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SUPREME COURT
GUM

IN THE SUPREME COURT OF GUAM

KINI B. SANANAP AND IOWANA SANANAP ET. AL.,
Plaintiffs-Appellees,

v.

CYFRED, LTD.,
Defendant-Appellant.

Supreme Court Case No. CVA09-025
Superior Court Case No. CV1448-02

OPINION

Cite as: 2011 Guam 22

Appeal from the Superior Court of Guam
Argued and submitted October 14, 2009
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO¹, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.

[1] Defendant-Appellant Cyfred, Ltd. (“Cyfred”) appeals a September 17, 2009 Decision and Order denying Cyfred’s Application to Recall and Quash a Writ of Execution issued on June 17, 2009 and to Add All Appropriate Plaintiffs to the Judgment prior to execution. Because the June 17, 2009 writ of execution and any levies made on specific properties expired pursuant to Title 7 GCA §§ 23104 and 23109, the appeal of the Decision and Order recalling and quashing the writ of execution is now moot. Accordingly, we dismiss this appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The underlying dispute in this case has already been before this court multiple times on appeal, and the details are fully described in the prior opinions. *See Yanfag v. Cyfred, Ltd.*, 2009 Guam 16; *Abalos v. Cyfred, Ltd. (Abalos II)*, 2009 Guam 14; *Sananap v. Cyfred, Ltd. (Sananap II)*, 2009 Guam 13; *Sananap v. Cyfred, Ltd. (Sananap I)*, 2008 Guam 10; *Abalos v. Cyfred, Ltd. (Abalos I)*, 2006 Guam 7. Indeed, there is another appeal before us pertaining to very similar issues. *See Sananap, et al. v. Cyfred, Ltd.*, CVA09-014. By way of a brief summary, Cyfred sold lots in the Gill-Baza Subdivision but failed to install sewer lines. *Sananap II*, 2009 Guam 13 ¶ 2; *Sananap I*, 2008 Guam 10 ¶ 2. Kini and Iowana Sananap, purchasers of one of the lots,

¹ On January 18, 2011, Associate Justice F. Philip Carbullido was sworn in as Chief Justice of the Supreme Court of Guam. The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

filed a complaint against Cyfred seeking damages.² *Sananap I*, 2008 Guam 10 ¶ 2. The Sananaps later moved to join as additional plaintiffs forty owners of thirty-three lots in the Gill-Baza Subdivision, which the trial court granted. Record on Appeal (“RA”), tab 126 at 4 (Dec. & Order, May 5, 2006). The trial court issued an amended judgment (“Sewer Judgment”) for approximately \$580,000.00 in damages and \$125,314.43 in attorney’s fees and costs. *Sananap II*, 2009 Guam 13 ¶ 6. Cyfred initially appealed both the damages and attorney’s fees awards, but later amended its notice of appeal to challenge only the award of attorney’s fees. *Id.*

[3] Only six plaintiffs (hereinafter “judgment creditors”) have recoveries under the Sewer Judgment. Excerpts of Record (“ER”) at 1-2 (First Am. Judgment, Sept. 22, 2006). After this court’s opinion was issued in *Sananap II*, the trial court issued its Findings of Fact and Conclusions of Law stating that “every proven owner at the Gill-Baza Subdivision has a right to be part of the judgment.” RA, tab 169 at 22 (Finds. Fact & Concl. L., Aug. 19, 2008). Three years after the Sewer Judgment was issued, the trial court issued a Decision and Order granting the judgment creditors’ motion to issue a writ of execution against Cyfred. Appellees’ Supplemental Excerpts of Record (“SER”) at 6 (Dec. & Order, May 29, 2009). Cyfred appealed the May 29, 2009 Decision and Order. *See Sananap v. Cyfred, Ltd.*, Supreme Court Case No. CVA09-014 (Not. of Appeal, June 5, 2009). The trial court issued a writ of execution on June 3, 2009, but Cyfred successfully moved to quash the writ of execution. SER at 10 (Writ of Execution, June 5, 2009). Subsequently, a second writ of execution was issued on June 17, 2009 and Cyfred attempted to quash the second writ of execution as well arguing that, first, it purports

² Other landowners in the Gill-Baza Subdivision also brought suits against Cyfred, some asking for rescission of their contracts, others for monetary damages. *See, e.g., Yanfag*, 2009 Guam 16; *Abalos II*, 2009 Guam 14.

to execute on a judgment for plaintiffs who have not been added to the judgment at issue. Second, Cyfred argues that the second writ of execution does not sufficiently or accurately describe the property to be sold by execution. Third, it seeks to execute against property interests which by the terms of the June 17, 2009 writ of execution, Cyfred has no interest in such property. Lastly, the second writ of execution improperly qualifies Cyfred's right to determine the order of sale of its property by stating that Cyfred may only "reasonably direct the order in which the property levied, real or personal, shall be sold." SER at 11-12 (Objection to the Substance and Form of the Writ of Execution, July 13, 2009). Cyfred timely appealed the Decision and Order denying Cyfred's Application to Recall and Quash the second writ of execution. Guam R. App. P. 4; Notice of Appeal, Oct. 14, 2009.

II. JURISDICTION

[4] This court has jurisdiction over the decision and order pursuant to 7 GCA § 25102 (2005) and 7 GCA §§ 3107 and (3108) (2005).

III. ANALYSIS

A. Mootness of the Appeal

[5] Although we have jurisdiction to review the denial of the motion to quash the writ of execution, we first address the judgment creditors' argument that the appeal is moot because of the expiration of the second writ of execution. In deciding whether the instant appeal is moot, it is important to distinguish the two orders on appeal. The May 29, 2009 Decision and Order appealed in Supreme Court Case Number CVA09-014 involves the trial court's decision to proceed with the execution of the Sewer Judgment. By contrast, the September 14, 2009 Decision and Order at issue in this appeal pertains specifically to the trial court's decision to

deny Cyfred's Application to Recall and Quash the second writ of execution issued on June 17, 2009. Unlike the September 14, 2009 Decision and Order, the trial court may still issue subsequent writ of executions under the May 29, 2009 Decision and Order. Here, the judgment creditors assert that the appeal is moot because the second writ of execution expired in December 2009 and thus, the September 14, 2009 Decision and Order has no further effect. Appellees' Br. at 12-13 (Nov. 18, 2010).

[6] It is well-settled that "the existence of an actual controversy is an essential requisite to appellate jurisdiction." *Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶ 37 (citation omitted). "A claim becomes moot only when the issues are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* (citation omitted). "The test for mootness is whether 'the issues involved in the trial court no longer exist' because intervening events . . . [have] render[ed] it impossible for the [reviewing] court to grant the complaining party effectual relief." *Id.* (quoting *In re A Minor*, 537 N.E. 2d 292 (Ill. 1989)) (alterations in original). An appeal is moot when it "presents or involves no actual controversy, interests or rights of the parties, or where the issues have ceased to exist." *Id.* (citation omitted). Furthermore, a dismissal of an appeal results "when, by virtue of an intervening event, the appellate court cannot grant effectual relief whatever in favor of the appellant." *Id.* (quoting *Town House Dep't Stores, Inc.*, 2000 Guam 32 ¶ 9).

[7] In making the argument for mootness on the basis that the second writ of execution expired, the judgment creditors rely on the last paragraph of the writ of execution, which states:

Make return of this Writ of Execution within 60 days after you receive it with endorsement on this writ of what you have done; you are entitled to add to the amount levied and collected the cost for this writ and your fees on such writ.

ER at 12 (Writ of Execution, June 17, 2009). The marshal attempted to execute the writ of execution sometime in October 20, 2009, thereby suggesting that the marshal was in receipt of the second writ of execution as early as October 2009. RA, tab 1104 (Return of Execution, Oct. 20, 2009); RA, tab 1104.1 (Return of Execution, Oct. 20, 2009). The judgment creditors, therefore, argue that the second writ of execution expired sometime in December 2009, or sixty days after the marshal's receipt thereof.

[8] The 60-day reference in the second writ of execution stems from 7 GCA § 23104, which provides: “The execution *may* be made returnable, at any time not less than ten (10) nor more than sixty (60) days after its receipt by the marshal, to the clerk of the court. When the execution is returned, the clerk must attach it to the judgment roll.” 7 GCA § 23104 (2005) (emphasis added). Title 7 GCA § 23109, which describes what property is subject to execution, states, in part, as follows: “Until a levy, the property is not affected by the execution, *but no levy shall bind any property for a longer period than one (1) year from the date of issuance of the execution.*” 7 GCA § 23109 (2005) (emphasis added).

[9] The use of the word “may” in section 23104 implies that its terms are intended to be permissive, rather than mandatory. *See, e.g., United States v. Rogers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion, but that commonsense principle of statutory construction is by no means invariable and can be defeated by indications of legislative intent to the contrary”); *Isle Royale Boaters Ass’n v. Norton*, 330 F.3d 777, 783 n.1 (6th Cir. 2003). *But see Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 199 (2000) (“The mere use of ‘may’ is not necessarily conclusive of congressional intent to provide a permissive or discretionary authority.”). In this case, the

second writ of execution may be returned anytime between ten to sixty days after the issuance of the writ of execution. Notably, the statute does not indicate whether the writ of execution becomes null and void after sixty days.

[10] In contrast to the permissive language of section 23104, other state statutes on writ of execution provide explicit and mandatory time limits. For instance, in Minnesota, a “writ of execution *expires* 180 days after its issuance by the court administrator.” Minn. Stat. Ann. § 550.051 (West 2011) (emphasis added). In Washington, “the execution *shall* be returned with a report of proceedings under the writ within *sixty* days after its date to the clerk who issued it.” Wash Rev. Code Ann. § 6.17.20 (West 2011) (emphasis added). In New Hampshire, “The Writ of Execution *will become void* after *ninety* days from the date of issue and if the sheriff is unable to find any property of the defendant, it *should be returned* to the court.” N.H. Rev. Stat. Ann. § 4:20 (2011) (emphasis added). Likewise, Oregon requires that “[t]he sheriff *shall* make a return on the writ of execution to the court administrator within *60* days after the sheriff receives the writ.” Or. Rev. Stat. Ann. § 18.872 (West 2011) (emphasis added). In these states in which the statutory provision is directory, a writ of execution ceases to have any effect when the statutory period has expired. *See, e.g., Bond v. Busch*, 313 N.W. 2d 704, 706 (N.D. 1981) (“A writ of execution which does not direct the foreclosure of a lien on specific property and under which property has not been taken into possession of the sheriff within the sixty-day period no longer is valid.”). The very short time limits (e.g. ranging from sixty days to one hundred twenty days) in these jurisdictions suggest that the effectiveness of a writ of execution is generally short-lived.

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[11] Guam’s section 23104 was derived from California’s Code of Civil Procedure § 683, and the language is nearly identical.³ Older California cases that have interpreted the permissive language of section 683 suggest that a writ of execution indeed expires after sixty days. For instance, in *Southern California Lumber v. Ocean Beach Hotel Co.*, 29 P. 627 (Cal. 1982), the plaintiff obtained a judgment for damages and thereafter obtained a writ of enforcement.⁴ *So. Cal. Lumber v. Ocean Beach Hotel Co.*, 29 P. 627, 628 (Cal. 1892). The sheriff advertised the sale of defendant’s property within the 60-day time limit, but sold the property after the return date of the writ of enforcement. *Id.* at 628. The defendant challenged the validity of the sale, arguing that the sheriff sold the property after the writ of enforcement expired. *Id.* The Supreme Court of California found that the sale was valid, in part because the sheriff levied on the property before the expiration of the writ of enforcement. *Id.* As such, the court found that “in the absence of some showing that injury has resulted from a delay in making the sale, it should not be set aside merely because it was not made before the return day of the writ.” *Id.* at 629. Significantly, the court held that in order for a sale occurring after the 60-day time limit to be

³ It is of significance to note that the permissive language of section 683 starkly differs from the more precise and mandatory language of California Code of Civil Procedure § 699.560, the current writ of execution statute that superseded section 683. *See* Cal. Civ. Proc. Code § 699.560(a) (West 2011). Specifically, California Code of Civil Procedure § 699.560(a) provides, in pertinent part, that “[t]he writ *expires* and . . . *shall* return [] to the court . . . (1) [t]wo years from the date of issuance of the writ,” but “[i]f no levy takes place under the writ within 180 days after its issuance, promptly after the expiration of the 180-day period.” *Id.*(emphasis added). Such language clearly dictates a time limitation of two years or 180 days depending on whether any levy was made under the writ of execution.

⁴ The plaintiffs in that case argued that a writ of enforcement is not an execution within the meaning of section 683, hence there is no limitation of time within which it must be returnable. The court rejected this argument and found that a writ of enforcement is within the definition of a writ of execution. *So. Cal. Lumber*, 29 P. at 627.

valid, some kind of seizure must occur before the 60-day time limit expires. *Id.* The court stated:

As the sheriff cannot justify an interference with the possession by the defendant of any of his property, except upon the production of a writ therefore, it is incumbent upon him to show that a seizure of the particular property is within the scope of his writ, and if, by the terms of the writ, *such seizure is authorized only within a limited period of time, a seizure after that time has expired is unauthorized*, and the sheriff is liable for trespass. If, however, the sheriff has taken the property within the lifetime of the writ, it has then become lawfully subject to be applied in satisfaction of the judgment, and a sale thereof may be made at any time thereafter.

Id. at 628 (emphasis added); *see also* *Alonso Inv. Corp. v. Doff*, 551 P.2d 1243, 1244 (Cal. 1976) (“[T]he writ or order of execution issued pursuant to section 683 may be made returnable ‘at any time not less than 10 nor more than 60 days’ after receipt of the levying officer. No levy may bind property subject to execution for longer than one year after issuance of the writ.”); *Partch v. Adams*, 130 P.2d 244, 250 (Cal. Ct. App. 1942) (“[U]nder section 683 execution *must* be made returnable *not more than sixty days* after receipt by the officer.”) (emphasis added); *Cordes v. Hammond*, 203 P. 131, 131 (Cal. Ct. App. 1921) (“[S]ection 683 of the Code of Civil Procedure . . . directs that no return on an execution may be made in less than 10 days *nor more than 60 days* after its receipt by the sheriff.”) (emphasis added).

[12] Because Guam adopted its writ of execution statute from California, California case law interpreting section 683 is persuasive authority. *See Zurich Ins. (Guam), Inc. v. Santos*, 2007 Guam 23 ¶ 7 (“California case law is persuasive when there is no compelling reason to deviate from California’s interpretation.”). No compelling reasons have been advanced to depart from California’s case law analyzing its writ of execution statute. Therefore, we adopt California’s

interpretation of section 683 and hold that under section 23104, a writ of execution expires after sixty days of its receipt, unless a levy on property has been made.

[13] If a levy on a property was made pursuant to a writ of execution, 7 GCA § 23109 provides that “no levy shall bind any property for a longer period than one (1) year from the date of issuance of the execution.” 7 GCA § 23109. Section 23109 is derived from section 688 of the California Code of Civil Procedure. In examining section 688, the California court in *Jones v. Toland*, 4 P.2d 178 (Cal. Ct. App. 1931), explained that “[i]t is plain the Legislature intended that, after the expiration of one year from the date of issuance, *a writ of execution would have no further force or effect.*” *Jones v. Toland*, 4 P.2d 178, 178 (Cal. Ct. App. 1931) (emphasis added); *see also Puissegur v. Yarbrough*, 175 P.2d 830, 831 (Cal. 1946) (“[S]ection [542b] does not postpone the time of the expiration of a writ of execution beyond the one-year period specified in section 688 which provides, with certain exceptions not material here, that no levy of execution shall bind any property for a longer period than one year from the date of the issuance of the execution.”); *W.J. Jones & Son v. Independence Indem. Co.*, 126 P.2d 463, 466 (Cal. Ct. App. 1942) (“The levy of execution did not bind the property after one year from the issuance of the execution . . .”).

[14] Here, the second writ of execution was issued on June 17, 2009 and the marshal attempted to execute it on October 20, 2009, thereby suggesting that the marshal was in receipt of the second writ of execution as early as October 20, 2009. RA, tab 1104 (Return of Execution, Oct. 20, 2009); RA, tab 1104.1 (Return of Execution, Oct. 20, 2009). Thus, the second writ of execution may have expired as early as December 19, 2009, or sixty days after the marshal received it. At oral argument, Cyfred conceded that some properties may have been

levied pursuant to the second writ of execution. Digital Recording at 10:24:35 (Oral Argument, Mar. 9, 2011). Such liens, however, were not fully and properly executed within one year from the date of the issuance of the second writ of execution. *Id.* at 10:24:48. Therefore, any levies that may have bound some properties would have expired after one year, or sometime in July 2010. *See* 7 GCA § 23109. Because the second writ of execution and any levies made on specific properties expired pursuant to sections 23104 and 23109, we find that the appeal of the September 14, 2009 Decision and Order recalling and quashing the second writ of execution is now moot.

III. CONCLUSION

[15] We hold that under 7 GCA § 23104, a writ of execution expires after sixty days of its receipt, unless a levy on property has been made. If a levy on a property was made pursuant to a writ of execution, such levy shall bind any property for no longer than one year from the date the writ of execution was issued. 7 GCA § 23109. Because the second writ of execution issued by the trial court expired in July 2010, the current appeal is now moot. Thus, we need not determine whether the trial court abused its discretion in denying Cyfred’s Application to Recall and Quash the second writ of execution. Accordingly, this appeal is **DISMISSED**.

Original Signed : F. Philip Carbullido

By
F. PHILIP CARBULLIDO

Associate Justice

Original Signed : Katherine A. Maraman

By
KATHERINE A. MARAMAN

Associate Justice

Original Signed : Robert J. Torres

By
ROBERT J. TORRES

Chief Justice