IN THE SUPREME COURT OF GUAM

KINI B. SANANAP, IOWANA M. SANANAP AND THE 40 LOT OWNERS (OF 33 LOTS) LISTED IN EXHIBIT "1" TO THE FIRST AMENDED COMPLAINT,
Plaintiffs-Appellants,

v.

CYFRED, LTD., A GUAM CORPORATION; ENRIQUE BAZA, JR.; ELEANOR B. PEREZ; DONGBU INSURANCE COMPANY AND DOE DEFENDENTS 1-10,
Defendants-Appellees.

OPINION

Cite as: 2008 Guam 19

Supreme Court Case No.: CVA07-006
Superior Court Case No.: CV1448-02

Appeal from the Superior Court of Guam
Argued and submitted February 15, 2008
Hagåtña, Guam

Appearing for Plaintiffs-Appellants:
Wayson W.S. Wong, *Esq.*
142 Seaton Blvd., Suite 101
Hagåtña, GU 96910

Appearing for Defendants-Appellees:
Curtis C. Van de Veld, *Esq.*
123 Hernan Cortes Avenue
Hagåtña, GU 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

TORRES, C.J.:

[1] Plaintiffs-Appellants Sananap, et al. ("the Homeowners") appeal from a denial of a preliminary injunction seeking to enjoin Defendants-Appellees Cyfred, et al. ("Cyfred") from foreclosing on their homes. Those foreclosures occurred on May 17, 2007 during the appeal of this case. In order to protect our jurisdiction, we set aside those foreclosures and reach the merits of this case. We also find that an injunction under the Deceptive Trade Practices-Consumer Protection Act is not an appropriate remedy against foreclosures only distantly related to the deceptions alleged. However, Cyfred was obligated to install sewer lines for all of the residents of the Gill-Baza subdivision within one year of transferring their respective lots to them. Once Cyfred failed to timely install the sewer lines, the Sananaps were excused from paying on their promissory notes, and their right to suspend performance under their contracts will continue until such time as they obtain satisfaction of a judgment under 21 GCA §§ 60314(f)(1) or (2). The Superior Court's denial of a preliminary injunction is reversed and remanded for proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] This case arises from a nearly identical transaction that was before this court in *Abalos v. Cyfred*, 2006 Guam 7. In fact, the original plaintiffs in this action, Kini and Iowana Sananap, were neighbors of the Abaloses. In both *Abalos* and the instant case, Cyfred was found to have failed to provide sewer lines to the Gill-Baza Subdivision in Yigo as promised in the Land Purchase Agreement. *Abalos*, 2006 Guam 7 ¶¶ 2-8. Similarly, plaintiffs in both cases were in

default on their promissory notes and sought a remedy under 21 GCA § 60314(f).[1] *Abalos*, 2006 Guam 7 ¶¶ 4-5.

[3] The fundamental difference between the instant case and *Abalos* is the remedy sought by plaintiffs. In *Abalos* the plaintiffs sought, and were granted, rescission of their contract with Cyfred under 21 GCA § 60314(f)(1). *Abalos*, ¶¶ 8, 71. This court reasoned that default on the promissory note was not a bar to the *equitable* remedy of rescission. *Id.* ¶¶ 35-38. By contrast, the Homeowners in the present case sought the *legal* remedies of damages, attorneys' fees, and costs under 21 GCA § 60314(f)(2). Therefore, the distinction between the two cases is that the parties in this case seek to enforce the contract going forward rather than returning to the pre-contract state of affairs.

[4] In 1999, Enrique Baza and Eleanor Perez sought permission from the Department of Land Management to convert their property into an agricultural subdivision. Permission was granted on condition that Enrique Baza and Eleanor Perez sign a statement on the Agricultural Subdivision Survey Map ("ASSM") acknowledging their obligation to provide sewer lines and other infrastructure. In 1998 or 1999,[2] Cyfred acquired title to the subdivision. On November 8,

---

[1] "(f) If the transferor agrees to make water or power or sewer available to the property, such shall be stated in the document transferring an interest in the property, and such hookup shall be made available to the property by the transferor within one (1) year or such lesser time as may be agreed upon between transferor and transferee. Failure to make power or water or sewer available to the property within one (1) year or such lesser time as agreed upon will result in the transferee being allowed, at his option, to:

> (1) rescind the transaction and recover all money paid, reasonable interest, and reasonable costs and attorney's fees; or
>
> (2) recover from the transferor all amounts required to make the promised utilities available on the property, plus all related costs and reasonable attorney's fees."

21 GCA § 60314(f) (2005).

[2] In its March 19, 2007 Decision and Order, the court determined that Enrique Baza and Eleanor Perez had transferred the property to Cyfred on August 21, 1998, almost eight months before Baza and Perez signed the ASSM. Appellants' Excerpts of Record ("ER"), Tab 23 at 9 (Dec. & Order, Mar. 19, 2007). However, the court advised "that this conclusion is final only as to this motion and not for the entire case." *Id.* at 10. The court then expressed doubts as to when the transfer of property had actually taken place. *Id.*

1999, the Sananaps signed a Land Purchase Agreement that included a promise by Cyfred to install a sewer line, among other things. Shortly thereafter, the Sananaps signed a promissory note and mortgage to Cyfred.

[5] The Sananaps stopped making their mortgage payments to Cyfred in March of 2002. Approximately a month later, the Sananaps' attorney notified Cyfred that the Sananaps would no longer be paying their mortgage because of Cyfred's alleged breaches of contract. On September 27, 2002, the Sananaps filed a complaint against Cyfred alleging that it failed to provide sewer lines and other infrastructure to residents of the Gill-Baza Subdivision in Yigo.

[6] Nearly four years later, the Sananaps' attorney filed his first motion for a preliminary injunction to prevent Cyfred from foreclosing on the Sananaps' home. The Sananaps also filed an Amended Complaint which included as plaintiffs all of the Homeowners now participating in this appeal. The Superior Court granted some of the Homeowners partial summary judgment with respect to the failure to install the sewer lines and ordered Cyfred to pay damages of $580,000.00 and attorneys' fees and costs of $125,314.43.[3] However, the court reserved judgment on the issue of whether to grant a preliminary injunction against the foreclosures.

[7] After the judgment, and with no decision forthcoming on the preliminary injunction, the Homeowners took additional steps to prevent foreclosure on their homes. The Homeowners asked for a temporary restraining order ("TRO") against Cyfred which was denied. The Homeowners tried again to request a TRO, but the court again denied the request on the grounds that the issue had already been decided. The Homeowners then requested a Rule 62(h) stay and

[3] The award of attorneys' fees and costs was appealed to this court in *Sananap v. Cyfred*, 2008 Guam 10, but the appeal was dismissed and the matter remanded so that the Superior Court could rule on a motion for reconsideration. 2008 Guam 10 ¶ 32.

repeated their request for a preliminary injunction. The stay was granted. Cyfred then filed a Motion for Reconsideration which eventually resulted in the Superior Court cancelling the stay.

[8] During this period, the Homeowners were without sewer facilities and had to rely on portable toilets. As a result, the Guam Environmental Protection Agency attempted to evict them for violating the Toilet Facilities and Sewage Disposal Act, 10 GCA §§ 48101-48126 (2005).

[9] The preliminary injunction was finally denied on January 15, 2007. The Homeowners then filed a Motion for Reconsideration on January 25, 2007. On March 19, 2007, the preliminary injunction was again denied. The Homeowners then filed a Second Motion for Reconsideration on March 29, 2007. The Superior Court subsequently denied the preliminary injunction for a third time on April 13, 2007.

[10] On April 16, 2007, Homeowners filed a Notice of Appeal. On the same day, the Homeowners filed an emergency motion in this court to enjoin foreclosure sales that were scheduled for the following day. The motion was immediately granted, and a temporary, thirty-day stay was issued enjoining the scheduled foreclosures. The issue of whether a more permanent stay pending appeal should be issued was remanded to the court below. On the morning of May 17, 2007, Cyfred held the foreclosure sales and sold the properties to itself. That afternoon, the Superior Court belatedly issued a stay of the foreclosures pending appeal. On February 22, 2008, the Homeowners filed a motion asking this court to set aside the foreclosures, which we address as part of this opinion. Similarly, this opinion responds to Cyfred's earlier motion to dismiss the present appeal as untimely.

II. JURISDICTION AND STANDARD OF REVIEW

[11] This court has jurisdiction to hear interlocutory appeals pursuant to 7 GCA § 3108(b) if "provided by law." 7 GCA § 3108(b) (2005); *see also HongKong & Shanghai Banking Corp. v.*

Kallingal, 2005 Guam 13 ¶ 16; *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 14. Appeals from a decision granting or denying a preliminary injunction are permitted under 7 GCA § 25102(f) (2005).

[12] "The district court's denial of a preliminary injunction is normally reviewed for an abuse of discretion." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006). Even though the "overall review is for an abuse of discretion, '[t]he district court's interpretation of the underlying legal principles . . . is subject to de novo review and a district court abuses its discretion when it makes an error of law.'" *Id.* (quoting *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc)). A court "will reverse a denial of a preliminary injunction where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 964 (9th Cir. 2002).

