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SUPERIOR COURT
N.M.I.

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

9)	Civil Action No. 90-828
10	LUCKY DEVELOPMENT CO., LTD.)	
11	Plaintiff,)	
12	v.)	DECISION AND ORDER ON REMAND
13	TOKAI, U.S.A., INC., <u>et al.</u>)	OF APPEAL NO. 91-023
14	Defendants,)	
15	and)	
16	THEODORE R. MITCHELL,)	
17	Respondent.)	

On September 18, 1991, this Court issued an order suspending attorney Theodore R. Mitchell, plaintiff's former counsel, from practicing before it for two months. Mr. Mitchell appealed, and the Supreme Court reversed the suspension with instructions for further proceedings in this Court to assess whether Mr. Mitchell should be found in criminal contempt. See *Lucky Development Co., Ltd. v. Tokai U.S.A., Inc.*, slip op., (N.M.I. Dec. 23, 1992).

FOR PUBLICATION

1 I. PROCEDURAL HISTORY

2 A. SUPERIOR COURT

3 The underlying lawsuit in this case was dismissed on
4 Defendant's motion for summary judgment, granted by Order dated
5 July 3, 1991 (*hereinafter* "July 3 Order"). In the July 3 Order,
6 the Court made two factual findings regarding Mr. Mitchell's
7 conduct during the course of the litigation. First, the Court
8 found that Lucky Development's amended complaint, drafted by Mr.
9 Mitchell, was not supported by existing law or by a good faith
10 argument for modification of existing law. July 3 Order at 17.
11 Second, the Court found that Mr. Mitchell "abused the processes of
12 this Court" by filing motions for transfer and recusal of the case
13 "in order to prolong the inevitable result in this matter." *Id.*
14 Accordingly, the Court issued an order to show cause why sanctions
15 should not be assessed based upon both Com.R.Civ.P. 11 and the
16 Court's "inherent power." It proposed sanctions ordering Mr.
17 Mitchell to pay defendants' attorneys' fees and to reimburse his
18 own client's fees in the case. *Id.*

19 The Court held a hearing on the order to show cause on July
20 31, 1991 (*hereinafter* "July 31 Hearing"). At that hearing, Mr.
21 Mitchell made the following statements to the Court:

22 Kill me, stifle me, do whatever you like in this case.
23 the purpose of Rule 11 is deterrence. I must tell you
24 now. If I sound like an unrepentant criminal I'm sorry.
25 If I had it to do again, I would have no choice out of
26 my sense of duty to my client, but to file this
27 complaint. You will not deter me with four hundred
28 twenty thousand or five hundred seventy-one thousand.
You will ruin me! And these lawyers right here sitting
at this table with a crowd of others will take your
decision and take it to the Northern Marianas Bar or
take it to Judge Hefner before he leaves the bench and
they'll proceed to disbar me because you've convicted me
of fraud. And of massive malpractice. Either you or
the Commonwealth Supreme Court. The Ninth Circuit and

1 the United States Supreme Court will decide whether that
2 is true or false.

3 Transcript of Proceedings, July 31, 1991, at 42:20-43:7.
4 Following this hearing, the Court issued Rule 11 sanctions against
5 Mr. Mitchell for the filing of the amended complaint and the
6 motions to recuse the trial judge. *Lucky Development v. Tokai*,
7 No. 90-828, slip op. at 24-26 (Super. Ct., Aug. 19, 1991). Mr.
8 Mitchell was ordered to pay attorneys' fees incurred by defendants
9 in answering the amended complaint. The Court declined to order
10 the reimbursement of Mr. Mitchell's own fees; instead, it ordered
11 further briefing on whether he should be suspended from practice
12 as a result both of his conduct during the litigation and of his
13 statements at the July 31 Hearing. *Id.* at 28-29.

14 While this sanctions inquiry was underway, Mr. Mitchell filed
15 two more motions for recusal of the trial judge. The first, filed
16 on behalf of plaintiff Lucky Development on July 30, 1991, was
17 denied from the bench on August 21, 1991. The Court again noted
18 that the motion was "frivolous and filed in bad faith."
19 Transcript of Proceedings, August 21, 1991, at 15:18-19. Mr.
20 Mitchell then filed in his own name another motion for recusal of
21 the trial judge -- the fourth since the litigation began -- on
22 August 28, 1991. The motion was denied by written decision on
23 September 18, 1991, and Rule 11 sanctions of \$2000, payable to the
24 Clerk of Court, were imposed on Mr. Mitchell. In explaining the
25 sanction, The Court declared itself "astonished" that:

26 Mr. Mitchell still continues to file motions with this
27 Court for bad faith purposes, and without a proper
28 inquiry into their factual and legal foundations. The
Court has already given Mr. Mitchell adequate warning
about filing pleadings with this Court in bad faith.

1 *Order Denying Motion to Vacate Transfer and Motion for Recusal of*
2 *Law Clerk and This Court*, slip op. at 13 (Super. Ct., Sept. 18,
3 1991).

4 Finally, on September 18, 1991, the Court issued an order
5 suspending Mr. Mitchell from practice before it for two months and
6 requiring him to take the Multistate Professional Responsibility
7 Examination on November 15, 1991. *See Order Suspending Attorney*
8 *Theodore R. Mitchell from Practicing Before the Commonwealth*
9 *Superior Court*, slip op. at 16 (September 18, 1991). This
10 sanction was legally premised on the Court's "inherent power," *Id.*
11 at 11, and was factually based on: Mr. Mitchell's filing of the
12 amended complaint; his repeated filing of bad-faith motions for
13 recusal; and for "his statement of prospective defiance" during
14 the July 31 Hearing. *Id.*

16 B. SUPREME COURT

17 On appeal, the C.N.M.I. Supreme Court reversed all of the
18 sanctions. First, it reversed the order suspending Mr. Mitchell
19 from practicing before the Superior Court. The Supreme Court
20 found it unclear whether the suspension was based on Mr.
21 Mitchell's filing of the amended complaint, on the motions for
22 recusal, on Mr. Mitchell's statements at the July 31 Hearing, or
23 on all of the above. *Lucky Development v. Tokai, supra*, slip op.
24 at 12. On this record, the Supreme Court found that the
25 suspension sanction was used neither "to coerce compliance with a
26 court order [nor] to compensate a complainant for losses
27 sustained," *Id.* (citing *Commonwealth v. Borja*, No. 91-010, slip
28 op. at 6 (N.M.I. June 15, 1992)), and therefore could not have

1 been a finding of civil contempt based on the Superior Court's
2 "inherent power." *Id.* at 12-13.

3 Rather, the Supreme Court held that the Superior Court must
4 have been imposing sanctions for criminal contempt, which are
5 "unconditional and are intended to punish the contemnor and
6 vindicate the authority of the court." *Id.* at 13. The Court
7 pointed out that neither the procedures followed nor the
8 punishment imposed by the Superior Court were appropriate for an
9 exercise of criminal contempt. Therefore, the Supreme Court
10 remanded this portion of the case with the direction that this
11 Court apply the laws of criminal contempt to Mr. Mitchell's
12 conduct.

13 The Supreme Court also reversed the Rule 11 sanctions
14 ordering Mr. Mitchell to pay Defendants' attorneys' fees. The
15 Supreme Court based this reversal on a finding that it was "not
16 convinced" that the amended complaint was frivolous or that the
17 first two motions for disqualification of the trial judge were
18 made for an improper purpose.^{1/} The Court vacated this part of
19 the sanctions award.

20 Finally, the Supreme Court reversed and vacated this Court's
21 Rule 11 sanction of \$2000 arising from Mr. Mitchell's filing of
22 the third and fourth motions for recusal. While the Supreme Court
23 agreed that "such motions were being filed for a bad faith
24 purpose," *Id.* at 18, it found that this Court abused its
25

26 ^{1/} *Id.* at 16-17. The *Lucky* opinion did not state that
27 Superior Court had abused its discretion in holding otherwise.
28 However, given that "abuse of discretion" is the applicable
standard of review (see *Commonwealth v. Borja*, slip op. at 5
(N.M.I., June 15, 1992)), this Court will interpret the Supreme
Court's opinion as having so held.

1 discretion in not providing Mr. Mitchell with notice and an
2 opportunity to respond prior to issuing this sanction. *Id.* at 19.

3
4 **II. ISSUE**

5 The factual background and procedural posture of this case
6 give rise to three issues. First, what acts by Mr. Mitchell are
7 within the scope of this remand? Second, do these acts warrant
8 further proceedings for criminal contempt pursuant to 6 CMC § 3307
9 and Com. R. Crim. P. 42? Third, what is the scope of the Court's
10 "inherent power" to issue civil sanctions in light of the Supreme
11 Court's ruling in this case?^{2/}

12
13 **III. ANALYSIS**

14 **A. CONDUCT WITHIN THE SCOPE OF THIS REMAND**

15 Given that the Supreme Court remanded only one of this
16 Court's sanctions orders and vacated all the others, this Court
17 cannot, on remand, premise further action on all of the conduct
18 originally held to be sanctionable. Thus, this Court must
19 determine which of Mr. Mitchell's acts are properly before it
20 before deciding whether these acts warrant criminal contempt
21 proceedings.

22 Clearly, the filing of the amended complaint and the first
23 two motions for recusal are no longer at issue, because the
24 Supreme Court has ruled that these papers were neither frivolous
25 nor filed for an improper purpose. *Lucky, supra*, slip op. at 16-
26 17. Conversely, Mr. Mitchell's statements at the July 31 Hearing
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28 ^{2/} The Court's reasons for reaching this third issue are
discussed in Part III(C), *infra*.

1 clearly do fall within the scope of the remand, given that the
2 Supreme Court did not rule on the propriety of these statements.
3 *Id.* at 11-13; see *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th
4 Cir. 1985), *cert. den.*, 476 U.S. 1169 (trial court is free to
5 address on remand those issues not disposed of on appeal).

6 As for Mr. Mitchell's conduct in filing his third and fourth
7 motions for recusal, the Supreme Court explicitly found that "the
8 trial court judge correctly concluded that such motions were being
9 filed for bad faith purposes." *Lucky, supra*, slip op. at 18.
10 However, the Supreme Court also reversed and vacated this Court's
11 sanctions based on this conduct, without remanding for any further
12 proceedings here. *Id.* This ruling requires that Mr. Mitchell's
13 filing of his third and fourth recusal motions not be considered
14 on remand. See *Loren v. E'Saipan Motors, Inc.*, No. 89-006, slip
15 op. at 5 (N.M.I. April 16, 1990) (lower court has no power on
16 remand except to comply strictly with the mandate of the Supreme
17 Court); *Rutherford v. U.S.*, 806 F.2d 1455, 1462 (10th Cir. 1986)
18 (a trial court cannot give other or further relief beyond that
19 which has been remanded).

20 This Court therefore holds that Mr. Mitchell's in-court
21 statement at the July 31 hearing constitutes the only conduct
22 which may form the basis for criminal contempt proceedings on
23 remand.

24 25 B. CRIMINAL CONTEMPT

26 Title 6 CMC Section 3307 provides:

27 Every person who unlawfully, knowingly, and willfully
28 interferes directly with the operation and function of
a court, by open defiance of an order, in or near the
courtroom; or by disturbing the peace in or near the

1 courtroom; or by speaking or writing in such a manner as
2 to intimate that the court is unfair or corrupt [...] is
3 guilty of criminal contempt and upon conviction thereof
4 may be imprisoned for a period of not more than six
5 months, or be fined not more than \$100, or both.

6 The fact of willfulness, along with all other elements of the
7 charge, must be proven beyond a reasonable doubt. *Commonwealth v.*
8 *Borja*, No. 91-010, slip op. at 10 (N.M.I. June 15, 1992).

9 Moreover, when the statute is invoked to punish a contemnor
10 for defiance of a court order, this Court has required that the
11 order be explicit. *In Re Matter of Tower*, No. 92-184, slip op. at
12 9-10 (Super. Ct., May 10, 1993). Here, as originally noted by
13 this Court,^{3/} Mr. Mitchell's statement at the July 31 Hearing is
14 one of prospective, not actual defiance. His comments were thus
15 analogous to the offending conduct in *In Re McConnell*, 370 U.S.
16 321, 82 S. Ct. 1288, 1292 (1962). In *McConnell*, an attorney was
17 ordered to stop a particular line of questioning. He responded:
18 "we have a right to ask the questions, and we propose to do so
19 unless some bailiff stops us." 82 S. Ct. at 1292. The trial
20 court found the attorney in contempt under the summary procedure
21 of Fed. R. Crim. P. 42(a). The United States Supreme Court
22 reversed; because the trial court had recessed immediately after
23 the attorney's statement and the defendant did not later attempt
24 to ask the prohibited questions, the Supreme Court found no
25 violation of an order or "obstruction of justice" as required by
26 the federal contempt statute.^{4/}

26 ^{3/} See *Order Suspending Attorney Theodore R. Mitchell from*
27 *Practicing Before the Commonwealth Superior Court*, slip op. at 11
(Super. Ct., Sept. 18, 1991)

28 ^{4/} See 18 U.S.C. § 401. The federal contempt statute sweeps
more broadly than its Commonwealth counterpart; while 6 CMC § 3307
(continued...)

1 Here, no matter how shocking Mr. Mitchell's statement of
2 defiance was and is, it violated no express, pre-existing order of
3 this Court. The "open defiance of an order" language of 6 CMC §
4 3307 therefore cannot apply to his conduct.^{4/}

5 The question remains whether Mr. Mitchell either "disturbed
6 the peace" or spoke "in such a manner as to intimate that the
7 Court is unfair or corrupt." 6 CMC § 3307. Here, the record
8 discloses that Mr. Mitchell's July 31 statement may have provoked
9 some applause. See Transcript of Proceedings, July 31, 1991, at
10 43:8 (The Court: "No clapping of hands please"). However, this
11 response can hardly be termed disturbing the peace. Likewise, Mr.
12 Mitchell did not accuse the Court of unfairness or corruption at
13 the July 31 hearing; his comments were focused on his own
14 intention of violating court rules, not the impropriety of the
15 court or the rules themselves. To consider Mr. Mitchell's
16 statement that this Court would "kill," "stifle" or "ruin" him
17 contumacious per se would upset the balance between judicial
18 integrity and vigorous advocacy. *McConnell, supra*, 82 S. Ct. at
19 1292; see also *Phelan v. People of Guam*, 394 F.2d 293, 294 (9th
20

21 ^{4/}(...continued)
22 punishes only "disturbing the peace in or near the courtroom," 18
23 U.S.C. § 401 punishes "misbehavior of any person in [the court's]
24 presence or so near thereto as to obstruct the administration of
25 justice."

26 ^{5/} In contrast, where a contemnor's threat to violate a court
27 order is followed by actual defiance, one court has upheld a
28 contempt conviction based on the threat. See *U.S. v. Baldwin*, 770
F.2d 1550, 1552 (11th Cir. 1985), cert. den., 475 U.S. 1120
(attorney's contumacious statement that he would not appear at
trial "ratified" by actual non-appearance). Here, Mr. Mitchell
likewise made good on his July 31, 1991 threat to file frivolous
pleadings by filing his fourth motion for recusal on August 28,
1991. However, that filing is not within the scope of this remand
(see Part III(A), *supra*) and cannot be considered here.

1 Cir. 1968) (attorney's statement before jury that he was being
2 foreclosed from legitimate cross-examination not contumacious).

3 In sum, this Court originally found Mr. Mitchell's statement
4 at the July 31 Hearing to be sanctionable because it was
5 emblematic of a larger course of improper conduct.^{6/} However, the
6 Supreme Court has determined that Mr. Mitchell's other conduct is
7 outside the scope of this remand. As a result, this Court is
8 constrained to hold that Mr. Mitchell's statement at the July 31
9 Hearing, taken alone, does not warrant initiating criminal
10 contempt proceedings.

11 12 C. THE SCOPE OF THIS COURT'S INHERENT POWER

13 The Superior Court has the duty of fairly and consistently
14 enforcing the rules of attorney conduct and protecting the
15 integrity of the judiciary on a day-to-day basis. Accordingly,
16 this Court is compelled to express its uncertainty, in light of
17 the Supreme Court's decision here, as to the scope of a court's
18 "inherent power" to issue sanctions "not specifically addressed by
19 rule." *Tenorio v. Superior Court*, No. 89-002, slip op. at 14
20 (N.M.I., March 19, 1990) (citing *In Re Villanueva*, 1 CR 952
21 (D.N.M.I. App. Div., 1984)).

22 On appeal in this case, the C.N.M.I. Supreme Court declared
23 that the inherent power can only be used "either to coerce
24 compliance with a court order or to compensate a complainant for
25 losses sustained." *Lucky, supra*, slip op. at 12 (citing

26
27 ^{6/} See, e.g., *In Re Chaplain*, 621 F.2d 1272, 1276 (4th Cir.
28 1980) (single episode of contumacious conduct can justify summary
contempt procedure when preceded by pattern of disruptive conduct
and advance warning from court that such conduct risked contempt
charge).

1 *Commonwealth v. Borja*, *supra*, slip op. at 8). Under this
2 formulation, a court can impose unconditional, punitive sanctions
3 only under either Rule 11 or the statutory powers of criminal
4 contempt; it cannot impose such sanctions under its inherent
5 power.²¹

6 However, elsewhere in *Borja*, the Supreme Court expressed a
7 much more expansive view of a court's inherent power, defined as
8 that power which is "necessary to the exercise of all the others."
9 *Id.* at 12 (citations omitted). According to the *Borja* opinion,
10 the inherent power of the court, though civil in nature, empowers
11 it to impose unconditional penalties, payable to the government.
12 *Id.* at 12-13. Moreover, *Borja* cites *Zambrano v. City of Tustin*,
13 885 F.2d 1473, (9th Cir. 1989), as exemplifying a court's exercise
14 of inherent powers; *Zambrano*, too, involved unconditional
15 sanctions payable to the court. 885 F.2d at 1476. The *Borja*
16 opinion further underscored courts' authority to impose
17 unconditional sanctions as punishment under either its criminal
18 contempt power or its inherent power, as circumstances warrant:

19 ...for criminal contempt, our only criminal statute is
20 6 CMC §3307, leviable under Rule 42, Com.R.Crim.P., with
21 a maximum penalty of six months imprisonment and/or
22 \$100. We hasten to note [...] that our courts may
alternatively sanction for non-criminal contempt of
court through the exercise of its [sic] inherent powers.

23 ²¹ Such a restricted definition of "inherent power" poses
24 practical problems where an attorney's conduct, though improper,
25 does not fit neatly within these two categories. As shown above,
26 6 CMC § 3307 reaches only a relatively narrow range of attorney
27 conduct. Likewise, Rule 11 is limited to attorney misconduct in
28 filing papers with the court. Indeed, the United States Supreme
Court recently approved a much broader definition of inherent
powers in *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123, 2134 (1991),
on the grounds that, while contempt statutes and Rule 11 reach
"only certain individuals or conduct, the inherent power extends
to a full range of litigation abuses." See also *Roadway Express,*
Inc. v. Piper, 447 U.S. 752 (1980).

1 Such civil contempt sanctions are not constrained by the
2 maximum punishment allowed for criminal contempt under
3 6 CMC §3307 (emphasis added).

3 *Borja, supra*, slip op. at 7, note 8; accord, *Chambers v. Nasco,*
4 *Inc.*, 111 S. Ct. 2123, 2134 (1991); *Roadway Express, Inc. v.*
5 *Piper*, 447 U.S. 752 (1980).

6 The *Lucky* opinion omitted any discussion of *Borja's* "inherent
7 powers" analysis. If the courts of the Commonwealth are now
8 indeed restricted to *Lucky's* narrowed definition of their inherent
9 power, then our Supreme Court has implicitly overruled *Borja* while
10 explicitly reaffirming it. However, this Court cannot not simply
11 infer that the "inherent power" analysis of *Borja* is no longer
12 good law; it is for the Supreme Court to say so explicitly. See,
13 e.g., *Cole v. Cole*,, 51 S.E.2d 491 (N.C. 1949) (subsequent
14 decision cannot, by mere implication, overrule prior case unless
15 inference is clear and compelling); *New Amsterdam Cas. Co. v. Nat.*
16 *Union Fire Ins. Co.*, 194 N.E. 745 (N.Y. App. 1935) (intention to
17 overrule former precedent should be expressed in plain and
18 explicit terms).

19 Moreover, *Lucky's* definition of inherent power calls into
20 question this Court's ability to initiate even criminal contempt
21 proceedings without violating the constitutional separation of
22 powers. *Lucky* stated that "the source of power for criminal
23 contempt is not the court's inherent powers," but rather
24 "Commonwealth law and our court rules." *Lucky, supra*, slip op. at
25 13. However, there is a conflict between applicable Commonwealth
26 law and court rules conflict on the question of whether a court
27 may initiate contempt proceedings sua sponte, or whether it must
28 refer the matter to the Attorney General for prosecution.

1 According to the C.N.M.I. Constitution, Art. III, § 11, the
2 Attorney General's office "shall be responsible for [...]
3 prosecuting violations of Commonwealth law." Rule 42, on the
4 other hand, allows the court to proceed summarily "if the judge
5 certifies that he saw or heard the conduct constituting contempt"
6 (Rule 42(a)), or alternatively to appoint private counsel for the
7 prosecution of the offense upon notice and hearing (Rule 42(b)).

8 The United States Supreme Court has fully addressed the
9 analogous conflict between Fed. R. Crim. P. 42 and the United
10 States Constitution's separation of powers. *Young v. U.S. Ex Rel.*
11 *Vuitton et Fils, S.A.*, 481 U.S. 787, 795-6, 107 S. Ct. 2124, 2131
12 (1987). *Young* held that the inherent power justifies a court's
13 sua sponte initiation of criminal contempt proceedings without
14 referring them to the executive branch for prosecution. *Id.* See
15 also *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450, 31 S.
16 Ct. 492, 501 (1911) (courts cannot be at the mercy of another
17 branch in deciding whether contempt proceedings are to be
18 initiated, lest they become "mere boards of arbitration whose
19 judgments and decrees would be only advisory"). However, if
20 under *Lucky* this Court has only statutory authority to punish
21 criminal contempt, the "inherent power" rationale applied in *Young*
22 and *Gompers* cannot save Rule 42 from constitutional attack.^{8/}

23 The matters raised here are not merely of academic interest;
24 judges and attorneys need to have a clear idea of the scope of the
25 court's power to enforce its rules and the range of punishments

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27 ^{8/} Having determined that Mr. Mitchell's conduct as defined
28 by this remand does not warrant criminal sanctions, this Court
does not here decide whether *Lucky* requires it on Constitutional
grounds to forward all contempt prosecutions to the Attorney
General.

1 which may be imposed in particular circumstances. This Court
2 invites the Supreme Court to clarify these issues in the near
3 future.

4
5 IV. CONCLUSION

6 This Court does not in any way condone or approve the
7 statements Mr. Mitchell made at the July 31 Hearing. Indeed, this
8 Court reaffirms the view expressed in its original *Order Issuing*
9 *Sanctions*: "[a]ny attorney who could make such a shocking
10 admission obviously has lost sight of the responsibilities
11 inherent in being an officer of this Court." Slip op. at 29
12 (August 19, 1991). Nevertheless, this Court is constrained to
13 view Mr. Mitchell's statement standing alone and can only apply
14 the statutory powers of criminal contempt. For these reasons,
15 this Court cannot impose criminal sanctions for his conduct. The
16 Court hereby DISMISSES this action against Attorney Theodore R.
17 Mitchell.

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19 So ORDERED this 20th day of August, 1993.

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22 ALEXANDRO C. CASTRO, Presiding Judge
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