

FILED
SUPREME COURT
OF GUAM
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IN THE SUPREME COURT OF GUAM

KISHORE HEMLANI and GURVINDER SINGH SOBTI
Plaintiffs-Appellants

vs.

**THEODORE S. NELSON, GLORIA B.L. NELSON,
GLENN R. NELSON, RHONDA T. NELSON, GWENDOLYN M.
TAIMANGLO and THEODORE D. NELSON**
Defendants-Appellees

OPINION

Supreme Court Case No. CVA99-032
Superior Court Case No. CV1721-94

Cite as: 2000 Guam 20

Appeal from the Superior Court of Guam
Argued and submitted on March 8, 2000
Hagåtña, Guam

Appearing for the Plaintiffs-Appellants:

Wilfred R. Mann, Esq.
Berman, O'Connor & Mann
111 Chalan Santo Papa
Hagåtña, Guam 96910

Appearing for the Defendants-Appellees:

Cesar C. Cabot, Esq.
Law Offices of Cesar C. Cabot, P.C.
BankPacific Bldg., 2nd Flr.
825 S. Marine Drive
Tamuning, Guam 96911

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice, PETER C. SIGUENZA, JR., Associate Justice, and JUNE S. MAIR, Justice *Pro Tempore*

MAIR, J.:

[1] Plaintiffs-Appellants Kishore Hemlani and Gurvinder Singh Sobti appeal the trial court's judgment in favor of Defendants-Appellees Theodore S. Nelson, Gloria B.L. Nelson, Glenn R. Nelson, Rhonda T. Nelson, Gwendolyn M. Taimanglo and Theodore D. Nelson. For reasons which follow, the trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In this case we decide whether lessors of real property breach the covenant of *seisin* when, prior to signing the lease, one of the lessors acquires the undivided fee simple interest of a party who did not join in the lease.

[3] Plaintiffs-Appellants (collectively "Hemlani") desired to incorporate a certain parcel in Hagåtña, Guam into a development they had been contemplating. Hemlani approached Defendants-Appellees (hereinafter "Nelsons"), and on or about August 31, 1992, the parties signed a ninety-nine year lease, which Hemlani drafted, for Lot 1419, Hagåtña. The Nelsons were to receive \$1,200 per month, with the first sixty months, or \$72,000, paid in advance. Paragraph 4 of the lease provided:

Title. Lessor warrants that it is lawfully seized of the above described real property in fee simple; that the same is free and clear of all encumbrances excepting those of record; and that it has good right to lease said property.

Hemlani included a reference to Certificate of Title No. 90588 in the lease's description of the property. This Certificate of Title indicated that both Defendants-Appellees and Margaret Nelson Hill held undivided interests in the property.

[4] Ms. Hill was not a signatory on the lease. She had passed away in Louisiana on May 30, 1991. She died intestate, leaving four heirs, James D. Hill, Sr., William Peter Hill, Betty H. McNeely, and Elena Florence Thomley. The heirs quitclaimed their interests to Theodore S. (“Ted”) Nelson, who recorded the quitclaim deeds. To clear title to Lot 1419, Ted petitioned for probate of Ms. Hill’s interest at the Superior Court on October 19, 1994. On July 6, 1996, over four years after Hemlani and the Nelsons signed the lease for Lot 1419, Ms. Hill’s interest was probated solely to Ted. Hemlani did not include the heirs in the lease of Lot 1419 when he drafted the lease agreement, and they were not party to it.

[5] Hemlani was unable to develop the property, allegedly because banks had refused financing when they discovered Ms. Hill’s interest on the Certificate of Title. The alleged defect in title caused Hemlani to file a complaint for breach of contract and breach of warranty of title on or about November 23, 1994. Bench trial yielded judgment for the Nelsons on both causes of action. *Hemlani v. Nelson*, CV1721-94 (Super. Ct. Guam Feb. 22, 1999).

[6] Hemlani appeals the judgment, asserting that it was error for the trial court to find that there was no breach of the lease agreement’s warranty provisions. Hemlani argues that Ms. Hill’s undivided interest was a not a mere encumbrance of record, which under the lease agreement, is an exception to the lessor’s warranty against encumbrances. Instead, Hemlani contends that Ms. Hill’s interest was a defect in record title causing a breach of covenant of *seisin*. We agree with Hemlani that Ms. Hill’s undivided interest in Lot 1419 is not a mere encumbrance of record. However, we do not agree that Ms. Hill’s interest constituted a breach of the covenant of *seisin*. Accordingly, the judgment of the trial court is affirmed.

II. ANALYSIS

[7] We have jurisdiction over the appeal of a final judgment of the Superior Court under Title 7 GCA, §§ 3107 and 3108.

[8] A trial court’s application of law is reviewed *de novo*. *Coffey v. Gov’t of Guam*, 1997 Guam 14, ¶ 6. A trial court’s findings of fact shall not be set aside unless such findings are clearly erroneous. *Yang v. Hong*, 1998 Guam 9, ¶ 4.

A. Ms. Hill’s undivided interest in Lot 1419 was not an encumbrance of record

[9] Under its application of law, the trial court concluded that Ms. Hill’s undivided interest, as designated on the Certificate of Title, was an encumbrance of record on Lot 1419. This conclusion led to the court’s finding that Ms. Hill’s interest did not constitute a breach of the lease agreement. We disagree.

[10] The parties failed to provide the court with a copy of the Certificate of Title for Lot 1419.¹ Nevertheless, it is undisputed that Ms. Hill had an interest designated on the Certificate of Title, and we begin our analysis by analyzing that interest.

[11] Under Guam law, ownership of real property by several persons is as joint tenant, tenant in common, partnership interest, or community property interest. Title 21 GCA § 1214, (1993). Under Guam’s Land Title Registration Law, “[i]n all cases where two (2) or more persons are entitled as tenants in common to an estate in registered land, such persons may receive one certificate for the

¹ The Plaintiffs-Appellants sought our review of the trial court’s findings of fact concerning whether Ms. Hill’s interest may have been subject to other outstanding claims at probate. However, as the record submitted to us lacked a copy of Certificate of Title No. 90588, and as neither party made available deeds affecting the transfer of interests in Lot 1419, we take the facts as they have been adjudicated or found in *Hemlani v. Nelson*, CV1721-94 (Super. Ct. Guam Feb. 22, 1999) and *In the Matter of the Estate of Margaret Hill*, PR0175-94 (Super. Ct. Guam July 5, 1996).

entirety, or each may receive a separate certificate for his undivided share.” Title 21 GCA § 29126, (1994). As Ms. Hill’s interest was designated with the other owners of Lot 1419 on the Certificate of Title, we can conclude that her interest was an undivided interest as a tenant in common in Lot 1419.

[12] Having concluded that Ms. Hill held an undivided interest as tenant in common, we must next determine the estate she possessed. The Land Title Registration Law provides:

No mortgage, lien, charge, or lesser estate than fee simple shall be registered unless the fee simple to the same land is first registered. It shall not be an objection to bringing land under this Law, that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, lien, or charge; but every such lesser estate, mortgage, lien, or charge shall be noted upon the certificate of title and the duplicate thereof, and the title or interest certified shall be subject only to such estates, mortgages, liens, and charges as are so noted, except as herein provided

Title 21 GCA § 29107, (1994). As there were no outstanding lesser estates having an interest in Lot 1419, all interests noted on the Certificate of Title must have necessarily been fee simple estates. Ms. Hill’s undivided interest as tenant in common, therefore, was in a fee simple estate.