[13] A preliminary injunction requires a showing of (1) irreparable injury, and (2) the likelihood of succeeding on the merits. *HongKong*, 2005 Guam 13 ¶ 18. The potential injury in this case is due to possible foreclosure, and the record suggests "irreparable injury" would be a factual determination. *See Friends for All Children. Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 836 n.39 (D.C. Cir. 1984) ("We think that the court properly exercised its discretion in making its factual finding as to irreparable injury on evidence that was readily available."). Thus, the Superior Court's findings regarding irreparable injury should not be disturbed unless clearly erroneous. *Sammartano*, 303 F.3d at 964. By contrast, the likelihood of the Homeowners succeeding on the merits, insofar as that determination involves questions of contract law or statutory interpretation, should be reviewed *de novo*. *Id.*

III. DISCUSSION

A. The Appeal was Timely

[14] Cyfred argues that Homeowners' appeal is untimely because the use of multiple motions to reconsider was improper and did not toll the time for appeal. Homeowners contend that this appeal is taken from the April 13, 2007 denial of the second motion to reconsider, and was therefore timely appealed on April 16, 2007. Although the appeal was timely made, neither party correctly interprets the relevant law.

[15] Appeals from a judgment or order must normally be certified no later than thirty days after the judgment or order has been entered by the Superior Court. Guam R. App. P. ("GRAP") 4(a)(1). The only exception to this time limitation appears in Rule 4(a)(4), which allows the time for appeal to toll until the Superior Court rules on a limited class of motions made after a judgment or order. GRAP 4(a)(4). Thus, for example, a motion for relief from judgment under Rule 60(b) of the Guam Rules of Civil Procedure, if made within ten days of the judgment or order, would allow the thirty day time for appeal to toll until the court decides the issue of reconsideration. GRAP 4(a)(4)(A)(vi); Guam R. Civ. P. ("GRCP") 60(b). Similarly, a Rule 59(e) motion to alter or amend the judgment, which *must* be made within ten days of the judgment or order, would have an identical effect in delaying the time for appeal. GRAP 4(a)(4)(A)(iv); GRCP 59(e). Because the Guam Rules of Civil Procedure mirror the changes made in 1993 to the Federal Rules of Civil Procedure, "there is no longer a distinction between Rule 59(e) and Rule 60(b) motions filed within ten days of entry of judgment for purposes of finality of the original judgment or calculation of the time within which a party may appeal." *Jennings v. Rivers*, 394 F.3d 850, 855 n.4 (10th Cir. 2005). Even before the 1993 amendments, courts held that "[r]egardless of how it is styled, a post-judgment motion filed within ten days of

entry of judgment that questions the correctness of a judgment is properly construed as a Rule 59(e) motion." *Venable v. Haislip* , 721 F.2d 297, 299 (10th Cir. 1983). Finally, a "motion for reconsideration" that makes no explicit reference to the rules is considered a Rule 59(e) motion if filed within ten days of the order or judgment, or a Rule 60(b) motion if filed later. *Am. Ironworks & Erectors, Inc. v. N. Am. Const. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001).

[16] A Rule 59(e) "motion to reconsider" made within the ten day period after an order or judgment has the obvious benefit of allowing the losing party to extend the time for appeal. Filing successive motions to reconsider would, at first glance, appear to abuse the judicial process. There are, however, cases where back-to-back Rule 59(e)/Rule 60(b) motions have been filed without objection from the courts. *See Thompson v. County of Franklin*, 127 F. Supp. 2d 145, 148 (N.D.N.Y. 2000). Often these cases involve *pro se* defendants attempting to conform to legal formalities. *See, e.g., Walker v. Ortiz*, 2007 WL 622244 (D. Colo.); *Williams v. Office of Fin. Mgmt.*, 1993 WL 87967 (D.C. Cir.). Nevertheless, the second and subsequent motions do not have any effect on extending the time for appeal. *Trinity Carton Co. v. Falstaff Brewing Corp.*, 816 F.2d 1066, 1069 (5th Cir. 1987) ("A motion to reconsider an order disposing of a motion of the kind enumerated in Rule 4(a) does not again terminate the running of the time for appeal" (quoting *Wansor v. George Hantscho Co.*, 570 F.2d 1202, 1206 (5th Cir.1978))). Thus, by analogy to the federal rules, the time for appeal can extend no later than thirty days from a decision on a single motion to reconsider, provided that the motion was itself timely filed within ten days of the original judgment or order.

[17] Homeowners did not specify the rule upon which their January 25th Motion to Reconsider was based. Because the January 25th Motion to Reconsider was made ten days after the January 15th denial of the preliminary injunction, it must be treated as a Rule 59(e) motion to

alter or amend the judgment. *Am. Ironworks*, 248 F.3d at 898-99. On the other hand, the March 29th Motion to Reconsider must be treated as a Rule 60(b) motion for relief from judgment. *Id.* Both purport to relate back to the original denial of the preliminary injunction on January 15, 2007, but only the Rule 59(e) motion of January 25th has any effect on the timeliness of the appeal. *Trinity Carton*, 816 F.2d at 1069. Thus, the thirty day time for appeal was tolled until March 19, 2007, when the first Motion to Reconsider was denied. GRAP 4(a)(4)(A)(vi). The last day to enter a Notice of Appeal would have been thirty days later on April 18, 2007. Therefore, the Notice of Appeal was timely entered on April 16, 2007.

[18] In a prior opinion, this court allowed an appeal from a denial of a motion to reconsider to appeal the underlying judgment being reconsidered. *Ward v. Reyes*, 1998 Guam 1 ¶ 7. Judge Posner best describes the rationale for this practice:

> The two orders—the judgment and the denial of the motion to change it—merge. They merge because the purpose of the motion, so far as suspending the time within which to appeal is concerned, is to delay the appeal from the judgment until the [lower] court has ruled on the motion, at which point the judgment is ripe for review. Since that is the only purpose of the motion should it be denied, the court of appeals will construe an appeal from the denial (should the appellant's notice of appeal mistakenly cite only the denial) as an appeal from the judgment.

Borrero v. Chicago, 456 F.3d 698, 700 (7th Cir. 2006). We will therefore consider Homeowners' appeal to be an appeal of the January 15th denial of the preliminary injunction, rather than the March 19th Decision and Order to which it refers. The better practice, however, is to designate the judgment or order one intends to appeal, as required by Rule 3(c) of the Guam Rules of Appellate Procedure.

B. The Appeal is not Moot

[19] At oral argument, the Homeowners' attorney conceded that if the foreclosure sales were valid, then this appeal would be effectively moot. Because the sales occurred during a brief

window between this court's stay and the stay issued by the court below, there was no legal impediment to conducting the sales on March 17, 2007. However, the Homeowners argue that the sales were not properly conducted and are therefore void. The validity of the foreclosure sales is a factual issue that this court need not address. Instead, we grant the motion to set aside the March 17th foreclosure sales to protect our appellate jurisdiction in this case. This, in turn, will allow us to reach the merits in reviewing the Superior Court's denial of the preliminary injunction.

[20] "In general, an appeal should be dismissed as moot when, by virtue of an intervening event, the appellate court cannot grant effective relief in favor of the appellant." *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 31. On the other hand, "a case is not moot if the court has the 'ability to undo the effects of conduct that was not prevented by the time of the decision.'" *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986) (quoting 13A Wright, at al., Federal Practice and Procedure, *Jurisdiction* 2d § 3533.3, at 278-79 (1984)). If an appellate court would have no power to reverse an event or action, a party must protect its claim by obtaining a stay during the appeal. "'[A] party who chooses to appeal but who fails to obtain a stay or injunction pending appeal risks losing its ability to realize the benefits of the successful appeal.'" *In re Combined Metals Reduction Co.*, 557 F.2d 179, 188 (9th Cir. 1977) (quoting *In re Lewis Jones, Inc.*, 369 F. Supp. 111, 115-16 (E.D. Pa. 1973)).

[21] "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Porter v. Lee*, 328 U.S. 246, 251 (1946). For example, in *National Forest Preservation Group v. Butz*, a land swap had occurred during an appeal, where the plaintiff was appealing a denial of an injunction against the land swap on the grounds that it

violated federal environmental laws. 485 F.2d 408, 410 (9th Cir.1973). The Ninth Circuit Court of Appeals responded to the government's argument that the appeal was moot as follows:

> Nonsense.
>
> > [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status quo, wholly irrespective of the merits as they may be ultimately decided.

Id. at 411 (quoting *Jones v. SEC*, 298 U.S. 1, 17-18 (1936)). The court therefore held that the appeal was not moot. *Id.*

[22] Other courts have also held that where an appellate court has the power to restore the status quo, an appeal is not moot. *See, e.g. Garcia*, 805 F.2d at 1402 (appeal from denial of an injunction against transfer of an employee was not moot because the court had the power to reinstate the terminated employee); *Padilla v. Ackerman*, 460 F.2d 477, 479 n.1 (9th Cir.1972) (appeal from denial of an injunction against transfer of state prisoners out of a drug treatment program was not moot even though transfer has occurred, because district court had power to restore the status quo by ordering the prisoners returned to the treatment program); *Hines v. U.S. Att'y Gen.*, 1988 WL 92898, at *1 (4th Cir.) (appeal from denial of an injunction against foreclosure was not moot because court had the power to restore property purchased at foreclosure sale by defendant). Of course, some events cannot be reversed, and courts will often dismiss such cases as moot. *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 9.[4]

[4] *See, e.g., Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571, 574 (9th Cir.1984) (action to enjoin performance of a contract was mooted by virtue of the completion of the contract); *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1254 (9th Cir.1984) (issue on appeal was mooted by virtue of an intervening decision by a California state court interpreting California state law); *Canez v. Guerrero*, 707 F.2d 443, 446 (9th Cir.1983) (action as to the procedures used in a union election was mooted because the election had occurred and the complainants had been victorious); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 192 (9th Cir.1977) (action as to the appropriate disposition of property of a bankrupt company was mooted because the sale and lease of the property in question had been completed pursuant to a valid order of the district court).

[23] The general rule that a case is moot when a court cannot reverse the transaction often applies to foreclosures that occur during the pendency of an appeal. *Christopher Vill., Ltd. P'ship v. Retsinas*, 190 F.3d 310, 314 (5th Cir. 1999) ("Ordinarily, an appeal will be moot when the property underlying the dispute has been sold at a foreclosure sale because [the] court cannot fashion adequate relief, i.e. cannot reverse the transaction."); *see also DuBose v. Gastonia Mut. Sav. & Loan Ass'n*, 286 S.E.2d 617, 621 (N.C. Ct. App. 1982); *Bunn v. Werner*, 210 F.2d 730, 731 (D.C. Cir. 1954); *NCNB Texas Nat'l Bank v. Southwold Assoc.*, 909 F.2d 128, 129 (5th Cir. 1990). This is particularly true when the purchaser is not a party to the lawsuit. *See Holloway v. United States*, 789 F.2d 1372, 1374 (9th Cir. 1986) ("Because the property has been sold and the purchaser of the property was not made a party to this proceeding and because we cannot grant effective relief in his or her absence, this appeal is dismissed.").

[24] However, if the purchaser at a foreclosure sale is a party to the lawsuit, a court may still reverse the transaction by setting aside the foreclosure. Foreclosure and purchase by a party does "not deprive[] [the] court of power to give effective relief, including invalidation of the foreclosure sale if indicated . . . where there is no innocent third-party purchaser whose rights could be prejudiced." *United Realty Trust v. Prop. Dev. & Research Co.*, 269 N.W.2d 737, 741 n.5 (Minn. 1978). An Illinois appellate court went so far as to require that a mootness dismissal of a petition to set aside a foreclosure be accompanied by proof of an actual third-party purchaser, even where no evidence was presented that a party to the suit had purchased the property. *Avondale Sav. & Loan Ass'n v. Amalgamated Trust & Sav. Bank*, 397 N.E.2d 121 (Ill. App. Ct. 1979). The Fourth Circuit, in an unpublished opinion considering an injunction against a foreclosure that had already occurred, found it significant that a government agency was both a party to the case and the purchaser of the property:

> This is not a case where an irreversible action has occurred, the *status quo* cannot be restored, or this Court's judgment cannot have a practical affect upon the existing controversy. Although it appears that the foreclosure sale sought to be enjoined has already taken place, the court may by mandatory injunction restore the s*tatus quo*. Nor is this a case in which the absence of a party to the transaction at issue disarms the court from granting effective relief.

Hines v. U.S. Atty. Gen., 1988 WL 92898, at *1. This view of mootness comports more closely with the general rule that an appeal is not moot if the court has the power to "restore the status quo." *Porter v. Lee*, 328 U.S. at 251. *See also F.T.C. v. Weyerhaeuser Co.*, 665 F.2d 1072, 1077-78 (D.C. Cir. 1981) (action to enjoin a merger was not mooted by completion of the merger pending appeal where all necessary parties were before the court); *Bastian v. Lakefront Realty Corp.*, 581 F.2d 685, 691-92 (7th Cir. 1978) (shareholder suit to enjoin a corporate sale of property to purchaser was not mooted by completion of the sale pending appeal where vendor and purchaser were parties to the suit); *Indus. Bank of Washington v. Tobriner*, 405 F.2d 1321, 1323 (D.C. Cir. 1968) (suit to enjoin issuance of tax deed to purchaser was not mooted by issuance of deed pending appeal where tax commissioners and purchaser were parties to the suit).[5]

[25] All of the foreclosure deeds are signed by Geraldine Mendiola as Cyfred's "Duly Authorized Representative." Appellees' Br., app. B. Neither party argues that ownership has been transferred to any other person or entity. Even assuming the foreclosure sales were properly conducted, Cyfred is both the purchaser of the foreclosed property and a party to this lawsuit, and this court retains the power to "restore the status quo" by setting aside the

[5] In bankruptcy law, which has its own set of rules regarding mootness, there are limited exceptions to the general rule that foreclosure moots an appeal absent a stay. *See generally In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1171-73 (9th Cir. 1988) (discussing the application of the mootness rule to bankruptcy foreclosures). In the Ninth Circuit, one exception to mootness "is available when real property is sold to a creditor *who is a party to the appeal*, but only when the sale is subject to statutory rights of redemption." *Id.* at 1173 (emphasis added).

foreclosures. *Porter*, 328 U.S. at 251. We therefore set aside the March 17, 2007 foreclosure sales as an exercise of our statutory authority to "protect [our] appellate jurisdiction" in this case. 7 GCA § 3107(b) (2005).

C. The Deposition Testimony of Francis Gill should have been Admitted

[26] The Superior Court was skeptical when the Homeowners submitted a deposition by Francis Gill as an attachment to a memorandum, in part because it was not signed. ER, Tab 28 at 8-9 (Dec. & Order, Apr. 13, 2007). However, the court also discussed the content of the deposition, so it is difficult to determine whether or not the deposition was considered part of the record. *Id.* For the sake of argument, we will assume that the Superior Court disregarded the deposition on the sole ground that Mr. Gill had neglected to sign it.

[27] The Homeowners assert that Cyfred's failure to file a motion to suppress the defective deposition waived any objection to its admission as evidence. The Homeowners are correct. GRCP 32(d)(4) states that "[e]rrors and irregularities in the manner in which . . . the deposition is . . . signed . . . are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained." GRCP 32(d)(4). Federal case law indicates that an unsigned deposition is admissible if objection has been waived by inaction. *United States v. Garcia*, 527 F.2d 473, 475 (9th Cir. 1975); *Valdez v. United States*, 326 F.2d 598, 600 (9th Cir. 1963). Cyfred did not respond at all to this issue, and no motion to suppress was filed. Therefore, the court clearly erred in refusing to admit Mr. Gill's deposition. Given our conclusion that Cyfred was obligated to provide sewer lines to the Homeowners, and that Mr. Gill's testimony was submitted for the purpose of showing the same, the effect of this error was minimal.

D. Injunction under the DTPA is not the Proper Remedy

[28] The Homeowners argue that failure to provide sewer lines within one year, in violation of 21 GCA § 60314(f), is also a violation of the Deceptive Trade Practices-Consumer Protection Act ("DTPA"). *See* 5 GCA §§ 32101-32604. Specifically, they argue that Cyfred's actions constitute a violation of 5 GCA §§ 32201(a) and (b)(29).[6] The Homeowners claim they were misled to their detriment because (1) Cyfred failed to include the promise to install sewer lines in warranty deeds given to some of the Homeowners; (2) Cyfred promised but failed to deliver "good title"; and (3) Cyfred misrepresented to five of the Homeowners that the Government would install the sewer lines rather than Cyfred. As a result, the Homeowners request that an injunction issue under 5 GCA § 32119[7] to halt the foreclosures.

---

[6] **§ 32201. Deceptive Trade Practices Unlawful.**

> (a) False, misleading, or deceptive acts or practices, including, but not limited to those listed in this chapter, are hereby declared unlawful and are subject to action by the Attorney General or any person as permitted pursuant to this chapter or other provisions of Guam law. A violation consisting of any act prohibited by this title is in itself actionable, and may be the basis for damages, rescission, or equitable relief. The provisions of this chapter are to be liberally construed in favor of the consumer, balanced with substantial justice, and violation of such provisions may be raised as a claim, defense, crossclaim or counterclaim.
>
> (b) The term *false, misleading,* or *deceptive acts* or *practices* includes, but is not limited to, the following acts by an person or merchant . . . .
>
> . . . .
>
> (29) *Doing any other act which is prohibited by the laws of Guam to mislead a consumer to his detriment* or to induce another person to buy or sell goods or services to such person's detriment.

5 GCA § 32201 (2005) (first emphasis in original, second emphasis added).

[7] **§ 32119. Injunctive Relief.**

> The court may issue any person including the Attorney General temporary restraining orders, and temporary or permanent injunctions *to restrain and prevent violations of this chapter* and such injunctive relief shall be issued without bond. The complaining party need not show that there is no remedy available at law and need not show irreparable damage if injunctive relief is not granted, but need only show that a violation of this chapter has occurred or is likely to occur . . . .

5 GCA § 32119 (2005) (emphasis added).

[29] Cyfred responds that there was insufficient evidence of a violation of the DTPA, that the Homeowners' titles were not defective, and that its breach of contract does not rise to the level of a deceptive act. The Superior Court echoed these concerns over the course of issuing its many decisions and findings. One of the court's principal objections to the applicability of the DTPA was that 5 GCA § 32119 cannot enjoin a foreclosure because the resulting injunction would not "restrain and prevent" the misleading acts alleged to be a violation of the DTPA. 5 GCA § 32119; Appellees' [Supplemental] Excerpts of Record ("SER"), Tab 3 at 11-12 (Finds. Fact & Concl. L., Oct. 5, 2006). As an example, the court argued that if Cyfred had really given the Homeowners bad title,[8] an injunction against foreclosures would not prevent the conveyance of bad title. ER, Tab 17 at 11 (Finds. Fact & Concl. L., Jan 15, 2007).

