IN THE SUPREME COURT OF GUAM

TOWN HOUSE DEPARTMENT STORES, INC.,
Plaintiff-Appellee

v.

HI SUP AHN,
Defendant-Appellant

Supreme Court Case No.: CVA01-018
Superior Court Case No.: CV0098-97

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on June 19, 2002
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice[1]; F. PHILIP CARBULLIDO, Associate Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice.

CARBULLIDO, J.:

[1] This case arises out of a contract between the Plaintiff-Appellee Town House Department Stores, Inc. ("Town House") and Defendant-Appellant Hi Sup Ahn ("Ahn") wherein Ahn executed a personal guarantee in favor of Town House as additional security for a contract for the sale of furniture. Upon default in payment under the sales contract, and pursuant to its rights as a secured creditor, Town House repossessed and sold the furniture, which served as collateral for the sale. Town House thereafter sued Ahn for the deficiency pursuant to its rights under the personal guarantee contract. The lower court granted Town House's requested relief, and Ahn appealed the deficiency judgment on the ground that the lower court erroneously failed to make a finding on whether the sale price of the collateral was fair and reasonable. In an Amended Opinion filed on October 10, 2000, cited as *Town House Department Stores, Inc. v. Ahn*, 2000 Guam 29, ("*Town House I*"), this court reversed the trial court's deficiency judgment and remanded for a finding on the issue of whether the sale price of the furniture was fair and reasonable.

[2] On remand, the lower court found that the sale price was "fair and reasonable," and entered judgment in favor of Town House. Ahn filed a motion for amended and additional findings of fact and conclusions of law. Ahn also pursued a previously filed motion to set aside the judgment. The trial court denied both motions. Ahn filed the instant appeal, arguing that: (1) the trial court erroneously failed to make a finding on whether the sale price was fair and reasonable; (2) the trial court erred by rendering a written decision and order on remand without conducting further proceedings; and (3) the trial court erred in denying Ahn's post-trial motions. We reject each of Ahn's arguments and therefore affirm the lower court's judgment.

I.

[3] On December 9, 1994, T&K Development Corporation ("T&K"), of which Ahn was a shareholder and officer, and Town House, executed a sales contract and security agreement for the

[1] The signatures in this Opinion reflect the titles of the justices at the time this matter was considered and determined.

purchase of furniture for Ladera Towers ("First Contract"). The purchase price for the furniture under the First Contract was $328,824.00. T&K made payments totaling $85,000.00 under the First Contract[2]. However, due to T&K's inability to pay in accordance with the agreed-upon terms, Town House threatened repossession. As a result, Ahn executed a "restructured" sales contract and security agreement ("Second Contract").[3] Ahn also executed a personal guarantee as additional security for the sale.[4] The Second Contract was for $370,213.71, which included $344,299.40 for the furniture, and $25,914.31 for the cost of financing.[5]

[4] Ahn defaulted on the payment terms of the Second Contract, and, pursuant to its rights as a secured creditor, Town House sold the furniture for $150,000.00 to LG Construction, the new owner of Ladera Towers. Town House thereafter filed an action on the guarantee against Ahn to collect on the deficiency of approximately $136,184.44. On July 6, 1998, after a bench trial, the lower court filed a judgment for Town House. Ahn filed a motion for a new trial on July 16, 1998, which was denied by the trial court in an order filed on September 2, 1998. The underlying judgment for Town House was thereafter entered on the docket on September 15, 1998. Ahn appealed the September 15, 1998 judgment to this court in Supreme Court Case No. CVA 98-024.[6] While the September 1998 judgment was on appeal, on June 29, 1999, Ahn filed in the Superior Court a motion to vacate and set aside the September 1998 judgment and for leave to file an amended answer and counter-claims for fraud pursuant to Guam Rule of Civil Procedure 60(b). The motion was apparently vacated on the ground that the trial court lacked jurisdiction to entertain the motion because the case was on appeal.[7]

[5] In an Amended Opinion filed on October 10, 2000, cited as *Town House v. Ahn*, 2000 Guam 29, this court reversed the trial court's September 15, 1998 judgment and remanded for a finding

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[2] *See* Appellant's Excerpts of Record, p. 1.

[3] *See* Record on Appeal, tab 1, Plaintiff's Exhibit 1 (Security Agreement).

[4] *See* Record on Appeal, tab 1, Plaintiff's Exhibit 2 (Guarantee).

[5] *See* Record on Appeal, tab 1, Plaintiff's Exhibit 1 (Sales Contract).

[6] Notably, Ahn did not appeal the trial court's denial of his new trial motion.

[7] See Record on Appeal, tab 112 (Ahn's Notice of Mot. & Mot. For Leave to Vacate).

on the issue of whether the sale price of the furniture was fair and reasonable. On remand, the trial court, without conducting a hearing or accepting additional evidence, filed a Decision and Order on May 21, 2001, finding that the sale price was "fair and reasonable." The court also filed its judgment in favor of Town House on June 14, 2001. On June 5, 2001, Ahn filed a motion for amended and additional findings of fact and conclusions of law pursuant to Guam Rule of Civil Procedure 52(b).[8] Around that time, Ahn also requested a hearing on the Rule 60(b) motion that he originally filed on June 29, 1999. The trial court held a hearing on both motions and denied both motions from the bench. A written order denying the motions was filed thereafter on September 14, 2001. This appeal followed.

II.

[6] This court has jurisdiction over the appeal of the final judgment and post-judgment orders entered by the Superior Court pursuant to Title 7 GCA §§ 3107 and 3108 (1994).

III.

[7] Ahn lists seven points of error in his Opening Brief. They are summarized as follows: (1) the trial court erred in refusing to conduct "further proceedings" on remand; (2) the trial court's judgment should be reversed because the court failed to make a finding on whether the sale price of the furniture was fair and reasonable; (3) the trial court's judgment should be set aside because Buzz Shiroma, who testified for Town House, delivered perjured testimony which constitutes fraud upon the court; (4) the trial court erred in including in the deficiency judgment the value of furniture which Ahn never received from Town House; (5) Buzz Shiroma's testimony at trial, that the vertical blinds in Ladera would be difficult to remove, was contrary to facts later discovered by Ahn; (6) the trial court erred in denying Ahn's Rule 52(b) motion to amend findings of fact and conclusions of law; and (7) the trial court erred in denying Ahn's Rule 60(b) motion in which Ahn alleged that Town House committed fraud in executing the Second Contract.

[8] It is not entirely clear from the docket sheet when Ahn filed his Rule 52(b) motion; however, according to the docket sheet, Ahn filed a memorandum of points and authorities in support of his motion for additional findings on June 5, 2001. Presumably, the Rule 52(b) motion was filed prior to or on that date. Furthermore, during a hearing on July 13, 2001, the lower court and attorneys for the parties also referred to a Rule 52(b) motion filed on June 5, 2001. *See* Supplemental Excerpts of Record, p. 14.

[8] Upon review of the record, it appears that the third through fifth arguments, enumerated above, were raised by Ahn on remand of *Town House I* in the context of Ahn's Rule 60(b) and 52(b) motions. Specifically, Ahn raised issue three in support of his 60(b) motion to set aside the deficiency judgment. Ahn raised issues four and five in support of his Rule 52(b) motion to amend the judgment. The trial court denied both post-trial motions on remand, and, consequently, in doing so, rejected Ahn's third through fifth arguments. Therefore, because issues three through five were both raised and rejected on remand in the context of Ahn's Rule 52(b) and 60(b) motions, we herein consolidate them with arguments six and seven which present challenges to the trial court's denial of Ahn's post-trial motions. *See Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999). Accordingly, Ahn's seven arguments in the instant appeal can be reduced to four. Those four issues are discussed in turn below.

A. Rule 70(a).

[9] Ahn argues that the trial court was required to make a finding on remand that Town House sold the furniture for a fair and reasonable price. Ahn argues that the trial court failed to make this finding and the deficiency judgment in favor of Town House should therefore be reversed.

[10] We easily dispose of Ahn's first argument. Pursuant to the *Town House I* Opinion and Mandate, the trial court was required to make a finding under Rule 70(a) of the Guam Rules of Civil Procedure regarding the sale price. Rule 70(a) provides: "No deficiency judgment after repossession of personal property shall be granted unless it shall appear to the satisfaction of the court by proper evidence that said property was resold for a fair and reasonable price." Guam R. Civ. P. 70(a). On remand, the trial court issued a decision and order providing:

> *I Kotte*[9], mindful of the mandate issued by *I Kotte Ni Mas Takhilo*[10] in Town House Department Stores, Inc. v. Hi Sup Ahn, 2000 Guam 29, has reached the conclusion herein that the sale price negotiated and received by the Plaintiff for the inventory of furniture in this matter was unquestionably both fair and reasonable. . . . *I Kotte* finds that in light of the circumstances of this case, the $150,000.00 purchase price was both fair and reasonable and commercially reasonable.

Record on Appeal, tab 119, pp. 11-12 (Disision Yan Otden[11], May 21, 2001).

[9] Translated as "The Court."

[10] Translated as "The Supreme Court."

[11] Translated as "Decision and Order."

[11] Thus, contrary to Ahn's argument, the trial court in fact made a specific finding, as required under Rule 70(a), that the sale price upon foreclosure was fair and reasonable. Accordingly, Ahn's first point of error is rejected.

B. Further Proceedings.

[12] As stated earlier, the trial court entered a judgment in favor of Town House on its claim for a deficiency. In *Town House I*, this court issued a Mandate reversing the lower court's judgment and remanding the case. On remand, without allowing further briefing or arguments, or accepting new or additional evidence, the trial court issued a Decision and Order finding that the sale price was fair and reasonable.

[13] Ahn argues that in *Town House I*, this court remanded the case for further proceedings. He asserts that because no further proceedings were conducted, the lower court's judgment should be reversed.

[14] While the language "further proceedings" was not used in either the *Town House I* Opinion or Mandate, Ahn is correct in asserting that the trial court was required to conduct further proceedings. Because the case was remanded, the trial court necessarily was required to conduct further proceedings, even without specific directions given to that effect. *See Haeuser v. Dep't of Law*, 2002 Guam 8, ¶ 16 ("[E]very remanded case is remanded for further proceedings in accordance with the appellate court opinion.") (citation omitted), *cert. granted*, Case No. 02-72249 (9th Cir. Sept. 13, 2002); *Abrams v. Scott*, 211 S.W.2d 718, 721 (Mo. 1948) ("Every case which is remanded is remanded 'for further proceedings,' whether those words are used or not, and such further proceedings are expected to be 'in accordance' with the opinion rendered.") (citation omitted). Consequently, Ahn's bare assertion that the trial court was required to conduct "further proceedings" is, by itself, unavailing. The determinative question is what type of "further proceedings" were required.

[15] It is unclear what type of "further proceedings" Ahn argues should have been conducted. It appears that Ahn argues that the trial court was required to conduct an entirely new trial, or, at the very least, accept new evidence or hear additional arguments on the issue of whether the sale price of the furniture was fair and reasonable. Town House contends that pursuant to this court's Opinion

and Mandate in *Town House I*, the trial court was not required to accept additional evidence on remand.

[16] On remand, a trial court must comply with the mandate of the appellate court. *Haeuser*, 2002 Guam 8 at ¶ 17; *Ex Parte King*, 821 So. 2d 205, 208 (Ala. 2001) ("The trial court's duty is to comply with the mandate 'according to its true intent and meaning' . . . ."") (citation omitted); *Higgins v. Karp*, 706 A.2d 1, 5 (Conn. 1998). Furthermore, a mandate cannot be applied in a vacuum, and must be interpreted in light of the appellate court's opinion. *Haeuser*, 2002 Guam 8 at ¶ 17 ("[T]he lower court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.") (citation omitted); *McDonough v. Liberty Mut. Ins. Co.*, 968 S.W.2d 771, 773 (Mo. Ct. App. 1998) ("The first opinion is part of the mandate and must be used to interpret the mandate itself."); *Bower v. D'Onfro*, 696 A.2d 1285, 1290 (Conn. App. Ct. 1997) ("In carrying out a mandate . . . the trial court is limited to the specific direction of the mandate as interpreted *in light of the opinion*.") (omission in original) (citation omitted); *Abrams*, 211 S.W.2d at 721 ("[W]henever an appellate court reverses and remands the judgment of a trial court, the appellate court does so with directions. Those directions are determined from the mandate and the opinion of the appellate court."). Thus, in determining how to proceed on remand, the trial court must examine both the mandate and the opinion and proceed in accordance with the views expressed therein. *See Haeuser*, 2002 Guam 8 at ¶ 17; *see also Higgins*, 706 A.2d at 5; *Inland Real Estate Corp. v. Village of Palatine*, 535 N.E.2d 42, 44 (Ill. App. Ct. 1989).

[17] In this case, a determination of the type of "further proceedings" the trial court was required to conduct on remand requires a review of the Mandate and Opinion issued in *Town House I*. "[T]he interpretation by an appellate court of its own mandate is properly considered a question of law, reviewable *de novo*." *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997). Furthermore, an appellate court reviews the trial court's actions on remand for an abuse of discretion. *Haeuser*, 2002 Guam 8 at ¶ 10 (citing *See In re Marriage of Blinderman*, 669 N.E.2d 687, 694 (Ill. App. Ct. 1996)); *R.J.M. v. State, Dept. of Health and Social Services*, 973 P.2d 79, 86 (Alaska 1999)).

[18] The Mandate issued in *Town House I*, provided: "ON CONSIDERATION THEREOF, it is now hereby ordered and adjudged by this court that this appeal from the Superior Court of Guam is **REVERSED AND REMANDED** to the trial court." *Town House v. Ahn*, CVA98-024 (Mandate, Nov. 20, 2000).). The Mandate appears to be general in that it does not impart specific directions for the trial court on remand. *See Associated Indus. of Missouri v. Dir. of Revenue*, 918 S.W.2d 780, 782 (Mo. 1996) ("[T]he . . . language – 'remanded for further proceedings in accordance with this opinion' – is merely a simple reversal and remand, as opposed to a remand importing a direction of specified things.") (citation and quotation marks omitted). However, in reviewing the Opinion, it is clear that the court remanded the case for a determination of only one issue. Specifically, in *Town House I*, the court held that pursuant to Rule 70(a), a deficiency judgment for the sale of personal property cannot be entered without a finding that the property was resold at a fair and reasonable price. *Town House I*, 2000 Guam 29 at ¶ 9. The court held that because the trial court did not make such finding, Rule 52(b), which requires that the court present facts which support its decision, remained unsatisfied. *Id*. ¶¶ 11-12. The appellate court was therefore precluded from conducting a meaningful review. *Id*. Based on these determinations, the court made the following pronouncement: "We REVERSE this decision and REMAND this case to the trial court *ordering it to address the issue of whether the sale price was 'fair and reasonable.'*" *Id*. ¶ 15 (emphasis added).

[19] Thus, upon review of the Mandate and Opinion, it is clear that the lower court was merely required to revisit one issue on remand, specifically, whether the sale of the collateral upon repossession was "fair and reasonable." *Id*. Therefore, we reject Ahn's argument that because the *Town House I* court reversed for further proceedings, the court was required to undertake a new trial. Courts have found that when an appellate court's mandate reverses for further proceedings without more specific instructions, the mandate is a general mandate which requires the trial court to conduct an entirely new trial on all the issues of fact. *See First State Bank of Bishop v. Grebe*, 162 S.W.2d 165, 168-69 (Tex. Civ. App. 1942). However, the instant case is distinguishable from cases where the appellate court's mandate is purely general because the mandate in *Town House I* specifically ordered the trial court to limit its proceeding to a particular inquiry regarding the sale price. The

mandate is therefore more properly interpreted as specific in that the lower court was required to follow the appellate court's specific instructions to decide a particular issue and could only conduct further proceedings which were not inconsistent with the appellate court's opinion. *See id.* at 168 (recognizing that a specific mandate is one wherein the lower court is instructed to "do a specified thing, or enter a specific judgment, or limit its proceedings to a particular inquiry"); *A.M. v. State*, 945 P.2d 296, 300 (Alaska 1997) (footnote omitted) ("A trial court has no authority to deviate from a specific mandate of the supreme court but may take actions not inconsistent with our decision."). Thus, it is clear that the trial court was not required, as Ahn suggests, to conduct a trial *de novo.*

[20] Furthermore, the lower court did not abuse its discretion in failing to conduct an entirely new trial. A trial on Town House's claim for a deficiency was fully conducted prior to *Town House I*, and Ahn did not appeal any issues related to the lower court's deficiency judgment aside from the lower court's failure to make a finding under Rule 70(a) of whether the sale price was fair and reasonable. Thus, in light of Ahn's limited challenge to the trial court's judgment, the only relevant issue on remand was the reasonableness of the sale price. *See Turner v. Commonwealth Edison Co.*, 380 N.E.2d 477, 481, 482 (Ill. Ct. App. 1978) ("[W]here a question was open to consideration in a prior appeal and it could have been presented but was not, the question will be deemed to be waived.").

[21] We further reject Ahn's argument that the trial court abused its discretion in failing to conduct a hearing or accept additional evidence with regard to the single issue to be decided on remand. Courts concur that if the mandate and, or, opinion specifically directs the trial court to take additional evidence or conduct a hearing, such directions must be followed by the trial court on remand. *See R.J.M* ., 973 P.2d at 86 ("[W]e will reverse a trial court's refusal to receive new evidence on remand only when the refusal constitutes an abuse of discretion, *unless we have expressly called for a new trial or evidentiary hearing*.") (emphasis added) (citation omitted); *Ruiz v. Oniate*, 806 So. 2d 81, 83 (La. Ct. App. 2001) (holding that because the appellate court did not direct the trial court to accept new evidence, the lower court on remand was not precluded from entering summary judgment on the remanded issue); *Poletti v. Comm'r of Internal Revenue*, 351 F.2d 345, 347 (8th Cir. 1965) ("[A]n inferior court has no authority to deviate from the mandate

issued by an appellate court."). However, absent specific directions as to how to decide the issues on remand, it is within the lower court's discretion to determine what further proceedings are appropriate on remand. *See Haeuser*, 2002 Guam 8 at ¶ 16 ("Proceeding simply means further judicial action; it does not necessarily mean an evidentiary hearing.") (citation omitted); *Blinderman*, 669 N.E.2d at 694 ("When a reviewing court remands a case with instructions that are general . . . the circuit court is required to examine the appellate court's opinion and *exercise its discretion* in determining what further proceedings would be consistent with the opinion on remand.") (emphasis added); *R.J.M.*, 973 P.2d at 86; *Poletti*, 351 F.2d at 348. Furthermore, if an appellate court does not give a trial court specific directions, a trial court's refusal to conduct an evidentiary hearing on remand is reviewed for an abuse of discretion. *See Murray v. Murray*, 856 P.2d 463, 466 (Alaska 1993); *see also Inland Real Estate Corp.*, 535 N.E.2d at 45 (holding that the trial court did not abuse its discretion in failing to hold an evidentiary hearing). The scope of a trial court's authority on remand should be examined on a case-by-case basis. *See Slattery v. Covey & Co.*, 909 P.2d 925, 927 (Utah Ct. App. 1995).

[22] In the present case, the Opinion and Mandate of *Town House I* did not specifically require the trial court to conduct a hearing or accept new evidence in determining whether the sale price was fair and reasonable. Therefore, it was within the trial court's discretion whether to conduct such proceedings on remand. *See Murray*, 856 P.2d at 466 ("Ordinarily, a remand for additional findings does not obligate the trial court to hear new evidence."). In determining whether the lower court should have taken evidence or conducted a hearing on remand, we must review the issue that was remanded and determine whether the trial court's proceedings were appropriate considering the resolution of that issue. *See Brown v. Whitaker*, 926 S.W.2d 1, 4 (Mo. Ct. App. 1996) (stating that a trial court is not required to receive new evidence on remand); *see also Ruiz*, 806 So.2d at 83; *Poletti*, 351 F.2d at 348; *Bittman v. Bittman*, 1935 WL 3287 (Ohio Ct. App. 1935).

[23] Here, because the trial court had evidence from the trial regarding the sale of the furniture, including the price Ahn paid for the furniture in the Second Contract, the price Town House sold the furniture for, and the circumstances surrounding the sale, it was not necessary for the trial court to accept and consider additional evidence in reaching a conclusion regarding whether the sale price

as fair and reasonable. *See Inland Real Estate*, 535 N.E.2d at 45 (determining that because the trial court had already received evidence on this issue in the first trial and was familiar with the evidence, it was unnecessary for the trial court to accept additional evidence on remand). Thus, we find that the trial court did not abuse its discretion in failing to either conduct a hearing or accept additional evidence in determining the issue on remand. *Id*.

C. Post-Trial Motions.

[24] The trial court denied both Ahn's Rule 52(b) and 60(b) motions from the bench at a hearing conducted on July 23, 2001. The court's decision was memorialized in an Order filed on September 14, 2001.

[25] Ahn argues that the trial court erred in denying his Rule 52(b) motion. He argues that the lower court was required to amend its findings regarding the sale price of the furniture. Ahn further contends that the lower court erred in denying his Rule 60(b) motion. Ahn asserts that the court was required to set aside the judgment considering that newly discovered evidence supported a finding that the underlying Second Contract between the parties was procured through fraud on the part of Town House.

[26] Town House counters both challenges by contending that Ahn is precluded from raising these issues because all the issues Ahn raised in the Rule 52(b) and 60(b) motions were decided prior to the first appeal, and Ahn failed to appeal them in *Town House I*. Town House also argues that those issues not raised in the prior trial or on appeal in *Town House I* could not be raised again on remand or in this appeal.

[27] We review the denial of a Rule 52(b) motion for an abuse of discretion. *Lei v. Global Eng'g & Maint. Servs. Corp.*, Civ No. 96-00007A, 1996 WL 875782, at *4 (D. Guam App. Div. Oct. 4, 1996). We similarly review the denial of a Rule 60(b) motion for an abuse of discretion. *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14, ¶ 4. "A trial court abuses its discretion when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Brown v. Eastman Kodak Co.*, 2000 Guam 30, ¶ 11 (citation omitted).

[28] In denying Ahn's two motions, the lower court made the following conclusions:

> [First], [t]he Court finds that many of the arguments raised in these two motions were previously raised in the defendant's motion for a new trial, which has already been denied by the Court. [Second,] [t]o the extent that defendant raises new arguments, the Court finds that these issues are barred, in that defendant failed to raise them on defendant's prior appeal to the Supreme Court of Guam in this matter.

Appellant's Excerpts of Record, pp. 119-20 (Order Den. Def.'s Post-Trial Mots., Sept. 14, 2001). We interpret this to mean that the trial court found its reasons supporting its prior denial of Ahn's new trial motion to likewise support a denial of similar contentions raised in his Rule 52(b) and 60(b) motions; and that the court declined to reconsider its prior decision.[12]

[29] In reviewing whether the trial court's prior rationale for denying Ahn's new trial motion formed an adequate basis for denying his Rule 52(b) and 60(b) motions, we must first review the issues raised in all three motions.

[30] In his new trial motion, Ahn presented the following arguments: (1) the Second Contract included amounts for furniture Ahn never received from Town House; (2) Buzz Shiroma's testimony did not reflect inventory that was still in Ladera, and therefore, the amounts received from the sale did not reflect this furniture which Town House essentially gave to LG Construction for free; accordingly, Town House only received 33 cents on the dollar for the sale of the furniture; (3) Town House's attorney misled the court to believe that Town House sold the furniture for 60 cents on the dollar, as opposed to 33 cents on the dollar; (4) Buzz Shiroma gave perjured testimony regarding the cost to deliver the furniture to Ladera; and (5) Buzz Shiroma misled the court in testifying that it would be difficult to remove the vertical blinds in the hotel.[13] [14] The trial court denied Ahn's Motion for a New Trial in a Decision and Order filed on September 2, 1998.[15]

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[12] Furthermore, in his Rule 52(b) motion, Ahn argued that the trial court erred in determining that the collateral was sold for 60 cents on the dollar. Ahn contended that the collateral was sold for 33 cents on the dollar, and that the judgment should be amended accordingly. At a hearing on his post-trial motions, the lower court rejected this argument, and found that even accepting Ahn's figure of approximately 30 cents on the dollar, the collateral was nonetheless sold for a fair and reasonable price. This ruling will be discussed later in the Opinion.

[13] Record on Appeal, tab 64 (Reply Mem., Aug. 14, 1998).

[14] Although we do not have a copy of the motion in the record, we do have Ahn's Reply to Town House's Opposition to the new trial motion. The arguments listed above were presented in Ahn's Reply. Furthermore, in its order denying the motion, the lower court address these arguments.

[15] Record on Appeal, tab 75 (Decision & Order, Sept. 2, 1998).

[31] In his Rule 52(b) motion for amended and additional findings of fact and conclusions of law, Ahn made the following arguments: (1) the deficiency judgment represented amounts for furniture that Town House never delivered to Ahn; (2) Buzz Shiroma delivered perjured testimony regarding the cost to deliver the furniture to Ladera Towers; (3) Town House's counsel erroneously understated to the court the value of the repossessed furniture, which in turn led the court to erroneously find that the furniture was sold for 60 cents on the dollar, as opposed to the true amount of 33 cents on the dollar; and (4) Buzz Shiroma misled the court when he testified that it would be difficult to remove the vertical blinds from Ladera Towers.[16]

[32] Finally, in his motion to set aside the judgment under Rule 60(b)(1) and 60(b)(3), Ahn raised the following points: (1) Town House fraudulently included in the Second Contract price a total of $37,941.49 for furniture which was never delivered to Ahn; (2) in its sale to LG Construction, Town House included a total of $28,000 worth of furniture which was not included in the original inventory list and was therefore given to LG Construction for free; (3) Town House sold new furniture in the model units as used furniture, and taking the value of the furniture as new, Town House received only 33 cents on the dollar for the furniture; (4) Buzz Shiroma gave false testimony that Town House spent between $40,000 to $50,000 to deliver and assemble the furniture in Ladera; and (5) Town House erroneously led the court to believe that at the time of the sale to LG Construction, the furniture was only worth $370,213.71, as opposed to $455,213.71, and therefore, Town House misled the court to believe that the furniture was sold for 60 cents on the dollar.[17]

[33] Upon review of all three motions, it is evident that the allegations Ahn raised in support of his Rule 52(b) and 60(b) motions were previously raised by Ahn in support of his motion for a new trial filed prior to his appeal in *Town House I*. Accordingly, the trial court did in fact previously consider and reject these contentions. Although the trial court rejected Ahn's arguments as supporting a new trial, the trial court *did not* reject Ahn's contentions as they relate to a motion to amend findings under Rule 52(b) or a motion to set-aside judgment under Rule 60(b).

[16] Record on Appeal, tab 121 (Mem. in Supp. of Mot., June 5, 2001).

[17] Record on Appeal, tab 111 (Memo. of P. & A. in Supp. of Mot. for Leave to Vacate & Set Aside J. & to File an Am. Answer & Countercls. for Fraud, June 29, 1999).

Consequently, we must review whether the trial court's former denial of Ahn's contentions also support a denial of his later Rule 52(b) and 60(b) motions.

1. Rule 52(b).

[34] Under Rule 52(b) of the Guam Rules of Civil Procedure, a trial court may amend its findings and conclusions, and amend the judgment should that be required. Guam R. Civ. P. 52(b)[18]; *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986) ("A party may move to amend the findings of fact even if the modified or additional findings in effect reverse the judgment."). A motion to amend under Rule 52(b) is intended "to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence." *Fontenot*, 791 F.2d at 1219 (citing *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976)); *Nat'l Metal Finishing Co. v. Barclays/American Commercial, Inc.*, 899 F.2d 119, 123-24 n.2 (1st Cir. 1990) (recognizing that frequently articulated grounds for granting a Rule 52(b) motion include "manifest error of law or fact," "newly discovered evidence," and "an intervening change in the law."). Motions made under Rule 52(b) "are not intended merely to relitigate old matters nor are such motions intended to allow the parties to present the case under new theories." *Evans, Inc.*, 416 F. Supp. at 244 (reciting this standard for both a motion to amend under Rule 52(b) and Rule 59(e)). Furthermore, a motion to amend under Rule 52(b), which seeks to introduce new evidence, "closely approaches a motion for a new trial on the ground of newly discovered evidence . . . ." [19] *See Morris Iron & Steel Co. v. Charal Metal Co.*, 1986 WL 12463, *1 (E.D. Pa. 1986) (quoting 6A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 59.04) (recognizing that a motion for a new trial is subject

[18] Rule 52(b) provides: "(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59." GRCP 52(b).

[19] A new trial may be granted pursuant to Rule 59(a), which provides:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted on suits in equity in the courts of Guam. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

GRCP 59(a) (1995).

to more stringent standards than a Rule 52(b) motion).[20] Similar to a motion for a new trial, a motion to amend should not be employed to introduce evidence that was available at the time of trial but was not proffered. *See Fontenot*, 791 F.2d at 1219; *Diaz v. Methodist Hosp.*, 46 F.3d 492, 495 (5th Cir. 1995) (citing the standards for granting a new trial based on newly discovered evidence). In fact, evidence which could have been proffered is not considered newly discovered for purposes of Rule 52(b). *See Hollis v. City of Buffalo*, 189 F.R.D. 260, 263 (W.D.N.Y. 1999) (denying the plaintiff's Rule 52(b) motion because "[t]he information plaintiff s[ought] to use to amend the court's findings was available to plaintiff prior to trial" and was thus not "newly discovered evidence").

a. Newly Discovered Evidence.

[35] Of the four arguments Ahn presented in his Rule 52(b) motion, three allege newly discovered evidence.[21] All three allegations of newly discovered evidence were raised in Ahn's motion for a new trial. In denying Ahn's Rule 52(b) motion, the trial court relied on the reasons it gave in rejecting Ahn's motion for a new trial. Thus, we must determine whether those reasons similarly supported a denial of Ahn's Rule 52(b) motion as it related to claims of newly discovered evidence. In denying Ahn's new trial motion, the lower court found that the evidence Ahn alleged to have discovered after trial, and which Ahn argued supported a new trial, "was not the type of evidence which could not have been discovered prior to trial through the exercise of due diligence." Record on Appeal, tab 75 (Decision and Order, Sept. 2, 1998). The court also rejected Ahn's argument that a new trial was warranted due to perjury committed by Town House officials. Specifically, with regard to Ahn's claims of perjury, the court found that Ahn "had ample opportunity to cross examine all of [Town House's] . . . witnesses, and further had the opportunity to bring in rebuttal evidence if he thought it was necessary." Record on Appeal, tab 75 (Decision and Order, Sept. 2, 1998).

[36] We find that the trial court's reasons for denying the motion for a new trial also supported a denial of Ahn's request for Rule 52(b) relief as it related to newly discovered evidence. First, the

[20] Moreover, Rule 52(b) contemplates that a motion under the Rule "be made with a motion for a new trial pursuant to Rule 59." GRCP 52(b).

[21] These include Ahn's arguments that (1) the deficiency judgment represented amounts for furniture that Town House never delivered to Ahn; (2) Mr. Buzz Shiroma delivered perjured testimony regarding the cost to deliver the furniture to Ladera Towers; and (3) Mr. Shiroma misled the court when he testified that it would be difficult to remove the vertical blinds from Ladera Towers. Record on Appeal, tab 121 (Mem. in Supp. of Mot. for Additional Findings of Fact & Conclusion of Law, June 5, 2001).

evidence which Ahn claims was newly discovered was the type which Ahn should have been aware of during trial, especially considering Ahn was being sued on a personal guarantee. The new evidence Ahn claims to have discovered was within the knowledge of either Ahn, Town House or T&K employees. The information Ahn himself knew at the time of trial, such as the fact that Town House lied about the cost to deliver the furniture to Ladera, is not newly discovered evidence. *See Fontenot*, 791 F.2d at 1219 (stating that a motion to alter or amend should not be employed to introduce evidence available at the time of trial); *Hollis*, 189 F.R.D. at 263. As for the information within the knowledge of Town House and T&K employees, it is evident that, considering the nature of the issues being litigated, a litigant exercising due diligence would contact these individuals prior to trial. *See Fontenot*, 791 F.2d at 1219; *Hollis*, 189 F.R.D. at 263; *Diaz*, 46 F.3d at 496 (rejecting the appellant's argument that she had no reason to question the veracity of the witness' statements at trial, and stating that "[w]hile cognizant of Appellant's trusting nature, we believe a prudent litigant would independently investigate such a pivotal issue and be less than willing to adopt blindly the statements of the opposing party").

[37] Because the alleged newly discovered evidence could have been discovered prior to trial, it is not the type of evidence which support an amendment to the findings and conclusions under Rule 52(b). *See Diaz*, 46 F.3d at 496. Accordingly, we find that the lower court did not abuse its discretion in denying those portions of Ahn's Rule 52(b) motion.

b. Value of the Collateral.

[38] Furthermore, Ahn presented one argument in his Rule 52(b) motion which was not based on newly discovered evidence; but rather, alleged that a particular finding did not represent the evidence already in the record. Specifically, Ahn claimed that Town House's counsel erroneously understated to the court the value of the repossessed furniture, which in turn led the court to erroneously find that the furniture was sold for 60 cents on the dollar, as opposed to the true amount of 33 cents on the dollar. Ahn argues that based upon the evidence in the record, the trial court's finding that the furniture was worth $370,213.71 was erroneous and that the furniture was actually

valued at $455,213.71. Further, it is evident that Ahn's argument regarding the court's error was presented to effectuate a change in the judgment.[22]

[39] At the July 23, 2001 hearing, the trial court rejected Ahn's argument on a separate ground not articulated in its September 14, 2001 Decision and Order. The trial court found that even assuming Ahn was correct that Town House sold the furniture for 33 cents on the dollar, Town House's actions in selling the furniture were fair and reasonable.[23] This was based on the court's finding that Town House could not have sold the furniture to any party other than LG Construction considering the facts previously found by the court.[24]

[40] The issue is whether the lower court abused its discretion in rejecting Ahn's Rule 52(b) motion with regard to the resale price. This requires an analysis of two matters: (1) whether the court was correct in concluding that the collateral was sold for 60 cents on the dollar; and (2) whether the court was correct in finding that even accepting Ahn's figures, the collateral was nonetheless sold for a fair and reasonable price.

[41] Rule 70(a) of the Rules of Civil Procedure provides: "No deficiency judgment after repossession of personal property shall be granted unless it shall appear to the satisfaction of the court by proper evidence that said property was resold for a fair and reasonable price." GRCP 70(a). As is mentioned in the source comment to the Rule, and as was recognized in *Town House I*, Rule 70(a) is derived locally and has no counterpart in the Federal Rules of Civil Procedure. *Town House I*, 2000 Guam 29 at ¶ 9. A trial court's finding that the re-sale price is "fair and reasonable" under Rule 70(a) is a finding of fact reviewed for clear error.[25] *See Nissan Motor Corp. v. Sea Star Group*

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[22] *See* Transcript, vol. II, pp. 6-8 (Mot. for Amended & Additional Findings of Facts & Conclusions of Law, July 23, 2001) (arguing that the court's decision and order improperly cited the sale price as being 60 cents on the dollar, that the price should really have been 33 cents on the dollar, or based on the court's figures, 35 or 42 cents on the dollar, thereby warranting an amendment to reflect the correct figures, and an amendment to the judgment in favor of Ahn).

[23] *See* Transcript, vol. II, p. 41 (Mot. for Amended & Additional Findings of Facts & Conclusions of Law, July 23, 2001).

[24] *See* Transcript, vol. II, p. 41 (Mot. for Amended & Additional Findings of Facts & Conclusions of Law, July 23, 2001).

[25] This court has not had occasion to discuss the standard of review for determinations made under Rule 70(a). We note, however, that under the Uniform Commercial Code, as enacted in Guam prior to the recent amendments found in P.L. 26-172 (repealed and reenacted Jan. 5, 2003), a deficiency judgment could only be awarded if the collateral was sold in a fair and reasonable manner. *See* Title 13 GCA § 9504(3) (1993); *see Bank of Guam v. Del Priore*, 2001 Guam 10, ¶ 10. A finding on commercial reasonableness is a factual finding and is reviewed for clear error. *Fed. Finance Co.*

Inc., 2002 Guam 5, ¶ 6 ("A lower court's findings of fact are reviewed for clear error."); *cf. Fed. Fin. Co. v. Papadopoulos*, 721 A.2d 501, 503 (Vt. 1998) (reviewing a lower court's finding of commercial reasonableness for clear error).

[42] Here, Ahn alleges that the furniture was worth $455,213.71. The trial court found that the furniture was worth $370,213.71, which was based upon its finding that the figure represented the parties' agreement as to the furniture's worth at the time of the Second Contract.[26]

[43] We find that the trial court's determination regarding the furniture's value was erroneous. There is nothing in the record which indicates that the parties actually agreed that the amount of $370,213.71 represented the value of all the furniture at the time of repossession and sale. In fact, we could find little testimony at trial regarding the value of the furniture at Ladera Towers. To the extent that the trial court's determination that the collateral was worth $370,213.71 is based upon the fact that the Second Contract was entered into for $370,213.71, the court's determination regarding the value of the furniture was erroneous. The amount owed under the Second Contract was $370,213.71, which represented $268,856.73 still owing under the First Contract, $9,697.00 for deliveries made after the First Contract, $65,745.67 for furniture loaned to Ladera Towers for their model units, and $25,914.31 in finance charges.[27] The amount Ahn initially contracted for under the Second Contract does not necessarily represent the market value of all the furniture either at the time of the Second Contract or the time of repossession and sale. In fact, the $370,213.71 figure does not take into account payments of $85,000.00 made under the First Contract, which represented amounts expended for furniture which were not included in the Second Contract.[28] Furthermore, we have not found much in the record which serves as evidence regarding the market value of the

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v. Papadopoulos, 721 A.2d 501, 503 (Vt. 1998) (reviewing a lower court's finding of commercial reasonableness for clear error); *see also Havins v. First Nat'l Bank*, 919 S.W.2d 177, 181 (Tex. App. 1996); *Hall v. Owen County State Bank*, 370 N.E.2d 918, 929 (Ind. Ct. App. 1977). One factor of commercial reasonableness is the reasonableness of the priced received upon disposition of the collateral. *See Hall*, 370 N.E.2d at 929; *In re estate of Sagmiller*, 615 N.W.2d 567, 569 (N.D. 2000). It follows that a determination regarding the reasonableness of the sale price in determining commercial reasonableness is similarly a question of fact.

[26] *See* Record on Appeal, tab 44, p. 2 (Decision & Order, June 30, 1998); Record on Appeal, tab 119, p. 6 (Disision Yan Otden, May 21, 2002).

[27] *See* Appellant's Excerpts of Record, pp. 1-2 (Pl.'s Ex. 2); Appellant's Excerpts of Record, p. 3 (Pl.'s Ex. 4); Record on Appeal, tab 1, (Pl.'s Complaint, Ex. 1, Sales Contract).

[28] *See* Appellant's Excerpts of Record, p. 1, (Pl.'s Ex. 2).

repossessed furniture. Thus, the trial court's reliance on the $370,213.71 figure as the value of the furniture was not supported by the evidence. The court's findings of fact on this issue was erroneous.

[44] However, as stated earlier, the lower court found that even accepting Ahn's figure, the furniture was nonetheless sold in accordance with the requirements of Rule 70(a). We agree. We find that the lower court's error with regard to the value of the furniture did not require the court to amend its conclusions of law and its judgment.

[45] First, we note Ahn's contention that the furniture was sold for 33 cents on the dollar. The evidence in the record does not support this conclusion. Ahn's figure represents his allegation that the furniture was worth $455,213.71. However, Ahn himself admits that of that amount, only $404,266.67 was for the furniture, and $50,947.04 was for the cost of financing. Therefore, at most, assuming the furniture was sold to Ahn for its fair market value and did not depreciate at all between the time of sale to Ahn and the time of the repossession and re-sale to LG Construction; based on Ahn's statements, the furniture was only worth $404,266.67. If the furniture was worth that amount and was sold for $150,000.00, then the furniture was sold for, at most, approximately 37 cents on the dollar. We find that even if the lower court's factual findings were amended to reflect a value of $404,266.67, the new figure would not render clearly erroneous the court's ultimate conclusion that Town House sold the furniture for a fair and reasonable price.

[46] It is evident that because the Guam legislature enacted a separate rule requiring a specific finding regarding the reasonableness of sale price, the legislature felt it necessary that, in addition to a finding of commercial reasonableness, all sales of collateral upon repossession be scrutinized with regard to the re-sale price. *See Town House I*, 2000 Guam 29 at ¶¶ 8-9 (rejecting Town House's argument that the trial court's finding that the resale price was "commercially reasonable" satisfies a finding under Rule 70(a), and holding that "Rule 70(a) operates to increase the importance of the price received in the final analysis of granting a deficiency judgment."). Aside from *Town House I*, there are no cases in this jurisdiction which discuss Rule 70(a), and there are consequently no cases which discuss the factors a court must consider in determining whether the re-sale price was "fair and reasonable" under Rule 70(a). Though not determinative, the resale price of collateral

is one factor in determining commercial reasonableness under Title 13 GCA § 9504(3)[29]. *See Hall*, 370 N.E.2d at 929; *see also* Title 13 GCA § 9507(2) (1993)[30]. Accordingly, cases discussing the reasonableness of the price in the context of secured transactions are useful guides in determining whether the price was fair and reasonable under Rule 70(a).

[47] A finding regarding the reasonableness of the price received upon disposition of collateral depends on the particular facts of a case. *Cf. Hall*, 370 N.E.2d at 929 (acknowledging that a determination of commercial reasonableness is highly dependent on the circumstances of a particular case). In determining reasonableness, it is important to compare the value of the collateral with the amount received upon the sale. *See Papadopoulos*, 721 A.2d at 504 (upholding the lower court's determination that a bid of $1,000 for pizza equipment sold to the debtor for $20,000 was one factor indicating that the sale was *not* commercially reasonable). Courts have held that a commercially reasonable price was realized from sales which yielded 62%, 50%, or 46% on the dollar, or "where the beneficial interest had a fair market value of $55,000 but sold for only $3,500." *See Ryder v. Bank of Hickory Hills*, 612 N.E.2d 19, 23 (Ill. App. Ct. 1993) (citing other cases in the jurisdiction in holding that a yield of 46% on the dollar was not commercially unreasonable).

[48] Furthermore, in analyzing the reasonableness of the sale price under Rule 70(a), we find that courts should consider the nature of the collateral, and take into account whether the collateral at issue is more properly sold in a particular manner even if it would not yield the best price. For instance, sales which bypass added costs for advertising, insurance, or reconditioning of the collateral are sometimes favored, as these costs may result in "higher storage expenses and a higher interest accrual under the original obligation". *See Hall*, 370 N.E.2d at 930 (determining that it may

[29] Title 13 GCA § 9504(3) was recently amended by P.L. 26-172, which adopts the Revised Article 9 of the Uniform Commercial Code in Guam. Like the requirement under 13 GCA § 9504(3), all sales of the collateral under the Revised Article 9 must be conducted in a commercially reasonable manner. *See* P.L. 26-172 (repealed and reenacted Jan. 5, 2003), Exhibit A, Section 9-610(b) ("Every aspect of a disposition of collateral . . . must be commercially reasonable.")

[30] Prior to its recent amendment by P.L. 26-172, this section provided in relevant part: "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." Title 13 GCA § 9507(2) (1993). Section 9-627(a) of the Revised Article 9 similarly provides: "The fact that a greater amount could have been obtained . . . is not of itself sufficient to preclude the secured party from establishing that the . . . disposition . . . was made in a commercially reasonable manner." *See* P.L. 26-172 (repealed and reenacted Jan. 5, 2003), Exhibit A, Section 9-627(a).

be more reasonable for creditors to sell the collateral wholesale as opposed to retail because the latter often generates considerable additional expenses).

[49] In the present case, assuming that Town House sold the furniture to LG Construction for 37 cents on the dollar, we agree that the collateral was sold for a "fair and reasonable" price. Here, there is evidence in the record that indicates that given the nature and volume of the collateral at issue, Town House sold the furniture in the most logical and cost-conscious manner.[31] Additionally, because the furniture was already in Ladera Towers, it was even more logical to sell the furniture to the new owners of Ladera.[32] In fact, there is testimony in the record which reveals that Ahn himself recommended that Town House sell the furniture to LG Construction. Further, the furniture was used; therefore, it is not unexpected that Town House would be unable to collect prices reflective of new furniture. *See Horney v. Hayes*, 142 N.E.2d 94, 97 (Ill. 1957) ("It has long been recognized that property does not bring its full value at forced sales, and that price depends upon many circumstances from which the debtor must expect to suffer a loss."). Finally, considering the amount of furniture, even if sales to individual consumers may have yielded a higher price, that price would not likely yield a lower deficiency judgment at the end of the day. Town House would likely have incurred considerable extra expenses, such as moving costs, storage costs, insurance, etc., in selling all the furniture.[33]

[50] Overall, under the circumstances of this case, even assuming Town House only received 37 cents on the dollar, there was enough evidence in the record to support the lower court's finding that the sale price was fair and reasonable considering the nature of the collateral. Thus, we find that the lower court did not abuse its discretion in denying Ahn's Rule 52(b) motion to amend its conclusions of law and, ultimately, its judgment, with regard to this issue.

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[31] *See* Transcript, vol. I, pp. 62-64, 65 (Bench Trial, May 27, 1998) (Buzz Shiroma testifying that based on the volume of furniture, it would be difficult to find an individual or firm to purchase it).

[32] *See* Transcript, vol. I, pp. 62-64, 65 (Bench Trial, May 27, 1998) (Buzz Shiroma testifying that because the furniture was used, hotels would not be interested in purchasing the furniture.)

[33] *See* Transcript, vol. I, pp. 62-67 (Bench Trial, May 27, 1998) (Buzz Shiroma testifying that removal of the furniture would produce considerable moving and storage expenses, and would subject the furniture to damage which would decrease its value).

2. Rule 60(b) Motion.

[51] The next issue is whether the lower court erred in denying Ahn's Rule 60(b) motion based on the same reasons for denying Ahn's motion for a new trial. Specifically, we must review whether the grounds the lower court asserted in denying Ahn's new trial motion similarly support a denial of Ahn's Rule 60(b) motion.[34]

[52] Ahn brought his Rule 60(b) motion under 60(b)(1) and (b)(3).[35] Guam Rule of Civil Procedure 60(b)(1) allows a judgment to be set aside based upon "mistake, inadvertence, surprise, or excusable neglect." GRCP 60(b)(1). Under Rule 60(b)(3), a judgment may be set aside for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." GRCP 60(b)(3).

[53] As stated earlier, Ahn made the following allegations in his Rule 60(b) motion: (1) Town House included in the sale price furniture which was never given to Ahn; (2) Town House included in the sale to LG furniture which was not listed; (3) Town House delivered perjured testimony regarding the cost to deliver the furniture to Ladera; (4) Town House should have sold the furniture in the model units as new as opposed to used furniture; and (5) Town House's counsel erroneously

[34] We note that Ahn's Rule 60(b) motion sought to set aside the judgment entered on September 15, 1998. However, the deficiency judgment was reversed by this court in *Town House I.* Thus, the lower court could not properly consider whether the judgment could be set aside, as the judgment was effectively set aside by virtue of *Town House I.* However, as provided earlier, *Town House I* did not reverse all findings of the trial court, but rather, reversed the judgment to the extent that it did not include a finding of whether the sale price was fair and reasonable as required by Rule 70(a). Thus, we treat the lower court's consideration of Ahn's Rule 60(b) motion as a motion to reconsider those aspects of the judgment which remained unaffected by this court's reversal in *Town House I.* Furthermore, to the extent that Ahn raised his Rule 60(b) motion in relation to the Judgment filed on June 14, 2001, we find that the lower court properly denied the motion for the reasons set forth in this Opinion.

[35] Rule 60(b) provides:

> (b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or if it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from operation of the judgment.

Guam R. Civ. P. 60(b).

told the court that the value of the furniture was $370,213.71. Essentially, Ahn claimed that new evidence showed perjury on the part of Town House.

[54] Ahn's arguments alleging perjury and misrepresentation arguably implicated Rule 60(b)(3). In its order denying Ahn's new trial motion, the lower court rejected Ahn's claims that new evidence showed perjury on the part of Town House. The court found that Ahn could have discovered the alleged perjury during cross-examination of the Town House officials at trial. The question is whether this was a proper ground to reject a motion made under Rule 60(b)(3).

[55] To set aside a judgment for fraud under Rule 60(b)(3), the trial court must determine whether the movant has "(1) prove[n] by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct, and (2) establish[ed] that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." *Guam Bar Ethics Comm. v. Maquera*, 2001 Guam 20, ¶ 35 (quoting *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990)) (internal brackets omitted); *see also Diaz*, 46 F.3d at 496; *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978); *Atkinson v. Prudential Prop. Co.*, 43 F.3d 367, 372-73 (8th Cir. 1994); *England v. Doyle*, 281 F.2d 304, 309-10 (9th Cir. 1960). The purpose of Rule 60(b)(3) "is to afford parties relief from judgments which are unfairly obtained, not those which may be factually incorrect." *Diaz*, 46 F.3d at 496; *see Maquera*, 2001 Guam 20 at ¶ 35 ("The rule is aimed at judgments which are unfairly obtained, not at those which are factually incorrect.") (citation omitted). "[T]he introduction of perjured testimony or false documents in a fully litigated case constitutes intrinsic . . . fraud." *Kachig v. Boothe*, 99 Cal. Rptr. 393, 398 (Ct. App. 1971). A judgment should be set aside under Rule 60(b)(3), and a new trial granted, if "evidence establishes that a party willfully perjured himself, and thereby prevented the opposition from fully and fairly presenting its case." *Diaz*, 46 F.3d at 497.

[56] Several courts have held that if the new evidence of perjury could have been discovered with due diligence, then a party is not prevented from fully and fairly presenting his case and, therefore, he is not entitled to relief under Rule 60(b)(3). *See id.* at 497; *Dixon v. C.I.R.*, 77 T.C.M. (CCH) 1630, 1999 WL 171398 (T.C. 1999) ("The very purpose of a trial is to test the truthfulness of testimony and other evidence proffered by the parties. Examining the possibility that testimony is

perjurious is one of the principal functions of cross-examination. . . . Rule 60(b) should not reward the lazy litigant who did not adequately investigate his or her case, or who did not vigorously cross-examine a witness." (citing 12 JAMES WM. MOORE, MORRE'S FEDERAL PRACTICE, ¶ 60.43[1][c] (3d ed.1998)) (omission in original); *see also Moore v. Jacobs*, 752 So. 2d 1013, 1018 (Miss. 1999) (agreeing that because the movant had access to the information at the time of trial, he failed to show that he was unable to fully and fairly present his case) (citing *Diaz*, 46 F.3d at 498); *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21 (1st Cir. 2002) (holding that the movant's failure to take advantage of the "panoply of pretrial discovery devices" which would have uncovered the alleged misstatements by witnesses supported a finding that the movant was not prevented from fully and fairly presenting his case).

[57] In *Diaz v. Methodist Hospital*, the appellant alleged that she discovered new evidence suggesting that two doctors perjured themselves when they testified at trial that blood testing could not be conducted during the weekends. *Diaz*, 46 F.3d at 495. In addition to arguing for a new trial, the appellant argued that a post-trial affidavit which directly contradicted statements made by the appellants amounted to perjury which warranted relief under Rule 60(b)(3). *Id*. at 496. The new affidavit offered evidence that the blood testing was available on the weekends. *Id*. at 496-97. This directly contradicted the testimony proffered by two witnesses (Drs. Williams and Bradshaw) that such testing was not available on the weekends. On appeal, the court determined that the new affidavit, which contradicted the statements presented at trial, "at most, . . . creates a factual dispute over whether the [appellant] was capable of performing amenoglycoside blood serum testing on weekends in January 1987. Appellant's new evidence does not conclusively establish that Drs. Bradshaw and Williams intentionally perjured themselves." *Id*. at 497. Furthermore, the court held that because the information contained in the post-trial affidavit was not solely in the control of the appellees, the appellant could have discovered it prior to trial and therefore, even assuming the appellees' witnesses delivered perjured testimony, the appellant was not prevented from fully and fairly presenting her case by such perjury. *See id*.

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[58] Following the rationale of the *Diaz* court, we find that the lower court did not err in denying Ahn's Rule 60(b) motion on the ground that Ahn could have discovered this evidence earlier and could have revealed it during trial. Because the new evidence of perjury was not solely within the knowledge of Town House, Ahn could have discovered it prior to the issuance of the judgment and was therefore not prevented by this alleged misrepresentation from fully and fairly presenting his case. *See id.*; *see also Karak*, 288 F.3d at 21-22 (determining that the appellant was not prevented from fully and fairly preparing his case because his "pursuit of the truth was [not] hampered by anything except his own reluctance to undertake an assiduous investigation (including pretrial discovery)"); *Gov't Fin. Servs. One Ltd. v. Peyton Place, Inc.*, 62 F.3d 767, 773 (5th Cir. 1995) (holding that notwithstanding the opposing party's failure to turn over a requested document at trial, the movant was not prevented from fully and fairly presenting his case because the document was available to the movant at trial). *But cf. Harre v. A.H. Robins Co.*, 750 F.2d 1501, 1505 (11th Cir. 1985) (holding that a failure to discover perjury during cross-examination does not necessarily preclude relief under Rule 60(b)(3)), *rev'd on other grounds*, 886 F.2d 1303.

[59] Moreover, a movant is only entitled to relief under Rule 60(b)(3) if he shows by clear and convincing evidence that the judgment was procured by fraud. A showing which reveals a conflict of evidence is not enough to justify relief; rather, the movant carries the burden of showing clear and convincing evidence that a witness perjured himself. *See Karak*, 288 F.3d at 20. All five arguments that Ahn alleged in his motion for relief, at most, establish a conflict in the evidence, and not that Town House clearly delivered false testimony. *See id.* at 21 (determining that one witness' affidavit merely showed a conflict in the evidence, and did not "clearly and convincingly show that [other witnesses] . . . intentionally misrepresented pertinent facts," as required for relief under Rule 60(b)(3)). As such, Ahn failed to meet the first prong of the test for relief under Rule 60(b)(3), and therefore, the trial court's denial of Ahn's 60(b) motion for the reasons given in denying Ahn's new trial motion was not in error. *Id.*

[60] Finally, it is evident that Ahn did not make any specific claims which would support relief under Rule 60(b)(1). Relief under Rule 60(b)(1) is not available when the alleged mistake is "the failure of a party to introduce certain evidence at trial which was then known and available to that

party." *Devault Mfg. Co. v. Jefferson Bank*, 4 B.R. 382, 386 (Bankr. E.D. Pa. 1980). Furthermore, a party's attempt to establish that a witness' testimony was incorrect does not qualify for relief from judgment on the basis of "accident or surprise" where the movant had ample opportunity to cross-examine the witness on the issue. *See Kolstad v. United States*, 262 F.2d 839, 842-43 (9th Cir. 1959) (affirming the lower court's denial of the appellant's Rule 60(b)).

[61] As discussed previously, the evidence which Ahn claims reveals fraud was within the knowledge of Ahn, or ascertainable by Ahn prior to the trial through diligent pre-trial investigation. Thus, Ahn could have brought the alleged misrepresentations out during cross-examination. Accordingly, because the case appears to have been "fully and fairly tried," we find no error in the lower court's denial of Ahn's motion based on Rule 60(b)(1). *Id*.

[62] Overall, we hold that the lower court did not abuse its discretion in denying Ahn's motion for relief from judgment under Rule 60(b)(1) or Rule 60(b)(3). Accordingly, the lower court did not abuse its discretion in denying Ahn's request to amend its complaint made in conjunction with his Rule 60(b) motion based on mistake, inadvertence, excusable neglect, and fraud. In order to be granted leave to amend, the movant must first satisfy the criteria to set aside a judgment. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *see also Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985) ("[O]nce judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed.R.Civ.P. 59(e) or 60(b)."); *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991) ("Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint."); *Wilcox v. Reconditioned Office Sys. of Colorado*, 881 P.2d 398, 400-01 (Colo. Ct. App. 1994). Because Ahn was not entitled to relief under Rule 60(b), the trial court was not required to allow him leave to amend his complaint.

IV.

[63] In light of the foregoing, we find that the trial court in fact made the appropriate finding, on remand, that the sale price was fair and reasonable as required under Rule 70(a). We also find that the trial court did not abuse its discretion in failing to accept additional arguments or evidence on

remand in order to determine whether the sale price was fair and reasonable. Furthermore, the lower court properly denied Ahn's Rule 52(b) motion, as it related to newly discovered evidence, as well as Ahn's Rule 60(b) motion. Finally, we agree that the lower court erred in determining that Town House sold the furniture for 60 cents on the dollar. However, even accepting Ahn's figure regarding the value of the collateral, the new figure would not warrant a finding that the trial court committed clear error in determining that the collateral was sold for a "fair and reasonable" price. Accordingly, the lower court's judgment and its denial of Ahn's post-trial motions are **AFFIRMED.**