IN THE SUPREME COURT OF GUAM

GUAM DEPARTMENT OF EDUCATION,
Petitioner-Appellant,

v.

GUAM CIVIL SERVICE COMMISSION,
Respondent-Appellee,

CAROL SOMERFLECK, ET AL.,
Real Parties in Interest-Appellees.

Supreme Court Case No.: CVA16-011
Superior Court Case No.: SP0051-14

OPINION

Cite as: 2017 Guam 8

Appeal from the Superior Court of Guam
Argued and submitted on February 22, 2017
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

TORRES, J.:

[1] The sole question on appeal is whether the Superior Court abused its discretion in granting a motion to dismiss filed by Real Parties in Interest-Appellees Carol Somerfleck, et al., ("Somerfleck") for failure to prosecute—pursuant to Rule 41(b) of the Guam Rules of Civil Procedure—based on Petitioner-Appellant Guam Department of Education's ("GDOE") failure to vigorously pursue resolution of its petition. The Superior Court applied only three of the five factors this court announced in *Santos v. Carney*, 1997 Guam 4, for assessing whether dismissal is the appropriate sanction. It also failed to address whether GDOE successfully rebutted a presumption that Somerfleck was prejudiced by GDOE's unreasonable delay. Because only two of the five *Santos* factors support the Superior Court's decision, we vacate its order of dismissal and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Because the only matter before us is the propriety of the order for dismissal, there are few relevant facts. Somerfleck, a local teacher, filed a grievance with the Civil Service Commission ("CSC") seeking payment of wages for two weeks in August 2003. CSC eventually found in favor of Somerfleck, awarding pay for August 1, 2003, through August 18, 2003, and 10% interest per annum on the unpaid balance.

[3] GDOE filed with the Superior Court a petition for judicial review and writ of mandamus seeking to overturn the CSC decision. Somerfleck and CSC subsequently filed answers. Thereafter, CSC's attorney filed a motion to withdraw as counsel, and the court granted the motion.

[4] About a month after CSC filed its answer, GDOE, through prior counsel, emailed the Superior Court, asking whether there was a scheduled hearing in this matter. Former counsel apparently never received a reply to that email. Because of an oversight, GDOE sent no further enquiries to the court. The Superior Court found GDOE also failed to furnish certified transcripts of the CSC proceedings pursuant to 4 GCA § 4406 (2005), and the Record on Appeal fails to note an entry for the transcripts.

[5] Over sixteen months after GDOE's email to the court, Somerfleck filed a motion to dismiss for failure to prosecute. The Superior Court granted the motion after considering GDOE's opposition and Somerfleck's reply.

[6] In its order, the Superior Court considered only three factors of the five-factor test this court adopted in *Santos v. Carney*, 1997 Guam 4. It also did not address GDOE's argument that Somerfleck suffered no actual prejudice as a result of GDOE's delay.

[7] GDOE timely appealed the Superior Court's order of dismissal.

II. JURISDICTION

[8] This court has jurisdiction over an appeal from a final order of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-43 (2017)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[9] "Dismissal for failure to prosecute under Guam Rules of Civil Procedure Rule 41(b) is reviewed for an abuse of discretion." *Lujan v. McCreadie*, 2014 Guam 19 ¶ 5 (quoting *Guam Econ. Dev. Auth. v. Affordable Home Builders, Inc.*, 2013 Guam 12 ¶ 7). "A trial court's decision will not be reversed unless we have a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant

factors.'" *Id.* ¶ 5 (quoting *Park v. Kawashima*, 2010 Guam 10 ¶ 8). "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.'" *Santos*, 1997 Guam 4 ¶ 5 (quoting *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994)).

IV. ANALYSIS

[10] Rule 41(b) of the Guam Rules of Civil Procedure ("GRCP") reads:

> For failure of the plaintiff to prosecute or 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. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Guam R. Civ. P. 41(b). In *Santos*, we adopted from the Ninth Circuit five factors to consider when determining whether dismissal is an appropriate sanction under GRCP 41(b): "(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." 1997 Guam 4 ¶ 5 (quoting *In re Eisen*, 31 F.3d at 1451). When balancing the factors, "[d]ismissal is appropriate if at least four factors favor dismissal or three factors 'strongly' support dismissal." *Kawashima*, 2010 Guam 10 ¶ 10 (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)).

[11] The first two factors can be analyzed together, *see Kawashima*, 2010 Guam 10 ¶ 13, and so this opinion proceeds in four parts.

A. The Public's Interest in Expeditious Resolution of Litigation and the Court's Need to Manage its Docket

[12] "The trial court is in the best position to decide when delay in a particular case interferes with the public interest and docket management, and we give deference to its determination of

the reasonableness of the delay." *Kawashima*, 2010 Guam 10 ¶ 19 (quoting *Santos*, 1997 Guam 4 ¶ 5). Despite its failure to concede the first two factors, GDOE does not offer any convincing argument to overcome the deference we give the trial court's determination. It argues that it "shares the public's interest in expeditious resolution of litigation and respects the lower court's need to manage it [sic] docket, and has not actively contravened either." Appellant's Br. at 9-10 (Sept. 14, 2016). It is certainly true that GDOE has not actively contravened anything; failure to prosecute is achieved through inaction. GDOE points to its email enquiring about a scheduled hearing as activity it undertook to keep the case moving forward. *Id.* at 11. But this activity was followed by approximately sixteen months of inactivity.

[13] The Superior Court found there was no scheduling order and appears to have held this against GDOE. *See* Record on Appeal ("RA"), tab 15 at 2 (Order of Dismissal, May 26, 2016). GDOE points to Local Rules of the Superior Court of Guam Civil Rule ("CVR") 16.1(b), Appellant's Reply Br. at 11-12 (Oct. 20, 2016), which explicitly exempts an action for review of an administrative record from its other terms, including having to submit a proposed scheduling order. But even if GDOE was exempted from such requirements, it was still responsible for providing transcripts—something it did not do. Guam law specifies that "[t]he party who appeals the Commission's decision to the court is responsible for providing certified transcripts of hearings and shall bear associated costs." 4 GCA § 4406 (amended by Pub. L. 30-112:3, Mar. 12, 2010). GDOE argues that the statute should not be read to make a hearing contingent on a petitioner supplying certified administrative transcripts, Appellant's Br. at 11 n.3, perhaps suggesting that it was the court's responsibility to schedule a hearing without them. We reject this argument out of hand.

[14] In the end, the record indicates that when its former counsel left its employ, GDOE made a mistake that caused it to lose track of the case. *See* RA, tab 11 ¶ 4 (Decl. of Jesse N. Nasis). As a result, it did not submit a transcript or further enquire as to the status of the case. *Id.* ¶ 9. The Superior Court found that this delay affected the public's interest in the expeditious resolution of the case and its ability to manage its already-busy docket. *See* RA, tab 15 at 4 (Order of Dismissal). We defer to the Superior Court's assessment of these considerations; these factors weigh in favor of dismissal.

B. The Risk of Prejudice to the Defendants

[15] Our case law makes clear that "once a delay is determined to be unreasonable, prejudice . . . is presumed." *Kawashima*, 2010 Guam 10 ¶ 21 (quoting *Santos*, 1997 Guam 4 ¶ 8) (alteration in original). *Santos* cites *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976), for this proposition. 1997 Guam 4 ¶ 8. In *Anderson*, the Ninth Circuit indicated that this presumption is a rebuttable one. *See* 542 F.2d at 525 ("The plaintiff has also failed to rebut the presumption of prejudice resulting from the failure to prosecute. In fact the findings of the district judge support the conclusion that the defendants have suffered actual prejudice from the delay in service."). *Santos* itself goes on to analyze actual prejudice even after establishing that the presumption would apply. 1997 Guam 4 ¶ 8 ("The record is also sufficient to support a finding of actual prejudice."). Our recognition of the rebuttable nature of this presumption has been consistent. *See, e.g.*, *Affordable Home Builders*, 2013 Guam 12 ¶¶ 39-41; *Kawashima*, 2010 Guam 10 ¶ 21.

