IN THE SUPREME COURT OF GUAM

KEVIN SHIN,
Plaintiff-Appellant,

vs.

FUJITA KANKO GUAM, INC.,
Defendant-Appellee.

SECURITY TITLE, INC.,
Plaintiff-Appellee,

vs.

FUJITA KANKO GUAM, INC. and KEVIN SHIN,
Defendants-Appellants.

Supreme Court Case No.: CVA07-002
Superior Court Case No.: CV1240-05/CV0001-06

OPINION

Cite as: 2007 Guam 18

Appeal from the Superior Court of Guam
Hagåtña, Guam

Appearing for Plaintiff-Appellant:
Fujita Kevin Shin
Louie J. Yanza, *Esq.*
Maher Yanza Flynn & Timblin
115 Hesler Pl., Ground Floor
Gov. Joseph Flores Bldg.
Hagåtña, GU 96910

Appearing for Proposed Intervenors-Real Parties in Interest:
Tanota Partners, LLC and Hee K. Cho
Richard A. Pipes, *Esq.*
Law Offices of Richard A. Pipes
Orlean Pacific Plaza, Ste. 201
865 S Marine Corps. Dr.
Tamuning, GU 96913

Appearing for Defendant-Appellee:
Kanko Guam, Inc.
Elyze J. McDonald, *Esq.*
Carlsmith Ball LLP
Bank of Hawaii Bldg., Suite 401
134 W Soledad Ave.
P.O. Box BF
Hagåtña, GU 96910

Richard L. Johnson, *Esq.*
Blair Sterling Johnson
Martinez & Leon Guerrero, P.C.
Pacific News Bldg., Ste. 1008
238 Archbishop Flores St.
Hagåtña, GU 96910

BEFORE: ROBERT J. TORRES, JR., Presiding Justice; RICHARD H. BENSON, Justice *Pro Tempore*; and JOHN A. MANGLONA, Justice *Pro Tempore*.

TORRES, J.:

[1] This matter comes before the court pursuant to a Motion to Dismiss Appeal filed by Defendant-Appellee Fujita Kanko Guam, Inc. ("Fujita") on March 5, 2007. Plaintiff-Appellant Kevin Shin ("Shin") presently appeals the trial court's Decision and Order, which partly denied his Motion for Leave to File First Amended Complaint.

[2] Fujita argues that this court is without jurisdiction to hear the instant appeal. Fujita maintains that Shin is attempting an interlocutory appeal of an order partly denying Shin's motion to amend his complaint and that such interlocutory appeals generally are impermissible. In response, Shin contends that this appeal raises issues which warrant the exercise of our discretion to conduct interlocutory review under 7 GCA § 3108(b). We decide that the issues raised in this appeal are inappropriate for interlocutory review. Accordingly, this appeal is dismissed for lack of jurisdiction.[1]

I.

[3] Shin timely filed a Notice of Appeal in accordance with former Rule 4.2 of the Guam Rules of Appellate Procedure on February 21, 2007, requesting interlocutory review of the trial court's Decision and Order that partly denied Shin's Motion for Leave to File First Amended Complaint. The Decision and Order, issued on February 2, 2007, prohibited Shin from alleging that Fujita did not provide him with a five-day opportunity to cure any default and that he was "ready, willing, and able" to close on the closing date, but permitted Shin to add the other remaining allegations and claims presented in his Proposed Amended Complaint. Appellant's

[1] This Opinion of the court supersedes the Order for dismissal issued on July 18, 2007 *nunc pro tunc*.

Statement of Jurisdiction, Ex. B (Decision and Order, February 2, 2007). On March 8, 2007, we rejected Fujita's request to require Shin to comply with the newly promulgated Rule 4.2 but reserved decision on Fujita's motion to dismiss and ordered that Shin respond to Fujita's motion. On March 21, 2007, Shin filed a Response to Fujita's motion to dismiss. On March 27, 2007, Fujita filed a Reply. During the consideration of the instant motion, several other motions were filed.[2]

II.

