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

J.C. TENORIO ENTERPRISES, INC.,
Plaintiff-Appellant and Cross-Appellee,

v.

MARIAN L. PEDRO, nka MARIAN LIMES UDDIN,
Defendant-Appellee and Cross-Appellant.

Supreme Court Consolidated **Appeal** Nos. **04-0024-GA and 05-0006-GA**
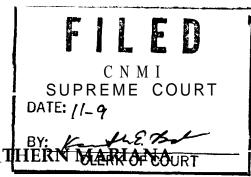Superior Court Civil **Case** No. 02-0037

JUDGMENT

THIS CAUSE came on to be heard from the Commonwealth Superior Court. Having considered the briefs and arguments of the parties, this Court has determined that the decision of the Superior Court should be REVERSED as to that part of the decision that found the judgment void and the original judgment is reinstated, as in accordance with the Opinion of the Court issued this date. In addition, this Court found that the Superior Court has jurisdiction to issue the default judgment initially and that the motion to vacate that judgment was not timely filed under Rule 60(b). This Court further found no reason to

consider the constitutional argument regarding the Bad Checks Act. This Court further DISMISSED the application made at oral argument to sanction counsel for Defendant-Appellee UDDIN.

JUDGMENT is so entered as indicated in the Opinion issued this date.

ENTERED this 9TH day of November 2006.

KENNETH E. BARDEN, *Clerk of Court*

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Superior Court Civil Case No. *02-0037*

OPINION

Cite *as: J.C. Tenorio Enterprises, Inc.* v. Uddin, *2006* MP 22

Argued and submitted on September 8, 2005
Saipan, Northern Mariana Islands

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FOR PUBLICATION

BEFORE: JESUS C. BORJA, *Chief Justice pro tempore*; *EDWARD* MANIBUSAN, *Associate Justice pro tempore*; *TIMOTHY* BELLAS, *Associate* Justice *pro tempore*.

BORJA, Chief Justice *pro tempore*:

I.

¶1   Appellee Marian L. Pedro n/k/a Marian Limes Uddin ("Uddin") moved to vacate a default judgment obtained pursuant to the attorney's fee provision of the Bad Checks Act of 1984, 7 CMC 2441 *et seq.* (the "Bad Checks Act") over two years and three months after it was entered. Uddin argued that the judgment was void ab *initio* because the Clerk did not have the authority to decide the amount of attorney's fees and the portion of the Bad Checks Act pertaining to attorney's fees violated the due process and equal protection clauses of the 14th Amendment. J.C. Tenorio Enterprises, Inc. ('Tenorio") argued that Uddin's motion was not timely under Com.R.Civ.Pro. Rule 60(b) ("Rule 60(b)").

¶2   The trial court held that the judgment was void ab *initio* as to attorney's fees because there was no computation presented to the Clerk. While the trial court agreed that the Clerk had authority to enter a default judgment, it found that because the Clerk was not given an explicit computation, the Clerk could not check the accuracy of the figures and therefore could not award the attorney's fees. The trial court considered Uddin's argument that the attorney's fees provision of the Bad Checks Act was unconstitutional and found the argument to be without merit.

¶3   We find that Uddin's motion was not timely under Rule 60(b) and therefore do not

reach the constitutional issue. We do, however, clarify the Clerk of Court's role in

entering default judgments. In addition, we clarify the procedural requirements for

moving for sanctions in the appellate forum.

II. FACTUAL AND PROCEDURAL BACKGROUND

¶4   Uddin issued 22 checks to Tenorio between September 2 and 10,2001 which were

drawn on a closed account. Tenorio filed an action against Uddin to recover. After Uddin

was properly served but failed to respond, the Clerk of the Superior Court entered a default

judgment against Uddin on April 9,2002 in the amount of $9240.64, which included treble

damages for a total of $6373.70, attorney's fees in the amount of $2,750.00[1], and costs in the

amount of $116.94. The attorney's fees represent the statutory minimum of $125.00 for each

of the 22 checks under the Bad Checks Act. 7 CMC 2442(b).

¶5   On August 5,2004, Uddin moved for relief from the April 9,2002 default judgment

on the basis that the judgment was void ab initio. Tenorio argued that Uddin's motion was

not timely under Rule 60(b). This rule provides that a motion for relief from a judgment

which is the result of mistake, inadvertence, surprise, excusable neglect, newly discovered

evidence, fraud, misrepresentation, or other misconduct must be made within a reasonable

time (not more than one year after judgment) unless that judgment is void, satisfied, or there

has been an extraordinary circumstance under Rule 60(b)(6). Tenorio argued that the motion

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[1]Due to a typographical error, the attorney's fees were listed at $3,750.00 but the
judgment itself reflected the correct amount of $2,750.00.

to vacate the default judgment was too late under Rule 60(b) and could not be considered under the provision for a void judgment because 1. The Clerk had authority to enter the judgment and; 2. the Superior Court had jurisdiction to hear the case. Therefore, Tenorio argued that because Uddin did not raise the constitutional issue within one year, the motion was precluded by Rule 60(b). Uddin did not argue below that her motion was timely due to an extraordinary circumstance under Rule 60(b)(6).

¶6 In its decision, the trial court held that the judgment was void as to attorney's fees. The trial court acknowledged that the Clerk has general authority to enter default judgments. It reasoned, however, that even though the attorney's fees were set at the statutory minimum, the fact that there was no actual computation presented caused the Clerk to enter a void judgment The trial court then found Uddin's argument regarding the constitutionality of the attorney's fees provision of the Bad Checks Act to be without merit. On December 15, 2004, the trial court fixed attorney's fees at $2,750.00.

¶7 On appeal, at oral argument, Tenorio's counsel asked the Court to impose sanctions because Uddin included a copy of her trial court memo in the Excerpts of Record, which is not permitted pursuant to the Commonwealth Rules of Appellate Procedure 30(g). Uddin's counsel was permitted to respond orally.

III. JURISDICTION

¶8 This Court has jurisdiction over an appeal from a final order of the Commonwealth Superior Court pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code. This appeal is timely pursuant to Rule 4 of

the Commonwealth Rules of Appellate Procedure.

IV. ISSUES AND STANDARDS OF REVIEW

¶9   The following issues are presented for our review:

1. Whether Uddin's motion for relief from the default judgment was timely under

Com.R.Civ.Pro. Rule 60(b)(4) is reviewed *de novo. Reyes v. Reyes*, 6 N.M.I. 299

(2001). Ordinarily, motions under Rule 60(b) are reviewed under the abuse of

discretion standard. When examining a Rule 60(b)(4) motion for a void judgment,

however, the review is *de novo* because "the question of the validity of a judgment

is a legal one." *Export Group v. Reef Industries, Inc.,* 54 F.3d 1466, 1469 (9" Cir.

1995)

2. Whether the Clerk had authority to enter the default judgment raises a question

of law which is subject to *de novo* review. *Agulto* v. *Northern Marianas*

Investment Corp., 4 N.M.I. 7, 9 (1993); *Sablan v. Iginoef,* 1 N.M.I. 190, 197

(1990).

3. Whether this Court will impose sanctions by oral motion at argument.

V. ISSUES

A. Motion to Vacate Default Not Timely

1. Definition of "void" judgment

¶10   Rule 60(b)(4) states in part that a party may be relieved from a judgment if: "(4) the

judgment is void." A void judgment is one of the few circumstances which does not require

a motion for relief in less than a year. Because the motion to vacate the default judgment for

attorney's fees was made well over 27 months after it was entered, Uddin would not have been timely under any other provision of Rule 60(b) except for the "extraordinary circumstances" catchall of Rule 60(b)(6) which was not raised below.

¶11   In its decision, the trial court referred to Rule 60(b)(4) in a footnote, where it equated voiding a judgment based on error with voiding a judgment based on jurisdiction. We have already ruled on this issue in *Reyes* v. *Reyes*, 2001 MP 13. In *Reyes*, we drew the distinction between an order that is void because the court did not have personal or subject matter jurisdiction and an order that is voidable because the court made some type of mistake or misapprehension of the law in its decision. We cited to *McLeod* v. *Provident Mut. Life Ins. Co. of Philadelphia,* 526 P.2d 1318, 1320-1321 (Colo. 1974) directly as follows:

> Judgment may be irregular, erroneous or void. An irregular judgment is one rendered contrary to the method of procedure and practice allowed by the law in some material respect. An erroneous judgment is one rendered in accordance with the method of procedure and practice allowed by the law, but contrary to the law. Irregular and erroneous judgments necessarily retain their force and have effect until modified by the trial court in consequence of its authority in certain circumstances, or until vacated pursuant to new trial procedures...or until reversed by an appellate court in review proceedings. Such judgments are subject only to direct attack; they are not vulnerable to collateral assault. A void judgment is a simulated judgment devoid of any potency because of jurisdictional defects only, in the court rendering it. Defect of jurisdiction may relate to a party or parties, the subject matter, the cause of action, the question to be determined, or the relief to be granted. A judgment entered where such defect exists has neither life nor incipience, and a court is impuissant to invest it with even a fleeting spark of vitality, but can only determine it to be what it is–a nothing, a nullity. Being naught, it may be attacked directly or collaterally at any time.

Rule 60(b)(4) contemplates a void judgment as one where the court did not have jurisdiction to render its decision. Our holding in *Reyes* is also the law of the 9th Circuit, which has held

that:

> A final judgment is "void" for purposes of Rule 60(b)(4) only if the court that considered it lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted in a manner inconsistent with due process of law. [citation omitted] 'A judgment is not void merely because it is erroneous.' United States v. Berke, 170 F.3d 882, 883 (1999), quoting In re Ctr. *Wholesale,* Inc., 759 F.2d 1440, 1448 (9'' Cir. 1985).

Accordingly, a judgment which was made in error and is thus voidable after an appeal does not fall under the Rule 60(b)(4) exception for void judgments. *Reyes* v. *Reyes*, 6 N.M.I. 299 (2001). **A** party may always seek relief from a default judgment if there has been a mistake or procedural irregularity under Rule 60(a). In this case, we hold that the default judgment was not void

2. Clerk's authority to enter default judgment and calculate attorney's fees

¶12   Com.R.Civ.Pro. Rule 55(b)(1) provides for default judgments by the clerk as follows:

> (B) JUDGMENT. Judgment by default may be entered as follows:
> (1) By the Clerk. When the plaintiffs claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

Rule 60(a) further provides that if a clerical mistake has been made in a judgment, it "may be corrected by the court at any time of its own initiative or on the motion of any party,..." It is clear from our rules that the Clerk has the authority to enter default judgments. The question raised by Uddin is: as a prerequisite to the Clerk obtaining authority to enter the judgment, did Tenorio have to demonstrate under Rule 55(b)(1) that the amount was a "sum certain" by

providing the Clerk with an affidavit which had sufficient detail to allow the Clerk to determine if there was a "sum certain" or a calculation to demonstrate how the "sum certain" could be derived.

¶13   It was not wholly clear from the Superior Court decision whether the trial court was holding that the judgment was void because the Clerk did not have statutory authority to enter the default, or whether the Clerk did have statutory authority to enter the default but procedurally should not have done so without **a** clear computation. Whichever the reasoning, the trial court held that the attorney's fee portion of the default judgment was void because Tenorio did not present an explanation for how the attorney's fees were calculated. The Superior Court's valid concern was that without a computation, the Clerk cannot check for accuracy and cannot be assured that the number is not arbitrary or in error. While we disagree with the analysis of the Superior Court, we find that the end result, i.e. the new judgment amount which reflected the original judgment, was appropriate.

¶14   **A** clerk has authority to enter a default judgment if the defaulting party did not appear and the judgment entered was for a sum certain. *Franchise Holding II, LLC.* **v.** *Huntington Restaurants Group, Inc.,* 375 F.3d 922, 925-929 (9'' Cir. 2004). The question of what constitutes a "sum certain" has not been fully settled. See *Id.* The inquiry, however, centers around whether the claim sets forth "a claim capable of simple mathematical computation." *Id.* at 929. In addition, whether the defaulter provided any specifics in its motion as to how the default judgment figures were wrong or how its own calculation would differ (without

attempting to re-argue defenses from the underlying suit) is relevant to the equation.[2] *Id.*

¶15 Examining the request for the default judgment which was presented to the Clerk, it is clear that there is no specific explanation as to how much per check is being charged, or even under what statutory provision Tenorio is entitled to the fees. Tenorio argues that because it only requested the minimum amount of fees under the Bad Checks Act, there is no question that the calculation was a very simple computation (22 checks times $125). While Tenorio should have actually put forward this simple computation, as the Clerk, acting in a ministerial position, cannot be expected to look up the statute and attempt to figure out how an attorney is calculating his fee, there is also no explanation by Uddin as to how this calculation would have been wrong. We understand that initially there was an error in the default judgment, insofar as the number listed in the total for attorney's fees was off by $1000.00, but this typographical error did not affect the total judgment amount, which was correct. Accordingly, we hold that the Clerk had authority to enter the judgment, which was not void for lack of jurisdiction. We note that in the future, to prevent questions of jurisdiction, counsel should be sure to present the simple mathematical calculation along with the relevant statutory authority when presenting a default judgment to the Clerk.

B. **Constitutionality of attorney's fee portion of the Bad Checks Act**

¶16 Uddin argues that the Bad Checks Act violates the due process and equal protection clauses of the 14th Amendment because the statutory minimum attorney's fee is an arbitrary penalty which invades property rights. This argument, regarding substantive due process, is

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[2] We note that the Ninth Circuit never considered whether a Clerk's entry of a default judgment was void because

wholly separate from the previous analysis. To argue a violation of due process for purposes of Rule 60(b)(4), there must be a demonstration that the trial court "acted in a manner inconsistent with due process of law." In re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985). Here, we have already made a finding that the judgment was not void and there was no violation of due process, insofar as the Court and through its authority the Court Clerk, did not act in any way to deprive Uddin of procedural due process.

¶17 Uddin now argues that the Bad Checks Act itself is unconstitutional. There is a fundamental rule of judicial restraint which states that we must consider non-constitutional grounds for decision before reaching constitutional arguments. Jean *v.* Nelson, 472 U.S. 846, 854 (1985). Because the judgment below was not void, we do not reach the substantive constitutional issue raised below.

C. Sanctions

¶18 Tenorio argues that under Rule 30(g) of the Rules of Appellate Procedure, Uddin should be sanctioned for "vexatiously and unreasonably increas[ing] the cost of litigation by inclusion of unnecessary material in the excerpts of record." Rule 30(g) requires that "[c]ounsel will be provided notice and have an opportunity to respond before sanctions are imposed." Com. R. App. Pro., Rule 30(g). See, Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980). Sanctions under local court rules such as Rule 30(g) are not imposed absent notice, an opportunity to respond, and a hearing. See, Miranda v. Southern *Pacific* Transp. Co., 710 F.2d 516, 522 (9th Cir.1983). The federal courts define "notice" as a motion by a

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the motion was made in a timely fashion under Rule 55(c). Franchise *Holding II,* LLC, *375* F.3d 922.

party or an order to show cause by the court. *See, Gabor v. Frazer,* 78 F.3d 459 (9" Cir. 1996)(discussing notice requirements of sanctioning a party under FRAP Rule 38). Even a request for sanctions within a party's brief does not constitute notice: there must be a proper motion. *Id.*

¶19   In *Kirshner* v. *Uniden Corp. of America,* 842 F.2d 1074, 1082-3 (9th Cir. 1988), the court faced an almost identical situation, where counsel sought sanctions because improper and irrelevant materials were included in the excerpts of record. In denying the motion, the *Kirshner* court emphasized that attorneys were entitled to due process protections including a hearing, if requested, before monetary sanctions could be imposed. *Id.* The *Kirshner* court denied sanctions because the inclusion of 79 pages of irrelevant material did not "vexatiously and unreasonably" increase the cost of litigation. *Id.*

¶20   In *Kirshner,* counsel made a motion to strike the offending materials as well as to sanction opposing counsel. Here, Tenorio's counsel never made a motion and therefore never gave notice or an opportunity to respond to Uddin's counsel. As a result, the oral application at argument to sanction counsel without a prior motion was itself improper, and should not have been brought without the proper procedural steps.[3]

D. **Conclusion**

¶21   The decision of the Superior Court is REVERSED as to that part of the decision that found the judgment void, and the original judgment is reinstated. The Superior Court had

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[3] Even if the application had been properly brought, the materials were included to show the issue was raised at trial, and the forty-seven page exhibit did not make the excerpts of record unduly burdensome.

jurisdiction to issue the default judgment initially and the motion to vacate the judgment was

not timely under Rule 60(b).   Because the judgment was valid, we do not consider the

constitutional argument regarding the Bad Checks Act. The application at oral argument to

sanction Uddin's counsel is DISMISSED for failure to properly present a written motion

under the Rules of Appellate Procedure.

SO ORDERED this —9th— day of November, 2006.

/s/ Jesus C. Borja
_____
JESUS C. BORJA
Chief Justice pro *tempore*

/s/ Edward Manibusan
_____
EDWARD MANIBUSAN
Associate Justice pro *tempore*

/s/ Timothy Bellas
_____
TIMOTHY BELLAS
Associate Justice pro *tempore*