

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

**ROBERT WALTER SHAFFER, JR;
SHAFFER, GOLD & RUBAUM, LLP,**
Petitioners,

v.

**SUPERIOR COURT OF THE COMMONWEALTH
OF THE NORTHERN MARIANA ISLANDS,**
Respondent,

v.

**MARIANAS INDUSTRIAL PROPERTIES, INC. and
GOLF APPAREL BRANDS, INC.,**
Real Parties in Interest.

SUPREME COURT NO. 2007-SCC-0017-PET

Cite as: 2007 MP 15

Decided August 10, 2007

John D. Osborn, Saipan, Northern Mariana Islands, for Petitioners
Richard W. Pierce, Saipan, Northern Mariana Islands, for Real Parties in Interest

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

DEMAPAN, C.J.:

¶ 1 Petitioners, Robert Walter Shaffer, Jr. (“Shaffer”) and Shaffer, Gold & Rubaum, LLP (collectively “petitioners”), request this Court to issue a writ of mandamus directing the trial court to vacate its order denying petitioners’ motion to dismiss for lack of personal jurisdiction, and dismiss the complaint of Marianas Industrial Properties, Inc. (“MIPI”) and Golf Apparel Brands, Inc. (“GABI”). We hold that petitioners have not satisfied the test laid out in *Tenorio v. Superior Court*, 1 NMI 1, 9-10 (1989), and therefore deny the mandamus request.

I

¶ 2 Shaffer is a resident of California, an attorney admitted to practice law in California, and a partner in the law firm of Shaffer, Gold, & Rubaum, LLP, which has its principal place of business in Los Angeles, California. Edward J. Kahn was principal officer and shareholder of La Mode, Inc., a now bankrupt California corporation with offices in Los Angeles, California. In 1998, Kahn spoke with Shaffer about performing transactional work for La Mode.

¶ 3 In 1999, La Mode had problems in Saipan regarding a construction bond for a building in Saipan. Around June, 1999, Shaffer became involved in the matter. Shaffer communicated with La Mode’s local counsel in Saipan regarding the construction matter, and billed Kahn for work completed. In July, 1999, Schaffer began work on restructuring La Mode. In his restructuring efforts, Shaffer helped form two corporations, MIPI and GABI. MIPI is incorporated in the Commonwealth and GABI in California. In communications with Kahn, Shaffer characterized part of his work with Commonwealth attorneys as supervising. Part of Shaffer’s involvement with La Mode involved working with Commonwealth attorneys and preparing transactional papers to effectuate the transfer of property in the Commonwealth to MIPI and GABI.

¶ 4 MIPI and GABI allege that from 1999 until September, 2000, Shaffer knew he had a duty to convey a leasehold interest and other personal property in the Commonwealth from La Mode to MIPI because Shaffer assured La Mode that he would complete the transactions. However, Shaffer never completed the transactions. Instead, the leasehold title and personal property remained in La Mode’s name. Shaffer never informed La Mode or MIPI that the transactions were not complete. In July, 2005, La Mode filed for bankruptcy. La Mode then discovered that the land and personal property transactions were not completed. As a result, La Mode had to amend its bankruptcy petition to reflect the additional assets. MIPI subsequently

took measures to obtain the leasehold title and personal property that was originally intended for it, but never conveyed.

¶ 5 Petitioners further contend that from 2001 to 2003 Shaffer was responsible for transactions separating La Mode’s Commonwealth assets from La Mode’s California-based assets. These transactions included forming GABI, and were supposed to include the transfer of \$5,007,815.60¹ to GABI as well as a judgment obtained in Hong Kong. Shaffer never advised GABI that the transfers were not complete, nor what needed to be done to complete the transfer. Upon discovery that the transactions were not made, Shaffer was instructed to revise the transactional papers to reflect the transfer. Shaffer revised the transactional papers, but Shaffer never advised GABI how to effectuate the transfer, or that certain procedures had to be followed to do so, or that GABI might need the advice of counsel in Hong Kong to effectuate the transfer of the Hong Kong judgment.

