IN THE SUPREME COURT OF GUAM

MATAO YOKENO aka EDDIE M. YOKENO,
Plaintiff and Counterclaim Defendant-Appellee,

v.

EMIL LAI; SAWAKO SEKIGUCHI; MASAAKI HAMAMOTO; SHUICHI ABE; JOSEPH P. PEREZ; JOEL TESS; KAZUHIRO SAKURAI; MAYUMI SHIINA; FAI FAI BEACH ASSOCIATES; and JOHN DOES 1-10.
Defendants and Counterclaim Plaintiffs-Appellants.

Supreme Court Case No.: CVA13-013
Superior Court Case No.: CV0935-06

OPINION

Cite as: 2014 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted on February 11, 2014
Hagåtña, Guam

Appearing for Counterclaim Plaintiff-Appellant Sawako Sekiguchi:
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Oral argument waived

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

TORRES, C.J.:

[1] Appellant Sawako Sekiguchi appeals the trial court's decision and order granting judgment on the pleadings against Sekiguchi's counterclaim for slander. Sekiguchi argues that the trial court erred by *sua sponte* entering judgment on the pleadings without giving her notice and an opportunity to be heard on her slander counterclaim. Additionally, she argues that the trial court erred substantively as a matter of law, because Sekiguchi's counterclaim properly stated a claim for slander per se. Appellee Matao Yokeno did not file a brief.

[2] Sekiguchi's counterclaim could not support a claim for slander or slander per se, and although the trial court's failure to give notice and an opportunity to be heard before dismissing the counterclaim was improper, the failure is not per se reversible error. Because no additional argument or fact-presentation could have converted Yokeno's non-slanderous statement into actionable slander, we affirm the trial court's decision to dismiss the counterclaim.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] This appeal is part of a large business dispute involving many separate parties and claims, but the facts relevant to the counterclaim at issue here are relatively limited. After being sued by Matao Yokeno, Sekiguchi and her co-defendants filed an answer and set of counterclaims. In that answer—as well as the Amended Answer and Counterclaim—Sekiguchi stated a counterclaim alleging that Yokeno had spoken defamatory words against her.

[4] In support of this counterclaim, Sekiguchi presented the following facts. In 2006, Sekiguchi was elected Director and Vice President of both Fai Fai Beach Associates and Powder

Sand, Inc. On May 13, 2006—the day after Sekiguchi was elected Director and Vice President of Powder Sand, Inc.—Yokeno allegedly stated:

> Ms. Sekiguchi does not necessarily like Fai Fai Beach. I, Mr. Abe, and Joel, we all like Fai Fai Beach. Therefore, because Ms. Sekiguchi does not necessarily like Fai Fai Beach, if it is determined to not be profitable, the beach will be sold off. If that happens, Mr. Abe and Joel, won't that be a problem for you. She is probably not thinking about the employees. Why didn't you think of that before taking on the General Manager's position? Ms. Sekiguchi has a large business in Japan and it will not pose any problem to her even if she does not have Fai Fai Beach. Therefore, if it is thought that it will not be profitable, it will be sold off right away.

RA, tab 30 at 11 (Am. Answer & Countercl., Sept. 5, 2006). This statement was made in the presence of Shuichi Abe, who was a business associate and co-defendant of Sekiguchi's in Yokeno's initial lawsuit.

[5] Sekiguchi and her co-defendants in the underlying action filed a motion for summary judgment to dismiss all of Yokeno's causes of action. This motion did not specifically seek summary judgment on Sekiguchi's slander counterclaim.

[6] The trial court issued a decision and order granting Sekiguchi and her co-defendants summary judgment on Yokeno's claims but rendering judgment on the pleadings against Sekiguchi's slander counterclaim.[1] The trial court later entered a judgment, which included judgment on the pleadings against Sekiguchi's slander counterclaim. Sekiguchi filed a timely notice of appeal.

[1] The trial court also denied summary judgment in Sekiguchi's favor. The trial court did not, however, render summary judgment against Sekiguchi's counterclaim. Because this case was disposed by *sua sponte* judgment on the pleadings and not by summary judgment, Sekiguchi's argument that the trial court should not have considered summary judgment will not be discussed.

