IN THE SUPREME COURT OF GUAM

MARIAN PIZARRO,
Plaintiff-Appellee,

v.

MICHAEL PIZARRO,
Defendant-Appellee.

JESUS PIZARRO,
Real Party in Interest-Appellant.

Supreme Court Case No.: CVA12-027
Superior Court Case No.: DM0526-09

OPINION

Cite as: 2013 Guam 16

Appeal from the Superior Court of Guam
Argued and submitted on February 19, 2013
Hagåtña, Guam

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

CARBULLIDO, C.J.:

[1] This appeal arises from an order denying a motion to intervene filed by Real Party in Interest-Appellant Jesus Pizarro. Jesus seeks to intervene in a domestic case between Plaintiff-Appellee Marian Pizarro and Defendant-Appellee Michael Pizarro. Jesus claims that Michael, his son, is no longer capable of protecting his interest in his time certificate accounts at Bank Pacific or his interest in MJM International Corporation ("MJM") from Marian, Michael's ex-wife. For the reasons stated herein, the trial court's order denying Jesus' motion to intervene is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Marian and Michael married in Guam on August 26, 2000, and separated about eight years later. Marian then filed for divorce in the Superior Court, which later entered a divorce decree.[1]

[3] Among the pending issues related to the divorce is whether Marian has a community property interest in MJM and in time certificate accounts held at Bank Pacific.

[4] Through the course of the proceedings, Marian made multiple discovery attempts to determine whether the Bank Pacific time certificate accounts and MJM shares constitute community property of the underlying marriage. Despite "many assurances, even in open Court," from Michael's former counsel, Stephanie Flores ("Attorney Flores"), that those

[1] The trial court limited the divorce decree only to the dissolution of the marriage, as it was "agreed that the issues of child and spousal support and property division should be reserved to the further determination of the [court]." RA, tab 106 at 1-2 (Final Decree of Dissolution of Marriage, Sept. 7, 2012); *see also* RA, tab 105 at 1-2 (Interlocutory Decree of Dissolution of Marriage, Sept. 7, 2012).

documents would be forthcoming, Michael failed to produce the relevant documents.[2] Transcripts ("Tr.") at 30 (Mot. Intervene, Oct. 3, 2011).

[5] After failed attempts at discovery, Marian requested that the trial court compel Michael to turn over the documents containing the sought-after financial information. The court granted that request, ordering Michael to produce documents in his possession pursuant to the Request for Production of Documents served on Attorney Flores on August 13, 2009.

[6] Still unable to obtain the requested documents from Michael, Marian then attempted to obtain some documents directly from Bank Pacific. Marian scheduled a deposition and issued a subpoena to Bank Pacific for information on MJM-related accounts held by Michael and Jesus. Bank Pacific filed an objection to the subpoena, indicating that the subpoena had technical problems and that Marian sought privileged or protected matter from Michael, Jesus, and MJM. Concurring that there were technical problems with the subpoena, Marian then rescheduled the deposition and issued another subpoena.

[7] Jesus sought to quash the later issued subpoena, claiming that he is not a party to the action and that "[t]here is no rationale [sic] explanation as to why [Marian] would have any reason to review [his] bank records." Record on Appeal ("RA"), tab 31 at 1-2 (Objection to & Mot. to Quash Subpoena Duces Tecum, June 8, 2010). Marian thereafter informed Jesus that she would only proceed to seek the records that included Michael's name on them.

[8] Marian later obtained some documents pertaining to Michael's Bank Pacific accounts. Still dissatisfied, Marian subsequently informed the trial court at a hearing that she intended to file a motion in limine to keep out discovery not provided. Although Marian did not file the

[2] Marian's counsel points out that while trying to obtain discovery from Michael, Attorney Flores advised him that Michael would not turn over any documentation without a court order. Marian's counsel further declares that Attorney Flores advised him that Jesus was in control of the sought-after documentation and was not allowing it to be released.

motion in limine, she did later request the trial court to prohibit Michael from providing "any evidence either written or oral testimony that should have been provided in a response to the discovery requests that were not responded to after the Court made its order compelling [Michael] to do so." RA, tab 41 at 3 (Trial Mem., Aug. 24, 2010).

[9] A bench trial then commenced on August 19, 2010 in the Superior Court. After Marian completed her testimony in her case-in-chief, the court decided to continue the trial, advising the parties that they should come to a settlement. RA, tab 72 at 75-76 (Cont'd Bench Trial, Aug. 20, 2010) ("I rarely ever do it, express my thoughts on what I see on the evidence at midpoint in the case, but I think that it is so important for you to settle your own affairs than for me to decide it.").

[10] Trial then resumed the morning of October 25, 2010, but Attorney Flores failed to appear.[3] Later that afternoon, Attorney Flores made an appearance but requested for another continuance.[4]

[11] Trial resumed on February 8, 2011. Santiago Mata, a part-time accountant of MJM, briefly testified on MJM's finances. Among other things, Santiago testified that Jesus made and continues to make numerous cash advances to MJM for cash flow purposes.

[12] His testimony was cut off by an objection raised by Marian. Marian asserted that Santiago should not be allowed to testify on these matters because Michael had failed to produce supporting documents during discovery.

[3] Attorney Flores notes that she was stuck at District Court. RA, tab 43 at 2 (Cont'd Bench Trial, Oct. 25, 2010); Appellant's Br. at 2.

[4] Attorney Flores stated before the court that she needed to go in order to take some insulin. RA, tab 43 at 2 (Cont'd Bench Trial, Oct. 25, 2010).

[13] The trial court thereafter sustained the objection, noting that the Santiago's testimony was about the loan and under the best evidence rule an original document or writing is required unless an exception exists. RA, tab 48 at 3 (Hr'g Mins. of Cont'd Bench Trial, Feb. 8, 2011). The trial court then took a brief recess to discuss a continuance for discovery purposes. Upon return, the trial court continued the trial to a later date and reminded counsels that failure to provide discovery will result in sanctions.

[14] Just as trial was set to resume, attorney John Terlaje appeared for Michael to inform the court that trial could not proceed as scheduled. He indicated that Attorney Flores had been suspended from practicing law in Guam on February 8, 2011.

[15] Michael thereafter retained David Lujan ("Attorney Lujan") as his new attorney. Attorney Lujan filed a motion to amend Michael's answer, assert a counterclaim, and reopen discovery, but the trial court denied that motion.

[16] Jesus then filed a motion to intervene in the ongoing bench trial on September 14, 2011, and Michael soon after joined in that motion. The trial court denied Jesus' motion to intervene, finding it untimely. Jesus appealed that decision and order.

[17] The trial court thereafter stayed the matter pending this appeal. Yet, at a later status hearing, the trial court arranged for trial to resume on February 25, 2013. This prompted Marian and Michael to file in the Supreme Court a joint emergency motion to stay further trial court proceedings. We granted that motion and ordered a stay of the proceedings below pending disposition of this appeal.

II. JURISDICTION

[18] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-13 (2013)), 7

GCA §§ 3107(b) and 3108(a) (2005). "An order denying a motion to intervene is treated as a final order for purposes of appeal." *Sablan v. Guam Land Use Comm'n (Younex Int'l Corp.)*, 2011 Guam 12 ¶ 7 (citing *Limtiaco v. Camacho (Guam Music Inc.)*, 2009 Guam 7 ¶ 7).

III. STANDARD OF REVIEW

[19] We review the trial court's determination of the timeliness of a motion to intervene as a matter of right pursuant to Guam Rules of Civil Procedure ("GRCP") Rule 24(a) for an abuse of discretion. *Id.* ¶ 8. Issues other than timeliness that factor into the GRCP Rule 24(a) considerations are reviewed *de novo*. *Id.*

IV. ANALYSIS

[20] This appeal presents the issue of whether we should allow Jesus to intervene in Michael and Marian's domestic case. Jesus argues that he is entitled to an intervention of right. Marian contends that Jesus is not entitled to such intervention because Jesus' motion to intervene was untimely, among other reasons.

A. Intervention of Right

[21] GRCP Rule 24(a) governs interventions of right and is to be construed in favor of the proposed intervenor. Guam R. Civ. P. 24(a); *Sablan*, 2011 Guam 12 ¶¶ 9-10. The Rule states, in pertinent part:

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

GRCP 24(a)(2).