[4] Fujita argues that interlocutory appeals from the denial of a motion to amend a complaint generally are impermissible. Further, Fujita asserts that while section 3108(b) of Title 7 of the Guam Code Annotated affords this court discretion to consider interlocutory appeals under

[2] On June 12, 2007, Tumon Partners, LLC ("Tumon Partners") and Hee K. Cho ("Cho") filed a motion to substitute for Shin or to intervene in the appeal. That same day, Attorney Louie Yanza entered an appearance on behalf of Shin and, on June 13, 2007, moved for a voluntary dismissal of the instant appeal.

On June 15, 2007, Shin withdrew both his motion for reconsideration, filed on May 24, 2007, and his Response to Fujita's motion to dismiss, filed on March 21, 2007. On June 18, 2007, Fujita filed a Statement of Non-Opposition to Shin's motion for voluntary dismissal of the appeal. That same day, Tumon Partners and Cho filed a Response to Shin's motion for voluntary dismissal of the appeal, again requesting that they be allowed to be substituted in as appellants or be allowed to intervene. On June 19, 2007, Fujita filed an Opposition to the motion to substitute or to intervene made by Tumon Partners and Cho. That same day, Shin filed a Response opposing the motion to substitute or to intervene made by Tumon Partners.

On June 20, 2007, Tumon Partners and Cho filed an Emergency Motion to Substitute or to Intervene pursuant to Rule 6(f) of the Guam Rules of Appellate Procedure. On June 21, 2007, Fujita filed an Opposition to the Emergency Motion filed by Tumon Partners and Cho. That same day, Shin also filed an Opposition to the Emergency Motion filed by Tumon Partners and Cho.

On June 22, 2007, Shin filed a Reply to the opposition, filed by Tumon Partners and Cho, to Shin's motion for voluntary dismissal of his appeal, arguing that Tumon Partners and Cho have no standing to oppose Shin's voluntary dismissal. On June 25, 2007, Tumon Partners and Cho filed a Reply to the oppositions, filed by Fujita and Shin, to their motion to substitute or to intervene. On June 26, 2007, Tumon Partners and Cho filed a Reply in support of their Emergency Motion to substitute or to intervene.

On July 2, 2007, Shin filed a motion to disqualify Attorney Richard Pipes from appearing in the instant appeal, or any other related matter, on behalf of Tumon Partners or Cho. On July 11, 2007, Tumon Partners and Cho filed an opposition to Shin's motion for disqualification. On July 16, 2007, Shin filed a Reply.

On May 23, 2007, upon Fujita's Motion to Toll Briefing Schedule Pending a Decision on Appellee's Motion to Dismiss, this court issued an order tolling the briefing schedule pending a ruling on the motion to dismiss. On May 24, 2007, Shin moved for reconsideration of that order. On May 30, 2007, Fujita filed a Response opposing Shin's motion for reconsideration. On June 1, 2007, Shin filed a Reply.

limited circumstances, such conditions are not met in this case. Shin, however, maintains that we should exercise our discretionary jurisdiction under subsections (1), (2), and (3) of section 3108(b).

[5] Shin first argues that this appeal would materially advance the termination of the litigation and clarify further proceedings because the parties would not be "forced to continue through discovery and trial with the possibility of having this Order overturned after final judgment, thereby requiring the parties to re-engage in discovery and trial." Appellant's Resp. to Mot. to Dismiss, p. 6 (March 21, 2007). Shin next contends that he may be substantially and irreparably harmed if he is not permitted to make the allegations against Fujita because the subject property "is the last remaining large set of parcels on Tumon Bay suitable for development as a resort, a unique property and opportunity," and "if this case is delayed by the need for two trials and sets of discovery, the property may have been developed in ways that will be difficult if not impossible to alter." Appellant's Resp. to Mot. to Dismiss, p. 6 (March 21, 2007). Finally, Shin argues that interlocutory review would clarify issues of genuine importance in the administration of justice by explaining, for the lower court, the standard in ruling on a motion to amend a complaint.

[6] Section 3108(b) affords this court discretion to exercise interlocutory review where immediate appellate review of orders, other than final judgments, is not specifically made available by statute. *People v. Angoco*, 2006 Guam 18 ¶ 19. Section 3108(b) provides that:

> Orders other than final judgments shall be available to immediate appellate review as provided by law and in other cases only at the discretion of the Supreme Court where it determines that resolution of the questions of law on which the order is based will:
>
> (1) Materially advance the termination of the litigation or clarify further proceedings therein;

(2) Protect a party from substantial and irreparable injury;

or

(3) Clarify issues of general importance in the administration of justice.

7 GCA § 3108(b) (2005).

[7] We generally exercise the policy of strictly limiting its interlocutory review. *People v. San Nicolas*, 1999 Guam 19 ¶ 11. An interlocutory appeal is discretionary and only should be exercised under "exceptional circumstances." *Merchant v. Nanyo Realty, Inc.*, 1997 Guam 16 ¶ 6; *see Hewsen v. Lynch*, 343 A.2d 45, 47 (D.C. 1975) ("We examine this issue from the fundamental premise that our broad discretion to grant [interlocutory] appeals will only be exercised when the case is exceptional."). We have expressed that "'[t]he limitations on interlocutory appeals ensure that such appeals are granted only when the necessity of immediate review outweighs [the] general policy against piecemeal disposal of litigation.'" *Angoco*, 2006 Guam 18 ¶ 14 (quoting *Sky Enter. v. Kobayashi*, 2002 Guam 24 ¶ 21) (second alteration in original).

[8] An appeal of a motion to amend a pleading is interlocutory and not immediately appealable. *Leigh v. Leigh*, 147 P.2d 701, 701 (Kan. 1944); *Buchanan v. Rose*, 296 S.E.2d 508, 509 (N.C. Ct. App. 1982) (citing *Calloway v. Ford Motor Co.*, 189 S.E.2d 484, 488 (N.C. 1972); *O'Neill v. S. Nat'l Bank*, 252 S.E.2d 231, 234 (N.C. Ct. App. 1979)) ("[A]n order denying a motion to amend pleadings is an interlocutory order, and is not immediately appealable."); *Horowitz v. Universal Underwriters Ins. Co.*, 580 A.2d 395, 397 (Pa. Super. Ct. 1990) ("In general, orders which deny or grant a party's request to amend the pleadings are interlocutory and, therefore, not immediately appealable."). It is undisputed that the trial court's order is a non-final interlocutory order. Shin maintains, however, that all three bases provided under

section 3108(b) are satisfied in this case. We examine each of the bases advanced by Shin in turn.

1. Materially advance termination of litigation or clarify further proceedings therein

[9] This court has discretion to exercise interlocutory review where the resolution of the questions of law will "[m]aterially advance the termination of the litigation or clarify further proceedings therein." 7 GCA § 3108(b)(1) (2005). Shin asserts that exercise of our discretion to consider this interlocutory appeal materially advances the termination of the litigation and clarifies further proceedings because the parties would not be "forced to continue through discovery and trial with the possibility of having this Order overturned after final judgment, thereby requiring the parties to re-engage in discovery and trial." Appellant's Resp. to Mot. to Dismiss, p. 6 (March 21, 2007).

[10] Shin fails to direct our attention to cases illustrating that a trial court's refusal to allow the amendment of a pleading, so that the party may make an additional factual allegation, necessarily frustrates the litigation process. Other jurisdictions have permitted interlocutory appeals from a denial of a motion to amend a pleading, but such review is limited to where the denial barred a petitioner's right to plead a defense by essentially putting that party "out of court." *Borough of Mifflinburg v. Heim*, 705 A.2d 456, 462 (Pa. Super. Ct. 1997); *Horowitz*, 580 A.2d at 397 ("[A]n order which denies a party's request to amend an answer to plead an affirmative defense is considered final and is, therefore, immediately appealable. This is so because denial of a motion to amend to plead an affirmative defense precludes the introduction of proof at trial of what might constitute a complete defense, effectively putting the pleading party 'out of court.'") (citations omitted). Such a situation is not present here. Shin was not prohibited from making any claims. While the trial court did not allow Shin to allege that he was "ready, willing, and

able" to close on the closing date and that Fujita did not provide him with a five-day opportunity to cure, it granted Shin's motion to include the proposed claims and other proposed allegations contained in his Proposed Amended Complaint. We are unconvinced that the inclusion, or exclusion, of the subject allegations necessarily will materially advance the termination of the litigation and clarify further proceedings in this case. Under this prong, therefore, we decline to exercise discretion under section 3108(b)(1).