II. JURISDICTION

[7] This court has jurisdiction over appeals from a final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-125 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[8] Dismissals under Guam Rules of Civil Procedure ("GRCP") Rule 12(c) are reviewed *de novo*. *See, e.g.*, *Ramos v. Docomo Pac., Inc.*, 2012 Guam 20 ¶ 7. "Issues which are purely legal issues are reviewed *de novo*." *People v. Rios*, 2008 Guam 22 ¶ 8.

IV. ANALYSIS

[9] Sekiguchi challenges both the procedure and substance of the trial court's decision. She argues that the trial court erred procedurally by failing to give her notice that it was considering judgment on the pleadings against her counterclaim. Appellant's Br. at 9-11 (Sept. 3, 2013). Furthermore, she argues that the trial court erred substantively, because her counterclaim stated a claim for slander per se. *Id.* at 13-16. Because we would not need to reach the procedural issue of notice—an issue of first impression in our court—if the trial court erred in its slander determination, we will address Sekiguchi's substantive argument first.

A. Yokeno's Statement Cannot Support a Claim of Slander or Slander Per Se

[10] Sekiguchi argues that Yokeno's statement was slander per se, because it "tend[s] directly to injure Sekiguchi . . . in respect to her office as Director and Vice President." *Id.* at 15. In particular, Sekiguchi argues that the statement imputed to Sekiguchi "general disqualification" for the position as it pertains to "the affirmative duty to manage the affairs and protect the financial interests" of the corporation. *Id.* at 15-16.

[11] Close examination of the duties owed by a corporate director makes clear that Yokeno's statement did not impute to Sekiguchi any disqualification to serve as director. First, the statement claimed that Sekiguchi did not like Fai Fai Beach. Directors of corporations have no legal duty to personally like the corporation or its business interests. *See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179-80 (Del. 1986) (noting the duties of care and loyalty as those that directors owe a corporation). Second, the statement claimed "if [Fai Fai Beach] is determined not to be profitable, it will be sold off." RA, tab 30 (Am. Answer & Countercl.). As a director of Fai Fai Beach, Sekiguchi had a duty to further the best interests of Fai Fai Beach and its shareholders by trying to make it profitable. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (describing duty of loyalty). Yokeno's statement does not claim or imply that Sekiguchi will make no such attempt. Instead, it simply suggests that if the venture proves not to be profitable, the beach will be sold. The law does not prohibit the selling of the assets of Fai Fai Beach, *see* 18 GCA § 4111 (2005) (concerning sale of assets in regular course of business); 18 GCA § 4112 (2005) (concerning the sale of all or substantially all of a corporation), and nothing in Yokeno's statement states or implies that if any or all of the assets of Fai Fai Beach were to be sold that there would not be compliance with the statutory procedural requirements.

[12] Yokeno allegedly further stated that Sekiguchi was "probably not thinking about the employees." RA, tab 30 (Am. Answer & Countercl.). This statement is not slanderous, as Sekiguchi had no legal duty as a director of the corporation to "think[] about" employees of Fai Fai Beach—her legal duties as officer and director are owed to the shareholders of the corporation. *See, e.g., Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (explaining that officers and directors have a "fiduciary relation to the corporation and its stockholders.").

[13] None of Yokeno's statements, nor his statement taken as a whole, can be read as tending to directly injure Sekiguchi in respect to her business, because the statement neither imputes "general disqualification" to be a director nor imputes anything that has a "natural tendency to lessen" Sekiguchi's profits. 19 GCA § 2104(c) (2005). Therefore, the trial court was correct that Sekiguchi cannot state a claim for slander or slander per se.

B. The Trial Court's Failure to Give Notice is Not Per Se Reversible Error

[14] Even though the trial court was correct that Yokeno's statement could not support a claim for slander, Sekiguchi still has an argument for remand. She argues that because no party moved for judgment on the pleadings under GRCP 12(c), the trial court was required to give her both notice that it was considering rendering judgment on the pleadings and an opportunity to be heard on the issue. Appellant's Br. at 9-11. Sekiguchi cites a First Circuit case for the proposition that *sua sponte* dismissals are "erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond." *Futura Dev. of P.R., Inc. v. Estado Libre Asociado de P.R.*, 144 F.3d 7, 13-14 (1st Cir. 1998).[2] This is an accurate description of First Circuit case law, but there is a significant split between jurisdictions on the requirement of notice and opportunity to be heard before a trial judge may *sua sponte* dismiss a case. This is a question of first impression in our court, so we will examine, analyze, and weigh the three approaches appellate courts appear to take in dealing with such cases.

