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

JESUS C. TUDELA, Personally and as Administrator of the Estate Of Angel Malite,

***Petitioners*,**

vs.

COMMONWEALTH SUPERIOR COURT,

***Respondent*,**

PAMELA BROWN, Commonwealth Attorney General and FERMIN ATALIG, Secretary of Finance,

Real Parties in Interest.

SUPREME COURT ORIGINAL ACTION NO. 05-0002-OA

ORDER

Cite as: *Tudela v. CNMI Superior Court* 2006 MP 7

Argued and submitted on November 10, 2005
Saipan, Northern Mariana Islands

Before: F. PHILIP CARBULLIDO, Designated Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Designated Associate Justice; ROBERT J. TORRES, JR., Designated Associate Justice.[1]

TORRES, J.:

Jesus C. Tudela, administrator of the Estate of Angel Malite, filed this Petition for a Writ of Mandamus (Petition) seeking reversal of the Superior Court's order denying Tudela's request to dismiss the underlying complaint filed by Pamela Brown, as Attorney General (AG) against the Estate and other defendants in Superior Court Civil Action No. 04-0563. The isolated issue before the court at this time is whether to entertain this Petition. After balancing the five factors for issuance of a writ of mandamus, we deny the Petition particularly because the trial court's denial of the motion to dismiss was not so clearly erroneous that a writ of mandamus, rather than an appeal, would be the permissible method of review.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to the local courts of the Commonwealth of the Northern Mariana Islands assuming jurisdiction over condemnation proceedings, the Trial Division of the High Court of the Trust Territory (TT) of the Pacific Islands issued a judgment in 1978 condemning 1.7 acres of land that is now the site of Marianas High School. *In the Matter of the Proceedings by the TTPI for Condemnation of the Property of the Estate of Angel Malite, et al*, Civ. Act 261. Pursuant to the Judgment, a certificate of title to the property in fee simple was issued to the CNMI and the Government was to deposit $3,692.30 as compensation for the taking. The money, which was to remain on deposit until either a court judgment distributed the funds or a signed stipulation by all condemnees for distribution was filed, was never distributed and apparently has been lost.

[1] Chief Justice Miguel S. Demapan, Associate Justice Alexandro C. Castro and Associate Justice John A. Manglona recused themselves from deciding this matter.

The matter lay dormant for many years when in June 2004, an attorney for the Malite Estate made a presentation to the Marianas Public Lands Authority (MPLA) Board of Directors asking for $3,450,000.00 as just compensation for the land that had been condemned in the TT action noted above. The MPLA Board later voted in favor of paying the $3,450,000.00 to the Estate.

Edward Deleon Guerrero, one of the defendants and as MPLA Commissioner, requisitioned the $3,450,000.00. Under the Land Compensation Act of 2002, as amended by Public Law 13-161, all such land compensation payments must be approved by the Commonwealth Development Authority (CDA). On advice of their counsel, the CDA initially declined to process the requisition. After meeting with the Governor, the MPLA and the CDA apparently agreed to pay the requisition.

Believing that the Malite Estate had no legal right to claim compensation, the AG filed a "Complaint for Declaratory Relief, Injunctive Relief, and Relief in the Nature of Mandamus or Prohibition" with the Superior Court of the Northern Mariana Islands. The AG sought to enjoin and restrain the MPLA and the CDA from disbursing the compensation payment of $3,450,000.00 to Tudela as administrator of the Malite Estate, until the legal issues surrounding the payment were decided by the trial court. The trial court granted a temporary restraining order but Tudela filed an Opposition to Motion for Declaratory Relief and Preliminary and Permanent Injunction stating that the AG did not meet the requirements for issuance of a preliminary injunction or temporary restraining order and that the AG had no standing to bring the action. Before the hearing on the preliminary injunction, CDA agreed that it would not disburse the money until the legal questions about the claim were resolved by the courts. CDA was then dismissed from the case.