2. Substantial and irreparable injury

[11] We also may grant interlocutory review where it determines that "resolution of the questions of law on which the order is based will . . . [p]rotect a party from substantial and irreparable injury." 7 GCA § 3108(b)(2) (2005). "'Irreparable injury' is defined as 'injury for which there is no adequate remedy at law.'" *Bangor Historic Track, Inc. v. Dep't of Agric.*, 837 A.2d 129, 133 (Me. 2003) (quoting *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980)). Shin maintains that he will be substantially and irreparably harmed if not permitted to make the allegations against Fujita because he may lose his rights to real property. Specifically, Shin argues that because the property "is the last remaining large set of parcels on Tumon Bay suitable for development as a resort, a unique property and opportunity," "if this case is delayed by the need for two trials and sets of discovery, the property may have been developed in ways that will be difficult if not impossible to alter." Appellant's Resp. to Mot. to Dismiss, p. 7 (March 21, 2007).

[12] In his complaint in the proceedings below, Shin has prayed for specific performance and damages. Appellant's Statement of Jurisdiction, Ex. B (Decision and Order, February 2, 2007).

Both remedies are available by statute.[3]

[13] We are guided by *Royer v. St. Paul Fire & Marine Insurance, Co.*, where the Louisiana Court of Appeals considered an interlocutory appeal of the trial court's decision denying the plaintiff's motion to amend his petition to the extent that he sought to make additional allegations of negligence. 393 So. 2d 936, 936-37 (La. Ct. App. 1981). The *Royer* court held that "[a] judgment denying a motion to amend a petition is a preliminary matter and does not determine the merits of a case." *Id.* at 937. The court further articulated that "[t]he standard for determining whether an interlocutory judgment may cause irreparable injury is whether any error in the judgment may be corrected as a practical matter in an appeal following the determination of the merits." *Id.* After concluding no such irreparable injury could be found, the court consequently dismissed the interlocutory appeal. *Id.*

[14] The test articulated in *Royer* finds support in another jurisdiction, which similarly held that the test for determining if an interlocutory judgment may cause irreparable injury is whether procedural error will have such an effect on the merits of the case that a reviewing court would not be able to correct an erroneous decision on the merits. *See Moshe Myerowitz, D.C., P.A. v. Howard*, 507 A.2d 578, 580 (Me. 1986).

[15] Similarly, Shin appeals the trial court's partial denial of his motion to amend his pleading. Based on the test followed by the *Royer* court, no irreparable injury exists here because Shin may raise this issue on appeal after a final judgment. Any potential error committed by the trial court in this case may be corrected on appeal after a final judgment on the

[3] Under section 3220 of Title 20 of the Guam Code Annotated, "specific performance of an obligation may be compelled," "[e]xcept as otherwise provided in this Part." 20 GCA § 3220 (2005). Additionally, section 2101 of Title 20 of the Guam Code Annotated provides that "[e]very person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor, in money, which is called damages." 20 GCA § 2101 (2005).

merits of the case. Under this standard, we reject Shin's position that the instant appeal warrants our immediate interlocutory review.

[16] Furthermore, courts have articulated that specific performance is an adequate remedy in enforcing real estate sales contracts. *See Sullivan v. Porter*, 861 A.2d 625, 634 (Me. 2004) (holding that the trial court "did not exceed the bounds of its discretion by finding that the nature of the property, [buyers'] substantial investment of time and money [for renovations] . . . and the resources they devoted to establishing a new business, made [the property] so unique that there was no adequate remedy other than an order of specific performance"); *Era Franchise Systems, Inc. v. Mathis*, 931 So. 2d 1278, 1287 (Miss. 2006) (finding that specific performance is a "particularly appropriate remedy in matters relating to tracts of real property because of the unique nature of real estate."). Certainly, in cases involving the purchase and sale of real property, specific performance is an adequate remedy where money damages are inadequate. *See O'Halloran v. Oechslie*, 402 A.2d 67, 70 (Me. 1979) ("Although no direct evidence of the uniqueness of the property to be conveyed was adduced nor monetary damages otherwise shown to be inadequate, a justice may assume the inadequacy of money damages in a contract for the purchase of real estate and order the specific performance of the contract without an actual showing of the singular character of the realty."); *Livinggood v. Balsdon*, 709 N.W.2d 723, 725 (N.D. 2006) ("Specific performance is one of the available remedies in cases involving an interest in real estate when it has unique character or if monetary damages are otherwise inadequate compensation for a breach of contract."); *Yates v. Hill*, 761 A.2d 677, 679 (R.I. 2000) ("[A] grant of specific performance is appropriate when adequate compensation cannot be achieved through money damages . . . ."). We reject Shin's argument that he will suffer

irreparable harm because specific performance, or damages, is an adequate remedy for injuries involving real property.

[17] In addition, although Shin maintains that because the subject of the litigation involves real property, any development of the property would be either "difficult" or "impossible" to correct, this court has articulated that while "[l]oss of property is generally considered to be irreparable," "it is not presumed to be so." *Hong Kong & Shanghai Banking Corp. v. Kallingal*, 2005 Guam 13 ¶ 22. We stated in *Hong Kong & Shanghai Banking Corp.* that:

> Irreparable harm is not assumed; it must be demonstrated. Even where real property is involved, [s]peculative injury does not constitute a showing of irreparable harm. While real property is often judicially perceived as unique, [where] plaintiffs are faced with the loss of commercial, and not residential, property[,] . . . [t]hey are thus threatened with an economic loss which is compensable in large part, if not entirely, in damages.

Id. (internal quotations and citations omitted) (first alteration in original). Consequently, because Shin's argument is based solely on injury to commercial property, Shin fails to demonstrate that he will suffer an irreparable harm. *Id.*

[18] Accordingly, we decline to exercise interlocutory appellate jurisdiction under section 3108(b)(2).

3. Issues of general importance in the administration of justice

[19] Finally, this court may grant interlocutory review where it finds that resolution of the questions of law raised will "[c]larify issues of general importance in the administration of justice." 7 GCA § 3108(b)(3) (2005). Shin contends that we should exercise jurisdiction because this appeal will clarify issues of genuine importance in the administration of justice.

[20] Resolution of whether Shin should be allowed to make what the trial court characterized as "substantial amendments to his original complaint," "which bears very little resemblance to the original complaint," does not clarify issues of genuine importance in the administration of

justice. Appellant's Statement of Jurisdiction, Ex. B (Decision and Order, February 2, 2007). In *Arashi & Co., Inc. v. Nakashima Enterprises, Inc.*, 2005 Guam 21 ¶ 16, we provided the lower court with a framework for determining whether to grant or deny leave to amend a pleading under Rule 15(a) of the Guam Rules of Civil Procedure. There are no issues of genuine importance in the administration of justice raised here that require further clarification by this court. We, therefore, decline to exercise discretion under section 3108(b)(3).

III.

[21] Ultimately, this court must exercise its discretion to accept interlocutory review under 7 GCA 3108(b). This case fails to present the "exceptional circumstances" necessary to convince us to exercise interlocutory review. *Merchant*, 1997 Guam 16 ¶ 6. We find that the issues raised in this appeal do not support a departure from the "general policy against piecemeal disposal of litigation." *Sky Enter.*, 2002 Guam 24 ¶ 21. Consequently, Shin's appeal is not properly before this court. For the reasons expressed, Fujita's motion to dismiss is hereby **GRANTED.**[4] Accordingly, Shin's appeal is hereby **DISMISSED.**

RICHARD H. BENSON

RICHARD H. BENSON
Justice *Pro Tempore*

JOHN A. MANGLONA

JOHN A. MANGLONA
Justice *Pro Tempore*

ROBERT J. TORRES, JR.

ROBERT J. TORRES, JR.
Presiding Justice

[4] Our decision renders moot all outstanding motions before this court, which includes the following: Shin's motion to reconsider this court's order tolling the briefing schedule pending a ruling on the motion to dismiss, filed on May 24, 2007; the motion to substitute or to intervene, filed on June 12, 2007 by Tumon Partners and Cho; Shin's motion for voluntary dismissal of the appeal, filed on June 13, 2007; the Emergency Motion to Substitute or to Intervene, filed on June 20, 2007 by Tumon Partners and Cho; and, finally, Shin's motion to disqualify Attorney Richard Pipes, filed on July 2, 2007. *See Freedom Life Ins. Co. of America, v. Wallant*, 953 So. 2d 16, 16 n.1 (Fla. Dist. Ct. App. 2007) ("Our grant of the motion to dismiss this appeal makes all other pending motions . . . moot.").