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IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

KEJJO BIEN and MARSHALLS JAPAN CONSTRUCTION CO., Defendants-Appellants, vs. MILI ATOLL LOCAL GOVERNMENT, TOMMY LEBAN, and THE REPUBLIC OF THE MARSHALL ISLANDS, Plaintiffs-Appellees.	Supreme Court No. 2018-006 (High Court Case No. 2012-141) OPINION

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

SEABRIGHT, A.J., with whom CADRA, C.J. and SEEBORG, A.J. concur:

I. INTRODUCTION

Defendants-Appellants Kejjo Bien ("Bien") and Marshalls Japan Construction Co. ("MJCC") (collectively, "Defendants") appeal the High Court's denial of Defendants' Republic of the Marshall Islands Rule of Civil Procedure 60(b) Motion for Relief from Judgment, and an associated order denying a motion to strike the opposition to that Rule 60(b) Motion. The Rule 60(b) Motion, however, was filed over a year after the underlying judgment awarded $40,000 to Plaintiffs, and almost a year after an order amending that judgment to add an award of $120,000

* The Honorable J. Michael Seabright, Chief 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.

in statutory punitive damages. Defendants, however, had not appealed the underlying judgment, nor the order awarding punitive damages. All the issues that Defendants raised in the Rule 60(b) motion could have been challenged on direct appeal. Given this posture, the High Court properly denied the Rule 60(b) motion under well-accepted waiver principles. *See, e.g.*, *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.") (citations omitted); *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012) ("In no circumstances . . . may a party use a Rule 60(b) motion as a substitute for an appeal it failed to take in a timely fashion.") (citation omitted). Further, the High Court did not abuse its discretion in denying the Rule 60(b) motion on the merits as to jurisdiction or in refusing to strike the opposition.

II. BACKGROUND

On March 14, 2017, the High Court issued its final judgment and decision after a non-jury trial, awarding general damages of $40,000 (plus fees of $55 and post-judgment interest of 9% per annum) in favor of Plaintiffs-Appellees Mili Atoll Local Government ("MiliGov"), Tommy Leban, and the Republic of the Marshall Islands ("RMI") (collectively, "Plaintiffs") against Defendants Bien and MJCC, jointly and severally. Defendants were found liable under count one (alleging "conversion") of the amended complaint for "having wrongfully taken and converted to the defendants' own uses the [RMI's] $40,000 [Republic of China] Funds issued for the benefit of MiliGov" for use in purchasing a boat for the people of Mili Atoll. The High Court declined to find liability on the other three counts, which alleged breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and negligence. Defendants did not appeal from this judgment.

On March 28, 2017, Plaintiffs filed a "Motion to Amend the Judgment by including an award for Punitive damages." The motion to amend was filed under RMI Civ. Proc. Act § 151, which reads:

> In civil cases where the defendant has been found liable because of fraud, or deceit, or misrepresentation, the court shall add to the judgment, as punitive damages, an amount equal to three (3) times the actual amount of damages found by the trier of facts.

Defendants did not file an opposition to this motion to amend. On May 30, 2017, the High Court granted the motion to amend, having already determined in its March 14, 2017 decision that Defendants' wrongful taking and conversion "were based on fraud." Accordingly, the High Court amended its judgment to add a $120,000 award of punitive damages. As with the prior judgment, Defendants did not appeal this order or the amended judgment.

On May 28, 2018, almost a year after the amended judgment and the order awarding punitive damages—and over a year after the original March 14, 2017 judgment and decision—Defendants filed their Rule 60(b) "Motion for Relief from Final Judgment and Order Granting Punitive Damages." Defendants argued that MiliGov lacked standing to sue, and that the RMI should have been dismissed as a Plaintiff.[1] Defendants also argued that (1) the High Court erred in adopting elements of "civil theft" from a Florida statute when ruling on the conversion claim, and (2) the punitive damage award was improperly pled and required a finding by clear and convincing evidence.

On June 13, 2018, Plaintiffs filed an opposition to the Rule 60(b) Motion. Although the opposition was apparently filed one or two days late, Defendants' counsel sought and eventually

[1] Earlier, the RMI had moved to be dismissed as a Plaintiff, but the High Court denied the motion because the RMI was a necessary party. After that ruling, the RMI remained as a proper Plaintiff, and it remains as an Appellee in this appeal.

received permission to file a reply that was limited to "respond[ing] only to argument raised in the opposition," with "no further briefing . . . permitted except by order of the Court." On June 25, 2018, Defendants filed their reply, but also filed a separate motion to strike Plaintiffs' opposition as untimely. The High Court denied both the motion to strike the opposition, and the Rule 60(b) motion itself.

