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

KEVIN INTERNATIONAL CORPORATION,
Plaintiff-Petitioner,

v.

SUPERIOR COURT OF THE NORTHERN MARIANA ISLANDS,
Respondent,

HYUNJIN SAIPAN, INC.,
Defendant-Real Party in Interest

Supreme Court Original Action No. 06-001
Civil Action No. 06-003E

FOR PUBLICATION

Cite as*: Kevin Int'l Corp. v. Superior Court*, 2006 MP 03

ORDER DENYING PETITION FOR EMERGENCY WRIT OF MANDAMUS OR PROHIBITION

¶ 1 Kevin International Corporation petitions this Court to issue a writ of mandamus and/or a writ of prohibition to the Superior Court.[1] We deny the petition.

[1] From the language of the petition, it is unclear what Petitioner is actually requesting. We believe Petitioner wants this Court to order the trial court to grant a preliminary injunction.

I. Facts

¶ 2 On February 10, 2000, Tony C.P. Ng ("Ng"), President of New Saipan Development, Inc., wrote a letter to Jin Sik Lee ("Lee"), General Manager of Hyunjin Saipan, Inc. ("Hyunjin") proposing to finance and build employee barracks in Gualo Rai to house Hyunjin's employees. New Saipan Development Inc. later became Kevin International Corporation ("Kevin"). In return for Kevin's proposal, Hyunjin agreed to lease the Gualo Rai property from Marianas Management Company for the site of the employee barracks as well as pay Kevin $80 per person per month. On February 17, 2000, Lee wrote a letter to Ng accepting the proposal.

¶ 3 The period of time the contract covers is in dispute.[2] The letter accepting the proposal refers to a period of "no less than five years." Ng maintains that Lee orally agreed to seven years. This issue has yet to be resolved by the trial court.

¶ 4 Construction of the employee barracks began in early 2001 and was completed in October 2001.[3] Hyunjin moved into the facility in November 2001 and began making monthly payments to Kevin. The monthly rental payments were $29, 292.00. Hyunjin made timely payments to Kevin from November 2001 until October 2005.

¶ 5 In November 2005, Hyunjin made an untimely payment to Kevin. Thereafter, they did not pay rent for December 2005, January 2006 and February 2006. The halt in rent payments coincided with an announcement by Hyunjin that they would be shutting down their business operations on Saipan on February 10, 2006.

¶ 6 On January 5, 2006, Kevin filed a complaint against Hyunjin for a temporary restraining order preventing Hyunjin from removing any merchandise or equipment and preventing removal of any property from the Commonwealth; for anticipatory breach of contract; damages for lost rent;

[2] Indeed, the existence of the contract is also still in dispute at the trial court level.

[3] The monthly rent was reduced by $5000 to pay back the sum of $200,000 that Hyunjin loaned Kevin to initially begin the project.

attorney's fees, costs and other relief. Kevin also filed an ex parte motion for temporary restraining order. In the complaint, Kevin seeks money damages. The next day, on January 6, the trial court granted Kevin's request for a temporary restraining order, enjoining Hyunjin from removing any personal property from the Gualo Rai factory. On February 9, the trial court heard arguments on whether a preliminary injunction should be issued against Hyunjin for removing the equipment and property out of the Commonwealth. On February 21, the trial court denied the Motion for a Preliminary Injunction.

¶ 7 This petition was filed on February 23, 2006. On that same day, Kevin filed with the trial court a Motion a Stay of the Denial of Preliminary Injunction pending appellate review. Kevin also filed a Motion to Shorten Time for the Motion to Stay the trial court's Denial of the Preliminary Injunction. Finally, Kevin filed an appeal of the Denial with this Court.

¶ 8 The trial court granted Kevin's Motion to Shorten Time to hear the Motion to Stay the Denial of the Preliminary Injunction. The hearing was set for March 1, 2006. The court also set a bench trial for the matter on the same day.

¶ 9 As this Court entertained the current petition, the trial court and the parties went forward with the hearing. On March 1, 2006, the trial court denied Kevin's motion to stay. The trial date was vacated as Kevin filed a new Motion to Disqualify Defendant's Counsel. Thus, the merits of this case have yet to be decided.

¶ 10 On February 28, this Court ordered the a response from the parties involved. A response was filed by Hyunjin on March 3. A reply by Kevin was untimely filed.[4] Finally, on March 7, 2006, Kevin filed a Motion for Emergency Stay Pending Appeal and Final Judgment with this Court.[5]

II. Jurisdiction

[4] The untimely Reply will not be considered by this Court.

[5] This Motion shall be dealt with separately. It involves the appeal filed by Kevin rather than the petition for the writ.

¶ 11 We have the power to issue extraordinary writs under 1 CMC § 3102(b). Article IV, Section 3 of the Commonwealth Constitution also confers the Supreme Court with the "power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth."

III. Analysis

A. Writs

1. Generally

¶ 12 Numerous CNMI cases have addressed the issuance of a writ. The most often cited case is *Tenorio v. Superior Court, et a.*, 1 N.M.I. 1 (1989). In *Tenorio*, this Court held that, "[t]raditionally, the use of the aid of appellate jurisdiction has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id* at 7. This Court has repeatedly noted that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations" and "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary writ." *Id*.

2. Writs and Preliminary Injunction

¶ 13 Commonwealth Rule of Civil Procedure 65 permits the Superior Court to issue preliminary injunction using its sound discretion. *Villanueva v. Tinian Shipping and Transp. Inc*., 2005 MP 12. Mandamus is generally not appropriate to dictate how the lower court should exercise its sound discretion. Therefore, while we may consider mandamus in this case, the discretionary nature of a preliminary injunction places a higher burden on a petitioner seeking a writ of mandamus or prohibition.

B. Tenorio Factors

¶ 14 In determining whether to issue writs of mandamus or prohibition[6], we are guided by five factors, first set forth in *Tenorio v. Superior Court,* 1 N.M.I. 1. These factors are:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
3. The lower court's order is clearly erroneous as a matter of law;
4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
5. The lower court's order raises new and important problems, or issues of law of first impression.

Id, 1 N.M.I. at 9-10.[7] "In applying the above guidelines to a particular case, there will not always be a bright-line distinction." *Commonwealth v. Superior Court (Ada),* 2004 MP 14 ¶ 8. "The considerations are cumulative, and proper disposition will often require a balancing of conflicting indicators." *Id*. Therefore, we shall consider each of the factors and their cumulative effect.

1. Other Adequate Means

¶ 15 Kevin argues that there is no other adequate means to attain the relief desired, because if the parties are forced to wait for an appeal, there is no guarantee that Hyunjin will have any assets left in the CNMI. Without a preliminary injunction, Hyunjin may freely ship any personal property and assets outside the jurisdiction. Ultimately, Kevin is concerned that if Hyunjin ships off the assets, Kevin will be left without recourse for collecting on damages awarded after final judgment from the trial court. While we are sympathetic to Kevin's concerns, we cannot agree with the argument.

¶ 16 Kevin seeks money damages, which is an adequate means of relief. Indeed, money damages for unpaid rent and anticipatory breach is the appropriate form of relief in this case. Kevin does not

[6] The same factors to be considered for issuance of a writ of mandamus apply to a writ of prohibition. *See Commonwealth v. Superior Court (Ada*), 2004 MP 14; *Paulis v. Superior Court*, 2004 MP 10.

[7] These principles have been cited in the following cases: *Bank of Saipan v. Superior Court*, 2005 MP 15; *Health Prof'l Corp. v. Superior Court*, 2004 MP 25; *Nakatsukasa v. Superior Court*, 1999 MP 25; *Sekisui House, Ltd v. Superior Court*, 1999 MP 21; *In Re Feliciano*, 1999 MP 3; *Villacrusis v. Superior Court*, 3 N.M.I. 546 (1993); *Mafnas v. Superior Court*, 1 N.M.I. 74 (1990); *Mafnas v. Hefner*, 1 N.M.I. 22 (1989); *OAF v. Superior Court*, 1999 MP 14.

have any interest in the assets of Hyunjin. In *Villanueva v. Tinian Shipping and Transp., Inc.*, 2005 MP 12, we distinguished the case *Grupo Mexicano de Desarro, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). In *Grupo Mexicano*, the U.S. Supreme Court held that a preliminary injunction cannot be issued to prevent a defendant from disposing of assets pending adjudication of an unsecured creditor plaintiff's contract claim for money damages. 527 U.S. 308, 340, 119 S.Ct. 1961, 1978, 144 L.Ed.2d 319. While *Villanueva* involved a government's claim for taxes, we find that *Grupo Mexicano* is directly applicable here.

¶ 17 As the trial court noted, "equity is a remedy of last resort, and for that reason should not be regularly employed as a collections tool when money damages is ostensibly an available and adequate remedy." *Kevin International Corporation v. Hyunjin Saipan, Inc.*, Civ. No. 06-03, p.5 (N.M.I. Super. Ct. February 21, 2006) (Order Denying Preliminary Injunction) ("Order"). This is consistent with the rule outlined above. Further, as a general rule, when a party is entitled to a remedy at law, no preliminary injunction should issue. *See Grupo Mexicano*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319.[8]

¶ 18 We cannot agree with Kevin that there is no adequate remedy on appeal. There is no evidence that Hyunjin will not remain in or return to the jurisdiction. Hyunjin has been cooperative thus far in the proceedings. Although Hyunjin is moving assets to Vietnam, the entity continues to exist in the CNMI. Absent any evidence to the contrary, this Court will not assume a party will entirely leave the jurisdiction or become insolvent. Therefore, an appeal would be an adequate means for Kevin to secure the remedy sought.

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[8] *But see Breetag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245 (2nd Cir. 1999) ("a more accurate description of the circumstances that constitute irreparable harm is that where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied); *Alvenus Shipping Co. v. Delta Petroleum Ltd.*, 876 F.Supp. 482 (D.C. N.Y. 1994) (exception to general rule exists when it is shown that money judgment will go unsatisfied absent equitable relief).

2. Prejudice or damage correctable

¶19 Kevin has provided no evidence to suggest that Hyunjin will not be able to pay, if monetary damages are assessed against them in a final judgment. On the contrary, the trial transcripts show that Hyunjin offered, on their own volition, to put up a $25,000 bond with the court so that they may continue to ship their assets to Vietnam. Accordingly, Hyunjin proceeded to place a $25,000 bond with the trial court. By Kevin's own admission, Hyunjin would also be willing to put up the value of the surety. Furthermore, Kevin has an additional $100,000 from Hyunjin as a security deposit. This evidence contradicts any equitable arguments which can be made that a preliminary injunction should issue. Instead, it shows that Hyunjin is willing and presumably able to pay out any monetary damages which may be awarded to Kevin.

3. Order Not Clearly Erroneous as a Matter of Law

¶20 The purpose of a preliminary injunction is to maintain the status quo between the parties pending a trial on the merits. *Pacific American Insurance & Escrow (CNMI), Inc., v. Anderson and John Does One through Seven,* 6 N.M.I. 17. Kevin argues that since the trial court denied the preliminary injunction, the status quo between the parties has been disrupted. Kevin further alleges that as a contract has been found to exist, and damages are sure to be awarded, the need to maintain the status quo is therefore necessary in order to ensure that Kevin will be able to collect after final judgment.

¶ 21 We first look to the reasoning of the trial court in denying the preliminary injunction. "If a rational and substantial legal argument can be made to support the questioned ruling, the case in not appropriate for mandamus relief, even though a reviewing court may find reversible error on normal appeal." *Sablan v. Superior Court*, 2 N.M.I. 166, 168 (1991). The two part test used by the trial court in determining whether or not to grant the preliminary injunction was plaintiff's

probability of success and the possibility of irreparable harm to plaintiff. *See Order*. The trial court found that Kevin may prevail on proving an enforceable contract lease agreement with Hyunjin for a term of five years. *Id*. at 4. The trial court went on to state "the finding Hyunjin is only obligated to a lease term of five years is significant because it suggests that Plaintiffs will likely not prevail on their claim of anticipatory breach and consequently any damages claim pursuant to its breach of claim will be significantly reduced." *Id*. We are puzzled by this reasoning, as Hyunjin has only paid rent to Kevin for four years, rather than five. We are further perplexed by the trial court's admonishment of Kevin by stating Kevin "could have implemented other measures, such as bringing suit once Hyunjin's went into arrears in paying its rent." *Id* at 5. In this case, Hyunjin did not pay rent in December 2005 and suit was filed on January 5, 2006. We can not imagine how Kevin could be expected to brought suit any quicker.

¶ 22 Notwithstanding these noteworthy questions, a rational argument can be made to support the denial of the preliminary injunction. First, the trial court noted that a remedy at law, rather than equity would be appropriate in this case. *Order* at 5. For the reasons discussed *supra*, we agree with that application in this case. Secondly, several facts of the case are still in dispute. No judgment has been made regarding the contract. The trial court found that Kevin *may* have had a contract, but a final determination has yet to issue. Further, Hyunjin questions whether Kevin fulfilled its responsibility in constructing the barracks within the time agreed. A finding on this issue could further reduce any monetary damages awarded to Kevin.[9] Finally, the trial court attempted to balance the needs that it saw in this case by ordering Hyunjin to post what amounts to a $25,000 bond. In that way, the trial court used its discretion to maintain the status quo between the parties.

[9] Kevin may also be required to mitigate damages on this contract, in accordance with contract law.

Therefore, we do not find that the ruling of the trial court to deny the preliminary injunction was clearly erroneous, as a matter of law.

4. Not An Oft-Repeated Error Manifesting a Persistent Disregard of Well-Established Principles

¶ 23 There are no arguments presented which maintain that this is an oft-repeated error. Instead, Kevin argues that it "will be" repeated often, but does not offer any past evidence of such an error. Therefore, this factor is essentially non-applicable in this case. We are mindful, however, that "the considerations are cumulative, and proper disposition will often require a balancing of conflicting indicators."[10] *Commonwealth v. Superior Court (Ada)*, 2004 MP 14 ¶ 8.

5. Order Raises Issues of First Impression and Creates New and Important Problems

¶ 24 This case does raise a judicial eyebrow. As Kevin notes, the economy of the CNMI is in decline and many foreign businesses are leaving. Creditors may be left without recourse. While this does create a new and important problem, "this factor alone does not convince us that writ of mandamus is the proper vehicle." *Mafnas v. Superior Court*, 1 N.M.I. 74, 79 (1990).

IV. Conclusion

¶ 25 As this Court found in *Tenorio*,

> There are dangers to an unprincipled use of preemptory writs, as for example, the possibility that its use would be an impermissible alternative to the normal appellate process. Its abuse could operate to undermine the mutual respect generally existing between trial and appellate courts. Further appellate courts should insure the temptation to grant such writs merely because they are sympathetic to petitioner's underlying actions.

. *Tenorio*, 1 N.M.I. at 8. While we understand the concern of the petition, we are convinced that there are other adequate means in which to have remedy. Further, we find no evidence that monetary damages will not be paid or that Hyunjin will not readily pay any monetary damages awarded.

[10] The Tenorio factors do require a balancing of conflicting factors, as the fourth and fifth factors seem to be conflicting.

Finally, we find that order was not clearly erroneous as a matter of law. The status quo of the parties was maintained despite the denial of the preliminary injunction. Therefore, the petition for the writ of mandamus or prohibition is DENIED.[11]

¶ 25 SO ORDERED this 9th day of March 2006.

/s/
ALEXANDRO C. CASTRO, Acting Chief Justice

/s/
JOHN A. MANGLONA, Associate Justice

/s/
TIMOTHY H. BELLAS, Justice *Pro Tempore*

[11] Because we deny the petition based on the Tenorio factors, we need not address the other issues presented by Hyunjin.

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

IN THE MATTER OF DECISIONS TO BE PUBLISHED IN NORTHERN MARIANA ISLANDS REPORTER, VOLUME SEVEN.	**ERRATA ORDER** **2011-~~ADM~~-0003-~~MSC~~**

PER CURIAM:

I. DECISIONS REVISED BY THIS ORDER

The decisions listed below, all styled as opinions, require substantive revision. They are hereby revised by changes as set forth in section two of this order. The published decisions containing all revisions shall constitute the final versions of the decisions.

1. *Commonwealth v. Taitano*, 2005 MP 20
2. *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3
3. *Liu v. CNMI,* 2006 MP 5
4. *Sattler v. Mathis,* 2006 MP 6
5. *Commonwealth v. Pua,* 2006 MP 19
6. *Bank of Saipan v. Martens,* 2007 MP 5
7. *Commonwealth v. Milliondaga,* 2007 MP 6
8. *Tan v. Younis,* 2007 MP 11
9. *Estate of Muna v. Commonwealth,* 2007 MP 16

10. *Commonwealth v. Blas,* 2007 MP 17

II. REVISIONS

1. *Commonwealth v. Taitano*, 2005 MP 20 ¶ 28 shall read as follows:

¶28 ...the trial court must consider the factors set forth in *United States v. Cook*, 608 F.2d 1175, 1185 n. 9 (9th Cir. 1979) (en banc). (*continuation omitted.*)

2. *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3 Supreme Court Original Action Number shall read as follows:

Supreme Court Original Action No. 06-0009-GA.

Attorneys of Record shall read as follows:

For Plaintiff-Petitioner: Viola Alepuyo, Saipan.

For Defendant-Real Party in Interest: Steven Carrara, Saipan.

3. Liu v. CNMI, 2006 MP 5 ¶ 27 shall read as follows:

¶27 ...The Petitioner cites *Unites States v. Fanfan*, 2004 WL 1723114, 2004 U.S. Dist. LEXIS 18593 (D.Me. June 28, 2004)...Petitioner likens the grant of certiorari in *Fanfan*, which sought to review the effects of the *Blakely v. Washington*, 542 U.S. 296 (2004)...the *Blakely* decision... (*continuation omitted.*)

4. *Sattler v. Mathis*, 2006 MP 6 ¶ 8 shall read as follows:

¶8 Looking beyond our own decisions, to those we have relief on in the past, is more helpful. Our precedent stems primarily from an Idaho case, *Krebs v. Krebs*, 759 P.2d 77 (1988) (discussed below), and from a Ninth Circuit decision, *U.S. v. McConney*, 728 F.2d 1195 (9th Cir. 1984). (*continuation omitted.*)

5. *Commonwealth v. Pua,* 2006 MP 19 ¶ 10 shall read as follows:

¶10 Aside from the fact that the Attorney General did not "certif[y] to the Superior Court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of

a fact material in the proceeding" – which will not necessarily defeat jurisdiction, *see U.S. v. Becker*, 929 F.2d 442, 445 (9th Cir. 1991) (finding that failure to certify pursuant to analogous federal statute is correctable at the court's discretion) – this statute is clearly inapplicable to the present case. (*continuation omitted.*)

6. *Commonwealth v. Pua*, 2006 MP 19 ¶ 16 shall read as follows:

