

IN THE SUPREME COURT OF GUAM

REBECCA ADAMS,
Plaintiff-Appellant,

vs.

FRANK DUENAS, BETSY HO, GUAM TOURIST NIGHT CLUB,
an instrumentality of KENT WAI HO, and JOHN DOES I-X,
Defendants-Appellees.

Supreme Court Case No. CVA97-032
Superior Court Case No. CV1497-95

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted on February 20, 1998
Hagåtña, Guam

Appearing for the Plaintiff-Appellant

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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS, and BENJAMIN J. F. CRUZ, Associate Justices.

CRUZ, J:

[1] The Plaintiff-Appellant, Rebecca Adams, appeals the trial court's orders granting two Motions to Set Aside Entry of Default, denying several Motions for Default Judgment, and denying a Motion for a New Trial following a jury verdict finding no liability on the part of the Defendants-Appellees. It is this court's determination that the trial court did not abuse its discretion in ruling against the Plaintiff-Appellant in the above motions. Therefore, we hereby affirm the trial court's ruling in its entirety.

FACTUAL BACKGROUND

[2] The Plaintiff-Appellant was an employee of the Guam Tourist Night Club ("GTNC") and brought suit against Defendants-Appellees for injuries sustained as a result of an argument on the premises. In her complaint, the Plaintiff-Appellant alleged battery, assault, false imprisonment, intentional infliction of emotional distress, and negligent selection by GTNC for its hiring of Appellee Frank Duenas. The Defendants-Appellees in return filed a counterclaim against the Plaintiff-Appellant. The Clerk of the Superior Court entered two Entries of Default; however, the trial court subsequently set aside both, consistent with the court's policy of deciding cases on their merits. The Plaintiff-Appellant also made several motions for default judgment for failure to comply with discovery, and motions to compel and for attorneys fees; all of which the court denied.

[3] The case proceeded to trial; however, prior to the jury's deliberation, Appellee Frank Duenas withdrew his counterclaim. The jury determined that the Defendants-Appellees were not liable to the Plaintiff-Appellant. The jury also awarded Defendants-Appellees Kent Wai Ho and Betsy Ho thirty dollars (\$30) each in punitive damages. During closing arguments, Appellee's counsel made a statement which the Plaintiff-Appellant deems inappropriate — "[I]ikewise, should I tell you this whole thing stems from a lawyer, a sleazy lawyer going to Kent Ho and saying 'give me five thousand dollars whether it be true or not.'" The Plaintiff-Appellant made a motion for a new trial on the basis of the above stated comment. The court subsequently denied the Motion for a New Trial in a written Decision and Order filed June 12, 1997. The order was entered on the docket on June 16, 1997. A timely Notice of Appeal was filed by the Plaintiff-Appellant on July 15, 1997.¹ The issues on appeal in this case do not revolve around the facts, but instead are a product of procedural questions which were brought before the court below.

ANALYSIS

[4] The Supreme Court has jurisdiction over this matter pursuant to 48 U.S.C. § 1424-3(d) and 7 GCA §§ 3107 and 3108. On appeal, the Plaintiff-Appellant raises several separate issues: (1) whether the trial court erred in granting the Defendants-Appellees' First and Second Motions to Set Aside Default Judgment, (2) whether the trial court erred in denying the Plaintiff-Appellant's Motion for Default for

¹ As noted in the case of *Merchant v. Nanyo Realty*, 1997 Guam 16, ¶ 2, Rule 4(a) of the Guam Rules of Appellate Procedure requires the entry of a judgment before the notice of appeal effectuates the initiation of an appeal. Although a written Decision and Order was issued by the trial court on June 12, 1997, no judgment was subsequently entered before a briefing schedule was established or oral arguments were made. On June 16, 1998, the court ordered the case be remanded to the trial court, for the limited purpose of providing the trial court with jurisdiction to enter a judgment. In accordance with the order from this court, the judgment was filed on July 16, 1998 and entered on the docket on July 20, 1998. Because the court only discovered the absence of the judgment after the parties had submitted their briefs and after oral arguments had already been made, the court chose not to dismiss the case but instead withheld issuance of this Opinion pending the filing of the judgment below.

Failure to Comply with Discovery, (3) whether the trial court erred in denying the Plaintiff-Appellant's Second, Third and Fourth Motions for Default or Motions to Compel and for Attorneys Fees, and (4) whether the trial court erred in denying the Plaintiff-Appellant's Motion for a New Trial. Separate analyses are necessary to address the different motions, the outcomes of which the Plaintiff-Appellant challenges on appeal.

I.

