IN THE SUPREME COURT OF GUAM

P.D. HEMLANI,
Plaintiff-Appellant,

vs.

MICHAEL FLAHERTY,
ANAO POINT ESTATE, a Guam Limited Partnership,
Defendants-Appellees.

Supreme Court Case No.: CVA02-009
Superior Court Case No.: CV0343-00

OPINION

Cite as: 2002 Guam 10

Filed: July 17, 2002

Appeal from the Superior Court of Guam
Submitted on the Motion June 13, 2002

For Plaintiff-Appellant:
Ross E. Putnam, Esq.
Law Office of Ross E. Putnam
153 Martyr St.
Hagåtña, Guam 96910

For Defendants-Appellees:
Thomas M. Tarpley, Jr., Esq.
Law Office of Thomas M. Tarpley, Jr.
Suite 201, American Life Building
137 Murray Blvd.
Hagåtña, Guam 96910

BEFORE: PETER C. SIGUENZA, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; FRANCES TYDINGCO-GATEWOOD, Associate Justice.

PER CURIAM:

[1] This matter is before the court pursuant to Plaintiff-Appellant P.D. Hemlani's ("Hemlani") motion requesting that this court remand the instant case to the Superior Court to allow the Superior Court to rule upon Hemlani's Rule 60(b) motion. We hold that the lower court retains jurisdiction to entertain and deny a Rule 60(b) motion after a notice of appeal has been filed. However, the lower court is without jurisdiction to grant a Rule 60(b) motion without a remand from this court. Because the lower court has not indicated a willingness to grant the Rule 60(b) motion, we deny Hemlani's motion to remand.

I.

[2] Hemlani filed a notice of appeal in the instant case on May 8, 2002, appealing from an Order of Summary Judgment and Judgment of Dismissal. On May 31, 2002, Hemlani filed a motion in the lower court, pursuant to Rule 60(b) of the Guam Rules of Civil Procedure, seeking to have the court vacate its Judgment of Dismissal. On June 13, 2002, Hemlani filed in this court a Motion for Leave to Have Motion to Vacate Judgment Heard Before the Superior Court.

II.

[3] In his motion, Hemlani argues that this court should remand the instant case so that the lower court may rule on his 60(b) motion. The Defendant-Appellees Michael Flaherty, *et al.*, ("Flaherty") oppose the instant motion for remand, arguing that remand is inappropriate in the absence of an indication that the

lower court intends to grant Hemlani's Rule 60(b) motion. *See* Defendants-Appellees' Opposition to Motion, p. 5 (June 19, 2002). We agree with Flaherty and therefore deny Hemlani's motion.

[4] The Superior Court has jurisdiction to set aside judgments pursuant to Rule 60(b) of the Rules of Civil Procedure. *See* Guam R. Civ. P. 60(b). In fact, the lower court is "the proper forum to determine in the first instance whether there is sufficient basis to overturn the judgments." *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 889 (4th Cir. 1999) (citation omitted). Rule 60(b) contemplates that a party may file a motion to set-aside within a "reasonable time," and for motions made pursuant to the first three subsections, within a year of entry of judgment. GRAP 60(b).

[5] A litigant may also challenge a final judgment through an appeal, and is required to file a notice of appeal within thirty days of the entry of the judgment. *See* Guam R. App. P. 3, 4. The filing of a Rule 60(b) motion generally does not toll the time to file a notice of appeal to this court, *see* GRAP 4(b); *Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994), and the period during which the case is on appeal counts towards the time to file a Rule 60(b) motion. *See Fobian*, 164 F.3d at 889. Accordingly, because the rules of procedure contemplate that a party may seek to vacate a judgment through either an appeal to this court or through a Rule 60(b) motion filed in the lower court, an anomalous situation may arise where a party seeks Rule 60(b) relief after notice of appeal has been filed. An issue that arises in such situations is whether the lower court may act on a Rule 60(b) motion while the case is on appeal.

[6] We have previously held that the filing of a notice of appeal divests the lower court of jurisdiction over the matters on appeal, with the exception that the lower court retains jurisdiction to take action in aid of the appeal. *Dumaliang v. Silan*, 2000 Guam 24, ¶ 14; *Bitanga v. Superior Court (Angoco)*, 2000 Guam 5, ¶ 22; *see also Willie v. Continental Oil Co.*, 746 F.2d 1041, 1046 (5th Cir. 1984); *Fobian*,

164 F.3d at 890; *Boyko v. Anderson*, 185 F.3d 672, 674 (7th Cir. 1999). Courts have differing interpretations as to how this "divestiture rule" affects the lower court's jurisdiction over a motion to set aside the judgment under Rule of Civil Procedure 60(b) once a notice of appeal has been filed. *See Dumaliang*, 2000 Guam 24 at ¶ 14 (discussing the divestiture rule generally); *Fobian*, 164 F.3d at 890 (discussing the different rules adopted by various circuit courts).

[7] A minority of circuit courts, including the Ninth Circuit, have ruled that the filing of a notice of appeal completely divests the lower court of jurisdiction to entertain a Rule 60(b) motion. *See Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979) (holding that the district court lacked jurisdiction to entertain and deny a Rule 60(b) motion after the filing of a notice of appeal); *see also Fobian*, 164 F.3d at 890 (discussing the rule adopted by the Ninth and Sixth circuits). Under this line of cases, the lower court may not rule on a Rule 60(b) motion without a remand from the appellate court. Appellate courts adopting this rule first review the merits of the movant's Rule 60(b) motion in determining whether to remand the case to the lower court. *See, e.g.*, *Smith*, 588 F.2d at 1307-08 (treating the lower court's denial of Rule 60(b) relief as a motion for remand and denying the remand on the ground that Rule 60(b) relief should not be granted); *see also Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 41 (1st 1979) (recognizing that courts which adopted the minority rule require the appellate court to review the underlying 60(b) motion in determining whether to remand).

[8] By contrast, the rule adopted by a majority of circuit courts is that a lower court retains jurisdiction to consider and deny a Rule 60(b) motion, but cannot grant the motion without a remand from the appellate court. *See Fobian*, 164 F.3d at 890 (adopting the rule for the 4th Circuit); *Boyko*, 185 F.3d at 675 (adopting the rule for the 7th Circuit); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992);

Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1073 (8th Cir. 1991); *Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991); *SS Zoe Colocotroni*, 601 F.2d at 41-42; *Willie*, 746 F.2d at 1046. In order to grant the motion, a remand is necessary otherwise the lower court is without jurisdiction to take such action. *See Winter*, 925 F.2d at 1073; *SS Zoe Colocotroni*, 601 F.2d at 40-41; *Toliver*, 957 F.2d at 49 ("In other words, before the district court may grant a rule 60(b) motion, this court must first give its consent so it can remand the case, thereby returning jurisdiction over the case to the district court.") (reversing a lower court's grant of 60(b) relief because the lower court did not get permission from the appellate court to rule on the motion while the case was on appeal).

[9] These authorities reason that a lower court retains jurisdiction to deny a Rule 60(b) motion because such action is in aid of an appeal. *See Fobian*, 164 F.3d at 890; *Willie*, 746 F.2d at 1046; *see also SS Zoe Colocotroni*, 601 F.2d at 41. Specifically, allowing the lower court, which is in the best position to determine whether the Rule 60(b) motion is frivolous, to swiftly deny the motion in time to consolidate the denial with the underlying appeal "preserves judicial resources . . . and therefore is surely in aid of the appeal." *Fobian*, 164 F.3d at 890 (quotations omitted); *see also Boyko*, 185 F.3d at 675.[1] In contrast, the granting of Rule 60(b) relief would require the lower court to vacate the very judgment on appeal, thereby creating a situation wherein "two courts would be exercising jurisdiction over the same matter at the same time." *Fobian*, 164 F.3d at 890. Because the simultaneous exercise of jurisdiction in this manner

[1] Unlike an order either granting the motion or setting it for a hearing, a denial of the motion does not alter the judgment that is under appeal and therefore does not (unless it spawns substantial ancillary proceedings, such as an evidentiary hearing) interfere with or threaten to duplicate the appellate proceedings.

is expressly prohibited, a grant of Rule 60(b) relief cannot be said to be in furtherance of the appeal. *Id*. at 891.

[10] We agree with the rationale underlying the rule adopted by the majority of circuits and consequently reject the minority rule that an appeal divests the lower court of all jurisdiction over a Rule 60(b) motion. *Accord Fobian*, 164 F.3d at 890. The minority rule would require this court to review the movant's Rule 60(b) motion and determine whether it has merit prior to remanding the case. *See, e.g., Smith*, 588 F.2d at 1307-08. Such a procedure "flies in the face of the reality that the . . . [lower] court, which has lived with a case and knows it well, is far better situated than an appellate court to determine quickly and easily the possible merit of a Rule 60(b) motion." *Fobian*, 164 F.3d at 890. Accordingly, we adopt the rule of the majority of circuit courts, that the lower court retains jurisdiction to consider and deny a Rule 60(b) motion after a notice of appeal has been filed. The denial of such a motion does not disturb appellate jurisdiction and, if promptly issued, are certainly in aid of the appeal. However, after a notice of appeal is filed, the lower court lacks jurisdiction to grant Rule 60(b) relief, and may not do so without a remand from this court.[2]

[11] We further adopt the following procedure: the movant must first present the Rule 60(b) motion to the trial court. The trial court may entertain the motion without any action by this court. *See Hoai*, 935 F.2d at 312; *SS Zoe Colocotroni*, 601 F.2d at 42. Upon filing the motion, the lower court:

[2] Any prior rulings of this court on this issue are overruled to the extent they are in conflict with the rule announced today. *See, e.g., Navarro v. Navarro*, CVA99-028 (Order, Aug. 20, 1999) (remanding the case to allow the lower court to rule on a pending Rule 60(b) motion).

> [I]s directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit, bearing in mind that any delay in ruling could delay the pending appeal.[3] If the . . . [lower] court is inclined to grant the motion, it should issue a brief . . . [order] so indicating. Armed with this, the movant may then request this court to remand the action so that the . . . [lower] court can vacate judgment and proceed with the action accordingly.

Puerto Rico, 601 F.2d at 42 (internal footnote included and renumbered); *see also Fobian*, 164 F.3d at 891 (requiring a similar procedure).

[12] In the instant case, Hemlani filed a Rule 60(b) motion in the lower court. In line with the rule announced above, the lower court has jurisdiction to deny the motion without action by this court. If the lower court is inclined to grant Hemlani's Rule 60(b) motion, it should enter an order so indicating. However, because there is no indication in the record that the lower court intends to grant Hemlani's Rule 60(b) motion, we find a remand to be premature and therefore inappropriate. *See Hoai*, 935 F.2d at 312. Should the lower court issue an order indicating its intention to grant Hemlani's Rule 60(b) motion, Hemlani may thereafter file in this court a motion to remand.

//

//

//

---

[3] If the . . . [lower] court is unable conscientiously to dispose of the motion within a few days of its filing because it requires further argument, briefing, or the like, it should issue a brief memorandum to this effect. The memorandum should indicate that the motion is non-frivolous and not capable of being fairly decided solely on the basis of the court's initial screening and that the court will require a specified number of more days to complete its review and issue an order. . . . This memorandum will enable us to act intelligently on extension requests made in the appeal.

Puerto Rico, 601 F.2d at 42 n.3.

III.

[13] Accordingly, Hemlani's motion for remand is hereby **DENIED** without prejudice, and this appeal will be considered in the regular course.