FOR PUBLICATION

Appeals Nos. 00-037/00-038

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

Guo Qiong He,
Plaintiff/Appellee
v.
Commonwealth of the Northern Mariana Islands, and
Thomas O. Sablan, David Ayuyu, Ralph S. Demapan,
Mark Zachares, Masaaki Nakamura, John T. Taitano,
Julita Omar, and John Does 1-4 (in their individual capacities),
Defendants/Appellants,

Yi Gong Chen,
Plaintiff/Appellee
v.
Commonwealth of the Northern Mariana Islands, and
Thomas O. Sablan, David Ayuyu, Ralph S. Demapan,
Masaaki Nakamura, John Taitano, Julita Omar, and
Does 1-4 (in their individual capacities),
Defendants/Appellants

ORDER DISMISSING APPEAL, AWARDING COSTS,
and IMPOSING SACTIONS

Cite as: *He v. Commonwealth,* 2003 MP 3

Civil Actions Nos. 99-0268/99-0269
Argued and Submitted June 20, 2002
Decided February 6, 2003

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BEFORE: ALEXANDRO C. CASTRO, Associate Justice; and VIRGINIA SABLAN-ONERHEIM and KATHLEEN M. SALII, Justices *Pro Tempore*.

CASTRO, Associate Justice:

¶1 The Government of the Commonwealth of the Northern Mariana Islands [hereinafter Government] and individually named defendants[1] [hereinafter Individual Defendants or collectively Defendants or Appellants] timely appeal the trial court orders denying their motions to dismiss related cases on the grounds of immunity. Plaintiff-Appellees are Guo Qiong He [hereinafter Ms. He] (Appeal No.00-037) and Yi Gong Chen [hereinafter Mr. Chen] (Appeal No. 00-038) [hereinafter collectively Plaintiffs].[2] For the reasons explained below, the appeals are DISMISSED.

QUESTIONS PRESENTED

¶2 Whether a trial court errs by addressing an original complaint, rather than a subsequently filed, First Amended Complaint, as the basis for its rulings, and whether a resulting order denying dismissal is valid.

¶3 Whether a defendant may appeal the interlocutory denial of a motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 On May 12, 1997, Ms. He and Mr. Chen were arrested by immigration officers for working illegally in the Commonwealth of the Northern Mariana Islands.[3] The two were taken into custody, detained for evidentiary hearings, and eventually ordered deported.[4]

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[1] The Individual Defendants, employed in official capacities by the Government, are Thomas O. Sablan, David Ayuyu, Ralph S. Demapan, Masaaki Nakamura, John T. Taitano and Julie (Julita) Omar. In addition, Plaintiff-Appellee Guo Qiong He names Mark Zachares.

[2] Except where otherwise noted, the issues and arguments in both Ms. He and Mr. Chen's cases are the same. Therefore, though the cases were assigned to separate trial judges and the orders appealed from differ slightly, the appeals were heard and are hereby addressed jointly.

[3] Plaintiffs were arrested during a search of the Jin Apparel Garment Factory.

[4] Ms. He appealed her deportation order and eventually reached a settlement with the Government. Mr. Chen did not contest his deportation order.

¶5 On May 11, 1999, Ms. He and Mr. Chen filed suit against the Government and Individual Defendants alleging unlawful search and seizure, as well as Federal civil rights violations under 42 U.S.C. § 1983, arising from the 1997 incidents.[5] Ms. He additionally alleges that an immigration guard assaulted her while she was in custody.

¶6 On June 21, 1999, Defendants filed motions to dismiss Plaintiffs' complaints.

¶7 While these motions were pending, on October 1, 1999, Plaintiffs submitted amended complaints. Five days later, on October 6, 1999, Defendants again responded with motions to dismiss.

¶8 On October 10 and October 25, 2000, the trial judges issued orders denying Defendants' motions to dismiss in Mr. Chen and Ms. He's cases, respectively. Both orders relate to the June 21, 1999, motions regarding the original complaints, not the October 6, 1999, motions regarding the amended complaints.

ANALYSIS

¶9 On appeal, a motion to dismiss under Commonwealth Rules of Civil Procedure 12(b)(6) is reviewed *de novo*. *O'Connor v. Div. of Pub. Lands*, 1999 MP 5 ¶ 2; *Sablan v. Tenorio*, 4 N.M.I. 351, 355 (1996).

I. The Orders are Invalid Because They Address Complaints Superceded by Amendment.

¶10 A party may amend her complaint once "as a matter of course" if no responsive pleading has been served. Com. R. Civ. P. 15(a).[6] Defendants responded to the complaints in this case by filing

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[5] They maintain that they were targeted without cause, and that various of their rights were violated during detention and deportation.

[6] Pleadings consist exclusively of complaints, answers to complaints, replies to counterclaims, answers to cross-claims, third-party complaints, and third-party answers. Com. R. Civ. P. 7(a). This is in contrast to "motions and other papers." Com. R. Civ. P. 7(b).

motions to dismiss. Such motions clearly are not pleadings. Plaintiffs therefore were automatically entitled to amend their complaints.[7]

¶11 Once filed, an amended complaint supercedes the original. The original complaint "no longer performs any function and is 'treated thereafter as non-existent.'" *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992) (*quoting Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)); *188 LLC v. Trinity Indus. Inc.*, 300 F.3d 730, 736 (7th Cir. 2002) (amendment renders the prior pleading "*functus officio*"); *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000) (amended complaint leaves original complaint without legal effect).

¶12 Because Plaintiffs had filed their amended complaints prior to issuance of the orders, the trial judges' assessments of the original complaints cannot control the disposition of Defendants' motions in these cases. *Duda v. Bd. of Educ.*, 133 F.3d 1054, 1057 (7th Cir. 1998).

II. Defendants Do Not Have the Right to Appeal the Interlocutory Orders Denying Dismissal.

¶13 Defendants suggest that we address the merits of the orders, despite their invalidity. At least one court has done so in "considerations of judicial economy." *Duda,* 133 F.3d at 1057. However, in the absence of a writ of mandamus, the "final judgment rule" denies this Court appellate jurisdiction over interlocutory orders. N.M.I. Const. art. IV, § 3; 1 CMC § 3102; *Commonwealth v. Guerrero*, 3 N.M.I. 479, 481 (1993).

¶14 We have recognized the collateral order doctrine as an exception to the final judgment rule,[8] but application of the exception is strictly confined. *Guerrero*, 3 N.M.I. at 481-82; *Commonwealth*

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[7] Whether the right to amend survives even after a motion to dismiss (or for summary judgment) has been granted remains open.

[8] The collateral order rule states that a party may appeal an order which: (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Commonwealth v. Guerro,* 3 N.M.I. 479, 482 (1993).

v. Sibetang, 2002 MP 9 ¶ 2 n.1; *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-68, 114 S. Ct. 1992, 1996, 128 L. Ed. 2d 842, 849 (1994) (conditions for collateral order appeal are stringent; narrow exception should stay that way and must "never be allowed to swallow the general rule").

¶15 A denial of qualified immunity falls under the collateral order doctrine, as immunity is not merely a defense but an actual exemption from liability and an entitlement not to stand trial. *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1114 (9th Cir. 2002) (Paez, J. dissenting) (distinguishing the General Aviation Revitalization Act statute of repose defense from a claim of immunity: "[a] government official's claim of qualified immunity is the defining example of a right that can be vindicated adequately only if pre-judgment appeal is available."); *Swint v. Chanbers County Comm 'n,* 514 U.S. 35, 42, 115 S. Ct. 1203, 1208, 131 L. Ed. 2d 60, 69-70 (1995).

¶16 However, a denial of a motion to dismiss based on immunity is not necessarily a denial of immunity. Notwithstanding Defendants' protestations, neither trial judge held that Defendants are *not* entitled to protection. Rather, both judges concluded that the issue couldn't be resolved on the motions under consideration.[9]

¶17 Thus, there was no final determination of the immunity question, no risk of waiving appeal, and therefore no exception to the collateral order rule. The trial judges' denials of Defendants' motions to dismiss were unappealable, non-final, interlocutory orders.[10] As a result, this Court

[9] Their paths vary somewhat - in essence the trial judge in *He* found a problem vis-a-vis Commonwealth Rules of Civil Procedure 7(b), while the *Chen* judge did not - but the distinction is peripheral to our analysis.

[10] Though we cannot issue a binding ruling on the substance of these appeals, Defendants are reminded that motions to dismiss do not test whether a plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. They do not test questions of fact, but questions of law. Where, as here, there is no basis for converting a motion for dismissal to one for summary judgment, the only elements of qualified immunity appropriately considered are two "abstract issues of law:" (1) whether the complaint alleges a violation of a constitutional right, and (2) whether the right in question was clearly established. *Johnson v. Jones*, 515 U.S. 304, 313-17, 115 S. Ct. 2151, 2156-58, 132 L. Ed. 2d 238, 247-50 (1995); *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998).

lacks jurisdiction over these appeals.

AWARD OF COSTS

¶18 According to the Commonwealth Rules of Appellate Procedure, dismissal of an appeal triggers taxation of costs. Com. R. App. P. 39(a) ("Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant . . . ."). Therefore, Plaintiffs are directed to follow the prescribed procedures by serving and filing itemized, verified bills of costs with the Clerk of Court within fourteen (14) days after date of entry of this judgment.

IMPOSITION OF SANCTIONS [11]

¶19 Defendants willfully pursued these appeals, including a delayed briefing schedule, despite the knowledge that the underlying orders are invalid. They compound their misconduct by failing to explain how the standards they present differ from those employed by the trial courts, conflating motions to dismiss with motions for summary judgment, making largely conclusory arguments, and consistently taking sources out of context or otherwise using them inappropriately.[12]

¶20 Though the substance of the motions is not properly before this Court, Defendants harp on

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This is notable because the reasonableness of an official's conduct, which Defendants argue *ad nauseum*, is not properly raised on a Rule 12(b)(6) motion.

[11] Having duly considered Defendants' objections to sanctions, we find them unpersuasive.

[12] For example:

Defendants rely on *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 2000), for the notion that they would have waived appeal had they not appealed at this stage. But *Price* stands for the proposition that the denial of immunity on a motion for summary judgment is not reviewable where final judgment has been entered after a jury trial on the merits, 200 F.3d at 1243. Not one of the *Price* conditions exists in the present cases, making the ruling entirely inapposite.

Defendants ignore the concurrent holding in *Price:* summary judgment determinations are not made immediately appealable "merely because they happen to arise in a qualified-immunity case," 200 F.3d at 1244 (*quoting Behrens v. Pelletier*, 516 U.S. 299, 313, ll6 S. Ct. 834, 842, 133 L. Ed. 2d 773, 787 (1996) (also used improperly by Defendants)). Restating the collateral order rule, the *Price* court emphasized that determinations must conclusively resolve a legal dispute relating to qualified immunity to be appealable. *Id.* This proposition is applicable.

Defendants justify the use of *Hoque*, which has been appealed, with the statement that the filing of an appeal "is of no consequence to the validity of the law." This may be true, but it is manifestly hypocritical given that Defendants sought and obtained delay in the briefing schedule in these cases based upon their own appeal to the Ninth Circuit of *Gorromeo v. Zachares*, 15 Fed. Appx. 555, 557 (9th Cir. 2001).

substantive issues. Nevertheless, they refuse to address the misconduct alleged, argue as if Plaintiffs are challenging the arrests themselves, and rely upon statutes authorizing the warrantless search of factories employing foreign workers to justify the unprovoked search of foreign workers themselves.[13]

¶21 Pursuant to Commonwealth Rules of Appellate Procedure 38(a), parties opposing frivolous appeals may be awarded damages, as well as single or double costs. Based on this tenet, we impose sanctions against the Government payable to Plaintiffs in an amount equal to their expenditures in opposing this appeal (including reasonable attorney fees).

¶22 In addition, appropriate sanctions are warranted against attorneys who sign frivolous appeals. Com. R. App. P. 38(b). On this basis, we impose sanctions against the Office of the Attorney General payable to this Court in the amount of $250.

¶23 Payment of all sanctions shall be made within 120 days of the date of this order.

CONCLUSION

¶24 The trial judges' orders in Ms. He and Mr. Chen's cases address complaints which were no longer valid, due to the filing of amended complaints and, as such, the orders are without legal effect. In addition, the orders do not conclusively determine the immunity question and, as such, fail the first level of inquiry under the collateral source rule. This Court, consequently, lacks

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[13] Any number of these mistakes might be forgiven, were it not for the fact that Defendants' analysis is so deeply flawed. They assert that Plaintiffs' convictions prove the reasonableness of Defendants' conduct at the time of arrest, detention, and trial. So, working backwards, they claim to have shown by the occurrence of a specific event (deportation) the character of unrelated previous events (such as warrantless arrests).

In the alternative, Defendants are making the point that the arrests, detentions and prosecutions themselves were justified. This interpretation is supported by the bald recital of such maxims as "a good faith prosecution cannot give rise to a § 1983 claim." It too, is absurd, however, as Plaintiffs are not challenging the law enforcement acts, but rather the attendant conduct of government personnel. Moreover, the Ninth Circuit explicitly admonished Defendants that, even if they were relying on duly enacted statutes, immunity does not extend to "official conduct which is patently violative of fundamental constitutional principles." *Gorromeo*, 15 Fed. Appx. at 557. Though the Ninth Circuit's opinion in *Gorromeo* is unpublished, and therefore not citable as precedent, it should have served to put Defendants on notice that this particular argument was frivolous.

jurisdiction to rule on the merits of Defendants' motions.

¶25 For the foregoing reasons, the appeals are **DISMISSED**, and Defendants and the Office of the Attorney General are ordered to pay **COSTS** and **SANCTIONS** as specified above.

SO ORDERED THIS 6TH DAY OF FEBRUARY 2003.

/s/___________________________________
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

/s/ ___________________________________
VIRGINIA SABLAN-ONERHEIM, JUSTICE *PRO TEMPORE*

/s/___________________________________
KATHLEEN M. SALII, JUSTICE *PRO TEMPORE*