For Publication

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

COCA-COLA **BEVERAGE CO. (MICRONESIA), INC.,** **Plaintiff,** **v.** POLYCARP BASILIUS **dba BLUE LINE TRADING CO.,** **Defendant.**	**CIVIL ACTION NO. 00-245 D** **ORDER GRANTING MOTION TO VACATE**

This matter was last before the Court on December 19, 2006, on Plaintiff Coca-Cola Beverage Co. (Micronesia), Inc.'s motion to vacate this Court's December 1, 2003, judgment entering summary judgment in Plaintiffs motion. Counsel were Michael White for Plaintiff and Joshua Berger for Defendant Polycarp Basilius (d.b.a. Blue Line Trading Co.).

I. BACKGROUND

This case arises out of series of purchases made by Defendant's General Manager from Plaintiff. Plaintiff filed suit in this Court in May 2000, and obtained a default judgment against Defendant. This default judgment was vacated, apparently due to defective service, pursuant to a stipulation entered June 7, 2001. Defendant then filed an answer to the Complaint in this Court (with his proper address and fax number) on September 11, 2001. Plaintiff filed and served requests for admission, to which Defendant did not respond.

On September 30, 2003, Plaintiff filed a motion and notice of motion in this Court for summary judgment against Defendant. Plaintiff separately filed a memorandum and declarations,

which do not appear to have been sent by the Court or received by Defendant. The motion and notice were sent by first class mail to a mailbox in Palau that was listed in the Palau directory as Defendant's business address. This address did not correspond to the one appearing in Defendant's answer, which would have been Defendant's last known address under Com. R. Civ. Pro. 5.

Defendant did not appear at the November 18, 2003 hearing, and filed no opposition. The Court granted Plaintiff summary judgment on the merits of Plaintiffs arguments.

Plaintiff brought suit against Defendant in Palau to collect on the grant of summary judgment of this Court. Defendant moved to dismiss the Palau action, alleging that the grant of summary judgment entered by this Court was void, because the motion for summary judgment had not been properly served on Defendant. Plaintiff chose not to litigate the issue, and on September 20, 2006, the Palau Supreme Court entered an order dismissing the case.

The statute of limitations in Palau bars Plaintiff from bringing a suit on the debts which are the subject of this action. Thus, Plaintiffs only possibility for collecting on the debts is to have this Court's grant of summary judgment vacated. Plaintiff may then properly serve Defendant with the original motion for summary judgment, and re-notice that motion for a hearing.

II. ARGUMENTS AND ANALYSIS

A. Rule 7(b)

Defendant argues that Plaintiff has failed to comply with Civil Rule 7(b), which requires that the motion "shall state with particularity the grounds therefor" and that it be accompanied by "a separate memorandum of reasons, including citation of supporting authorities." Courts have deemed unsupported arguments waived and abandoned.[1] Courts have also refused to allow parties to make such arguments in a rebuttal or reply brief.[2]

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[1] *Middlemist* v. *BDO Seidman*, 958 P.2d 486,495 (Colo. 1997); In *Re Estate Of Lande*, 983 P.2d 308,311 (Mont. *1999): Harrison* v. *State*, 106 N.E.2d 912, 32 A.L.R.2d 875, 889-90 (Ind. 1952); and *Rissler & McMurray v.*

Plaintiff notes that it did file a memorandum, although the memorandum did not raise any issue of law. Plaintiff asserts that the only questions of interpretation of law in this case are those which were raised by Defendant in his opposition to Plaintiffs Motion. Plaintiff also asserts that the summary judgment order entered by this Court is void because the motion for summary judgment was not properly served upon Defendant.

Plaintiff argues that even if he failed to comply with Rule 7(b)(5), denial of the motion is not mandated, but lies within the discretion of the Court.[3] Plaintiff further asserts that denial of his motion for failure to comply with Rule 7(b)(5) would constitute an abuse of the Court's discretion.[4]

Plaintiff distinguishes the cases cited by Defendant as inapplicable, as none relate to Rule 7(b)(5).[5] Most concern dismissal of appeals for egregious violations of the appellate rules.[6]

Sheridan Area Water, 929 P.2d 1228, 1235 (Wyo. 1996); *Ala Moana Boat Owners' Asso. v. Stare*, 434 P.2d 516, 518 (Haw. 1967)—(sloppy brief warranted dismissal of appeal). Plaintiff cites no rule or case law to support its motion); *Shorter* v. *State*, 122 N.E.2d 847, (Ind. 1954); *Levine v. Randolph Corp.*, 188 A.2d 59, (Conn. 1963); *Brownfield* v. *Brownfield*, 249 S.W.2d 389, (Mo. 1952); *Tanuwasa v. City & C'ty of Honolulu*, 626 P.2d 1175,1179 (Haw. 1981); *Osburn* v. *Bendix Home Sys. Inc.*, 613 P.2d 445,448n. I (Okla. 1980); *Bettencourt v. Bettencourt*, 909 P.2d 553,558 (Haw. 1995); *Kusher* v .*Wintererthur Swiss Co.*, 620 F.2d 404,407 (3d Cir. 1980); O' *Brien* v. *Schultz*, 278 P.2d 322, 324 (Wash. 1954) (the penalty for a perfunctory appeal can be a dismissal of the appeal); *Adams* v. *Valley Nat. Bank*, 678 P.2d 525,527-28 (Ariz. 1984).

[2] *Carrillo* v. *State*, 817 P.2d 493 @ 499 (Ariz. 1991); *Hitt* v. *J.B. Coghill, Inc.*, 641 P.2d 211, 213n. 4 (Alaska 1982); In *Re One Bancorp Sec. Lit.*, 134 *F.R.D.* 4, 10 (D. Me. 1991) ("The court does not address [the argument advanced for the first time in plaintiff's reply memorandum] as it should have been raised in [its] first memorandum in support of the motion."); *Takayama* v. *Kaiser Found. Hosp.*, 923 P.2d 903,913-914 (Haw. 1996).

Rebuttal should be confined to matters which contradict new facts offered by the opponent after the movant has finished his presentation in chief and which could not reasonably have been foreseen. *Miller v. Frasure*, 871 P.2d 1302, 1312 (Mont. 1994); *Takayama* v. *Kaiser Found Hosp., supra; Sirotiak v. HC Price Co.*, 758 P.2d 1271,1277-79 (Alaska 1988); *People* v. *Carter*, 312 P.2d 665 (Cal. 1957).

[3] *Phillips* v. *Barron*, 158 Cal. App. 2d 316, 322 P.2d 506 (1958) (failure to file memorandum in support of motion for new trial did not require denial of the motion, despite court rule that failure to file was ground for denial); *Matter of Appeal in Yuma County*, 682 P. 2d 6, 8-9 (1984) (failure to file required memorandum with notice of appeal, although grounds for dismissal of appeal, did not require dismissal; remedy was within court's discretion); *Schwab v. Ames Construction, 207* Ariz. 56, 83 P.3d 56, 59 (2004); and *U.S. v. Hristov*, 396 F.3d 1044, 1046 (9th Cir. 2005). (failure to file a motion containing all information required by law does not constitute absolute bar to the motion).

[4] *See Moss* v. *U.S.*, 5 F. 3d 538, (9th Cir. 1993); *Garcia v. City of Orange*, 928 F.2d 1136 (9th Cir. 1991) (granting of motion to dismiss complaint on ground of plaintiffs failure to file memorandum in opposition was abuse of discretion, notwithstanding rule providing for granting of motion under such circumstances.)

[5] *See Merrill* v. *Merrill*, 449 A. 2d 1120 (Me. 1982) (a trial court's sua sponte grant of relief from a judgment was reversed where neither party had moved for relief).

The Court finds that an insufficient memorandum alone does not warrant dismissal of a motion before a trial court. It is simply a foregone opportunity for a litigant to raise arguments. While Plaintiff's reply memorandum is lengthy, it does not raise issues outside of those raised in Defendant's opposition. Thus, the Court will not strike Plaintiffs arguments.

B. **Motion's Basis in Rule 60(b)(4)**

Plaintiffs motion to vacate or to seek other relief from a judgment appears to be governed by Civil Rule 60(b)(4). Under Subpart (4), a party is entitled to relief from a void judgment.[7] Plaintiff argues that if the judgment is void, the court in fact has no discretion at all; it must rule that the judgment is a nullity, and grant relief from it.[8] Plaintiff suggests that this Court's grant of summary judgment order is void, because Defendant did not receive proper notice of the hearing.

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[6] *Tanuvasa v. City and County of Honolulu*, 626 P. 2d 1175 (Haw. 1981) (failure to include a statement of points relied on, as required by a specific court rule, resulted in dismissal); *Osburn v. Bendix Home Systems, Inc.*, 613 P. 2d 445 (Okla. 1980)(dismissal where no brief at all was filed); *Bettencourt* v. *Bettencourt*, 909 P. 2d 553 (Haw. 1995) (dismissal where the brief exceeded the maximum size permitted by court rule, contained no citations to the record, contained "argument" consisting solely of personal attacks on the trial court judges, and contained no legal or factual analysis whatsoever); *Kusher* v. *Winterthur Swiss Co.*, 620 F. 2d 404 (dismissal for failure to file an appendix as required by court rules); *O'Brien* v. *Schultz*, 278 P. 2d 322 (Wash 1954) (cross-appeal dismissed because no notice of the cross-appeal was ever filed, and no grounds for the cross-appeal were ever specified).

[7] Defendant argues that a judgment is void only if the court lacked jurisdiction over the defendant or subject matter, or acted to deny the losing party its due process rights and the losing party protests. Plaintiff cites *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861,871 (4th Cir. 1999) for this proposition. However, this citation is misleading. The order actually reads: "Although Rule 60(b) offers relief from judgments that are void, "'a judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, **or if it acted in a manner inconsistent with due process of law.**"' (emphasis added) *Schwartz* v. **United** *States*, 976 F.2d 213, 217 (4th Cir.1992) (quoting 11 WRIGHT & MILLER, **FEDERAL** PRACTICE AND PROCEDURE § 2862 at 198-200 (1973))." (emphasis added). Likewise, Defendant's citation of footnote 5 in this case is inaccurate. The case simply stands for the proposition that a motion for relief from judgment based on such things as mistake, inadvertence, or voidness may not serve as a surrogate to a tardy motion to dismiss for failure to state claim. Id at 870-871.

[8] *Thos. P. Gonzales Corp. v. Consejo Nacional de Costa Rica*, 614 F. 2d 1247, 1256 (9th Cir. 1980); *Honneus v. Donovan*, 691 F. 2d 1, 2 (1st Cir. 1982); *Recreational Properties, Inc. v. Southwest Mortgage Service, Inc.*, 804 F. 2d 311,314.

When a judgment is void, the judgment is a nullity, and the district court has a nondiscretionary duty to grant relief. *Dial Corp. v. MG Skinner & Associates*, 180 Fed. Appx. 661, 663-664, 64 Fed. R. Serv. 3d 566 (9th Cir. 2006); *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769,771 (9th Cir. 1986); *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985).

See Winhoven v. United States, 201 F. 2d 174 (9th Cir. 1952) (procedures that deny a meaningful opportunity to participate in litigation render a judgment void, even when personal jurisdiction is not in question).

At the hearing and in his brief, Defendant stressed the fact that neither counsel could uncover a case in which a court had granted Rule 60(b) relief to the winner of a judgment. Plaintiff argues that relief under Rule 60(b)(4) is appropriate, as the language of the rule allows the court to "relieve a party . . . from a final judgment." Plaintiff is "a party" to this lawsuit. Plaintiff cites the history of Rule 60(b) for the proposition that relief is not limited to non-prevailing parties. As originally adopted in 1937, the federal rule read: "On motion the court, upon such terms as are just, may relieve a party . . .from a judgment . . . taken against him." See 12 MOORE'S FEDERAL PRACTICE (3rd Ed.) Sec. 60 App.102[4]. Rule 60(b) was revised in 1946, greatly expanding the grounds upon which relief could be sought. The words "taken against him" were deleted from the Rule. The Rule adopted in 1946 reads substantially as it does today. See also Ayala v. KC Environmental Health, 426 F. Supp. 2d 1070, 1098 (E. D. Cal. 2006) ("Either the moving or the opposing party may seek reconsideration of a summary judgment ruling.").

Finally, Plaintiff notes that before the Supreme Court of Palau, Defendant moved to dismiss the complaint on grounds this Court's Judgment was void? Plaintiff argues that Defendant is legally and ethically bound by the position which he took before the Palau court.

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[9] Defendant made the following claims: "Defendant has filed his . . . motion to dismiss on the basis that the complaint herein fails to state a claim upon which relief may be granted since the judgment is void." Memorandum, p. 1.

"The CNMI court's foreign judgment is void due to plaintiffs failure to have complied with the CNMI Rules of Civil Procedure which require plaintiff to have served [defendant] with the summary judgment motion and supporting documents and the notice of the hearing . . . " Memorandum, p. 1.

Because "Plaintiff failed to serve its summary judgment motion and supporting documents as required by law . . . the . ..judgment is void." Memorandum, p. 1.

"Under the circumstances. . . the judgment is void and may not be enforced. . . " Memorandum, p. 3.

"[P]laintiff had to serve defendant with the motion and other documents in a certain minimum fashion. Plaintiff failed to do so. Therefore, the judgment is void." Memorandum, p. 3.

The Court accepts the position of the Plaintiff in the instant motion (and of the Defendant in the Palau proceeding) that the Court's grant of summary judgment was void due to the Defendant's lack of notice. A void judgment can be vacated at any time upon a party's motion or by the Court. See *Mother's* Restaurant Inc. v. *Krystkiewicz*, 861 A.2d 327,337 (Pa. Super. 2004). ("an individual may seek to strike a void judgment at any time . . even . . . after a trial court has previously denied his/her petition to open the same judgment."); Rinas v. Rinas, 847 So.2d 555, 557 (Fla. App. 5 Dist. 2003). (void judgment was a nullity and could be vacated at any time, even though party did not file appeal within 30 days of the judgment); *Patton* v. *Diemer*, 518 N.E.2d 941 (Ohio St.3d 1988) (authority to vacate a void judgment constitutes an inherent power possessed by Ohio courts).

C. Equitable Considerations

Defendant argues that Plaintiff is not entitled to the relief it seeks on general principles of equity, as Plaintiff caused the judgment to be entered. Defendant argues that Civil Rule 60(b)'s function and rationale are to offer assistance to a party against whom a judgment was entered, and not to the prevailing party. Defendant cites Cano v. Baker, 435 F.3d 1337 (11th Cir. 2006), in which a woman had obtained a declaratory and injunctive judgment against Georgia's abortion laws. She later filed a Rule 60(b) motion to have the judgment vacated. The court explained that Rule 60 is an

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"A judgment rendered without [proper] notice and opportunity [to be heard] having been given is void . . ., for 'due process requires that no other jurisdiction shall give effect . . . to a judgment elsewhere acquired without due process.'" Memorandum, pp. 5-6.

"The judgment is improper and void and may not be enforced in Palau." Memorandum, p. 7.

"Since plaintiff failed to comply with Civil Rule 5's requirements, the CNMI judgment, as a matter of law, cannot be valid." Memorandum, p. 8.

"Since the CNMI judgment was rendered without plaintiff having complied with the CNMI Rules of Civil Procedure also violates due process, it may not be recognized or enforced in Palau." Memorandum, p. 10.

"Plaintiffs failure to comply with the CNMI's civil rules is similar to fraud in procuring the judgment. In that instance, the judgment may not be enforced". Memorandum, p. 10.

"[P]laintiff's failure to [comply with the Rules of Civil Procedure] totally and fatally flaws the judgment". Memorandum, pp. 10-11.

"[D]efendant asserts that the CNMI judgment is void". Memorandum, p. 11.

"[P]laintiff failed to comply with the CNMI Rules of Civil Procedure . . .. [T]hat failure constitutes a violation of [Defendant's) clue process rights. Independently, the CNMI Court denied [Defendant] due process of law . . .. Therefore, this court should dismiss the complaint since the foreign Order granting judgment is void . . .. Memorandum, p. 13.

equitable vehicle and that it grants to the court the equitable power to relieve the losing party of the burden of the judgment. "The equitable purpose of Rule 60(b) cannot be to 'relieve' a party from her own lawsuit in which she had prevailed...." Id. at 1340.

Plaintiff suggests that Cano is irrelevant, because the court did not decline to grant relief on grounds that the plaintiff had been the prevailing party. While the court noted that neither Cano nor the Court had been able to locate any case in which a prevailing litigant had sought relief from a judgment in the litigant's favor, 435 F. 3d at 1339, this observance was made in dicta "prior to discussing the merits of the . . . decision on appeal", id. The Court noted that the phrase to "relieve" a party from a judgment is to ease the burden, wrong or oppression of the judgment, and to prevent its inequitable operation. 435 F. 3d at 1340. However, the Court found nothing burdensome, wrong, or oppressive in the 1970 judgment; nor did it find that the judgment was inequitable in its operation.

Plaintiff argues that unlike Cano, Plaintiff is ultimately the loser of the summary judgment motion. Plaintiff is trapped by an unenforceable judgment because Defendant does not reside here and has no assets in the CNMI with which the judgment can be satisfied.

Defendant argues that in the instant case, Plaintiff had information, weeks before summary judgment was granted, that it had not served its summary judgment documents upon defendant as required by Rule 5. Defendant argues that Plaintiff had a duty to notify the court of its error. Since Plaintiff chose to let the summary judgment be entered, it should not be allowed to complain that the entry of judgment was a mistake or unfair. Abyar *v. Crispin-Reyes*, supra; *Hayden* v. *Grayson*, 134 F.3d 449 at 455n. 9 (1st Cir. 1998).

The Court finds than neither party is particularly in a better equitable position than the other. Defendant disingenuously argues that the resulting improper summary judgment must be upheld,

and that Plaintiff can enforce the judgment in a jurisdiction where Defendant has no assets. Plaintiff improperly served Defendant, and initially made no attempt to alert the Court as to the error. Nevertheless, this is not a situation in which Plaintiff is seeking to vacate an order in order to avoid compliance. Rather, Plaintiff is attempting to litigate a matter that was not properly litigated in the first place.

The Court's preference is to have matters fully litigated on the merits. *Sanford* v. 27-29 W *181st Street Ass'n, Inc.*, 300 A.D.2d 250, (N.Y.S.2d 2002) (there is a preference that disputes be resolved on their merits); *Millar* v. Bay Area Rapid Transit Dist., 236 F.Supp.2d 1110 (N.D. Cal. 2002); *Hritz* v. Woma Corp., 732 F.2d 1178 (3rd Cir. 1984) (court's ovemding preference is the disposition of litigated matters on the merits rather than by default). Since neither party has acted entirely fairly, the Court reasons that the better solution is to re-open the case and allow for a more fully-informed decision.

D. **Timeliness**

Defendant argues that the motion was not "made within a reasonable" time.[10] Plaintiff notes that the Order of the Palau Court dismissing the case was entered on September 20, 2006. Plaintiff filed this Motion on October 21, 2006, barely a month later. Plaintiff notes that there is in fact no time limit of any kind on a motion under Rule 60(b)(4).[11]

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[10] Various shorter delays have been found unreasonable: two months—*McCullough* v. Walker Livestock, 220 F. Supp. 790, 796-97 (W.D. Ark. 1963); six weeks after an amended judgment and two years after the original judgment, which had been subject to challenge even then on the same grounds as the party finally relied in its Rule 60(b) motion, was too long—Moolenaar v. Government Of Virgin Islands, 822 F.2d 1342, 1348 (3rd Cir. 1987); three months—*Sec. Mut. Cas.* Co. v. Century Cas. Co., 621 F.2d 1062, 1068 (10th Cir. 1980); eight months—*Cobos v.* Adephi *Univ.*, 179 F.R.D. 381, 387 (E.D.N.Y. 1998).

[11] *Meadows* v. Dominican *Republic*, 817 F. 2d 517, 521 (9th Cir. 1987) ("There is no time limit on a Rule 60(b)(4) motion to set aside a judgment as void); *Sea-Land Service, Inc.* v. *Ceramica* Europa *II, Inc.*, 160 F. 3rd 849, 852 (1st Cir. 1998); Carter v. Fenner, 136 F. 3rd 1000, 1006 (5th Cir. 1998) (there is no time limit for an attack on a judgment that is void).

It is clear to the Court why Plaintiff did not bring his motion sooner: there was no reason to vacate the judgment until Plaintiff learned it was unenforceable in Palau. The Court takes notice, however, that there was more than one occasion in which Plaintiff agreed not to pursue his case in Palau due to a problem with service. Plaintiff might have anticipated the need to vacate this court's order sooner. At the same time, Defendant has not lost anything by the delay; he has avoided paying the sum he allegedly owes. The Court will not strike the motion for untimeliness.

E. **Costs**

Rule 60(b) allows the court to vacate a judgment "upon such terms as are just." Defendant suggests that this language means that movant will be required to pay the opponent's attorney fees and costs incurred in resisting the motion or otherwise in the case. This is the rule throughout the courts of the United States.[12]

Plaintiff argues that Defendant necessitated this motion by claiming before the Palau court that this Court's Judgment was void for lack of due process. Defendant now argues the opposite point of view—that the summary judgment order was not void. Plaintiff argues that any attorney's fees which Defendant has incurred in opposing this motion are due to his own inconsistent positions, and should not be chargeable to Plaintiff.

The Court finds that neither party has clean hands; each shall bear its own costs.

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[12] E.g., *Walpex Tr. Co.* **v.** ***Yacimientos Petro.*****, 109 F.R.D.692, 698 (S.D.N.Y.1986);** *Nilsso.* **v.** ***Louisiana Hydro.*****, 854 F.2d 1538, 1546-47 (9th Cir. 1988);** ***Gerlach*** **v.** ***Michigan Bell Tel.*****, 448 F. Supp. 1168, 1174** (E.D. Mich. 1978); *Leab v. Streit*, 584 **F. Supp. 748 @ 762 (S.D.N.Y.1984);** ***In Re Arthur Treacher's Fran. Lit.*****, 92** ***F.R.D.*** **398, 418-9** (E.D. Penn. 1981); *Thorpe* **v.** ***Thorpe*****, 364** F.2d **692** (D.C. **Cir. 1966);** *Gatefield Corp.* **v. Gwinnett** *County*, **507** S.E.2d **164,166** (Ga. 1998); Anno., **Propriety** Of **Conditions Imposed In Granting Relief From Judgment Under Rule Of Civil Procedure** 60(b), **3 A.L.R.Fed. 956 (1970).**

CONCLUSION

Plaintiff's motion is GRANTED. The December 11, 2003 grant of summary judgment in favor of Plaintiff is VACATED. Plaintiff is ordered to re-notice a hearing on the issue of summary judgment and serve Defendant with all necessary documents at his last known address.

SO ORDERED this 3 day of ~~December~~ January 2006.

JUAN T. LIZAMA, Associate Judge