[15] The first approach, argued for by Sekiguchi, is that a trial court's failure to give notice and opportunity to be heard or amend before *sua sponte* dismissal is per se reversible error. *See*

[2] This case and others discussed deal with Rule 12(b)(6) dismissals, but such dismissals involve the same standard as 12(c) judgments on the pleadings. *See, e.g.*, Ramos, 2012 Guam 20 ¶ 7; *see also Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) (stating that 12(b)(6) and 12(c) are "functionally identical," the only difference being the stage of litigation when a motion may be filed under each rule). Accordingly, though most cases discussed in this analysis dealt with Rule 12(b)(6), they are equally applicable to Rule 12(c).

Appellant's Br. at 10. The First, Second, Sixth, and Eleventh Circuits follow this approach. *See, e.g., Street v. Fair*, 918 F.2d 269, 272 (1st Cir. 1990); *Perez v. Ortiz*, 849 F.2d 793, 797-98 (2d Cir. 1988); *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983), *superseded by statute on other grounds*, 28 U.S.C. § 1915(e)(2) (1996); *Jefferson Fourteenth Assocs. v. Wometco de P.R., Inc.*, 695 F.2d 524, 527 (11th Cir. 1983). Jurisdictions that follow this approach remand cases regardless of the merits of the underlying claim, with some remanding despite determining that the trial court was correct that no claim had been stated, *see, e.g., Fair*, 918 F.2d at 272, and others avoiding the merits altogether, *see, e.g., Perez*, 849 F.2d at 793.

[16] Second, there is an intermediate approach where failure to give notice is held improper, but the failure is not per se reversible error; instead, the reviewing court determines whether the plaintiff could have possibly stated a claim on the facts of the complaint, and if he or she cannot, the trial court is affirmed. *See, e.g., Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991). The Fifth, Seventh, and Eighth Circuits take this approach. *See, e.g., Lozano v. Ocwen Fed. Bank, FSB*, 489 F.3d 636, 643 (5th Cir. 2007) ("We do not always require notice prior to *sua sponte* dismissal . . . as long as the plaintiff has alleged his 'best case.'"); *Joyce v. Joyce*, 975 F.2d 379, 386 (7th Cir. 1992) ("[W]hile we reiterate the caution necessary in *sua sponte* dismissal without notice of hearing, we find no error in the district court's action in this case.").

[17] The third approach followed by some jurisdictions finds that *sua sponte* dismissal without notice or opportunity to be heard is not error where the trial court determines that the plaintiff cannot possibly prevail based on the facts in the complaint. *See, e.g., Baker v. U.S. Parole Comm'n*, 916 F.2d 725, 726-27 (D.C. Cir. 1990). The Ninth, Tenth, and D.C. Circuits follow this approach. *See, e.g., id.*; *Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981); *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *Hall v. Bellmon*, 935 F.2d 1106, 1110-11

(10th Cir. 1991).[3] This last approach is very similar to the intermediate approach, but courts in these jurisdictions do not caution trial courts to give notice in every case.

[18] Proponents of the first approach—per se reversible error—argue that dismissals *sua sponte* without notice both "deviate from the traditions of the adversarial system by making the judge 'a proponent rather than an independent entity'" and "may tend to produce the very effect they seek to avoid—a waste of judicial resources—by leading to appeals and remands." *Perez*, 849 F.2d at 797. While these are worthy concerns, they are not necessarily implicated in every case, and the latter concern can actually be exacerbated by a per se rule. For example, in this case, were we to adopt a per se rule, we would remand the case for the trial court to hear argument on the same fully argued slander counterclaim it has already correctly dispensed with, only to have the court reach the same conclusion—thus wasting judicial resources.

[19] The Eighth Circuit's approach in *Smith v. Boyd* is a reasonable middle ground. There the court stated that "[t]hough district courts should provide pre-dismissal notice, we decline to hold that the failure to give such notice mandates reversal." *Smith*, 945 F.2d at 1043. It found the per se reversible error approach "too inflexible." *Id.* at 1043 n.2. This intermediate approach properly discourages widespread *sua sponte* dismissal without notice but does so in a manner that does not hamstring a reviewing court into remanding a case that clearly cannot state a claim. Therefore, we hold that trial courts should provide notice to litigants before issuing judgments on the pleadings, but that failure to do so is not per se reversible error. Instead, we will exercise our *de novo* review to determine whether any additional set of facts or arguments could have created a cognizable claim—if so, we will reverse and remand to offer the appellant an opportunity to

[3] The Third and Fourth Circuits do not appear to have directly addressed the issue.

present those facts and arguments. However, if the appellant could not possibly have stated a claim, we will affirm.

[20] Applying this rule to the facts of this case, we are convinced that Sekiguchi could not state a claim for slander even if given an opportunity to present additional facts or arguments. Judgment on the pleadings cannot be granted unless the trial court is convinced "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[4] *Taitano v. Calvo Fin. Corp.*, 2009 Guam 9 ¶ 6. When reviewing a counterclaim under this standard, "we must . . . take as true the material facts alleged in the counterclaim." *First Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 9 (internal quotation marks omitted) (citing *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 740 (1976)). The trial court took all of the alleged facts as true and was convinced that Sekiguchi could prove no set of facts to state a slander claim; our *de novo* review yields the same conclusion.

[21] By the time the Superior Court made its decision, this case was over six years old, discovery had been completed, and Sekiguchi admitted that there was no need for further discovery. Oral Argument at 10:17:10-10:17:30 (Feb. 11, 2014). Thus, Sekiguchi had all of the relevant facts necessary to state her claim and was not deprived of an opportunity to find or present different facts. Additionally, nothing in Sekiguchi's appellate brief or presentation during oral argument indicated an additional fact or argument that could possibly create a cognizable slander claim. As explained above, the material facts—as alleged in the counterclaim, as presented on appeal, and as they exist—are not sufficient to state a claim for slander or slander per se. In sum, this is a particularly apt case to refuse to remand, because the

[4] As noted above, in footnote 2, the substantive standards of Rule 12(b)(6) and Rule 12(c) are identical. *See, e.g.*, *Dworkin*, 867 F.2d at 1192 (stating that 12(b)(6) and 12(c) are "functionally identical," the only difference being the stage of litigation when a motion may be filed under each rule). Accordingly, the *Conley* standard applies to the determination of whether Rule 12(c) judgment on the pleadings is warranted.

record was fully developed and we are presented with the purely legal issue of whether these facts can state a claim for slander; thus, our decision conserves judicial resources. *See, e.g.*, *Catz v. Chalker*, 142 F.3d 279, 286-87 (6th Cir. 1998), *amended on denial of reh'g on other grounds*, 243 F.3d 234 (6th Cir. 2001).

[22] We see our holding as only marginally different from the dissent's preferred per se rule. This difference is amply borne out by one of the dissent's leading cases—*Jefferson Fourteenth*, 695 F.2d 524. In *Jefferson Fourteenth*, the Eleventh Circuit panel reversed a *sua sponte* dismissal because the "showing made by [the appellant] could not be more incomplete," and the appellant "had no opportunity to develop the facts supporting its claim or to complete its pleadings." *Jefferson Fourteenth*, 695 F.2d at 527. In reaching its decision, the panel distinguished two decisions affirming *sua sponte* dismissals where the appellants had completely presented their best case, but the case was meritless and could not be remedied by any amendment or additional evidence. *Id.* at 526-27 (discussing *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 495 (1900) and *Aerojet-General Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 253 (9th Cir. 1973)). If Sekiguchi's slander claim were capable of amendment to remedy its lack of merit, then we would reverse and remand this case to give Sekiguchi that opportunity. However, the dissent agrees that no such remedying amendment is possible in this case.

[23] The rule we establish today is that a trial judge should always give notice before granting judgment on the pleadings, but in order to conserve judicial resources, we will affirm those cases where it is clear that the appellant had presented his or her best case prior to dismissal. We stress that this review will be thorough and will give the benefit of any doubt about the efficacy of amendment or additional evidence to the claimant.

[24] In a footnote, the dissent claims that we have "created two different rules for essentially the same action." The dissent points to our decision in *Cristobal v. Siegel*, 2014 Guam 16, which involved *sua sponte* amendment of a judgment. We do not agree that judgment on the pleadings and amendment of judgment are "essentially the same action." A judgment may be amended pursuant to GRCP 59(e) or GRCP 60, whereas judgment on the pleadings is granted pursuant to GRCP 12(c). These actions entail two different analyses—the former requiring examination of whether a mistake or oversight has occurred, and the latter involving a comprehensive evaluation of the merits of a claim to determine whether one party is entitled to judgment as a matter of law. Courts have treated these procedures separately when crafting rules regarding when a trial court may *sua sponte* amend a judgment or enter judgment on the pleadings. *Compare Dow v. Baird*, 389 F.2d 882, 884-85 (10th Cir. 1968) (holding that trial court may not *sua sponte* amend judgment under FRCP 60(b)), *with Hall*, 935 F.2d at 1110 (making no mention of *Dow v. Baird* or any other judgment amendment opinion and providing for *sua sponte* dismissal where the complainant could not prevail and amendment would be futile). *See also Pierson v. Dormire*, 484 F.3d 486, 491-92 (8th Cir. 2007) (making no mention of the Circuit's intermediate approach cases for *sua sponte* dismissal when confronting the question of *sua sponte* amendment of judgment), *overruled on other grounds*, 276 F. App'x 541 (8th Cir. 2008). With our opinion in *Cristobal* and our opinion in this case, we have crafted particularized rules for distinct procedures.

V. CONCLUSION

[25] Yokeno's statement cannot found a slander claim because it did not impute to Sekiguchi any disqualification for the office of Vice President or director, nor did it have a natural tendency

to harm her profits. 19 GCA § 2104(c). As discussed above, each aspect of the statement was reconcilable with Sekiguchi's legal duties as a corporate officer and director.

[26] On the procedural question of notice, in an effort to balance judicial efficiency with affording plaintiffs every opportunity to be heard, we stress that notice should be given in every case but hold that failure to provide notice is not per se reversible error. Instead we will exercise our *de novo* review to determine whether any additional set of facts or arguments could have created a cognizable claim. Applying that approach to the facts of this case, although the trial court's failure to give notice and opportunity to be heard before dismissing the counterclaim was improper, the failure is not per se reversible error. The material facts for Sekiguchi's slander counterclaim were fully presented, and no additional argument or fact-presentation could have converted this non-slanderous statement into actionable slander. Because additional argument would be futile, remanding this case would be a waste of judicial resources.

[27] Therefore, we **AFFIRM** the Superior Court's dismissal.

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Chief Justice

MARAMAN, J., dissenting:

[28] I agree with this court's analysis of Sekiguchi's substantive claim, and agree that Yokeno's statement cannot support a claim for slander per se. However, I believe that a trial court's failure to give notice and an opportunity to be heard before *sua sponte* dismissing a complaint is per se reversible error.

[29] Plaintiffs have a due process right to litigate their claims, which is violated by *sua sponte* dismissals issued without giving the parties notice or an opportunity to be heard. *See Jefferson Fourteenth*, 695 F.2d at 527. I am persuaded by the reasoning of the First, Second, Sixth, and Eleventh Circuits, which find that a *sua sponte* dismissal of a complaint without notice or an opportunity to be heard, regardless of the merits, hinders a just determination of that claim by preventing parties from "present[ing] their best arguments in opposition." *Perez*, 849 F.2d at 797. I agree with these circuits and find that the majority's approach places undue emphasis on the judge, rather than the parties, and could create judicial waste by leading to appeals and remands of such dismissals. *See id.*; *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1184 (7th Cir. 1989); *Tingler*, 716 F.2d at 1111-12, *superseded by statute on other grounds*, 28 U.S.C. § 1915(e)(2) (1996). An approach that views all such *sua sponte* dismissals without notice or an opportunity to be heard as per se reversible error, regardless of the merits of the claim, provides a clear rule in keeping with the requirements of due process.[5]

[5] In *Cristobal v. Siegel*, 2014 Guam 16, this court recently adopted the First Circuit's reasoning in a case where a trial court amended a judgment *sua sponte* without notice to the parties. In my opinion, the court created two different rules for essentially the same action, entering judgment *sua sponte*. The First Circuit's requirement of notice applies when a judge amends a judgment but the Fifth Circuit's rule applies when a court issues a judgment on the pleadings. *Id.* In the interest of clarity, I believe they should be the same.

[30] Accordingly, I would adopt the approach of the First, Second, Sixth, and Eleventh Circuits, and would remand this case to allow the plaintiffs notice and an opportunity to be heard on the substance of their claims.

Original Signed By: **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice