IN THE SUPREME COURT OF GUAM

FRANKY UKAU and SOFALIN SINUK,
Plaintiffs-Appellants,

v.

**FUSHENG WANG, WEI PING WANG,
FUSHENG CONSTRUCTION COMPANY, BRUCE KAROLLE,
JENNIE WANG and ENTITY CONSTRUCTION, INC.,**
Defendants-Appellees.

Supreme Court Case No.: CVA15-008
Superior Court Case No.: CV0687-14

OPINION

Cite as: 2016 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted on October 29, 2015
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] Plaintiffs-Appellants Franky Ukau and Sofalin Sinuk (collectively "Ukau") appeal from a final judgment granting a Guam Rules of Civil Procedure ("GRCP") Rule 12(b)(6) motion to dismiss Ukau's Complaint.[1] Ukau argues that the trial court erred by granting the Rule 12(b)(6) motion because his Complaint was pleaded sufficiently. Defendants-Appellees Fusheng Wang, Wei Ping Wang, Fusheng Construction Company, Bruce Karolle, Jennie Wang, and Entity Construction, Inc., (collectively "Appellees") argue that Ukau's complaint was not pleaded sufficiently because it lacked particularity, made only conclusory allegations, and included attachments that evidenced *bona fide* transactions. Appellees also argue, alternatively, that if this court determines that Ukau's pleading is sufficient to defeat a Rule 12(b)(6) motion, we should nevertheless decide the issue as a motion for summary judgment. Ukau responds by arguing that summary judgment is not appropriate because he has not been provided sufficient opportunity to undertake discovery, but if summary judgment is considered, the facts in the record create inferences in his favor that would defeat a summary judgment motion.

[2] For the reasons detailed herein, we reverse the decision of the trial court to grant Appellees' Rule 12(b)(6) Motion to Dismiss, decline to address the motion to dismiss as one for summary judgment, and remand for further proceedings.

[1] In his Complaint, Ukau asserted claims for fraudulent transfer of real properties, piercing the corporate veil, and punitive damages. On appeal, Ukau only raises a claim for fraudulent transfer. The remaining claims are therefore considered abandoned. *See Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 3 n.2 (citing *Hemlani v. Flaherty*, 2007 Guam 17 ¶ 18).

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

[3] Ukau initiated the action in the trial court by filing a Complaint to Set Aside Fraudulent Conveyances of Real Properties and Demand for Jury Trial, followed by a Notice of Lis Pendens. Defendants-Appellees Fusheng Wang, Wei Ping Wang and Fusheng Construction Company filed a Motion to Dismiss Ukau's Complaint pursuant to GRCP Rule 12(b)(6). Defendants-Appellees Bruce Karolle, Jennie Wang and Entity Construction, Inc., joined the Rule 12(b)(6) motion as co-defendants. The trial court granted Appellees' Rule 12(b)(6) motion. Ukau timely filed his Notice of Appeal.

B. Personal Injury Action

[4] The facts that give rise to the case below stem from a July 2011 accident in which Ukau was severely injured by Jennie Wang. While working in her capacity as President of Entity Construction, Inc. ("Entity"), Jennie Wang negligently caused steel panels to fall from the back of a pickup truck resulting in a severe injury to Ukau's left leg. Treatment for the injury required the amputation of Ukau's leg above the knee. *Id.*

[5] Ukau and his wife, Sinuk, brought claims against Jennie Wang and Entity in the District Court of Guam for negligence, unpaid overtime, and loss of consortium. The court awarded Ukau $6,421,566.33 for his claims of negligence and unpaid overtime and Sinuk $104,755.00 for her claim of loss of consortium.

C. Complaint and Motions

[6] In his Complaint, Ukau alleged that Entity made transfers of real property to Fusheng Wang, Wei Ping Wang, and Fusheng Construction Company with the intent to defraud and to obstruct Ukau from claiming the properties upon execution of a judgment against Entity in a

personal injury action in the District Court of Guam. Ukau alleged that as a result of the alleged fraud, the transfers were void, and he requested the trial court to enjoin the transferees from selling, encumbering, or disposing of the properties.

[7] In their Rule 12(b)(6) motion, Fusheng Wang, Wei Ping Wang, and Fusheng Construction Company argued that Ukau failed to meet his "burden of proof" that the real property transfers were made with an intent to defraud, that the transfers were made for valuable consideration, and that Entity was permitted under law to prefer one creditor over another when satisfying its debts. The three parties attached 28 exhibits to their motion, which included declarations by Appellees and their counsel, bank records and receipts, Entity's Articles of Incorporation, land registration and title records, and other related documents.

[8] Defendants-Appellees Bruce Karolle, Jennie Wang, and Entity joined the Rule 12(b)(6) motion and submitted supplemental points and authorities. In their joinder motion, the three parties introduced arguments related to converting the motion to a Rule 56 motion for summary judgment. First, they noted that a court should generally convert a Rule 12(b)(6) motion to one for summary judgment if it considers matters outside of the pleadings. Second, they argued the court is permitted, under exceptional circumstances, to deviate from this general rule by considering evidence outside the pleadings when deciding a Rule 12(b)(6) motion if those facts are integral to the complaint and relied upon by the plaintiff. Third, they argued that whether or not the motion is converted, they should prevail because the transactions were *bona fide*.