[16] In this case, the Superior Court found that the delay was unreasonable and that prejudice was presumed. RA, tab 15 at 4 (Order of Dismissal). The Superior Court did not go on to analyze whether GDOE rebutted this presumption with a showing that Somerfleck suffered no actual prejudice, *see id.*, even though GDOE so argued, *see, e.g.*, RA, tab 12 at 7 (Pet'r GDOE's

Opp'n to Real Parties' in Interest Carol Somerfleck, et. al. Mot. to Dismiss for Failure to Prosecute, Mar. 9, 2016) ("Real Parties' [sic] in Interest have thus suffered no actual prejudice because of such delay."). Indeed, as GDOE points out on appeal, Somerfleck appears to concede the lack of prejudice in her reply before the Superior Court. *See* Appellant's Br. at 14; *see also* RA, tab 13 at 5 (Reply to Pet'r's Opp'n to Mot. to Dismiss, Mar. 23, 2016) (admitting that "the delay in this matter is no [sic] typical as there are [sic] no evidence or witnesses [sic] testimony to be changed or lost over time" but asserting that prejudice should be presumed). Somerfleck's counsel again conceded the lack of actual prejudice before this court during oral argument.

[17] Given the argument and concession before the Superior Court, we are confident that, had it completed analysis under the third factor, it would have found GDOE successfully rebutted the presumption that the unreasonable delay prejudiced Somerfleck. By failing to complete its enquiry under the third *Santos* factor, the court mistakenly found that the third factor weighed in favor of dismissal. It does not.

C. The Public Policy Favoring the Disposition of Cases on their Merits

[18] The Superior Court did not consider this factor in its order. "Although courts provide necessary procedural rules that bar certain actions from proceeding to final judgment, ideally all cases should find a resolution based on the merits." *Lujan v. McCreadie*, 2014 Guam 19 ¶ 22. Usually, this factor "weighs against dismissal." *Kawashima*, 2010 Guam 10 ¶ 22 (citing *Santos*, 1997 Guam 4 ¶ 9). In examining this factor, we do so generally, and refrain from "assess[ing] the likelihood of success on the merits." *See Santos*, 1997 Guam 4 ¶ 9. "The question is whether the policy of determining cases on their merits justifies the delay and prejudice caused by [the party's] conduct." *Id.* (citations omitted); *see also Kawashima*, 2010 Guam 10 ¶ 22.

[19] Although the delay was significant, we have already discussed the lack of actual prejudice. Thus, on balance, we find that this factor, which "ordinarily weighs against dismissal," *Kawashima*, 2010 Guam 10 ¶ 22, weighs against dismissal in this case. Had the Superior Court considered this factor explicitly, its weighing of the relevant circumstances would have been entitled to deference.

D. The Availability of Less Drastic Sanctions

[20] The Superior Court also failed to consider the effectiveness of other possible sanctions. "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." *Kawashima*, 2010 Guam 10 ¶ 24 (quoting *Santos*, 1997 Guam 4 ¶ 10). Nor is the court "required to examine every single alternate remedy in deciding if sanction of dismissal is appropriate." *Id.* "[T]he reasonable exploration of possible and meaningful alternatives is all that is required." *Id.* (quoting *Anderson*, 542 F.2d at 525).

[21] We would give deference to the Superior Court's determination of this factor, but because it did not explain why other remedies would not be sufficient, we cannot say, based on the record before us, that a warning or monetary sanctions were not reasonable options. Thus, this factor does not weigh in favor of dismissal.

V. CONCLUSION

[22] The Superior Court rightly assessed that the first two *Santos* factors weigh in favor of dismissal. Because GDOE argued, and Somerfleck conceded, the lack of actual prejudice, the Superior Court was mistaken when it found the third factor similarly favors dismissal. We assess on this record, in the absence of explanation from the Superior Court, that the final two factors do not favor dismissal. Because only two of the five *Santos* factors support the Superior Court's

decision, we **VACATE** its order of dismissal and **REMAND** for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice