



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

DAVID J. LUJAN and ANNA B. LUJAN,
Plaintiffs-Appellants/Cross-Appellees,

v.

CALVO FISHER & JACOB LLP f/k/a Calvo & Clark, LLP,
a Guam Limited Partnership, and DOES 1 through 100,
Defendants-Appellees/Cross-Appellants.

Supreme Court Case No.: CVA17-011
(Consolidated with CVA17-012)
Superior Court Case No.: CV0818-10

OPINION

Cite as: 2018 Guam 27

Appeal from the Superior Court of Guam
Argued and submitted on October 17, 2018
Hagåtña, Guam

E-Received

12/28/2018 4:35:23 PM

Appearing for Plaintiffs-Appellants/
Cross-Appellees:

James M. Maher, *Esq.* (argued)
Law Office of James M. Maher
238 Archbishop Flores St., Ste. 300
Hagåtña, GU 96910

Delia Lujan Wolff, *Esq.*
Lujan & Wolff LLP
300 DNA Building
238 Archbishop Flores St.
Hagåtña, GU 96910

Appearing for Defendants-Appellees/
Cross-Appellants:

Edward Swanson, *Pro Hac Vice* (argued)
Britt Evangelist, *Pro Hac Vice*
Swanson & McNamara LLP
300 Montgomery St., Ste. 1100
San Francisco, CA 94104

Duncan G. McCully, *Esq.*
Mark Beggs, *Esq.*
McCully & Beggs, P.C.
139 Murray Blvd., Ste. 200
Hagåtña, GU 96910

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

CARBULLIDO, J.:

[1] Plaintiffs-Appellants Ana and David Lujan (“the Lujans”) appeal (1) a denial of their motion to amend and supplement their complaint and (2) a grant of Defendant-Appellee Calvo Fisher & Jacob LLP’s¹ (“CFJ”) motion for summary judgment. The Lujans argue the trial court erred in denying their motion to amend and supplement for futility because their proposed amended complaint stated cognizable damages in tort and because the trial court failed to consider their legal malpractice in contract claim. CFJ cross-appeals the trial court’s denial of their motion for fees and costs.

[2] For the following reasons, we vacate the trial court’s judgment and remand for the trial court to consider whether the Lujans’ proposed amendment asserting a legal malpractice claim in contract is futile.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In 2009, the Lujans engaged CFJ and executed an engagement agreement. That year, CFJ filed a complaint on behalf of the Lujans in Superior Court Case No. CV0776-09 (“the Girardi Action”).

[4] In April 2010, CFJ brought an action in California against Mr. Lujan for unpaid legal fees and costs (“the California Action”). In May 2010, the Lujans brought the underlying action in the Superior Court of Guam against CFJ (“the Guam Action”). The parties agreed to stay the

¹ The complaint was originally filed against Calvo & Clark, LLP. A substitution of counsel was subsequently filed and since said filing, the trial court used the current firm name of Calvo Fisher & Jacob LLP to refer to Defendant-Appellee. For uniformity, we use the current firm name in the caption and throughout this opinion.

proceedings in Guam until the California Action was resolved. In 2013, the San Francisco court entered judgment for CFJ in the California Action. Mr. Lujan lost again on appeal. After this decision, the Superior Court granted CFJ's motion to lift the stay in the underlying action, and CFJ filed an answer and counterclaim.

[5] In the Guam Action, CFJ moved for summary judgment, asserting *res judicata*. Subsequently, and after the Superior Court dismissed the Girardi Action, the Lujans moved to supplement and amend their complaint to add allegations of legal malpractice based on this dismissal. The Lujans sought to add to their complaint paragraph 46 regarding CFJ's alleged negligence in its handling of the Girardi Action. The Lujans' breach of contract claim incorporated the proposed paragraph 46. CFJ opposed the Lujans' motion.

[6] The trial court denied the Lujans' motion and granted CFJ's motion for summary judgment. Both the Lujans and CFJ timely appealed, and the appeals were consolidated.

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-281 (2018)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[8] The denial of a motion to amend or supplement a complaint is reviewed for abuse of discretion. *See M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.*, 2016 Guam 35 ¶ 25; *see also Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988) (applying abuse of discretion standard to grant of Federal Rule of Civil Procedure 15(d) request to supplement). "A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard." *M Elec. Corp.*, 2016 Guam 35 ¶ 41 (quoting *Agana Beach Condo. Homeowners' Ass'n v. Untalan*, 2015 Guam 35 ¶ 12).

IV. ANALYSIS

[9] The trial court denied the Lujans’ motion to amend and supplement because it found that the Lujans had not stated cognizable damages and, thus, the motion was futile. Record on Appeal (“RA”), tab 152 at 20 (Dec. & Order, Mar. 21, 2016). At issue is whether this decision constitutes an abuse of discretion.²

[10] The only addition to the Lujans’ complaint is paragraph 46 under Count 1 for legal negligence based on the dismissal of the Girardi Action. *Compare* RA, tab 117 at 25-31 (Mem. Supp. Mot. Amend & Suppl., Nov. 10, 2015), *with* RA, tab 1 at 25-30 (Compl., May 25, 2010). As the factual allegations in paragraph 46 occurred after the Lujans filed their initial complaint, the motion is one to supplement under Guam Rule of Civil Procedure (“GRCP”) 15(d). *See* Guam R. Civ. P. 15(d).

[11] Guam Rule of Civil Procedure 15(d) states, “Upon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” *Id.* This rule was derived from Rule 15 of the Federal Rules of Civil Procedure (“FRCP”). *Id.* source note to 2014 amendment. This court has previously noted that federal interpretation of FRCP 15 is persuasive when interpreting GRCP 15. *M Elec. Corp.*, 2016 Guam 35 ¶ 40. “The rule is a tool of judicial economy and convenience. Its use is therefore favored.” *Keith*, 858 F.2d at 473 (discussing FRCP 15(d)). Motions for supplemental pleadings are “[s]o useful . . . and of such service in the efficient administration of justice that they ought to be allowed as of course, unless some particular reason

² Both parties contend that the other has in some manner conceded or waived various arguments regarding this issue. *See* Appellants’ Br. at 15 (Sept. 11, 2017); Appellee’s Br. at 28 (Nov. 15, 2017). Neither party’s contentions are well taken, and we will address the merits.

for disallowing them appears.” *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28-29 (4th Cir. 1963).

[12] A court “faced with a Rule 15(d) motion must weigh the totality of circumstances, just as it would under Rule 15(a).” *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 7 (1st Cir. 2015). In *Foman v. Davis*, 371 U.S. 178 (1962), the U.S. Supreme Court laid out a number of factors to consider when deciding a request for leave to amend, 371 U.S. at 182, which this court has adopted, *see M Elec. Corp.*, 2016 Guam 35 ¶ 42. These same factors used to analyze motions to amend, including futility, should be considered when deciding a request for leave to supplement. *See, e.g., Gadbois*, 809 F.3d at 6-7 (collecting cases).

[13] A motion to amend is futile when the complaint as amended would be subject to dismissal. *See, e.g., Sonoma Cty. Ass’n of Retired Emps. v. Sonoma County*, 708 F.3d 1109, 1118 (9th Cir. 2013); *Laber v. Harvey*, 438 F.3d 404, 428 (4th Cir. 2006); *United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 387 (5th Cir. 2003); *Leary v. Daeschner*, 349 F.3d 888, 905 n.22 (6th Cir. 2003); *Lucente v. Int’l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). When determining whether a proposed amendment should be denied as futile, a court must analyze the proposed amendment as if it were before the court on a motion to dismiss. *See Krainski v. Nevada ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010); *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007). In so doing, the court must accept as true all well-pleaded factual allegations, and view them in the light most favorable to the pleading party. *First Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 9. The court must then look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief. *Anderson*, 499 F.3d at 1238.

[14] The trial court analyzed the Lujans' proposed addition as a tort claim, rather than a contract claim. *See* RA, tab 152 at 11-19 (Dec. & Order, Mar. 21, 2016). The Lujans argue that the allegations of malpractice in their proposed paragraph 46 were realleged and incorporated in the breach of contract claim and, therefore, the trial court erred in denying their motion without consideration of the legal malpractice claim in contract. *See* Appellants' Reply Br. at 24 (Dec. 15, 2017).

[15] While this court has yet to decide whether a cause of action for malpractice lies in contract or tort, it has previously applied California caselaw to a legal malpractice claim. *See Gayle v. Hemlani*, 2000 Guam 25 ¶¶ 45-47. In California, legal malpractice can be a claim either in tort or in contract, depending on the circumstances. *See Orrick Herrington & Sutcliffe LLP v. Superior Court*, 132 Cal. Rptr. 2d 658, 664 (Ct. App. 2003) (discussing both tort and contract damages in a legal malpractice action). This approach is followed by a majority of other jurisdictions. *See, e.g., Ambrose v. Roberts*, 393 So. 2d 132, 133-34 (La. Ct. App. 1980); *Hendrickson v. Sears*, 310 N.E.2d 131, 132-33 (Mass. 1974); *Hutchinson v. Smith*, 417 So. 2d 926, 927 (Miss. 1982); *Vollgraft v. Block*, 458 N.Y.S.2d 437, 438-39 (Sup. Ct. 1982); *Harrison v. Casto*, 271 S.E.2d 774, 775 (W. Va. 1980). Given this court's previous reliance on California jurisprudence in analyzing a legal malpractice issue and the fact that California's approach is consistent with a majority of other jurisdictions, we will also recognize actions for legal malpractice in contract. As Guam recognizes actions for legal malpractice in contract, the trial court abused its discretion in denying the motion to amend and supplement without considering the legal malpractice in contract claim put forth by the Lujans.

[16] We need not consider the Lujans' other arguments regarding the trial court's denial of their motion to amend and supplement. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33 ("As a

general appellate principle, a court will not address issues unnecessary to the resolution of the case before it.”). Moreover, as the trial court’s reconsideration of the Lujans’ motion to amend may lead the court to reconsider its grant of CFJ’s motion for summary judgment and the court’s ultimate judgment, which denied CFJ costs and fees, we will not address these issues at this time. If the trial court upon remand denies the Lujans’ motion to amend, the court shall reenter judgment and the parties are free to seek further review in the ordinary course.

V. CONCLUSION

[17] We hold that the trial court abused its discretion in denying the Lujans’ motion to amend and supplement their complaint because the trial court failed to consider the Lujans’ proposed legal malpractice claim in contract. Accordingly, we **VACATE** the judgment and **REMAND** for the trial court to address the Lujans’ proposed amendment asserting a legal malpractice claim in contract. If the trial court upon remand denies the Lujans’ motion to amend and supplement, the court shall reenter judgment.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

ROBERT J. TORRES
Associate Justice

/s/

KATHERINE A. MARAMAN
Chief Justice