IN THE SUPREME COURT OF GUAM

TERRITORY OF GUAM

JOSEPH E. SANTOS,
Plaintiff-Appellant,

vs.

CRAIG S. CARNEY, MDI GUAM CORPORATION,
DAI-TOKYO FIRE & MARINE INSURANCE COMPANY,
Defendants-Appellees.

Supreme Court Case No. CVA96-011
Superior Court Case No. CV1853-94

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted 28 January 1997
Agana, Guam

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BEFORE: MONESSA G. LUJAN, Presiding Associate Justice, JANET HEALY WEEKS, Associate Justice, and EDUARDO A. CALVO, Associate Justice.

Lujan, Presiding Associate Justice:

This is a timely appeal from an order of the Superior Court dismissing Plaintiff-Appellant Joseph B. Santos' ("Santos") complaint based upon Santos' failure to diligently prosecute the action or to comply with discovery pursuant to Guam Rules of Civil Procedure 41(b) and 37(d) respectively. Jurisdiction over this appeal is vested in this Court pursuant to 48 U.S.C. §§ 1424-1 and 1424-3(d). Based upon a review of the record and applicable law, this Court finds that the trial court did not abuse its discretion in dismissing the action based on Guam Rule of Civil Procedure 41(b) or 37(d). We affirm the order dismissing the action.

I.

[1] On December 16, 1992, Santos allegedly sustained personal injury and property damage in an automobile accident involving Defendant-Appellee Craig S. Carney ("Carney"). Santos alleges that at the time of the accident, Carney was employed by Defendant-Appellant MDI Guam Corporation ("MDI") and was driving a vehicle owned by MDI. On December 15, 1994, Santos filed a personal injury complaint against Carney and against MDI under the theory of *Responde at Superior*. Dai-Tokyo Fire & Marine Insurance Company ("Dai-Tokyo") was sued as MDI's motor vehicle insurance provider. On April 21, 1995, service of the complaint was effected upon MDI and Dai-Tokyo. Carney has never been served and the record is absent any attempt to serve Carney. On May 2, 1995, MDI and Dai-Tokyo filed their respective answers. On May 9, 1995, Santos filed a jury demand. Santos took no other affirmative steps to prosecute the action.

[2] On June 12, 1995, MDI and Dai-Tokyo served Santos with interrogatories and a request to produce documents. Responses were due on July 12, 1995. Santos obtained an extension of time to respond. The responses were finally served on MDI and Dai-Tokyo on August 14, 1996.

[3] On June 13, 1996, MDI and Dai-Tokyo moved to dismiss the complaint due to the Plaintiff's failure to prosecute and respond to discovery. The motion was heard on August 15, 1996 and granted by the trial judge. A written decision and order dismissing the complaint was subsequently entered on August 22, 1996.

II.

[4] This appeal involves the interpretation of Guam Rules of Civil Procedure 41(b) and 37(d) and the extent of discretion permitted a trial court under those rules. The Ninth Circuit has afforded Guam courts great latitude in interpreting a Guam Rule of Civil Procedure identical to a federal rule, but which relates to the establishment of general standards of litigation conduct. *Lynn v. Chin Heung Intern., Inc.*, 852 F.2d 1221 (9th Cir. 1988). In *Lynn,* the Ninth Circuit interpreted GRCP Rule 41(b), and affirmed the trial judge's 41(b) dismissal of a complaint despite the absence of a warning or the consideration of lesser sanctions. *Id.* In affirming the dismissal, the Ninth Circuit noted that the Guam courts are not bound by Ninth Circuit precedent in interpreting a local procedural rule which establishes general standards of litigation conduct. The Ninth Circuit noted:

> [w]here, as here, the local court has studiously avoided recent and obvious Ninth Circuit authority in favor of original analysis, we find no basis for presuming orthodoxy. Accordingly,

> we honor the Superior Court of Guam's independence and accept its construction of Guam R. Civ. P. 41(b). *Lynn*, 852 F.2d at 1223.

The Appellate Division of the District Court has consistently applied *Lynn* in deferring to the Superior Court interpretation of GRCP 41(b). *See Farmer v. Slotnick*, D.C. Nos. CV 95-0056A, 95-00073A, 1996 WL 104527 (D. Guam App. Div. 1996); *San Nicolas v. Guam United Trading Services and Finances Co.*, D.C. No. CV. 94-0050A, 1995 WL 604373 (D. Guam App. Div. 1995); *Corbilla v. Villalada*, D.C. No. CV. 94-00045A, 1995 WL 222205 (D. Guam App. Div. 1995). The cumulative effect of the Appellate Division decisions is to place litigants on notice of the litigation conduct expected of the parties. The Superior Court has determined that Rule 41(b) is a proper docket management tool and that dismissal may be proper in certain situations. This Court acknowledges that the trial courts of Guam may consider prevailing local conditions in administering their dockets. However, this Court must insure that dismissals based upon a procedural rule are not utilized in an abusive manner. A decision of the Superior Court of Guam dismissing an action for a GRCP Rule 41(b) failure to prosecute is reviewed for a clear abuse of discretion. *Lynn v. Chin Heung Intern., Inc.*, 852 F.2d at 1221. Under such a standard, a trial court decision will not be reversed unless it has "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *In re Eisen*, 31 F.3d 1447 (9th Cir. 1995). A review of the facts and the factors weigh in favor of dismissal, and the record is sufficient to support affirmance.

III.

[5] GRCP Rule 41(b) states in relevant part: "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." The Guam Rules of Civil Procedure do not define what is a "failure to prosecute" sufficient to warrant dismissal.[1] In determining whether a sanction is appropriate under Rule 41(b) the Ninth Circuit has employed a five factor test:

> "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." *In re Eisen*, at 1451; *Lynn v. Chin Heung International Inc.*, 1986 WL 68916.

The Plaintiff bears the burden of showing that the delay is reasonable and that the defendant is not prejudiced by the delay. *Franklin v. Murphy*, 745 F.2d 1221, 1232 (9th Cir. 1984). If there is a reasonable excuse for the inaction, then the burden shifts to the defendant who must then demonstrate prejudice. *Id.* This Court will give deference to the trial court in determining the reasonableness of the delay "because it is in the best position to determine what period of delay can be endured before its docket becomes unmanageable." *In re Eisen* at 1451 (citations omitted). If the trial court does not make specific findings as to each factor, the appellate court reviews "the record independently to determine whether the court abused its discretion." *In re Eisen* at 1451 (cite omitted); *see also Calilung*, 1989 WL 265030 at *3.

IV.

[6] We find that the trial court did not abuse its discretion. The record reveals that the Appellant's period of prosecutorial inactivity lasted from April 26, 1995 (date of service of complaint) through

[1] The only rule violation which constitutes a per se "failure to prosecute" under GRCP 41(b) is Guam Rule of Court 7(d), which requires the filing and service of an at-issue memorandum within 120 days after the close of the pleadings.

dismissal of the complaint on August 22, 1996. The record evidences Santos' callous disregard for the governing rules of procedure, an unwillingness to proceed with the action initiated by Santos or inexcusable neglect on the part of Santos and Santos' counsel.

[7] The docket management factor is ordinarily considered in conjunction with the public's interest in the expeditious resolution of litigation in determining whether there was an unreasonable delay. *In re Eisen*, 31 F.3d at 1452. In the present case, the trial judge determined that the Appellant's delay was inexcusable. A review of the record supports such a finding. The injury which forms the basis of the complaint was sustained on December 16, 1992. Since then Santos has filed a complaint (December 15, 1994), served two of the three defendants (MDI and Dai-Tokyo on April 21, 1995) and a jury demand on May 9, 1995. Other than these isolated incidents of prosecutorial activity, the claim has not been pursued. Santos does not explain why no further steps have been taken to prosecute the claim against MDI and Dai-Tokyo. Santos has not served Carney, nor does he indicate whether service has even been attempted. There was no competent evidence indicating that the Appellant was intent on expeditiously resolving the matter in the near future. *In re Eisen*, 31 F.3d at 1452. The fact that the Appellant filed a delinquent response to the discovery request is not indicative of any prosecutorial zeal and cannot be considered to excuse the delay in prosecuting the action. *In re Eisen*, 31 F.3d at 1453.

[8] The third Rule 41(b) factor is the prejudice to the defendants caused by the delay. Once a delay is determined to be unreasonable, prejudice to the Plaintiff is presumed. *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976). The excuses presented by Santos are as follows: (1) Santos was off-island for a 2 and 1/2 month period; (2) an associate working on Santos' case left the firm; and (3) there was miscommunication between the departing associate and Santos' counsel. In the present case, the trial court found that the delay was inexcusable. Such a finding should be given deference. Presumed prejudice is sufficient to support a dismissal under GRCP 41(b). The record is also sufficient to support a finding of actual prejudice. Carney is no longer on Guam and other than Santos, there are no additional percipient witnesses. *See Lynn v. Chin Heung International, Inc.* 1986 WL 68916; *San Nicolas v. Guam United Trading Services and Finances Co.*, 1995 WL 604373. This factor favors dismissal.

[9] Factor four involves the policy favoring disposition on the merits and ordinarily weighs against dismissal. *See, e.g., U.S. for use of Wiltec Guam v. Kahaluu Const.*, 857 F.2d 600, 604 (9th Cir. 1988); *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990); *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 948 (9th Cir. 1993). Furthermore, this court does not assess the likelihood of success on the merits, but considers the public policy in favor of determining cases on their merits. The question is whether the policy of determining cases on their merits justifies the delay and prejudice caused by Santos' conduct. *In re Eisen*, 31 F.3d at 1454. It is sufficient to demonstrate that the plaintiff has "ignored his responsibilities to the court in prosecuting the action and the defendant had suffered prejudice as a result thereof." *Anderson*, 542 F.2d at 526. This factor is weighed against the prejudice suffered by the Defendants. *In re Eisen*, 31 F.3d at 1454. The prejudice caused by Santos' lack of diligence outweighs factor four. The public policy of determining cases on their merits should not be used defensively as a shield by a passive Plaintiff who has failed in his obligation to prosecute the defendants with the vigor expected of a plaintiff.

[10] The fifth factor relates to the availability of lesser sanctions. For purposes of GRCP Rule 41(b), *Lynn* and its progeny support the proposition that it is not a per se abuse of discretion for a trial judge to dismiss an action due to a party's failure to prosecute without issuing advance warnings or lesser sanctions. *Farmer v. Slotnick*, 1996 WL 104527; *Corbilla v. Villalada*, 1995 WL 222205; *San Nicolas v. Guam United Trading Services and Finances Co.*, 1995 WL 604373. The trial court is not required to impose lesser sanctions, when the rules do not so provide, and when to do so would encourage neglect and noncompliance with the Guam Rules of Civil Procedure. In the present case, the trial judge was

aware of the available sanctions and the non-movant did not offer reasonable alternate sanctions. This factor also weighs in factor of dismissal.

[11] After applying the Rule 41(b) five factor test, and weighing such factors as the local courts have interpreted them, the dismissal is affirmed. Santos failed to carry the burden of establishing the reasonableness of the delay and failed to rebut the presumption of prejudice arising from such delay. Since the trial court did not abuse its discretion in granting the 41(b) motion, it is unnecessary to address the merits of the Rule 37(d) ruling. Accordingly, we **AFFIRM** the dismissal.