[30] We agree. Injunctive relief under 5 GCA § 32119 is specific in its purpose. A plain reading of 5 GCA § 32119 reveals that an injunction can only issue "to restrain and prevent violations of this chapter." 5 GCA § 32119. An injunction preventing the foreclosures would not "restrain and prevent" the wrongs alleged, such as Cyfred's failure to provide a sewer line or the alleged failure to provide good title. *Id.* Nor would the alleged misrepresentations during the sale be restrained or prevented by an injunction on the foreclosures. In that sense, an injunction against the foreclosures would not be the type of remedy contemplated by the drafters of the DTPA. *See generally* Richard F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L. J. 485, 495-501 (1967) (describing the purpose and

[8] The court found insufficient evidence that Cyfred had conveyed bad title. ER, Tab 17 at 11 (Finds. Fact & Concl. L, Jan 15, 2007).

function of injunctive relief under the Uniform Deceptive Trade Practices Act).[9]

[31] The foreclosures are more directly related to the Homeowners' voluntary failure to make payments than they are to any action by Cyfred. Any causal relationship between Cyfred's allegedly deceptive practices and the foreclosures would be remote and speculative at best. We therefore find that an injunction under 5 GCA § 32119 cannot enjoin foreclosures only distantly related to the deceptions alleged.

E. Injunction Under Rule 65(a)

[32] The Homeowners also argue that they have a right to a preliminary injunction under Rule 65(a) of the Guam Rules of Civil Procedure. GRCP 65(a). Based on general contract principles, their argument boils down to whether or not the Homeowners' failure to pay their promissory notes was a justifiable breach of contract. To succeed in justifying a preliminary injunction the Homeowners must show (1) a threat of irreparable injury, and (2) a likelihood of succeeding on the merits. *HongKong*, 2005 Guam 13 ¶ 18.

1. Irreparable Injury

[33] The court below only addressed the question of irreparable injury once, but found that the threat of foreclosure was only a "potential" rather than a serious threat. SER, Tab 3 at 13 (Finds. Fact & Concl. L., Oct. 5, 2006). There was also the suggestion that the Homeowners should have submitted notices of foreclosures as evidence. *Id.* Here, foreclosures have already occurred on the properties in question, and the threat of foreclosure is demonstrably real.

[9] State consumer protection statutes are generally modeled after either the Uniform Deceptive Trade Practices Act ("UDTPA") or the Federal Trade Act ("FTA"). Alan S. Brown & Larry E. Hepler, *Comparison of Consumer Fraud Statutes Across the Fifty States*, Fed'n Def. & Corp. Council Q., Spring 2005. Guam statues are modeled after the UDTPA, *id.*, yet 5 GCA § 32108(c)(A) directs the courts to look to interpretation of the FTA for guidance.

[34] In *HongKong*, this court stated that "[l]oss of property is generally considered to be irreparable but it is not presumed to be so." 2005 Guam 13 ¶ 22. "[W]hether real property loss creates irreparable injury is a fact-sensitive inquiry, and . . . such loss cannot be said to constitute irreparable harm as a matter of law." *Id.* ¶ 24 (quoting *Medgar Evers Houses Assoc., L.P. v. Carro*, No. 01-CV-6107, 2001 WL 1456190 (E.D.N.Y. Nov. 6, 2001)). Nevertheless, the potential of irreparable harm was found to exist in *HongKong* where commercial owners of an apartment building obtained a preliminary injunction to stop a private foreclosure sale. *Id.* ¶¶ 25-26. There, the owners depended on their apartment building as part of their efforts to emerge from Chapter 11 bankruptcy. *Id.* ¶ 25.

[35] Here too, special circumstances exist that show the Sananaps will suffer irreparable injury as a result of foreclosure. In setting aside foreclosures that had occurred in 2006, the Superior Court reported that unaccepted bids of $35,000.00 and $50,000.00 had been made on the properties (which were actually purchased for a nominal price of $1,000.00.) ER, Tab 17 at 5 (Finds. Fact & Concl. L., Jan. 15, 2007). This, and the fact that the homes were constructed on lots of minimal size, see 21 GCA § 62105, suggest that the homes were some of the least expensive available on Guam. The fact that many of the Homeowners insisted on remaining there despite the lack of adequate sewer facilities also suggests that the Gill-Baza homes may have been the only ones they could afford. Thus, foreclosure may result in leaving many of the Homeowners without adequate housing or even homeless, and as one judge observed, "[t]he risk of being rendered homeless is a risk of suffering an irreparable injury." *Morillo v. City of New York*, 582 N.Y.S.2d 387, 392 (N.Y. App. Div. 1992) (Carro, J., dissenting).

[36] Even in the unlikely event that the Gill-Baza homes were investment properties for which damages would be adequate compensation, irreparable injury cannot be considered in isolation

from the likelihood of succeeding on the merits. This is because "the issues of likelihood of success and irreparable injury represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Humane Soc'y of U.S. v. Gutierrez*, 527 F.3d 788, 790 (9th Cir. 2008). In other words, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay . . . . [M]ore of one excuses less of the other." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002).

[37] We must therefore also consider the question of whether the Homeowners are likely to succeed in avoiding foreclosure by the end of this case. If their chances of success are very good, then they need only make a minimal showing of irreparable injury. *See id.* Although foreclosure on a residential home is not irreparable injury *per se*, "irreparable injury is suffered when one is *wrongfully* ejected from his home." *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984) (emphasis added). Only an examination of the Homeowners' arguments on the merits will reveal whether the foreclosures were wrongfully pursued. Thus, we turn next to the question of whether the Homeowners can demonstrate a "likelihood of succeeding on the merits." *HongKong*, 2005 Guam 13 ¶ 18.

2. Likelihood of Succeeding on the Merits

[38] To succeed on the merits in the instant case means that the Homeowners would have to demonstrate by the end of trial that they were not in default on their promissory notes, or that such default can be cured, and that foreclosure is not an available remedy. Such a demonstration involves four distinct questions: 1) whether the Homeowners were justified in suspending their payments once the sewer lines were not timely installed; 2) whether late payments by the Sananaps and perhaps other Homeowners justified Cyfred's failure to install sewer lines; 3)

whether and when those Homeowners who obtained a judgment under 21 GCA § 60314(f)(2) are obligated to resume payments; and 4) whether the failure to install the correct diameter water lines according to the ASSM would also justify suspending payments.

F. The Nature of the Contract and Its Consideration

[39] Before we address these central questions, we must first examine the nature of the contract between Cyfred and the Homeowners and define each party's respective obligations. We will also examine the nature of the contract's consideration. In particular, we analyze the Superior Court's arguments relating to the conditional and negotiable nature of the promissory notes. Finally, we will address the Homeowners' argument that they did not receive good title to their homes.

1. Cyfred was Obligated to Install Sewer Lines

[40] An enormous amount of effort has gone into determining whether Cyfred agreed to install sewer lines in the Gill-Baza subdivision. This issue is central to the Homeowners' case because section 60314(f) only applies "[i]f the transferor agrees to make water or power or sewer available to the property." 21 GCA § 60314(f). The parties, and the Superior Court itself, appear to be under the impression that some evidence in the form of a bilateral contract is required to show that such an agreement exists. In the words of the court below:

> The Court is not aware of any statute that requires a land developer to provide a sewer line or give notice of such requirement. See generally 21 [GCA] 60314. There are statutes that require a disclosure of the availability of water and power (21 [GCA] § 60314(a); 21 [GCA] § 60314(c); 21 [GCA] § 60314(e)) and there are statutes that require a sewer line in one year if one is promised (21 [GCA] § 60314(f)), but the Court did not find any provisions requiring Defendant to lay down a sewer line or promise to lay one down.

ER, Tab 17 at 12 (Finds. Fact & Concl. L., Jan 15, 2007). Thus, the court found that only those Homeowners with Land Purchase Agreements were entitled to recover under 21 GCA §

60314(f)(2) because only they could "clearly demonstrate[] to the Court that a promise was made as to the sewer line." ER, Tab 10 at 27 (Finds. Fact & Concl. L., Aug. 1, 2006). We disagree.

[41] According to 21 GCA § 62108.1(a), "[a]ny person . . . subdividing agriculturally-zoned land into six (6) or more lots . . . that are less than twenty thousand (20,000) square feet per lot with the intention of selling three (3) or more of the subdivided lots *shall be required* to make improvements consistent with [21 GCA] § 62108." 21 GCA § 62108.1(a) (2005) (emphasis added). The Gill-Baza subdivision clearly satisfies these requirements,[10] which therefore obligates Cyfred to make the improvements required by section 62108:

> **§ 62108. General Requirements for Subdivisions.** In all subdivisions presented for recording under this Chapter the subdivider *shall*:
>
> . . . .
>
> (c) Except as may be provided for pursuant to 56111, Title 5, Guam Code Annotated [repealed], *provide for the installation of power, water* and telephone lines, fire hydrants, roads and highways within the subdivision *in accord with any general or precise plan approved by the Commission.*

21 GCA § 62108(c) (2005) (emphasis added). Perhaps some of the confusion in the instant case arises from the fact that 21 GCA § 62108 does not specifically mention the installation of sewer lines. When section 62108 was enacted in 1962, the Legislature may have recognized that amenities such as running water and telephone lines were no longer luxuries but necessities. *See* Guam Pub. L. 6-134:2 (Dec. 18, 1962). Apparently, the Legislature did not find it necessary to mention sewers in section 62108 because since at least 1952, Guam law has *required* subdividers

[10] According to the foreclosure deeds, the lots have an area of approximately 10,000 square feet. Appellees' Br., app. B.

to either provide sewer lines or to subdivide the property in a way that will allow installation of individual septic systems.[11]

[42] Title 21 GCA § 62501 allows some flexibility as to the type of sewer infrastructure best suited to a particular subdivision, but it cannot be construed to allow development of residential subdivisions with no sewers or septic systems at all. *Cf.* 10 GCA § 48102 (2005) ("No building shall be occupied or used as a dwelling . . . without toilet and sewage facilities of a type required by this Chapter . . . ."). For some types of land use, the Legislature has made clear that sewers rather than septic systems must be installed. Of particular relevance to the present case is the fact that in agricultural subdivisions like Gill-Baza "the minimum ten thousand (10,000) square foot lot must be connected to a public or other EPA-approved sewer system . . . ." 21 GCA §

//

//

//

[11] **§ 62501. Required Improvements.** The subdivider *shall provide the following improvements* and improvement areas within time limits specified by the Commission:

. . . .

> (e) Sanitary Sewage Disposal. When sanitary sewers are provided in a subdivision, *they shall be in conformity to plans prepared by the subdivider satisfactory to the Commission.* When sewers are placed within a subdivision, the minimum permissible lot size shall be as determined by the applied zoning district, or in the absence of zoning, shall be not less than seven thousand (7,000) square feet. In subdivisions where sanitary sewers are not provided, the minimum permissible lot size shall be determined by the slope and characteristics of the subdivision soil and subsoil but in no event shall be less than is established by the applied zoning district, or in the absence of zoning, seven thousand (7,000) square feet. Determination of lot size shall be made on the basis of soil percolation tests made in conformity to standards adopted by the Commission. Lot sizes, including area and minimum widths and depths shall be related to the ability of the subdivision lands to accept the anticipated septic tank effluent whereby no sanitary problem will be created. The Commission shall establish criteria relating lot sizes and shapes to tested rates of seepage, and all lots created after the enactment of this Chapter shall conform thereto.

21 GCA § 62501(e) (2005) (emphasis added).

62105(a) (2005).[12]

[43] For a more detailed description of the type of sewer infrastructure required in a particular subdivision, one must look to the subdivision plan, which is required of all subdividers and approved by the Territorial Land Use Commission. *See* 21 GCA §§ 62201, 62203-62206, 62401-62402, 62501(e) (2005). The subdivision plan is less a contract between a developer and the subdivision's residents than it is a license allowing a developer to legally develop and sell subdivision property in Guam. *See* 21 GCA § 62304 (2005) ("Upon final approval of a[n] . . . agricultural subdivision map . . . the subdivider shall record the map in conformity to [the Subdivision Law]"); 21 GCA § 62107 (2005) ("No subdivider shall subdivide any land . . . or sell . . . any lot . . . therein until the record map has been officially recorded."). As such, the subdivision plan defines the subdivider's obligations without requiring a separate contractual relationship between the subdivider and the homeowners.

[44] Cyfred's specific obligations with regard to the sewer lines are set forth in the ASSM. *See* 21 GCA § 62107. According to the ASSM, Cyfred is "responsible for placement and construction of the SEWER, WATER, FIRE HYDRANTS, POWER and TELEPHONE . . . ." Appellants' Br. at. 10. Cyfred, as a subdivider, had a statutory obligation to install water and sewer lines and to install them according to the plan set forth in the ASSM. By law, anyone who agrees to make water or power available to a property must do so within one year. 21 GCA §

[12] In addition, Rural Zone (A) properties are required to have a sewer system if the lot sizes are smaller than 19,200 square feet, as they are in the Gill-Baza subdivision, see Appellees' Br., app. B.

> The lot areas per dwelling unit in the Rural Zone (A) shall not be less than nineteen thousand two hundred (19,200) square feet without sewer connection only if located on top of the Northern Aquifer. The lot area per dwelling unit in the Rural Zone (A) shall not be less than nine thousand six hundred (9,600) square feet with sewer connection, if located on top of the Northern Aquifer.

21 GCA § 61501(a) (2005). While we take judicial notice that the Gill-Baza subdivision is on top of the Northern Aquifer, we cannot say whether the subdivision is Rural Zone (A) without reference to the ASSM. Unfortunately, the Homeowners did not submit a copy of the ASSM as part of their Excerpts of Record.

60314(f). Because it would be nonsensical to hold a person who is *obligated* to install sewer lines to a lesser standard than one who merely *agrees* to install them, we hold that a subdivider must also install the water and sewer lines within one year. In fact, the only purpose for the qualifying phrase "If the transferor agrees to make water or power or sewer available . . ." is to allow undeveloped property to be freely transferred on Guam. *Id.* By requiring subdividers to install water and sewer lines, the Legislature clearly intended that subdividers would *not* be allowed to transfer undeveloped property, which might result—as it has in this case—in families living under unsanitary and unhealthy conditions.

[45] "Statutory or ordinance provisions in effect at the time a contract is executed become as much a part of the contract as if incorporated therein." *Marriott v. Harris*, 368 S.E.2d 225, 233 (Va. 1988) (referring to a statutory obligation by developers to install infrastructure in subdivisions). It follows that *all* of the Gill-Baza residents who failed to receive sewer and water lines within one year as required by 21 GCA §§ 62108, 60314 and the ASSM would be able to select from the remedies of damages or rescission under 21 GCA §§ 60314(f)(1) and (2). Some Homeowners, such as the Sananaps, have already chosen their remedy. We leave it to the Superior Court to determine how to apply these remedies to those Homeowners who have not yet received final judgment.

[46] One minor point must also be addressed. The court below made a preliminary determination that Enrique Baza and Eleanor Perez had signed the ASSM after it had transferred the property to Cyfred. ER, Tab 23 at 10 (Dec. & Order, Mar. 19, 2007). The court then concluded that Cyfred was not bound by the ASSM because it had been signed by parties who were not in possession of the Gill-Baza subdivision at the time of signature. *Id.* However, Cyfred continued to sell property, build houses, and install infrastructure after it purchased the

subdivision, and at all times conducted itself as a legally authorized subdivision developer. Cyfred is therefore estopped from now asserting that it is not bound by the conditions set forth in the mandatorily required subdivision plan. *See* 21 GCA §§ 62201-62209, 62401-62402, 62501(e) (2005). To hold otherwise would allow developers to avoid the mandatory requirements of our subdivision laws by simply failing to have the proper parties sign the subdivision plan.[13]

2. The Negotiable and Unconditional Nature of the Promissory Notes is Not Relevant

[47] In the March 19, 2007 Decision and Order, the Superior Court determined that the promissory notes signed by the Homeowners were unconditional promises to pay and that the Homeowners therefore had no valid defense to the payment of the note. ER, Tab 23 at 12-19 (Dec. & Order, Mar. 19, 2007). The court cited to *Bank of Viola v. Nestrick*, for the proposition that "a promise will be held unconditional whenever it is possible to do so without doing violence to the ordinary meaning of the language used." 390 N.E.2d 636, 638 (Ill. App. Ct. 1979); *see also* 10 C.J.S., *Bills and Notes* § 102 (2007). This is because "[n]egotiability is favored in the law." *Bank of Viola*, 390 N.E.2d at 639. The court then correctly asserted that "[u]nder 13 GCA § 3105(2)(a), a promissory note is deemed conditional if it is expressly made 'subject to' the terms of another agreement." ER, Tab 23 at 13 (Dec. & Order); *see* 13 GCA § 3105(2)(a) (2005) ("A promise or order is not unconditional if the instrument (a) States that it is subject to or governed by any other agreement. . . ."). Finally, the court concluded that because the Sananaps' promissory note contains no express reference to a contract to build a sewer line, it is an unconditional promise to pay. ER, Tab 23 at 14 (Dec. & Order).

[13] Moreover, if Cyfred did indeed develop the Gill-Baza subdivision without a valid subdivision plan, it would be subject to a violation under 21 GCA § 62701.

[48] The court relied heavily on *Burch v. Ashburn*, 368 S.E.2d 82 (S.C. Ct. App. 1988). ER, Tab 23 at 15-16 (Dec. & Order). In *Burch*, the parties entered into a partnership agreement that involved a promissory note as consideration. 368 S.E.2d at 83. The South Carolina Court of Appeals made the following analysis in determining that the promissory note was an unconditional promise to pay:

> [T]he terms of a separate agreement will not be read into a note so as to destroy its negotiability nor to limit the rights of a holder in due course who took without notice of any claims, defenses, or limitations arising from the separate agreement. [Citations omitted.] Likewise, a separate agreement may not be used to contradict the unambiguous terms of the note. [Citation omitted.] And the terms of a separate agreement which is not intended to affect the note at all may not be used to defeat enforcement according to its own tenor, even though the note and the agreement arise from the same transaction. [Citation omitted.]

Id. at 84. This analysis is certainly consistent with Guam law, which presumes, absent an express provision to the contrary, that a note is unconditional. *See* 13 GCA § 3105(1) (2005). This allows a "holder of an instrument whether or not he is the owner [to] transfer or negotiate it and . . . discharge it or enforce payment in his own name." 13 GCA § 3301 (2005).

[49] The law of negotiable instruments is designed to protect "holder[s] in due course who [take] without notice of any claims, defenses, or limitations arising from the separate agreement." *Burch*, 368 S.E.2d at 84; *see also* 13 GCA § 3305 (2005) (rights of a holder in due course). For example, in *Marriott v. Harris*, a developer failed to install roads, water lines, and sewage facilities. 368 S.E.2d 225, 227-28 (Va. 1988). The developers in *Marriott* transferred the homeowners' promissory notes to a third-party bank before the required infrastructure became statutorily due. *Id.* at 239. The homeowners ceased making their monthly payments and the third-party bank attempted to foreclose. *Id.* at 227-28. The Virginia Supreme Court reasoned that because the notes were negotiable and had been transferred to a holder in due course, the

homeowners had no defense to enforcement of the promissory notes. *Id.* at 237-39. Although factually similar to the present case, *Marriott v. Harris* is distinguishable in that the promissory notes were in the possession of a holder in due course. Cyfred, on the other hand, was not a holder in due course because it clearly had notice of the Homeowners' claims and defenses to payment. *See* 13 GCA § 3302(1) (2005) ("A holder in due course is a holder who takes the instrument . . . [w]ithout notice . . . of any defense against or claim to it on the part of any person."). Moreover Cyfred was, and still is, a party to the contract at issue in the present case.

[50] *Burch* is perhaps more factually similar to the present case in that the holder of the promissory note was also a party to the original contract. 368 S.E.2d at 83. At the time, South Carolina had a statutory provision similar to 8 GCA § 3306 that allowed a defense of "failure of consideration" against "any person not having the rights of a holder in due course." S.C. Code 1976 § 36-3-408, *amended by* 2008 S.C. Act 204 (S.B. 936); *compare* 8 GCA § 3306 (2005) ("Unless he has the rights of a holder in due course any person takes the instrument subject to . . . [t]he defense[] of want or failure of consideration . . . ."). Although the court in *Burch* did not find it necessary to determine whether the promissee was a holder in due course, it determined that such a defense would fail because the party had received full consideration (a one-half undivided interest in the partnership) in exchange for the promissory note. 368 S.E.2d at 84. This suggests that earlier language in the opinion referring to negotiable, unconditional instruments was dicta, since the court never determined whether the promissee was truly a holder in due course. *Id.* at 84.[14] The Superior Court therefore misapplied language in *Burch* that would only have applied to a holder in due course and not to Cyfred.

[14] Moreover, the promissor was asserting a *complete* defense to the promissory note, that is, that the note should be forgiven. *Burch*, S.E.2d at 83-84. The argument of the present case—that payments may be suspended due to material breach—was never analyzed in *Burch*.

[51] To be fair, the Superior Court eventually turned its discussion to 13 GCA § 3306. ER, Tab 23 at 17-19 (Dec. & Order). Title 13 GCA § 3306 describes the limitation on the rights of a holder of a promissory note who is not a holder in due course:

> **§ 3306. Rights of One Not Holder in Due Course.** Unless he has the rights of a holder in due course any person takes the instrument subject to
>
> (1) *All valid claims to it on the part of any person*; and
>
> (2) *All defenses of any party which would be available in an action on a simple contract*; and
>
> (3) *The defenses of want or failure of consideration (Section 3408), nonperformance of any condition precedent*, nondelivery, or delivery for a special purpose . . . .

13 GCA § 3306 (2005) (emphasis added). It is clear from the wording of this statute that holding a promissory note does not insulate one from other claims arising from a larger contract for which the note is merely consideration. This is true both of claims arising under a contract, 13 GCA § 3306, and of claims arising from a violation of the DTPA. *See Rivera Motors, Inc. v. Higbee*, 609 P.2d 369, 372-73 (Or. Ct. App. 1980) (interpreting Oregon's version of 13 GCA § 3306 and finding that violation of the Oregon Unlawful Trade Practices Act was a defense to recovery under a check made out for unnecessary automobile repairs). The negotiable or unconditional nature of the Homeowners' promissory notes does not insulate the present controversy from analysis under either the DTPA or the law of contracts.

3. The Homeowners Received Good Title

[52] Scattered within the Homeowners' Opening Brief is an argument that Cyfred failed to deliver good title to the Homeowners. The Homeowners' interpretation of the ASSM is that a certificate of title cannot be issued unless the infrastructure is provided, which results in a "substantial defect of title." Appellants' Br. at 20 n.13. They point to the language of the ASSM itself:

> We, the undersigned, Owners of Tract 63004 (Formerly Lot 10102-16), acknowledge that we are responsible for placement and construction of the SEWER, WATER, FIRE HYDRANTS, POWER and TELEPHONE, as provided for by 21 GCA 61501, 62105(a), 62108(c), 62108.1, 62502(a), 62502(b), 62502(c) and 62503 and that we indemnify the Government against any responsibility or claim to so construct, further that *the issuance of a certificate of title based on any sale or transfer of land subdivided hereunder shall be contingent upon the completion of construction of the above infrastructures*, and that *this condition shall run with the land*, and that *any contract of sale, deed or other similar documents given to any purchaser or transferee shall give notice of this condition.*

Id. at 10 (emphasis added). The Homeowners also point to 21 GCA § 60314(f) which requires that "[i]f the transferor agrees to make water or power or sewer available to the property, such shall be stated in the document transferring an interest in the property . . . ." 21 GCA § 60314(f). They do not explain how this "statutory disclosure requirement" renders their title defective. Appellants' Br. at 13.

[53] In the ASSM, the Department of Land Management clearly indicates that it will not issue a certificate of title to the individual lots until Cyfred completes construction of the required infrastructure. *Id.* at 10. It is unknown whether certificates of title were ever issued to the Homeowners, but one can assume, for the moment, that they were not. *See* ER, Tab 17 at 11 (Finds. Fact & Concl. L., Jan. 15, 2007) ("Plaintiffs have failed to offer anything more than speculation as to the status of their title."). However, the ASSM does contemplate that "sale or transfer of land" would occur prior to the issuance of the certificate of title. Appellants' Br. at 10. This is because under Guam law, ownership of real property does not require a certificate of title. *See Zahnen v. Limtiaco*, 2008 Guam 5 ¶ 25.

[54] Title 21 GCA § 4101 states in part that "[a]n estate in real property . . . can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized in writing." 21 GCA § 4101 (2005). For example,

title can be transferred by a simple warranty deed or quitclaim deed. A certificate of title, on the other hand, is evidence that a titleholder's interest has been recorded under Guam's Land Title Registration Act. *See* 21 GCA §§ 29101-29206. A certificate of title is acquired later, after title has already been conveyed by another instrument:

> A registered owner of land desiring to transfer his whole estate *or interest therein, or some part or parcel thereof . . . may execute an instrument of conveyance in any form authorized by law for that purpose.* Upon filing such instrument at the registrar's office, and surrendering to the registrar the duplicate certificate of title, the transfer shall be complete and the title so transferred shall vest in the transferee; thereupon, the registrar shall issue in duplicate . . . a new certificate . . . .

21 GCA § 29149 (2005) (emphasis added). The "title so transferred" referenced in 21 GCA § 29149 should be read to mean "registered title" and does not imply that only registered deeds are capable of legally transferring title. As we stated in *Zahnen v. Limtiaco*:

> Although an unregistered deed is not afforded the same protections as a registered one, for example, protection from adverse possession, see 21 GCA § 29140, it does not follow that an unregistered deed is somehow an imperfect vestment of title. Rather, as the law clearly states, "[a]n unrecorded instrument is valid as between the parties thereto and those who have notice thereof." 21 GCA § 37105.

2008 Guam 5 ¶ 25. It follows that the Homeowners would not have defective title even if it were alleged that they are unable to obtain a certificate of title from the Department of Land Management.

G. Application of the Relevant Contract Laws

1. The Homeowners were entitled to Suspend Performance

[55] A basic principal of contract law is that "[i]f one party has failed to perform the bargained for exchange, the other party may be relieved of a duty to continue its own performance, where the failure is material and unexcused." *Converse v. Zinke*, 635 P.2d 882, 887 (Colo. 1981); *see also* Restatement (Second) of Contracts § 237 (1981). Although the Uniform Commercial Code

and 13 GCA § 3306 use the related term "failure of consideration,"[15] we will use the more conventional term "material breach" in the belief that the terms are interchangeable as a defense to continuing performance. *See* Restatement (Second) of Contracts § 237, cmt. a (preferring the term "failure of performance"); *cf. Bailie Comm., Ltd. v. Trend Business Sys.*, 765 P.2d 339, 342 (Wash. Ct. App. 1988) ("A material breach suspends the injured party's duties until the breaching party cures the default." (citing Restatement (Second) of Contracts §§ 237, 241 (1981)). For the purposes of the present dispute, the central issue is whether Cyfred's failure to install sewer lines was a material breach. If so, Cyfred's failure would allow the Homeowners to suspend their promises to make regular payments on their promissory notes during the period of the breach.

[56] The Homeowners are not arguing that their promissory notes should be forgiven or that their total debt should be reduced. Instead, they argue that they were justified in suspending payments once Cyfred materially breached its promise to install sewer lines. A more substantial showing of *total* failure of consideration would only be necessary if the Homeowners were seeking to cancel their promissory notes completely. *See Tri-D Acceptance Corp. v. Scruggs*,

[15] Failure of consideration appears to have a slightly different meaning when applied as a *complete* defense to enforcement of a promissory note and mortgage:

> Failure of consideration can be total or partial. A partial failure of consideration occurs when only a part or portion of the consideration originally contemplated by the parties actually moved from obligee to obligor. A total failure of consideration, on the other hand, happens when a party has failed or refused to perform a substantial part of what the party agreed to do.