[9] Ukau opposed Appellees' Rule 12(b)(6) motion by making three primary arguments. First, he argued that his Complaint was sufficiently pleaded because it gave Appellees fair notice of a legally cognizable claim and the basis on which it rests. Second, he argued that an additional declaration provided as an attachment to Appellees' Rule 12(b)(6) motion was

inadmissible testimony that must not be considered by the court when ruling on the Rule 12(b)(6) motion. Third, he argued that should the court find that his Complaint was insufficiently pleaded, it should grant him the opportunity to request leave to amend the document pursuant to GRCP 15(a).

[10] Ukau addressed the Defendants-Appellees' Rule 56 summary judgment arguments by emphasizing that all parties must be given reasonable opportunity to present their evidence and undertake discovery prior to the court issuing a ruling should the court decide to convert the Rule 12(b)(6) motion to one for summary judgment. "If the court is going to consider any of the material presented other than the Complaint and its exhibits, then this motion must be addressed pursuant to Rule 56 together with all the procedural protections accorded by the rule." Record on Appeal ("RA"), tab 29 at 6 (Pls.' Opp'n Mot. Dismiss, Sept. 4, 2014).

[11] Ukau notified the trial court that Jennie Wang filed for bankruptcy and pursuant to the provisions of 11 U.S.C. § 362, an entry of Notice of Automatic Stay was in effect for her in Bankruptcy Case No. 14-06668-LA7.

[12] In reply to Ukau's opposition motion, Defendants-Appellees Fusheng Wang, Wei Ping Wang, and Fusheng Construction Company purported to "concur with [Ukau] that the Moving Defendants' motion should be treated as one for Summary Judgment under Rule 56."[2] RA, tab 33 at 1 (Reply Pls.' Opp'n Mot., Sept. 17, 2014). Defendants-Appellees also argued that Ukau should not be granted discovery for a summary judgment motion because he did not comply with Rule 56(f) procedural requirements.

[2] Defendants-Appellees quote a portion of a passage in Ukau's brief for the proposition that Ukau requested that the Rule 12(b)(6) motion be converted. This is a mischaracterization of Ukau's conditional statement: "*To the extent that* factual determination such as the circumstances surrounding the transfers is deemed relevant to a decision of this motion, plaintiffs move for Rule 56(f) relief until reasonable discovery can be conducted." RA, tab 29 at 13 (Pls.' Opp'n Mot. Dismiss) (emphasis added). The trial court confirmed during proceedings that there was no agreement that the motion be converted.

[13] Defendants-Appellees Bruce Karolle, Jennie Wang, and Entity joined Fusheng Wang, Wei Ping Wang and Fusheng Construction Company in reply to Ukau's opposition motion. They argued that Ukau conceded in his opposition motion that the Rule 12(b)(6) motion should be converted to one for summary judgment.[3] They argued that Ukau cannot prevail on a motion for Rule 56 summary judgment because he presented no meaningful response to the Appellees' declarations and attached exhibits. They also argued that Ukau should not be granted discovery for a summary judgment motion because he did not comply with Rule 56(f) procedural requirements.

D. Decision & Order

[14] The trial court granted Appellees' Rule 12(b)(6) motion based on its finding that Ukau failed to show the requisite facts to establish a fraudulent transfer by a "preponderance of the evidence." *See* RA, tab 40 at 3-5 (Dec. & Order, Mar. 4, 2015). When ruling on Appellees' Motion to Dismiss, the trial court declined Appellees' request to convert the motion to one for summary judgment:

> The court recognizes that in ruling on a Rule 12(b)(6) motion to dismiss, it must convert the dismissal motion into a summary judgment motion whenever it considers extraneous material outside the pleadings. . . . With respect to the instant motion, the [c]ourt will only consider the Complaint and exhibits attached to the Complaint. Thus, the Court will proceed with ruling on the 12(b)(6) motion.

RA, tab 40 at 3-4 (Dec. & Order) (citation omitted).

[15] The trial court cited *Town House Department Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 19, as the controlling law on fraudulent transfers:

> For purposes of determining whether to set aside a conveyance of property pursuant to 20 GCA § 6101, the question of actual intent to defraud the creditor is the essential element of a cause of action. Thus, it must be affirmatively shown

[3] As above, this is a mischaracterization of Ukau's conditional statement.

> by sufficient evidence that the transfer was made by the transferor with the intent to delay or defraud his creditors or other persons owning and holding demands against him.

RA, tab 40 at 5 (Dec. & Order) (citations and internal quotation marks omitted).

[16] Applying this law to the Complaint and exhibits, the trial court concluded that Ukau did not sufficiently plead his claim because he failed to show by a preponderance of the evidence that the transfers were made with actual intent to defraud and without consideration. *Id.* Specifically, the trial court found that the exhibits showed that consideration was given for the transfers:

> The three exhibits attached to the Complaint are Debt Satisfaction Agreements which are integral instruments for [Ukau's] instant action. The exhibits account for the conveyance of six lots for which valuable consideration was made. Therefore, the [c]ourt finds that [Ukau] failed to affirmatively show by sufficient evidence that the transfer was made by the transferor with the intent to delay or defraud his creditors or other persons owning and holding demands against him.

Id. at 4-5.

[17] The court concluded its Decision and Order by stating that Appellees' Rule 12(b)(6) motion was granted "[b]y preponderance of the evidence." *Id.* at 5. Ukau timely filed a Notice of Appeal.

II. JURISDICTION

[18] This court has jurisdiction over appeals from a final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2)(Westlaw through Pub. L. 114-115 (2015)) and 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[19] We review dismissal for failure to state a claim pursuant to GRCP 12(b)(6) *de novo*. *Taitano v. Calvo Fin. Corp.*, 2008 Guam 12 ¶ 9 (citing *First Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 6) ("*Taitano I*").

IV. ANALYSIS

A. Whether the *Twombly* "Plausibility" Standard Applies to Local Civil Pleadings

[20] Appellees argue that the plausibility standard announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to civil pleadings in Guam and establishes "a new higher pleading standard." Appellees' Br. at 10 (Sept. 11, 2011). Therefore, as a threshold matter, we must determine whether this standard applies to general civil pleadings in Guam courts.

[21] Rule 8(a) of the Guam Rules of Civil Procedure provides, in relevant part, that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." GRCP 8(a). "We review issues of statutory interpretation *de novo*." *Cristobal v. Siegel*, 2014 Guam 16 ¶ 9 (emphasis added) (citing *People v. Alisasis*, 2006 Guam 9 ¶ 10). Our starting point for interpretation is the plain language of the rule, and absent legislative intent to the contrary, the plain meaning prevails. *Castro v. G.C. Corp.*, 2012 Guam 6 ¶ 20 (citations omitted); *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17. When interpreting the plain language of Rule 8(a), this court has historically held that "Guam law requires only notice pleading, not fact pleading." *Joseph v. Guam Bd. of Allied Health Exam'rs*, 2015 Guam 4 ¶ 9 (citing *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 94); *see also Taitano I*, 2008 Guam 12 ¶ 13 ("Rule 8 requires only a short and plain statement of the claim." (internal quotation marks omitted)).

[22] In *Conley v. Gibson*, the United States Supreme Court interpreted the federal counterpart to GRCP 8(a)—Federal Rules of Civil Procedure Rule 8(a)(2)—to mean a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." 355 U.S. 41, 45-47 (1957). "[A] complaint should not be dismissed for failure to state a claim unless

it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46.

[23] In *Bell Atlantic Corp. v. Twombly*, the Court announced a new pleading standard—the plausibility standard—for civil actions in federal court. The plausibility standard altered the federal pleading standard by making it more stringent for plaintiffs. *See Iqbal*, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)). This heightened standard is at odds with Guam's historical approach to civil pleading.

[24] Two years after *Twombly*, the Court clarified in *Ashcroft v. Iqbal* the two "working principles" that underlie the plausibility standard:

> First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.

Iqbal, 556 U.S. at 663-64 (citations omitted).

[25] In *Taitano I*, we interpreted Rule 8(a) consistent with the *Conley* standard and our historical approach, requiring only notice pleading. 2008 Guam 12 ¶ 13 ("Rule 8 requires *only* a 'short and plain statement of the claim.'" (emphasis added) (quoting GRCP 8(a) (2007)). That case, like the present one, involved dismissal of a complaint under Rule 12(b)(6) as well as a challenge to the sufficiency of the pleadings under the fraud standard provided by GRCP 9(b).[4] *See id.* ¶ 1.

[26] When interpreting Rule 8(a) in previous cases, we have not expressly adopted or rejected the *Twombly* plausibility standard. We have cited to *Twombly* in only one opinion and have

[4] The fraud pleading standard imposed by GRCP 9(b) is discussed below.

never cited to *Iqbal*. In *Core Tech International Corp. v. Hanil Engineering & Construction Co.*, we stated the following:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

Core Tech, 2010 Guam 13 ¶ 52 (quoting *Twombly*, 550 U.S. at 555 (2007)). In *Core Tech* we did not quote the plausibility standard and followed the passage with a second quotation that endorsed the *Conley* standard: "A complaint should not be dismissed for failure to state a claim unless it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Core Tech*, 2010 Guam 13 ¶ 52 (quoting *Twombly*, 550 U.S. at 561).

[27] With this background in mind, we now decline to adopt the plausibility standard from *Twombly* and *Iqbal*, choosing instead to rely on our traditional interpretation of GRCP 8(a).

[28] When a local rule tracks the language of its federal counterpart, we view federal precedent as highly persuasive when interpreting our own. However, we are not bound by such interpretations. *See Santos v. Carney*, 1997 Guam 4 ¶ 4 ("The Ninth Circuit has afforded Guam courts great latitude in interpreting a Guam Rule of Civil Procedure identical to a federal rule, but which relates to the establishment of general standards of litigation conduct."); *Lynn v. Chin Heung Int'l, Inc.*, 852 F.2d 1221, 1222 (9th Cir. 1988) (holding when Guam has not expressly adopted the federal interpretation of a federal rule of civil procedure, Guam is free to interpret its own rule independently).

[29] Guam has historically required only "notice pleading" of a short and plain statement of the claim, and this court has very recently declined the opportunity to elevate this approach by

adopting a heightened standard. *See Joseph*, 2015 Guam 4 ¶ 9 (reiterating Guam is a notice pleading and not a fact pleading jurisdiction).

[30] Other jurisdictions with rules of procedure that track the federal rules have also chosen not to adopt the *Twombly* standard. *See, e.g., Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014) (declining to adopt plausibility standard for Minnesota pleadings); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011) (declining to adopt plausibility standard for Tennessee pleadings).

[31] In *Twombly*, the United States Supreme Court expressly rejected the often cited "no set of facts" *Conley* standard for Rule 12(b)(6) motions in federal courts:

> The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . . *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

Twombly, 550 U.S. at 563 (2007) (citations omitted).

[32] This court has endorsed the *Conley* standard as recently as last year. *See Joseph*, 2015 Guam 4 ¶ 10 (applying the "liberal rules of notice pleading" and citing to *Guam Election Comm'n*, 2007 Guam 20 ¶ 94 n.58 (citing *Conley*, 355 U.S. 41, 47 (1957)). Therefore, we find that the *Twombly* standard is at odds with our approach to civil pleadings and our interpretation of our own Rule 8(a).

[33] Based on the plain language of Rule 8(a) and this court's historical interpretation as imposing only a liberal, notice pleading requirement, we find that the *Twombly* standard is inapplicable to local civil pleadings. For these reasons, Appellees' reliance on *Twombly* and *Iqbal* is misplaced, and this court declines their invitation to apply a heightened plausibility standard to general pleadings.

B. Whether the Superior Court Erred in Granting the Appellees' GRCP 12(b)(6) Motion to Dismiss for Failure to State a Claim of Fraudulent Transfer

1. Pleading Fraud Claims under Rule 9(b)

[34] Appellees argue that Ukau's Complaint does not meet the heightened pleading standard of GRCP 9(b). Appellees' Br. at 12. We must now determine whether Ukau's Complaint was sufficiently pleaded under the Rule 9(b) standard for pleading fraud.

[35] Fraud claims are special matters that are subject to a heightened pleading standard. Rule 9(b) provides, in relevant part, that "the circumstances constituting fraud or mistake shall be stated with *particularity*" and that "[m]alice, intent, knowledge, and other conditions of mind of a person may be averred *generally*." GRCP 9(b) (emphasis added). When reviewing a Rule 12(b)(6) dismissal for failure to plead a fraud claim pursuant to Rule 9(b), we must determine *de novo* whether the complaint pleaded facts with sufficient particularity. *Taitano I*, 2008 Guam 12 ¶ 9 (citing *Yourish v. Cal. Amplifier*, 191 F.3d 983, 992 (9th Cir. 1999)).

[36] Under Guam law, the elements of fraud are: "(1) a misrepresentation; (2) knowledge of falsity (or scienter); (3) intent to defraud to induce reliance; (4) justifiable reliance; and (5) resulting damages." *Id.* ¶ 12 (quoting *Hemlani v. Flaherty*, 2003 Guam 17 ¶ 9).

[37] These kinds of fraudulent transfers are defined in 20 GCA §§ 6101 and 6103. Section 6101 states in relevant part that "[e]very transfer of property . . . with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor."[5] 20 GCA § 6101 (2005). In all cases arising under section 6101, "the question of fraudulent intent is one

[5] Title 20 GCA § 6101 states in full:

> Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

20 GCA § 6101.

of fact and not of law," provided that "any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." 20 GCA § 6103 (2005).[6]

[38] These statutes create two scenarios in which a creditor may avoid a fraudulent transfer, an intentional fraudulent transfer and a constructive fraudulent transfer. First, under section 6101, a creditor may avoid a transfer when he is able to affirmatively prove actual fraudulent intent on the part of the debtor. *See Town House*, 2000 Guam 32 ¶ 19. Second, under section 6103, a creditor may avoid a transfer when he can show that the debtor transferred property to another without consideration while insolvent or in anticipation of insolvency because such a transfer is presumed to be made with knowledge and intent to defraud. *See id.* ¶¶ 25-26. Importantly, proving a fraudulent transfer under section 6103 does not require showing actual fraudulent intent. *See id.* ¶ 26.

[39] To assess whether Ukau's pleading was sufficient, we must determine whether an action for fraudulent transfer under 20 GCA §§ 6101 and 6103 implicates the heightened standard

[6] Title 20 GCA § 6103 states in full:

> In all cases arising under 21 GCA § 41101 [*Void Instruments, purchases*], or under the provisions of this Chapter, except as otherwise provided in 7 GCA § 50500 [*Transfers, Etc., Defraud Creditors*], the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.

20 GCA § 6103.

The exception under 20 GCA § 6103 applying to cases subject to 7 GCA § 50500 does not apply under the present facts because no insolvency petition was made within thirty days of the transfers at issue. *See* 7 GCA § 50500 (applying to a debtor who makes a transfer "within thirty (30) days before the filing of a petition by or against him"). Defendant Jennie Wang filed an insolvency petition under federal bankruptcy law in 2014. The transfers at issue took place in November 2011 and February 2012. Further, we are unaware of any insolvency petitions filed by remaining defendants-appellees.

imposed by Rule 9(b). In other words, we must determine whether an action for fraudulent transfer is equivalent to an action for "fraud."

[40] A key feature of a fraud claim is the "knowledge of falsity (or scienter)" element. *Gov't of Guam v. Kim*, 2015 Guam 15 ¶ 60. "Fraud implies bad faith, intentional wrongdoing and a sinister motive . . . [and] is never imputed or presumed." *Id.* (alteration in original) (quoting *Davis v. Comm'r*, 184 F.2d 86, 87 (10th Cir. 1950)).

[41] Taking the scienter element into account, we hold that an action for fraudulent transfer under section 6101 meets the elements of general "fraud." An action for fraudulent transfer under section 6103, however, does not. The presumption of fraud under section 6103 is inapposite to a general action for fraud. Therefore, the heightened standard provided by Rule 9(b), applicable only to "fraud" claims, is not appropriate for an action for fraudulent transfer under 20 GCA § 6103.

[42] Ukau did not name the statutory sections or subsections under which his Complaint asserted a cause of action. His description of the claim was given as one for "fraudulent transfer of real property." *See* RA, tab 1 at 10 (Compl., June 27, 2014).

[43] Because a fraudulent transfer claim under 20 GCA § 6101 implicates Rule 9(b) as a claim for "fraud," we must review whether Ukau pleaded his claim with sufficient particularity pursuant to Rule 9(b). This analysis is twofold. First, we must determine whether Ukau stated the circumstances surrounding the fraud with particularity. Second, we must determine whether Ukau averred the Appellees' intent to defraud generally.

[44] Because a fraudulent transfer claim under 20 GCA § 6103 does not implicate Rule 9(b)'s heightened pleading requirement, we must review whether Ukau pleaded his claim under the general notice pleading standard pursuant to Rule 8(a).

[45] Ukau's Complaint stated the following regarding the c*ircumstances surrounding the fraud*:

> 16. On or about June, 26, 2014, the District Court of Guam rendered its Findings of Fact Conclusions of Law and Order for Compensatory Damages as well as its Judgment. The award is $6,526,321.33 plus attorney's fees.
>
> 17. [Ukau is] informed and believe[s] and on that basis allege[s] that the Judgment obtained in the District Court of Guam Civil Case No. CIV11-00030 exceeds the net worth of defendants Jennie Wang and [Entity].
>
> . . . .
>
> 19. On or about November 15, 2011, a mere 25 days after filing Jennie Wang and Entity's Answer in Civil Case No. CIV11-00030, defendants Jennie Wang, Bruce Karolle and Wei Ping Wang, in their capacities as officers of the defendant [Entity] voluntarily entered into a Resolution of Directors of [Entity] to execute three Debt Satisfaction Agreements in contemplation of insolvency.
>
> . . . .
>
> 21. [Ukau is] informed and believe[s] and on that basis allege[s] that all the defendants herein voluntarily and willfully conspired to transfer all the real properties owned by [Entity] so that the properties would not be available to satisfy Jennie Wang and Entity's liability to [Ukau] in Civil Case No. CIV11-00030.
>
> . . . .
>
> 29. [Ukau is] informed and believe[s] and on that basis allege[s] that the purported considerations which appear to be paid by defendants Fusheng Wang and Wei Ping Wang for the transfer of the real properties referred to in paragraphs 22, 23[,] 24, 25, 26 and 27 herein are not genuine, are spurious, false, fraudulent and fabricated.

RA, tab 1 at 4-10 (Compl.).

[46] Ukau's Complaint stated the following with regard to the Appellees' alleged *intent to defraud*:

> 28. [Ukau is] informed and believe[s] and on that basis allege[s] that all the defendants herein conspired and carried out the transfers of real properties of Entity with an actual intent to hinder, delay, or defraud the creditors of Entity and especially [Ukau].

> . . . .
>
> 30. [Ukau is] informed and believe[s] and on that basis allege[s] that in making and receiving the transfer of the above-mentioned real properties, defendants knew or at the very least had reasonable cause to believe that such transfers were made with a view to prevent the properties from coming to [Ukau].
>
> . . . .
>
> 32. [Ukau is] informed and believe[s] and on that basis allege[s] that the transfer of the property by defendants as described above was done for the purpose of defrauding [Ukau] and to obstruct the enforcement by legal process of their rights to take said properties in execution upon a judgment obtained by [Ukau] against defendants [Entity] and Jennie Wang in Civil Case No. CIV11-00030.

Id. at 9-10.

[47] Rule 9(b) does not require a plaintiff to prove a claim of fraud at the pleading stage. *Taitano I*, 2008 Guam 12 ¶ 16. "Rather, what is required is that a plaintiff set forth his claim with sufficient detail to provide notice to defendants as to what particular fraudulent action is being alleged." *Id.* (citing *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). This standard has been described as a "who, what, when, where, and how" requirement. *See id.* ¶ 14 (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)).

[48] Ukau's Complaint alleges facts that when taken as true establish the particular transferor and transferees, the transfer of particular real properties, the dates upon which the properties were transferred, and the means by which the transfers were agreed upon and executed. Therefore, his Complaint goes far beyond a mere conclusory allegation and satisfies the heightened "particularity" pleading standard set out in Rule 9(b) for the circumstances surrounding the fraud. His Complaint also alleges intent to defraud by alleging that Appellees conspired to defraud with actual intent by transferring the property "for the purpose of defrauding [him] and to obstruct the enforcement by legal process of [his] rights to take [the

properties] in execution upon a judgment." RA, tab 1 at 10 (Compl.). This satisfies and exceeds the Rule 9(b) general pleading requirement for fraudulent intent.

[49] In summary, Ukau's fraudulent transfer claim is well-pleaded pursuant to Rule 9(b).

2. Review of Ruling on Rule 12(b)(6) Motion

[50] The trial court ruled on the Appellees' Rule 12(b)(6) motion to dismiss by concluding that Ukau did not sufficiently plead his claim "[b]y preponderance of the evidence" because he failed to "affirmatively show by sufficient evidence" that the real property transfers were made with actual intent to defraud and without consideration. RA, tab 40 at 5 (Dec. & Order, Mar. 4, 2015). Ukau argues that the trial court's standard was not appropriate for reviewing a Rule 12(b)(6) motion to dismiss but rather a burden of proof for use at trial. Appellant's Br. at 25. He is correct.

[51] When reviewing a Rule 12(b)(6) motion, the trial court must "construe the pleading in the light most favorable to the non-moving party, and resolve all doubts in the non-moving party's favor." *First Hawaiian Bank*, 2007 Guam 2 ¶ 9 (citation omitted). Dismissal is appropriate only when the non-moving party "can prove no set of facts in support of his claim which would entitle him to relief."[7] *Taitano I*, 2008 Guam 12 ¶ 9 (quoting *Vasques v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007)) (internal quotation marks omitted).

[52] As discussed above, Guam law requires only a short and plain statement of the claim showing entitlement to relief. GRCP 8(a); *see also Taitano I*, 2008 Guam 12 ¶ 13; *Guam Election Comm'n*, 2007 Guam 20 ¶ 94.

[53] Viewing the Complaint in the light most favorable to Ukau, the non-movant, there is no doubt that his Complaint was sufficient, whether pleaded as an action under 20 GCA §§ 6101 or

[7] This standard, derived from *Conley*, has been superseded in federal courts but persists in Guam and other jurisdictions. *See supra* Part IV.A (Whether the *Twombly* "Plausibility" Standard Applies to Local Civil Pleadings).

6103. Whether Ukau pleaded or proved his claim "[b]y preponderance of the evidence," as analyzed by the trial court, is immaterial at the Rule 12(b)(6) phase. Ukau stated sufficient facts to place the Appellees on notice of his claim. Therefore, the trial court erred in granting the Appellees' Rule 12(b)(6) motion.

3. Rule 15(a) Amendment

[54] At trial, Ukau requested leave to amend his Complaint pursuant to Rule 15(a)[8] in the event that the trial court found that his claims were insufficiently pleaded. *See* RA, tab 29 at 13 (Pls.' Opp'n Mot. Dismiss). He raises this issue for the first time on appeal in his Reply Brief. Appellant's Reply Br. at 20-22 (Sept. 24, 2015).

[55] Generally, we will review only issues presented in a party's opening brief. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 7 n.3 (citing *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994)). We generally exercise our discretion to reject issues raised for the first time in a reply brief. *Id.* (citing *In re Estate of Concepcion*, 2003 Guam 12 ¶¶ 10-11). Because Ukau neglected to raise the issue of Rule 15(a) amendment in his opening brief, we deem the issue waived.

4. Title 20 GCA § 5104 Payments in Preference

[56] Appellees argue under 20 GCA § 5104 that a debtor may pay any one creditor in preference to another.[9] Appellees' Br. at 20. While this is generally true, when reviewing Appellees' Rule 12(b)(6) motion, we must resolve all doubt in favor of Ukau.

[8] Rule 15(a) states in pertinent part: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." GRCP 15(a).

[9] Title 20 GCA § 5104 states the following: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another, except as provided in the insolvency law of Guam." 20 GCA § 5104 (2005).

[57] Ukau has pleaded a claim of fraudulent transfer. As discussed above, this potentially implicates two statutory sections of the Guam Code: 20 GCA §§ 6101 and 6103. Ukau's pleading involves an allegation of fraudulent intent. His pleading also involves an allegation that there was no legitimate consideration for the transfers and that they were made in contemplation of insolvency.

[58] Ukau alleges that the transferees of the property were not, in fact, *bona fide* creditors and that the consideration provided was fraudulent and falsified. Appellees' proposed reading of 20 GCA § 5104 would allow them to avoid the fraudulent transfer statutes entirely. Under such a reading, any defendant facing similar allegations could avoid trial at the pleading stage by simply providing a cursory showing that recipients of fraudulently transferred property were creditors. Therefore, Appellees' interpretation of 20 GCA § 5104 would render the fraudulent transfer statutes meaningless.

[59] On the contrary, construing the pleadings in the light most favorable to Ukau, Appellees face potential liability for fraudulent transfer. If Ukau is mistaken and the property transfers were not void, Appellees will have sufficient opportunity to provide proof of those facts. However, we cannot read 20 GCA § 5104 in such a way as to render ineffective well-pleaded allegations of potentially unlawful activity.

5. Complaint Exhibits Do Not Contradict Allegations

[60] Appellees argue that the exhibits attached to Ukau's Complaint are inconsistent with his allegations. Appellees' Br. at 23-24 ("In the instant case, the attachments to the Complaint, on their face, support the inference that the transfers were *bona fide*—i.e., agreements to discharge *preexisting* obligations, prior to the date of the instrument."). Ukau argues that this is a

"senseless" approach because the very nature of a fraudulent conveyance is such that a perpetrator does not admit to fraud on the face of a document. Reply Br. at 18-19.

[61] The documents provided as attachments to the Complaint show that property transfers were executed. Ukau alleges that the transferees of the property were not in fact *bona fide* creditors and that the consideration provided was fraudulent. He alleges intent to defraud and falsified documentation. Therefore, the fact that the documents show what appear to be *bona fide* transactions is not surprising. The essence of Ukau's claim is that the Appellees attempted to transfer properties fraudulently under the guise of legitimate transactions. For this reason, Appellees' argument is unpersuasive.

C. Summary Judgment

[62] Appellees request in the alternative that this court decide the motion as one for summary judgment. Appellees' Br. at 6, 36. Ukau responds by arguing that summary judgment is not appropriate because he has not been provided sufficient opportunity to undertake discovery, but if summary judgment is considered, the facts in the record create inferences in his favor that would defeat a summary judgment motion. Appellant's Br. at 31; Reply Br. at 4.

[63] Appellees argue that all parties agreed to treat the Rule 12(b)(6) motion as one for summary judgment. Appellees' Br. at 26. Since there was an agreement, they argue, there was also sufficient notice that the court could consider converting the motion and ruling on it as one for summary judgment. *Id.* at 27. Following such logic, Appellees assert Ukau would not be prejudiced by this court's review for summary judgment because he had an opportunity to present evidence below and declined to do so. *Id.* at 28.

1. Trial Court's Election Not to Convert the Motion

a. No "Agreement" to Convert the Motion

[64] Appellees argue that all parties agreed to convert the Rule 12(b)(6) motion to one for summary judgment, citing only Ukau's Opposition to Rule 12(b) Motion to Dismiss. *Id.* at 27. First, Appellees cite to a heading within Ukau's opposition memorandum that states the following: "By asking the court to consider matters outside the pleadings this motion should be addressed pursuant to [R]ule 56." *Id.* (citing RA, tab 29 at 6 (Pls.' Opp'n Mot. Dismiss)). The section of the memorandum that this heading represents presents a conditional argument. "*If* the court is going to consider any of the material presented other than the Complaint and its exhibits, *then* this motion must be addressed pursuant to Rule 56 together with all the procedural protections accorded by the rule." RA, tab 29 at 6 (Pls.' Opp'n Mot. Dismiss) (emphasis added). This is neither equivalent to a stipulation nor a concession that such treatment is the most appropriate course of action.

[65] Next, Appellees cite to another section within the same memorandum in which Ukau presents a request for Rule 56(f) discovery conditioned upon conversion to summary judgment. Appellees' Br. at 27. They quote Ukau as saying that he "move[d] for Rule 56(f) relief until reasonable discovery can be conducted." *Id.* (quoting RA, tab 29 at 13 (Pls.' Opp'n Mot. Dismiss). This is a mischaracterization of Ukau's position. The partial quotation ignores a key clause within the same sentence and the fact that Ukau used a conditional statement. In full, Ukau stated the following: "*To the extent that factual determination such as the circumstances surrounding the transfers is deemed relevant to a decision of this motion,* [I] move for Rule 56(f) relief until reasonable discovery can be conducted." RA, tab 29 at 13 (Pls.' Opp'n Mot. Dismiss) (emphasis added). This is equivalent to arguing *if* the court considers additional materials, *then* Ukau should be afforded the protections of Rule 56. This is not a concession that the motion is

best suited for conversion to one for summary judgment. The trial court did not convert the motion to one for summary judgment, and this conditional argument was never implicated.

[66] It is clear from the record that Appellees seek to characterize Ukau's arguments regarding summary judgment as a concession that the Rule 12(b)(6) motion should be converted to a Rule 56 motion. Faced with the same arguments below, the trial court asked Ukau's counsel in open court if Ukau agreed to convert the motion. *See* Transcript ("Tr."), vol. 4 at 2-3 (Hr'g Mot. Dismiss, Dec. 4, 2014). The court determined from counsel's response that there was no agreement. *Id.*

[67] We find that Ukau did not agree to convert the motion. He merely presented alternative arguments in the event that the trial court exercised its discretion to convert the motion. The court elected not to convert the motion, and thus Ukau's conditional arguments were never effectuated.

b. Rule 56(f) Arguments are Not Relevant to this Appeal

[68] Appellees argue that Ukau is not entitled to discovery because he did not meet the procedural requirements of Rule 56(f). Appellees' Br. at 29. This argument is misguided based on the fact that the trial court did not consider any evidence outside the pleadings and attached exhibits. The trial court declined to decide summary judgment. Therefore, Rule 56(f) was never implicated. Whether Ukau can meet the showing required by Rule 56(f) is an issue for summary judgment proceedings.

2. We Decline Review for Summary Judgment

[69] Appellees argue that this court should exercise its discretion to decide the issue of summary judgment because the trial court erroneously failed to address the issue and the record is sufficiently developed. *Id.* at 35-37 (citing *Kim*, 2015 Guam 15 ¶ 76). Ukau argues that this

court should not exercise its discretion because there is a general policy to allow the trial court to decide issues in the first instance. Appellant's Br. at 28 (citing *Barrett-Anderson v. Camacho*, 2015 Guam 20 ¶ 36).

[70] It is well-settled law that this court may, in its discretion, either remand or decide issues in the first instance if the record is sufficiently developed. *See Kim*, 2015 Guam 15 ¶ 76 ("When a trial court erroneously fails to address an issue raised before it, 'an appellate court may either remand or, if the record is sufficiently developed, decide the issue itself.'" (quoting *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 16)). Our discretion includes the ability to convert review of a Rule 12(b)(6) motion into a review for summary judgment. *See Taitano v. Calvo Fin. Corp.*, 2009 Guam 9 ¶ 32 ("In cases where both sides have been given an opportunity to be heard, an appellate court may, on its own authority, convert a Rule 12(b)(6) review into one for summary judgment.") ("*Taitano II*"). However, "we have demonstrated a general policy to allow the trial court to decide issues before it in the first instance, even questions of law." *Barrett-Anderson*, 2015 Guam 20 ¶ 36.[10]

[71] In *Government of Guam v. Kim*, we encountered a scenario in which the trial court dismissed a case while declining to consider a motion for summary judgment. 2015 Guam 15. There, the Government moved for summary judgment after filing its complaint. *Id.* ¶¶ 8-9. Kim responded by challenging the Government's standing to bring the suit. *Id.* ¶ 10. The trial court dismissed the complaint for lack of standing without specifically considering the Government's

[10] *See, e.g.*, *Kim*, 2015 Guam 15 ¶ 76 (determination of whether summary judgment is proper should be made by trial court in first instance); *Gutierrez v. Guam Power Auth.*, 2013 Guam 1 ¶ 60 (leaving to trial court to decide in first instance question of whether income approach was appropriate method of compensation in temporary taking case); *Enriquez v. Smith*, 2012 Guam 15 ¶ 19 (determination of whether plaintiff's actions fell within purview of Citizen Participation in Government Act should be made by trial court in first instance); *Villagomez-Palisson v. Superior Court*, 2004 Guam 13 ¶ 32 (determination of organicity of Arbitration Act raised below should be made by trial court in first instance (citing *Brown v. United States*, 851 F.2d 615, 620 (3d Cir. 1988))).

summary judgment motion. *Id.* ¶ 12. On appeal, we determined that the Government did in fact have standing to bring the suit but remanded to the trial court to decide the summary judgment issue because the record was not sufficiently developed. *Id.* ¶ 76.

[72] Appellees argue that unlike in *Kim*, the record on appeal here is sufficiently developed. Appellees' Br. at 37. They reference the fact that both parties have "addressed the summary judgment issues at length on appeal, with citations to the record," including briefing and transcripts. *Id.* However, while both parties referenced summary judgment below, the trial court did not rule on the summary judgment issue.

[73] Rule 56(c) provides that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." GRCP 56(c). In order to determine whether summary judgment may be granted, "the court must view the evidence and draw inferences in the light most favorable to the non[-]movant." *Edwards v. Pac. Fin. Corp.*, 2000 Guam 27 ¶ 7 (citing *Iizuka Corp. v. Kawasho Int'l (Guam) Inc.*, 1997 Guam 10 ¶ 8). "The court's ultimate inquiry is to determine whether the 'specific fact' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *Iizuka*, 1997 Guam 10 ¶ 8 (quoting *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987)) (internal quotation marks omitted). "Stated simply, there is a trial issue if there is sufficient evidence for a jury to return a verdict in the non-moving party's favor." *Kim v. Hong*, 1997 Guam 11 ¶ 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

[74] Fundamental to the consideration of a motion for summary judgment is consideration of the evidence. Here, no discovery has been undertaken. The record before this court contains only the Complaint with attached exhibits, a litany of arguments presented by the parties, and 28 exhibits submitted by Appellees that the trial court did not consider. Importantly, as noted above, the arguments made by Ukau related to summary judgment were conditioned upon the court's consideration of summary judgment in lieu of the Rule 12(b)(6) motion. The trial court did not rule on the summary judgment motion or consider extraneous material outside of the Complaint. Therefore, Ukau's summary judgment arguments below were immaterial, and Ukau was afforded no opportunity to discover additional evidence.

[75] In *Taitano II*, the defendant challenged the sufficiency of plaintiffs' amended claim under Rule 12(b)(6) after many years of protracted litigation in a land dispute case. 2009 Guam 9. The defendant requested this court to take judicial notice of a host of public documents related to the litigation. *Id.* ¶ 31. We considered the documents. *Id.* Plaintiffs did not object or submit their own evidence in response. *Id.* This court was consequently presented with the task of determining "whether the copious submission of documents to this court has so changed the character of our Rule 12(b)(6) review that it now becomes a review of summary judgment." *Id.* ¶ 32. We held that it was not appropriate to convert our review to one for summary judgment because the plaintiffs were not properly presented the opportunity to present their own evidence for that purpose:

> While we find the [p]laintiffs' silence deafening regarding [defendant's] submitted documents, the [p]laintiffs were responding to the appropriate standard of review (and our instructions) in discussing only the legal issues. They have not yet been given a reasonable opportunity to present all pertinent material. We therefore continue to apply the standard of review for Rule 12(b)(6) dismissals. The documents submitted on appeal are relevant to the extent they show that [p]laintiffs can prove no set of facts in support of [their] claim which would entitle [them] to relief.

Id. ¶¶ 32-33 (citations and internal quotation marks omitted).

[76] Here, like in *Taitano II*, we are asked to convert our review of a Rule 12(b)(6) decision to one for summary judgment. Appellees make this request having only received a judgment on their Rule 12(b)(6) motion below. We find that Ukau adequately responded to that motion. To grant summary judgment now would deny Ukau the opportunity to undertake discovery and present evidence pertinent to summary judgment.

[77] Accordingly, we decline to review the Rule 12(b)(6) decision as one for summary judgment.

V. CONCLUSION

[78] The trial court erred in granting the Appellees' Rule 12(b)(6) motion because Ukau pleaded his cause of action sufficiently under Rule 8(a) and Rule 9(b). Additionally, we decline to affirm the judgment of the trial court on the alternative ground of summary judgment.

[79] Accordingly, we **REVERSE** the decision of the trial court to grant Appellees' Rule 12(b)(6) Motion to Dismiss and **REMAND** for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice