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

| | | |
|---|---|---|
| SAIPAN LAU LAU DEVELOPMENT, INC., SHIMIZU CORPORATION, and TOKIO MARINE & FIRE INS. CO.,<br><br>Petitioners,<br><br>v.<br><br>SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,<br><br>Respondent,<br><br>v.<br><br>JUAN M. SAN NICOLAS,<br><br>Real Party in Interest. | ) | **ORIGINAL ACTION NO. 00-001**<br>**CIVIL ACTION NO. 97-1107**<br><br>**OPINION** |

Argued and submitted September 22, 2000.

**Cite as: *Saipan Lau Lau Development, Inc. v. Superior Court (San Nicolas)*, 2000 MP 16**

Counsel for Petitioners: Randall Todd Thompson
Glen Robles
Matt Gregory
Mair, Mair, Spade & Thompson
Saipan

Vicente T. Salas
Saipan

Counsel for Real Party in Interest: Jeanne H. Rayphand
Saipan

BEFORE: CASTRO, Associate Justice, ATALIG, Justice *Pro Tem*, LAMORENA, Special Judge

CASTRO, Associate Justice:

**FOR PUBLICATION**

**[1,2]** Petitioners seek a writ of mandamus to vacate a writ of execution issued by the Superior Court on a non-final judgment.[1] We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended,[2] and 1 CMC 3102(b). We grant the petition and remand this matter, except for two ancillary issues, to the Superior Court with instructions.[3]

## I.

## FACTUAL AND PROCEDURAL BACKGROUND

On March 27, 2000 a jury trial commenced involving Plaintiff and Real Party in Interest Juan M. San Nicolas ("Plaintiff San Nicolas") against Defendants Saipan Lau Lau Development, Inc. ("Saipan Lau Lau"), Shimizu Corp., and Tokio Marine & Fire Ins. Co. ("Tokio Marine") (collectively, "Defendants" or "Petitioners"). On May 24, 2000 the jury returned a $1.5 million dollar verdict which the Superior Court memorialized as follows:

> IT IS THEREFORE ADJUDGED by the court, in conformity with that verdict, that the plaintiff recover from defendants *Saipan Lau Lau Development, Inc. and Shimizu Corporation* the sum of $1,500,000.00.

*See San Nicolas v. Saipan Lau Lau Devel., Inc.*, Civ. No. 97-1107 (N.M.I. Super. Ct. May 26, 2000) (Judgment) (emphasis added). There was no reference to Defendant Tokio Marine in the Judgment.

On May 31, 2000 Plaintiff San Nicolas filed an "Amended Motion to Amend Judgment and Notice of Hearing," arguing that Defendant Tokio Marine, as the insurer of Defendant Saipan Lau Lau, must be

---

[1] Pursuant to Petitioner's request, this Court has already stayed the Superior Court proceedings. *See* Order Granting Motion for Stay and Directing Answer to Writ of Mandamus (July 3, 2000).

[2] N.M.I. Const. art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

[3] This Court must retain jurisdiction over two matters. First, on August 1, 2000, this Court issued an Order of Suspension and Order to Show Cause directing Mitchell to show cause why his suspension should not continue or why he should not be disbarred for his conduct in the proceedings before this Court regarding Petitioners' writ petition. A hearing was held on November 9, 2000. This Court retains jurisdiction over all proceedings taken in connection with its August 1, 2000 order.

Second, this Court scheduled a hearing on Petitioners' motion for contempt filed on August 16, 2000 (said motion also renewed an earlier motion to sanctions filed on July 28, 2000). The hearing was set for 9:30 a.m. on September 22, 2000. That morning, Plaintiff attempted to continue the hearing due to the illness of his attorney, Jeanne H. Rayphand. We elected to appoint a special master to resolve said motions. *See* Order re: Motions for Contempt and Sanctions; and Petition for Writ of Mandamus (Sept. 27, 2000). Because said motions have yet to be resolved, this Court retains jurisdiction over all proceedings taken in connection with Petitioners' August 16, 2000 motion for contempt and July 28, 2000 motion for sanctions.

added to the Judgment to reflect that it was jointly and severally liable to the extent of the insurance policy. Plaintiff San Nicolas also suggested the wording for a proposed amended judgment.

On June 13, 2000 Plaintiff San Nicolas filed a "Second Amended Motion to Amend Judgment and Notice of Hearing," in which he requested that the amended judgment he proposed in his May 31 motion be entered *nunc pro tunc* to maximize the amount of interest due on the judgment. In their opposition, Defendants contended that granting Plaintiff San Nicolas' motion would effectively cut off their time for filing post-judgment motions or an appeal. Defendants also pointed out that the May 26, 2000 Judgment would not be final until it included Tokio Marine's liability.

Also in early June 2000, Plaintiff San Nicolas filed a motion for new trial as to the jury's finding of no liability for punitive damages. Defendants opposed the motion because the Judgment was not final.[4] Again, they stressed that the Judgment did not address the liability of all three defendants.

On June 26, 2000 Defendants filed a Notice of Appeal noting that the appeal ". . . is being filed, in an abundance of caution, in the event that the Plaintiff should withdraw his Second Amended Motion to Alter or Amend the Judgment".[5] That same day, Plaintiff San Nicolas filed a "Withdrawal of Notice of Hearing on Motion to Amend Judgment and Request for Status Conference" in which he again conceded that the Judgment was not final. He went into an in-depth discussion of the problem of a non-final judgment, characterizing the Judgment as "an incomplete, non-appealable judgment." Plaintiff San Nicolas then suggested a method of amending the non-final Judgment, acknowledged his motion for new trial was premature because the May 26 Judgment was not final, and requested a status conference to further discuss the issue.

On June 29, 2000 Defendants filed a Motion for Stay of the Judgment and execution thereon pending disposition of any post-trial motions and an appeal. Defendants also offered to post a supersedeas bond pursuant to Com. R. Civ. P. 62(d).[6] In his opposition, Plaintiff San Nicolas argued the bond was

---

[4] *See* Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a New Trial (June 19, 2000).

[5] *See San Nicolas v. Saipan Lau Lau Devel., Inc.*, Civ. No. 97-1107 (N.M.I. Super. Ct. June 26, 2000) (Notice of Appeal).

[6] Defendants obtained the bond through First Insurance Co. of Hawaii, Ltd. ("FICOH").

defective because FICOH allegedly is not licensed to do business in the Commonwealth, and does not have an agent in the Commonwealth.

On June 30, 2000, after a hearing, the Superior Court issued an "Order Denying Defendant's [sic] Motion for Stay and Vacating the Status Conference Scheduled for July 6, 2000." The Superior Court first found that there were no pending motions under Com. R. Civ. P. 62(b) to trigger a stay under the rule. Additionally 7 CMC § 4209(b) did not apply because Defendants had not filed an application for an order in aid of judgment. The Superior Court then vacated the status conference on Plaintiff San Nicolas' motions to amend the judgment and for a new trial. As to the proffered bond, the Superior Court noted Plaintiff San Nicolas' objection that the bond did not comply with Com. R. Civ. P. 65.1, and further noted that Defendants had not submitted documentation in compliance with Rule 65.1. That same day, the Court issued a "Writ of Execution of Judgment" which is the subject of this petition.

On July 3, 2000 we issued a stay of the proceedings below pending review of this matter.[7] A few hours before the order was filed, Plaintiff San Nicolas withdrew all funds from Defendants' Saipan bank account pursuant to the Writ of Execution. Defendants immediately filed a motion for a temporary restraining order and preliminary injunction which we granted.[8] To date, Plaintiff San Nicolas and his attorneys have refused to comply with the preliminary injunction.[9]

## II.

## ISSUE PRESENTED

**[3,4]**The issue is whether the Defendants are entitled to a writ of mandamus. A writ of mandamus is traditionally used to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when so required. *See Tenorio v. Superior Court*, 1 N.M.I. 1, 7 (1989). The remedy of mandamus is a drastic one to be invoked only in extraordinary situations. *See Taimanao v. Superior Court*, 4 N.M.I. 94, 97 (1994). We determine the propriety of issuing a writ by applying the guidelines set forth in *Tenorio*:

---

[7] *See* Order Granting Motion for Stay and Directing Answer to Writ of Mandamus (July 3, 2000).

[8] *See* Order Granting Motion to Shorten Time and Motion for Temporary Restraining Order (July 7, 2000); Order Granting Motion for Preliminary Injunction (July 14, 2000).

[9] *See* Order of Suspension and Order to Show Cause (Aug. 1, 2000).

(1) Whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired;

(2) Whether the petitioner will be damaged or prejudiced in a way not correctable on appeal;

(3) Whether the lower court's order is clearly erroneous as a matter of law;

(4) Whether the lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and

(5) Whether the lower court's order raises new and important problems or issues of law of first impression.

*See Tenorio*, 1 N.M.I. at 9-10. The first two factors are similar and may be considered together. *See Office of the Att'y Gen. v. Superior Court (Fabricante)*, Orig. No. 99-001 (N.M.I. Sup. Ct. June 28, 1999) (Opinion at 8). As for the third factor, if a rational and substantial legal argument can support the questioned ruling, then the case is not appropriate for mandamus. *See Sablan v. Superior Court*, 2 N.M.I. 165, 168 (1991). This is true even though a court may find reversible error on normal appeal. *See id*. In determining whether a writ should issue, this Court cumulatively considers and balances the *Tenorio* factors. *See Tenorio*, 1 N.M.I. at 10; *Villacrusis v. Superior Court*, 3 N.M.I. 546, 550 (1993).

## III.

## DISCUSSION AND ANALYSIS

### A. The May 26, 2000 Judgment Clearly Lacks Finality

**[5,6]**Rule 54 of the Commonwealth Rules of Civil Procedure provides in pertinent part:

> When more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. *In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties,* and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Com. R. Civ. P. 54(b) (emphasis added). Judgments must be self-contained. *See American Interins. Exch. v. Occidental Fire & Cas. Co.*, 835 F.2d 157, 159-60 (7th Cir. 1987). Although the *Occidental*

case refers to judgments under Federal Rules of Civil Procedure 58, which differs from Com. R. Civ. P. 58, the court's explanation as to the rationale behind this rule is instructive:

> [A final judgment] starts a period within which to file motions and notices. The time limits are short and strictly enforced. Unless the judgments are clear and complete, neither the parties nor the courts will know who has charge of the case. To avoid risking forfeiture of their rights, parties . . . must appeal from the entry of all judgment-like documents, which causes wheels to spin in the court of appeals and exposes the parties to needless expense.

*See id.* at 159-60 (internal citations omitted); *see also Charles v. Daley*, 799 F.2d 343, 346 (7th Cir. 1986) (finding minute order did not constitute final judgment where it referred to but did not supercede earlier opinion).

**[7,8,9]**In the Superior Court, the time for filing post-trial motions and appeals is limited. Upon entry of a final judgment, a party intending to move for a new trial has 10 days to serve the motion. *See* Com. R. Civ. P. 59(b). This deadline also applies to motions to alter or amend the judgment. *See* Com. R. Civ. P. 59(e). The deadline for appealing a judgment is 30 days from its entry. *See* Com. R. App. P. 4(a).

**[10,11]**The above deadlines are suspended by a motion for new trial or a motion to alter or amend the judgment under Com. R. Civ. P. 59. Accordingly, the finality of a judgment must also be suspended while such motions are pending. *See Wages v. Internal Revenue Serv.*, 915 F.2d 1230, 1233 n.3 (9th Cir. 1989); *Charles v. Daley*, 799 F.2d at 344.[10] Until the court issues an order disposing of any such motions, the 30-day appeal period does not begin to run, and any notice of appeal filed while the motions are pending is of no effect and must be re-filed once the 30-day period has begun. *See* Com. R. App. P. 4(a)(4).

**[13]**Plaintiff San Nicolas argues that the Superior Court Judgment was final for purposes of execution but not for appeal. He cites no authority to support this argument. He merely points to an absence of Commonwealth law on this issue. However, where neither Commonwealth written law nor Chamorro customary law are instructive as to a particular issue, we may look to the common law of other

---

[10] We may look to federal case law for guidance in interpreting our local counterpart to Fed. R. Civ. Proc. 59. *See Commonwealth v. Martinez*, 4 N.M.I. 18, 20 (1993) (involving appellate rules); *Commonwealth v. Condino*, 3 N.M.I. 501, 507 (1993) (regarding similar clauses of Commonwealth and federal constitutions); *Ada v. K. Sadhwani's, Inc.*, 3 N.M.I. 303, 311 n.3 (1992) (regarding rules of civil procedure).

United States jurisdictions for guidance. *See* 7 CMC § 3401; *I.G.I. Gen. Contractor & Dev., Inc. v. P.S.S.*, App. No. 97-031 (N.M.I. Sup. Ct. Apr. 28, 1999) (Opinion at 3).

**[13,14]**Until a judgment is final, a party cannot appeal it. *See United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 918 n.1 (9th Cir. 1998); *Charles v. Daley*, 799 F.2d at 344; *Acha v. Beame*, 570 F.2d 57, 62 (2d Cir. 1978); *Hamman v. United States*, 399 F.2d 673, 674 (9th Cir. 1968). *United Nat'l* explained:

> By requiring parties to raise all claims of error in a single appeal following final judgment on the merits, [28 U.S.C. § 1291, the federal statute conveying appellate jurisdiction,] forbids piecemeal disposition on appeal of what for practical purposes is a single controversy.

*United Nat'l v. R & D Latex*, 141 F.3d at 918 n.1 (quoting *Dannenberg v. Software Toolworks, Inc.*, 15 F.3d 1073, 1075 (9th Cir. 1994)). *Acha v. Beame* defines "finality" as:

> [T]hat degree of finality required to meet the appealability requirements of 28 U.S.C. § 1291 . . . This, in turn, is usually defined as a judgment 'which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'

*Acha v. Beame*, 570 F.2d at 344 (internal citations omitted). Finality implies that, after entry of judgment, the court will concern itself with nothing other than the mechanics of execution. *See International Controls Corp. v. Vesco*, 535 F.2d 742, 747 (2d Cir. 1976).

**[15]**Similarly, if a judgment is not final, a party cannot enforce a writ of execution. *See id.* at 744-45 (citing *Redding & Co., Inc. v. Russwine Constr. Corp.*, 417 F.2d 721, 727 (D.C. Cir. 1969). The *Russwine* court explained:

> [Rule 54(b)] is not a technicality in the interest of form; rather, it serves primarily the important function of denoting unmistakably that a final order has been entered so that the losing party may either file a timely appeal or pay the judgment. *We think the role Rule 54(b) plays with reference to the finality of a judgment for purposes of appeal has implications as regards its finality for purposes of execution as well.*

*Russwine*, 417 F.2d at 727 (emphasis added).

**[16]**The foregoing principles demonstrate that, until a judgment is clearly and unambiguously final on its face, the parties cannot definitively know when the crucial 10-day period for filing post-trial motions begins. Until a judgment is clearly and unambiguously final, the parties cannot know when to file an appeal. And until a judgment is clearly and unambiguously final, the parties cannot seek to execute it.

**[17]**Here, the May 26, 2000 Judgment on its face did not clearly and unambiguously adjudicate Plaintiff San Nicolas' rights against all three Defendants. Plaintiff San Nicolas himself conceded this point several times before the Superior Court. Since the Judgment was not final, the time for filing post-trial motions and appeals, and for resolving the litigation according to our rules of civil procedure, was disrupted. Further, Defendants were unable to seek relief from the Judgment. Indeed, attempting to do so despite the obvious non-finality of the May 26 Judgment would have exposed the parties to needless expense and wasted the Commonwealth's limited judicial resources. For these reasons, Defendants' Petition for Writ of Mandamus must be granted so that the parties may resolve the litigation according to our rules of civil procedure.

### B. Plaintiff Cannot Now Assert That the Judgment Is Final

**[18,19]**In the Superior Court, within four days of entry of the May 26 Judgment, Plaintiff San Nicolas urged that the judgment could not be final until it specifically named Defendant Tokio Marine as a jointly and severally liable defendant. Now, before this Court, Plaintiff San Nicolas takes a position wholly inconsistent with that taken below. In *Haley v. Dow Lewis Motors, Inc.*, 72 Cal. App. 4th 497 (1999), a California appellate court explained the doctrine of judicial estoppel:

> Judicial estoppel, sometimes called the "doctrine against the assertion of inconsistent positions," is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding . . . [I]t is designed to prevent litigants from 'playing "fast and loose with the courts."
>
> . . . .
>
> Asserting inconsistent positions does not trigger application of judicial estoppel unless "intentional self-contradiction is . . . used as a means of obtaining unfair advantage." Thus, the doctrine of judicial estoppel does not apply "when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court." An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing.

*Id.* at 509-10.

**[20]**Clearly, Plaintiff San Nicolas is playing "fast and loose" with the courts by trying to profit from a procedural quagmire which he himself has created. His switch of positions cannot be seen as anything but intentional, made for the purpose of obtaining the unfair advantage of denying Defendants their right to post-trial remedies and short-cutting Plaintiff's way to execution of the judgment. Plaintiff San Nicolas is

therefore judicially estopped from asserting his current position on the finality of the trial court Judgment, because this position directly and inexplicably contradicts Plaintiff's argument in the Superior Court.

### C. Defendants Are Therefore Entitled to Writ Relief

**[21]**The basis of Petitioners' entitlement to writ relief is that the judgment below was clearly non-final. *See Sablan v. Superior Court*, *supra*, 2 N.M.I. at 168. Because we find that the judgment below was not final, Defendants will suffer damage or prejudice not correctable on appeal if their petition is denied, and have no other adequate means of obtaining relief since they cannot appeal a non-final judgment. Moreover, despite the procedural confusion as to the finality of the May 26 Judgment, Plaintiff San Nicolas has already executed on the Writ of Execution and will presumably continue to do so as any other of Defendants' funds become available. Writ relief is therefore appropriate.

## IV.

## CONCLUSION AND ORDER

The May 26, 2000 Judgment was not final for purposes of post trial motions, appeal, or execution. Consequently, the June 30, 2000 Writ of Execution was void. We therefore GRANT Defendants' Petition for Writ of Mandamus. Accordingly,

IT HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The June 30, 2000 Writ of Execution shall be and is hereby VACATED.

2. Since it follows that any action taken to enforce the June 30, 2000 Writ of Execution is void, the Superior Court shall take all necessary measures to ensure the return of the funds prematurely withdrawn from Defendants' Saipan bank account.[11]

3. Because the May 26, 2000 Judgment was not final for purposes of appeal, the appeal filed by Defendants on June 26, 2000 shall be and is hereby dismissed without prejudice, pursuant to Com. R. App. P. 4(a)(4).

---

[11] This directive is separate and distinct from this Court's order to Plaintiff San Nicolas and others which is the subject of Defendant's motions for contempt and sanctions retained by this Court. *See* n.3, *supra*.

4. The stay entered by this Court on July 3, 2000 is lifted and this matter is remanded[12] to the Superior Court to conduct further proceedings consistent with this Opinion.[13]

SO ORDERED this 1st day of December 2000.

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ Pedro M. Atalig
PEDRO M. ATALIG, Justice *Pro Tem*

/s/ Alberto C. Lamorena III
ALBERTO C. LAMORENA III, Special Judge

---

[12] This Court retains jurisdiction of Defendant's Motions for Contempt and Sanctions and its August 1, 2000 Order of Suspension and Order to Show Cause. *See* n.3, *supra*.

[13] Plaintiff San Nicolas objected to the proffered bond because the bond company is not licensed to do business in the Commonwealth. He also objected to Defendants' submission of evidence to this Court regarding the bond, because Defendants did not submit this evidence to the trial court. Defendants note they offered to submit evidence to rebut Plaintiff's objection to the bond, but the trial court did not request any.

Com. R. Civ. P. 62 sets forth the prerequisites for a stay of execution of or any proceedings to enforce a judgment pending the disposition of a Rule 59 motion for a new trial or to alter or amend a judgment. The stay is effective when the supersedeas bond is approved by the court. *See* Com. R. Civ. P. 62(d). By providing the bond, a surety submits to the jurisdiction of the Commonwealth courts. *See* Com. R. App. P. 8(b), Com. R. Civ. P. 65.1(a). In the federal system, a party is entitled to a stay of a money judgment as a matter of right upon the posting of a bond pursuant to Fed. R. Civ. Proc. 62(d). *See American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S. Ct. 1, 3, 17 L. Ed. 2d 37 (1966); *Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992); *Ascher v. Gutierrez*, 66 F.R.D. 548, 549 (D. D. C. 1975).

Here, Defendants submitted proof that its surety, FICOH, holds a certificate of authority from the Secretary of the Treasury, in compliance with Com. R. Civ. P. 65.1(d)(2). Rule 65.1 by its terms does not require that the company be admitted to do business in the Commonwealth. If there were any objections to the FICOH bond, the parties should have been permitted to present evidence at a hearing on the motion for stay.