

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

DOUGLAS F. CUSHNIE,	)	APPEAL NO. 97-052
	)	CIVIL ACTION NO. 95-0162
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	<b>OPINION</b>
	)	
JOAQUIN C. ARRIOLA,	)	
	)	
Defendant-Appellee.	)	
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Argued and Submitted May 13, 1999

**Cite as: *Cushnie v. Arriola*, 2000 MP 7**

Counsel for Appellant: Douglas F. Cushnie  
Saipan

Counsel for Appellee: Richard W. Pierce  
Saipan

BEFORE: MANIBUSAN, MANGLONA and LIZAMA, Justices *Pro Tem*.

MANIBUSAN, Justice *Pro tem*.

[1] Douglas F. Cushnie (“Cushnie”) appeals from the Superior Court’s December 18, 1997, order granting summary judgment in favor of Defendant Joaqiun C. Arriola (“Arriola”). This Court has jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution.

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Whether, in the same case, a previous decision denying summary judgment bars a subsequent decision granting summary judgment pursuant to the law of the case doctrine.

[2]The law of the case is a question of law that is reviewed de novo. *See Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 N.M.I. 7, 9 (1993).

2. Whether the Superior Court's grant of summary judgment, dismissing Cushnie's claim against Arriola for breach of a contractual obligation, should be upheld where the court found no genuine issues of material fact.

[3,4]We review the Superior Court's grant of summary judgment *de novo*. *See Diamond Hotel Co., Ltd. v. Matsunaga*, 4 N.M.I. 213, 216 (1995), *aff'd*, 99 F.2d 296 (9<sup>th</sup> Cir. 1996). To affirm, this Court must find that there was no genuine issue of material fact and that the court below correctly applied the substantive law. *See Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 518 (1993). Further, this Court can affirm if it finds that the result is correct under a different theory. *Id.* In *de novo* review of a grant of summary judgment, evidence and inferences will be drawn in favor of the non-moving party. *Id.*

## **FACTUAL AND PROCEDURAL BACKGROUND**

On February 10, 1972, Arriola purchased a five percent interest in property described as Lot B, Dandan, Municipality of Inarajan, Guam ("Lot B"). Subsequent to acquiring that interest, Arriola and Cushnie entered into a Memorandum of Agreement in which Arriola transferred one-third of his interest to Cushnie.<sup>1</sup>

In 1986, Cushnie, in his capacity as president of Micronesian Yachts, Inc. ("Micronesian Yachts"), obtained two loans from the Bank of Guam ("Bank"). Cushnie personally guaranteed one of the loans by providing the Bank with a mortgage on his interest in Lot B. The other loan was unsecured.

In September 1991, the United States government purchased a portion of Lot B and required that the title be delivered "clear of all liens and encumbrances." The Arriola law firm (the "Firm") handled the matter for the sellers and directed that the proceeds from the sale be deposited into an escrow account with the First American Title & Escrow Co. of Guam, and then distributed to the numerous landholders. In the

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<sup>1</sup> A third party, Mitchell A. Stevens, also acquired a one-third interest in Arriola's five percent through the Memorandum of Agreement. Stevens subsequently transferred one-half of his one-third interest to Cushnie and the other half to another individual. Both Cushnie's and Steven's interests were taken subject to an existing note and mortgage.

escrow instructions, the Firm directed that \$30,459.77 be deducted from Arriola's share and transferred to the Bank to satisfy Cushnie's mortgage, rather than calculating the amount due directly to Cushnie.<sup>2</sup> Cushnie did not learn of the payment to the Bank until after the transfer occurred.

Following the payment to the Bank, Cushnie brought an action against the Bank asserting that the Bank had waived its right to enforce the mortgage because of a previous lawsuit in which the Bank failed to raise a compulsory counterclaim against the mortgage.<sup>3</sup> The court found that although the Bank had waived its right to sue on the mortgage, the mortgage remained a valid document. *See Cushnie v. Bank of Guam*, Civ. No. 93-0244 (N.M.I. Super. Ct. Dec. 14, 1993) (Decision on Motion for Summary Judgment at 1) ("*Bank of Guam*"). The court granted summary judgment in favor of the Bank, stating that the payment of the mortgage through the escrow account was an appropriate form of non-judicial remedy. *Id.* This Court affirmed on appeal. *See Cushnie v. Bank of Guam*, 4 N.M.I. 198 (1994).

On February 10, 1995, Cushnie filed this action against Arriola asserting that Arriola had breached his contractual obligations, as established by the Memorandum of Agreement, by failing to transfer \$30,459.77 from the sale of Lot B directly to Cushnie. Cushnie also asserted that Arriola, as a partner of the Firm that issued the escrow instructions, committed conversion by ordering the transfer of the funds to the Bank. On May 24, 1995, Arriola filed a motion to dismiss pursuant to Com. R. Civ. P. 12(b)(6) and a motion for summary judgment pursuant to Com. R. Civ. P. 56(c). Cushnie also moved for summary judgment.

On July 31, 1995, the Superior Court denied in part and granted in part Arriola's motion to dismiss. The court dismissed Cushnie's claim for conversion on the ground that the *Bank of Guam* case previously decided the issue of whether Arriola had improperly paid the Bank, thus collaterally estopping Cushnie. *See Cushnie v. Arriola*, Civ. No. 95-0162 (N.M.I. Super. Ct. July 31, 1995) (Order Partially Granting Defendant's Motion to Dismiss and Denying Defendant's and Plaintiff's Motion for Summary Judgment) ("*July 1995 Decision*"). The court, however, did not dismiss the issue of whether Arriola had

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<sup>2</sup> Cushnie received the remainder ultimately due to him.

<sup>3</sup> Micronesian Yachts had sued the Bank in a lender liability action in federal district court. The Bank counterclaimed on one of the two notes executed pursuant to the guaranty, but did not counterclaim on the mortgage at issue.

breached a contractual duty to Cushnie as it had not been previously decided in the *Bank of Guam* case. *Id.* The court also dismissed both motions for summary judgment stating that the “evidence before the Court is inconsistent regarding the question of what form of interest Cushnie held in Lot B.” *Id.* at 5. Cushnie asserted that both he and Arriola held a non fee simple interest in Lot B entitling him to a percentage of the profits in the event of a sale or lease, and that such interest could not affect title. *Id.* The court noted, however, that the record appeared to show that Arriola and Cushnie had a fee simple interest. *Id.* at 6. Because the record presented a material factual conflict “likely to affect the determination of whether Arriola’s actions were justified,” the court denied both motions for summary judgment.<sup>4</sup> *Id.*

On November 26, 1997, Arriola again moved for summary judgment to resolve the remaining issue of Arriola’s contractual obligations to Cushnie. On December 18, 1997, a new sitting judge, finding no material disputes of fact, granted Arriola’s motion for summary judgment. The court held that because Cushnie assigned his right to proceeds from his interest in Lot B to the Bank in 1986 as security for a loan, Arriola was obligated to pay the proceeds from the sale of Lot B to the Bank. *See Cushnie v. Arriola*, Civ. No. 95-0162 (N.M.I. Super. Ct. Dec. 18, 1997) (Order on Defendant’s Motion for Summary Judgment at 1) (“December 1997 Decision”). Cushnie then filed this appeal on December 18, 1997.

## ANALYSIS

- A. *Whether under the law of the case doctrine, a previous decision denying summary judgment effectively bars a subsequent decision granting summary judgment in the same case.*

Cushnie contends that the July 1995 Decision established the law of this case, thus barring the December 1997 Decision, absent any changes in fact, relevant documents, and the law. The question we must therefore decide is whether the decision denying summary judgment established the law of the case and was therefore binding on the second judge. *See, e.g., Dictograph Prod. Co. v. Sonotone Corp.*, 230 F.2d 131, 134-36 (2<sup>nd</sup> Cir. 1956).

[5,6]The law of the case doctrine developed “to maintain consistency and avoid reconsideration

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<sup>4</sup> In a footnote to the opinion, the court stated that “its pronouncements are tentative, as it has not been adequately briefed on this subject.” *Cushnie v. Arriola*, Civ. No. 95-0162 (Order at 6, n.6).

of matters once decided during the course of a single continuing lawsuit.” 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4478 (1981) (hereinafter WRIGHT AND MILLER). “While the doctrine does not jurisdictionally bar a court from reconsidering issues previously concluded, as does the related doctrine of res judicata, the principle of law of the case directs a court not to alter a previous judicial determination unless unusual circumstances are present.” *United States v. Eilberg*, 553 F. Supp. 1, 3 (D.D.C. 1981); *see also Camacho v. J.C. Tenorio Enter., Inc.*, 2 N.M.I. 407, 413-414 (1992) (*citing* WRIGHT AND MILLER § 4478 (1981)). “[L]aw of the case,’ as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power.” *See Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912); *Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1393 (9<sup>th</sup> Cir. 1995).

[7]The doctrine is not an inflexible rule. “[T]here is no imperative duty to follow the earlier ruling-- only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs.” *See Dictograph*, 23 F.2d at 135. Even if a different judge is assigned to a continuing case, it is not inappropriate for that judge to arrive at a different decision. The judge still retains the ultimate discretion in the case. Thus, a denial of summary judgment does not preclude a successor judge from reconsidering the denial and then granting summary judgment, when appropriate. *See Paulson v. Greyhound Lines, Inc.*, 628 F.Supp. 888, 891 (D. Minn. 1986), *aff’d*, 804 F.2d 506 (8th Cir.1986); *Whirlpool Corp. v. U.M.C.O. Int’l Corp.*, 748 F.Supp. 1557, 1561 (S.D.Fla. 1990) (one judge denying a motion for summary judgment does not preclude a later judge from reconsidering and granting the motion for summary judgment).

Here, we find that unusual circumstances existed. It is clear from the record that the court, in the July 1995 Decision, was apprehensive about granting either party’s motion for summary judgment. The court clearly stated that there had not been adequate briefing on the subject. Therefore, the court was not in the position of making a conclusive determination on the propriety of either motion.

[8]Thus, given the apprehensive and uncertain nature of the July 1995 Decision, we cannot conclude that it established the law of the case, which would bar the subsequent determination in the

December 1997 Decision.

[9]Accordingly, we hold that the law of the case doctrine is not a bar to the subsequent granting of Arriola's second motion for summary judgment so long as unusual circumstances such as error have been established. Thus, we now examine whether the court properly granted summary judgment in its December 1997 Decision.

*B. Whether the December 1997 Decision properly granted summary judgment in favor of Arriola on Cushnie's claim for breach of a contractual obligation.*

Cushnie asserts that Arriola is liable for breach of contract on the ground that Arriola wrongfully transferred \$30,459.77 to the Bank in satisfaction of Cushnie's mortgage secured by Cushnie's interest in Lot B. Cushnie contends that the Memorandum of Agreement obligated Arriola to transfer any and all proceeds from the sale of Lot B directly to Cushnie.<sup>5</sup>

Based on the record, and on further briefing concerning the type of interest held by Cushnie, the court granted Arriola's motion for summary judgment in its December 1997 Decision. The court determined that Cushnie "[had] assigned his right to the proceeds from his interest in Lot B Dandan to the Bank of Guam as security for a debt." December 1997 Decision at 1.

[10,11]The mortgage agreement between Cushnie and the Bank states that:

All such . . . proceeds, . . . are hereby assigned to mortgagee, who may release any money so received by it, or apply the same on any indebtedness secured hereby. Mortgagor agrees to execute such further assignments of any . . . proceeds as mortgagee may require.

*See* Fee Simple Mortgage, Excerpts of Record ("E.R.") at 29. An assignment is the transfer of a right by the owner to another person. *See* RESTATEMENT (SECOND) OF CONTRACTS § 316 cmt. c (1979). Thus, "[a]n assignment of a right is a manifestation of the assignor's intention to transfer [that right] by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." Restatement (Second) of Contracts § 317(1) (1979). Because Cushnie had assigned his interest to the Bank, Arriola was obligated to pay the proceeds from the sale of

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<sup>5</sup> The Court notes that the Memorandum of Agreement did not expressly provide for the possible sale of Lot B and for the handling of any proceeds from such sale.

Lot B to the Bank.<sup>6</sup> *See* December 1997 Decision at 1.

[12]Cushnie further contends that his assignment of his interest to the Bank became a mortgage, and “[a]s a mortgage it must comply with the provisions of the laws of the Territory of Guam regarding mortgage foreclosure.” Appellant’s Brief at 6. Thus, Cushnie asserts that because the Bank failed to properly raise its interest in collecting on the mortgage in the federal district court lender liability action, *see supra* n.3, it could not seek satisfaction from Arriola. We find this argument to be without merit. As previously discussed, the *Bank of Guam* case determined that though the Bank was barred from pursuing a judicial remedy in the form of a formal foreclosure proceeding, it was not barred from a non-judicial remedy, which is the case here.

[13]Thus, the record below us establishes that Cushnie did assign his interest in Lot B to the Bank. Because Cushnie assigned his interest, the type of interest Cushnie held in Lot B is irrelevant to the determination of Arriola’s contractual obligations to Cushnie. Regardless of Cushnie’s interest, Cushnie’s assignment of his interest obligated Arriola to transfer the proceeds of the sale to the Bank and not to Cushnie. Further, the Bank was not precluded from accepting payment from Arriola. We therefore find that the court did not err in determining that no genuine issues of material fact existed and thereby granting summary judgment in its December 1997 Decision.

### CONCLUSION

For the foregoing reasons, we hereby **AFFIRM** the Superior Court’s December 18, 1997, order granting Defendant’s Motion for Summary Judgment.

Dated this 11 day of April, 2000.

/s/ Edward Manibusan  
EDWARD MANIBUSAN, Justice *Pro Tem*

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<sup>6</sup> It is also clear that Cushnie became the “[g]uarantor of a certain Promissory Note executed and delivered by Micronesian Yacht, Inc., to Mortgagee . . . .” E.R. at 16. Further, in consideration for the mortgage, Cushnie “irrevocably granted, sold, conveyed, and confirmed . . . All [his] undivided right, title, claim and interests in and to Lot “B,” Dandan, Municipality of Inarajan, Guam.” *Id.*

/s/ John A. Manglona  
JOHN A. MANGLONA, Justice *Pro Tem*

/s/ Juan T. Lizama  
JUAN T. LIZAMA, Justice *Pro Tem*