Thereafter, Tudela and other defendants filed motions to dismiss under Com. R. Civ. Pro. 12(b)(6) arguing that the AG had no standing to bring the complaint and failed to exhaust administrative remedies. The movants asserted that the lack of standing emanated from Brown's purported illegal appointment as AG. Moreover, they argued that even if Brown was properly appointed, the AG has no "standing to bring lawsuits to decide land condemnation issues," because the land compensation statutes give the MPLA and the CDA, not the AG, the power to administer, settle, and dispose of eminent domain cases. The movants further alleged that the AG had no standing because the AG cannot take a position contrary to the Governor. Concerning the alleged failure to exhaust administrative remedies, they claimed that since the AG did "not appeal or challenge the [MPLA]'s decision regarding the Maliti [sic] case . . . it waived its right to allow for administrative or judicial review." Memorandum of Points and Authorities in Support of Motion to Dismiss, ER II p. 192. More specifically, the movants asserted that Public Law 13-25 requires an administrative review of any agency decision by written notice of a demand for review within 15 days from the agency decision,[2] and if no appeal is made, then the decision is unreviewable both administratively or judicially. Because the AG failed to exhaust administrative remedies by not appealing the MPLA's decision pursuant to Public Law 13-25, movants argued the AG should not be able to now attack the MPLA's decision to pay the money and the complaint should be dismissed.

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[2] Public Law 13-25 section 11 provides:

Section 11. Administrative Review.
(a) Within 15 days of the date of service upon any person or party affected by findings, orders, or decisions of the agency made pursuant to Section 10 of this Act may appeal to the Board of Public Lands by written notice. If no appeal is made to the board within 15 days of the date of service of the original findings, orders or decisions, the findings, orders or decisions shall be unreviewable administratively or judicially.

The trial court did not confine its "analysis to the allegations and implications contained on the face of the complaint." Instead, the court considered "matters outside the pleadings," treated the motions to dismiss as a motion for summary judgment under Com.R.Civ.P. 56, and denied the various motions to dismiss in an order entitled "Order Denying Various Motions to Dismiss, with Some Treated as Motions for Summary Judgment."

Tudela thereafter filed the Petition seeking to overrule the trial court's order which denied the motions to dismiss. Brown, as the real party in interest, was permitted by court order to respond to the Petition and she filed a response (in the nature of an opposition). A Reply to the Opposition was then filed by Petitioner Tudela, by the MPLA, by MPLA Commissioner Deleon Guerrero, and by the MPLA Board. [3]

LEGAL ANALYSIS

A. JURISDICTION AND ISSUANCE OF WRITS

The CNMI Supreme Court's writ jurisdiction is codified as part of the general jurisdiction of the CNMI Supreme Court and found in I CMC § 3102(b) which reads: "(t)he Supreme Court has original jurisdiction but not exclusive jurisdiction to issue writs of mandamus . . . and all other writs or orders necessary and appropriate to the full exercise of its appellate and supervisory jurisdiction." *See also In re Feliciano*, 5 N.M.I. 211 (1999) (N. Mar. I. 1999). "We have jurisdiction over extraordinary writs pursuant to our general supervisory powers codified at 1 CMC § 3102(b)." *Id.* ¶ 2.

[3] It does not appear the MPLA, the MPLA Board ,and MPLA Commissioner Deleon Guerrero are even properly parties to this Petition since they were not named as petitioners and did not join in the original petition. Although they are named parties in the proceedings at the Superior Court, the Petition is a separate proceeding directed to the CNMI Supreme Court's original jurisdiction.

A writ of prohibition is a drastic remedy that will not be granted, except to confine an inferior court to the exercise of its prescribed jurisdiction. *Tenorio v. Superior Court,* 1 N.M.I. 1 (N. Mar. I. 1989). In determining whether to issue a writ, we are guided by the five factors set out in *Tenorio.* These five factors are:

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

Tenorio, 1 N.M.I. 1; *see also Commonwealth v. Superior Court,* 1 N.M.I. 287, 294-95 (N. Mar. I. 1990).

Our decision in *Feliciano* offers further guidance on how to approach the issuance of a writ of mandamus in this particular case:

> The United States Supreme Court has given general guidance on when we may issue writs:
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> The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *American Fidelity Fire Insurance Co. v. United States District Court for the Northern District of California,* 538 F.2d 1371, 1374 (9th Cir.1976).
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> **The issue before us should not be whether the district court was in error, but whether the disqualification issue was so far afield that a writ of mandamus, rather than appeal, is a permissible method of review.** In establishing the general rule that only final judgments are reviewable, the Unites Stated [sic] Congress contemplated that some individual convenience would be sacrificed for the greater overall effectiveness and efficiency of the appellate process. *American Fidelity,* 538 F.2d at 1376; *see also Roche v. Evaporated Milk Association,* 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943).