[13] By contrast, Guam law provides that an encumbrance “includes taxes, assessments, and all liens upon real property.” Title 21 GCA § 4211, (1994). As with many statutes in this jurisdiction, section 4211 was adopted from California; in this case California Civil Code § 1114. California authority applying section 1114 defines an encumbrance as “any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee.” *Evans v. Fraught*, 231 Cal. App. 2d 698, 706, 42 Cal. Rptr. 133, 137 (Cal. Dist. Ct. App. 1965) (citations omitted). Additionally, an encumbrance is an interest that “charges, burdens, obstructs or impairs [a property’s] use or impedes its transfer.” *Id.* The list of interests described in the statute is inclusive. *1119 Delaware v. Continental Land Title Co.*, 16 Cal. App. 4th 992, 1000, 20

Cal. Rptr. 2d 438, 443 n. 4 (Cal. Ct. App. 1993). Thus, courts have found covenants restricting the use of property, restrictions on construction, reservations of right of way, easements, encroachments, leases, deeds of trust, and pendency of condemnation proceedings to be encumbrances. *Evans* 231 Cal. App. 2d at 706, 42 Cal. Rptr. at 137 (citations omitted). Prospective real property and inheritance taxes on land conveyed to Native Americans have also been found to be an encumbrance. *Kirkwood v. Arenas*, 243 F.2d 863, 869 (9th Cir. 1957) Likewise, an encumbrance has been found where land transferred was subject to a conditional use permit limiting occupancy only to senior citizens. *1119 Delaware* 16 Cal. App. 4th at 999, 20 Cal. Rptr. 2d at 444.

[14] It is apparent that Ms. Hill's undivided interest in fee simple is unlike the encumbrance interests found in California case law. Her interest is the largest estate in property and does not subsist in another estate to the diminution of the value of the other estate as does a mortgage (encumbering the mortgagor's interest), a covenant (encumbering the covenantor's interest), an easement (encumbering the subservient estate), or the like. Her undivided interest in fee simple is clearly not an encumbrance. Therefore, the trial court's conclusion that Ms. Hill's interest was an encumbrance was error.

B. The Nelsons neither breached the covenant of *seisin* or covenant of right to convey

[15] Although we find the trial court's conclusion of law to be error, we hold that the Nelsons did not breach the warranty provisions contained in the lease agreement with Hemlani.

[16] When a grantor makes a covenant of *seisin*, she warrants that, at the time of the conveyance, she was lawfully seized of a good, absolute and indefeasible estate of inheritance, in fee simple, and had power to convey the same. *Maxwell v. Redd*, 496 P.2d 1320 (Kan. 1972) (citations omitted).

Additionally, when a grantor makes a covenant of *seisin*, she promises that she is *seised* of the estate she purports to convey. *See, generally*, RICHARD R. POWELL, POWELL ON REAL PROPERTY § 81A.06[2][ii], at 81A-115 (Matthew Bender & Co. ed. 1999). Similarly, a grantor covenants that she has good right to convey a particular estate in property when she makes a covenant of right to convey. *See, generally, id.* § 81A.06[2][b], at 81A-116. It follows, then, that a grantor does not warrant that she is *seised* in fee simple unless that is the estate she purports to convey.

[17] As holders of fee simple interests, the Nelsons can give covenants of title when conveying a lesser estate. *See, e.g., Nicholson Corp. v. Ferguson*, 243 P. 195 (Okla. 1925), *Sun Exploration and Production Co. v. Benton*, 728 S.W.2d 35 (Tex. 1987), *Walker & Withrow, Inc. v. Haley*, 653 P.2d 191 (Okla. 1982), *Siniard v. Davis*, 678 P.2d 1197 (Okla. Court. App. 1984). The question is what, exactly, is warranted when a covenantor makes the covenants for title that the Nelsons have here.

[18] In *Nicholson Corp.*, 243 P. 195, an assignor of oil rights covenanted that it was the lawful owner of a lease of oil rights and interests and that it had good right and authority to sell and convey the lease and rights and interests under it. *Id.* at 197. The oil field and well referred to in the lease were in fact on another's land. *Id.* at 196. The question was whether the assignor's covenants of *seisin* and of good right to convey were enforceable given that oil and gas leases were assigned. *Id.* at 197. In Oklahoma,

[t]he detriment caused by a breach of a covenant of *seisin*, of right to convey, of warranty, or of quiet enjoyment, *in a grant of an estate in real property*, is deemed to be: First. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore, at the time of the grant, to the value of the whole property. Second. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding six years. Third. Any expenses properly incurred by the covenantee in defending his possession.

