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IN THE SUPREME COURT OF GUAM

KATHLEEN A. WARD)
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 Plaintiff-Appellant)
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 vs.)
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 ANTONIO L.G. REYES)
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 Defendant-Appellee)
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SUPREME COURT CASE NO. CVA96-004
SUPERIOR COURT CASE No. CV1867-92

OPINION

Filed April 2, 1998
Cite as 1998 Guam 1
Appeal from the Superior Court of Guam
Argued and submitted on 9 December 1997
Agana, Guam

Appearing for the Plaintiff-Appellant:
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Appearing for the Defendant-Appellee:
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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS, and JOAQUIN C. ARRIOLA, Associate Justices.

WEEKS, J.:

[1] Appellant Kathleen A. Ward (“Ward”) is appealing an order denying her Guam Rule of Civil Procedure Rule 59(e) Motion to Reconsider the granting of an order dismissing her complaint and the entry of Judgment dismissing her complaint with prejudice based upon her failure to prosecute. This Court finds that the trial court did not abuse its discretion in denying the Motion to Reconsider, in granting the Motion to Dismiss and in entering a Judgment of Dismissal. The decision below is hereby affirmed.

I.

[2] On 15 December 1992, Ward filed suit against Antonio L.G. Reyes (“Reyes”) alleging that Reyes had sexually assaulted her while on a business trip. The jury trial began on 12 April 1995 and a mistrial was declared on 19 April 1995. A year later, on 9 April 1996, Reyes moved to dismiss the case for failure to prosecute and as a sanction for the misconduct of Ward’s trial counsel which resulted in the mistrial. The motion was heard on 8 May 1996. Neither Ward nor her attorney appeared at the 8 May 1996 hearing. The Motion was orally granted on that date and on 13 May 1996, Judge Joaquin V.E. Manibusan issued a written order granting the Motion to Dismiss and entered a Judgment of Dismissal with prejudice.

[3] On 17 May 1996 Attorney John White, counsel for Ward, filed a “Motion to Responder” [sic] the order granting Defendant Reyes’ Motion to Dismiss and the subsequent Judgment. The Appellant’s sole argument in support of the written Motion to Reconsider was that the Appellant was given the wrong time to appear for the hearing¹.

[4] The Motion to Reconsider the order granting the Motion to Dismiss was heard on 7 June 1996, at which time Ward orally presented new arguments opposing the Motion to Dismiss. The

¹Appellant’s counsel was able to produce a copy of the Notice of the Motion to dismiss which indicated that the hearing was scheduled for 8 May 1996 at 2:00 p.m. However, both the Notice of Motion filed with the Court and the 8 May 1996 court calendar indicated that the hearing was set for 10:00 a.m. on that morning.

novel arguments related to the allegations of misconduct by Ward's trial counsel and the causes for the delay in prosecuting the underlying complaint. After listening to oral argument of both counsel, the trial court denied the Motion to Reconsider. The court indicated that the absence of counsel at the 8 May 1996 hearing on the Motion to Dismiss was not a factor in granting the Motion to Dismiss. The order denying the Motion to Reconsider was filed by the trial court on 28 June 1996. The Appellant filed a timely Notice of Appeal from the 28 June 1996 Order.

II.

[5] The Supreme Court has jurisdiction over this appeal pursuant to 7 GCA §§ 3107, 3108 and 48 U.S.C. §1424-3(d). We look first to determine the subject of the appeal. Rule 3(c) of the Guam Rules of Appellate Procedure requires that the Notice of Appeal designate the order or judgment being appealed. In the present appeal, the Notice only designates the order denying the Motion for Reconsideration as the final decision being appealed. The Notice of Appeal did not include either the order granting the motion to dismiss for failure to prosecute or the Judgment dismissing the complaint with prejudice, nor did the Appellant later attempt to amend the Notice of Appeal to include the dismissal Order and Judgment. In a procedural order dated 15 January 1997, the Chief Justice noted that the only order being appealed is the order granting the Motion to Reconsider. The Appellee contends that the Supreme Court therefore does not have jurisdiction to review the Judgment or the order granting the Motion to Dismiss.

[6] In certain situations, the Ninth Circuit treats a Rule 59 motion as an appeal of the underlying judgment. *Washington State Health Facilities Ass'n v. Dep't of Social and Health Services*, 879 F.2d 677, 681 (9th Cir. 1989). This is appropriate where there is no prejudice and it could be fairly inferred that the Appellant had intended to appeal the judgment. *See id.* at 681; *Lynn v. Sheet Metal Workers' Int'l. Ass'n*, 804 F.2d 1472, 1481 (9th Cir. 1986). In the instant case, throughout her filings, the issues underlying the Motion to Dismiss and the entry of Judgment were raised and briefed by Ward. Furthermore, at the trial court hearing on the Motion for Reconsideration, the court

permitted Ward to argue the merits of the Motion to Dismiss. Additionally, the Appellee has also responded to Ward's arguments related to the Motion to Dismiss and Judgment. We conclude that no prejudice would be suffered by the Appellee, if this Court were to consider the merits of the Motion to Dismiss and entry of Judgment.