¶ 6 On September 11, 2006, GABI and MIPI filed a complaint in the trial court. MIPI seeks costs and fees in relation to the subsequent transfer of title of interests it was forced to effectuate as result of Shaffer’s failure to effectuate the transfers, as well as other expenses which resulted from the property interests not being in MIPI’s name. MIPI further seeks punitive damages for Shaffer’s breach of fiduciary duty. GABI seeks to recover the \$5,007,815.60 judgment, or in the alternative the expenses from prosecuting the judgment.

¶ 7 On April 12, 2007, petitioners filed a motion to dismiss for lack of personal jurisdiction in the trial court. In denying Shaffer’s motion, the trial court ruled that petitioners’ contacts with the Commonwealth were sufficient to meet constitutional due process requirements and that it was not unreasonable for petitioners to litigate in the Commonwealth.

II

¶ 8 “A Writ of Mandamus is an extraordinary writ, reserved for the most dire of instances when no other relief is available.” *Bank of Saipan v. Martens*, 2007 MP 5 ¶ 16. “It is by no means a procedural right, and shall not be used to second guess the trial court every step of the way.” *NMI Scholarship Bd. v. Superior Court*, 2007 MP 10 ¶ 4. With that in mind, we look to the five factors laid out in *Tenorio*, 1 N.M.I. at 9-10. The five factors are: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired; (2) petitioners will be damaged or prejudiced in a way not correctable on appeal; (3) the lower court’s order is clearly erroneous as a matter of law; (4) the lower court’s order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and (5) the lower court’s order raises

¹ The \$5,007,815.60 was obtained as part of a judgment in *La Mode, Inc. v. Wang Tai Enters. (Int’l) Evelopment, Ltd*, CV 99-0023 (D.N.M.I.).

new and important problems, or issues of law of first impression. *Commonwealth v. Pua*, 2006 MP 19 ¶ 19. “Not all five factors need be satisfied to justify the issuance of mandamus.” *NMI Scholarship Bd.*, 2007 MP 10 ¶ 4. “Rather, *Tenorio* provides a balancing test; the factors are cumulative and require this Court to determine the degree to which each is implicated.” *Malite v. Superior Court*, 2007 MP 3 ¶ 9.

¶ 9 Under the first two *Tenorio* factors, petitioners claim they require mandamus relief because they lack adequate means of relief such as a direct appeal, and will be damaged or prejudiced in a manner not correctable on appeal. We previously noted the first two *Tenorio* factors are similar and may be considered together. *Bank of Saipan v. Superior Court*, 2001 MP 1 ¶ 17. Petitioners rely on *Chelsea Neighborhood Ass’n v. U.S. Postal Serv.*, 516 F.2d 378, 390 (2nd Cir. 1975), for the proposition that a denial of a motion to dismiss is not a final judgment, and therefore not appealable, to suggest there is no further relief available regarding the trial court’s decision on personal jurisdiction. In *Chelsea Neighborhood*, the U.S. Postal Service filed a motion to dismiss claiming, inter alia, that the Clean Air Act did not apply. *Id.* The Second Circuit decided that the denial of the motion to dismiss itself was not appealable, but whether the Clean Air Act applied, to the extent it was properly before the court, could be reviewed. *Id.* Similarly, petitioners may appeal personal jurisdiction even if the actual denial of the motion to dismiss is not appealable. See *Liu v. CNMI*, 2006 MP 5, slip op. at 7 (holding a determinative issue objected to by a motion to dismiss, such as whether a prosecuting attorney is improperly selected in a criminal case, may be reviewed on appeal). Under Fed. R. Civ. P. 12(h),² any objections to personal jurisdiction must be raised in a party’s first motion, and if the motion is denied the party may proceed to trial on the merits without waiving the jurisdictional challenge. *Stewart v. Ragland*, 934 F.2d 1033, 1036 n.5 (9th Cir. 1991) (citation omitted).

¶ 10 Contrary to the petitioners’ claim that they have no other adequate means of relief, the issue of personal jurisdiction is far from settled after a denial of a motion dismiss. When a defendant files a motion to dismiss “[t]he plaintiff need make only a prima facie showing of jurisdiction, so that the allegations of the complaint are taken as true except as controverted by the defendant’s affidavits and conflicts in the affidavits are resolved in the plaintiff’s favor.” *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986) (citing *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 332 (5th Cir. 1982)). The Fifth Circuit noted, “at any time when the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, he must still prove the jurisdictional facts at trial by a preponderance of the evidence” *Id.* (quoting *Data Disc, Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 n.2

² Com. R. Civ. P. 12 is identical to its federal counterpart.

(9th Cir. 1977). Here, the trial court decided that the facts as pled were sufficient to exercise jurisdiction over the petitioners. Petitioners can still contest personal jurisdiction in the trial court if plaintiffs fail to present jurisdictional facts.

¶ 11 Additionally, under the second *Tenorio* factor, petitioners assert that the trial court’s decision will force both parties to enter into costly litigation in a jurisdiction far from where the alleged omissions occurred. “Undoubtedly, the cost and delay occasioned by . . . erroneous rulings, in the aggregate, are quite significant and can be quite burdensome to the individual litigant. If such harm could support mandamus, however, then mandamus would no longer be an extraordinary remedy” *Office of Atty. Gen. v. Superior Court (Fabricante)*, 1999 MP 14 ¶ 24 (quoting *Calderon v. United States Dist. Court*, 163 F.3d 530, 535 (9th Cir. 1998)). Considering that the petitioners still have avenues to contest personal jurisdiction, and that the cost of litigation is insufficient to support mandamus relief, the first two *Tenorio* factors are not satisfied.

¶ 12 Petitioners further argue that mandamus relief is appropriate because the trial court’s decision regarding personal jurisdiction is clearly erroneous. Pursuant to *Tenorio* factor three, we previously spelled out the standard for clear error in jurisdictional decisions:

The issue to be decided by an appellate court in reviewing an alleged jurisdictional error of a lower court is whether the challenged assumption or denial of jurisdiction is so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court might find reversible error.

Tenorio, 1 N.M.I. at 7-8 (citations omitted).

¶ 13 Petitioners present reasonable arguments that the extent of their presence in the Commonwealth was limited, that they would suffer significant burden defending in the Commonwealth, and that California might be an efficient, convenient, and legitimately interested jurisdiction for the adjudication of the dispute. As we stated above, however, in a motion to dismiss, the allegations of the complaint are accepted as true except as controverted by the defendant’s affidavits, and conflicts in the affidavits are resolved in the plaintiff’s favor. Thus, in light of the facts presented and given the contacts of petitioners with the Commonwealth, the trial court’s decision to exercise jurisdiction over petitioners is not clearly erroneous.

¶ 14 Finally, petitioners’ arguments that *Tenorio* factors four and five support mandamus relief is without merit. Petitioners claim that the issuance of mandamus will guide future court

decisions where the trial court may be called upon to determine questions of jurisdiction. As we stated in *NMI Scholarship Bd.*:

Even if we agreed with petitioner, this argument must fail. *Tenorio* factor four asks whether the lower court's action was an oft-repeated error, or demonstrates persistent disregard for applicable rules. Speculation into future court action is immaterial. Factor four requires evidence showing a course of conduct of related judicial error.

2007 MP 10 ¶ 8 (citations omitted). Petitioners' mere speculation into future court action is immaterial, and without evidence showing related judicial error, *Tenorio* factor four does not support mandamus relief. *Tenorio* factor five looks for important issues of first impression. 1 NMI at 10. "While the question presented appears to be a matter of first impression in the Commonwealth, that alone is insufficient to grant a writ of mandamus." *NMI Scholarship Bd.*, 2007 MP 10 ¶ 8.

III

¶ 15 The *Tenorio* analysis, taken as a whole, does not support the issuance of a writ of mandamus. We, therefore, DENY petitioners' request.

Concurring:
Castro, Manglona, JJ.