In denying the Rule 60(b) motion, the High Court reasoned that (1) neither Defendant filed an opposition to Plaintiffs' Motion to Amend the Judgment to add an award of punitive damages, and (2) neither Defendant filed an appeal from the March 14, 2017 final judgment nor from the May 30, 2017 order granting the award of punitive damages. Nevertheless, the High Court addressed the merits of Defendants' standing argument by concluding that MiliGov had standing, either because (1) it had a beneficial interest in the $40,000 converted by Defendants, or (2) it was a third-party beneficiary of the grant between the RMI and the Republic of China. It also reasoned that, even if MiliGov lacked standing, it is sufficient for justiciability purposes that the RMI, a co-Plaintiff, had standing. The High Court also concluded that punitive damages were adequately pled, and the award was sufficiently supported by a finding of fraud.

III. DISCUSSION

A. Well-Settled Principles Bar Defendants' Challenge

Defendants appeal the denial of their Rule 60(b) Motion for Relief From Judgment (and the ancillary order denying their Motion to Strike Opposition to the Rule 60(b) motion).[2] These

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[2] RMI Rule of Civil Procedure 60(b) provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(continued . . .)

decisions are reviewed for abuse of discretion. *See Pac. Basin, Inc. v. Mama Store*, 3 MILR 34, 36 (2007) (denial of a Rule 60(b) motion reviewed for abuse of discretion); *Dribo v. Bondrik*, 3 MILR 127, 135-36 (2010) ("A high degree of deference is given to a trial court's interpretation of its own rules.").

Most importantly, as summarized above, all the grounds for relief raised by Defendants in their Rule 60(b) motion could have been raised on direct appeal (and there was no such appeal). It is a well-settled principle that "a Rule 60(b) motion may not substitute for a timely appeal." *United States v. O'Neil*, 709 F.2d 361, 372 (5th Cir. 1983) (citing cases). *See also, e.g.*, *Browder*, 434 U.S. at 263 n.7 ("[A]n appeal from denial of Rule 60(b) relief does not bring up

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> (1) mistake, inadvertence, surprise, or excusable neglect by the moving party, or an inadvertent mistake by the court or a clerk;
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> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
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> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Rule 60(c) provides:

> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the filing of the judgment or order or the date of the proceeding.
>
> (2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

the underlying judgment for review."); *Stevens*, 676 F.3d at 67 ("In no circumstances . . . may a party use a Rule 60(b) motion as a substitute for an appeal it failed to take in a timely fashion."); *Ojeda-Toro v. Rivera-Mendez*, 853 F.2d 25, 28 (1st Cir. 1988) ("Plaintiff may not use Rule 60(b) as a substitute for a timely appeal . . .").

"Allowing motions to vacate pursuant to Rule 60(b) after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). "The ground for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal." *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000).

Here, Defendants' asserted grounds for vacating the judgment—lack of standing, error in defining conversion as civil theft, improper award of punitive damages—fell under Rule 60(b)(1) ("mistake"), or Rule 60(b)(4) ("void"), or perhaps Rule 60(b)(6) ("any other reason"). The motion did not, for example, assert newly discovered evidence, or previously-unknown fraud, or any other reason that could not have been brought on direct appeal. Indeed, Defendants did not even oppose the punitive damages motion before the High Court. *See, e.g.*, *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) (recognizing that, by failing to present an argument in his opposition to summary judgment below, appellant failed to preserve the argument for appeal); *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 163 (2d Cir. 2011) ("Arguments raised for the first time on appeal are deemed waived.") (citation omitted); *Slaven v. Am. Trading Transp. Co.*, 146 F.3d 1066, 1069 (9th Cir. 1998) ("[I]f a party fails to raise an objection to an issue before judgment, he or she waives the right to challenge the issue on

appeal."). Accordingly, the High Court did not abuse its discretion in denying the Rule 60(b) motion.

B. Even Assuming Defendants Could Raise Subject-Matter Jurisdiction at this Stage, Defendants' Arguments Fail

Defendants nevertheless argue that they raise MiliGov's standing to sue, which can implicate subject-matter jurisdiction. They contend that subject-matter jurisdiction can always be challenged (and if the court lacked jurisdiction, then the judgment was "void"). But even assuming that specific arguments regarding subject-matter jurisdiction "may be raised . . . at any stage in the litigation, even after trial and the entry of judgment," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006), in this case Defendants' arguments plainly fail.[3]

First, MiliGov did in fact have standing. As the High Court reasoned, MiliGov had a beneficial interest in the $40,000—the boat was for its use. The money was allocated by the RMI for MiliGov. Indeed, Mili Atoll is *part of* the RMI (the co-Plaintiff). At minimum,

[3] It is not always true that subject-matter jurisdiction may be challenged *after* entry of judgment. Some courts have held that if jurisdiction could have been challenged on direct appeal—but was not—then Rule 60(b) cannot be used later to raise jurisdiction to void the judgment. *See Bell*, 214 F.3d at 801 ("That is why a lack of subject-matter jurisdiction is not by itself a basis for deeming a judgment void [under Rule 60(b).]"); *In re G.A.D., Inc.*, 340 F.3d 331, 336 (6th Cir. 2003) ("[A] Rule 60(b)(4) motion will succeed only if the lack of subject matter jurisdiction was so glaring as to constitute a total want of jurisdiction, or no arguable basis for jurisdiction existed.") (citations and internal quotation marks omitted). As *Bell* reasoned in addressing a Rule 60(b) challenge to subject-matter jurisdiction:

> To allow a ground that can be adequately presented in a direct appeal [such as subject matter jurisdiction] to be made the basis of a collateral attack would open the door to untimely appeals . . . . The losing party could reserve the ground until he had presented it unsuccessfully to the district court in the form of a Rule 60(b) motion. That is not permitted[.]

214 F.3d at 801. We need not, however, decide whether to adopt the reasoning in these cases because, here, the jurisdictional arguments clearly lack merit. That is, Plaintiffs plainly had, and still have, standing to bring their claims.

MiliGov was a third-party beneficiary of the RMI's agreement to provide the $40,000 in funds to MJCC as payment for the boat, intending to benefit MiliGov. *See, e.g.*, *Flexfab, LLC v. United States*, 424 F.3d 1254, 1263 (Fed. Cir. 2005) (concluding that a third-party beneficiary had standing to enforce a contract); *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016) ("As the Restatement makes clear, typical third-party beneficiary situations arise when, for example, one party promises another to pay a debt to a third party. In such circumstances, the third party is a third-party beneficiary with standing to sue on the contract.") (citing *Restatement (Second) of Contracts* § 302 illus. 1 (1981)).

Second, Defendants' argument that the RMI should not be a party is unavailing. Even if the RMI had sought dismissal earlier, the High Court refused (properly) to dismiss it because it was a necessary party to claims in the Complaint. The RMI is not challenging that refusal, and it remained a Plaintiff throughout trial, and is an Appellee here. Thus, even if MiliGov lacked standing, it would still be sufficient for justiciability purposes that the RMI has standing. *See, e.g.*, *Kostick v. Nago*, 960 F. Supp. 2d 1074, 1089-90 (D. Haw. 2013) ("It is enough, for justiciability purposes, that at least one party with standing is present.") (citing *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999)).

C. The High Court Did Not Abuse its Discretion in Denying the Motion to Strike Plaintiffs' Opposition to the Rule 60(b) Motion

Finally, the High Court did not abuse its discretion in allowing (i.e., not striking) Plaintiffs' opposition to Defendant's Rule 60(b) Motion. At most, the opposition was filed two days late, but circumstances existed that gave discretion to the High Court to excuse the late filing. There was no prejudice to Defendants because the High Court allowed Plaintiffs to file a Reply memorandum. Moreover, Defendants had violated a court order by filing the motion to strike without permission. *See, e.g.*, *Green v. Baca*, 306 F. Supp. 2d 903, 913 n.40 (C.D. Cal.

2004) ("Because there is no indication that plaintiff was prejudiced by the one-day late filing, the court exercises its discretion to consider the declaration.") (citations omitted); *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009) ("The discretionary determination to accept the late filing was not an abuse of discretion.").

IV. CONCLUSION

Because all of Defendants' arguments in their Rule 60(b) Motion could have been brought on direct appeal (but were not), well-settled principles barred their arguments. The High Court also properly rejected Defendants' arguments challenging subject-matter jurisdiction. There was no abuse of discretion in denying Defendants' motion to strike the opposition to the Rule 60(b) motion.

AFFIRMED.

Dated: October 7, 2019

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: October 7, 2019

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

Dated: October 7, 2019

/s/ Richard Seeborg
Richard Seeborg
Associate Justice