FILED

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

FIRST COMMERCIAL BANK, Appellant, v. NANCY WONG and BERLINDA NGIRAUNGIL, Appellees.	:	CIVIL APPEAL NOS. 12-037, 12-044 (Consolidated) Civil Action No. 07-348 **OPINION**

Decided: April 30, 2013

Counsel for Appellant: David F. Shadel, Patrick Civille
Counsel for Appellee Wong: Mariano Carlos
Counsel for Appellee Ngiraungil: Pro Se

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

This is an appeal by Appellant First Commercial Bank of certain orders for provisional remedies issued in a pending Trial Division matter. Appellant challenges both the merits of the trial court's orders and its authority to issue them. To the extent Appellant seeks review of the merits of the trial court's orders, we **DISMISS** Appellant's

appeal as premature. To the extent that Appellant seeks to challenge the authority of the Trial Division to issue the challenged orders, the Trial Division is **AFFIRMED**.[1]

BACKGROUND

The relevant facts in this matter are neither complex nor are they in dispute.[2]

In the pending underlying matter, Appellee Wong seeks relief for her claims against Appellant and employees of First Commercial Bank for their alleged conversion of funds she deposited with Appellant.

In December 2011, Appellant issued a public notice in which it announced that it would be closing its Palau Branch operations in the early months of 2012. In February 2012, Appellee Wong sought a Writ of Attachment and requested that the trial court attach $420,219.78 of Appellant's Palau Branch funds to provide security for any judgment that might ultimately issue against Appellant in the case. In her supporting affidavit, Appellee Wong attested to her belief that Appellant was closing its Palau Branch and sending all funds that could potentially satisfy a judgment out of the country and beyond the reach of the Trial Division. Appellant filed an opposition.

On March 13, 2012, the Trial Division found special cause existed to support a writ of attachment, granted Appellee Wong's motion, and directed the Bureau of Public Safety to "attach and safely keep $420,219.78 of [Appellant's] funds pending the

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[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

[2] Appellee Wong accepted Appellant's statement of the case in her Response.

outcome of this litigation." For reasons the record does not reflect, it appears the Bureau of Public Safety did not take any action on the March 13, 2012, Order until August 27, 2012, at which time it delivered the writ to Mr. Jing-Fang Huang, a First Commercial Bank manager. According to Appellee Wong, and as reflected in the Bureau of Public Safety's letter of August 28, 2012, after consulting with counsel David Shadel, Huang informed the Bureau of Public Safety that there were not any funds in Appellant's Palau Branch available to satisfy the writ.

On August 29, 2012, Appellee Wong filed an emergency motion seeking to modify the writ of attachment by either requiring the repatriation to Palau of the funds subject to the attachment or, in the alternative, the posting of a bond by Appellant for the amount of the writ. On August 30, 2012, the trial court granted Appellee Wong's motion and ordered Appellant "to deposit with the Director the amount of $420,219.78 by September 4, 2012. If [Appellant] cannot deposit the funds, it should file an affidavit explaining why, and then be prepared to post a bond in the amount of $420,219.78 [within] five days after filing the affidavit." Appellant did neither, and instead filed a motion to enlarge the time to respond to the trial court's order on September 4, 2012.

On September 7, 2012, the trial court denied Appellant's motion to enlarge time and ordered Appellant to "post a bond in the amount of $420,219.78 with the Clerk of Courts at the Palau Supreme Court by September 12, 2012 at 9 a.m. Palau time." The order further provided: "Refusal to follow the Court's orders may result in sanctions."

Due to a service oversight, the Court subsequently extended the deadline to file the bond to September 18, 2012.

On September 7, 2012, Appellant filed in the Appellate Division its Petition for Writ of Prohibition or Mandamus in Special Proceeding No. 12-002, seeking to prohibit or stay the Trial Division's Orders relating to the attachment of Appellant's funds. On September 13, 2012, citing difficulty communicating with his client and the filing of Appellant's Petition, counsel for Appellant moved to stay the action in the Trial Division to permit this Court to rule on the challenge to the trial court's orders. The trial court denied Appellant's motion that same day and reiterated its order to file a bond no later than September 18, 2012. On September 17, 2012, this Court denied Appellant's petition in Special Proceeding 12-002.

On September 18 and October 3, 2012, Appellant filed consecutive notices regarding their unsuccessful efforts to obtain a surety bond in compliance with the trial court's orders. On October 8, 2012, the trial court issued its "Final Order Directing Compliance" in which it stated:

> [Appellant] has now been ordered four times to obtain a surety bond by a certain date. The last deadline for obtaining a bond passed nearly three weeks ago and still, [Appellant] has failed to provide such a bond. The Court now issues its final warning. [Appellant] is ordered to deliver a bond to the Clerk of Courts by October 16. If [Appellant] fails to deliver a surety bond in the amount of $420,219.78 by that date, the Court will strike [Appellant's] Answer in the case, enter a default against [Appellant], and the case will imminently proceed to judgment. Further, the Court will consider whether sanctions are appropriate against counsel, depending on

whether the Court determines that counsel's actions constitute delay tactics or otherwise gross misconduct in this case.

On October 12, 2012, Appellant submitted "under protest" a surety bond in accordance with the trial court's order of October 8, 2012.

This matter remains pending in the Trial Division, and Appellant seeks this Court's immediate review of the Trial Division's orders of August 30, 2012; September 7, 12, and 13, 2012; and October 8, 2012 (hereinafter, the Orders).

STANDARD OF REVIEW

For the reasons that follow, we conclude only one legal issue raised by Appellant is immediately appealable. We review that question of law de novo. *See Wong v. Obichang*, 16 ROP 209, 212 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

Appellant appeals both the merits of the Orders and the Trial Division's authority to issue the provisional remedies granted therein. With interlocutory appeals, we first must determine whether the issues raised are appealable in advance of a final judgment, and, if so, proceed to a resolution of the merits of the appeal.

Under Article X, § 6 of the Constitution, we have jurisdiction to review all decisions by the lower courts. In considering the proper timing of such review, we have applied the "final judgment rule," which holds that a party may not appeal a trial court's orders until a final judgment has been rendered. *See ROP v. Black Micro Corp.*, 7 ROP

Intrm. 46, 47 (1998). In *ROP v. Black Micro Corporation*, we clarified the basis for the application of the rule in Palauan jurisprudence:

> There is nothing unusual about our adoption of the "final judgment" rule; it was the rule at common law and is the historic rule of the United States federal courts. 4 Am. Jur. 2d Appellate Review § 85 (1995); 9 James W. Moore, *Moore's Federal Practice* ¶ 110.07 (2d ed. 1991). Piecemeal appeals disrupt the trial process, extend the time required to litigate a case, and burden appellate courts. It is far better to consolidate all alleged trial court errors in one appeal. *See Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988) ("[T]here is a long-settled and prudential policy against the scattershot disposition of litigation.").
>
> Some of the appellants have argued that "blind, unyielding adherence to the final judgment rule" does not serve the needs of modern jurisprudence. We agree, and for that reason have recognized certain exceptions to the rule. Some interlocutory orders will have an impact, not only on the course of the litigation in which they are entered, but also on "real world" events. If the impact on real world events is of a nature that it cannot be easily undone after judgment, we have held that the final judgment rule has sufficient flexibility to allow for an immediate appeal of such an order. Thus, we have held that an order granting or denying a request for a preliminary injunction is immediately appealable. *See Olikong v. Salii*, 1 ROP Intrm. 406, 411 (1987).

Id. Accordingly, the *Black Micro* Court recognized the "collateral order" exception to the final judgment rule, which permits "an immediate appeal of an interlocutory order entered during trial that determines important rights of the parties but that is not related to the relevant cause of action." *Id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1945)).

Appellant maintains the challenges it has raised to the Orders are subject to immediate appeal and review.

I. Appealability of the Merits of the Orders.

As noted, Appellant seeks to appeal the merits of the Orders attaching Appellant's funds and ordering it to post a surety bond. Appellant contends the Orders are appealable under the collateral order doctrine.

The collateral order doctrine permits immediate appeal of a trial court order when: (1) it conclusively determines a disputed question, (2) resolves an important issue that is completely separate from the merits of the action, and (3) it is effectively unreviewable on appeal from a final judgment. *Heirs of Drairoro v. Yangilmau*, 10 ROP 116, 118 (2003) (citing *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757, 2761 (1985)). Appellant contends the Orders meet each of the three elements of the exception. We disagree.

With respect to the first element, conclusive resolution of a disputed question, the Trial Division's Orders only directed the attachment of funds and, subsequently, the provision of a bond pending the outcome of the case. Liability has not yet been established, and the bond may not have to be forfeited if Appellant defeats Appellee Wong's claims. Thus, the Orders are not final as a matter of the collateral order doctrine. *See In Re Norman B. Jenson*, 980 F.2d 1254, 1257 (9th Cir. 1992) (A prejudgment attachment order does not resolve the matter in any final sense and is not appealable on the basis of the collateral order doctrine.). In support of its position that the trial court's Orders are immediately appealable, Appellant cites to *Wolff v. Sugiyama*, in which the

Court permitted an interlocutory appeal from trial court order directing a party to pay another party's attorneys' fees as a sanction. *Wolff v. Sugiyama*, 5 ROP Intrm. 10, 11 (1994). In *Wolff*, we held:

> In the ordinary course, an order directing the payment of money is subject to review and revision by the trial court at any time prior to final judgment and therefore is not enforceable or appealable until after final judgment. Conversely, if payment is directed on a date certain before final judgment then a party should ordinarily be entitled to a prompt appeal.

Id. Appellant, however, misses the distinction the Court relied on in *Wolff*. Here, because the "order to pay money" is provisional and for security purposes only, it is "subject to review and revision by the trial court at any time prior to judgment," and is, therefore, not a final resolution on the issue of payment of money to Appellee as was the case in *Wolff*. Thus, Appellant's reliance on *Wolff* is misplaced.

Appellant also contends generally that provisional remedies, such as prejudgment attachment, are immediately appealable and cites a case from the Maine Supreme Court in the United States so holding. *See Official Post Confirmation Comm. of Holding Unsecured Claims v. Markheim*, 877 A.2d 155, 157 (Me. 2005) (concluding prejudgment attachment orders are immediately appealable). We note, however, the writ of attachment in Palau is made pursuant to ROP Rule of Civil Procedure 64, which is an analogue of the U.S. Federal Rule of Civil Procedure 64. We look to federal law to resolve the application of those rules where Palau has yet to clarify aspects of its rules. *See, e.g., Ngarmesikd Council Chiefs v. Rechucher*, 15 ROP 46, 48 n.4 (2008). To that

extent, Appellant has overlooked the relevant body of law by citing to a state supreme court's interpretation of its rules.

A cursory examination of federal law on the matter reveals the bulk of federal appeals courts in the United States do not permit immediate appeals from a grant of writs of attachment pursuant to Rule 64. *See Perpetual Am. Bank v. Terrestrial Systems Inc.*, 811 f2d 504, 505-06 (1987) ("Most circuits that have addressed the issue have concluded that a grant of attachment [pursuant to Rule 64] is not appealable" as a collateral order.) (citing *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (distinguishing between the appealability of an order *vacating* an attachment and an order *granting* an attachment on the ground that when such an order is granted "the rights of all the parties can be adequately protected while the litigation on the main claim proceeds.")). Appellant does not cite a single federal case from the United States that provides any basis for this Court to depart from the general rule that a grant of an order for security under Rule 64 is not immediately appealable.

Based on the foregoing, we conclude the Orders are neither final nor subject to the collateral order doctrine, and, accordingly, we decline to address the merits of those Orders. Such an appeal must await a final judgment.

II. Appeal of the Trial Division's Authority to Issue the Orders.

Even if the merits of the Orders are not appealable, Appellant contends it should be able to appeal on the issue of whether the trial court has the authority to issue the writ

of attachment or to order Appellant to file a bond as security. Specifically, Appellant appeals whether the trial court had the authority under Republic of Palau Rule of Civil Procedure 64 or under 14 PNC § 2101 to issue the provisional remedies of attachment of funds and requirement of a bond. We conclude that the limited question as to whether the trial court exceeded its authority to issue the provisional remedies at issue is immediately appealable as a matter of law. *See Bancroft Nav. Co. v. Chadade S.S. Co.*, 349 F.2d 527, 529-30 (2d Cir. 1965) (Although most orders fixing an amount of security are not immediately appealable, an appeal challenging the power of the trial court to issue such an order may be appealed immediately). Thus, we limit Appellant's challenge of the Orders to whether the Trial Division has the power to: (1) attach Appellant's funds within the meaning of Rule 64 or 14 PNC § 2101, or (2) to require the provision of a bond for security.

The Trial Division initially ordered the Palau Branch of First Commercial Bank to deposit the attached funds in the sum of $420,219.78 with the Bureau of Public Safety. When it appeared that those funds may have been moved out of Palau and that Appellant would not satisfy the writ, the Trial Division, on Appellee Wong's motion to modify the writ, ordered Appellant instead to file a bond in the same amount to secure a potential judgment in this matter.[3]

[3] Appellant repeatedly challenges the Trial Division's authority to issue the writ of attachment on the ground that there were not any funds in Appellant's Palau Branch that were subject to attachment. This argument assumes facts about the funds available in the Palau Branch in March and August 2012 that are not before the Court in an admissible form.

ROP Rule of Civil Procedure 64 gives the trial court broad authority to enact provisional remedies to secure a potential judgment:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the Republic of Palau existing at the time the remedy is sought. The remedies thus available may include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to the action or must be obtained by an independent action.

Thus, the Trial Division has broad discretion, at the commencement of a case and without notice to the non-moving party, to fashion provisional remedies, such as a writ of attachment, seizing "property" to secure satisfaction of a judgment that might ultimately issue. *See Richmond Wholesale Meat Co. v. Ngiraklsong,* 2 ROP Intrm. 292, 298 (1991). Rule 64 permits "all remedies providing for seizure of . . . property for the purpose of securing satisfaction of the judgment."

Appellant contends the attachment of its funds exceeded the Trial Division's authority under Palauan law. Under 14 PNC § 2101(a), Palauan statute provides the Trial Division with the power to issue writs of attachment:

> Writs of attachment may be issued only by the Trial Division of the high court or Supreme Court for special cause shown, supported by statement of the high court or Supreme Court for special cause shown, supported by statement under oath. Such writs when so issued shall authorize and require the Director of the Bureau of Public Safety, any policeman, or other person named therein, to attach and safely keep so much of the personal property of the person against whom the writ is issued as will be sufficient to satisfy the demand set forth in the action, including interest

> and costs. The Director of the Bureau of Public Safety, policeman, or other person named in the writ shall not attach any personal property which is exempt from attachment, nor any kinds or types of personal property which the court may specify in the writ.

The statute does not preclude the attachment of funds and expressly permits the attachment of "personal property." Appellant does not provide, and the Court is not aware of, any legal definition of personal property that does not include money. In addressing § 2101, however, we have held that "[t]he purpose of attachment statutes is to permit 'plaintiffs to obtain jurisdiction and secure, for judgment, *funds* of persons who might otherwise dispose of assets and leave the jurisdiction.'" *Klongt v. Paradise Air Corp.*, 7 ROP Intrm. 140, 141 (1999) (citing *Landau v. Vallen*, 895 F.2d 888, 891 (2nd Cir. 1990) (emphasis added)). In addition, the statutory context of § 2101 makes it clear the legislature contemplated seizure of funds as well as other personal property. Sections 2101(b) and 2110(d) both exempt from attachment certain funds, such as salary, Social Security benefits, and pension benefits, which are necessary for the debtor's subsistence.

Furthermore, the Ninth Circuit has recognized a trial court's authority to attach liquid assets pursuant to the authority granted under Rule 64. *See Reebok Int'l, Ltd. v. Maunatech Enters., Inc.*, 970 F.2d 552, 559 n.10 (9th Cir. 1992) (recognizing an independent authorization under Rule 64 for the attachment of monetary funds); *U.S. v. Cauwenberghe*, 934 F.2d 1048, 1063-64 (9th Cir. 1991) (recognizing appropriate writ of attachment of funds pursuant to Rule 64).

Although Appellant quibbles with the form of the trial court's writ, Rule 64 plainly permits all appropriate remedies, "however designated," and does not specify any particular form. Furthermore, the Trial Division's writ at least facially complied with the requirements of § 2101(a). Accordingly, the Court does not find any ground for error in the form of the writ.

Appellant also contends the Court did not have the authority to require a bond when it the Court determined that the writ would not be satisfied. Nothing in Rule 64 or under Palauan law prohibits the Trial Division from ordering the provision of a bond, ancillary to an unsatisfied writ of attachment, to secure satisfaction of a potential judgment, and Appellant does not cite any binding authority to the contrary. Particularly under the present circumstances, where it appears that a foreign entity may be leaving to the jurisdiction to avoid potential legal obligations, the Court finds the broad authority granted under Rule 64 and pursuant to § 2101 to be a sufficient basis to authorize the bond in this instance. *See Klongt,* 7 ROP Intrm. at 141 ("The purpose of attachment statutes is to permit plaintiffs to . . . secure, for judgment, funds of persons who might otherwise dispose of assets and leave the jurisdiction.") (quotation marks omitted). Because the trial court ordered the provision of a bond as security for a final judgment and pursuant to a writ of attachment it had the authority to issue but was ineffective, we conclude it falls within the Court's broad authority under Rule 64.

Thus, as to the question whether the Trial Division may, as a matter of law, attach funds or require a bond under the circumstances, we conclude that it may do both. Appellant's numerous remaining challenges based on the facts of this matter and concerning whether the writ was procedurally proper or whether it was justified under the circumstances remain for appeal when a final judgment has been issued in this matter.

CONCLUSION

For the foregoing reasons, we **DISMISS** Appellant's appeal as premature to the extent Appellant seeks review of the merits of the trial court's Orders at this time. To the extent that Appellant seeks to challenge the authority of the Trial Division to issue the Orders, the Trial Division is **AFFIRMED**. Having resolved Appellant's appeal in full, the Trial Division may now proceed with the case.

SO ORDERED, this 30th day of April 2013.

KATHLEEN M. SALII
Associate Justice

LOURDES F. MATERNE
Associate Justice

KATHERINE A. MARAMAN
Part-Time Associate Justice