

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

Stanley T. **Torres** and Jeanne H. Rayphand, Plaintiffs,

v.

Froilan C. **Tenorio**, Governor, Commonwealth of the Northern Mariana Islands,
Benigno M. Sablan, Secretary of Department of Lands and Natural Resources,
Commonwealth of the Northern Mariana Islands,
Bertha T. Camacho, Director, Division of Public Lands, Department of Lands and
Natural Resources, Commonwealth of the Northern Mariana Islands,
and L&T Group of Companies, Ltd., Defendants.

Civil Action No. 95-0390

Memorandum Decision and Order Denying
Motions to Dismiss and for Summary Judgment

November 6, 1995

MANIBUSAN, Judge:

Plaintiffs initiated this action to set aside a commercial lease of public land, contending that the rental rate is unreasonably low, and that the Governor, the Secretary of the Department of Lands and Natural Resources, and the Director of the Division of Public Lands breached their fiduciary duties by entering into the lease. In response, defendants moved to dismiss [pg. 2] the complaint for failure to state a cause of action. Alternatively, defendants asked the court to find that they acted properly by entering into the lease, and are entitled to summary judgment as a matter of law. The court heard these motions on July 26, 1995, and now renders its decision.

I. FACTS

N.M.I. Const. art. XI, § 4 established the Marianas Public Land Corporation ("MPLC") to administer the use and distribution of public lands for the benefit of the Commonwealth residents of Northern Marianas descent. The revenue generated by public lands was to be deposited with

the Marianas Public Land Trust ("MPLT"). N.M.I. Const. art. XI, § 5(g). MPLC was created for a twelve year period, after which time it was to be dissolved and its functions transferred to the executive branch. N.M.I. Const. art. XI, § 4(f); L&T's Memorandum of Law in Support of Motion to Dismiss or in the Alternative, for Summary Judgment at 10. This was achieved in 1994 when, pursuant to Executive Order 94-2, MPLC's functions vested with the office of the Governor, the Secretary of the Department of Lands and Natural Resources and the Director of the Division of Public Lands in the Department of Lands and Natural Resources ("Governor, Secretary, and Director"). Complaint, ¶¶ 23, 24, 30 and 31.

From March 1994 until February 1995, the Governor conducted negotiations with defendant L&T Corporation, culminating in the lease of Lot Nos. 098 D 05 and 098 D 04 ("the site"), consisting of approximately 38,574 square meters in the lower Navy Hill area. Tenorio Declaration ¶ 4 (July 13, 1995). L&T was interested in erecting a commercial complex containing a shopping mall, a supermarket, a food court, a multiplex movie theater, a post office, and an amusement center. L&T's Memorandum of Law in Support of Motion to Dismiss or in Alternative, for Summary Judgment at 2, 3. Defendants posit that in December of 1994, L&T and the government jointly commissioned P&R Enterprises to provide an appraisal of the rental value of the site over a twenty-five year period. Ponciano Declaration ¶ 4 (June 16, 1995). Plaintiffs dispute this, claiming that P&R Enterprises were hired at the sole behest of L&T.

The P&R appraisal set the fair market value of the lease at \$10.8 million. Tenorio Declaration, [pg. 3] ¶ 5. In contrast, plaintiffs maintain that the true value is approximately \$18.8 million (McCart Declaration ¶ 6 (July 18, 1995)) and that this value will never be realized under the existing lease. The terms of the lease allow the lessee to pay the greater of the annual rent or three percent of gross receipts of rental income and three percent of gross receipts of L&T owned businesses and affiliates. Lease, article 5; Tenorio Declaration, ¶ 8. Conversely, defendants argue that plaintiffs' \$18.8 million estimate is inflated, but insist that in any event the lease is reasonable as it will generate \$11.4 million in payments.¹ Further, defendants forecast that the lease will yield direct and indirect revenue of over \$163 million. Defendant L&T's Memorandum in Further Support of Motion to Dismiss or in the Alternative, for Summary Judgment at 4.²

II. ISSUES

A. Whether the complaint is subject to dismissal under Com. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

B. Whether plaintiffs have standing to bring a taxpayer action absent demonstration of special harm.

C. Whether, with regard to the handling of public lands, the Governor, the Secretary of

the Department of Lands and Natural Resources and the Director of the Division of Public Lands are held to a strict standard of fiduciary care or an abuse of discretion standard.

