IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

MYJAC FOUNDATION, PANAMA, Plaintiff-Appellee, v. SYLVIA MARIA VEGA ARCE and JUAN BAUTISTA ALFARO ALFARO Defendants-Appellants.	Supreme Court No. 2017-006 OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT,* and SEEBORG,** Acting Associate Justices.

SEEBORG, Acting Associate Justice:

I. INTRODUCTION

Defendants Sylvia Maria Vega Arce ("Arce") and Juan Bautista Alfaro Alfaro ("Alfaro") seek reversal of a December 2017 Order by the High Court denying their motion to set aside a default judgment. In support of their appeal, they assert the court lacked personal jurisdiction over them and that the High Court erred in concluding they were properly served. On the latter issue, they specifically

* The Honorable J. Michael Seabright, U.S. District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Richard Seeborg, U.S. District Judge, Northern District of California, sitting by designation of the Cabinet.

contend plaintiff's service in English did not comply with the language requirements of Marshall Islands Rule of Civil Procedure (MIRCP) 4(o) and was not conducted in a manner reasonably calculated to provide notice as required by Marshallese law. For the reasons explained below, the High Court's order is AFFIRMED.

II. BACKGROUND[1]

Plaintiff Myjac Foundation ("Myjac") is a private interest foundation domiciled in Panama. In 2011, Myjac retained a Polish lawyer named Robert Nogacki to arrange the incorporation of two Marshall Islands corporations: Oceanus Holding Gesellschaft Mit Beschrankter Haftung ("Oceanus"); and Chronos Investment Advisors Limited ("Chronos"). Both Oceanus and Chronos were incorporated as holding companies for entities that ultimately held property and real estate in Poland.

At the outset, Arce, a Costa Rican citizen and resident, was named as the sole shareholder, director, and secretary for Oceanus. Alfaro, also a Costa Rican citizen and resident, occupied the same role for Chronos. On May 23, 2011, both defendants transferred their shares in the two companies to Myjac. Then, in 2013, they resigned or were removed from their positions. This sequence of events

[1] The factual background is based on the averments in the complaint and is supplemented with relevant contextual information gleaned from the parties' subsequent filings.

should, in the ordinary course, have left Myjac as the sole shareholder for both Oceanus and Chronos.

Not long after, however, Nogacki submitted counterfeit declarations of incumbency for both Oceanus and Chronos to the Marshall Islands Registrar of Corporations. Relying on these false declarations, the Registrar issued Certificates of Incumbency in 2015 that incorrectly named Nogacki as director of each of the corporations, Arce as the sole shareholder of Oceanus, and Alfaro as the sole shareholder of Chronos.

When Myjac became aware of Nogacki's actions, it contacted the Registrar to request re-issuance of new and corrected Certificates of Incumbency. The Registrar informed Myjac, however, that it would only correspond with the individual listed in the address on record—i.e., Nogacki—and refused to make the correction. Nogacki then used the false Certificates to gain control of Oceanus and Chronos and to transfer property in Poland (valued at approximately EUR 20,000,000.00) to a foundation he controlled.

Several criminal and professional ethics proceedings have since been initiated against Nogacki in Poland. Myjac filed this action in order to clarify the shareholding situation and leadership structure for both Oceanus and Chronos. It sought a declaratory judgment finding, most importantly, that: (1) Nogacki was

never appointed as a director or officer of Oceanus or Chronos; and (2) Myjac has been the sole shareholder in both companies since May 23, 2011.

Myjac filed its complaint on August 3, 2016. On September 30, 2016, a notary public served Arce and Alfaro in Costa Rica with English copies of the summons and complaint. Neither defendant filed a responsive pleading nor otherwise took action and the court entered a default judgment on January 30, 2017. Eight months later, in September of 2017, the defendants moved pursuant to MIRCP 60(b) to set aside the default judgment. The High Court denied that motion and, on December 27, 2017, the defendants filed a notice of appeal.

III. LEGAL STANDARD

MIRCP 60(b) allows a party to seek relief from a final judgment under a limited set of circumstances. Rule 60(b)(4), at issue in this case, authorizes the court to relieve a party from a final judgment if "the judgment is void." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010).

A void judgment is "one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Id.* The list of qualifying infirmities is "exceedingly short." *Id.* It is not enough, for example, for a judgment to have been erroneous. Rather, Rule 60(b)(4) applies only in "the rare instance where a judgment is premised either on a certain type of jurisdictional

error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.* at 271 (citations omitted).

Rulings on motions for relief under Rule 60(b) are ordinarily reviewed for abuse of discretion. *Agostini v. Felton*, 521 U.S. 203, 256 (1997). Because, however, the validity of a judgment is a question of law, a ruling on a Rule 60(b)(4) motion to set aside a "void" judgment is reviewed de novo. *Exp. Grp. v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995).

IV. DISCUSSION

The defendants assert the default judgment entered against them is void due to lack of personal jurisdiction and defective service of process. They also raise a procedural issue related to MIRCP 17's real party in interest requirement. Each issue is addressed in turn below. None merits relief.

A. Personal Jurisdiction

Courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief "only for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." *United Student Aid Funds*, 559 U.S. at 271 (internal quotation omitted) (citing *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare

instances of a clear usurpation of power will render a judgment void" (brackets and internal quotation marks omitted)).") *See also DiRaffael v. California Military Dep't*, 593 F. App'x 679, 680 (9th Cir. 2015).

Here, the defendants contend the default judgment is void for lack of personal jurisdiction. As a threshold matter, the parties do not dispute that the defendants are non-residents. As such, whether they are subject to the court's jurisdiction is governed by the Republic's long-arm statute. The pertinent portion of that statute provides that any person who "commits an act or commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic; is subject to the civil jurisdiction of the courts of the Republic as to any cause of action arising from any of those matters." 27 MIRC § 251(1)(n). The plaintiff bears the burden of proving the existence of personal jurisdiction and, in attempting to carry that burden, is entitled to favorable inferences from the pleadings, affidavits, and other documents submitted on the issue. *See Combs v. Bakker,* 886 F.2d 673, 676 (4th Cir. 1989).

The defendants attack the court's exercise of personal jurisdiction on two primary fronts. They argue: (1) Myjac's complaint did not adequately plead a statutory basis for jurisdiction; and (2) even if it did, exercising jurisdiction over the defendants did not comport with due process.

With regard to the first attack, the defendants assert the allegations in the complaint, even when viewed in the light most favorable to Myjac, do not give rise to claims against either named defendant based on deceit, fraud or misrepresentation as required by the long-arm statute. All of the allegations of wrongdoing, they insist, are against Nogacki, not against them. Moreover, the complaint does not explicitly allege they assisted Nogacki in any way or were even aware of his actions. In the absence of such allegations, they argue, Myjac cannot show either defendant committed a tortious act or is properly subject to the court's jurisdiction.

With regard to the second attack, the defendants assert even if the complaint adequately alleged a statutory basis for jurisdiction, the exercise of such jurisdiction would violate due process. In particular, they contend Myjac has not alleged facts sufficient to establish that Arce or Alfaro: (1) have the "minimum contacts" needed to be subject to the jurisdiction of the Republic's courts; or (2) have purposefully availed themselves of the protections made available by Marshall Islands law. In support of these arguments, the defendants largely rely on a recent Marshall Islands High Court decision, *Samsung Heavy Industries Co., Ltd. v. Focus Investments, Ltd.*, (High Court Civil No. 2017-081 (Feb. 7, 2018)), in which the court found that merely being a shareholder of a Marshall Islands

corporation was not enough to make one subject to civil jurisdiction under the Republic's long-arm statute.

Myjac has compelling responses to both of defendants' attacks. As an initial matter, Myjac argues the High Court, in denying the motion to set aside the default judgment, correctly found the defendants waived their right to assert a defense of lack of personal jurisdiction by failing to respond to the complaint in a timely manner. The High Court's decision on this point, Myjac asserts, was within the discretion provided by Rule 60[2] and was not clear error justifying reversal. It is doubtful personal jurisdiction can be waived merely by failing to respond in a timely manner in the context of a motion for default judgment; to so hold would mean the issue could never be raised in a default setting. In the end, waiver notwithstanding, the defense fails on the merits.

First, the complaint's allegations do support jurisdiction over Arce and Alfaro under the long-arm statute. While Arce and Alfaro are correct that the complaint's allegations most explicitly accuse Nogacki of wrongdoing, it is reasonable to infer from these same allegations that they were involved in, or at least aware, of his actions. The complaint makes clear both Arce and Alfaro transferred all of their shares in Oceanus and Chronos, respectively, to Myjac on

[2] Rule 60(b)(4) provides that "the court ***may*** relieve a party" from a judgment that is void. (emphasis added). Rule 60(b)(3)(1) also provides that a motion "must be made within a ***reasonable*** time." (emphasis added).

May 23, 2011. The complaint also alleges the Certificates of Incumbency issued in 2015, which name the defendants as the sole shareholders in Oceanus and Chronos, were fraudulent. To the extent either defendant is seeking to claim he or she is rightfully listed as a shareholder in either corporation based on the allegedly fraudulent Certificates, the reasonable inference arises that they were somehow involved in the deceitful behavior leading to the Certificates' issuance and are therefore properly subject to the court's jurisdiction.

Second, as to due process, the *Samsung* decision recently issued by the High Court is distinguishable. In *Samsung*, the plaintiff sought to enforce an English judgment against a non-resident who indirectly owned shares in a Marshall Islands corporation which, in turn, owned shares in a separate company. The plaintiff did not allege the defendant had engaged in any conduct that would subject him to civil jurisdiction under 27 MIRC § 251. By contrast, the complaint here supports an inference the defendants engaged in conduct covered by the long-arm statute. Arce and Alfaro's inferred involvement in the issuance of the false Certificates, as discussed above, affected two Marshall Islands corporations (Oceanus and Chronos)[3] by essentially nullifying their transfer of shares to Myjac in May 2011.

[3] A Marshall Islands company is a "person" as contemplated by the long-arm statute. Section 15 of the Business Corporations Act, 52 MIRC Chapter 1, provides in pertinent part that: "Every corporation . . . shall have power in furtherance of its corporate purposes [to:] . . . (b) sue and be sued in all courts of competent jurisdiction of the Republic . . . as natural persons . . . ."

Moreover, Oceanus and Chronos are holding companies and as such have no principal places of business. They are only at home in the Marshall Islands. Accordingly, it is reasonable and consistent with due process for the court to exercise jurisdiction over individuals who: (1) claim to be shareholders of corporations that can only be considered to be at home in the Marshall Islands; and (2) allegedly committed acts affecting those corporations. At the very least, the defendants have failed to demonstrate that this is one of the "exceptional cases" in which "the court that rendered judgment lacked even an arguable basis for jurisdiction." *United Student Aid Funds*, 559 U.S. at 271.

B. Service of Process

Service of process under Marshallese law is governed by MIRCP 4. A court may not exercise personal jurisdiction over a defendant unless that defendant has been served in accordance with Rule 4. *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009). "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *United Food & Comm. Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir.1984). Without substantial compliance with the rule, however, neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction. *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). In addition to Rule 4, service of

process also has its own due process component, and must be "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The defendants raise two arguments related to service of process: (1) service in English did not comply with MIRCP 4(o) because Myjac did not make a sufficient effort to determine what language Arce and Alfaro were likely to understand; and (2) service was not in accordance with the rules for serving a foreign defendant as dictated by MIRCP 4(f) and Costa Rican law. Neither argument is persuasive.

i. Compliance with MIRCP 4 as to Language of Summons & Complaint

MIRCP 4(o) states:

> (o) Language of Summons, Complaint.
> In each instance ***an effort shall be made*** to see that the copy of the summons and of the complaint delivered, left for, or sent to each defendant, is in ***a language that the defendant is likely to understand or can easily have explained to the defendant. Unless it is certain*** that the defendant understands a particular language, the copy or translation delivered, left for or sent to the defendant shall be ***either in English or in Marshallese***. The decision as to what language shall be used shall be made by the clerk or judge signing the summons, subject to any order made by the court on the matter.

(emphasis added).

Arce and Alfaro contend, because they are Costa Rican citizens, Myjac could not reasonably assume they would understand English. Defendants also assert Myjac made no effort to determine what language they were "likely to understand" nor did it obtain a decision from the clerk or judge signing the summons regarding what language should be used for service. These failures, according to the defendants, are plain violations of Rule 4(o).

Myjac offers a number of arguments in response. First, documents filed in tandem with the complaint indicated the defendants could understand English. Most notably, both defendants signed share certificates and share transfer documents drafted entirely in English. The only evidence either defendant does not understand English is an affidavit submitted after service by Arce stating she is "not fluent in legal English." This, Myjac contends, is not enough to support a finding that service in English was improper. Second, the lack of a determination by a clerk or judge as to the proper language for service impliedly authorized the use of English as the Rule provides that English or Marshallese should be the default where the language of the defendant is uncertain. Third, the notary public who served the documents explained them to the defendants and thereby went above and beyond the requirements of MIRCP 4(o).

Myjac gets the better of these arguments. While neither party has pointed to a great deal of legal authority in support of its position, Myjac's arguments are

rooted more strongly in common sense. It is not clear, and the Court does not here hold, that the existence of documents indicating a defendant understands English will always satisfy the "effort shall be made" language in Rule 4 when the country in which the defendant resides is not predominantly English speaking. Here, however, the documents in question and the surrounding context indicate Myjac's efforts were sufficient. Both Alfaro and Arce had previously signed legally significant documents written entirely in English. Accordingly, it makes sense that the level of investigation required into their language ability under MIRCP 4(o) would be less than that required for the average Costa Rican citizen who has given no prior indication of an ability to understand any language other than Spanish.

At bottom, it is difficult to see how service in English under the circumstances violated the letter or spirit of MIRCP 4(o). The defendants appear to have been involved in what was a relatively sophisticated corporate arrangement and had previously signed documents, in English, related to their involvement. It was therefore reasonable for Myjac to believe that even if Alfaro and Arce were "not fluent in legal English," they could at least understand that the documents with which they were served were important and could obtain help in getting them translated and "explained." As discussed above, the purpose of Rule 4 is to ensure parties receive sufficient notice of the lawsuit against them. Arce and Alfaro's arguments that they did not receive such notice here purely because the service was

in English (one of two default languages approved for use when the defendant's language is uncertain, and also a language in which they had previously transacted business) are unconvincing.

ii. Lack of Proper Service on Foreign Defendants

The manner in which parties outside the Marshall Islands are to be served is addressed by the Republic's Judiciary Act, which states in pertinent part:

> (1) Service of process may be made upon any person subject to the jurisdiction of a court of the Republic under this Division by personally servicing the process on him outside the territorial limits of the Republic.
> (2) Service shall be made, in the same manner as service is made within the territorial limits of the Republic, by an officer or person authorized to service process in the jurisdiction where service is made.

27 MIRC § 252. A later section in the same chapter states:

> Nothing in this Division limits or affects the right to serve process in any other manner provided by law or by the Rules of Court, or allowed by order of the court concerned.

27 MIRC § 255.

Elaborating on this statutory basis, MIRCP 4(f) provides that an individual in a foreign country may be served by any "internationally agreed means of service" (e.g., the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents) or, if there is no internationally agreed means, by a method reasonably calculated to give notice. One such approved method is any method prescribed by the foreign country's laws for service in that country.

MIRCP 4(f)(2)(A). The Rule also states, however, that personal service is adequate as long as it is not "prohibited by the foreign country's law." MIRCP 4(f)(2)(C)(i).

Here, the defendants argue service was improper because: (1) it did not meet the requirements set forth in the Hague Convention or other internationally agreed upon means of service; and (2) it did not comply with the service requirements of Costa Rican law. The fatal flaw with the service, according to Arce and Alfaro, was that the summons and complaint were not properly translated.

These arguments, too, are unavailing. Service did not need to comply with the Hague Convention. The Marshall Islands is not a party to the Convention and Costa Rica, which recently became a party, did not have the Convention enter into force until October 1, 2016—after Arce and Alfaro had already been served.

Moreover, Myjac convincingly argues the statutory framework laid out above in the Judiciary Act and MIRCP 4(f) did not require that service comply with Costa Rican law. Under MIRCP 4(f)(2)(C)(i), where there is no internationally agreed means of service, personal service is permitted as long as it is not "prohibited by the foreign country's law." The defendants do not point to any such prohibition in Costa Rica. They also fail to offer any compelling alternative interpretation of the statutory framework.[4]

[4] In light of this framework, the back and forth in the briefing regarding the legal opinions offered by the parties as to whether service complied with Costa Rican law—and whether the High Court weighted those opinions properly—is largely academic. Myjac

The defendants' final attack on service is mostly a rehash of their arguments regarding why English service violated MIRCP 4(o). The minor twist is, here, Alfaro and Arce contend that by neglecting to translate the summons and complaint into Spanish, Myjac failed to satisfy the constitutional due process requirement enshrined in MIRCP 4(f)(2) that service be "reasonably calculated to give notice."

As discussed at length in the previous section, there is little reason to believe failure to translate deprived the defendants of reasonable notice of the lawsuit against them. The two cases relied upon by the defendants in their reply brief do not alter this conclusion.

In *Epic Games, Inc. v. Mendes,* 2018 WL 582411 (N.D. Cal. Jan. 29, 2018), the court permitted Epic Games to serve a summons and complaint on a Russian defendant by email as long as service included a certified Russian translation of the summons and complaint. It did so, however, only after finding no evidence the defendant could "speak or understand English or would understand what a summons and complaint written in English were if they were emailed to him." *Id.* at *3. Notably, the court did not require translation for service on a second Russian defendant who had previously responded in English to Epic's emails and indicated

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acknowledges that had it attempted to serve defendants under MIRCP 4(f)(2)(A) it would have been subject to additional requirements under Costa Rican law. It was not required to go that route, however, and did not choose to do so. Thus, those additional requirements do not apply.

he understood the language well enough to know that the summons and complaint were documents initiating a lawsuit against him. *Id.* Arce and Alfaro's situation is more akin to that of the second Russian defendant than the first.

Montana Trucks, LLC v. UD Trucks N. Am., Inc., 2013 WL 39228634 (D. Mont. July 29, 2013), is similarly inapposite. There, the court ordered the plaintiff to serve the defendant, a Japanese corporation, with a certified translation of the complaint and summons in Japanese. The context for that order, however, was that both Japan and the United States were signatories to the Hague Convention and the plaintiff was seeking an order under Rule 4(f)(3) authorizing service by mail and courier—a means not specified by the Convention. The court found service by mail and courier was appropriate but that plaintiff's objections to the delay and added expense of obtaining translation were not sufficient reasons to justify setting aside the Hague Convention's general requirement (and the nation of Japan's interest) in "providing service of process to its citizens in Japanese." *Id.* at *4.

Here, the Hague Convention does not apply and Myjac did not seek to serve the defendants by court-ordered means pursuant to Rule 4(f)(3). Accordingly, the same concerns regarding respect for international law are not applicable and, as discussed above, defendants' arguments that service in English did not provide them with reasonable notice are unpersuasive.

C. Compliance with MIRCP 17 – Real Party in Interest

Defendants identify as an additional ground for reversal Myjac's failure to comply with MIRCP 17's requirement that "[a]n action must be prosecuted in the name of the real party in interest." MIRCP 17(a)(1). In short, they contend the listed plaintiff, "Myjac Foundation, Panama," appears to be a pseudonym or non-existent entity and point to the fact that Myjac is referred to in different ways in different documents (e.g., as Myjac International Foundation or simply as Myjac Foundation).

The real party in interest rule is procedural, not substantive, and aims to protect defendants from subsequent similar actions by a party actually entitled to recover. *See BP Oil, Inc. v. Bethlehem Steel Corp.*, 536 F. Supp. 396 (E.D. Pa. 1992). While an action must be prosecuted by the real party in interest, a court "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." MIRCP Rule 17(a)(3).

Here, it is not clear the defendants' objection to Myjac's name, nine months after entry of the default judgment, was timely. In any event, the argument lacks merit. The documents attached to the complaint establish that Arce and Alfaro transferred their respective interests in Oceanus and Chronos to "Myjac

Foundation, domiciled in the Republic of Panama." *See* Comp., Exs. 4 and 12. Accordingly, "Myjac Foundation, Panama," appears to be the Myjac entity in a contractual relationship with the defendants such that it could sue them. To the extent another Myjac entity should also be involved, it is a factual issue that may have been relevant at an earlier juncture but is insufficient on its own now to justify reversal.

V. CONCLUSION

Based on the foregoing, the High Court's December 18, 2017 Order Denying Motion to Set Aside Default Judgment is ~~AFFIRMED~~.

DATED: 7/23, 2018

Daniel N. Cadra
Chief Justice

DATED: July 23, 2018

J. Michael Seabright
Associate Justice

DATED: July 23, 2018

Richard Seeborg
Associate Justice