IN THE SUPREME COURT OF GUAM

ROSARIO S. BAUTISTA and MANUEL C. SHOLING,
Plaintiff-Appellees,

v.

FRANCISCO TORRES, Individually and as the Previous Special Administrator and Now Executor of the Estate of Jesus U. Torres, Deceased, and PETER F. PEREZ,
Defendant-Appellees.

DANIEL U. TORRES and BARBARA M. DeMELLO,
Trustees under the Esteban Torres Family Trust Dated May 12, 1995,
Plaintiff-Intervenor/Counterclaim-Defendant Appellees,

v.

ROSARIO S. BAUTISTA and MANUEL C. SHOLING,
Defendant-Appellees,

and

GLORIA C. SHOLING,
Third-Party Defendant/Counterclaim-Plaintiff Appellant.

Supreme Court Case No.: CVA16-021
Superior Court Case No.: CV0471-07

OPINION

Cite as: 2017 Guam 17

Appeal from the Superior Court of Guam
Argued and submitted on June 1, 2017
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Presiding Justice[1]; ROBERT J. TORRES, Associate Justice; ALBERTO E. TOLENTINO, Justice *Pro Tempore*.

PER CURIAM:

[1] Gloria C. Sholing appeals a final judgment of the Superior Court. Gloria Sholing contends the trial court erred by applying the law of the case doctrine to her counterclaims, by finding that her proposed claim for fraud was barred by the statute of limitations, and in deciding that her counterclaims were time-barred even under the doctrine of recoupment. She further argues the trial court abused its discretion by denying her motion for leave to file a second amended answer and counterclaims, and third-party cross-claims, by implication through entering final judgment. Appellees Daniel U. Torres and Barbara M. DeMello—trustees under the Esteban Torres Family Trust dated May 12, 1995—offer several rationales for affirming the judgment on other grounds in addition to defending the judgment on its own terms. For the reasons explained below, we reverse the Superior Court judgment in part, and remand for further consideration of Gloria Sholing's arguments.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The underlying case is sprawling, generating multiple appeals. *See Bautista v. Torres*, CVA16-020 (another appeal by Gloria Sholing's siblings). It is also related to a probate matter, *In re Estate of Jesus U. Torres*, Superior Court Case No. PR0104-02, which itself has generated an appeal and writ case, *see In re Estate of Jesus U. Torres*, CVA17-005; *Bautista v. Superior Court* (*Torres*), WRP17-001. The facts we expound upon here are relevant to the instant appeal.

[3] In September 1967, the Sholing Family—siblings Rosario Bautista, Manuel Sholing, and Gloria Sholing ("Sholing Siblings"), and their mother Ana Sholing, acting individually and as

[1] Associate Justice F. Philip Carbullido, as the senior member of the panel, was designated Presiding Justice.

attorney-in-fact for her children—signed a retainer agreement (the "1967 Agreement") with attorney Jesus U. Torres ("Attorney Torres"). For $200.00 per month—payable October 1, 1967, through September 30, 1987—Attorney Torres agreed to handle legal matters related to the lease of several properties on which the Pacific Islands Club hotel is currently built (the "PIC Property").

[4] Several days after the agreement was signed, Attorney Torres sent a letter to Manuel Sholing (the "1967 Letter") explaining the terms of a lease he had negotiated. In that letter, he mentions his retainer fees under the 1967 Agreement, which he explains are "for my services and services that I have agreed to render in the future." Record on Appeal ("RA"), tab 211, Ex. D (1967 Letter to Manuel Camacho Sholing as attached to Decl. of Leslie Travis, May 28, 2010).

[5] In October 1987, the same parties signed a new retainer agreement (the "1987 Agreement"). This agreement recognized that Attorney Torres had been retained for the preceding twenty years and created a new retainer agreement guaranteeing Attorney Torres ten percent of the annual rental of the PIC Property from October 1, 1987, through September 30, 2012. The amount to be paid under the 1987 Agreement was written to be "earned and vested" immediately and would be paid in full in consideration for Attorney Torres's professional services rendered for as long as he was able to provide them. Record on Appeal ("RA"), tab 211, Ex. C (1987 Agreement as attached to Decl. of Leslie Travis).

