IN THE SUPREME COURT OF GUAM

KINI B. SANANAP AND IOWANA SANANAP ET AL.,
Plaintiffs-Appellees,

v.

CYFRED, LTD.,
Defendant-Appellant.

Supreme Court Case No. CVA09-014
Superior Court Case No. CV1448-02

OPINION

Cite as: 2011 Guam 21

Appeal from the Superior Court of Guam
Argued and submitted October 14, 2009
Hagåtña, Guam

Appearing for Defendant-Appellant:
Curtis C. Van de veld, *Esq.*
Historic Bldg., Second Fl
123 Hernan Cortes Ave.
Hagåtña, GU 96910

Appearing for Plaintiffs-Appellees:
Wayson W.S. Wong, *Esq.*
196 Hesler Pl, Apt. A-1
Hagåtña, GU 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO[1], Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendant-Appellant Cyfred, Ltd. ("Cyfred") appeals from a post-judgment Decision and Order allowing a writ of execution to enforce a monetary judgment for failure to install sewer lines in the Gill-Baza Subdivision. For the reasons set forth herein, we affirm the trial court's order to issue the writ of execution.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The underlying dispute in this case has been before this court multiple times on appeal, and the details are fully described in our prior opinions. *See Yanfag v. Cyfred, Ltd.*, 2009 Guam 16; *Abalos v. Cyfred, Ltd.* (*Abalos II*), 2009 Guam 14; *Sananap v. Cyfred, Ltd.* (*Sananap II*), 2009 Guam 13; *Sananap v. Cyfred, Ltd.* (*Sananap I*), 2008 Guam 10; *Abalos v. Cyfred, Ltd.* (*Abalos I*), 2006 Guam 7. To summarize, Cyfred sold lots in the Gill-Baza Subdivision but failed to install sewer lines. *See Sananap II*, 2009 Guam 13 ¶ 2; *Sananap I*, 2008 Guam 10 ¶ 2. Kini and Iowana Sananap, the purchasers of one of the lots, filed a complaint against Cyfred seeking compensatory damages. *See Sananap I*, 2008 Guam 10 ¶ 2. The Sananaps later moved to join, as additional plaintiffs, forty owners of thirty-three lots in the Gill-Baza Subdivision,[2] as

[1] On January 18, 2011, Associate Justice F. Philip Carbullido was sworn in as Chief Justice of the Supreme Court of Guam. The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

[2] The owners of thirty-three lots joined pursuant to the trial court's Decision and Order of May 5, 2006 are as follows: Sinfiano S. Soni, Divina Vaiau, Fine Indonesio, Serena Tiron Tithmed, David Waathdad, Stanley Yanfag, Raymond Martin, Rainis Rangi, Lynn Otiwii, Gabriel Baffel and Angelina Gurungin, Tnel Mori, Alex Ruben, Rose Ifram, Anis Sino, Margaret Yagatina and Junior Yowl, Harper Kimiena, Smither Ezra, John Lignaw, Joshua Peter and Daisy Narruhn, Marsala D. Martin, Christopher Nero, Alejo J. Untalan and Redsa Menas, Albert Kinasira, Santiago T. Wai and Dolores O. Wai, Martin Sontag, Renspar B. Alpert and Lasda R. Alpert, Martin Loretta, Justina Hartman, Sammy K. Sharep, Daria Kosam Tongan, Jennifer Topacio, Paul Kargon and Martina Rueman, and Margaret L. Fanoway. Appellant's SER at 12 n.2 (Dec. & Order, May 5, 2006).

well as United Pacific Islanders Corporation ("UPIC"), a nonprofit organization. Appellant's Supplemental Excerpts of Record ("Appellant's SER") at 9 (Dec. & Order, May 5, 2006). The Sananaps also filed a Motion for Partial Summary Judgment, seeking damages to construct sewer lines and correct the water lines they called defective. Record on Appeal ("RA"), tab 169 at 4 (Finds. Fact & Concl. L., Aug. 19, 2008). Cyfred did not oppose joinder of the additional landowners but objected to the joinder of UPIC. Appellant's SER at 6-8 (Pls.' Supp. Br. Re: Defs.' Auth., May 1, 2006). Cyfred further argued that, in addition to the individual residents of Gill-Baza, the Guam Waterworks Authority ("GWA") and other Government of Guam agencies are indispensable parties that must be joined. Appellant's SER at 2-3 (Opp'n Pls.' Mot. for Joinder, Apr. 17, 2006). The trial court granted joinder of the landowners of the thirty-three lots but denied joinder of UPIC. Appellant's SER at 13-14 (Dec. & Order, May 5, 2006).[3]