Id. at 198 citing § 5980 C. O. S. (1921) (emphasis added).² The *Nicholson Corp.* court held that the statute concerns not title to real estate, but where “title to an estate in real property fails” and found that the covenants applied to assignments of gas leaseholds. *Id.* at 199. See also POWELL, POWELL ON REAL PROPERTY § 81A.06[2][a][iii], at 81A-115.

[19] Here, the estate that the Nelsons purported to convey was a ninety-nine-year leasehold. Under such conveyance, Hemlani becomes vested of a ninety-nine-year tenancy for years and the Nelsons have a reversion. Hemlani argues that there was a breach of the covenant of seisin because Ms. Hill had an undivided 1/7 interest in Lot 1419. However, as explained below, Hemlani’s argument is incorrect.

[20] In Guam,

“[u]pon a person’s death, the title to such person’s property, real and personal, *passes immediately* to the person or persons to whom it is devised or bequeathed by such person’s last will, or, in the absence of such disposition, to the person or persons who succeed to such person’s estate as provided in Division 2 of this Title.”

Title 15 GCA § 1401, (1994) (emphasis added). Thus, at death, title passes immediately to devisees and legatees by will or in accordance with intestate succession.

[21] In *Lathrop v. Kellogg*, 158 Cal.App.2d 220, 322 P.2d 572, (Cal. Ct. App. 1958), competing claimants to a piece of property brought suit to quiet title. It was undisputed that title to the property

² The Oklahoma statute concerning the covenant of *seisin* tracks, verbatim, Guam’s statute:

Detriment: breach of covenant of *seizin*. The detriment caused by a breach of a covenant of *seisin*, of right to convey, of warranty, or of quiet enjoyment, in a grant of an estate in real property, is deemed to be: (1) The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property; (2) Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding five (5) years; (3) Any expenses properly incurred by the covenantee in defending his possession.

Title 20 GCA § 2204, (1992).

was vested in 1916 in one Ettie A. Sprague. *Id.* at 222, 322 P.2d at 574. The record indicated that on July 2, 1937, a tax deed to the state of California was recorded. Next, a November 14, 1939 deed from the state to Warren and Frank Kellogg was recorded. *Id.* The instrument recorded after the deed to the Kelloggs was a quitclaim deed from Ettie L. Sprague, Marian L. Sprague, John H. Sprague, and George P. Low to Wilbert Lee Lathrop and Mable Lathrop, husband and wife, who eventually came into possession. *Id.* There was no record that Ettie A. Sprague was ever divested of her interest. *Id.* However, the same Ettie A. Sprague died in 1936 (before the tax deed to the state was recorded), leaving her husband John H. Sprague and two children, Marian L. Sprague and George P. Low as heirs. *Id.* Ettie A. Sprague's estate was never probated. *Id.* at 226, 322 P.2d at 576.

[22] The issue was whether a plaintiff in possession makes a *prima facie* case of ownership sufficient to withstand judgment of nonsuit. In California, once the plaintiff establishes ownership, the burden shifts to the defendant to establish that title vests in him through the tax deed. The *Kellogg* court held that the Lathrops, the successors in interest to Ettie A. Sprague's heirs, made a *prima facie* case when they were in possession and derived title from the decedent's intestate heirs. *Id.* at 223, 322 P.2d at 574. The appellate court's rationale was that at death, title vests immediately in the heirs, subject only to administration; that the heirs may maintain an action to quiet title; and that the right extends to a grantee of an heir. *Id.* at 225, 322 P.2d at 576.

[23] Another quiet title action was brought in *Jordan v. Fay*, 98 Cal. 264, 33 P. 95 (1893). In *Jordan v. Fay*, Edward P. Fay, owner of 3/4 undivided interest in 547 acres of property, died and left his estate to his wife, Maria Kate Fay. *Id.* at 265, 33 P. at 95. The remaining 1/4 undivided interest was community property vested in William and Bridget Fay, husband and wife. *Id.* In

1872, Bridget Fay died intestate, leaving four heirs, whom consisted of her husband, and three sons, including the defendant, Thomas J. Fay. *Id.* In 1880, Bridget's husband William and one of their sons, Jeremiah G. Fay, conveyed their interests to Maria Kate Fay. *Id.* at 265, 33 P. at 96. In 1883, Maria Kate Fay conveyed the whole property to Charles F. McDermott, who, in a back-to-back transaction, conveyed this interest to the plaintiff, Jordan. *Id.* at 266, 33 P. at 95.

[24] Jordan brought suit claiming ownership of the property in fee simple. *Id.* at 265, 33 P. at 95. The court agreed, holding that, as to the 3/4 undivided interest that Maria Kate Fay inherited from her husband, she had taken the entire interest notwithstanding the fact that the estate was never settled, nor property distributed. *Id.* at 266, 33 P. at 96. As to the 1/4 undivided interest, under California law of the time, the rule in intestate succession was that the surviving husband takes all community property without administration. *Id.* at 267, 33 P. at 96. The court held that William Fay was vested in all of Bridget Fay's 1/4 undivided interest in the property at her death, and his subsequent conveyance to Maria Kate Fay was of the entire 1/4 undivided interest. *Id.* at 268, 33 P. at 97. Jordan was, therefore, vested of the entire parcel in fee simple absolute. *Id.*

[25] Applying *Lathrop v. Kellogg* and *Jordan v. Fay* to the facts of this case, at Ms. Hill's death, her heirs became immediately vested of her 1/7 undivided interest in the property in accordance with the statutory scheme for intestate succession. Upon quitting their interest in favor of Ted, he became vested of their estate. Ted's estate in Lot 1419, therefore, was an undivided 2/7 interest in fee simple. As the record indicates that the quitclaim deeds from the heirs to Ted were recorded prior to the signing of the lease, Ted's undivided 2/7 interest combined with the remaining interests to vest the Lessors in all 7/7 undivided interests in fee simple in Lot 1419.

[26] Such a conclusion is not in contravention of the holding in *Pangilinan v. Palting*, DCA Civ. No. 86-0027A, SC Civ. No. 1069-84 (D. Guam App. Div. Jan. 29, 1987). In *Pangilinan v. Palting*, Pangilinan contracted for the sale of a lot in Tamuning with Rosalia C. Palting Guerrero and Marilyn C. Palting on September 10, 1975. It was understood by the parties that ownership of the property was subject to probate proceedings in the estate of Paul D. Palting. Paul D. Palting's estate was not settled until April 11, 1980, over four years later. Unfortunately for Pangilinan, probate did not vest title to the lot in Rosalia Palting Guerrero or Marilyn Palting but in other heirs. Pangilinan filed suit seeking to compel Rosalia Palting Guerrero and Marilyn Palting to specifically perform the land sale contract and a declaration that the other heirs had no interest in the property. *Id.*

[27] The *Pangilinan v. Palting* court held that, while under section 1401(a) real and personal property passes immediately to heirs either by will or by statute, under subsection (b), such immediate vesting of title at death is subject to possession by the administrator of the estate and the control of the Superior Court for administration, sale, or other distribution. *Id.* Further, under similar case law interpreting the analogous California statutory scheme, although title vests in the heirs at death, it is subject to divestment by the probate court. *Id.*

[28] For Pangilinan, operation of section 1401 meant that equitable title derived from the contract of sale purporting to convey Rosalia Palting Guerrero's and Marilyn Palting's interests was subject to the probate proceeding. However, as the final decree of the probate court failed to vest title to the lot in them, they had no interest to convey to Pangilinan. *Id.* The *Pangilinan* court then held that Pangilinan had no interest in the lot that was purportedly conveyed to him. *Id.*

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[29] Like *Pangilinan*, title vests immediately in Ms. Hill's heirs subject to probate of their interests. In *Pangilinan*, after probate Rosalia Palting Guerrero and Marilyn Palting were found not to take any interest in the estate of Paul D. Palting. Such finding must necessarily mean that upon application of the law of wills and intestacy, Rosalia Palting Guerrero and Marilyn Palting were not devisees or intestate takers who succeeded to Paul D. Palting's estate. Here, on the other hand, Ms. Hill's intestate heirs were apparently vested of her 1/7 interest; otherwise, Ted Nelson would not have succeeded to their 1/7 undivided interest in the lease property. The distinction is that while Rosalia Palting Guerrero and Marilyn Palting did not take either under will or by intestate succession and were not vested, Ms. Hill's heirs were takers under intestate succession.

[30] Under the same rationale, the *Lathrop v. Kellogg* successors in interest to the intestate heirs established ownership sufficient to challenge title derived under a tax deed. Similarly, under the holding of *Jordan v. Fay*, the surviving spouse's conveyance of his interest to a *bona fide* purchaser was a conveyance of the entire 1/4 undivided interest, which he took from his wife by intestate succession. In *Lathrop v. Kellogg*, *Jordan v. Fay*, and *Pangilinan v. Palting*, the respective heirs' interests vested immediately upon death of the decedent, and their respective estates were vested either as an heir under rules of intestate succession or as a devisee under a will. Thus, the cases cited as comparison say no more than the rule that an heir takes so long as she is a taker under a will or by intestate succession. Likewise, Appellant Ted Nelson took as grantee of Ms. Hill's intestate heirs.

[31] The conclusion that the Nelsons were vested in fee simple prior to conveyance of the tenancy of years necessarily means that there was neither a breach of the covenant of *seisin* or of the right to convey. Powell explains breaches of the covenant of *seisin*:

conveyance taking the property out of what would be, at her death, her intestate estate.

[34] It follows that, upon quitting their interests, Ted Nelson took title to the heirs' estates subject to possible competing claims. However, as there were no competing claims, the probate court must have found that, upon application of the rules of intestate succession, Ted Nelson took Ms. Hill's entire 1/7 undivided interest. Therefore, after delivery and acceptance of the quitclaim deeds, Ted succeeded in interest to the intestate heirs.

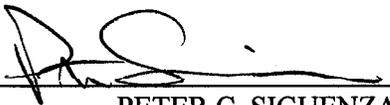
[35] It is of no consequence that the Lessors did not conclusively know at the time of the grant whether or not they were vested in fee simple or not vested at all. The dispositive fact is that Ted took the heirs' interest prior to conveyance of the tenancy at years to Hemlani. Moreover, the probate court's judgment that the 1/7 undivided interest vests in Ted Nelson conclusively proves that he took what the heirs had taken under intestacy.

[36] Hemlani testified that he was unable to develop the property because of the recorded existence of Ms. Hill's undivided interest. The ability to incorporate the property into his planned development and mortgage it must be the appurtenance which Hemlani complains is lacking. However, again, Ms. Hill in fact had no interest in the property. Ms. Hill's heirs took title by intestacy; Ted Nelson acquired their interests prior to lease execution; and, upon the Nelsons acquiring 7/7 undivided interests in the ninety-nine-year tenancy of years, Hemlani was entitled to all appurtenances to the leasehold. Under Hemlani's interpretation of *seisin*, no one would be *seised* of an estate until either recordation of an interest or entry of probate judgment. However, such a rule would mean that no conveyance of an estate could be made outside of probate or recordation. This rule is patently erroneous and would have transferors rely on the Department of Land Management's issuance of a certificate of title to effect a transfer of an estate when the Department's proper role

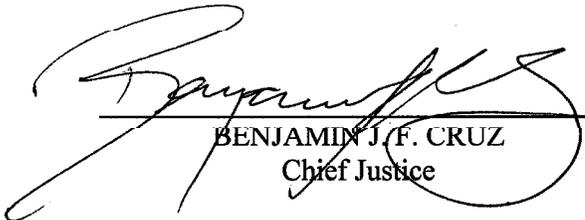
is to give evidence of chain of title.

III. CONCLUSION

[37] The Nelsons had fee simple title to the estate of years they purported to convey. Being vested in fee simple, they did not breach the covenant of seisin, covenant against encumbrances, or of right to convey. Not breaching any of these covenants, they did not breach the lease agreement with Hemlani. Accordingly, the judgment of the trial court is **AFFIRMED**.


PETER C. SIGUENZA
Associate Justice


JUNE S. MAIR
Justice Pro Tempore


BENJAMIN J. F. CRUZ
Chief Justice