> **Even though we have power to grant the writ, the power is discretionary and wisdom dictates a thorough examination of all the facts to be sure the issuance is appropriate**. *Id.* [emphasis added].

Feliciano, 5 N.M.I. ¶ 23. We therefore do not simply review the trial court's decision denying the various motions to dismiss for error, but rather we must decide in exercising our jurisdiction whether the trial court's resolution of the issues was so "far afield that a writ of mandamus, rather than appeal, is a permissible method of review." *Id.*

Moreover, even assuming *arguendo* that the trial court erred egregiously, if there is an appeal available at law, we will generally decline to exercise our discretion to grant the writ. "It is the general rule that 'where the law allows an appeal from an order or judgment, even when the tribunal making such order or rendering such judgment exceeded its authority in so doing, a writ of review may not be granted' [citation omitted]." *Ivory v. Superior Court*, 85 P.2d 894, 896 (Cal. 1939) (to be distinguished from the situation where a court acts utterly without jurisdiction; in the latter case, mandamus may be appropriate, as in *State ex rel. Willacy v. Smith,* 676 N.E.2d 109, 113 (Ohio 1997)).[4]

It is virtually universal that a petition for a writ cannot be a substitute for an appeal at law. *See Univ. Nat. Stockholders Protective Comm., Inc. v. Univ. Nat. Life Ins. Co.* 328 F.2d 425 (6th Cir. 1964) (extraordinary writs will not be used as substitutes for appeal); *Hartford Acc. & Indem. Co., to Use of Silva v. Interstate Equip. Corp.* 176 F.2d 419 (3rd Cir. 1949) (the extraordinary writs of certiorari, mandamus and prohibition may not be invoked in lieu of appeals); *Pickwick-Greyhound Lines v. Shattuck*, 61 F.2d 485 (10th Cir. 1932) (Original extraordinary writ cannot be used as substitute for appeal).

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[4] "Where the court patently and unambiguously lack jurisdiction to act . . . extraordinary relief lies to prevent the excesses of jurisdiction." *State ex rel. Willacy v. Smith*, 676 N.E.2d 109, 113 (Ohio 1997).

Accordingly, we will grant the writ here only if a balancing of the *Tenorio* factors weighs in favor of Tudela with particular emphasis on whether there is no avenue for appeal and whether the trial court's decision was "so far afield" that there has been an outrageous injustice which requires intercession by writ.

B. THE SUPERIOR COURT'S ORDER

The court made several holdings in its order denying the motions to dismiss. The judge first found that the movants had failed to prove Brown was not the legitimate AG. In making this decision, the trial judge evaluated section 2904 of Title 1 CMC, which provides that the appointment of an attorney general by the Governor of the CNMI must be confirmed by the CNMI Senate within 90 days, and that "if the appointment is not confirmed by the Senate . . . within 90 days from the date the person was temporarily appointed, the appointment shall automatically terminate." 1 CMC § 2904. Tudela and the other defendants claimed that Brown's appointment as AG was rejected by the Senate, or if not rejected, her confirmation was acted upon too late. Brown disputed these claims and further argued that 1 CMC § 2904 was unconstitutional. The trial judge determined that section 2904 is constitutional, a "reasonable rule [that] protects the advice and consent function while not unduly encroaching on the executive branch's appointment power." ER vol. I p. 7 (Order). Having found that section 2904 was constitutional, the trial judge then applied it to the facts surrounding Brown's appointment. Ultimately, the court concluded that even if Brown is not the lawful appointed AG, this fact "does not deprive the office of the power to bring prosecutions, be they criminal or civil." *Id.* Therefore, the AG had standing to file the complaint.

Next, the court addressed the application of Public Law 13-25 and ruled there was no legislative bar to the filing of the complaint by the AG. Tudela had sought a dismissal of the

action on the ground that a party to agency action must request a hearing within 15 days after the decision of the MPLA. Under section 11 of Public Law 13-25, failure to request a hearing renders the findings "unreviewable, administratively or judicially." The trial court noted that Tudela and the MPLA Board had not followed any of the other provisions of Public Law 13-25 so they should not be able to take advantage of sections of Public Law 13-25 that helped them. Furthermore, section 10(a) of P.L. 13-25 requires a hearing only when the "land owner " requests one, and in this case, the landowner who has the certificate of title – the Commonwealth – had not requested a hearing. Even if the Estate of Malite was deemed to be the "land owner," Tudela likewise had never asked for a hearing. Having failed to follow the procedures set forth in section 10 of P.L. 13-25, the court believed the defendants should not be entitled to rely on the protections of section 11and denied the motion to dismiss.

The trial court also rejected Tudela's argument that the delegation of power to the MPLA under the land compensation statutes prohibits the AG from bringing the action to enjoin the payment. The trial court believed that the action of the AG in bringing suit to prevent an illegal payment is not the same thing as deciding a land compensation issue. The AG sought to prohibit an allegedly illegal payment made through an invalid legal procedure – not to decide a land condemnation issue. The trial court found that attempting to stop a payment which may violate law and procedure was within the AG's powers.

Tudela's next claim that the AG could not proceed with the complaint because the Governor had not approved the suit was also dismissed. The trial court reasoned that the CNMI AG is "one of the few executive branch offices mentioned by name in our Commonwealth Constitution," the AG has "general, independent power" to initiate civil lawsuits that uphold CNMI law, independent of the Governor's power to run the executive branch. The court also

found that the AG can proceed with this type of lawsuit without the Governor's blessing and that this sort of public interest lawsuit is within the AG's common law powers. The court also noted that the MPLA has their own counsel, so there was no conflict of interest between the AG and the MPLA.

The trial court further determined that the dismissal of Defendant Deleon Guerrero was not warranted because section 102(c) of P.L. 12-33, as amended by P.L. 12-71, did not prohibit suing individual members of the MPLA Board. Moreover, the capacity in which Deleon Guerrero had been sued was not entirely clear. The court believed his status as the alleged Commissioner of MPLA and whether he held that office legally, made Deleon Guerrero a necessary party to the lawsuit, particularly because the suit, among other things, sought a declaration that Deleon Guerrero was holding office illegally.

Finally, the trial court concluded that the Department of Finance was not an indispensable party under Com. R. Civ. P. 19. Although the Department of Finance is authorized to spend public funds under NMI Const. Art. X sec. 8, the court found that they have no decision making role in the dispute with the Estate of Malite, and the Department of Finance's role is purely ministerial.

C. BALANCING OF THE *TENORIO* FACTORS

Having summarized the trial court order, we will now review whether Tudela has met his burden of proving, by way of the five *Tenorio* factors, that writ intercession is appropriate. Most of the Petition for Writ of Mandamus focuses on the factual issues surrounding the appointment of Brown as AG. As previously indicated, this court will not address the legality of Brown's appointment and hence her standing unless the court finds, under *Feliciano*, that the lower court's ruling is so outside the bounds of jurisdiction that writ intrusion is appropriate.

1. *Tenorio* Factors One and Two: No Other Adequate Means for Relief and Non-correctable Prejudice

Tudela argues that he has no other adequate means to attain the relief sought, such as a direct appeal, though he states, "there is perhaps other means of remedy but that such would require enormous time and effort and greatly increase litigation costs. Defendant is of meager income and could not bear additional legal expenses." The fact that Tudela may have to bear additional litigation expenses or experience delay does not mean that Tudela has no adequate means of relief available or will be prejudiced in a way not corrrectable on appeal. The expenditure of time and money is not the type of harm that will justify writ review. "Before mandamus will lie, something more is required than the likelihood that the alternative remedies may involve inconvenient delay." *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 268 (Mo. 1980); *see also In re BellSouth Corp.*, 334 F.3d 941, 953 (11th Cir. 2003) (stating "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress.")

Second, to establish that he faces damage in a way not correctable on appeal, Tudela states that the "land compensation account continues to be depleted while Defendant's legal battle in court continues." He further argues that "the Pamela Brown lawsuit is merely a . . . dilatory tactic." As elucidated above, delay does not meet mandamus requirements. Even under *Tenorio*, "[i]f a rational and substantial legal argument can be made in support of the questioned ruling . . . the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court may find reversible error." *Id.*; *see also Sablan v. Superior Court*, 2 N.M.I. 165, 168 (N. Mar. I. 1991). The first two factors, therefore, do not weigh in favor of granting Petitioner the writ relief requested.

2. *Tenorio* Factor Three: Clearly Erroneous as a Matter of Law

Tudela argues that the trial court's decision is clearly erroneous as a matter of law. Tudela's argument primarily rests on his claims that: "Brown has no standing to file the lawsuit. Plaintiff failed to exhaust administrative remedies which deprive the court of jurisdiction. Plaintiff usurped the power vested in the office of the attorney general by filing a complaint contrary to the wishes or directions of the Governor."

The trial court addressed each of these issues in its order. If it were shown that the trial court were utterly wrong on these threshold issues, we may be able to find that the trial court's action has been so far "afield" of the trial court's jurisdiction that this court should intervene. Tudela has failed to make such a showing. Without the initial showing that the trial judge was far "afield," and that there is absolutely no right to appeal, we see no reason for this court to intervene.

"'Standing' or 'standing to sue' is, generally, 'a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court.'" *Borja v. Rangamar*, 1 N.M.I. 126, 131 (N. Mar. I. 1990) (citation omitted). If Brown were herself not the proper AG, there may indeed be an issue of standing, but it could be cured. Conceivably, the actions of an illegally appointed AG are subject to the *de facto* officer doctrine -- a doctrine which ratifies the acts of public officers as to third parties. The defect could also be repaired by amending the lawsuit to be a taxpayer lawsuit. Ultimately, however, whether the AG is properly appointed is not ascertainable without a fully developed record, and it is clearly unascertainable based on the record in this proceeding.

In addition to arguing that Brown's appointment could not possibly be legal, counsel for the MPLA contends that the trial court's discussion of the powers-and-duties of the AG is

manifestly wrong. The MPLA argues that the AG is acting *ultra vires* in bringing a lawsuit in the public interest, and proposes that an AG cannot sue a state agency. This is not, however, well established in law, and the trial court's analysis of this issue did not go beyond the bounds of law. The trial judge's analysis of this argument instead appears to be well grounded in reason and law, especially since there is no attorney-client relationship between the AG and the MPLA (particularly since the MPLA has their own lawyer). Thus, it cannot be presumed, as Tudela would suggest, that the Attorney General is suing its own client. It is not this court's domain to determine whether the trial court erred in this ruling, but only to determine whether there are good grounds to exercise writ jurisdiction. We conclude that Tudela therefore, has not demonstrated that the challenged order is clearly erroneous as a matter of law.

3. *Tenorio* Factor Four: Oft-repeated Error

Tudela argues that the lower court's order is an oft-repeated error or manifests a persistent disregard of the applicable rules because the "court failed to mention the significance [of the statutes governing the settlement of land compensation claims]." Petitioner's Petition p. 8-9. Petitioner further argues, "the court strictly interpreted the intent of the confirmation statute," (1 CMC § 2904). This court fails to see how this argument meets the *Tenorio* test that there is an oft-repeated error or manifests a disregard of applicable rules. Petitioner also fails to satisfy this factor .

4. *Tenorio* Factor Five: New Questions of Law

Finally, Tudela claims that the lower court's order raises new and important problems, or issues of law of first impression. While Petitioner makes an arguable showing of this factor, as the appointment of Brown as AG has some weighty implications, we have already concluded that the trial court's order was not utterly unsupported by law. The record before us also is not

conducive to a proper examination of the validity of Brown's appointment. Accordingly, even if this factor weighs in favor of granting mandamus, at least four of the five *Tenorio* factors weigh against the issuance of the writ. We therefore decline to exercise our writ jurisdiction.

CONCLUSION

Tudela asks that this court vacate the trial court's order denying their motion to dismiss. However, he has made no showing that the trial judge exceeded his jurisdiction so dramatically that the Supreme Court should intervene, interrupting the normal progress of this case. We rule that the Petitioner has not met his burden of establishing, under the *Tenorio* and *Feliciano* cases, that the lower court's decision was so far afield from justice that writ intervention is appropriate. The Petition for a Writ of Mandamus is DENIED.

/s/
ROBERT J. TORRES, JR.
Designated Associate Justice

/s/
FRANCES M. TYDINGCO-GATEWOOD
Designated Associate Justice

/s/
F. PHILIP CARBULLIDO
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JUDGMENT

¶ 1 **THIS CAUSE** was duly argued and submitted on November 10, 2005.

¶ 2 Accordingly, the Petition for a Writ of Mandamus is **DENIED**.

Entered this 31st day of March 2006.

/s/
CRISPIN M. KAIPAT
Clerk of Court