¶16 Furthermore, we are not the first court to find mandamus jurisdiction may be accorded even when appellate jurisdiction is lacking. In *U.S. v. Barker*, 1 F.3d 957, 959 (9th Cir. 1989), the Ninth Circuit held that where the Government had plead in the alternative for 1) jurisdiction pursuant to 18 U.S.C. § 3731 (the federal analog to our 6 CMC § 8101), or 2) mandamus relief, even though no jurisdiction could be had under 18 U.S.C. § 3731, mandamus relief was still available due to the gravity of issue. *See also U.S. v. Collamore*, 868 F.2d 24, 30 (1st Cir. 1989) (holding similarly that mandamus was proper when 18 U.S.C. § 3731 jurisdiction was questionable.) (*continuation omitted.*)

7. *Bank of Saipan v. Martens*, 2007 MP 5 ¶ 14 shall read as follows:

¶14 . . . The question in each case is whether under all the circumstances the remedy was pursued with reasonable dispatch. *See McDaniel v. U.S. Dist. Court*, 127 F.3d 886, 890 n.1 (9th Cir. 1997) (Rymer, Circuit Judge, concurring, *citing United States v. Olds*, 426 F.2d 562 (3rd Cir. 1970)). (*continuation omitted.*)

8. *Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 6 shall read as follows:

¶6 . . . Two provisions are not the same offense if each contains an element not included in the other. *Hudson v. United States*, 522 U.S. 93, 107 (1997) (Stevens, J. concurring). (*continuation omitted.*)

9. *Tan v. Younis*, 2007 MP 11 ¶ 36 shall read as follows:

¶36 So strong is the Constitutional protection of free expression that it even contemplates and protects a degree of abuse. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (citations omitted). Indeed, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *New York Times*, 376 U.S. at 271 (quoting James Madison, 4 *Elliot's Debates on the Federal Constitution* 571 (1856)).

10. *Estate of Muna v. Commonwealth*, 2007 MP 16 ¶ 13 shall read as follows:

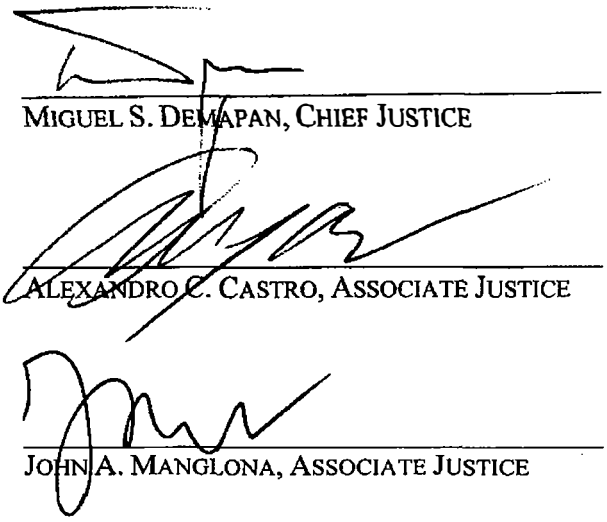
¶13 The Fifth Amendment of the United States Constitution and the Constitution of the Commonwealth of the Northern Mariana Islands Constitution require that when private property is taken for public use by eminent domain, "just compensation" must be provided to the owner. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9 (1984).

11. *Commonwealth v. Blas*, 2007 MP 17 ¶ 3 shall read as follows:

¶3 The Commonwealth charged Blas with vehicular homicide, reckless driving, and driving under the influence of alcohol. On October 18, 2004, the jury heard the vehicular homicide charge, while the trial court heard the reckless driving and driving under the influence charges. On November 2, 2004, the jury returned a verdict acquitting Blas on the vehicular homicide charge, but the trial court found him guilty of reckless driving and driving under the influence of alcohol. Blas timely appealed.

SO ORDERED.

Entered this 30th day March of 2011.



MIGUEL S. DEMAPAN, CHIEF JUSTICE

ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

JOHN A. MANGLONA, ASSOCIATE JUSTICE