[3] Thereafter, the trial court granted partial summary judgment and issued an amended judgment (hereinafter "Sewer Judgment") in favor of six of the plaintiffs (hereinafter "judgment creditors") for approximately $580,000.00 in damages and $125,314.43 in attorney's fees and

[3] In its May 5, 2006 Decision and Order, the trial court did not address the joinder of the Guam Waterworks Authority and other Government of Guam agencies as indispensable parties. A month later, the trial court issued its Findings of Fact and Conclusions of Law on the motion for partial summary judgment and the motion for preliminary injunction wherein the trial court stated:

> Defendant argued on numerous occasions that the Court could not proceed to the motions because of absent parties. Defendant seemed to refer to the absence of both the 33 landowners and GWA saying they were indispensable. In the Court's view, though, Rule 19 would prohibit a ruling on the motions only if the 33 landowners and GWA could not be joined and if they were necessary. Here, Defendant has shown neither. The 33 landowners and GWA can be joined. In fact, the Court has already issued an order permitting joinder of the 33 landowners and the Court sees no reason why GWA could not be joined either. Joining the 33 landowners is just a matter of completing the procedures of Rule 15. Moreover, the Court believes it is authorized to address the motions here separately based on Rule 21 which states, ". . . Any claim against a party may be severed and proceeded with separately."

RA, tab 178 at 17 (Finds. Fact & Concl. L., Aug. 1, 2006) (internal citations omitted). The trial court also remarked that GWA is not a party to the lawsuit, thereby indicating that GWA was not formally joined as an indispensable party. *Id.* Cyfred did not file any written motions to join GWA or any other government agencies.

costs.[4] *Sananap II*, 2009 Guam 13 ¶ 6. Cyfred initially appealed both the damages and attorney's fees awards, but later amended its notice of appeal to challenge only the award of attorney's fees. *Id.* The other thirty-six named plaintiffs were not given recoveries in the Sewer Judgment. RA, tab 178 at 27-28 (Finds. Fact & Concl. L., Aug. 1, 2006). The trial court reasoned that these other plaintiffs could not recover in partial summary judgment because they had yet to show that Cyfred promised to install sewer lines[5] and a trial was necessary. *See id.* After a bench trial, the trial court issued its Findings of Fact and Conclusions of Law stating: "Now that Francis Gill admits to liability for the sewer line, the Court believes every proven owner at the Gill-Baza Subdivision has a right to part of the judgment." RA, tab 169 at 20-22 (Finds. Fact & Concl. L., Aug. 19, 2008) (internal citations omitted).

[4] In early 2009, Cyfred moved this court for a stay of enforcement and to post bond for the Sewer Judgment. ER at 3-4 (Order Staying Mandate, Feb. 24, 2009); ER at 10-11 (Order Denying Bond, Feb. 24, 2009). This court denied Cyfred's request for bond, and found that the "[h]omeowners are therefore free to execute their judgment." ER at 11 (Order Denying Bond, Feb. 24, 2009). Soon thereafter, the trial court granted the six judgment creditors' Motion to Issue a Writ of Execution against Cyfred. ER at 5-20 (Pls.' Mot. for This Ct. to Issue Writ of Execution, Mar. 3, 2009); ER at 29-34 (Dec. & Order, May 29, 2009). The May 29, 2009 Decision and Order is the subject of this appeal. ER at 29-34 (Dec. & Order, May 29, 2009).

[4] The judgment was based on the Motion for Partial Summary Judgment filed by the Sananaps for money to construct sewer lines along the Gill-Baza Subdivision. *See* RA, tab 169 at 31 (Finds. Fact & Concl. L., Aug. 19, 2008); ER at 2 (First Am. Judgment., Sept. 22, 2006). The six plaintiffs awarded the Sewer Judgment are Kini B. Sananap, Iowana M. Sananap, Stanley Yanfag, Raymond Martin, Anis Sino, and Martin Sontag. RA, tab 178 at 27-28 (Finds. Fact & Concl. L., Aug. 1, 2006).

[5] The trial court also denied summary judgment on the issue of repairing the water lines, finding that the plaintiffs failed to present an argument that the water lines violated a statute. RA, tab 169 at 6 (Finds. Fact & Concl. L., Aug. 19, 2008).

[5] According to the judgment creditors, the first writ of execution was signed by the trial judge on June 5, 2009. Appellees' Br. at 1 (Sept. 21, 2009). Cyfred moved to recall and quash the writ of execution, which the trial court orally granted. *Id.* at 2. Thereafter, a second writ of execution was issued. *Id.* Cyfred attempted to quash the second writ of execution as well, in part because the Sewer Judgment was not amended to include the thirty-six additional plaintiffs. *Id.* The trial court denied Cyfred's motion, and specifically rejected Cyfred's argument to include all appropriate plaintiffs because no written motion was made or case law cited to amend the Sewer Judgment. Appellees' Supplemental Excerpts of Record ("Appellees' SER") at 134 (Dec. & Order, Sept. 14, 2009).

II. JURISDICTION

[6] A threshold question we must address is whether this court has jurisdiction over this appeal. Cyfred appeals from the Decision and Order of May 29, 2009. ER at 37 (Not. of Appeal, June 5, 2009). That Decision and Order concludes as follows:

> By preponderance of the evidence and based on the foregoing reasons, the Court GRANTS Plaintiffs' Motion to Have Court Issue the Writ of Execution in the amount of $578,836.47, together with interest at the rate of 6% per year on the unpaid balance and costs.

ER at 34 (Dec. & Order, May 29, 2009). Since this Decision and Order was issued, two writs of execution have issued, both of which Cyfred moved to quash. Appellees' SER at 52 (Ex Parte Appl. to Recall & Quash Writ of Execution, June 8, 2009); Appellees' SER at 86 (Ex Parte Appl. to Recall & Quash Writ of Execution, July 16, 2009). The judgment creditors argue that this appeal must be dismissed for lack of jurisdiction because the May 29, 2009 Decision and Order was not a final order, as evidenced by the number of writs, ex parte motions, and decisions that followed. Appellees' Br. at 11. They also submit that the appeal is moot because the first writ of execution was recalled and quashed on June 16, 2009. *Id.* at 15. Cyfred counters, by citing to

Zurich v. Santos, 2007 Guam 23, and several California cases, that an order to issue a writ of execution is appealable. Appellant's Reply Br. at 8-9 (Oct. 5, 2009). Cyfred also argues that the case is not moot because it is appealing the May 29, 2009 Decision and Order rather than any particular writ of execution issued as a result of the Order. *Id.* at 10-11. Cyfred contends that under the May 29, 2009 Decision and Order, the trial court may still issue a writ of execution without applying an offset and without adding all excluded plaintiffs to the Sewer Judgment. *Id.*

[7] An order to issue a writ of execution at a set sum with interest is an order made after judgment and may be appealable. 7 GCA § 25102(b) (2005) ("An appeal in a civil action or proceeding may be taken from the Superior Court . . . [f]rom an order made after a judgment made appealable by subdivision (a).")[6] However, not every post-judgment order is appealable. In *Zurich v. Santos*, 2007 Guam 23, this court set forth a two-part test to determine whether a post-judgment order was appealable. *See Zurich v. Santos*, 2007 Guam 23 ¶¶ 6-12. First, the issues raised on appeal from the order must be different from those arising from an appeal of the judgment. *Id.* ¶ 8. "The reason for this general rule is that to allow the appeal from [an order raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment." *Id.* (quoting *P. R. Burke Corp. v. Victor Valley Waste Water Reclamation Auth.*, 120 Cal. Rptr. 2d 98, 102 (Ct. App. 2002)) (internal quotation marks omitted). Second, "the order must either affect the judgment or relate to it by enforcing it or staying its execution." *Id.* ¶ 9. The order to issue a writ of execution clearly relates to the Sewer Judgment by enforcing it, thus satisfying the second part of the *Zurich* test. However, we

[6] Title 7 GCA § 25102(a) specifies that appeals may be taken "[f]rom a judgment, except (1) an interlocutory judgment other than as provided in subdivisions (h), (i) and (j); [and] (2) a judgment of contempt which is made final and conclusive by § 34106 of this Title (Contempts)." 7 GCA § 25102(a) (2005).

must still examine whether the first part of the *Zurich* test is satisfied, specifically whether the issues Cyfred raises on appeal are truly challenges to the method of execution of the Sewer Judgment and not an attempt to untimely appeal the underlying Sewer Judgment itself. While an order to issue a writ of execution may be appealable, the issues raised on appeal must relate to the writ of execution and not to the judgment itself.

[8] In *Wagner v. Wagner*, 205 P.3d 306 (Alaska 2009), the Alaska Supreme Court confronted a very similar problem. *Wagner v. Wagner*, 205 P.3d 306 (Alaska 2009). The plaintiff in *Wagner* received a judgment for specific performance related to monthly payments owed by the defendant. *Id.* at 308-09. The defendant appealed the judgment, but the appeal was ultimately dismissed for lack of prosecution. *Id.* at 309. Later, the defendant appealed the writ of execution enforcing the arrearages owed to the plaintiff. *Id.* Two of the arguments raised on appeal – that the amount of the monthly payments was wrongly calculated and that specific performance should not have been ordered – were found to be barred because the plaintiff had already received a final judgment. *Id.* at 309-10. The court reasoned that "[e]xecution does not give a party a second chance to appeal the merits more than thirty days after the entry of final judgment." *Id.* at 310.

[9] However, the *Wagner* court was willing to consider the question of whether payments owed to one of the defendant's creditors should be deducted in calculating the amount owed under the writ of execution. *Id.* In finding that no such deduction was necessary, the court determined that the calculation used in the writ of execution was consistent with the jury's findings and prior statements made by the trial court. *Id.* The sum stated in the writ of execution was obtained using the same methodology used in calculating the judgment. *Id.* This suggests

that an appeal from a writ of execution can be used to challenge inconsistencies between the writ of execution and the judgment that preceded it. *Id.*

[10] Other cases also support this conclusion. In *Norville v. BellSouth Advertising & Publishing Corp.*, 664 So. 2d 16, the defendant appealed a writ of execution that ordered execution against his personal property. *Norville v. BellSouth Adver. & Publ'g Corp.*, 664 So. 2d 16 (Fla. Dist. Ct. App. 1995). The court reversed the writ of execution, finding that the judgment was against the defendant's corporation, and not against the defendant as an individual. *Id.* at 17. Similarly, in *Hersch v. Citizens Savings & Loan Ass'n*, 218 Cal. Rptr. 646 (Ct. App. 1985), a defendant challenged the rate at which pre-judgment interest was to be calculated. *Hersch v. Citizens Sav. & Loan Ass'n*, 218 Cal. Rptr. 646, 647 (Ct. App. 1985). The writ of execution was reversed because it contained a sum computed using the wrong interest rate. *Id.* at 649-50. Neither of these cases was a challenge to the judgment itself.

[11] In order to determine whether Cyfred challenges the execution of the judgment or the judgment itself, we must scrutinize the three substantive issues raised by Cyfred on appeal. Cyfred argues: that the trial court erred in (a) not granting Cyfred an offset for all amounts due to it before ordering that a writ of execution be issued; (b) granting a writ of execution before including all appropriate plaintiffs in the Sewer Judgment; and (c) not joining all indispensable non-parties in the action. Appellant's Br. at 11-14 (Oct. 5, 2009).

A. The Application of Offsets

[12] Cyfred argues that an order for a writ of execution cannot be issued until all the offsets due from all of the plaintiffs for unpaid mortgage payments are determined. The granting of an offset for any unpaid mortgage payments during the first year was addressed in this court's opinion in *Sananap II*, 2009 Guam 13. *Sananap II*, 2009 Guam 13 ¶¶ 77-78. The Sewer

Judgment did not discuss offsets; however, the trial court discussed the offsets in the May 29, 2009 Decision and Order now being appealed. *Compare* ER at 1-2 (First Am. J., Sept. 22, 2006), *with* ER at 29-34 (Dec. & Order, May 29, 2009). One might argue that any discussion of offsets at all is an attempt to modify a final, unappealed judgment. However, *Sananap II*, 2009 Guam 13, the source of the offset rule, was not issued until well after the Sewer Judgment was entered by the trial court. Relying on Guam Rule of Civil Procedure Rule 60(b), the trial court granted a $1,162.53 offset against the $580,000.00 Sewer Judgment. ER at 33 (Dec. & Order, May 29, 2009). Therefore, the appropriate amount of any offsets is now at issue.

[13] The only offset included in the May 29, 2009 Decision and Order and in the two writs of execution is $1,162.53—the amount Kini B. Sananap and Iowana M. Sananap personally owed Cyfred at the time of Cyfred's breach. *Id.* Cyfred provides no clear evidence on the additional amounts owed or which plaintiffs owe it. Sananaps' attorney provided payment records for the four other judgment creditors' named in the Sewer Judgment, and from these he estimates that the additional offset would be about $101.15. Appellees' Br. at 9.

[14] To determine what additional amounts may be owed to Cyfred, we elucidate upon our reasoning in *Sananap II*, 2009 Guam 13, regarding offsets. *See Sananap II*, 2009 Guam 13. We stated that "Cyfred should be allowed to offset any damages due by the amount owed during the first year *but never paid*." *Id.* ¶ 74 (emphasis added). At the moment of Cyfred's material breach of failing to install sewer lines, the landowners were free to suspend further payments until Cyfred cured the breach. *Id.* ¶¶ 76-77. Consequently, even if any landowners were behind in their payments at the end of the first year, any additional payments made after the first year should be credited to the "amount owed during the first year" because these later payments were suspended under the doctrine of suspension of performance for material breach. *Id.* ¶ 74.

Therefore, Cyfred is entitled to offset only the amounts which were due but not paid to Cyfred during the first year, less any amounts subsequently paid by the homeowner. *See id.* ¶ 66.

[15] Here, the Sananaps purchased their property in 1999 and continued paying until March of 2002. *Id.* ¶¶ 4-5. The payments by the Sananaps made after the first year exceeded the total of the two missed payments during the first year. All payments made subsequent to Cyfred's breach should be credited to the amounts owed during the first year.[7] In order to determine if Cyfred is entitled to offset any amounts due from the thirty-six plaintiffs who were not included in the Sewer Judgment, we must first decide whether these thirty-six plaintiffs should have been included in the Sewer Judgment before issuance of any writ of execution, which is Cyfred's second argument on appeal.

B. Amendment of the Sewer Judgment

[16] The trial court initially excluded the thirty-six landowners because they did not provide proof that Cyfred promised to install sewer lines to each landowner individually. RA, tab 169 at 20-21 (Finds. Fact & Concl. L., Aug. 18, 2009). At trial, however, Francis Gill admitted that

[7] The four other judgment creditors continued making mortgage payments well after the first year.

7i. Stanley Yanfag purchased his property in December 2000 and missed two payments during the first year. As such, he personally owed $100.00 at the time of Cyfred's breach. Appellees' SER at 4 (Yanfag Payment History, Aug. 21, 2007). However, Yanfag continued to make mortgage payments up until October 2006. *Id.*

7ii. Martin Sontag missed three payments during the first year, thereby owing Cyfred $150.00 at the time of the breach. Appellees' SER at 8 (Sontag Payment History, Aug. 22, 2007). Sontag, however, continued to pay his mortgage until March 2006. *Id.*

7iii. Anis Sino missed five payments during the first year and, therefore, owed Cyfred $250.00. Appellees' SER at 2 (Anis Payment History, Aug. 22, 2007). Anis continued to make payments up until January 2007. *Id.*

7iv. During the first year, Martin Raymond made nine untimely mortgage payments, thereby owing Cyfred $450.00 in late fees. Appellees' SER at 6 (Raymond Payment History, Aug. 22, 2007). Regardless, he was able to make up these delinquencies by continuing to pay his mortgage up until August 2007. *Id.*

Cyfred had an obligation to install sewer lines in the entire subdivision. In its findings, the trial court held:

> The record in this case will show the Court has communicated that it expected solid proof of sewer-line promises for every Plaintiff. That is why the Court awarded summary judgments to a few but not all. . . . In this final decision, the Court announces that its expectations have shifted because of an admission made by Francis Gill on A[p]ril 8, 2008. When asked if Defendant had an obligation to "install a sewer system" for the entire Gill-Baza Subdivision[,] Francis Gill said, "Yes, we did." . . . Now that Francis Gill admits to liability for the sewer line, the Court believes every proven owner at the Gill-Baza Subdivision has a right to part of the judgment. With the new evidence, the Court feels the Law-of-the-Case Doctrine and Civil Procedure Rule 60(b) would justify this decision.

RA, tab 169 at 20-22 (Finds. Fact & Concl. L., Aug. 19, 2008) (internal citations omitted). The additional plaintiffs who did not recover under the Sewer Judgment were then listed. *Id.* at 22. Cyfred contends that this language, particularly the trial court's reference to Rule 60(b), was sufficient to amend the Sewer Judgment. In the second writ of execution, the trial court again tried to solve the problem of not including the thirty-six plaintiffs to the Sewer Judgment by adding the following:

> Any amounts obtained pursuant to this Writ of Execution will also be credited to defendant Cyfred, Ltd., in satisfaction of any judgment the following other plaintiffs obtain for the amount to construct the sewer lines for the Gill-Baza Subdivision to the extent the amounts obtained satisfy that same amount to construct such sewer lines awarded to the Judgment Creditors.

RA, tab 1071 at 3 (Writ of Execution, June 17, 2009). The court again listed the thirty-six plaintiffs. *Id.* Because these plaintiffs were not included in the Sewer Judgment, Cyfred asserts that the Sewer Judgment is defective and no writ of execution can be issued. *Id.* Whether the thirty-six plaintiffs already part of this suit may be included in the Sewer Judgment is dependent on the trial court's ability to amend the Sewer Judgment based on an admission made long after the Sewer Judgment was issued.

[17] Rule 60(b) of the Guam Rules of Civil Procedure is based on Federal Rule of Civil Procedure 60(b).[8] *Brown v. Eastman Kodak Co.*, 2000 Guam 30 ¶ 14. *Cf.* Guam R. Civ. P. 60(b), *with* Fed. R. Civ. P. 60(b). A Rule 60(b) motion must be brought within a reasonable time. *Brown*, 2000 Guam 30 ¶ 15. The trial court did not specify which subsection of Rule 60(b) applies to the facts of this case and, in such situation, "an appellate court may inquire into the applicability of any subsection." *Webb v. Erickson*, 655 P.2d 6, 10 (Ariz. 1982). "Rule 60 is remedial in nature and is to be liberally construed." *Brown*, 2000 Guam 30 ¶ 18 (citing *Falk v. Allen,* 739 F.2d 461, 463 (9th Cir. 1984)). This court has in numerous occasions explored the applicability of Rule 60(b). *See, e.g.*, *Melwani v. Arnold*, 2010 Guam 7; *Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6; *Trans Pacific Export Co. v. Oka Towers Corp.*, 2000 Guam 3; *Merchant v. Nanyo Realty, Inc.*, 1998 Guam 26.

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[8] Rule 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. *On motion and upon such terms as are just, the court may relieve a party* or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
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> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as required by law, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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

[18] In *Town House Department Stores, Inc. v. Ahn*, this court addressed what constitutes "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1), and stated that it is unavailable "when the alleged mistake is 'the failure of a party to introduce certain evidence at trial which was then known and available to that party.'" *Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6 ¶ 60 (quoting *Devault Mfg. Co. v. Jefferson Bank*, 4 B.R. 382, 386 (Bankr. E.D. Pa. 1980)); *see also* Guam R. Civ. P. 60(b)(1). Here, Cyfred cannot claim "mistake, inadvertence, surprise, or excusable neglect" when the admission of liability to install sewer lines to all landowners at the Gill-Baza subdivision was made by its own witness, Francis Gill. Therefore, subsection (1) does not apply. Rule 60(b)(2)[9] is inapplicable for the same reason. Francis Gill's admission cannot be considered "newly discovered evidence" because the information is of the type which Cyfred should have been aware of even before the Sewer Judgment was issued. *See Ahn*, 2003 Guam 6 ¶ 36 (holding that evidence within the knowledge of the movant and its employees was not newly discovered evidence). Likewise, subsections (3), (4), and (5) do not apply because there is no evidence of fraud or misrepresentation, and the Sewer Judgment is neither void nor satisfied. Guam R. Civ. P. 60(b)(3)–(5). Under Rule 60(b)(6), relief from the judgment may be granted for "any other reason justifying relief from operation of the judgment." Guam R. Civ. P. 60(b)(6). Subsection (6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States,* 335 U.S. 601, 615 (1949). "To justify relief, the movant, in addition to showing an extraordinary set of facts, must also show that it has a meritorious case, that substantial injustice would otherwise result, and that it would be appropriate to set aside

[9] Rule 60(b)(2) provides relief from a judgment upon a finding of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Guam R. Civ. P. 60(b)(2).

default so that the case can proceed to the merits." *Mariano v. Surla*, 2010 Guam 2 ¶ 34 (internal quotations and citations omitted). Furthermore, the movant "must show extraordinary circumstances suggesting that a party is faultless in the delay." *Id.* If the movant is partially at fault, "relief must be made within one year and the party's neglect must be excusable." *Id.* Subsection (6) is unavailable to a party who is completely at fault. *Id.* While we recognize the broad equitable power of Rule 60(b)(6), the facts of the instant case do not indicate extraordinary and compelling circumstances to warrant amending the Sewer Judgment.

[19] Rule 60(b) also contains a residual clause that states that the rule "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as required by law, or to set aside a judgment for *fraud* upon the court." Guam R. Civ. P. 60(b) (emphasis added). This court previously clarified that "[f]raud upon the court embraces only that species of fraud which subverts or attempts to subvert the integrity of the court itself, or fraud perpetrated by officers of the court so that the judicial machinery cannot perform in an impartial manner." *Trans Pacific Export Co. v. Oka Towers Corp.*, 2000 Guam 3 ¶ 33 (quoting *In re Marriage of Miller*, 902 P.2d 1019, 1022 (Mont. 1995)). Here, there is no allegation or evidence of any fraud upon the trial court in initially awarding the Sewer Judgment to only six plaintiffs. Thus, the residual provision does not apply.

[20] More importantly, Rule 60(b) is inapplicable where the appealing party, as in this case, is not seeking complete relief from the Sewer Judgment, which Rule 60(b) affords. *See* Guam R. Civ. P. 60(b) ("On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . ."). Rather, Cyfred's position seems to be that the trial court has the power to *amend* the Sewer Judgment pursuant to

Rule 60(b), which the trial court exercised in issuing its August 19, 2008 Findings of Fact and Conclusions of Law. An *amendment* to a final judgment, however, is governed by Rules 52(b) and 59(b) of the Guam Rules of Civil Procedure, not Rule 60(b).

[21] Under Rule 52(b), "On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings–or make additional findings–and may amend the judgment accordingly." Guam R. Civ. P. 52(b). Rule 52(b) is designed "to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence." *Ahn*, 2003 Guam 6 ¶ 34 (internal citations omitted); *see also Nat'l Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 124 n.2 (1st Cir.1990) (noting that frequently articulated grounds for granting a Rule 52(b) motion include "manifest error of law or fact," "newly discovered evidence," and "an intervening change in the law"). Rule 52(b) is "not intended merely to relitigate old matters nor are such motions intended to allow the parties to present the case under new theories." *Ahn*, 2003 Guam 6 ¶ 34 (quoting *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976)). Moreover, Rule 52(b), "which is designed to introduce new evidence, 'closely approaches a [Rule 59] motion for a new trial on the ground of newly discovered evidence.'" *Ahn*, 2003 Guam 6 ¶ 34 (citation omitted); *see also* Guam R. Civ. P. 52(b);[10] Guam R. Civ. P. 59(e).[11] In this case, neither party filed a Rule 52(b) or Rule 59 motion seeking to amend the judgment to include the thirty-six plaintiffs. Furthermore, Rule 52(b) is inapplicable for the same reason Rule 60(b) is inapplicable; Francis Gill's admission is not newly discovered evidence. We, therefore, hold that Sewer Judgment may not be amended to include the thirty-six other plaintiffs.

[10] A Rule 52(b) "motion may accompany a motion for a new trial under Rule 59." Guam R. Civ. P. 52(b).

[11] Under Rule 59(e), "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Guam R. Civ. P. 59(e).

C. Joinder of Non-Joined Indispensable Parties

[22] While offset was not an issue until this court's decision in *Sananap II*, 2009 Guam 13, the issue of joinder of indispensable parties has been before the trial court since at least 2006. On August 1, 2006, the trial court issued its Findings of Fact and Conclusions of Law, stating that, "[d]efendant's argument all along has been that the 40 Lot Owners-Plaintiffs are indispensable parties and that no motions could be heard without them as parties." RA, tab 178 at 17 (Finds. Fact & Concl. L., Aug. 1, 2006). Consequently, the trial court granted joinder of the additional plaintiffs, but denied joinder of UPIC. Appellant's SER at 13-14 (Dec. & Order, May 5, 2006). Cyfred's argument now is that there may be as many as fifty-one additional lot owners who should have been joined in the lawsuit as indispensable parties.[12] Appellant's Br. at 6. Cyfred alleges that it may be subject to multiple litigation and/or inconsistent verdicts unless all parties with interests in the Gill-Baza Subdivision are joined as parties and the underlying lawsuit should be dismissed. *Id.*

[23] A trial court's decision concerning joinder of necessary parties pursuant to Rule 19(b) of the Guam Rules of Civil Procedure is generally reviewed for an abuse of discretion. *See Benavente v. Taitano*, 2006 Guam 15 ¶ 56. However, since Cyfred did not file a motion in the trial court to join these other landowners as parties, the trial court has not ruled on the joinder motion and there is no decision concerning joinder for this court to review.

[24] Cyfred makes a well-cited argument that joinder of necessary and indispensable parties may be raised at any time, even on appeal. Appellant's Br. at 14-18. It is true that the issue of a

[12] It is important to clarify that there are two sets of parties of which Cyfred claims are indispensable and must be joined in the Sewer Judgment. The first are the owners of thirty-three lots who were included in the lawsuit back in 2006. Appellant's SER at 16 n.6 (Find. Fact & Concl. L., June 12, 2006). The second are the owners of the other fifty-one lots in the Gill-Baza Subdivision who were neither identified nor added in the lawsuit. Appellant's Br. at 6, 11. Because they are not parties to this action, Cyfred contends the trial court had no jurisdiction to enter the Sewer Judgment and that the action should be dismissed. *Id.*

party's alleged indispensability is sufficiently important that it can be raised at any stage of the proceeding – even *sua sponte*. *McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984); *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960) (holding that absence of indispensable parties can be raised *sua sponte* at any time). In fact, both the Guam and Federal Rules of Civil Procedure indicate that a party may be added upon the motion of a party or the court's own motion at any time on such terms as are just. *See* Guam R. Civ. P. 21; Fed. R. Civ. P. 21.[13]

[25] However, it does not follow that a motion to dismiss for failure to join an "indispensable" party is always granted, especially where such a motion is untimely. As the commentary to Rule 19 of the Federal Rules of Civil Procedure indicates:

> A person may be added as a party at any stage of the action on motion or on the court's initiative; and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits. *However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person, and is not seeking vicariously to protect the absent person against a prejudicial judgment, his undue delay in making the motion can properly be counted against him as a reason for denying the motion.*

Fed. R. Civ. P. 19 advisory committee's note (emphasis added) (internal citations omitted). Where the issue of failure to join an indispensable party is raised for first time on appeal, the delay in raising the argument is a factor which may be evaluated in considering propriety of joinder. *Geisser v. United States*, 513 F.2d 862, 872 (5th Cir. 1975). As a result, some courts have denied untimely motions to join an otherwise indispensable party.[14] *See Arnold v. Blast Intermediate Unit 17*, 843 F.2d 122, 125 n.6 (joinder of barred by laches); *Barr Rubber Prods.*

[13] Rule 19 of the Guam Rules of Civil Procedure is nearly identical to Rule 19 of the Federal Rules of Civil Procedure. *Compare* Guam R. Civ. P. 19, *with* Fed. R. Civ. P. 19. Accordingly, we analyze Cyfred's concerns by reference to federal case law. *See* Fed. R. Civ. P. 19.

[14] "Under the revised Rule 19 the label of 'indispensable' party is to be affixed only after a determination has been made that the action should not go forward, thereby doing away with the verbal anomaly of an 'indispensable' party who turns out to be dispensable after all." Wright & Miller, *Federal Practice and Procedure*, § 1609; *see also Provident Tradesmans Bank*, 390 U.S. at 118.

Co. v. Sun Pubber Co., 425 F.2d 1114, 1126-27 n.23 ("The denial of Barr's motion to join two additional parties after four and one half years and six thousand pages of deposition testimony was not an abuse of discretion."). As the United States Supreme Court held, where the defendant is asserting his interest in avoiding multiple litigation or inconsistent relief, "if the defendant has failed to assert this interest [until after trial], it is quite proper to consider it foreclosed." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968).

[26] In the present case, Cyfred did not move for joinder of the additional lot owners or seek to have the action dismissed for failure to join these additional landowners as indispensable parties. While Cyfred is correct in asserting that it may raise the issue of joinder of necessary parties on appeal, its failure to previously ask this court for joinder or a dismissal during its many appeals over the years raises serious concerns about timeliness. The untimely nature of Cyfred's request makes dismissal of the case for failure to join additional indispensable parties improper. *Geisser*, 513 F.2d at 872; *Patterson*, 390 U.S. at 110.

[27] Moreover, neither party has indicated who the allegedly indispensable parties might be. Cyfred claims that there are fifty-one lots whose owners are not parties to the lawsuit, but it is unclear who those owners are or if they even exist.[15] It may be that many of the remaining fifty-one lots were never sold, were abandoned, or were eventually occupied by squatters with no legal title. A bare allegation that there are fifty-one additional lots in the subdivision does not necessarily identify fifty-one additional plaintiffs who are indispensable. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) ("The key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy

[15] In its Appellant's Brief, Cyfred lists seventy-eight (78) names, claiming that each person has an interest in the outcome of the case. Appellant's Br. at 1-2. Thirty-eight of these named persons are plaintiffs in this case, and two were named twice. It is unclear what interests the remaining named persons have in this suit.

the Rule 19(a) criteria."). Because Cyfred's motion to dismiss for failure to join additional indispensable parties is unreasonably dilatory, it is foreclosed.

IV. CONCLUSION

[28] We hold that the May 29, 2009 Decision and Order to issue a writ of execution is an appealable order. Accordingly, the court has jurisdiction to hear this case. We **AFFIRM** the May 29, 2009 Decision and Order allowing the trial court to issue the writ of execution, finding that the trial court properly considered offsets due to Cyfred for the six judgment creditors even though the thirty-six other plaintiffs were not included in the Sewer Judgment. Furthermore, Cyfred's requests on appeal to add additional plaintiffs or to dismiss for failure to join indispensable parties are untimely and improper and therefore, **DENIED**.

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

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

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