FSM SUPREME COURT APPELLATE DIVISION

WELSIN HELGENBERGER,	)	APPEAL CASE NO. P2-2012
	)	Civil Action No. 2009-004
Appellant,	)	
	)	
vs.	)	
	)	
BANK OF HAWAII,	)	
	)	
Appellee.	)	
	)	

OPINION

Argued: August 8, 2013
Decided: September 13, 2013

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court

APPEARANCES:

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HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo; Civil Procedure – Summary Judgment – Grounds

The appellate court applies the same standard in reviewing a trial court's grant of summary judgment that the trial court initially employed under Civil Procedure Rule 56(c), that is, it views the facts in the light most favorable to the party against whom judgment was entered and it determines de novo whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 143 (App. 2013).

Civil Procedure – Summary Judgment – Procedure

Once a moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable material issue of fact. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 143 (App. 2013).

Appellate Review – Standard – Civil Cases – De Novo; Contracts – Interpretation

Since interpretation of contract provisions is a matter of law to be determined by the court, an appellate court will review de novo the interpretation of contract provisions. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 143 (App. 2013).

Appellate Review – Standard – Civil Cases; Contracts – Breach

Issues of whether an act was a material breach of a contract can be a mixed question of law and fact. An appellate court will review questions of law de novo and will review a trial court's factual determinations under a clearly erroneous standard. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 143 (App. 2013).

Appellate Review – Standard – Civil Cases – Factual Findings

A trial court's findings are presumptively correct. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 143 (App. 2013).

Appellate Review – Decisions Reviewable; Constitutional Law – Case or Dispute – Mootness

An appellate court may receive proof or take notice of facts outside the record to determine whether a question presented to it is moot, and, if events after an appeal is filed make the issue presented moot, no justiciable dispute is presented and the court is without jurisdiction to consider the appeal – it must dismiss a moot appeal. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 143-44 (App. 2013).

Constitutional Law – Case or Dispute – Mootness

A claim becomes moot when the parties lack a legally cognizable interest in the litigation's outcome. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 144 (App. 2013).

Appellate Review – Decisions Reviewable; Constitutional Law – Case or Dispute – Mootness

A court is precluded from making pronouncements on the basis of a hypothetical, abstract, or academic issue or when the matter is moot. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 144 (App. 2013).

Appellate Review – Decsions Reviewable; Constitutional Law – Case or Dispute – Mootness

When an appellant asserts that the six-year statute of limitations means he is not legally liable for any payments that were due over six years before the lawsuit was filed and all the extra interest that accrued because those payments were missed and the appellee has conceded that the judgment against the appellant should be reduced by those amounts, the parties no longer have a legally cognizable dispute about this issue's outcome and the issue is moot. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 144 (App. 2013).

Contracts – Breach

Not every departure from a contract's literal terms can be deemed a material breach of the contract thereby allowing the non-breaching party to cease its performance and seek an appropriate remedy. The standard of materiality for the purposes of deciding whether a contract was breached is necessarily imprecise and flexible. A breach is material when it relates to a matter of vital importance or goes to the contract's essence. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 144 (App. 2013).

Contracts – Breach

Whether a breach is material may be a question of fact depending on several factors, particularly when the breach deprives the injured party of the contract's benefits. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 144 (App. 2013).

Banks and Banking; Contracts – Breach

When a promissory note, by its express terms, did not require the obligor to pay at the Pohnpei branch office but stated that payments were to be made "to our branch address above, or at any of our other branches" and the "branch address above" was "PO BOX 280, KOLONIA, POHNPEI FM 96941," under the note's terms, payment at any branch office will do. When it is undisputed that the bank still had an office on Pohnpei, the bank cannot have breached its contract by moving its office to another location on Pohnpei. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 144 (App. 2013).

Contracts; Debtors' and Creditors' Rights

As a general rule, in the absence of an agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or at his place of business, if he has one, or wherever else he may be found; and ordinarily it is the duty of the debtor to seek the creditor for the purpose of making payment, provided the creditor is within the state of his residence when the payment is due. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 145 (App. 2013).

Banks and Banking; Contracts; Debtors' and Creditors' Rights

Where the obligor on a promissory note is to make his payments does not relate to a matter of vital importance or go to the contract's essence since the note provides a number of options for place of payment, and since the obligor was not deprived of the benefits he expected to receive under the contract – his use of the bank's money (the loan) for a specified period of time. He knew he had an obligation to pay the bank and he knew (or should have known) where to pay and if he did not know it was his duty to find out where. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 145 (App. 2013).

Civil Procedure – Notice

The law does not favor the willfully blind. Willful blindness is usually considered as the legal equivalent of actual knowledge. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 145 (App. 2013).

Banks and Banking

A bank does not have to contact each borrower personally and negotiate separately with each borrower to get each borrower to agree to amend the note to require or to allow payment somewhere other than at the closed Pohnpei retail branch office. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 146 (App. 2013).

Banks and Banking

A borrower's duty is to repay his loan and to seek a bank office in order to make those payments. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 146 (App. 2013).

Banks and Banking; Contracts – Breach

A bank does not breach its agreement with a borrower by closing its retail branch office on Pohnpei, and if it did it was not a material breach excusing performance. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 146 (App. 2013).

Appellate Review – Standard – Civil Cases

When an appellant listed an issue in his brief but did not include any argument about it in his brief and did not mention it during oral argument, the issue must be considered waived. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 146 (App. 2013).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This appeal is from the trial division's December 5, 2011 summary judgment that this debt collection action was filed within the six-year statute of limitations and that the plaintiff Bank of Hawaii's closure of its Pohnpei retail branch was not a material breach by the bank of the promissory note that defendant Welsin Helgenberger had executed with the bank. We conclude that the statute of limitations issue has become moot after the trial court judgment was entered and we affirm the trial court decision that the bank did not materially breach its agreement with Helgenberger. Our reasons follow.

I. BACKGROUND

On December 21, 2000, Helgenberger borrowed $20,348 from the bank at 16% interest to be repaid by 36 monthly payments of $720.14. His last (the September 2002) payment was made on October 14, 2002 at which time he still owed $10,791.42 in principal. The bank closed its Pohnpei retail branch office in November 2002, but continued to employ agents in a Pohnpei office to support its customers there and to receive loan payments. On February 25, 2003, the bank "charged off" Helgenberger's loan. When the loan was charged off the principal was reduced by $405.55, the value of the paid credit life insurance. On April 16, 2003, the bank sent him a letter accelerating the loan and demanding payment in full.

The bank filed suit against Helgenberger on January 12, 2009. It sought judgment for the unpaid $10,385.87 principal and $9,542.48 in interest up to November 20, 2008, plus $4.55 interest per day from then until entry of judgment since Helgenberger had defaulted on his promise to pay the note. Helgenberger raised as affirmative defenses that the statute of limitations barred the bank's claim and that his default was the bank's fault because it had not told him where to make his payments.

The bank moved for summary judgment. Helgenberger opposed, arguing that certain installment payments would, under Waguk v. Kosrae Island Credit Union, 6 FSM Intrm. 14 (App. 1993), be barred by the statute of limitations. He also made a cross-motion for summary judgment, arguing that he had no liability to the bank because it had assigned the right to receive payments to some entity other than its Pohnpei retail branch and that this assignment was a material breach of his contract with the bank.

The trial court granted the bank's summary judgment motion and denied Helgenberger's cross-motion. It found that after the bank had closed its Pohnpei retail branch office it employed agents who set up a Pohnpei office to respond to inquiries and receive loan repayments and that therefore the Bank did not deprive Helgenberger of an opportunity to make loan repayments locally and it further found that there was no evidence that Helgenberger did not know where or how to continue to make his loan payments. The trial court concluded that the bank did not materially breach the contract since the change did not deprive Helgenberger of the contract's benefits. The trial court also concluded that Helgenberger's claim that the loan was accelerated over six years before suit was filed was not supported by any evidence. Summary judgment was entered in the bank's favor for $19,928.35 plus $4.55 interest per day from November 20, 2008 to January 10, 2012.[1]

Helgenberger timely appealed.

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[1] This would make the judgment amount about $25,142.65.

II. Issues Presented

Helgenberger asserts that the trial court erred: 1) in law and fact in concluding that the bank accelerated the payments on the promissory note and, since they were not because of the statute of limitations, judgment would have to have been entered for a lower amount; 2) by not concluding that the bank was required to amend the promissory note to reflect the changed place of payment; and 3) by not concluding that the invalid judgment constituted state action that violated Helgenberger's due process rights.

III. Standards of Review

We apply the same standard in reviewing a trial court's grant of summary judgment that the trial court initially employed under Civil Procedure Rule 56(c), that is, we view the facts in the light most favorable to the party against whom judgment was entered and we determine de novo whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Allen v. Allen, 17 FSM Intrm. 35, 39 (App. 2010). Once the moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable material issue of fact. Nanpei v. Kihara, 7 FSM Intrm. 319, 325 (App. 1995).

Since interpretation of contract provisions is a matter of law to be determined by the court, Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 621 (App. 1996); Nanpei, 7 FSM Intrm. at 323, we will review de novo the interpretation of contract provisions. Issues of whether an act was a material breach of a contract can be a mixed question of law and fact. We review questions of law de novo, *e.g.*, Simina v. Kimeuo, 16 FSM Intrm. 616, 619 (App. 2009), and we review a trial court's factual determinations under a clearly erroneous standard, *e.g.*, George v. George, 17 FSM Intrm. 8, 9 (App. 2010). A trial court's findings are presumptively correct. George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010).

IV. Analysis

A. *Statute of Limitations and Judgment Amount*

Helgenberger contends that his loan was an installment contract and that, in accordance with Waguk v. Kosrae Island Credit Union, 6 FSM Intrm. 14 (App. 1993), the six-year statute of limitations started running when each installment became due and that since the judgment held him liable for monthly payments that were due more than six years before the suit was filed, he should not be legally liable for those payments or any interest that would have accrued on those payments.

Stating that it does not disagree with FSM Dev. Bank v. Chuuk Fresh Tuna, Inc., 16 FSM Intrm. 335, 338 (Chk. 2009), the bank does not argue the point but has instead consented to reduce the judgment against Helgenberger by the amount that would account for the unpaid three monthly payments due at the end of 2002 and the extra interest that accrued because of those missed payments. The bank asserts that this concession renders the statute of limitations issue moot.

Helgenberger argues that this concession, while welcome, does not make the issue moot because there are other cases which have judgments in which time-barred installment payments were included in the judgment amount even though the statute of limitations had been pled as an affirmative defense. Helgenberger states that a ruling in this case would help the judgment-debtors in those cases.

We may receive proof or take notice of facts outside the record to determine whether a question

presented to us is moot, and, if events after an appeal is filed make the issue presented moot, no justiciable dispute is presented and we are without jurisdiction to consider it – we must dismiss a moot appeal. Reddy v. Kosrae, 11 FSM Intrm. 595, 596-97 (App. 2003). *See also* Wainit v. FSM, 14 FSM Intrm. 476, 478 (App. 2006); Wainit v. Weno, 10 FSM Intrm. 601, 610 (Chk. S. Ct. App. 2002). A claim becomes moot when the parties lack a legally cognizable interest in the litigation's outcome. FSM v. Udot Municipality, 12 FSM Intrm. 29, 42 (App. 2003); McIlrath v. Amaraich, 11 FSM Intrm. 502, 506 (App. 2003); FSM v. Louis, 9 FSM Intrm. 474, 482 (App. 2000). We are precluded from making pronouncements on the basis of a hypothetical, abstract, or academic issue or when the matter is moot. Fritz v. National Election Dir., 11 FSM Intrm. 442, 444 (App. 2003).

Helgenberger asserts that the six-year statute of limitations means he is not legally liable for any payments that were due over six years before the lawsuit was filed (the payments due October-December 2002) and all the extra interest that accrued because those payments were missed. The bank has conceded that the judgment against Helgenberger should be reduced by those amounts. The parties in this case thus no longer have a legally cognizable dispute about this issue's outcome. Helgenberger asserts that he cannot be required to pay those sums and the bank agrees. This issue is moot. If, in some other cases, other judgment-debtors have similar defenses, those judgment-debtors must seek relief in their own cases.

B. *Promissory Note's Place of Payment Provision*

Helgenberger contends that, because the promissory note, in his view, states that his payments were to be made to the Pohnpei branch office, the bank was required to amend the promissory note to reflect a changed place of payment when it closed its Pohnpei branch, and since it did not, that failure was a material breach of the contract. Helgenberger contends that the note fixed the place of payment at the Pohnpei branch office and that when the location to pay in Pohnpei changed to an office staffed by the bank's agents, this material breach excused him from making any further payments on his loan.

Not every departure from a contract's literal terms can be deemed a material breach of the contract thereby allowing the non-breaching party to cease its performance and seek an appropriate remedy. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011). The standard of materiality for the purposes of deciding whether a contract was breached is necessarily imprecise and flexible. *Id.* (citing RESTATEMENT (SECOND) CONTRACTS § 241 cmt. a (1981)). A breach is material when it relates to a matter of vital importance or goes to the contract's essence. GMP Hawaii, Inc., 17 FSM Intrm. at 570. "Whether a breach is material may be a question of fact depending on several factors, particularly when the breach deprives the injured party of the contract's benefits." *Id.* (citing Panuelo v. Pepsi Cola Bottling Co. of Guam, 5 FSM Intrm. 123, 128 (Pon. 1991)).

The note, by its express terms, does not require Helgenberger to pay at the Pohnpei branch office. The promissory note states that payments were to be made "to our branch address above, or at any of our other branches." The "branch address above" on the note is "PO BOX 280, KOLONIA, POHNPEI FM 96941." Under the note's terms, payment at any branch office will do. There also is no evidence that the address listed on the note, PO Box 280, was not still open and payments could not still be received there, in which case there would have been no breach by the bank, let alone a material breach. While Helgenberger asserts that the bank's failure to comply with what Helgenberger considers the note's literal terms excuses him from repayment, his affirmative defense implies that he never complied with the note's literal terms either – he never made any payments to PO Box 280 or to any other branch. It is undisputed that the bank still had an office on Pohnpei and, since there is no street address in the note, the bank cannot have breached its contract by moving its office to another location on Pohnpei.

To support his contention that any change in the location of payment was a material breach, Helgenberger relies on O'Steen v. Craig, 302 P.2d 435 (Cal. Ct. App. 1956). In that California case, the court ruled that a debtor could be required to pay a note in California since the promissory note required payment at Winnemucca, Nevada or anywhere "within or without the State of Nevada" the holder might demand payment and payment was demanded in California, which was "without the State of Nevada." This was an issue in O'Steen because a California statute made prejudgment attachment available to a plaintiff only if the note had been made in or was payable in California. No such statute exists in the FSM and two places of payment were available to Helgenberger on Pohnpei – the office with the bank's agents and the post office box.

Helgenberger relies on language in O'Steen from Corpus Juris Secundum that says "[w]hen the place of payment is fixed by agreement, express or implied, payment must be made at the place agreed on unless both parties consent that it should be elsewhere . . . ." O'Steen, 302 P.2d at 439. O'Steen offers Helgenberger little support. He overlooks several things. First, O'Steen involved a promissory note executed between two private parties and did not involve a financial institution that should be easy to locate and it did not involve a loan but was payment for property. He also overlooks that his payment location was not "fixed" at one location but his note was payable at any Bank of Hawaii branch anywhere or at P.O. Box 280, Kolonia. Helgenberger also ignores other, more pertinent language in O'Steen that states:

> [a]s a general rule, in the absence of an agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or at his place of business, if he has one, or wherever else he may be found; and ordinarily it is the duty of the debtor to seek the creditor for the purpose of making payment, provided the creditor is within the state of his residence when the payment is due . . . .

O'Steen, 302 P.2d at 439 (quoting 70 C.J.S. *Payment* § 6, at 217).

Helgenberger was already falling behind in his payments when the bank closed its retail branch office – his (last) October 14, 2002 payment was his monthly payment due in September 2002. He did not make an October (or November or December) 2002 payment. The trial court found as fact that there was no evidence that Helgenberger did not know where or how to make his loan payments. Helgenberger has not pointed to anything that would show that there is a genuine issue of material fact that he did not know or could not find out where he had to pay. The post office box address is on the note and even if the bank closed the post office box, the post office will forward the mail for months thereafter.

Even if the bank were considered to have breached its contract, the breach cannot be considered a material breach excusing performance by Helgenberger. Where Helgenberger is to make his payments does not relate to a matter of vital importance or go to the contract's essence since the note provides a number of options for place of payment – at any branch or at P.O. Box 280, Kolonia. And Helgenberger was not deprived of the benefits he expected to receive under the contract – his use of the bank's money (the loan) for a specified period of time. He knew he had an obligation to pay the bank and he knew (or should have known) where to pay and if he did not know it was his duty to find out where. It was an act of willful blindness if Helgenberger did not know. The law does not favor the willfully blind. Willful blindness is usually considered as the legal equivalent of actual knowledge. *See, e.g.*, United States v. Rodriguez, 53 F.3d 1439, 1447 (7th Cir. 1995); United States v. Antzoulatos, 962 F.2d 720, 724 (7th Cir. 1992); Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143, 1149 (7th Cir. 1992).

Helgenberger also asserts that in order for the bank not to have breached the promissory notes

signed by its Pohnpei borrowers, it had to contact each borrower personally and negotiate separately with each borrower to get each borrower to agree to amend the note to require or to allow payment somewhere other than at the closed Pohnpei retail branch office. Not only is this proposition commercially unreasonable but the logic behind it leads to an absurd result. If one, or a few, of the bank's many borrowers refused to negotiate or to agree to a new payment location, then the bank would have been forced to keep its Pohnpei branch office open just to receive those borrowers' loan payments or be forced to forgo any repayment. This makes no sense.

Helgenberger's duty was to repay his loan and to seek a bank office in order to make those payments. He could have paid the bank at the office staffed by its agents or by mail to the Kolonia post office box listed on the promissory note or (presumably by mail) to any other Bank of Hawaii branch office. He did not. Thus no genuine issue of material fact was present. The bank did not breach its agreement with Helgenberger by closing its retail branch office on Pohnpei, and if it did it was not a material breach excusing performance – payment – by Helgenberger. The bank was therefore entitled to judgment as a matter of law.

Helgenberger's position is untenable. Helgenberger had the duty to repay the bank and the duty to seek where to make his payments. He did neither. We therefore affirm the trial court's ruling that the Bank of Hawaii's closure of its Pohnpei retail branch was not a material breach of the contract and did not excuse Helgenberger from his obligation to repay the loan.

C. *State Action and Due Process Claim*

Lastly, Helgenberger's brief listed as an issue "the invalid judgment" as constituting state action violating his due process rights, Appellant's Br. at 4, but he did not include any argument on this "issue" in his brief and it was not mentioned during oral argument. We must consider this "issue" waived since Helgenberger did not argue it and since the bank could not respond to it.

V. Conclusion

Accordingly, we decline to consider the statute of limitations issue since that dispute is now moot and we affirm the trial court decision that the Bank of Hawaii did not materially breach its agreement with the borrower by closing its Pohnpei retail branch office. The borrower's duty was to repay the loan and to find out where to make his payments if he did not know.

The matter is remanded to the trial court for it to enter an amended judgment reflecting the Bank of Hawaii's concession that it cannot collect Welsin Helgenberger's payments that were due in October through December of 2002 and all the interest that accrued because those sums were not paid, thus reducing the judgment amount. The parties shall bear their own costs.

* * * *