[6] The 1987 Agreement states that during that same month of October, the Sholing Family entered into an agreement with the lessee of the PIC Property implementing escalation clauses to the Sholing Family's benefit. Throughout this period, Attorney Torres sent periodic statements to the Sholing Family to inform them of the total rent collected and the amounts of taxes and legal fees deducted.

[7] Attorney Torres passed away in August 2002, and Ana Sholing passed away in September 2005.

[8] In April 2007, Rosario Bautista and Manuel Sholing filed a complaint against Francisco Torres, individually and as the previous special administrator and now executor of Attorney Torres's estate (together, the "Estate"), and attorney Peter F. Perez ("Attorney Perez") alleging breach of fiduciary duty, deceptive trade practices, and negligence, and requesting rescission and restitution. They subsequently amended their complaint three times.

[9] Daniel Torres and Barbara DeMello ("Heirs") later intervened. They alleged breach of contract claims against the Sholing Siblings, bringing Gloria Sholing into the suit for the first time.

[10] Gloria Sholing filed an Answer, and later an Amended Answer and Counterclaims. Gloria Sholing alleged in her counterclaims against the Heirs that the 1987 Agreement was void for lack of consideration and was unconscionable; she also sought restitution. Gloria Sholing later moved to dismiss the Heirs' complaint for lack of standing, and the court later did so.

[11] The Heirs filed a motion for summary judgment on Rosario Bautista and Manuel Sholing's third amended complaint and Gloria Sholing's counterclaims. The memorandum in support of that motion argued, among other things, that the statutes of limitation had run on the Sholing Siblings' claims and that they should be further barred by laches. Gloria Sholing opposed the motion. The trial court took the matter under advisement.

[12] Gloria Sholing thereafter filed a motion for leave to file a second amended answer and counterclaim, and third-party cross-claims, seeking to assert, among other claims, that there was fraud in the inducement of the 1987 Agreement. She argued that the 1967 Letter, disclosed to

her during discovery, gave rise to the new claim. The Heirs filed an opposition, and Gloria Sholing replied. The trial court did not take action on Gloria Sholing's motion.

[13] Several other parties filed motions for summary judgment that the trial court acted on before the Heirs' motion for summary judgment. The trial court granted Attorney Perez's motion for summary judgment on Rosario Bautista and Manuel Sholing's third amended complaint, finding that the statutes of limitation had run on the claims and that they would further be barred by laches. Subsequently, the trial court granted an Estate motion for summary judgment on the third amended complaint on the same grounds.

[14] Thereafter, the trial court issued a decision and order granting the Heirs' motion for summary judgment. The court found Gloria Sholing's counterclaims were barred, whether by application of the law of the case doctrine or an independent application of the statutes of limitation. It also found that the doctrine of recoupment did not apply to preserve Gloria Sholing's claims because laches still applied. In disposing of the claims, the trial court also engaged briefly with Gloria Sholing's fraud claim, even though it had not formally acted on the motion to file amended pleadings in which that claim was proferred.

[15] Having disposed of all issues before it, the trial court entered judgment in favor of the defendants and dismissed the matter with prejudice. Gloria Sholing timely appealed.

II. JURISDICTION

[16] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-84 (2017)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[17] "We review a trial court's decision granting a motion for summary judgment *de novo*." *Hawaiian Rock Prod. Corp. v. Ocean Hous., Inc.*, 2016 Guam 4 ¶ 13 (citing *Zahnen v. Limtiaco*, 2008 Guam 5 ¶ 8; *Taitano v. Lujan*, 2005 Guam 26 ¶ 11). "In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light most favorable to the non-moving party." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7 (quoting *Edwards v. Pac. Fin. Corp.*, 2000 Guam 27 ¶ 7). "[S]ummary judgment is proper 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." *Edwards*, 2000 Guam 27 ¶ 7. There is a genuine issue of material fact if sufficient evidence exists to establish "a factual dispute requiring resolution by a fact-finder." *Id.*

[18] "A trial judge's conclusions of law . . . are reviewed *de novo*," *Mendiola v. Bell*, 2009 Guam 15 ¶ 11 (citing *Craftworld Interior, Inc. v. King Enters.*, 2000 Guam 17 ¶ 6), and "[f]actual determinations are reviewed for clear error." *Yang v. Hong*, 1998 Guam 9 ¶ 4.

[19] We review denial of a motion to amend pleadings for abuse of discretion. *M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.*, 2016 Guam 35 ¶ 25.

IV. ANALYSIS

[20] This opinion considers (A) whether the trial court erred in applying the law of the case doctrine to Gloria Sholing's counterclaims; (B) whether the trial court abused its discretion in denying Gloria Sholing's motion to file amended pleadings by implication through erroneous application of the statute of limitations; (C) whether the trial court erred in finding that Gloria Sholing's counterclaims were time-barred even under the doctrine of recoupment; and (D)

whether, as the Heirs argue, we should affirm on other grounds because (1) Gloria Sholing does not have standing personally to assert a claim for fraud, (2) her claim in the Probate Case is time-barred, or (3) she has waived her fraud claim.

A. Whether the Trial Court Erred in Applying the Law of the Case Doctrine to Gloria Sholing's Counterclaims

[21] Gloria Sholing argues that the trial court misapplied the law of the case doctrine by using her siblings' already-adjudicated claims against Attorney Perez and the Estate as a bar against her. Gloria Sholing argues that she is a different party with distinct claims, specifically that her fraud claim has an entirely different factual underpinning because of the circumstances of discovering the 1967 Letter. Appellant's Br. at 22-23 (Feb. 21, 2017).

[22] The trial court decided that Gloria Sholing's counterclaims are barred either by law of the case *or* by an independent application of the statutes of limitation. RA, tab 390 at 7 (Dec. & Order, Sept. 9, 2016). An independent application of the statutes of limitation bar the three counterclaims in her Amended Answer and Counterclaims even if they are distinct from the claims raised by her siblings. *Id.* at 8; *see also* RA, tab 158 (Am. Answer & Countercls., Apr. 1, 2010). Gloria Sholing essentially concedes this by only arguing that the discoverability of her fraud claim is distinct. At oral argument, Gloria Sholing more clearly conceded this point. As such, we do not need to consider whether law of the case was applicable to these claims or whether the three initial counterclaims are viable.

[23] The Decision and Order does not clearly apply the law of the case doctrine to the fraud claim, which was actually part of Gloria Sholing's Motion for Leave to File Second Amended Answer and Counterclaim, and Third-Party Cross-claims—a motion that was never directly addressed. *See* RA, tab 390 at 7-8 (Dec. & Order); RA, tab 230 (Mot. Leave to File Second Am. Answer & Countercls., & Third-Party Cross-cls., June 10, 2010). Because the claim has a

distinct factual underpinning that the trial court had not previously considered in disposing of any other claim, the law of the case doctrine would not have been applicable. *See, e.g.*, *Lujan v. Lujan*, 2002 Guam 11 ¶ 7 ("With respect *to the re-litigation of a previously decided issue*, the rule is that 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" (emphasis added) (quoting *People v. Hualde*, 1999 Guam 3 ¶ 13)); *cf. McDonough v. Marr Scaffolding Co.*, 591 N.E.2d 1079, 1084 (Mass. 1992) ("It is sufficient to note that the factual issues raised in the two motions differed significantly from each other . . . ."). As such, we now consider the trial court's independent treatment of the fraud claim.

B. Whether the Trial Court Abused Its Discretion in Denying Gloria Sholing's Motion for Leave to File a Second Amended Answer and Counterclaims, and Third-Party Cross-claims, by Implication through Erroneous Application of the Statute of Limitations

[24] The trial court engaged with Gloria Sholing's fraud claim, RA, tab 390 at 7 (Dec. & Order), even though it was contained in a motion to file amended pleadings that it never directly addressed, *see* RA, tab 230 (Mot. Leave to File Second Am. Answer & Countercls., & Third-Party Cross-cls.) (setting forth the fraud claim); Certified Docket Sheet (lacking entry for any order granting the foregoing). When determining whether a pending motion was impliedly denied by entry of judgment, we "examine both the judgment and the nature of the motion whose implied denial is at stake." *Abalos v. Cyfred, Ltd.*, 2009 Guam 14 ¶ 17. Because the trial court explicitly addressed one of the claims contained within what would have been the amended pleadings, found it inviable, and entered judgment for the defendants, we conclude the trial court impliedly denied the motion.

[25] Although we do not have the trial court's explicit reasoning, the text of the Decision and Order suggests that the denial was based on the trial court's decision that the claims contained in

the proposed amended pleadings were also time-barred. The trial court, however, did not squarely address Gloria Sholing's argument for the fraud claim's viability.

[26] The trial court wrote:

> Gloria [Sholing] argues that her fraud claim was timely made. Gloria believes that, because she did not discover the fraud until discovery for this case was underway, the Court should not start the limitations clock until her involvement in the matter. If the Court were to start the limitations clock on February 26, 2010, the day she started receiving discovery material in this matter, Gloria would have been within the time limit at the filing of her counterclaim. . . .
>
> . . . . Gloria Sholing stated that she had no knowledge of the 1987 Agreement between her mother and Attorney Torres until discovery for this instant case started, around March or April, 2010. *See Bautista v. Torres*, Superior Court Case No. CV0471-07, Decl. of Gloria Sholing at 1 ¶ 4 (May 28, 2010). However, Gloria also states that she first was made aware of the 1987 Agreement in September 2005, when she went through a metal box with all of Ana Sholing's important legal papers and documents after Ana Sholing's death. *See id.* at 2 ¶ 7. Furthermore, Gloria states in her declaration that she lived with her mother for most of her life. Even if Gloria did not know of the rental agreement from its inception in 1987, and continued to be unaware of its existence until 2005, the statute of limitations for Counts 1-3 would have started in September 2005. When Gloria filed her Opposition and Counterclaims in 2010, all time under the statute had expired.

RA, tab 390 at 7-8 (Dec. & Order).

[27] The trial court took Gloria Sholing to be arguing "that she had no knowledge of the 1987 Agreement between her mother and Attorney Torres until discovery for this instant case," *id.* at 7, but she argued instead a more limited point, that "[p]rior to receiving a copy of the 1967 Letter, [she] did not know that [Attorney] Torres was being paid legal fees under the 1987 [Agreement] for services for which he had already been paid under the 1967 agreement," *see* RA, tab 209 at 2 (Decl. of Gloria C. Sholing, May 28, 2010); *see also* RA, tab 256 at 7 (Reply Mem. in Supp. of Mot. for Leave to File Second Am. Answer & Countercls., & Third-Party Cross-Cls., July 22, 2010) ("Gloria Sholing did not have any knowledge of facts sufficient to put her on notice of her obligation of inquiry of these counterclaims until after she filed her original

Answer in this matter on February 26, 2010, and engaged in meaningful discovery."). Gloria Sholing acknowledges access to the Agreements, but argues that she did not discover the fraud of the 1987 Agreement until reading the contents of the 1967 Letter, and that she should not have been expected to discover it before that time based solely on the contents of the Agreements or other relevant information previously available to her. The 1967 letter was addressed only to Manuel Sholing, and Gloria Sholing asserts she did not receive a copy of it until she received discovery material in 2010, at which time she claims the statute of limitations should begin to run.

[28] The trial court abused its discretion when it impliedly denied Gloria Sholing's motion to file amended pleadings based, at least in part, on an incomplete application of her argument. On remand, the trial court should reconsider the motion to file amended pleadings in the context of discerning the proper application of the discovery rule to the claims contained therein. Guam Rule of Civil Procedure 15(a)—concerning amended and supplemental pleadings—was derived from its federal counterpart. *M Elec. Corp.*, 2016 Guam 35 ¶ 40. Based on the federal *Foman* factors we have adopted, leave should be freely given in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Id.* ¶ 42 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). If the trial court were to accept Gloria Sholing's discovery arguments, the formerly implicit reasoning regarding those factors—especially as to delay or futility—may change.

C. Whether the Trial Court Erred in Finding that Gloria Sholing's Counterclaims Were Time Barred Even Under the Doctrine of Recoupment

[29] In *Overboe v. Brodshaug*, the North Dakota Supreme Court stated:

> Recoupment is an equitable doctrine with its own unique characteristics: it must arise out of the same transaction that is the subject matter of the plaintiff's action and it can only be used to reduce or avoid the plaintiff's recovery. It is not a "weapon of offense." Recoupment cannot be used to obtain affirmative relief. Recoupment differs from a counterclaim, which may arise out of a separate transaction and allows for affirmative relief and recovery in excess of that sought by the plaintiff, and from a setoff, which involves a transaction unrelated to the plaintiff's action. Recoupment is purely defensive.

751 N.W.2d 177, 182 (N.D. 2008) (quoting *Minex Res., Inc. v. Morland*, 467 N.W.2d 691, 699 (N.D. 1991)) (cited favorably in *Yanfag v. Cyfred, Ltd.*, 2009 Guam 16 ¶ 15).

[30] After filing her Answer, Gloria Sholing moved to dismiss the Heirs' complaint for lack of standing, RA, tab 208 (Mot. to Dismiss, May 28, 2010), and the trial court later did so, RA, tab 294 (Dec. & Order, May 31, 2013). This happened well before the trial court issued the order in which it denied application of the doctrine of recoupment. *See* RA, tab 390 (Dec. & Order, Sept. 9, 2016). Thus, at the time that order issued, there were no pending claims against Gloria Sholing for which recoupment might be invoked, and this aspect of the order was essentially advisory. However, Gloria Sholing is concerned about this decision's effect on possible future litigation or matters that may later be remanded in other appeals. *See* Appellant's Br. at 30-31.

[31] The trial court acknowledged that statutes of limitation do not apply to claims in recoupment, RA, tab 390 at 12 (Dec. & Order) (citing *Overboe*, 751 N.W.2d at 182), but it nonetheless decided that the underlying claims were barred by the equitable doctrine of laches, *id.* We do not squarely address the application of the doctrine of recoupment to the facts of this case because we find the trial court had no need to decide the issue. However, should the doctrine become relevant in this case at a later date, the trial court's decision should not preclude reargument. This is especially so in light of at least some persuasive authority that laches is inapplicable to claims in recoupment. *See, e.g.*, *NVF Co. v. New Castle Cty.*, 276 B.R. 340, 353 (D. Del. 2002) ("An otherwise untimely claim asserted as a recoupment will not be time-

barred."), *aff'd*, 61 F. App'x 778 (3d Cir. 2003); *Holzer v. United States*, 250 F. Supp. 875, 878 (E.D. Wis. 1966) ("laches is not a defense to a claim for equitable recoupment"), *aff'd*, 367 F.2d 822 (7th Cir. 1966).

D. Whether We Should Affirm the Judgment on Other Grounds Because Gloria Sholing Does Not Have Standing Personally to Assert a Claim for Fraud, Her Claim in the Probate Case is Time-barred, or She Has Waived Her Fraud Claim

[32] The Heirs assert three reasons we could affirm on other grounds, Appellee-Heirs' Br. at 26-33 (Apr. 5, 2017), but we do not find these arguments persuasive.