[5] In reviewing a motion to set aside the entry of default the standard of review is whether the trial court abused its discretion in granting such relief. *Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986). "A trial court decision will not be reversed unless it [the appellate court] 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.'" *Santos v. Carney*, 1997 Guam 4, ¶ 4. Guam Rule of Civil Procedure 55(c) provides that "for good cause shown, the court may set aside the entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." The concepts of default and default judgment are distinct and must be treated separately. *U.S. v. Topeka Livestock Auction, Inc.*, 392 F.Supp. 944 (N.D. Ind. 1975). However, due to the parallels between entries of default and default judgments, in reviewing entries of default courts will look to the same grounds that are relevant in considering whether to set aside a default judgment. *Id.* On the other hand, the standard is less rigorous when examining a motion to set aside entry of default than for default judgments, so these grounds are more liberally construed. *Hawaii Carpenters'*, 794 F.2d at 513. The grounds on which a court will deny a Rule 60(b) motion are if "(1) the defendant's culpable conduct led to the default, (2) the defendant has no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside." *Midsea Industrial, Inc. v. HK Engineering, Ltd.*, 1998 Guam 14, ¶ 5. It must also be kept in mind that default judgments are generally disfavored and deciding a case on its merits is encouraged whenever possible. *Id.* at ¶ 7. The above test must be applied to each motion separately. In this case, an Entry of Default was entered by the Clerk of Court on two separate occasions, November 16, 1995 and September 10, 1996.

[6] Counsels stipulated to an extension of time, until November 15, 1995, for the Defendants-Appellees to file an answer to the complaint. The Defendants-Appellees did not file their answer and counterclaim until November 17, 1995, two days after the deadline. In the interim, on November 16, 1995, one day after the deadline, the Plaintiff-Appellant filed and the court entered the first Entry of Default. The Defendants-Appellees failed to appear at the default hearing date on December 18, 1995; however, the court continued the matter until December 29, 1995, at which time the Defendants-Appellees appeared. At that time the court set aside the entry of default based on what the court must have determined to be excusable neglect and in keeping with the court's policy of determining cases on their merits.

[7] Applying the *Midsea* test, we examine the three factors for Rule 60(b) motions. As to the Defendants-Appellees' conduct, no evidence was presented to indicate that the late filing was a result of the Defendants-Appellees' culpable conduct. It is, however, unclear what the reason for the late filing was. The Plaintiff-Appellant argues that defense counsel knew that the fifteenth of November was the deadline. But to the extent this reflected neglect, the court found it to be excusable.

[8] As to the second factor, the standard in a Rule 60(b) motion for whether a meritorious defense existed is to ask the question of whether it is possible that the outcome after a full trial would be contrary to that achieved from a default judgment. *Midsea*, at ¶ 11. In this case, not only was there some possibility that a contrary result would occur, but in fact the Defendants-Appellees presented defenses which the jury accepted as valid. And as to the third and final prong, there was no showing of prejudice by the Plaintiff-Appellant in the two day delay in the filing of the answer.

[9] The second motion to set aside relates to the Default entered on September 10, 1996. An amended complaint was filed by the Plaintiff-Appellant on August 21, 1996, and an entry of Default was then entered after the Defendants-Appellees had failed to file an answer. The Defendants-Appellees filed a motion to set aside the entry of default on September 18, 1996. The hearing was held on October 22, 1996 and the court set aside the default after finding good cause and again reiterating the policy of the court to decide cases on their merits. There was no evidence of culpability as the Defendants-Appellees expressed confusion due to the volume of paperwork and motions involved in the case and an unawareness that an answer needed to be filed for the amended complaint.² The Defendants-Appellees also filed an answer to the First Amended Complaint two days after the hearing, on October 24, 1996. Meritorious defenses, again, were raised in the answer to the amended complaint.³ And, the Plaintiff-Appellant once again failed to provide any showing of prejudice.

II.

[10] Motions for default are reviewed for clear abuse of discretion by the trial court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are generally disfavored because deciding cases on their merits is preferred. *Midsea*, at ¶ 7. Plaintiff-Appellant argues that the trial court erred in not granting a default judgment pursuant to Rule 37(b)(2)(C) as a sanction for the Defendants-Appellees' failure to comply with discovery. The imposition of sanctions is discretionary and reviewed for clear abuse of discretion. *People v. Tuncap*, 1998 Guam 13, ¶ 11. "Where the drastic sanctions of dismissal or default are imposed, however, the range of discretion is narrowed and the losing party's non-compliance must be due to willfulness, fault or bad faith." *Sigliano v. Mendoza*, 642 F.2d 309, 310 (9th Cir. 1981). Factors which the court may consider in determining whether default judgment is proper include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel, 782 F.2d at 1471-72.

[11] The Plaintiff-Appellant filed a motion to compel on April 17, 1996. The Appellee failed to file a timely opposition and requested an extension of time to file the opposition. The court granted the motion of the Plaintiff-Appellant. The Plaintiff-Appellant then filed a motion for default due to a failure to comply with the motion to compel. Once again the Defendants-Appellees failed to file a timely opposition, but at the hearing on August 12, 1996 the court denied the motion for default and granted the Defendants-Appellees an extension of time to comply with the motion to compel, until August 26, 1996. The Defendants-Appellees offered as justification for the failure to file a timely opposition the fact that counsel had miscounted the number of days in which to file the opposition. No evidence of willfulness or bad faith has been presented by the Plaintiff-Appellant. Instead, the only evidence presented as an explanation was defense counsel's assertion that he inadvertently miscalculated the time to file an opposition. No prejudice to the plaintiff was shown through an extension of time to comply and the court's continuing reliance on the policy against default judgments in favor of a decision on the merits is sufficient to sustain its decision. At that hearing the court not only granted the extension of time, but granted the Plaintiff-Appellant's costs in bringing the motion. This sanction was a less drastic than

² Courts have expressed a reluctance that parties, not being personally negligent themselves in the pursuit or defense of their case, be held responsible for the errors of their legal representatives. *Barber v. Tuberville*, 218 F.2d 34, 36 (D.C. Cir. 1954).

³ In the Defendants-Appellees' answer to the amended complaint, the Appellee raised several defenses including, but not limited to, contributory negligence, self-defense, lack of duty of care, the statute of limitations and fraud.

imposing default, but still acted to punish the Defendants-Appellees for non-compliance.

[12] On August 20, 1996 the Plaintiff-Appellant filed its second Motion to Compel which was then scheduled for September 26, 1996. The court, on December 18, 1996 denied the motion on the basis that it believed the Defendants-Appellees had complied with the orders. The Plaintiff-Appellant does concede that the Appellee provided responses; however, the Plaintiff-Appellant deemed the responses to be incomplete and evasive. The trial court did not agree.

[13] On January 14, 1997, the Plaintiff-Appellant made its third and fourth motions for default or motions to compel and for attorney's fees. The court heard the motions on March 4, 1997 and took the matter under advisement. The motions were again argued on March 14, 1997. The third motion was filed due to failure to provide documents (1) through (7) identified in the Plaintiff-Appellant's Requests for Production (RFPs). The Defendants-Appellees had responded by saying it could not find the documents corresponding to item number (4) in the RFPs. The fourth motion was filed due to Appellee Betsy Ho's failure to comply with discovery. Appellee Betsy Ho did, however, comply after the motion was filed.

[14] As to the third motion, the Defendants-Appellees contended that they had searched, but could not find the documents requested. The Plaintiff-Appellant claimed that this contention was both false and inappropriate. The trial court, however, denied both of the motions on two grounds—(1) that the court had heard all the evidence and did not believe at the time it was appropriate to take the case away from the jury, by granting a default judgment, and (2) the court believed the Defendants-Appellees' contention that they had searched for the items requested and could not find them. Given the circumstances, (1) the timing at which the motion was made and heard, (2) the fact that the Defendants-Appellees had made some effort to comply with discovery, which was deemed a good faith effort by the trial court, and (3) the fact that default is a drastic sanction, the trial court acted within its discretion in denying the motions.

III.

[15] The Plaintiff-Appellant filed a Motion for a New Trial pursuant to Guam Rule of Civil Procedure 59(a) based on a statement made by the Defendants-Appellees' counsel during closing arguments. The grounds for which a new trial may be granted under Rule 59 are broad and, in the case of a jury trial, a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of . . . Guam"

[16] The statement at issue is as follows: "[I]ikewise, should I tell you this whole thing stems from a lawyer, a sleazy lawyer going to Kent Ho and saying 'give me five thousand dollars whether it be true or not.'" The Plaintiff-Appellant argues that this statement was evidence of an offer of settlement which is not allowed at trial. Plaintiff-Appellant also argues that the statement was "highly irresponsible, reckless, malicious, negligent, and unprofessional" and that the trial court erred in not granting the motion for a new trial even though the court conceded the statement was inappropriate. A trial court's decision to grant or deny a motion for a new trial will not be disturbed on appeal except for cases of clear abuse of discretion. *Phillips v. Ceribo*, 1984 WL 48862, Civ. No. 83-0053A (D. Guam App. Div. April 16, 1984).

[17] Attorney misconduct warrants a new trial only if such misconduct affected the verdict. *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1990), cert. denied, 112 S.Ct. 65 (1991). In determining whether prejudice had occurred due to attorney misconduct which would warrant a new trial, the court should consider "the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances." *Dominguez v. Pantalone*, 212 Cal. App. 3d 201, 211, 260 Cal. Rptr. 431, 437 (Cal. Ct. App. 1989). In *Dominguez*, the Defendant alleged that Plaintiff's counsel committed prejudicial misconduct by attempting, on several occasions throughout the trial, to introduce to the jury the investigating officer's opinion of fault after the trial court expressed doubts as to the opinion's

admissibility. *Id.* at 207-8. The Plaintiff argued that the Defendant had waived her right of review for most of the instances of misconduct because she failed to make note of the conduct, at the time each act occurred, so that the judge could admonish the jury. *Id.* at 211. Although defense counsel had made objections to the plaintiff's counsel's remarks, he only requested an admonition after the last instance of alleged misconduct occurred. *Id.* at 212. The court held that a claim of attorney misconduct should be given no consideration on appeal absent a showing of timely and proper objection and request for jury admonishment. *Id.* at 211.

Because the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that an act of misconduct be subject to review on appeal, that it be called to the attention of the trial court at the time, to give the court an opportunity to so act, if possible, as to correct the error and avoid a mistrial.

Id. at 211-12.

[18] In this case, the Plaintiff-Appellant did not raise any objection during or immediately after closing arguments were made, which would have provided the trial court an opportunity to admonish the jury and counsel as to the inappropriateness of the specific statement. The trial court did, however, instruct the jury through the reading of a jury instruction that statements of counsel were not evidence. The jury instruction, coupled with the fact that the Plaintiff-Appellant failed to raise any objection to the statement at the time it was made, evinces no resulting prejudice against the Plaintiff-Appellant. The *Dominguez* court addressed the possible impropriety of counsel's statement as follows:

As the [California] Supreme Court noted nearly eighty years ago, '[i]t rarely occurs in any case which is of moment and sharply contested that counsel on both sides in their zeal and partisan devotion to their clients do not indulge in arguments, remarks, insinuations, or suggestions which find neither support in, nor are referable or applicable to the testimony, or warranted by any fair theory upon which the case is being presented. If such impropriety of counsel always afforded ground for a new trial, there would be little prospect of any litigation becoming finally determined. It is only when the conduct of counsel consists of a willful or persistent effort to place before a jury clearly incompetent evidence, or the statements or remarks of counsel are of such a character as to manifest a design on his part to awake the resentment of the jury, to excite their prejudices or passions against the opposite party, or to enlist their sympathies in favor of his client or against the cause of his adversary, and the instructions of the court to the jury to disregard such offered evidence or objectionable remarks of counsel could not serve to remove the effect or cure the evil, that prejudicial error is committed. It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.'

Id. at 210-11.

[19] The Plaintiff-Appellant's attempt to characterize defense counsel's statement as an attempt to introduce evidence of offers of settlement is curious. In making this argument, Plaintiff-Appellant would suggest the existence of a certain amount of truth in the statement and, thus, only objects to its admissibility into evidence as an offer of settlement. Nonetheless, because the Plaintiff-Appellant did not raise an objection to the statement at the time it was made on any basis, waiver of that right has occurred. The trial court never addressed the issue of whether this was actually evidence of an offer of settlement which would be inadmissible because the Plaintiff-Appellant failed to timely object. The fact that the Plaintiff-Appellant, at the time the statement was made, either did not have a problem with the statement

or was unable to come up with a proper objection to make does not mean that counsel should subsequently be able to go before the court when he finally thought of an objection to make.

CONCLUSION

[20] Although, at best, Defendants-Appellees' counsel's handling of this case was sloppy⁴, no willfulness was established by the Plaintiff-Appellant. Furthermore, no showing of prejudice resulted from Defendants-Appellees' untimeliness. Additionally, the policy of the court to decide cases on their merits and its disfavoring of default judgments provides the bases for setting aside of the entries of default and not entering default judgments for the noncompliance with discovery. None of the trial court's actions demonstrate any abuse of discretion. Perhaps the repeated problems with late filings or the issues of the noncompliance with discovery could have been addressed with other sanctions, less drastic than default, such as costs for attorneys fees and the filing and arguing of motions. However, the trial court obviously did not believe that such sanctions were necessary and we respect the trial court's judgment.

[21] Furthermore, the circumstances surrounding the bases for the Motion for a New Trial do not present any reversible error by the trial court.⁵ On the contrary, the evidence presented to the court, the Plaintiff-Appellant's failure to make a timely objection to the defense counsel's statement in closing arguments and the fact that the jury was properly admonished by the court through jury instructions, only provide support for the trial court's decision. Therefore, trial court's decision is **AFFIRMED**.

⁴ The court in no way condones defense counsel's inaction, inattentiveness and unawareness of proper procedure in this case. Although this court may have found the defense counsel's behavior to be unacceptable, we find that the trial court acted completely within its authority in setting aside the entries of default and denying the default judgments and motion for a new trial.

⁵ We will defer to the trial court's good judgment as to the statement's impropriety as the trial court was in a better position than we to assess the prejudicial effect of the statement. *Mayetko*, 924 F.2d at 828.