IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

President JOHNSON TORIBIONG, in his personal capacity,
Appellant,
v.
Senator SURANGEL WHIPPS, JR., et al.,
Appellees.

Cite as: 2016 Palau 4
Civil Appeal No. 15-003
Appeal from Civil Action No. 12-049

Decided: January 25, 2016

Counsel for Appellant.....Pro Se
Counsel for Appellees.....Rachel A. Dimitruk

BEFORE: LOURDES F. MATERNE, Associate Justice
R. ASHBY PATE, Associate Justice
C. QUAY POLLOI, Associate Justice Pro Tem

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] This appeal arises from the Trial Division's order granting in part and denying in part the parties' cross-motions for partial summary judgment in the case below. The Trial Division thereafter certified its judgment for appeal pursuant to ROP R. Civ. P. 54(b). In certain circumstances, Rule 54(b) permits a trial court to "direct the entry of a final judgment as to one or more but fewer than all of the claims," ROP R. Civ. P. 54(b), but only when the claims to be certified under Rule 54(b) have been fully resolved, *see Toribiong v. Seid*, 23 ROP 1 (2015). We hold that a claim has not been fully resolved, so as to render it subject to certification under Rule 54(b), if the trial court has reserved for later adjudication a defense to the claim. Because the claims that are the subject of this appeal either have not been fully

resolved or were never certified for appeal pursuant to Rule 54(b), the appeal must be dismissed.[1]

BACKGROUND

[¶ 2] Appellees, a group of senators ("the Senators"), filed a complaint in 2012 against Appellant, then-president Johnson Toribiong, and other officials, challenging certain actions taken by Toribiong's administration. Relevant to this appeal, the complaint, as amended, concerned two issues. First, the complaint addressed the nature of funds the United States paid to Palau as part of an agreement that the Toribiong administration negotiated to resettle in Palau a number of detainees of Uighur descent whom the United States had confined at Guantanamo Bay Detention Facility in Cuba ("resettlement funds"). The Senators sought a declaratory judgment that, among other things, (1) the resettlement funds constituted public funds, (2) the funds were therefore subject to Palau's procurement laws, 40 PNC §§ 601-681, and (3) Toribiong's handling of the funds violated the procurement laws. Second, the complaint alleged that Toribiong had acted unlawfully by authorizing expenditures in excess of the amount appropriated by the legislature during fiscal years ("FY") 2009, 2010, and 2011, in violation of government funding laws, 40 PNC §§ 401-412. The Senators sought money damages based on the alleged over-expenditures, as well as a declaratory judgment that the over-expenditures were unlawful and that Toribiong was personally liable for them.

[¶ 3] Toribiong moved to dismiss the complaint, arguing, among other things, that he enjoyed qualified immunity from the claims raised in the complaint. The Trial Division rejected this argument, explaining that resolution of the qualified immunity defense depended, in part, on whether Toribiong in fact violated the laws regarding procurement and the authorization of expenditures. Because resolution of that question of fact was premature, dismissal on qualified immunity grounds was inappropriate.

[¶ 4] Following discovery, the parties filed cross-motions for partial summary judgment, both of which were granted in part and denied in part. Relevant to this appeal, Toribiong, in his motion for summary judgment, again asserted a qualified immunity defense. The Trial Division first questioned the application of qualified immunity to certain claims raised by the Senators:

---

[1] We determine that oral argument is unnecessary to resolve this matter. ROP R. App. P. 34(a).

> At the outset it is not clear whether qualified immunity even applies in the context of Plaintiffs' claims for declaratory relief. Th[e qualified immunity] doctrine . . . generally shields government officials performing discretionary functions from liability *for civil damages* . . . . Thus, . . . it is not evident that qualified immunity has any bearing on Plaintiffs' claim for declaratory judgment.

Order at 21 (Jan. 23, 2015). The Trial Division denied Toribiong's motion for summary judgment on qualified immunity grounds, however, because it concluded a decision on that issue was premature:

> [Toribiong] has . . . failed to offer any evidence or argument that suggests the expenditure of the Uighur [resettlement] funds did not violate the Procurement Laws. At the same time, . . . [the Senators] have not moved for summary judgment as to whether [Toribiong]'s actions actually violated the Procurement Laws. Rather, they sought summary judgment only as to whether the Uighur [resettlement] funds were public funds and whether, as a result, the Procurement Laws applied. Consequently, neither party has established that it is entitled to summary judgment on [Toribiong]'s assertion of qualified immunity.
>
> Furthermore, as it is wholly undeveloped by the parties, both in terms of evidence, and argument, this Court declines to decide, *sua sponte*, whether [Toribiong]'s actions in fact violated the Procurement Laws.

Order at 23.

[¶ 5] Toribiong also sought summary judgment on the over-expenditure claims, contending that the Senators had failed to adduce sufficient evidence in support of their claim arising out of expenditures in FY 2010 and that the political question doctrine barred review of the Senators' claim arising out of expenditures in FY 2011. The Trial Division agreed, granting summary judgment to Toribiong on the Senators' claims arising out of alleged over-expenditures during those two fiscal years. However, the Trial Division declined to grant summary judgment with respect to one claim arising out of expenditures during FY 2009:

> [Toribiong]'s argument regarding [an overall budget surplus in FY 2009] is at most implied and, more importantly, wholly undeveloped, as he presented no argument or authority supporting this purported basis for avoiding liability. Furthermore, [the Senators] have not sought summary judgment as to the expenses incurred in FY 2009 and do not respond to [Toribiong]'s implicit arguments regarding the

> significance of the overall surplus for that year. For similar reasons to those discussed above, the Court declines to consider and resolve this novel and potentially significant matter *sua sponte*. As such, summary judgment is not appropriate in favor of either party with respect to [the Senators'] claims under [40 PNC] § 406 as they pertain to FY 2009.

Order at 31.

[¶ 6] Following the Trial Division's summary judgment order, Toribiong moved for entry of judgment pursuant to Rule 54(b), which the Trial Division granted. The judgment stated that "[t]he Uighur resettlement funds constitute public funds subject to the procurement laws of the Republic of Palau" and, thus, that Toribiong's motion for summary judgment was denied as to the claims regarding the resettlement funds. Judgment at 1 (Feb. 25, 2015). The judgment also granted Toribiong's motion for summary judgment on all claims based on over-expenditures except for the claim under 40 PNC § 406 pertaining to expenses incurred in FY 2009. As to that claim, the judgment made no mention. The Trial Division entered the judgment pursuant to Rule 54(b) as a final judgment on fewer than all of the claims and certified that there was no just reason to delay the entry of judgment on the resolved claims.

[¶ 7] Toribiong timely filed a notice of appeal, challenging the Trial Division's order and judgment. Specifically, he challenged (1) the "declar[ation] . . . that the Uighur resettlement funds constitute public funds subject to the procurement laws of the Republic of Palau" and (2) the "part of the . . . Judgment that did not dismiss the claim regarding the alleged [FY 2009 over-expenditures] in violation of [40 PNC § 406]." Notice of Appeal (Mar. 13, 2015). Toribiong raises these same challenges in his appellate brief.

PARTIES TO THE APPEAL

[¶ 8] Before turning to the issues presented, it is first necessary to clarify the identities of the parties to this appeal. Toribiong captioned his notice of appeal with the Appellant named as "President Johnson Toribiong in his official capacity and personally" and the Appellees named as "Senator Surangel Whipps, Jr., et al." Both parties' filings have retained this captioning in their motions and briefs. There are two glaring problems with the parties' captioning of this appeal.

[¶ 9] The first problem is the designation of Toribiong as an appellant both personally and in his official capacity. In their complaint, the Senators

named Toribiong as a defendant in both his official and personal capacities; however, the parties later stipulated to the dismissal of Toribiong in his official capacity. The distinction between personal and official capacities is not without significance, as defendant officials enjoy separate privileges and defenses depending largely on whether they are sued in their personal or official capacities. *See ROP v. Akiwo*, 6 ROP Intrm. 283, 291-93 (1996).

[¶ 10] "The right to appeal is limited to parties who are aggrieved in some appreciable manner by the judgment." 5 Am. Jur. 2d *Appellate Review* § 242 (2007). "A person is aggrieved if the judgment bears directly and injuriously on his or her interests"; however, "[t]he mere fact of a person's status as a participant in the proceedings below does not constitute aggrievement for the purpose of taking an appeal." *Id.*

[¶ 11] Here, Toribiong is no longer a party to this case in his official capacity, and the judgment has no effect whatsoever on him in his official capacity. In other words, in his official capacity, he has not been aggrieved by the judgment he seeks to appeal. Accordingly, Toribiong, in his official capacity, may not appeal the judgment he challenges, so the caption of this opinion reflects that he is not an appellant in his official capacity.

[¶ 12] The second problem is the use of the phrase "et al." with respect to the Appellees. The Rules of Appellate Procedure require that "[t]he notice of appeal shall specify the party or parties taking the appeal . . . and shall specify the party or parties against whom the appeal is filed." ROP R. App. P. 3(c). Although informality in designating the parties in a notice of appeal provides no ground for an appeal's dismissal, *id.*, a complete failure to designate the parties "is ground . . . for such action as the Appellate Division deems appropriate, which may include dismissal of the appeal," ROP R. App. P. 3(a).

[¶ 13] The use of phrases such as "et al." as the sole means of identifying a party to the appeal is not merely a defect in formality, but, instead, constitutes a failure to specify the parties. Addressing a rule similar to ROP R. App. P. 3, the United States Supreme Court explained:

> Federal Rule of Appellate Procedure 3(c) provides in pertinent part that a notice of appeal "shall specify the party or parties taking the appeal." . . . Th[e] caveat [that an appeal "shall not be dismissed for informality of form or title of the notice of appeal"] does not aid petitioner in the instant case. The failure to name a party in a notice of appeal is more than excusable "informality"; it constitutes a failure of that party to appeal.

> . . . .
>
> Petitioner urges that the use of "*et al.*" in the notice of appeal was sufficient to indicate his intention to appeal. We cannot agree. The purpose of the specificity requirement of [Fed. R. Civ. P.] 3(c) is to provide notice both to the opposition and to the court of the identity of the [parties to the appeal]. The use of the phrase "*et al.*," which literally means "and others," utterly fails to provide such notice to either intended recipient.

Torres v. Oakland Scavenger Co., 487 U.S. 312, 314, 317-18 (1988).[2] We find *Torres* persuasive, and we advise litigants that it is *never* acceptable to file a notice of appeal that refers to a party with the shorthand "et al." or a similar expression without identifying the party or parties to whom the expression refers. We admonish future appellants to avoid using "et al." and like phrases altogether in their notices of appeal. The best practice, though at times it might be cumbersome, is to individually name all appellants and all appellees in the notice of appeal.[3]

[¶ 14] Here, Toribiong's reference to "et al." in his notice of appeal fails to meet the specificity requirement of ROP R. App. P. 3(c). Although we warn future appellants that this practice may result in adverse action, including dismissal, the Court need not decide whether such a sanction is warranted here because dismissal is appropriate on other grounds. Because we have no basis upon which to accurately guess, and because it is unnecessary due to dismissal of the appeal on other grounds, we decline to designate for Toribiong which of the plaintiffs below are appellees in this matter and, instead, retain the phrase "et al." in the caption of this opinion.

---

[2] The holding of *Torres* was abrogated somewhat by the 1993 amendments to Fed. R. App. P. 3, which provide that "an attorney representing more than one party may describe those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X,'" Fed. R. App. P. (3)(c)(1)(A), and that "[a]n appeal must not be dismissed . . . for failure to name a party whose intent to appeal is otherwise clear from the notice," Fed. R. App. P. 3(c)(4). Our Rules of Appellate Procedure do not include these caveats. Even if they were included, they would not apply to Toribiong's notice of appeal, which names one defendant then says "et al.," without noting whether "et al." includes all of the defendants in the case below, or some subset including the one named appellee.

[3] A shorthand such as "et al." might be acceptable in appellate submissions following the filing of the notice of appeal.

DISCUSSION

I. Applicable Law

[¶ 15] We have recently had occasion to consider the certification of judgments for appeal under Rule 54(b) in *Toribiong v. Seid*. There, we reaffirmed our commitment to the final judgment rule:

> We have long adhered to the premise that the proper time to consider appeals is after final judgment. An order which does not finally settle the issues on trial is generally not appealable.
>
> We condition the right to appeal upon the entry of a final judgment because 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.
>
> . . . [A] judgment is final and appealable when there is no further judicial action required to determine the rights of the parties. Absent an exception, appeals from interlocutory judgments and orders will be dismissed.

Toribiong v. Seid, 23 ROP at 3 (citations, quotation marks, brackets, and ellipsis omitted).