[22] An applicant for intervention must satisfy each of the following four criteria before a motion to intervene may be granted: (1) the motion to intervene must be timely; (2) the applicant

must have a significantly protectable interest regarding the property or transaction that is the subject of the suit; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by an existing party. *Sablan*, 2011 Guam 12 ¶ 10.

[23] Of these four criteria, the first criterion of timeliness is a threshold requirement. *Id.* ¶ 11. Should we determine that a motion to intervene is untimely, we may deny intervention without considering the remaining three criteria. *Id.*; *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). Accordingly, we turn to whether Jesus' motion to intervene was timely.

B. Timeliness

[24] "Timeliness is to be determined from all the circumstances. And it is to be determined by the [trial] court in the exercise of its sound discretion; unless that discretion is abused, the [trial] court's ruling will not be disturbed on review." *Sablan*, 2011 Guam 12 ¶ 11 (quoting *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 11).

[25] To determine whether a motion to intervene is timely, we consider: (1) the stage of the proceedings at the time the applicant seeks to intervene, (2) the prejudice to the other parties if the motion is granted, and (3) the reason and length of the delay. *Id.* ¶ 12 (citations omitted). We consider each of these three factors, slightly out of turn.

1. Stage of the Proceedings

[26] Intervention will not generally be allowed after trial has begun or is about to begin. *See Union Nat'l Bank of Youngstown, Ohio v. Superior Steel Corp.*, 9 F.R.D. 124, 127 (W.D. Pa. 1949); *Schaulis v. CTB/McGraw-Hill, Inc.*, 496 F. Supp. 666, 677 (N.D. Cal. 1980) (holding that motion to intervene was untimely where the case had been set for trial); *Equal Emp't*

Opportunity Comm'n v. United Air Lines, Inc., 515 F.2d 946, 950 (7th Cir. 1975) (upholding denial of intervention when discovery was nearly completed and the case had been placed on final pretrial calendar); *White v. Hanson*, 126 F.2d 559, 562 (10th Cir. 1942) (upholding denial of intervention when case was set for trial); *Timelines of Application for Intervention as of Right Under Rule 24(a) of Federal Rules of Civil Procedure,* 57 A.L.R. Fed. 150 §§ 2[a], 11[a] (originally published in 1982). Still, the timeliness of an intervention in any given case must be measured in light of all the circumstances of that particular case. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 11. When determining timeliness, we are cognizant that absolute measures of timeliness should be ignored. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000) (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)).

[27] Jesus filed his motion to intervene in this case about one year after trial commenced but prior to its closure. RA, tab 92 at 2 (Dec. & Order, June 4, 2012) (noting that bench trial commenced on August 19, 2010 and that Jesus filed his motion to intervene on September 14, 2011). Jesus cites to this court's ruling in *Sablan*, 2011 Guam 12, to suggest that his intervention may be considered timely. *See id.* (citing to *Sablan* to suggest that even post-judgment motions may be timely). In *Sablan*, Younex (the intervenor) sought to intervene post judgment, after the trial court's grant of a writ of judicial review. *Sablan*, 2011 Guam 12 ¶¶ 5, 14. We permitted intervention at that stage in that instance because Younex was in a situation where, if not permitted to intervene, there would not be a party left in the case willing to mount a post-judgment challenge. *Id.* ¶ 14. There the respondents, who Younex had relied upon to protect its interests, intimated that they did not intend to move the trial court to reconsider its writ of judicial review. *Id.* ¶ 5. We found that this resulted in a divergence of interests that, at that post-judgment stage, appropriately triggered Younex's decision to intervene. *See id.* ¶¶ 5, 14.

[28] In the instant case, we agree with Jesus that his intervention should not be considered untimely summarily based on the fact that his motion for intervention occurred after trial commenced. Here, as in *Sablan*, we take into consideration all the circumstances of the case. *Id.* ¶ 13. As we will discuss in greater detail in the succeeding section, we recognize that it was reasonable for the trial court to conclude that the appropriate trigger to intervene in this case was not set off until some point at trial when Jesus became aware that Michael was unable to protect his interests. Thus, the stage of the proceedings under these circumstances -- after the commencement of trial but prior to its closure -- does not weigh against Jesus' intervention. Notwithstanding, the test for timeliness does not end here. We next consider Jesus' reason for and length of delay in filing his motion to intervene.

2. The Reason for and Length of Delay

[29] "The timeliness clock runs either from the time the applicant knew or reasonably should have known of his [stake in the case into which he seeks to intervene] or from the time he became aware that his [stake] would no longer be protected by the existing parties to the lawsuit." *Sablan*, 2011 Guam 12 ¶ 25 (citation omitted); *see also John Doe No. 1 v. Glickman*, 256 F.3d 371, 376 (5th Cir. 2001).

[30] The trial court determined Jesus' length of and reason for delay based on the time that Jesus became aware that his stake would no longer be protected by the existing parties to the lawsuit. RA, tab 92 at 9 (Dec. & Order). Using this measure, the trial court found that the timeliness clock began to run on February 8, 2011 because Jesus became aware that Michael was unable to protect his interests. *Id.* The trial court explained that Jesus became aware of this because (1) the trial court made an evidentiary ruling, which in effect precluded the introduction

of evidence not provided in discovery, and (2) Michael's then counsel, Attorney Flores, was suspended from practicing law. *Id.*

[31] It was reasonable for the trial court to conclude that Jesus was aware that Michael was unable to protect his interests as of February 8, 2011, especially when considered with all the circumstances of this particular case. *See Sablan*, 2011 Guam 12 ¶ 11 (recognizing that the propriety of intervention in any given case must be measured under *all the circumstances* of that particular case). The following circumstances are worth highlighting: (1) Jesus retained counsel for this matter,[5] RA, tab 71 at 4 (Bench Trial - Day 1, Aug. 19, 2010) (indicating that Jesus had counsel present at first day of trial); (2) Michael had repeatedly failed to produce requested documents during discovery, prompting the trial court to issue an order to compel discovery, RA, tab 27 at 1 (Order to Compel, Apr. 14, 2010); (3) Marian subpoenaed documents that included Jesus' bank records from Bank Pacific, which prompted Jesus to quash the subpoena, RA, tab 31 at 1 (Objection to and Mot. to Quash Subpoena Duces Tecum); and (4) Jesus admits that he "had an inkling" that Michael was unable to adequately represent his interest on February 8, 2011. Appellant's Br. at 14 (Oct. 5, 2012).

[32] In light of all these circumstances, taken together, it was reasonable for the trial court to conclude that Michael was unable to protect Jesus' interests as of February 8, 2011 and that Jesus lacked an adequate reason for waiting seven months to file his motion to intervene. This factor, therefore, weighs against Jesus' intervention.

[5] A review of the trial transcripts reveals that Jesus had retained counsel for this matter since at least the first day of trial. During the first day of the bench trial, the trial court acknowledged the presence of Jesus' counsel, "Mr. Terlaje," who informed the court he was "just observing," unless he was needed. RA, tab 71 at 4 (Bench Trial - Day 1).

3. Prejudice

a. Prejudice to Marian

[33] "The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Sablan*, 2011 Guam 12 ¶ 15. "[T]he prejudice to the original parties to the litigation that is relevant to the question of timeliness *is only that prejudice* which would result from the would-be intervenor's failure to request intervention" at an earlier time. *Id.* (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) (internal quotation marks omitted) (emphasis added).

[34] Here, the trial court held that allowing Jesus to intervene after delaying his motion by seven months would cause prejudice to Marian in two ways in that it may negate Marian's benefit of the court's evidentiary rulings, "which were issued as a sanction to [Michael] for failure to comply with [its] discovery orders[,]" and would cause prejudicial delay. RA, tab 92 at 8 (Dec. & Order).

[35] The trial court correctly concluded that prejudice would result from Jesus' failure to intervene at an earlier time. The trial court's February 8, 2011 evidentiary rulings made clear to the parties that they could not bring in evidence not produced in discovery. RA, tab 48 at 3-4 (Hrg Mins. of Cont'd Bench Trial, Feb. 8, 2011). At the time Jesus filed his motion to intervene, discovery was closed. Jesus' attorney represented at oral argument that if we were to allow Jesus to intervene, he would seek to protect Jesus' interests by, among other things, admitting documentary evidence connected to Santiago's testimony to trace MJM-related money to a separate source. Digital Recording at 46:35-46:49, 48:21-48:32 (Oral Argument, Feb. 19, 2013). Therefore, to permit Jesus' intervention would in effect provide Jesus with a path to circumvent

the trial court's evidentiary rulings in that he now seeks to admit evidence Michael has since been precluded from bringing in. Relatedly, such allowance would contribute to delay, which runs contrary to the purpose of the timeliness requirement and which has been recognized as a form of prejudice to the parties. *See Timelines of Application for Intervention as of Right Under Rule 24(a) of Federal Rules of Civil Procedure,* 57 A.L.R. Fed. 150 § 2[a] ("The timeliness requirement is founded upon the interest of expeditious administration of justice, which does not permit litigation to be interminably protracted[.]"); *see Timeliness of Motion*, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.); *see, e.g., Tennessee Coal, Iron & R. Co.*, 5 F.R.D. 174, 178 (N.D. Ala. 1946) ("[I]t would be unfair to require the plaintiff to return to a phase of the litigation long since past . . . with new petitioners for the first time after the litigation was underway.").

b. Prejudice to Jesus

[36] Next, although not necessary, we find it beneficial to discuss whether Jesus would suffer prejudice if his motion to intervene in this action is denied. *See Timelines of Application for Intervention as of Right Under Rule 24(a) of Federal Rules of Civil Procedure,* 57 A.L.R. Fed. 150 § 5[b] (noting that some courts have considered the prejudice that the intervenor would suffer if not allowed to intervene). In doing so, we do not depart from our recognition that the most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case. *See Sablan*, 2011 Guam 12 ¶ 15.

[37] Here, if Jesus' motion for intervention is denied, his prejudice would be slight, if indeed, existent. This is because Jesus can, in a separate suit against a party to this action, protect the

interest, if any, he might have in the property that Marian seeks.[6] *See In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 199 (2d Cir. 2000) ("Because appellants remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied."); *Osage Tribe of Indians of Oklahoma v. United States*, 85 Fed. Cl. 162, 173 ("Numerous courts have found intervention to be inappropriate where relief is available elsewhere.") (internal quotation marks and citation omitted); *Long v. Long*, 199 P.2d 47, 51 (Cal. Dist. Ct. App. 1948) (concluding that it is not essential that a third party claiming an interest in property involved in the divorce action be made a party to the action given that the third party may maintain separate subsequent action to protect property). The potential obstacles to the pursuit of such an independent action would not impair or impede Jesus' ability to protect his interest to an extent warranting intervention of right. *See, e.g., In re Holocaust Victim Assets Litigation*, 225 F.3d at 199. Therefore, given the prejudice to Marian and the lack of prejudice to Jesus, this timeliness factor also weighs against Jesus' intervention.

[38] Upon review, we agree with the trial court that Jesus' motion to intervene was untimely. Since timeliness was a threshold that was not met, we need not address the remaining criteria under GRCP Rule 24(a).

[6] Third party intervention in an action for divorce may still be permitted in certain cases. We recognize that there are instances where "the court in an action for divorce should be permitted to adjudicate the rights of third parties in property alleged by one or both of the spouses to be community property." *Elms v. Elms*, 52 P.2d 223, 224 (Cal. 1936). One benefit is that third party intervention in an action for divorce in the appropriate case may promote judicial economy. *Id.* at 225 ("If the rights of the third party are determined in the divorce action, not only will a separate action to determine the rights of such party be avoided, but also a possible proceeding for modification of the alimony allowance will not be necessary."). However, we note that this is not one of those appropriate cases because, among the other reasons stated in this Opinion, there does not appear to be anything in the record that suggests that Marian is claiming a community property interest in any assets that are owned by Jesus. She is only claiming a community property interest in property owned by Michael. As such, divorce cases where adjudication of rights of third parties in property alleged by one or both of the spouses to be community property may be distinguishable.

V. CONCLUSION

[39] We recognize that broad discretion is accorded to the trial court in the matter of intervention and hold that the trial court was within its discretion in denying Jesus' intervention. Here, two of the three timeliness factors weigh against Jesus' intervention. Accordingly, we **AFFIRM** the trial court's denial of Jesus' motion to intervene for untimeliness.

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

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

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