III. ANALYSIS

A. Failure to State a Claim [pg. 4]

In reviewing a motion to dismiss under Com. R. Civ. P. 12(b)(6), the court must accept the factual allegations contained in the nonmoving parties' pleadings. *In re Adoption of Magofna*, 1 N.M.I. 449 (1990). A prima facie claim for breach of fiduciary duty requires a beneficiary to allege that a trust exists and that a fiduciary duty owed to him has been breached. A trust exists where three elements are present: (1) a trustee, (2) a beneficiary and (3) trust property. Restatement (Second) of Trusts § 2(h) (1959); *Romisher v. Marianas Pub. Land Corp.*, 1 CR 841, 848 (Dist. Ct. 1983). Moreover, Restatement (Second) of Trusts §§ 170 and 174 respectively establish that a trustee must administer a trust "solely in the interest of the beneficiary," and, while doing so, must "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." More specifically, comment b to Restatement (Second) of Trusts § 189 states: "In making leases the trustee is under a duty to the beneficiary to exercise such care and skill as a person of ordinary prudence would exercise. *See id.* § 174. Thus, he cannot properly make a lease for an unreasonably low rental or on unreasonable terms."

Here plaintiffs have alleged material points supporting a cause of action for a breach of fiduciary duty. Plaintiffs have alleged the existence of a trust concerning public lands, a fiduciary duty owed by the Governor, the Secretary, and the Director to the plaintiffs as beneficiaries, and the breach of that duty by allegedly leasing public land at a commercially unreasonable rate. Accordingly, defendants' motion to dismiss is denied.

B. Standing

1. *Special Harm*. Defendants claim that plaintiffs lack standing because they have not suffered pecuniary injury or damages distinct from the general public. However, N.M.I. Const. art. X, § 9 eliminates the need for proving unique damage, stating that a "taxpayer may bring an action against the government or one of its instrumentalities for a breach of fiduciary duty."³ [pg. 5] *Mafnas v. Commonwealth*, 2 N.M.I. 248 (1991). In addition, N.M.I. Const. art. X, § 9 simply codified the treatment already granted Commonwealth litigants. *Lizama v. Rios*, 2 CR 568 (Dist.

Ct. 1986); *Romisher, supra*; *Manglona v. Camacho*, 1 CR 820 (Dist. Ct. App. Div. 1983).

2. *Northern Marianas Descent*. Plaintiffs base their breach of fiduciary duty claim upon the theory that the Commonwealth government, initially through MPLC and later through the Governor, the Secretary, and the Director, manages public lands in trust. Thus, standing necessitates that a plaintiff be a beneficiary of the trust. The trust at issue here was established for the benefit of the people of Northern Marianas descent. *Cf.* N.M.I. Const. art. XI, § 1. Plaintiff Rayphand is not of Northern Marianas descent; thus, defendants contend that she lacks standing. The court disagrees. Any proceeds generated from public lands are transferred first to the Marianas Public Lands Trust (“MPLT”), N.M.I. Const. art. XI, § 5(g), and then to the Department of Finance. N.M.I. Const. art. XI, § 6(d). Once at the Department of Finance, the funds are “deposited in a trust account for the health services, to be appropriated by the Legislature for Health Services for the people of the Commonwealth, as required.” 4 CMC § 1803(d). Health service expenditures benefit all residents of the Commonwealth irrespective of whether they are of Northern Marianas descent. Consequently, such services benefit Rayphand. Thus, Rayphand is ultimately a beneficiary of public lands and has standing to bring this action.⁴

C. Duty of Care

N.M.I. Const. art. XI, § 4 established the Marianas Public Land Corporation (“MPLC”) to administer the use and distribution of public lands for the benefit of the people of Northern Marianas descent. The directors of MPLC were expressly bound to “strict standards of fiduciary care.” N.M.I. Const. art. XI, § 4(c). MPLC was created for a twelve year period, after which it was to become defunct and its functions [pg. 6] transferred to the executive branch. N.M.I. Const. art. XI, § 4 (f). In 1994, pursuant to Executive Order 94-2 § 306(a), MPLC was disbanded and its functions vested with the Division of Public Lands in the Department of Lands and Natural Resources, and with the Governor’s office.

The question of the reasonableness of the Lease turns in part upon the standard of care owed by the Governor, the Secretary and the Director. Plaintiffs state that the transfer of MPLC’s functions was intended to be accompanied by a transfer of MPLC’s *duties*, binding its successors to the same strict standard of fiduciary care. Conversely, defendants maintain that given the lack of countervailing statutory or constitutional instruction, the governing standard is that of government officers or officials. Judicial review of government officers is constrained by the necessity of proving an abuse of discretion. Defendants assert that this burden has not been met. Alternatively, defendants maintain that even if a fiduciary standard applies, the Restatement (Second) of Trusts also prohibits judicial review absent a showing of abuse of discretion. Defendants hypothesize that the reason the MPLC directors were held to a stricter standard of

care is that the administration of public lands required greater oversight during the Commonwealth's formative years.

1. *MPLC Standard*. The court, after reviewing relevant case law, particularly *Romisher, supra*, is convinced that the Framers intended the executive branch to be held to the same standard of care regarding the management of public lands as MPLC. In *Romisher*, the court found that the public lands of the Commonwealth were held in trust, observing that “[t]he basic elements of a trust are established in that a trustee, the res and beneficiaries through a trust agreement—in this case the Constitution—are clearly identifiable.” *Id.*, 1 CR at 848 (citing *United States v. Mitchell*, 103A S. Ct. 2961, 2972 (1983)). In addition, *Romisher* held that the directors of MPLC were trustees, using a functional analysis: “MPLC acts in a fiduciary capacity when it performs its functions pursuant to the constitution. It holds and transfers public lands for the [pg. 7] benefit of an identifiable class of people, to wit: persons of Northern Marianas descent.” *Id.*⁵

Applying *Romisher*'s functional critique to the facts at hand, the court concludes that the Governor, the Secretary, and the Director act in a fiduciary capacity regarding the handling of public lands. The Constitution—the de facto trust agreement—designated the MPLC directors as the initial trustees and the executive branch as their successors. Therefore, they are accountable to the same strict standard of fiduciary care, regarding the management of public lands, as were their predecessors. A “strict standard” of fiduciary care is measured against the conduct of a reasonably prudent person in the handling of his own affairs. *Govendo v. Marianas Pub. Land Corp.* 2 N.M.I. 485, 490-91 (1992).

2. *Officers*. The court finds, based solely on their status as government officers, that the Governor, the Secretary and the Director have a fiduciary obligation to the public. As defendants point out, courts will not normally disturb the discretionary decision of a public officer absent a showing of an abuse of discretion, an arbitrary decision, or fraud. *Schreiber v. United States*, 129 F.2d 836 (7th Cir. 1942); *Standard Printing Co. v. Miller*, 199 S.W.2d 199 (Ky. Ct. App. 1947); *Safire v. Atkins*, 288 S.W.2d 441 (Tenn. 1956); *Gunson v. Williams*, 48 N.W.2d 809 (Iowa 1951); *Commonwealth v. Frost*, 172 S.W.2d 995 (Ky. Ct. App. 1943); *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67 (D.C. Pa. 1944); 63A Am. Jur. 2d *Public Officers and Employees* § 309; 67 C.J.S. *Officers* § 196. However, an exception arises where, as here, public property or public funds come [pg. 8] into the hands of a public officer by virtue of her office. In such instances, the officer is held to a strict standard of care and is considered either a bailee, an insurer, or a fiduciary. *Secretary of State v. Hanover Ins. Co.*, 411 P.2d 89, 92 (Or. 1966) (strict liability); *Bonneville County v. Standard Accident Ins. Co. of Detroit, Michigan*, 67 P.2d 904 (Idaho 1937) (bailee); *Village of Hampton v. Gausman*, 286 N.W. 757 (Neb. 1939) (insurer); *Columbia Casualty Co. v. County of Westmoreland*, 74 A.2d 86 (Penn. 1950) (trustee). In a trust situation, the public property is considered trust property, and the officer is bound to the

standard of a trustee. *Chicago Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181, 186 (Ill.1980); *Brewer v. Hawkins*, 455 S.W.2d 864 (Ark.1970); *Columbia Casualty Co. v. County of Westmoreland*, 74 A. 2d 86 (Penn.1950); *Sumter County v. Hurst*, 1 S.E.2d 242 (S.C. 1939); *State v. Broadway*, 93 S.W.2d 1248 (Ark. 1936); *Lamar Tp. v. City of Lamar*, 169 S.W. 12 (Mo. 1914); *Carbon County v. Draper*, 276 P. 667 (Mont. 1929); *Fulton v. City of Lockwood*, 269 S.W.2d 1(Mo. 1954); *State v. Weatherby*, 129 S.W.2d 887 (Mo. 1939). 67 C.J.S. *Officers* § 211.⁶

In the case at bar, we are dealing with a trust comprised of public lands. Hence, the Governor, the Secretary and the Director are held to a fiduciary standard, respecting public lands. *Govendo, supra*, [pg. 9] mandates that a fiduciary dealing with public lands must act as a reasonably prudent person would in the management of his own affairs.

3. *Restatements*. Defendants argue that even if the Governor, the Secretary and the Director are held to a fiduciary standard, the Restatement (Second) of Trusts conditions judicial inquiry upon a showing of an abuse of discretion. This argument fails on two grounds. First, the court turns to the Restatements only in the absence of applicable local law. 7 CMC § 3401. This is not the case here, as our Supreme Court has spoken on the question of fiduciary care. *See, e.g., Torres v. Marianas Pub. Land Corp.*, 3 N.M.I. 484 (1993); *Govendo*, 2 N.M.I. at 490-91 (1992); *Ulloa v. Maratita*, Civ. No. 91-0365 (N.M.I. Super. Ct. July 31, 1995) (Findings of Fact and Conclusions of Law); *Taitano v. South Seas Corp.*, Civ. No. 92-1620 (N.M.I. Super. Ct. Mar. 7, 1994) (Decision and Order on Defendant Marianas Public Land Trust's Motion for Sanctions Against Plaintiff and His Counsel), *modified on other grounds* (N.M.I. Super. Ct. Apr. 8, 1994). The cases on this subject hold trustees to a strict standard of fiduciary care and do not require an abuse of discretion prior to review. However, only *Govendo* sheds any real light on how this standard is to be applied. In *Govendo* the court equates conduct which satisfies a strict standard of fiduciary care with the actions of a reasonably prudent person in the handling of his own affairs.

Second, defendants misconstrue the Restatement (Second) of Trusts: they fail to realize that even if the Restatement applied the outcome would essentially be the same as under local case law. The general rule under the Restatement is that a trustee is bound to exercise reasonable care and skill as judged against the hypothetical man of ordinary prudence dealing with his own property. *Id.* § 174. As defendants observe, where the trustee is exercising a discretionary power, his conduct is not subject to judicial oversight except to prevent an abuse of discretion. *Id.*; *see also id.* § 187. What defendants fail to recognize, however, is the seeming anomaly in the area of lease transactions: "In making leases the trustee is under a duty to the beneficiary to exercise such care and skill as a *person of ordinary prudence would exercise*. *See* Restatement (Second) of Trusts § 174. Thus, he can not properly make a lease for an unreasonably low rental or on unreasonable terms." *Id.* § 189, cmt. b (emphasis added).

This precept appears to be applied across the board. *Band of Pomo Indians, Inc. v. United [pg. 10] States*, 363 F. Supp. 1238 (N.D. Cal.1973) (government, like a private trustee, held to standard of man of ordinary prudence dealing with own property); *Richards v. Midkiff*, 396 P.2d 49 (Ha.1964); *Haesloop v. City Counsel of Charleston*, 115 S.E. 596, 601 (S.C. 1923). Thus, in the context of leasing trust property, there is no measurable difference between the application of the abuse of discretion standard and the application of the reasonably prudent person standard. See, e.g., *Richards, supra*; *Haesloop, supra*; cf. 76 Am. Jur. 2d *Trusts* § 528 (“Prudent person rule generally governs the exercise of discretionary power by a trustee in the matter of investments”). Courts uniformly hold that in preparation to lease or sell trust property, a trustee must attempt to obtain the maximum return, just as an individual would if it were her own property. *Allard v. Pacific Nat. Bank*, 663 P.2d 104 (Wash. 1983); *Ross v. Wilson*, 127 N.E.2d 697 (N.Y. 1955); *Berner v. Equitable Office Bldg. Corp.*, 175 F.2d 218 (2d Cir. 1949); 76 Am. Jur. 2d *Trusts* § 528.

Summary Judgment

The factual issues involved here are complex and open to divergent interpretations. Thus, the court will not to assess the reasonableness of the lease based solely upon the pleadings. Numerous assumptions necessary to evaluate the lease are dependent upon hypothesis and estimates proffered by experts in preparation for litigation. Many of these assumptions are in controversy, such as the value of the lease, the rental revenue it will yield, the value of the capital improvements, and whether P&R was retained at the joint request of L&T and the government. Therefore, as the trier of fact, the court requires a plenary trial to best evaluate the credibility of the evidence and the competency of its source. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172 (1990) (summary judgment necessitates uncontroverted material facts). Accordingly, the court **DENIES** summary judgment in this case.

IV. CONCLUSION

- A. The motion to dismiss is **DENIED**.
- B. Plaintiffs have standing to bring a taxpayer action without demonstrating special harm.
- C. The Governor, the Secretary of the Department of Lands and Natural Resources and the Director of the Division of Public Lands are held to a strict fiduciary standard concerning the treatment of public lands. Compliance with this standard is measured by comparison with the conduct of a reasonably prudent person in the management of his own affairs.

D. Material and genuine issues of fact exist, therefore summary judgment is **DENIED**.