Fed. Land Bank v. Woods, 480 N.W.2d 61, 66 (Iowa 1992) (citations and quotation marks omitted). The remedies differ for partial or total failure in that "[a] mortgage ceases to be an enforceable security when the consideration fails [totally], and where there is a partial failure of consideration the mortgage becomes unenforceable to the extent of such failure." *Midwest Fed. Sav. and Loan Ass'n of Minot v. Miller*, 349 N.W.2d 19, 21 (N.D. 1984) (quoting 59 C.J.S. *Mortgages* § 96 (1949)). Thus, when a mortgagee fails "to perform a substantial part of what [the mortgagee] agreed to do," the mortgage is no longer enforceable. *Woods*, 480 N.W.2d at 66. On the other hand, when the mortgagee fails to provide "only a part or portion of the consideration originally contemplated," then the mortgage is enforceable, but can only be enforced up to the amount actually owed. *Id.; see also* 13 GCA § 3408 (2005) (stating in reference to defense against enforcement of promissory notes that "[p]artial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount"). Here, the Homeowners are justifying their suspension of payments, not defending against their debt owed to Cyfred.

223 So. 2d 273, 274-75 (Ala. 1969) (affirming a permanent injunction against foreclosure where a company had promised to repair a house in exchange for a mortgage, and only a small portion of the repairs were actually completed); *see also supra*, note 14.

[57] The factors to be considered in determining whether a breach is material are:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Seherr-Thoss v. Seherr-Thoss, 2006 WY 111 ¶ 14, 141 P.3d 705, 713 (Wyo. 2006) (quoting Restatement (Second) of Contracts § 241). Although these are all factors to be considered, the most important inquiry is the first one—that is, to determine the extent to which the Homeowners did not get the benefit of their bargain after Cyfred failed to install the sewer lines. *Cf. Ranes v. Am. Family Mut. Ins. Co.*, 580 N.W.2d 197, 200 (Wis. 1998) ("For a breach to be material, it must be so serious to destroy the essential object of the agreement.").

[58] The Homeowners received title to a house, water lines, and power connections. They did not receive the sewer lines that were owed them. In pure economic terms, the sewer lines represent only a fraction of the total consideration that was given them in exchange for the mortgages and promissory notes. Oftentimes, when most, but not all, of a bargain has been completed, courts will find that a material breach has not occurred. *See, e.g., Converse*, 635 P.2d at 887 (holding that the disrepair of 71 out of 273 rental items did not amount to "a breach

sufficient to relieve the injured party of the duty of performance" to pay the promissory note used to purchase a rental business); *Moss v. Moss*, 959 So. 2d 375, 377 (Fla. Ct. App. 2007) (payment made three days late found to be immaterial breach of child support contract). However, the standard is not the relative economic cost of the breach as compared with the completed portion of the contract—the standard is whether the breach "defeats the object of the parties entering into the contract." *Kim v. Park*, 86 P.3d 63, 66 (Or. App. 2004) (quoting *Bisio v. Madenwald*, 576 P.2d 801, 804 (Or. Ct. App. 1978)). Cyfred's failure to install sewer lines had an effect out of proportion to its economic value in defeating the Homeowners bargained-for consideration of a habitable home.

[59] In an analogous case, *Kim v. Park*, buyers of an apartment building had a contract that required the vendor to bring the building's plumbing up to code within eight months of purchase. 86 P.3d at 65 (Or. App. 2004). The vendor failed to do so, and the apartment building lost tenants and received citations from the city. *Id.* at 66. The court found that "the failure of [the vendor] to make the repairs in accordance with the contract ultimately prevented [the buyers] from using the building as intended by the parties' agreement." *Id.* The failure to timely repair the plumbing was therefore found to be a material breach as a matter of law. *Id.* As a result, the buyer's failure to make payments after the breach was justified, and the building was not subject to strict foreclosure. *Id.* at 66-67.

[60] The Homeowners have been forced to rely on portable toilets for years. They have also found themselves in violation of Guam's health codes and were at one point subject to government eviction. In short, the homes they bargained for are effectively uninhabitable. Cyfred's failure to timely install the sewer lines has therefore deprived the Homeowners of the essential benefit of their bargain. As a result, the Homeowners were justified in refusing to make

further payments on their promissory notes until the situation was rectified or damages for their loss were awarded to them.

2. The Sananaps' Late Payments did not Relieve Cyfred of its Obligation to Install Sewer Lines

[61] The court below determined that the Sananaps were $1,162.53 behind in their payments to Cyfred at the time the sewer line was required to be installed. ER, Tab 17 at 17-18 (Finds. of Fact & Concl. of L., Jan. 15, 2007). Without reaching the issue of materiality, the court then concluded that the Sananaps' breach justified Cyfred's refusal to install a sewer line. *Id.* We disagree.

[62] Cyfred's obligation to install sewer lines is mandated by statute and by reference to the subdivision plan. *See* 21 GCA §§ 62108, 62591, 60314(f). The Legislature has also provided time limits within which improvements such as sewer lines must be made:

> **§ 62504. Time Allowed for Completion of Improvements.** Upon approval of the tentative subdivision plan by the Commission, the subdivider shall complete within one (1) year all of the improvements required, except that the Commission, for good cause shown, may authorize an extension of time, not to exceed twelve (12) months, for such completion. Within such time, the subdivider must either:
>
> > (a) Complete the required improvements and, upon acceptance thereof by the government, file his final plans; or
> >
> > (b) Furnish bond acceptable to the Commission of the completion of improvements, *the bond to be in penal sum of one hundred fifteen percent (115%) of total work costs* as verified by the Director of Public Works. On approval of the bond, the final plans may be filed.

21 GCA § 62504 (2005) (emphasis added). Unlike 21 GCA § 60314(f), which provides the traditional contract remedies of damages or rescission when improvements are delayed, 21 GCA § 62504 provides that the subdeveloper pay a penal cost of one hundred fifteen percent (115%) of the total work costs. The obligation to timely install sewer lines must therefore be viewed as a

mandatory requirement of the Subdivision Law that can be remedied not just with damages, but with punitive sanctions as well.

[63] "It is a long-held, and well-settled, general principle of contract law that contract remedies are to be compensatory, not punitive." *Barrie Sch. v. Patch*, 933 A.2d 382, 295 (Md. 2007) (Bell, J., dissenting) (citing Restatement (Second) of Contracts § 356). This suggests that it would be error to interpret Cyfred's obligation to install sewer lines in a purely contractual way. In fact, the time limits of 21 GCA § 62504 would seem to apply even to empty, unsold lots. Certainly a subdeveloper's obligation to connect sewer lines to an ownerless home would have nothing to do with any contractual relationship between the subdivider and the non-existent owner. Rather, the obligation is to the Territorial Land Use Commission. *See* 21 GCA § 62504. As a result, the Homeowners' failure to make payments to Cyfred would have no effect on Cyfred's obligation to timely install the required infrastructure.

[64] This view also comports with the purpose and function of the Subdivision Law, which is described as follows:

> [T]o provide for the orderly growth and harmonious development of the territory; . . . to achieve individual property lots of maximum utility and livability; to secure adequate provisions for water supply, drainage, sanitary sewerage and other health requirements . . . .

21 GCA § 62102 (2005). Adequate sewer lines are required not only for the health and safety of a home's occupants, but also for the health and safety of the surrounding community. The obligation extends to the subdivision as a whole and is not contingent on an individual homeowner's promise and ability to pay. *See* 21 GCA § 62504. If installation of sewer lines were merely contingent on a homeowner's continued timely payments, the whole community would suffer from the delinquencies of individual homeowners. In addition, the subdivision would devolve into a patchwork of partially livable, partially unlivable homes. The result would

be a community of residents living under unsanitary and unhealthy conditions, much like the subdivision here.

[65] A more difficult question is whether Homeowners like the Sananaps who missed payments during the first year can still claim the right to suspend payments at the end of that year. In other words, can the first party to commit a material breach claim a right to suspend performance resulting from a later material breach? The question is a difficult one that does not normally present itself, as in most cases the "second breach" would be a justified suspension of performance. *See Converse*, 635 P.2d at 887. Here the "second breach" after the Sananaps' late payments was Cyfred's failure to install the sewer line, which was not justified because it breached Cyfred's obligations under the ASSM and the Subdivision Law. *See* 21 GCA §§ 60314, 62504.

[66] Our view is that the first party to commit an uncured material breach should not be able to claim a right to suspend performance resulting from a later material breach, even if the later breach is unexcused. *Cf.* Restatement (Second) of Contracts, § 237, cmt. b (explaining why the first party to materially breach a contract is held liable). This rule is a reasonable extension of Missouri's "first to breach" rule, which states that "[a] party to a contract cannot claim its benefit where he is the first to violate it." *Forms Mfg., Inc. v. Edwards*, 705 S.W.2d 67, 69 (Mo. Ct. App. 1985). If a materially breaching party cannot claim benefit from the contract, then likewise, a materially breaching party cannot invoke the right to suspend performance after a later material breach. However, "determination of the first to breach does not end the analysis, . . . as only a material breach may excuse the other party's performance." *R.J.S. Sec., Inc. v. Command Sec. Servs., Inc.*, 101 S.W.3d 1, 18 (Mo. Ct. App. 2003). The only remaining question, therefore, is whether the Sananaps or others were in material breach of their agreement

with Cyfred due to late payments made during the first year. If the breach was material, then Cyfred's later breach did not relieve those Homeowners of their obligation to continue payment beyond the first year.

[67] "[C]ourts and commentators have long recognized that materiality is primarily a question of fact, the resolution of which is necessarily a function of context and circumstances." *Dopp v. Pritzker*, 38 F.3d 1239, 1244 (1st Cir. 1994) (citing, inter alia, 2 E. Allan Farnsworth, Farnsworth on Contracts § 8.16, at 443 (1990)) ("Whether a breach is material is a question of fact."). For this reason, the number and amount of late payments does not, by itself,[16] decide the issue of materiality. One must look instead to the bargain itself. Clearly, Cyfred did not receive the full number of monthly payments it had bargained for. On the other hand, the "context and circumstances" of the contract at issue here suggest that other considerations might also be important in determining whether the Sananaps' breach was material. *Dopp*, 38 F.3d at 1244.

[68] First, the Restatement indicates that courts should consider the "extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived" in determining whether a breach is material. Restatement (Second) of Contracts § 241(b). The Sananaps' $1,162.53 overdue debt resulted from two missed monthly payments of $396.53 during a one year period. ER, Tab 17 at 17-18 (Finds. Fact & Concl. L., Jan. 15, 2007). The rest of the balance consisted of late fees. *Id.* Cyfred was thus partially compensated for the

[16] The case law suggests that a single late payment does not constitute a material breach. *See, e.g., Moss v. Moss*, 959 So. 2d at 377 (Fla. Ct. App. 2007) (payment made three days late was found to be an immaterial breach of a child support contract); *Mills v. Marquard & Assoc.*, 2003 WL 21321723 *5 (Minn. Ct. App. 2003) (payment of out-of-pocket expenses after leaving a law firm rather than at the time of leaving was not a material breach). On the other hand, multiple failures in making payments will often constitute a material breach. *See, e.g., In re Ogden Howard Furniture Co.*, 35 B.R. 209, 210 (Bankr. Del. 1983) (tenants' long history of deficiencies and irregular payments constituted a material breach of their covenant to pay rent); *Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 389 N.E.2d, 133, 115 (N.Y. 1979) ("by failing to tender payment of two monthly rental payments or even offering to cure the default, defendant tenant was in willful breach of a material term of the lease").

breach in that the Sananaps became liable for late fees in addition to the debt they originally owed Cyfred. Moreover, Cyfred should be allowed to offset any damages due by the amount owed during the first year but never paid.

[69] Second, the Restatement indicates that one must examine "the extent to which the party failing to perform or to offer to perform will suffer forfeiture" if the non-breaching party's obligations are suspended. Restatement (Second) of Contracts § 241(c). Here, we must examine the consequences of declaring the Sananaps' breach to be material. If the breach were material, the Sananaps would forfeit their right to suspend their payments once Cyfred failed to install their sewer line. The Sananaps would then be forced to continue paying their loan, even after their home became effectively uninhabitable. Such a forfeiture of rights would be grossly out of proportion to the significance of missing two monthly payments.

[70] Third, we are not convinced that the timing of Cyfred's breach can be established with pinpoint precision. Timing is relevant because only those missed payments that occurred before Cyfred's breach could be considered an unjustified breach. While the sewer line became due exactly twelve months after purchase, Cyfred was clearly unprepared to meet its obligations at that time—indeed it has yet to install the sewer lines six years later. As the deadline for installation of the sewer lines loomed, the Homeowners must have been aware that no trenches were being dug, no heavy equipment was operating, and no pipes were being transported to the site for installation. Sewer lines are not typically installed in a single day, and the Homeowners may have seen the lack of preparations and anticipated that Cyfred had no intention of meeting it obligations. In other words, only evidence of significant preparation for construction would have provided the Homeowners with adequate assurances that the sewer lines would be timely installed. *See* Restatement (Second) of Contracts § 251(1) ("Where reasonable grounds arise to

believe that the obligor will commit a breach by non-performance . . . the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance."). Without such preparations, the Homeowners would have been justified in suspending performance at some point toward the end of the first year in anticipation of a likely breach. *See C.L. Maddox, Inc. v. Coalfield Servs., Inc.*, 51 F.3d 76, 81 (7th Cir. 1995) (finding that anticipation of plaintiff's breach justified suspending performance). Later Homeowners who observed their earlier neighbors failing to timely receive sewer lines might have anticipated Cyfred's breach even sooner.

[71] Considering all the relevant factors, we do not find that the Sananaps' two missed payments during the first year rise to the level of a material breach. The approximately six years of missed payments that occurred after Cyfred's material beach can therefore be justifiably excused. However, we lack sufficient information to determine whether the same conclusion applies to the other Homeowners. On remand, the court below must apply the above reasoning to any Homeowners who missed payments during the first year. The court should consider the extent to which Cyfred was deprived of its bargain, the extent to which Cyfred can be adequately compensated for its loss, the extent to which the Homeowners will suffer forfeiture, and all other relevant factors mentioned above. The court should also consider the timing of Cyfred's breach and the time at which the breach was anticipated in deciding which missed payments occurred before the breach.

[72] Because the Sananaps' suspension of payments after the first year was justified, their unexcused debt to Cyfred at this time amounts to only two missed payments and late fees. As a result, the Sananaps are likely to eventually succeed in avoiding foreclosure on their home.

Given the strong likelihood of succeeding on the merits and the irreparable injury that would result from foreclosure, the Superior Court abused its discretion in denying the Sananaps a preliminary injunction against foreclosure.

[73] By comparison, those Homeowners, if any, who are found to have been in material breach during the first year cannot claim to have justifiably suspended their payments after Cyfred's breach occurred. Because those Homeowners may now owe six or more years' worth of missed payments, Cyfred will likely succeed in foreclosing on their property. It would not amount to an abuse of discretion to deny a preliminary injunction to a Homeowner found to be in material breach prior to Cyfred's breach. We leave it to the Superior Court to determine whether such Homeowners exist on a case-by-case basis.

[74] Finally, we remind the trial court that Cyfred's obligation to install sewer lines does not depend on whether the Homeowners breached their portion of the agreement. The Homeowners possible material breaches are only relevant in determining whether their payments could later be suspended. All the Homeowners, whether receiving a preliminary injunction or not, can receive a remedy under 21 GCA § 60314(f) subject to offset by any unexcused debt still owed to Cyfred.

3. The Homeowners' Payments must Resume once Cyfred Satisfies the Judgment

[75] Title 21 GCA § 60314(f) only provides two remedies in the event of a breach: (1) rescission, whereby the Homeowners can give up their property and be restored to their position prior to the contract; or (2) compensatory damages, costs, and attorneys' fees, whereby the Homeowners can collect a judgment and build the sewer lines themselves.[17] Once those Homeowners who chose the remedy of damages actually receive the money necessary to

[17] These remedies are not exclusive, however. We held in *Abalos* that damages under the DTPA, for example, may also be sought in addition to the remedies described in 21 GCA § 60314(f). *Abalos*, 2006 Guam 7 ¶¶ 53-58. It is reasonable to assume that specific performance would also be an available remedy.

construct the sewer lines, Cyfred will have no further obligation to construct the sewers lines itself. Thereafter, those Homeowners will be required to resume their payments to Cyfred. *See Kim v. Park*, 86 P.3d at 67 ("When plaintiff's material breach is cured by the satisfaction of the judgment for damages awarded to defendants, defendants' obligation to make the payments due under the contract will resume.").

4. Installation of the Incorrect Diameter Water Pipes was not a Material Breach

[76] One might argue that Cyfred's failure to install the correct diameter water pipes, as the Homeowners allege, would also be a material breach of contract. If so, the Homeowners would be justified in suspending payments until they receive satisfaction of judgment on the issue of water lines. However, water lines do exist at the moment, and there is no indication that the Homeowners are subject to eviction because they were incorrectly installed. Even if true, defective but functional water lines would not rise to the level of a material breach. Instead, the installation of defective water lines would likely be a non-material breach that should be remedied by damages or a reduction in the Homeowners' overall debt. *See Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 270 F.3d 1117, 1126 (7th Cir. 2001) (reciting the rule that partial failure of consideration is remedied *pro tanto*).

IV. CONCLUSION

[77] We **DENY** the motion which argues that this appeal should be dismissed as untimely. In order to protect our jurisdiction, we hereby **GRANT** the motion to set aside the foreclosures that occurred on May 17, 2007 and **VACATE** the resulting foreclosure deeds. Although an injunction under the DTPA is not an appropriate remedy under the facts of this case, we find that the Homeowners have demonstrated a threat of irreparable injury and a likelihood of succeeding on the merits of their claim. Specifically, we find that Cyfred was obligated to install sewer lines

for all the Homeowners, that the Sananaps were justified in suspending their payments to Cyfred after Cyfred's breach, and that the Sananaps are likely to succeed in avoiding foreclosure on their home. The order denying the Sananaps the preliminary injunction they seek is therefore **REVERSED** and the matter is **REMANDED** for additional proceedings consistent with this opinion.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Richard H. Benson**
RICHARD H. BENSON
Justice, *Pro Tempore*

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice