IN THE SUPREME COURT OF GUAM

PEDRO T. TAITANO,
Plaintiff-Appellant,

vs.

RAFAEL LUJAN, and DOES I Through XX, and any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud on plaintiff's title,
Defendants-Appellees.

Supreme Court Case No.: CVA04-032
Superior Court Case No.: CV0170-04

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on June 30, 2004
Hagåtña, Guam

Appearing for the Plaintiff-Appellant:
Seth Forman, *Esq*.
Daniel J. Berman, *Esq*.
Berman, O'Connor, Mann & Shklov
Suite 503 Bank of Guam Building
111 Chalan Santo Papa
Hagåtña, Guam 96910

Appearing for the Defendants-Appellees:
Peter F. Perez, *Esq.*
Suite 216, 194 Hernan Cortes Avenue
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice

TORRES, J.:

[1] This case arises from a judgment issued by the trial court in a quiet title action filed by Pedro T. Taitano against Rafael Lujan concerning a portion of real property located in Tamuning, Guam. The trial court ruled that the deed of gift transferring one-half of the property to Rafael in 1980 was valid and title to the property, which was condemned by the United States government and later returned to the original landowners, passed by operation of law to Rafael pursuant to the subsequently acquired title doctrine. The court further determined that under Guam's race notice statute, Title 21 GCA § 37102, Rafael's previously recorded 1980 deed of gift was superior to the 1997 probate distribution to Manuel L. Tenorio, Pedro's alleged predecessor in interest. We find no error in the ruling of the Superior Court that the deed of gift was valid and title passed to Rafael pursuant to the subsequently acquired title doctrine and that the previously recorded deed of gift was superior to the probate decree by virtue of 21 GCA § 37102. Accordingly, we affirm.

I.

[2] Maria Santos Lujan, owner of Lot 5049 Tamuning (formerly Dededo),
died in 1944 and her six children -- Manuel M. Lujan, Isabel Lujan Cruz, Enrique M. Lujan, Joaquin Lujan Lujan, Juan Lujan Lujan and Paz Lujan Tenorio -- each inherited a one-sixth undivided interest in Lot 5049. During the early 1950's, the United States of America condemned millions of square meters of real estate throughout Guam, including part of Lot 5049. Notwithstanding the United States' condemnation, certain of Maria's children still engaged in various transactions conveying their one-sixth interest in the property. In 1980, three of these children, Enrique, Isabel and Paz granted to their nephew and son,
Rafael, by deed of gift, their interest in Lot 5049. Enrique signed the deed even though he had executed a will in 1978 leaving all of his

estate to another nephew, Manuel, also Paz's son.

[3] Enrique died in 1990 and the 1978 will was probated in Superior Court Probate Case No. PR 0124-92. Letters testamentary were issued to Manuel who listed Lot 5049 as an asset of the estate. Notice of the petition for the probate of the will was given to the widows or children of Enrique's siblings (Manuel, Isabel, Joaquin, and Juan) who had predeceased Enrique. Paz, the only surviving sibling of Enrique, also received notice of the petition, but her son Rafael, grantee under the deed of gift, did not receive any notice of the petition.

[4] In 1994, the United States Congress passed the Guam Excess Lands Act, Public Law No. 103-339, 108 Stat. 3116 (1994), requiring identification and valuation of lands that had been condemned under eminent domain on Guam, but which were no longer needed for the purposes for which they were condemned. After identifying and valuing those lands, the Administrator of General Services was to "transfer all right, title and interest of the United States in and to the parcels of land . . . to the Government of Guam for public benefit use, by quitclaim deed." Guam Excess Lands Act §2 (a).

[5] In anticipation of the return of these excess lands, the Guam Legislature enacted several laws, among them An Act to Develop Land-Use Policy and Plans for Certain Parcels of Land Belonging to the Government of Guam, Guam Public Law 22-145, whereunder the Legislature first expressed its intent to convey all returned land to the original landowners by directing the Director of Land Management to transfer to the original landowners and their heirs any land that is acquired by the government by the Guam Excess Lands Act. The Legislature again voiced its intent to return the land to the original landowners when it later passed An Act to Create the Guam Land Repatriation Commission, Guam Public Law 23-23; An Act to Provide an Environmental Clearinghouse for the Review of Federal Real Property Transfers, Guam Public Law 23-101; and An Act to Develop Land-Use Policy and Plans for Certain Parcels of Excess Federal Properties, Guam Public Law 23-141.

[6] Manuel filed a Claim of Interest, for himself and his heirs, with the Office of the Recorder, Department of Land Management in February 1995, as the "Administrator" of the Estate of Enrique. In the Claim of Interest, he purportedly gave public notice of their legal claim and title to Lot 5049 and requested the lot be returned to Enrique's Estate. In 1997, the Superior Court of Guam entered a Decree of Final Distribution in Enrique's probate case distributing all of Enrique's property, including Lot 5049, to Manuel. Manuel later sought assurances from the Government of Guam that the property would be returned to the original landowners, and as part of the process of the return of excess lands from the United States, Manuel, as grantee and the Department of Land Management, Government of Guam as grantor, executed a Grant of Contingent Future Interest granting an undivided one-sixth contingent future interest in Lot 5049 to the six children of Maria (five of whom had died by 1998).

[7] On November 14, 2001, Manuel granted a durable limited power of attorney to Pedro to "maintain, oversea (sic), execute all transactions concerning Lot 5049." Appellant's Excerpts of Record ("ER"), p. 15 (Petition to Quiet Title). The same day, Manuel also executed a Bill of Sale which transferred to Pedro the "house and everything contained therein located at 1368 N. Marine Drive Tamuning Guam of Lot 5049." ER p. 35 (Notice of Mot. and Mot. to Dismiss or in the Alt. for Summ. J., Ex. A, Bill of Sale). The Bill of Sale further provided that Manuel agreed to "negotiate sale of property where house is located at a later time." Appellant's Excerpts of Record ("ER"), p. 35 (Notice of Mot. and Mot. to Dismiss or in the Alt. for Summ. J., Ex. A, Bill of Sale). The power of attorney was not recorded with the Office of the Recorder until March 2002, and two days later Pedro, as attorney in fact for Manuel, quitclaimed Lot 5049 to his son Richard Steuart Taitano. Shortly thereafter Manuel revoked the power of attorney given to Pedro.

[8] The title for Lot 5049 finally passed from the U.S. to the Government of Guam in October 2002 by a quitclaim deed, and from the Government of Guam to the Guam Ancestral Lands Commission in November 2002. Appellant's ER, p.50 Exhibit C. The Guam Ancestral Lands Commission then transferred Lot 5049 to the heirs of Maria by quitclaim deed in June 2003. Appellant's ER p. 51, Exhibit C.

[9] Pedro filed the quiet title action against Rafael in February 2004, claiming he was the owner in fee simple of Lot 5049, being a bona fide third party purchaser of the property after it was returned to the heirs of Maria. Rafael responded with a Motion to Dismiss or in the Alternative for Summary Judgment, arguing that Pedro's petition failed to state a claim upon which relief could be granted under Guam Rule of Civil Procedure 12(b)(6) and/or that summary judgment was appropriate on the basis that the 1980 deed of gift to Rafael was recorded prior to any conveyance to Manuel and therefore superior under Guam's race notice statute, Title 21 GCA § 37102. Pedro opposed, asserting that the 1997 decree of final distribution in Enrique's estate should be given effect over the 1980 deed of gift, since at the time of the gift, Enrique and his siblings did not own the property. Rather the property was owned by the United States until it was returned to the Government of Guam in 2002.

[10] After a hearing, the Superior Court of Guam ruled that Enrique, Isabel and Paz could transfer their ownership interest in Lot 5049 by way of the 1980 deed of gift even though they did not possess any present interest in Lot 5049 but only possessed a future contingent interest. The court further determined the probate distribution to Manuel in 1997 was precluded by the doctrine of subsequently acquired title because the property had already been conveyed to Rafael in 1980. Finally the court held, since the deed of gift was recorded with the Office of the Recorder before the decree of final distribution, the deed of gift was superior under Guam's race notice statute, 21 GCA §37102. The trial court granted summary judgment in favor of Rafael and vacated the *lis pendens* which had been filed by Pedro with the Office of the Recorder. A judgment decreeing that Pedro had no interest to Lot 5049 was entered and Pedro appealed.

II.

[11] This court has jurisdiction over this appeal from a final judgment pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 109-20 (2005)), and Title 7 GCA §§ 3107(b) and 3108(b) (2005). A trial court's decision granting a motion for summary judgment in a quiet title action is reviewed *de novo.* *Paulino v. Biscoe,* 2000 Guam 13 ¶12. In rendering a decision on a motion for summary judgment, the court must draw the evidence in a light most favorable to the non-moving party. *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7; *Taijeron v. Kim*, 1999 Guam 16 ¶ 8.

III.

[12] Pedro argues on appeal that the trial court erroneously concluded that the 1980 deed of gift was a valid transfer of a future interest pursuant to Title 21 GCA §§1226, 1228 and 1230. The mere possibility of the return of property condemned by the United States to its original owners is, Pedro contends, so remote as to be an expectancy and not an interest of any kind. Moreover, the doctrine of subsequently acquired title should not have applied in this case because the deed of gift was not a warranty deed conveying a fee simple interest.

[13] Rafael maintains that the trial court properly granted summary judgment because, under Guam law, the deed of gift was a valid future interest transfer, and superior to any subsequent inconsistent transfers. Even if the grantors did not have title in 1980, Rafael insists that Pedro should be estopped from opposing Rafael's interest under the doctrine of subsequently acquired title which is not limited to conveyances involving warranty deeds. Rafael also contends that the appeal should be dismissed. Rafael's arguments that the appeal should be dismissed are essentially two-fold. First, he maintains Pedro has no interest in Lot 5049 and lacks standing to bring the appeal because the Bill of Sale did not convey any property to Pedro and any alleged interest that Manuel had was instead conveyed by quitclaim deed to Pedro's son Richard and also because Pedro did not make the appropriate jurisdictional allegations that the trial court had subject matter jurisdiction or personal jurisdiction over the parties. Second, Rafael alleges that the appeal should be dismissed as moot because Rafael's interest had already been conveyed to Fuji Guam Corporation, a bona fide third party purchaser which later conveyed its interest to yet another bona fide third party purchaser, Chris Felix. Consequently Rafael argues this court cannot grant any effectual relief in favor of Pedro.

[14] We first consider whether the appeal should be dismissed because it is moot or because Pedro lacks standing to pursue his claims.

A. Standing and Mootness

1. Pedro's standing to appeal

[15] Rafael's arguments on standing and mootness are raised for the first time on appeal. Normally, this court will not entertain new arguments on appeal, *Taniguchi-Ruth & Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 82 ("Our exercise of discretion to review an issue raised for the first time on appeal is reserved for extraordinary circumstances where review is necessary to address a miscarriage of justice or clarify significant issues of law.") Standing is, however, a component of subject matter jurisdiction. *See Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 17 ("Standing is a threshold jurisdictional matter."). If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim. *Id*. Accordingly, it "may be raised at any stage of the proceedings, including for the first time on appeal." A-*Z Intern. v. Phillips,* 179 F.3d 1187, 1190-91 (9th Cir. 1999) (citation omitted). The question of standing to sue goes to the existence of a cause of action against the defendant. *Parker v. Bowron*, 254 P.2d 6, 9 (Cal. 1953); *Common Cause v. Bd. of Supervisors*, 777 P.2d 610, 613-14 (Cal. 1989). Our review of whether a party has standing is *de novo*. *Rivas v. Rail Delivery Serv., Inc.*, 423 F.3d 1079, 1082 (9th Cir. 2005).

[16] The argument that Pedro lacks standing stems from the language in the Bill of Sale from Manuel to Pedro and Pedro's quitclaim as attorney-in-fact for Manuel to his son Richard. Rafael advances that the Bill of Sale did not convey any real property interest to Pedro and the quitclaim to Richard on behalf of Manuel means Richard, not Pedro, is the proper party to bring the quiet title action. The Bill of Sale states that Manuel is transferring the "following described chattels and personal property: The house and everything contained therein located at 1368 N. Marine Drive, Tamuning, Guam of Lot 5049. . .". Appellant's ER p. 35, Ex.A, Defendant's Mot. to Dismiss or in the Alt. for Summ. J. The Bill of Sale further provides that "Seller agrees to negotiate sale of property where house is located at a later time however first option goes to the buyer of said house." Appellant's ER p. 35.

[17] Pedro argues that the language of the Bill of Sale itself seems unclear whether Pedro was being granted an interest in the land where the house was located or just the house without any interest in the land. He asserts that the court has the equitable power to determine his and Manuel's rights in the property and to give effect to their intentions and summary judgment was not appropriate.

[18] "In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party." *Flores*, 2004 Guam 25 ¶ 7. The viewpoint most favorable to Pedro would be that the Bill of Sale in question did indeed convey some cognizable interest in the property to Pedro prior to the quitclaim to his son, Richard.

[19] Manuel's subsequent quitclaim of the property to Richard would, therefore, not include any real property interest that Manuel may have earlier conveyed to Pedro. "A quitclaim deed only transfers whatever interest the grantor had in the described property at the time the conveyance was made." *In re Marriage of Gioia*, 14 Cal. Rptr. 3d 362, 368 (Ct. App. 2004). Moreover, even if Pedro was not conveyed any title to the real property by virtue of the Bill of Sale, he was given a "first option" on the property. The grant of the "option" on Lot 5049 alone

appears sufficient to give Pedro standing to bring a claim. This court need not decide at this juncture the nature or efficacy of the conveyances between Manuel, Pedro and Richard in 2001 to 2002. We only need to decide if Pedro has standing. When viewed in a light most favorable to the non-moving party, the record supports that Pedro had some cognizable interest in the land, and therefore we must conclude that Pedro has standing sufficient to overcome Rafael's objection on this ground.

[20] Rafael also claims that Pedro does not have standing because he did not make a correct jurisdictional allegation in his pleadings that the trial court had jurisdiction over the parties or the subject matter. Although Rafael complains of the missing jurisdictional allegation, Rafael simultaneously defends the trial court's decision, which is in his favor. Interestingly, Rafael complains only that allegations of the complaint are insufficient to confer upon the court subject matter jurisdiction or jurisdiction over the parties and not that the court did not actually have subject matter jurisdiction or jurisdiction over the parties. Again, Rafael did not raise these arguments below.

[21] Pedro points out that Rafael's delay in raising this issue and his failure to identify it in prior pleadings should bar him from raising it at this late stage of the litigation. A court's lack of subject matter jurisdiction over an action may, however, be raised at any time, including after trial has concluded and for the first time on appeal, and may not be waived or excused by the parties. *Jenkins v. Keller*, 216 N.E.2d 379, 382 (Ohio 1966), *Davis v. Dep't of Corr.*, 651 N.W.2d 486, 488 (Mich. Ct. App. 2002); s*ee also State ex rel. Skinkis v. Treffert,* 280 N.W.2d 316, 319 (Wisc. Ct. App. 1979).

[22] In determining if the court has subject matter jurisdiction we follow the widely accepted principle that a complaint is construed broadly and liberally, in conformity with the general principle set forth in Rule 8 of the Guam Rules of Civil Procedure. *Huettig & Schromm, Inc. v. Landscape Contractors Council,* 790 F.2d 1421, 1426 (9th Cir. 1986). It has been well-established by case law that the pleadings will be read as a whole with any relevant specific allegations found in the body of the complaint taking precedence over the formal jurisdictional allegation, and with all uncontroverted factual allegations in the complaint being accepted as true. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002).

[23] The petition in this case is to quiet title to real property located in Tamuning Guam, a matter the trial court obviously has jurisdiction over pursuant to Title 21 GCA § 25101 and 7 GCA § 3105 (2005). The allegations set forth in the petition are sufficient to confer jurisdiction and need not be pleaded specifically. Rafael himself indicates this case as a "quiet title" action, over which the Superior Court has jurisdiction pursuant to Title 21 GCA § 25101. Rafael states in his Motion to Dismiss or in the Alternative for Summary Judgment that he seeks to dismiss the Petition to Quiet Title to Lot 5049. Appellee's ER p. 26, Mot. to Dis. or in the Alt. for Summ. J. A liberal reading of the complaint and the record makes clear that the trial court had subject matter jurisdiction in this case.

[24] As to Rafael's right to object to a lack of personal jurisdiction, generally this is an affirmative defense that is waived by a failure to raise it promptly either by pre-answer motion or in the response pleading Guam R. Civ. P. 12(h)(1). *Long-Term Credit Bank v. Superior Court*, 2003 Guam 10 ¶ 43 (jurisdictional objections such as defects in personal jurisdiction, venue or service of process, are waived unless asserted early in the litigation.). "There is no dispute that normally a failure to timely raise the defense of personal jurisdiction waives the defense[,]"yet a court may "retain discretion to reach an issue initially raised on appeal in certain situations." *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 663 (7th Cir. 1986)

[25] We hold that Rafael's failure to promptly raise the issue of personal jurisdiction, the participation of Rafael in the lawsuit, his submission to the ultimate judgment of the court, and his defense in this appeal of that judgment, constitutes a waiver of the affirmative defense of personal jurisdiction. There is no impediment to Pedro's standing to bring a quiet title action or this appeal.

2. Whether Fuji or Felix is a Bona Fide Purchaser Remains in Dispute

[26] Rafael further argues for the first time on appeal that his conveyance to Fuji has made the action moot because Fuji is a bona fide third party purchaser and transfer to a bona fide third party purchaser cuts off prior disputes. Moreover, when the court vacated the *lis pendens* in its Decision and Order, no new *lis pendens* was filed. Meanwhile, the deed transferring title to Fuji was recorded and Fuji entered into an agreement to convey its interests to another third party, Felix, who Rafael argues is also a bona fide purchaser. Pedro, in reply, insists the action has not been mooted because the transfer to Fuji by quitclaim deed did not occur until January 2005 and Fuji was aware of the litigation. Therefore, Fuji is not a bona fide third party purchaser. In addition, *Pelowski v. Taitano*, 2000 Guam 34 ¶¶ 22-25, holds that constructive notice of the pendency of the action continues during the time an appeal is taken. The initial *lis pendens* effectively imparts constructive notice of the pending action to Fuji and Felix before legal title was transferred, therefore preventing either of them from being a bona fide third party purchaser.

[27] Under the bona fide purchaser doctrine, a good faith real estate purchaser for value who is without actual or constructive notice of another's interest in the property purchased has the superior interest in the property. Title 21 GCA § 37102 (2005). *See Morioka v. I & F Corp.*, Civ. No. 91-00027A, 1991 WL 255842 at *3 (D. Guam App. Div. Nov. 18, 1991) ("To become a bona fide purchaser of property one must acquire title through payment of value, in good faith, and without actual or constructive notice of another's rights."). If Fuji or its successor Felix is a bona fide purchaser, then their right to the land prevails over other claimants, and the case becomes moot. An appellate court lacks jurisdiction to resolve issues that have become moot by intervening events. "The case must be viable at all stages of the litigation; it is not sufficient that the controversy was live only at its inception." *C & C Products, Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983). The fact that the mooting event occurred after the decision below "does not save the . . . claims from mootness. There must be a live

case or controversy before this Court." *Kremens v. Bartley*, 431 U.S. 119, 128 (1977); *see also Silver v. Benson*, 177 A.2d. 898, 901 (Md. 1962) (recognizing that "cases where appeals were dismissed as moot are generally where relief has become impossible, as where the property in question has been sold to a bona-fide purchaser . . . .").

[28] Rafael's argument that Fuji and Felix qualify as bona fide purchasers simply because no new *lis pendens* was filed after the trial court vacated the original *lis pendens* and legal title was thereafter transferred is unpersuasive and has no basis in Guam law. Although a notice of *lis pendens* filed under Title 7 GCA §14103 cannot be relied upon to afford constructive notice when the underlying action is terminated, in *Pelowski,* 2000 Guam 34 ¶ 25, we interpreted section 14103 "to impart constructive notice through the period for which an appeal may be taken or the time for appeal has passed." As we stated in *Pelowski*:

> The policy underlying the lis pendens doctrine is the need, in the interest of the proper administration of justice, "to keep the subject-matter of the litigation within the control of the court, and to render the parties powerless to place it beyond the reach of the final judgment." *Roberts v. Cardwell*, 154 Ky. 483, 157 S.W. 711, 713 (Ky.1913); *see also Ashworth*, 408 S.W.2d at 873. Where the ownership of property remains subject to further litigation it is incumbent to "preserve the property [so] that the [very] purpose of the pending suit may not be defeated by successive alienations and transfers of title." *Ashworth*, 408 S.W.2d at 873 (internal quotations omitted) (citation omitted). A litigant should be forbidden from "giv[ing] rights to others, [while the opportunity for further review remains], so as to affect the proceedings of the court then progressing to enforce those rights." *Id.* (internal quotations omitted) (citation omitted).

Id. ¶ 24. Constructive notice to Fuji and Felix continues during the appeal even though the *lis pendens* was vacated by the trial court.

[29] The fact that Fuji received legal title in January 2005 with constructive notice of the pendency of the action in CV0170-04 does not, however, completely answer the question of whether or not Fuji or Felix qualifies as a bona fide purchaser. In *Morioka,* the trial court, in construing Title 21 GCA § 37102, rejected the pre-1953 California cases that "held that in order to be accorded bona fide purchaser status, a purchaser must prove that he paid the full purchase price before receiving actual or constructive notice." *Morioka*, 1991 WL 255842 at *3. Instead the court held that an uncompleted land sales contract does not preclude a purchaser from becoming a bona fide purchaser for value. *Id*. (relying on *Perry v. O'Donnell*, 749 F.2d 1346 (9th Cir. 1985).

[30] Fuji entered into its Memorandum of Purchase and Sale in August 2002 and acquired legal title in 2005, while Felix entered into its contract of sale in January 2004.
Fuji and Felix's constructive notice of the pending action before they acquired full legal title does not prevent them from enjoying the status of bona-fide purchases. Both had an equitable interest in the property before the commencement of the litigation and recording of the *lis pendens*. "[T]he equitable nature of their interest does not automatically preclude them from becoming bona fide purchasers." *O'Donnell*, 749 F.2d at 1350. A purchaser who holds an equitable interest leaving legal title in the vendor may be a bona fide purchaser for value.

[31] While the equitable nature of their interest does not prevent them from bona fide purchaser status, Fuji and Felix would still not be bona fide purchasers if they acquired their equitable interest with notice of the prior interest claimed by Manuel, Pedro's' predecessor in interest. It is undisputed that a "Claim of Interest" was completed with the Office of the Recorder in February 16, 1995 wherein Manuel purportedly gave public notice of the Estate of Enrique's legal claim and title to Lot 5049 and requested the lot be returned to Enrique's Estate. Appellant's ER, p. 5 (Claim of Interest, Feb. 16, 1995). This document was recorded nearly seven years before Rafael entered into the contract with Fuji to sell the property.
An examination of the record discloses that the trial court did not make a finding on whether Fuji or Felix was a bona fide purchaser without notice of the "Claim of Interest." The burden of proof is upon Rafael to establish Fuji's and Felix's status as bona fide purchasers without notice of any adversarial claims to the property. *See Gates Rubber Co. v. Ulman, 262 Cal. Rptr. 630, 637 n.6 (Ct. App. 1989)*; *Rabbit v. Atkinson*, 113 P.2d 14, 18 (Cal. Ct. App. 1941); *James v. James*, 251 P. 666, 670 (Cal. Ct. App. 1926). A representative of Fuji or Felix did not file any affidavits setting forth that Fuji or Felix did not have notice or knowledge of any competing claims to the property, before the purchase and sale agreements were signed. *See Rabbit*, 113 P.2d at18. (stating that "[n]either the appellant nor his grantor took the witness stand to testify as to whether or not they had notice or knowledge of respondents' rights or claims or that appellant was a purchaser in good faith, without notice, and for a valuable consideration").

[32] We cannot determine from the record as it exists if the property has been sold to a bona fide purchaser case thereby rendering the case moot. There is a genuine issue of fact regarding whether Fuji or Felix had notice of a competing claim or opposing interest in the property which presents them from being a bona fide purchaser. However, "[t]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Bank of Guam*, 2004 Guam 25 ¶ 30 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). If we determine Enrique validly gifted his interest in Lot 5049 to Rafael, then deciding whether Fuji Corporation or its successor, Felix, is a bona fide purchaser is immaterial as they would nevertheless receive title from a prevailing party. If Enrique could not, however, transfer his interest in Lot 5049, by a deed of gift, then there may be a genuine issue of material fact which would preclude summary judgment. *Id*. ¶ 29.

[33] In resolving whether summary judgment was appropriate, the starting point of our analysis must be whether the deed of gift transferring one-half (½) of the property to Rafael in 1980 was a valid conveyance.

B. Validity of the 1980 Deed of Gift

[34] Pedro initially argues that Enrique did not have any sort of recognizable future interest that could be transferred to Rafael at the time of the 1980 deed of gift. In 1980 the property was still owned by the United States and Enrique's chances of recovering the property was dependent on the United States' return of the property which, according to Pedro was, a mere possibility and too remote to qualify as a future interest. Under Title 21 GCA § 1231 (2005), "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind." Rafael counters this by stating that although the property was owned by the United States at the time of the deed's execution, the original landowners possessed a future interest in the property which they were free to convey to Rafael.

[35] The statutory scheme on future interests is found in Title 21 GCA Division 1, Subpart B. A future interest entitles "the owner to the possession of the property only at a future period." Title 21 GCA § 1221 (2005). The "Kinds of Future Interests," are either vested or contingent.
Title 21 GCA § 1224 (2005). A future interest is also not "void merely because of the improbability of the contingency on which it is limited to take effect." Title 21 GCA § 1228 (2005). "Future interests may pass by succession, will, and transfer, in the same manner as present interests." Title 21 GCA §1230 (2005). Future interests are thus freely transferable, and they are not less so simply because the event upon which they are limited to take effect remains uncertain. Title 21 GCA § 1226 (2005). The question is, therefore, whether Enrique's future interest in Lot 5049 was a "contingent future interest" or a mere "expectancy." These are two statutorily unique estates; one is transferable and the other is not.

[36] An expectancy has been interpreted by California courts,
examining the identical statute, as a "mere naked hope" and explained that: "[T]he mere hope of acquiring future property without any present source from which it may be obtained is neither an interest nor right, nor anything which has value or can be made the subject to legal relations." *Bank of Cal. v. Connolly*, 111 Cal. Rptr. 468, 480 (Ct. App. 1973). However, if the "mere naked hope" were united with an interest in a contract, it rose above a "mere naked hope" and became a transferable estate, that is, a "possibility of acquiring property coupled with a legal interest in the contract" was transferable). *Id.* (quoting 4 Pomeroy's Equity Jurisprudence § 1287 (5th ed. n.d.).

[37] An expectancy has always been distinguished from a contingent remainder: "It is settled that the interest of a contingent remainderman is not a mere possibility, such as the expectancy of an heir apparent, but an estate in the property," *Kenny v. Citizens Nat. Trust & Savings Bank*, 269 P.2d 641, 649 (Cal. Dist. Ct. App. 1954) (citing *Akley v. Bassett*, 228 P. 1057 (Cal. Dist. Ct. App. 1924)); *see also Los Angeles County v. Winans*, 109 P. 640 (Cal. Dist. Ct. App. Cal. 1910); *Hall v. Wright*, 120 P. 429 (Cal. Dist. Ct. App. 1911). There is a subtle but important distinction between a contingent remainder and an expectancy. As the court in *In re Estate of Ferry*, 361 P.2d 900 (Cal. 1961) instructed, "In using the term 'expectancy' in real property law, . . . a careful distinction must be made between those instances where it is used in relation to 'expectant estates' or future interests and those in which it is used to refer to a 'mere possibility, such as the expectancy of an heir apparent.'" *Id.* at 903 (citation omitted).

[38] One California court discussed possibility versus contingency in this way:

> The term expectancy describes the interest of a person who merely foresees that he might receive a future beneficence . . . [T] he defining characteristic of an expectancy is that its holder has no *enforceable right* to his beneficence." (*In re Marriage of Brown* (1976) 15 Cal. 3d 838, 844-845, 202 126 Cal. Rptr. 633, 544 P.2d 561.) By contrast, a contract right, which has been earned or purchased for a consideration, is property, even though its enjoyment may be contingent upon future events. (*Id.,* at pp. 846-847 and fn. 8, 126 Cal. Rptr. 633, 544 P.2d 561; accord, *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746, 131 Cal. Rptr. 873, 552 P.2d 1169.) Such a right "cannot be defeated or diminished without [the holder's] agreement and it is therefore a valuable property right." (*In re Marriage of Fonstein, supra,* at p. 746, 131 Cal. Rptr. 873, 552 P.2d 1169.)

Estate of Mitchell, 91 Cal. Rptr. 2d 192, 201-02 (Ct. App. 1999).

[39] A good example of the distinction is found in *In re Estate of O'Connor*, 322 P.2d 616 (Cal. Ct. App. 1958), where the decedent left a remainder estate to four educational institutions, on the condition that those four institutions match the bequest, but if they did not match the bequest, then the remainder would go to a hospital. *Id.* at 619. The issue was the nature of the hospital's interest. It was held that the four schools had vested interests subject to defeasance, and the hospital had an executory interest, specifically, an alienable contingent future interest in the form of an executory interest. *Id.* at 622. Most importantly, even though the hospital's right to receive the remainder was contingent on something entirely outside its control, it was found to have been an executory interest because it was enforceable in the event the schools did not match the bequest. *Id.* at 622-23.

[40] Revisiting the issue, the *Ferry* court relied on *O'Connor* in holding that "we disapprove of the inference, if any, created by the Estate of O'Connor that an 'executory interest' is a 'mere possibility' of the type contemplated in Civil Code § 700." *Ferry*, 361 P.2d at 904. A contingent future interest, even if the occurrence of the contingency is improbable, is nonetheless a future interest that can be conveyed like any other interest. It is thus more than a "mere naked hope;" it is enforceable in the event the contingency comes about. "[B]y virtue of Civil Code section 699, [footnote omitted] an interest, whether vested, contingent or of an executory nature, may be transferred inter vivos, devised, or be the subject of intestate succession." *Id.* at 903. The *Ferry* court reasoned, "[t]o draw a contrary conclusion would produce the result that very few contingent interests of this type would be descendible or devisable." *Id.* at 904.

[41] Under this analysis, the question is whether Enrique had an enforceable right to a portion of Lot 5049, even if the occurrence of the

contingency (the return of the property) was highly improbable and entirely outside his control. The answer is clearly yes. If the United States returned the property to the government of Guam and the government of Guam returned the land to the original landowners, Enrique would have an enforceable right to that property because he was one of the original owners with an undivided interest. Enrique therefore had an alienable contingent future interest, not a "mere possibility, such as the expectancy of an heir apparent." Pedro's argument that Enrique was legally unable to transfer this interest under Title 19 GCA § 40202 (2005), because it was not coupled with an interest, likewise fails. We have already agreed that the interest was not a "mere possibility." Enrique's interest was therefore freely transferable by deed of gift. Title 21 G.C.A. §1230.

C. Guam's Subsequently Acquired Title Doctrine and Race-Notice Statutes

[42] The next issue we must address in deciding if summary judgment was appropriate is whether the trial court properly applied Guam's subsequently acquired title doctrine (codified at Title 21 GCA § 4203 (2005)). The trial court held that Enrique's 1980 Deed of Gift to Rafael precluded distribution to Manuel in the 1997 probate case because any title Enrique subsequently acquired when the property was returned by the United States passed by operation of law to Rafael.

[43] Guam's subsequently acquired title statute, Title 21 GCA § 4203, provides that, "[w]here a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors." This statute was adopted from a California statute with identical language, California Civil Code §1106.

[44] The California statute, with identical language to Guam's section 4203, was analyzed by a California appellate court in *Schwen v. Kaye*, 202 Cal. Rptr. 374 (Ct. App. 1984). The court there observed:

> Civil Code section 1106 has as its genesis the common law doctrine of estoppel by deed. That doctrine generally precludes a grantor of real property from asserting, as against the grantee, any right or title in derogation of the deed . . . . The net effect is the same as if the grantor specifically provided in the deed that he conveyed all of the title and estate which he then possessed or which he might at any time thereafter acquire.

Id. at 375-76 (citations omitted)

[45] The doctrine that allows a prior grantee to receive subsequently acquired title is not so much an acknowledgment of the deed as it is an estoppel theory. "The policy behind the doctrine is to protect an unwitting grantee who relies upon the good title of the grantor when the latter does not possess legal or perfect title to the property." *Id.* The grantor is essentially estopped from saying that he did not already convey the property. It prevents a party from validly conveying his interest, whether it is an executory, contingent or a vested future interest, and then claiming that the prior conveyance meant nothing.

[46] A Montana court in *Mitchell v. Pestel*, 208 P.2d 807 (Mont. 1949), reviewing its estoppel-by-deed statute, identical to Guam's and California's, describes its operation:

> The salutary principle that if a vendor conveys land or an interest in land to which he has no title, and to which he afterward acquires the title, the title thus acquired shall inure to the benefit of his vendee, and he is thereby estopped to assert the same as against his grantee, cannot be defeated in equity by any circuitous method of attempting to dishonor or disclaim his covenants.

Id. at 811. The doctrine of subsequently-acquired title thus puts grantors on notice that a conveyance will be honored by the law even if the grantor changes his mind after he actually receives the title he expected. It is designed, not so much to protect the prior grantee, as to prevent inconsistent grants or unjust enrichment by the grantor. If the first grant would otherwise be valid if the grantor did own the land, then the initial grant counts if the grantor afterward acquires ownership, regardless of whether the grantor owns it or not at the time of the initial grant.

[47] Under the doctrine of subsequently acquired title, courts have gone back as far as forty years to honor prior grants of future interests. For instance, in *Lampley v. United States*, 17 F. Supp. 2d 609 (N.D. Miss. 1998), the court went back to 1955 to look at the grantor's actions in granting the property as tenants in common. *Id.* at 615. Mortgages undertaken before the surviving tenant owned the property were recognized as valid, though the mortgagor did not really own the property at the time she was mortgaging it. *Id.* A more common fact pattern is the landowner whose land is taken by property tax sale. Though the land has already been seized by county authorities, landowners have been known to still sell their land. When they redeem it from the tax authorities, the conveyances executed when the tax authorities were holding title to the land are honored. *See Anderson v. Pease*, 727 N.Y.S.2d 717 (Ct. App. N.Y. 2001) (holding that subsequently acquired property doctrine applied to grantor whose land had been taken at the time that he executed a sale to a third party; third party's ownership of land recognized).

[48] Pedro argues that since Rafael acquired title by a deed of gift, rather than a warranty deed, the doctrine of subsequently acquired title is not recognized by law and cannot be applied. In support he cites to a number of the cases wherein courts have held that the subsequently acquired title doctrine does not apply to quitclaim deeds. The deed before the trial court was not, however, a quitclaim deed. A quitclaim

deed by its very nature conveys only what the grantor has. It is established that a quitclaim deed would not suffice to pass this not-yet-acquired title. *North Star Terminal and Stevedore Co., Inc. v. State*, 857 P.2d 335, 340 (Alaska 1993); *see also Klamath Land & Cattle Co. v. Roemer*, 91 Cal. Rptr. 112, 115 (Ct. App. 1970) ("A grant deed unquestionably transfers an after-acquired title.").

[49] On the other hand, where

> It appears that the intention of the parties was to convey the fee simple or any definite estate in the land, effect will be given to such intention, and the deed will operate by way of estoppel, so that any estate subsequently acquired by the grantor will inure to the grantee . . . *even in the absence of any warranty whatever.*

Balch v. Arnold, 59 P. 434, 436 (Wyo. 1899) (emphasis added). Pedro presents no authority for the position that a transfer by deed of gift cannot be subject to the subsequently acquired title doctrine.

[50] Moreover, Title 21 GCA § 4202 (2005) which governs when a "fee simple" title passes, provides that **"**a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." As long as the word "grant" is used in the instrument of conveyance, then fee simple title is presumed. "To convey a fee, all that is required is the word 'grant.'" *Severns v. Union Pac. R.R. Co.*, 125 Cal. Rptr. 2d 100, 104-105 (Ct. App. 2004). "A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." *Collier v. Oelke*, 21 Cal. Rptr. 140, 142 (Ct. App. Cal. 1962). A grant is also to be construed in favor of the grantee. *City of Manhattan Beach v. Superior Court*, 52 Cal. Rptr. 2d 82, 89 (Cal. 1996).

[51] In this case, the operative language in the deed of gift is that the grantors "do by these presents hereby give, *grant*, alien and confirm unto the said RAFAEL L. LUJAN . . . Lot 5049 . . ." Appellant's ER, p. 37 (Notice of Mot. and Mot. to Dismiss or in the Alt. for Summ. J.) (emphasis added). By using the term "grant," a fee simple title was presumed to have been conveyed by the deed of gift. We reject Pedro's arguments that the subsequently acquired title doctrine does not apply to the deed of gift.

[52] The trial court also relied upon Title 21 GCA § 37102 in holding that the deed of gift from Enrique to Rafael prevailed over the Probate Decree, recorded in 1997, since the deed was recorded first.
The trial court, aptly we think, labeled this provision as a "race-notice statute." *See In re Walker*, 861 F.2d 597, 598 (9th Cir. 1998) (identifying California Civil Code § 1214, upon which § 37102 is based, as "California's race-notice recording statute."). Section 37102 reads:

> Every conveyance of real property, other than a lease for a term not exceeding one (1) year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.

21 GCA § 37102 ((2005). Guam's recording statute, Title 21 GCA § 4204 is also relevant to our discussion and provides:

> Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for valuable consideration acquires a title or lien by an instrument that is first duly recorded.

21 GCA § 4204 (2005).

[53] One of the functions of sections 37102 and 4204 is to permit a purchaser or encumbrancer without actual or constructive knowledge of another's rights, who pays valuable consideration for his interest in real property in good faith and who records his interest, to receive an interest in the property free and clear of all prior unrecorded claims. However, the priority given to a subsequent bona fide purchaser for value is inapplicable in the instant case for two reasons. First, Rafael was not a subsequent purchaser. Secondly, Rafael did not provide valuable consideration because Enrique conveyed his interest for "the love and affection which [the grantors] have and bear unto our nephew and son" which this court has held does not constitute valuable consideration. *See* *Torres v. Torres*, 2005 Guam 22 ¶ 17 n.3 ("[A]ssuming an expressed consideration 'for love and affection' typical in deeds of gift, while good, it is not valuable consideration.") (citing *Town House v. Ahn*, 2000 Guam 32 ¶ 28). Lack of valuable consideration, however, does not end our analysis.

[54] Section 37102 additionally provides that every conveyance of real property is void against "any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action." 21 GCA § 37102. In *Evarts v. Jones*, 274 P.2d 185 (Cal. Dist. Ct. App. 1954), observed that the analogous California statute was amended to include this language in order to "afford a means for strengthening titles to real property." *Id.* at 187. The court further stated:

> Before the amendment one who obtained a judgment quieting his title in an action instituted subsequent to the acquisition of an earlier hostile conveyance was not protected as a bona fide purchaser or encumbrancer. Unless his judgment ran against the holder of the earlier conveyance, it would not have been binding upon the latter.

Id.

[55] In the instant case, Rafael recorded the deed of gift prior to the notice of petition for probate of Enrique's will. Under section 37102, the recording of the instrument made the conveyance of Enrique's interest effective against any claims which arose under the probate decree. Although arguably distinguishable from the quiet title action in *Evarts*, our reading of 21 GCA § 37102 promotes the purpose of the amendment to "encourage the recordation of instruments affecting title and thereby give greater protection to those who in all matters concerning title might rely upon the public records." *Evarts*, 274 P.2d at 187.

IV.

[56] In conclusion, we hold that Enrique, Isabel and Paz could transfer their ownership interest in Lot 5049 by way of the 1980 Deed of Gift even though they did not possess any present interest in Lot 5049 but only possessed an executory interest. Guam law allows the conveyance of this sort of interest, and the trial court correctly applied Guam's subsequently acquired title statute in ruling that Rafael is the owner of one-half of Lot 5049. Although Rafael was not a purchaser in good faith and for valuable consideration, the 1980 Deed of Gift still had priority over the 1997 probate decree by virtue of Guam's race-notice statute because the 1980 conveyance was duly recorded prior to the 1997 probate decree.

[57] The trial court's Decision & Order is **AFFIRMED**.