FOR PUBLICATION

IN THE

SUPREME COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BANK OF SAIPAN, INC.,
Petitioner,
v.
SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Respondent,

SECRETARY OF COMMERCE FERMIN M. ATALIG, IN HIS OFFICIAL CAPACITY AS THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DIRECTOR OF BANKING, PURSUANT TO 4 CMC § 6105(a),
and
RANDALL T. FENNELL, IN HIS CAPACITY AS FORMER TEMPORARY RECEIVER FOR THE BANK OF SAIPAN,

Real Parties In Interest.

ORIGINAL ACTION NO. 02-002-0A

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Cite as: ***Bank of Saipan v. Superior Court*****, 2004 MP 15**

Saipan, Northern Mariana Islands
Decided August 12, 2004

BEFORE: VIRGINIA SABLAN ONERHEIM, ALBERTO C. LAMORENA, III, and MICHAEL J. BORDALLO, Justices Pro Tempore

¶1 In this mandamus Petition challenging the actions of the temporary receiver for the Bank of Saipan, Randall T. Fennell ("Receiver"), and the Superior Court judge in this case, Petitioner Bank of Saipan, Inc. ("Bank") seeks removal of Mr. Fennell from the receivership, appointment of a new receiver, reassignment of the case to another judge, and the vacating of certain orders issued by the Superior Court in this case. The Attorney General's Office opposes the Petition on behalf of the Acting Secretary of Commerce, Fermin T. Atalig, in his official capacity as the CNMI Director of Banking pursuant to 4 CMC § 6105(a). In its Petition, the Bank provides a long list of grievances with the proceedings in the trial court, including, among others, that the Receiver and the trial judge engaged in improper *ex parte* communications. This Court concludes that during the lengthy period of time when this Petition action was voluntarily stayed by the parties, the circumstances surrounding the trial court proceedings changed dramatically, such that the conditions that formed the basis for this Petition are no longer present. Accordingly, this Court denies the mandamus Petition.

¶2 On May 28, 2002, Petitioner filed a Petition for Writ of Mandamus. The Petition alleged that the Bank was entitled to the extraordinary remedy of mandamus because, in the Bank's words, "an extraordinary public emergency exists which warrants immediate intervention by the High Court." Specifically, the Bank alleged that the trial court proceedings were irrevocably tainted by conflicts of interest on the part of the Receiver, by the Government misleading the Bank, by the Government and the Receiver concealing conflicts of interest from the trial court and the Bank, by disclosure of confidential Bank documents by the Receiver, and by denial of the Bank's notice and opportunity to be heard by the Government and the Receiver. Further, Petitioner alleged that the trial court proceedings were fatally defective because the Bank was

denied service of process, the trial court entered orders based on *ex parte* requests without an opportunity for the Bank to be heard, and the Receiver conducted a private briefing with the judge. Thus, the Bank requested that the Receiver be replaced with another receiver without any conflicts of interest, that the case be assigned to another judge, and that all the orders issued by the trial court up to that point in the case be vacated.

¶3 After oral arguments on this matter, the parties negotiated a stay and submitted a Stipulation and Order for Stay of Proceeding on November 7, 2002. On November 13, 2002, pursuant to the Stipulation, this Court ordered a stay of the proceedings. On August 12, 2003, a status conference was held, and the parties requested leave to file additional briefing in this matter, given that the situation is now much different from when the Petition was originally filed. Such leave was granted, and the Government and the Bank filed supplemental memoranda. On August 26, 2003, the Court lifted the stay.

¶4 In its supplemental filing, the Government argues that because circumstances in this case so substantially changed during the time proceedings were stayed, there is no present need for the relief previously sought by the Petition. The Government states that the original trial court judge in this case has retired, a different judge is assigned to the case, there is a new receiver, there is a new plan of rehabilitation for the Bank, there is a new board of directors, and there is a new protocol followed by the current receiver and the trial court to identify, discuss, and resolve major issues. The Government also points to the fact that the Bank has reopened and the rehabilitation is moving forward smoothly.

¶5 The Bank in its supplemental filing does not dispute any of these points. In fact, the Bank explicitly agrees with the Government that the rehabilitation is going well under the new receiver. The Bank provides no evidence that *ex parte* communications or any of the other

originally complained of activities are taking place presently or affecting the present receivership or rehabilitation. Instead, the Bank argues that this Court must necessarily issue a writ, so as to give guidance to the trial court on the issue of *ex parte* communications that may take place in the future during this receivership or other receiverships. The Bank contends that without a writ, the trial court could revert to the former practice of such *ex parte* communications.

¶6 It is improper for the Court to issue a writ of mandamus in this situation for two reasons. First, issuance of a writ would require us to give an opinion on a moot question or abstract proposition, or to declare principles or rules of law that do not presently affect this case, which this Court does not do. *In re Seman,* 3 N.M.I. 57, 64 (1992). Second, in light of the new circumstances surrounding this case compared to when the Bank filed the Petition, the Bank has not shown that it is entitled to the extraordinary remedy of writ of mandamus.

¶7 We will first address the issue of mootness. Because this case was stayed for so long and because during that time the circumstances surrounding this case have so substantially changed, we hold that this Petition is now moot. We also hold that the "capable of repetition yet evading review" exception to the mootness doctrine does not apply here.

¶8 The duty of the Court is to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case at bar." *Id.* (*citing Govenda v. Micronesian Garment Mfg., Inc.,* 2 N.M.I. 270, 281 (1991)). However, when the issue raised affects the public interest, and it is likely that similar issues arising in the future would likewise become moot before this Court can make a determination, there is an exception to the mootness rule. *Id.* This exception is commonly referred to as the "capable of repetition yet evading review" exception. The exception applies when there is something inherent in the

situation presented such that mootness will prevent consideration of the issues nearly every time those issues arise. For example, in *United States v. New York Tel. Co.,* 434 U.S. 159, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977), the expiration of an order requiring the phone company to assist in police surveillance of two phones did not moot an appellate court ruling that the district court had abused its discretion in granting the order. Such orders authorized surveillance only for a brief period of time. Even if such an order is stayed pending appeal, the mootness problem would remain, since the showing of probable cause required to secure the order could easily become stale. The controversy is therefore one that presented a danger of repetition and continual evasion of review. *See also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) and *Meyer v. Grant,* 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

¶9 The posture of the litigation that is the subject of this Petition is now completely different. There is a new judge assigned to the case. There is a new receiver. No *ex parte* communications are taking place in the trial court. The rehabilitation is no longer contentious, but rather all parties agree that it is going well.

¶10 Indeed, the relief the Bank asks for in the original Petition is no longer relevant. The Bank asks for a new judge; there is now a new judge. The Bank asks for a new receiver; there is a new receiver. The Bank asks for a halt to the *ex parte* communications; there are no such communications taking place. The Bank asks us to vacate orders but cannot at this point explain why these orders are presently prejudicial to the Bank or impeding the progress of the rehabilitation. Everything the Bank asked for in its Petition, it has obtained during the stay.

¶11 The question remains of what the Bank now seeks from this Court, when all the Bank's requests in the Petition have been fulfilled. In its supplemental briefing, the Bank now urges us

to give an advisory opinion on the propriety of *ex parte* communications between a receiver and a judge.

¶12 We fail to see how simply chiding a retired judge and former receiver for taking actions that no longer have any bearing on this case will provide effective relief for the Bank. The judge and receiver objected to by the Bank are no longer involved in the case, and the rehabilitation is successfully moving forward. The Bank has failed to prove that the pre-Petition *ex parte* communications or orders that resulted from these communications have any bearing on the current posture of the Bank of Saipan litigation or rehabilitation. Therefore, any decision issued by this Court on the matter would be completely abstract and not rooted in knowledge of the actual effect that such communications and orders have on the receivership as it now stands. It is consequently impossible for the Court to craft a remedy here when there is no specific harm which the Bank is currently suffering.

¶13 The present situation meets the first prong of the "capable of repetition yet evading review" test outlined in *In re Seman,* namely, that the litigation affects the public interest. However, the Bank has not shown that the second prong of the test is met. That is, the Bank has pointed to no reason why similar issues arising in the future would likewise become moot before the Court can make a determination. If these issues arise again, it is not likely that the Court will be prevented from addressing the issues on the basis of mootness. The only reason mootness prevents our consideration in the present situation is because the parties voluntarily stayed the proceedings for nine months, during which time, wholesale changes in every aspect of the case relevant to this Petition took place, including the installation of a new judge, a new receiver, and new procedures for communication between the judge and the receiver. There is nothing inherent in the issues presented that makes it likely that the issues will become moot before we are able to

consider them. The stay and subsequent change in circumstances that occurred in this case is unique to the present case only. If these issues arise in the future, we can consider them at that time and make a determination that has an actual effect on the parties. Therefore, the "capable of repetition yet evading review" exception does not apply here.

¶14 We will now turn to the second issue, whether the Bank has shown that is entitled to the extraordinary remedy of writ of mandamus at this juncture. We hold that the Bank has not made such a showing.

¶15 The purpose of a writ is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Tenorio v. Superior Court,* 1 N.M.I. 1, 7 (1989). The *Tenorio* case lists five guidelines for granting a writ, namely that: (1) petitioner has no other adequate means, such as direct appeal, to attain the relief desired, (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal, (3) the lower court's order is clearly erroneous as a matter of law, (4) the lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules, and (5) the lower court's order raises new and important problems, or issues of law of first impression. *Id.* at 9 (*citing Bauman v. United States District Court,* 557 F.2d 650, 654-55 (9th Cir. 1977) and cases cited therein).

¶16 Here, the trial court is not exceeding its jurisdiction or failing to exercise its prescribed jurisdiction, which compels us to deny the writ. The trial court is currently conducting itself in a manner to which the Bank does not object. Therefore, the Bank has failed to prove that the court is exceeding its jurisdiction here. Moreover, the Bank completely fails to prove the first two guidelines listed above. With regard to the first guideline, the Bank is not requesting substantive relief from any order so much as it is asking us to abstractly declare something improper. As to

the second guideline, there is no prejudice or damage being suffered by the Bank. We reiterate that all parties involved are satisfied with the progress of the rehabilitation. Thus, denial of this writ will not be prejudicial to the Bank.

SO ORDERED this 12th day of August 2004.

/s/____
VIRGINIA SABLAN ONERHEIM, Justice *Pro Tempore*

/s/____
ALBERTO C. LAMORENA, III, Justice *Pro Tempore*

/s/____
MICHAEL J. BORDALLO, Justice *Pro Tempore*