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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Petitioner,

v.

COMMONWEALTH UTILITIES CORPORATION,
Respondent.

SUPREME COURT NO. 2014-SCC-0017-PET

OPINION

Cite as: 2014 MP 21

Decided December 30, 2014

David Lochabay, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Petitioner Commonwealth of the Northern Mariana Islands
Michael A. White, Saipan, MP, for Respondent Commonwealth Utilities Corporation

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; TIMOTHY H. BELLAS, Justice Pro Tem.

PER CURIAM:

¶ 1 The Commonwealth petitions the Court for a writ of mandamus ("writ") directing the trial court to: (1) vacate its order denying the Commonwealth's motion to dismiss for lack of capacity and (2) grant the motion to dismiss for lack of capacity. According to the Commonwealth, a writ is appropriate because the trial court clearly erred by concluding the Commonwealth Utilities Corporation ("CUC") has capacity to sue the Commonwealth. For the reasons discussed below, we DENY the Commonwealth's petition.

I. Facts and Procedural History

¶ 2 In 1985, CUC was organized as a public corporation with a board of directors. In 2006, CUC lost its independent nature and board of directors when CUC was integrated into the Department of Public Works. However, CUC was quickly reconstituted as a public corporation with an executive director and an advisory board appointed by the governor.

¶ 3 In 2007, the governor declared a state-of-disaster emergency and took control of various aspects of CUC. This control has been repeatedly exercised and extended through various executive orders.

¶ 4 In 2008, the Legislature repealed and re-enacted laws dealing with CUC. These laws re-established CUC as a public corporation with a board of directors and an executive director. Until recently, these laws had limited effect because the governor controlled much of CUC through executive orders declaring a state-of-disaster emergency. However, most of these laws were not in effect when the trial court ruled because, at that time, the only order affecting CUC suspended the limitation on employing foreign nationals.

¶ 5 On December 13, 2013, CUC sued the Commonwealth, seeking payment for utility services provided to the Commonwealth. The Commonwealth filed a motion to dismiss the case on the basis that CUC lacked capacity to bring the lawsuit.

¶ 6 On September 3, 2014, the trial court denied the Commonwealth's motion to dismiss for lack of capacity. The trial court explained that it was guided by NMI Rule of Civil Procedure 17, which required the trial court to look to the Commonwealth Code in determining CUC's ability to sue. Thus, the trial court turned to the statutes affecting CUC rather than the common law. The trial court explained that the statutes: (1) make CUC a public corporation; (2) require CUC to obtain financial independence through fee collection; and (3) direct CUC to bill the government for utilities. Therefore, the trial court concluded CUC has capacity to sue the Commonwealth because the statutes created a contract between the parties and imposed contract liability on the Commonwealth.

¶ 7 While explaining its decision, the trial court addressed and rejected some of the Commonwealth's arguments. The Commonwealth asserted the relationship between CUC and the Commonwealth was not

reflected in the statutes because executive orders suspended the act establishing CUC. But the trial court rejected this argument because no order suspended the act or exempted the Commonwealth from being billed for utilities. The Commonwealth also argued that 7 CMC § 3401 and the common law prevent a creature of the state from suing the state. But the trial court rejected the invitation to apply the common law for multiple reasons: (1) the common law did not apply because there is applicable statutory authority; (2) courts apply applicable statutes to determine whether a state entity can sue the state before turning to other sources; and (3) the Commonwealth's reliance on *City of New York v. State*, 655 N.E.2d 649 (N.Y. 1995), did not support a blanket ban.[1]

II. Jurisdiction

¶ 8 We have jurisdiction over a petition for a writ of mandamus. NMI CONST. art. IV, § 3; 1 CMC § 3102(b).

III. Standards of Review

¶ 9 We determine whether a writ is appropriate by balancing the five *Tenorio* factors: (1) "the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired[;]" (2) "the petitioner will be damaged or prejudiced in a way not correctable on appeal[;]" (3) "the [trial] court's decision is clearly erroneous as a matter of law[;]" (4) "the [trial] court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules[;]" and (5) "the [trial] court's order raises new and important problems, or issues of law of first impression." *Tenorio v. Superior Ct.*, 1 NMI 1, 9-10 (1989). While we weigh all the factors, the absence of factor three is dispositive; a writ is not appropriate if the petitioner has not shown clear error. *In re Buckingham*, 2012 MP 15 ¶ 10.

IV. Discussion

¶ 10 We begin and end our analysis with the clear error factor because the Commonwealth's failure to demonstrate clear error is fatal to their petition. *See id.* (requiring clear error for a writ).

¶ 11 The Commonwealth argues that the third *Tenorio* factor—that the trial court's decision was clearly erroneous—favors granting the writ. The trial court's decision, on a question of law, is accorded more deference within the context of a writ petition than it would be on direct appeal. *See Commonwealth v. Quitano*, 2014 MP 5 ¶ 40 (reviewing question of law de novo on direct appeal). Rather than asking whether the trial court made the correct decision—the analysis under de novo review—we limit our

[1] The trial court highlighted three reasons why *City of New York* did not support block CUC's suit. First, *City of New York* only addressed political subdivisions but CUC is not a subdivision. Second, *City of New York* only restricted suits seeking to invalidate legislation but CUC is not attempting to overturn a law. Third, *City of New York* acknowledged state entities with a propriety interest in a specific fund of money can sue the state over the fund, which means the case might support CUC's position because the statutory requirement that CUC provide utilities to the Commonwealth and bill every customer creates a proprietary interest.

inquiry to whether there is any rational and substantial argument that could support the trial court's decision. *In re Buckingham*, 2012 MP 15 ¶ 10.

¶ 12 The Commonwealth cannot meet this burden. The Commonwealth argues that under the common law, CUC lacks capacity because it is a state entity—either a "creature of the state" or an "arm of the state." In support, the Commonwealth points to three errors the trial court allegedly made: (1) ignoring the arm-of-the-state doctrine; (2) disregarding the total effect of the executive orders that allegedly removed CUC's independent nature; and (3) defining political subdivision too narrowly. But the Court does not need to engage with these contentions because, even if the Court agrees with the Commonwealth's position that the common law controls and CUC is a state entity, there is a rational argument that CUC has capacity to sue the Commonwealth. *City of New York*, which the Commonwealth cites as support, recognized a general prohibition on state entities suing the government while also acknowledging four exceptions.[2] 655 N.E.2d at 652. We are only concerned with one of the exceptions: permitting a state entity to sue the state over a proprietary interest. *See id.* (specific fund); *Coos Cnty. v. State*, 734 P.2d 1348, 1352 (Or. 1987) (real property).

¶ 13 In light of that exception, there is a rational argument that CUC had a contractual agreement with the Commonwealth triggering *City of New York*'s proprietary interest exception. Here, the Commonwealth arguably created a contract by requiring CUC to bill the government for utilities, 4 CMC § 8143(a), and at the same time "collect fees . . . from *all* customers," *id.* § 8122(b) (emphasis added). A legitimate argument can be made that this is a contract: CUC provides utilities to the Commonwealth and, in exchange, the Commonwealth pays CUC. Because arguably there is a contract, a court could fairly conclude CUC has a proprietary interest in the payment for utilities provided. *Cf. Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006) (concluding that a state has a proprietary interest in getting what it paid for); *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1025 (9th Cir. 2010) (referencing with approval the state's proprietary interest in getting what it paid for). Under *City of New York*, there is a valid argument that the presence of a contract and a proprietary interest give CUC capacity to sue to protect that interest. 655 N.E.2d at 652. Accordingly, the trial court's decision permitting CUC to sue was rational; thus, we cannot grant the writ because the trial court did not commit

[2] The New York Court of Appeals set forth the general rule and exceptions for lawsuits where a government entity is suing the state to invalidate legislation. *City of New York*, 655 N.E.2d at 652. At first glance, *City of New York* does not reach the situation in this case: a government entity suing over a contract. Because we are reviewing for clear error, we must determine whether there is any rational interpretation that would justify extending *City of New York*'s holding to the present case. We conclude there is because the underlying issue in both cases is the same: limitations on litigation between the state and its agencies. Our conclusion is reinforced by the Commonwealth's brief, which relies on *City of New York* for the general proposition that municipalities cannot sue the state rather than limiting the case to lawsuits seeking to invalidate legislation. Accordingly, for purposes of clear error review, *City of New York* stands for the proposition that state entities cannot sue the state unless the action falls into one of the enumerated exceptions.

clear error. *See In re Buckingham*, 2012 MP 15 ¶ 10 (explaining a writ is inappropriate without clear error).

V. Conclusion

¶ 14 For the reasons discussed above, we DENY the Commonwealth's petition for a writ.

SO ORDERED this 30th day of December, 2014.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
TIMOTHY H. BELLAS
Justice Pro Tem