[¶ 16] One exception to the final judgment rule is found in Rule 54(b), which states, in relevant part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

ROP R. Civ. P. 54(b). "'The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all the parties until the final adjudication of the entire case by making an immediate appeal available.'" *Toribiong v. Seid*, 23 ROP at 4 (quoting *Ngirchechol v. Triple J Enters.*, 11 ROP 58, 60 (2004). We explained in *Toribiong v. Seid*, however, that the Rule 54(b) exception is a limited one. Crucial to this appeal, it "'applies only where particular claims or the claims as to a particular party have been *fully* resolved and then only upon an express determination that there is no just reason for delay.'" *Id.* (quoting *Renguul v. Orak*, 9 ROP 86, 88 (2002) (internal quotation marks, citation omitted) (emphasis added in *Toribiong v. Seid*).

II. Standard of Review

[¶ 17] We review de novo the Trial Division's conclusion that a claim has been fully resolved such that final judgment may be entered in accordance with Rule 54(b), and we review for abuse of discretion its determination that no just cause to delay exists. *See Toribiong v. Seid*, 23 ROP at 4.

III. Analysis

[¶ 18] Absent a Rule 54(b) certification, the judgment from which Toribiong appeals is not a final, appealable judgment. "A summary judgment that fully disposes of all claims among all parties is final" for purposes of the final judgment rule. 15B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 3914.28 (2d ed. 1992). "A summary disposition of less than all claims among all parties is not final, unless judgment is entered under [Fed. R. Civ. P.] 54(b) or all other matters have been resolved by other orders." *Id.*; *see also Feichtinger v. Udui*, 16 ROP 173, 175 (2009) ("When there is no further judicial action required to determine the rights of parties, an order is final and appealable."); *In re Estate of Kaleb Udui*, 3 ROP Intrm. 130, 131-32 (1992) ("To determine whether the rulings were interlocutory or final orders, the Court must consider whether further action by the Trial Court is essential to a final determination of the rights of the parties. . . . 'So long as the matter remains open, unfinished or inconclusive, there may be no intrusion[] by appeal.'" (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949))). In its summary judgment order, the Trial Division declined to dispose of all of the claims raised in the Senators' complaint. Because the summary judgment order contemplates that further adjudication is necessary to fully dispose of the litigation, no final judgment has yet been entered in the case below.[4] This appeal, then, may only be maintained if the Rule 54(b) exception applies to the claims at issue in this appeal.

A. Resettlement funds claim

[¶ 19] In *Toribiong v. Seid*, we addressed one scenario in which a Rule 54(b) certification is inappropriate: when the judgment or order from which appeal is sought decides liability, but does not address relief. Such a decision is simply not a final disposition of a claim. *See Toribiong v. Seid*, 23 ROP at

[4] Indeed, the Trial Division's certification under Rule 54(b)—which presupposes that its judgment concerns "fewer than all of the claims or parties," ROP R. Civ. P. 54(b)—is a convincing indication that no final judgment has been entered.

4-5; *see also Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) ("The order, viewed apart from its discussion of Rule 54(b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory, and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' . . . ." (internal citation omitted)); 10 James Wm. Moore, *Moore's Federal Practice* § 54.22[2][a] (3d ed. 2011) (explaining that "an order adjudicating liability without an assessment of damages or other relief" is not "final" and thus "may not be made appealable by certification under Rule 54(b)"). In this appeal, we are faced with another scenario in which, we conclude, a claim has not been fully resolved, and, thus, Rule 54(b) certification is inappropriate.

[¶ 20] We conclude that the Trial Division's declarations that the resettlement funds are public funds and that they are subject to the procurement laws—declarations that Toribiong seeks to challenge on appeal—do not constitute claims that have been fully resolved for purposes of Rule 54(b). Importantly, although the Trial Division's summary judgment order stated that declaratory judgment in the Senators' favor on these two issues was warranted, that same order also determined that "neither party has established that it is entitled to summary judgment on [Toribiong]'s assertion of qualified immunity," Order at 23, and that a decision on qualified immunity depended on factual determinations that would be made at a subsequent stage of litigation. Because the Trial Division declined to decide whether qualified immunity shielded Toribiong from the declaratory relief sought by the Senators, a defense to the claims for declaratory relief remains pending.

[¶ 21] We hold that, when a trial court reserves for later adjudication defenses raised against a claim for which Rule 54(b) certification is sought, the claim has not been fully resolved, and certification pursuant to Rule 54(b) is inappropriate. We are not alone in concluding that the presence of unresolved defenses to a claim bars Rule 54(b) certification. A number of United States federal courts are of the same mind. *See Waldorf v. Shuta*, 142 F.3d 601, 611 (3d Cir. 1998) ("[I]f the [defendant] has retained its right to assert an affirmative defense . . . against [the plaintiff], the reservation would prevent a Rule 54(b) certification in this case because the judgment would not be final."); *In re Lull Corp.*, 52 F.3d 787, 788-89 (8th Cir. 1995) ("[T]he [trial] court could not dispose of [the claims] by granting summary judgment to the [plaintiff] unless every one of [the defendant's] defenses to [the claims] was legally insufficient. Because the [trial] court did not rule on the legal sufficiency of [the defendant's] . . . defense, the court did not finally dispose

of [the claims], and entry of a Rule 54(b) judgment was improper." (citation omitted)); *see also* 10 James Wm. Moore, *Moore's Federal Practice* § 54.22[2][a] (3d ed. 2011) ("[N]ormally a decision on a claim is not final unless both the claim and the affirmative defenses to that claim have been addressed . . . ."); 10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2734 (3d ed. 1998) ("When the denial [of summary judgment] with regard to a particular defense is predicated on the [presence of triable issues of material fact], the court is not precluded from rendering judgment for defendant based on the same defense later in the proceeding if the controverted factual issues ultimately are resolved in the movant's favor.").

[¶ 22] Here, the Trial Division's judgment granted the Senators declaratory relief by declaring that the resettlement funds constituted public funds and that the funds were subject to the procurement laws. However, because the Trial Division left a defense against those claims unresolved, those claims are not amenable to Rule 54(b) certification.[5]

B. FY 2009 over-expenditure claim

[¶ 23] In *Toribiong v. Seid*, we noted that, when an appeal is taken pursuant to Rule 54(b), "our review is limited to the issue[s] certified for immediate appeal by the Trial Division." *Toribiong v. Seid*, 23 ROP at 3 n.3. Even where the trial court has fully resolved one claim of a multi-claim suit, "in the absence of a Rule 54(b) certificate, an appeal from a decision adjudicating a portion of the case must be dismissed." 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and*

---

[5] Importantly, this Court has not—as of yet—recognized the doctrine of qualified immunity as a defense. As the Trial Division alluded, the contours of that defense—were it to be accepted in Palau—are unclear. Whether it might apply to claims for declaratory or other equitable relief, for instance, remains to be seen.

The Trial Division declined to determine whether the defense should be recognized and, if recognized, whether it would shield Toribiong from the Senators' claims for declaratory relief. With no analysis of these issues by the trial court, we will not decide them in the first instance. The Trial Division's order contemplates that a decision on qualified immunity—its validity, its scope, and its application to the facts of this case—would issue at a later time. For this reason, Toribiong's qualified immunity defense has yet to be resolved with respect to any of the Senators' resettlement funds claims, including those for declaratory relief.

Procedure § 2660 (4th ed. 2014). We do not review claims that the Trial Division declined to certify.[6]

[¶ 24] Here, it is clear that the Trial Division did not certify the FY 2009 over-expenditure claim for appeal under Rule 54(b). The judgment, which contains the Rule 59(b) certification, never mentions any decision regarding the FY 2009 over-expenditure claim that Toribiong seeks to address on appeal. The Trial Division's summary judgment order confirms that the claim has not been certified, because, in it, Trial Division declined to decide anything whatsoever that might resemble grounds for disposing of the claim. All the trial court decided was that it was too soon to decide. Because the Trial Division did not issue or certify any judgment regarding the FY 2009 over-expenditure claim raised by Toribiong on appeal, we will not review it.

CONCLUSION

[¶ 25] The partial summary judgment entered by the court below does not contain a final, appealable judgment on either of the issues Toribiong seeks to appeal. The Trial Division's Rule 54(b) certification of the declaratory judgments with respect to resettlement funds claims constituted legal error, and no judgment with respect to the FY 2009 over-expenditures claim was issued or certified. Because the Rule 54(b) exception is inapplicable here, and because no other exception to the prohibition on interlocutory appeals appears to apply, we dismiss the appeal.

SO ORDERED, this 25th day of January, 2016.

---

[6] We note that Rule 54(b) certifications are not to be read broadly. *See* 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2660 (4th ed. 2014) ("[T]here should be no doubt as to the [trial] court's intention to certify. A strong policy in favor certainty as to the [trial] court's intention to give its decision final-judgment status underlies the rule's procedure.").