1. Whether Gloria Sholing lacks personal standing to maintain the suit

[33] The Heirs claim, and Gloria Sholing confirms, that she conveyed all of her real property to a trust in 2005. *See* Appellee-Heirs' Br. at 26; Appellant's Reply Br. at 16 (Apr. 24, 2017). The Heirs claim that this transfer means that the trust, and not Gloria Sholing, should have instituted the suit. Gloria Sholing retorts:

> The monies collected by J.U. Torres prior to his death were derived, in part, from Gloria [Sholing]'s rentals from the PIC Property. As one of the parties to the 1987 Agreement, Gloria [Sholing] has claims against the Estate for attorney's fees collected by J.U. Torres until his death in 2002, and subsequently by the Estate, through 2005, when she conveyed her interest in the PIC Property to the Trust. Gloria [Sholing] is entitled to recover the amounts paid to Torres and his Estate.

Reply Br. at 17. Gloria Sholing can assert personal rights to redress injuries she sustained prior to establishing the trust.

2. Whether Gloria Sholing's claim in the Probate Case is time-barred

[34] The Heirs claim that

> [n] probate claim was filed by Gloria Sholing preceding her filed Counterclaims in the underlying civil action. . . . The appointed Executor and permanent Administrator F. Torres published his Second Notice to Creditors and his remedial steps were taken on March 11, 12 and 13, 2009. . . . If Gloria Sholing's claims are time-barred in probate; then, the bar applies as well in this civil action.

> Accordingly, the full weight of 15 G.C.A. § 2503(a) should apply to the belated claims of Gloria Sholing as against the Estate of J.U. Torres and its Heirs.

Appellee-Heirs' Br. at 30-31.

[35] However, the Heirs continue

> Of course, the Probate Court in 2009 did not agree with the position asserted by the Heirs as to the running of the claim period against the Sholings as creditors. The Court ruled on February 26, 2009, that only a general administrator, and not a special administrator, has the power to publish a Notice to Creditors to start the claim period. *Id.* The Heirs take vigorous issue with this conclusion, and request that this Court review and reverse on appeal that part of the Decision (2/26/09) voiding the Special Administrator's publication of Notice to Creditors on June 30, 2004 because without standing, Ms. Gloria Sholing's claims must be dismissed and the lower court judgment affirmed.

Id. at 32-33 (citations omitted).

[36] We decline to entertain what amounts to an invitation by the Heirs to collaterally attack a separate matter not currently before the court as part of this appeal.

3. Whether Gloria Sholing has waived her fraud claim

[37] The Heirs argue that Gloria Sholing waived her fraud claim, but the argument is ill-formed and confused. As Gloria Sholing responds,

> Intervenors-Appellees conclude with a confusing argument that Gloria [Sholing] has somehow waived her claims because she took no steps to assert a claim while J.U. Torres was alive. Intervenors-Appellees support this claim with arguments extolling J.U. Torres' virtues and accomplishments, with no discussion about the standards applicable to a legal defense of waiver other than to state that it is an equitable defense. J.U. Torres's accomplishments are not relevant.

Reply Br. at 23. The Heirs have not made out a legal defense in waiver.

V. CONCLUSION

[38] The trial court correctly discerned that Gloria Sholing's initial counterclaims were time-barred, but it abused its discretion by impliedly denying her motion to file amended pleadings which would have added, among others, a fraud claim, the viability of which the trial court did

not fully assess. Because the trial court did not need to address the doctrine of recoupment, the parties should not be precluded from rearguing this issue should the need arise. The Superior Court Judgment is **REVERSED** in part, and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

/s/
ROBERT J. TORRES
Associate Justice

/s/
ALBERTO E. TOLENTINO
Justice *Pro Tempore*

/s/
F. PHILIP CARBULLIDO
Presiding Justice