[7] Therefore, under the rationale of *Washington State Health Facilities v. DSHS*, and given the specific facts of this case, this Court will consider the appeal of the order denying Rule 59 relief as an appeal also of the underlying judgment. 879 F.2d at 681. In other cases, where Guam Rules of Appellate Procedure Rule 3(c) is not strictly complied with, this Court may not be so lenient.

III.

[8] Before proceeding to the merits of the appeal, a preliminary issue must be addressed. Appellee Reyes urges this Court to disregard all arguments made by the Appellant which were not raised originally in the Motion for Reconsideration and/or Motion to Dismiss and which depend on filings which were not properly before the trial court.

[9] This Court's review of the trial court's decision will be limited to those arguments which were raised at the trial level. The appellate record is likewise restricted to those portions of the record which were considered by the trial court in support of those arguments. Both the Motion for Further Proceedings and portions of the trial transcripts the Appellant thought relevant, could have and should have been raised first in opposition to the Motion to Dismiss. No excuse is given as to why the Appellant failed to do so. It would have been improper for the trial court to consider a new argument made by the Appellant "never before briefed and advanced for the first time at the hearing on the [reconsideration] motion." *Universe Resort Guam v. Sandcastle, Inc.*, 1996 WL 104525 at **5 (D.Guam.App.Div. 1996); *see also, Tonry v. Security Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994); *United States v. Walker*, 601 F.2d 1051, 1054-1055 (9th Cir. 1979).

Motion for Reconsideration

[10] The Appellant is seeking a reversal of the trial court's order denying the Motion for

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3 Reconsideration made under Guam Rule of Civil Procedure 59(e). The Appellant incorrectly argues
4 that the standard of review for a motion for reconsideration is de novo. In fact, the denial of such
5 motions is reviewed for an abuse of discretion. *Universe Resort Guam v. Sandcastle, Inc.*, 1996 WL
6 104525 at **2 (D.GuamApp.Div. 1996). Motions for reconsideration are appropriate where the trial
7 court: “(1) is presented with new evidence; (2) committed clear error or the decision was manifestly
8 unjust, or (3) if there is an intervening change in controlling law.” *School Dist. No. 1J, Multnomah*
9 *County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2742 (1994). In
10 the present appeal, the Appellant has failed to satisfy any one of the three prongs justifying
11 reconsideration of the underlying motion. Appellant argues two of the three possibilities: she
12 attempts to pass off as “new evidence” certain trial transcripts and a court filing, and she contends
13 that dismissal of the case is manifestly unjust.

14 **[11]** The evidence Ward attempts to present in support of the reconsideration of the Motion to
15 Dismiss consists of: (1) trial transcripts evidencing the conduct of Ward’s counsel which are related
16 to the mistrial declared by Judge Cruz; and (2) a Motion for Further Proceedings which was never
17 officially docketed with the Superior Court. Neither the trial transcripts nor the Motion for Further
18 Proceedings were a part of the record when the trial court was determining the Motion to Dismiss
19 and were only first offered during the hearing on the Motion for Reconsideration.

20 **[12]** The Appellee’s comments regarding the trial conduct of Ward’s trial counsel were attached
21 as an affidavit in support of the Defendant-Appellee’s Motion to Dismiss for Failure to Prosecute.
22 The transcripts were never provided to the Court. The Appellant contends that the conduct of the
23 Appellant’s counsel at trial did not justify a mistrial. The Appellant is attempting to support this
24 argument with the trial transcripts. However, in opposing the Motion to Dismiss, the Plaintiff-
25 Appellant did not dispute the Defendant-Appellee’s Affidavit regarding the misconduct of the
26 Appellant’s trial counsel. In now rebutting the allegations of misconduct, the Appellant is asking
27 this Court to review trial transcripts which were not considered by the trial judge in determining the
28 Motion to Dismiss.

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3 **[13]** Ward’s failure to submit available evidence in support of his opposition to the Motion to
4 Dismiss does not make such evidence “newly discovered” as is necessary to satisfy the standards for
5 a Motion for Reconsideration. *ACandS, Inc.*, 5 F.3d at 1263. It was not an abuse of discretion to
6 deny a Motion to Reconsider when the Motion is supported by evidence which could have and
7 should have been presented to the trial court during consideration of the original Motion to Dismiss.
8 *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994); *Dale & Selby Superette & Deli v. U.S. Dept.*
9 *Of Agric.*, 838 F.Supp. 1346 (D. Minn. 1993) (reconsideration motion of motion to amend cannot
10 be used to introduce available evidence which was not proffered, to relitigate old issues, to advance
11 new theories, or to secure a rehearing on the merits); *Beyah v. Murphy*, 825 F.Supp. 213 (E.D. Wis.
12 1993) (citing *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986).

13 **[14]** The Appellant next contends that the trial court should have considered as evidence of
14 prosecutorial zeal, a Motion for Further Proceedings, delivered by the Appellant on 1 December
15 1995 to the Clerk’s Office of the Superior Court. The motion submitted by the Appellant was
16 stamped received by the Superior Court Clerk’s Office. But the same standard applies to this
17 document. The trial court was never presented with the Motion for Further Proceedings during
18 consideration of the Motion to Dismiss or the Motion for Reconsideration. The actual filing was
19 questioned by both the trial court and Appellee as neither the Court nor the Appellee were aware of
20 its existence. The trial court noted that it was never raised in the Appellant’s opposition to the
21 Motion to Dismiss or in the papers supporting the Motion for Reconsideration. There was no copy
22 in the official court file, there was no affidavit attesting to its existence and of its filing with the
23 clerk’s office, and the counsel for the Appellee never received a copy of the motion. In fact, the
24 purported Motion for Further Proceedings was first mentioned at the hearing on the Motion to
25 Reconsider. More importantly, even then its existence was not substantiated by the presentation of
26 the document itself, but by the unverified oral assertion of Plaintiff-Appellant’s counsel. The Motion
27 itself, undeniably stamped “received” but not “filed” by the Clerk’s office, was never viewed by a
28 judicial officer until Ward’s Motion to Supplement the Record on Appeal came before this Court.

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3 Since the trial court did not consider the existence of this Motion when ruling on the Motion to
4 Dismiss and since it was not properly before the trial court during the argument of the Motion for
5 Reconsideration, this Court will not consider such evidence in reviewing the trial court's decision
6 in dismissing the case below.

7 [15] Ward also argues that the order granting the Motion to Dismiss is manifestly unjust². Ward
8 admits that she failed to appear at the hearing on the Motion to Dismiss but alleges that such non-
9 appearance was not her fault. She contends that she was not notified properly of the 10:00 A.M.
10 hearing on 8 May 1996. It should be noted that both the trial court judge and the Appellee-
11 Defendant were present at the 10:00 a.m. hearing. Also, the court-filed original of the Notice of
12 Motion indicates that the hearing on the Motion to Dismiss was scheduled for 10:00 a.m. on 8 May
13 1996. The 8 May 1996 calendar for the trial court also indicated that the hearing was set for 10:00
14 a.m. The bottom line is, however, that the trial court clearly indicated that Ward's absence, while
15 noted, was not significant in the Court's granting of the Motion to Dismiss.

16 [16] Since the Appellant has failed to demonstrate the existence of "new evidence," "manifest
17 injustice" or an "intervening change in controlling law," this Court cannot find that the trial court
18 abused its discretion in denying the Motion for Reconsideration, and such decision is therefore
19 affirmed.

20 **Motion to Dismiss**

21 [17] The Appellee-Defendant sought dismissal of the action under GRCP 41(b). Under this rule,
22 a defendant may move for dismissal for the failure of the plaintiff to prosecute the action or for
23 failure of the plaintiff to comply with an order of the court. Dismissal of an action is a serious
24 sanction which should be used in a non-abusive manner. Such dismissals are reviewed for an abuse
25 of discretion. *Santos v. Carney*, 1997 Guam 4 ¶4. An abuse of discretion occurs only when the
26 decision is "based on an erroneous conclusion of law or where the record contains no evidence on
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28 ²Ward fails to cite any legal authority which sets forth the standard of review for Rule 59(e) motions or the
standard for granting a Rule 59(e) motion.

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3 which the judge could have rationally based the decision.” *Lynn v. Chin Heung Int’l, Inc.*, 1986 WL
4 68916 at **2. In reviewing a trial court decision, this Court weighs five factors: “(1) the public’s
5 interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk
6 of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits;
7 and (5) the availability of less drastic sanctions.” *Id.* at 3-5 (citations omitted). This Court will not
8 reverse a trial court determination unless we have “a definite and firm conviction that the court
9 below committed a clear error of judgment in the conclusion it reached upon weighing of the
10 relevant factors.”” *Id.* (citations omitted).

11 [18] The plaintiff bears the burden of showing that the delay is reasonable, and if proven, the
12 burden shifts to the defendant to prove prejudice. *Santos v. Carney*, 1997 Guam 4 at ¶ 8. If the
13 Plaintiff fails to meet its burden, prejudice is presumed. *Id.* Presumed prejudice is sufficient to
14 support dismissal under GRCP 41(b). *Id.* Also, in reviewing the trial court decision, this Court can
15 only consider the record as was presented before the trial judge hearing the Motion. *Tonry v.*
16 *Security Experts, Inc.*, 20 F.3d 967, 974; *United States v. Walker*, 601 F.2d at 1054-1055.

17 [19] The trial judge granted the Motion to Dismiss based upon the grounds stated in the
18 Defendant’s memorandum in support of the Motion to Dismiss. However, the trial judge did not go
19 into each of the factors identified above. This Court may independently review the record (as
20 presented to the trial judge) to determine whether there was an abuse of discretion. *Santos v. Carney*,
21 1997 Guam 4 at ¶ 5.

22 [20] In moving to dismiss the case for a failure to prosecute, Reyes cited several factors: (1) the
23 prosecutorial inactivity from the date of the mistrial on 19 April 1995 until the filing of the Motion
24 to Dismiss on 9 April 1996; (2) the misconduct of Ward’s counsel which consisted of filing, but not
25 serving, a moot motion to recuse Judge Cruz, seven months after the mistrial and two months after
26 Judge Cruz had recused himself; (3) the misconduct of Ward’s counsel which resulted in a mistrial;
27 (4) the failure of Ward to take any action on an order granting attorney’s fees to Ward; (5) the
28 prejudice suffered by Reyes by the delay which would result in a trial (if one were to occur at all)

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3 over four and a half years after the incidents in question. Reyes supported the Motion to Dismiss
4 with a sworn affidavit executed by defense counsel who was present at the trial. No trial transcripts
5 evidencing the misconduct of Ward's trial counsel were presented to the trial court.

6 [21] In Ward's opposition to the Motion to Dismiss only two arguments were advanced: (1) the
7 delay was due to the constant reassignment of the case to different judges, and (2) there was no
8 misconduct in failing to serve Reyes with the Motion to Recuse Judge Cruz since Judge Cruz
9 recused himself. Ward did not address the misconduct of counsel at trial, the prosecutorial
10 inactivity, or the prejudice suffered by Reyes due to the delay.

11 [22] Ward claimed that the motion to recuse Judge Cruz was not served upon the Appellee
12 because it was moot, and that therefore it was not misconduct. Also, Ward did not support the
13 opposition to the Motion to Dismiss with trial transcripts, affidavits or pleadings.

14 [23] The trial court determined that Ward failed to meet her burden of showing that the delay was
15 reasonable. Ward's counsel blamed the delay on the court, yet Ward fails to realize that as the
16 Plaintiff in the action, Ward herself had a duty to prosecute the matter. Apart from the tardily
17 presented Motion for Further Proceedings³, Ward took no action herself to expedite resolution of the
18 case. The one year delay was not justified by the Appellant. All discovery had been completed, the
19 matter had been fully prepared for trial, yet no action was taken to set the matter for a new trial. In
20 addition, during the delay, there was no evidence of settlement discussions and the Appellant did not
21 take further action on an order which awarded attorneys' fees to Ward.

22 [24] Furthermore, this Court grants deference to a trial court in determining the reasonableness
23 of the delay. *Santos v. Carney*, 1997 Guam 4 at ¶ 5. As indicated by this Court in *Santos v. Carney*,
24 the trial judge "is in the best position to determine what period of delay can be endured before its
25 docket becomes manageable." *Id.* (citations omitted).

26 [25] Since Plaintiff-Appellant failed to demonstrate the reasonableness of the delay, prejudice
27 against the defendant sufficient to justify dismissal can be presumed. Appellant Ward failed to rebut
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³Which this Court cannot consider.

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the presumption of prejudice.

[26] Therefore, we cannot say that we have a firm and definite conviction that the trial court committed a clear error of judgment in determining that the Plaintiff failed to show that the delay was reasonable. We must therefore affirm the trial court’s granting of the Motion to Dismiss for failure to prosecute.

Conclusion

[27] The trial court did not abuse its discretion in denying the Motion for Reconsideration. Appellant proffered no new evidence and failed to demonstrate manifest injustice. Nor was the trial court’s granting of the Motion to Dismiss based on an erroneous conclusion of law or an insufficient record. The order denying the Motion for Reconsideration, the order granting the Motion to Dismiss and the subsequent Judgment are hereby AFFIRMED.

DATED: _____ March 1998

JOAQUIN C. ARRIOLA, Associate Justice

JANET HEALY WEEKS, Associate Justice

PETER C. SIGUENZA, Chief Justice