Evidence**

   In suit on promissory note, court would not accept plaintiff's unsupported figures of principal and interest due and reject all of defendant's testimony to the contrary.

8. **Bills and Notes—Promissory Notes—Interest on Overdue Payment**

   Where promissory note recited specific due date, holder's claim for interest prior to that date would be rejected.

9. **Contracts—Offsetting Credits**

   Liabilities plaintiff was obligated to assume under agreement for exchange of plaintiff's stock in defendant for certain of defendant's assets, but which defendant paid, would be held to constitute an offsetting credit against balance due on promissory note plaintiff held against defendant.

10. **Contracts—Construction—Particular Agreements**

    In suit for balances due under promissory note plaintiff held against defendant and agreement for exchange of plaintiff's stock in defendant for certain assets in Koror, Yap and Guam, under which plaintiff was to assume the known liabilities at Koror and Yap, additional liabilities, at Truk and Saipan, would not be applied to reduce the stock's value and thus wipe out the balance due on the note, because the Truk and Saipan liabilities were not applicable to the value of the Koror, Yap and Guam assets transferred since neither Truk nor Saipan assets were transferred, and because one liability had ceased to be a legal liability as a statute of limitations had run out against it.

11. **Contracts—Costs and Attorney Fees Provisions**

    Where note sued upon provided for reasonable attorney fees in the event of a collection suit, plaintiff's claim that a twenty-five percent fee was reasonable would be rejected and court would, in its discretion and in absence of evidence as to value of services, fix a fee of five percent of the amount due on the note.

Assessor:	JESUS A. SONODA, *Associate Judge of the District Court*
Interpreter:	HEDWIG I. HOFSCHNEIDER
Reporter:	NANCY K. HATTORI
Counsel for Plaintiff:	MARGARET N. SHERWOOD, ESQ., of BARRETT, FERENZ, BRAMHALL and KLEMM
Counsel for Defendant:	JOSE A. TENORIO; with ARTHUR ROTHENBERG, *Consultant*

TURNER, *Associate Justice*

This was a suit on a promissory note issued by defendant corporation to plaintiff and in a second count, a claim for a balance due on an agreement whereby defendant transferred its assets in Koror, Yap and Guam in exchange for 2,569 shares of defendant's capital stock held by plaintiff.

The note in suit was in the face amount of $25,000.00. It was undated with a recited due date of July 25, 1970. The note also provided payment of interest "at the rate of 8 per cent per annum payable every Three Months."

Plaintiff's complaint alleged the note was executed on its due date of July 25, 1970. The complaint also claimed calculated interest from January 1, 1970, "through August 15, 1970" and thereafter. No proof was offered to explain this inconsistent pleading nor the apparent ambiguity in the note itself.

[1, 2] Promissory notes are to be construed like other contracts. They are to be interpreted in the light of what the parties intended. The duty of the Court is to ascertain not what the parties may have secretly intended as distinguished from what the words used in their agreement or note express, but what the meaning is of the words used. 46 A.L.R. 485; 11 Am.Jur.2d, Bills and Notes, Sec. 62; 17 Am.Jur.2d, Contracts, Secs. 244, 245.

[3] Both sides came up with suggestions as to how the dispute should be resolved. Defendant believes the "fair value" of the stock, which may or may not be the same as "book value", should be recalculated and thus wipe out the indebtedness on the note. The Court will not rewrite a contract for the parties and for reasons later demonstrated must accept the April 8, 1970 agreement as written.

The plaintiff's suggestion as to the "easy way out", is equally unacceptable. Plaintiff proposes that if the Court accepts any part of defendant's claims, "the whole transaction must be unwound and the status quo ante restored."

[4, 5] Rescission is permissible for mutual mistake in the terms or fraud in the inducement of a contract. Rescission, however, requires the parties be restored to their original positions—in this case the defendant receives back its assets and plaintiff is returned his corporate stock. This, of course, may not be considered without some showing that the assets plaintiff received from defendant are still intact and returnable to defendant. The record precludes rescission.

[6] The Court, without any help from the parties, could take the easy way out and hold that plaintiff has failed to prove by the preponderance of the evidence its claim. In a suit for an accounting, the burden of proof rests with the claimant of an affirmative balance. In 1 Am.Jur.2d, Accounts and Accounting, Section 19, it is said:

"In a suit upon an unsettled account the proof must go to the separate items of the account, and evidence tending to show that defendant was indebted to plaintiff in some amount is not such proof as is required to entitle plaintiff to a verdict."

[7] All we have in this record is a note having a face amount of $25,000.00 which had been substantially reduced before the due date. Undoubtedly there is a balance remaining. But what the amount is depends upon offsetting

credits. Plaintiff apparently expects the Court to accept its unsupported figures of principal and interest due at the time of trial and to reject all testimony to the contrary offered by defendant. This, of course, we decline to do. Illustrative is the plaintiff's claim for interest, in varying amounts, calculated from January 1, 1970. The pleadings, however, assert the note was executed and became due July 25, 1970. If this is so, there is no way interest could be due before that date.

[8] The promissory note plus the proof adduced thereon requires that any claim for interest prior to July 25, 1970, be rejected and that interest at eight per cent per annum shall be calculated on the balance due on the due date. The principal issue for the Court's determination is the amount of the balance due.

Plaintiff alleged in his complaint the principal due on the due date was $13,951.58. However, written argument submitted at the close of trial stated: "Total owing to Odell, after computation—$12,272.88", plus interest. The plaintiff's "computed" figure included interest from January 1, 1970 to July 25, 1970, which we hold is not allowable, and also $1,325.00 purportedly owing to Odell under the April 8, 1970 agreement.

As against plaintiff's claim is the defendant's memorandum at the close of trial which asserts that plaintiff has been overpaid on his note by $584.40. Somewhere in between these two extremes, the truth must lie. Counsel for both parties are clearly not qualified as accountants and it is thus left to the Court, without books of account, work records or adequate proof, to resolve the conflict. Assuming neither side will be satisfied with the solution reached here, we express the pious hope that such evidence as there is in the record will be better compiled to permit the Appellate Court to more readily reach its conclusions.

The crux of the controversy is the April 8, 1970 agreement for exchange of assets for capital stock. This agreement recites:

1. The "sound value" of assets at Koror was $38,137.00; at Yap it was $15,077.00; and at Guam $6,000.00.

2. That the "known liabilities" at Koror and Yap as of December 31, 1969, were $4,055.62 and $7,069.00. Plaintiff agreed "to assume responsibility for payment of accounts payable at Yap and Koror" in the amount of the "known liabilities."

3. The "fair value" of plaintiff's 2,569 shares of stock at $17.84 per share was $45,830.96.

From these figures were computed an offset against the promissory note in the sum of $2,258.42. Payments and credits on the note prior to July 25, 1970, unexplained but not disputed, reduced the original $25,000.00 amount by $8,800.00. The credit arising from the April 8, 1970 agreement further reduced it by $2,258.42 to a remaining balance due of $13,941.58. The computation, from which the controversy springs was as follows:

Guam assets	$ 6,000.00
Koror assets	38,137.00
Yap assets	15,077.00
Total assets	$59,214.00
Less "known liabilities" assumed by plaintiff	$11,124.62
Net assets	$48,089.38
Value of stock exchanged	45,830.96
Offset against note	$ 2,258.42

[9] Two problems arose with this relatively simply arithmetical solution. It developed the "known liabilities" were incomplete in that shipping liabilities in Yap and Koror incurred prior to January 1, 1970 were found in the amount of $2,304.66. These had not been recorded in the company books and were not listed in the agreement. However, they were "known" in that plaintiff incurred them in behalf of defendant corporation prior to January 1, 1970.

In addition to this charge, the shipping company (MILI) added $621.66 interest calculated from November 1, 1969 to September 1, 1971. What additional interest, if any, defendant was liable for, it neglected to show. We hold, therefore, the liabilities plaintiff was obligated to assume but which were in fact paid by defendant constitutes an offsetting credit against the note of $2,926.32.

The second problem arising from the intended agreement was that defendant and not plaintiff paid some of the liabilities plaintiff was to have assumed. Plaintiff in its closing memorandum agreed to offset this figure against the note in the amount of $3,346.60. With the two offsets against the balance due on the note of $13,941.58 as of the date of the agreement between the parties, we arrive at a due date (July 25, 1970) amount due of $7,668.66.

Defendant insisted additional liabilities, not recorded in the company books, at the time of the April 8, 1970 agreement but arising (and therefore known) prior to January 1, 1970, should be applied to reduce the book value of the corporate stock. These liabilities, thus applied, would wipe out any balance due on the note, defendant argues.

These liabilities were an amount of $4,207.50 due Truk Transportation Company and $19,007.19 due Saipan Shipping Company. Had these liabilities been shown on the books, the book value of the corporate stock would have been less than the $17.84 "fair value" recited in the April 8, 1970 agreement. But this item was not shown in the agreement to have been calculated as was the $2,258.42 offset against the note balance arising from the difference between the value of the corporate assets at Guam, Yap and Koror transferred in exchange for the capital stock at the specified value. There is nothing in the record to precisely show how the stock value was determined. It may have been a compromise agreement. Plaintiff gave some indica-

tion of this when he testified he would not have "sold" his stock at a lower value than $17.84 per share. In any event, it would require a rewriting of the contract, rather than an interpretation of ambiguous provisions, to change the stock value because of liabilities "discovered" after execution of the agreement.

[10] Also, the Truk and Saipan liabilities are not applicable to the value of assets transferred as the Yap-Koror liabilities were, because neither Truk nor Saipan assets were involved in the agreement, except indirectly as they related to corporate stock book value which may be different than the stock "fair value" of the agreement. It also is noted the Saipan Shipping Company obligation had ceased to become a legal liability because of the running of the six-year statute of limitations against it.

[11] A final claim needs to be resolved. The note in suit provided for "reasonable attorney fees" in the event of collection suit. Plaintiff claims a twenty-five per cent fee as reasonable. We disagree and because no evidence was offered as to the value of the services, fix as "reasonable" as a matter of the Court's discretion, a fee of five per cent of the amount due on the note.

Ordered, adjudged and decreed:—

1. That plaintiff have and recover from defendant corporation the sum of Seven Thousand Six Hundred Sixty Eight Dollars and Sixty Six Cents ($7,668.66), together with interest at the rate of eight per cent per annum from July 25, 1970 until date of entry of judgment herein and thereafter at the rate of six per cent per annum on the judgment amount until paid, together with attorney fees in the sum of Three Hundred Eighty Three Dollars and Forty Three Cents ($383.43).

2. That plaintiff have and recover from defendant the sum of One Thousand Three Hundred Twenty Five Dollars

($1,325.00) under paragraph 5c of the April 8, 1970 agreement, together with interest at the rate of six per cent per annum from date hereof until paid.

3. That payment of the judgment amount herein shall be in full satisfaction of defendant's obligations upon that certain promissory note in the face amount of $25,000.00 due July 25, 1970, from defendant to plaintiff and that certain agreement entered into between the parties dated April 8, 1970.

4. Costs are not allowed.

TRUST TERRITORY OF THE PACIFIC ISLANDS
v.
TRUMAN NGIRMANG AND ABRAHAM OBAK

Criminal Case No. 390

Trial Division of the High Court

Palau District

November 7, 1972

Prosecution for kidnapping and rape. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, found alibi offered as only defense to be insufficient to adequately challenge evidence of guilt beyond a reasonable doubt where defendants did not offer corroborating testimony regarding their presence, for a crucial period of at least an hour, at club they claimed to have been at.

1. **Criminal Law—Evidence—Hearsay Exceptions**

   In prosecution for kidnapping and rape, conversations between perpetrators of the crimes, overheard by raped girl and overheard the morning after the offense occurred by girl who lived at house where perpetrators assembled and discussed what had happened, admonished each other not to talk about the events and voiced their concern over being discovered together by police a few hours after the offense, at which time one of them had been arrested, were properly admitted in evidence under exceptions to the hearsay rule relating to conspirators. (Rules of Evidence, Rule 63)