IN THE SUPREME COURT OF GUAM

MIDSEA INDUSTRIAL, INC.,	)	Supreme Court Case No. CVA97-008
	)	Superior Court Case No. CV0798-94
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
HK ENGINEERING, LTD., a Guam Corp., and UTTAM'S, INC., a Guam Corp.	)	**OPINION**
	)	
Defendants-Appellees.	)	
	)	

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On Appeal from the Superior Court of Guam

Submitted on Briefs February 19, 1998

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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, Midsea Industrial, Inc., appeals from a Superior Court judgment granting Defendant-Appellee Uttam's, Inc.'s Motion to Set Aside Entry of Default and Default Judgment. The Plaintiff-Appellant contends that the trial court clearly abused its discretion in granting the motion below**.** After careful review of the records and the arguments presented on appeal, we have serious concerns relating to the trial court's role in possibly prejudicing the Plaintiff-Appellant. We, therefore, REMAND this case to the Superior Court for a determination of whether prejudice to the Plaintiff-Appellant, particularly attributable to the trial court, exists, which may require a different result.

FACTUAL AND PROCEDURAL BACKGROUND

[2] The Plaintiff-Appellant, Midsea Industrial, Inc., is seeking recovery of payment and the return of goods and equipment from the Defendant-Appellee, Uttam's, Inc., based on the sale of goods and equipment to Defendant HK Engineering, designated for Defendant-Appellee. The goods, wares and equipment in question were the result of a purchase order between the Plaintiff-Appellant and Defendant HK Engineering dated October 28, 1992. The total cost of the goods was approximately $79,686.42 with a down payment of approximately $31, 333.00 paid by Defendant HK Engineering on or about November 17, 1992. The goods were shipped by the Plaintiff-Appellant on or about November 26, 1992. They were used and installed by Defendant HK Engineering in a construction project benefitting the Defendant-Appellee. The Plaintiff-Appellant filed a complaint

against Defendant HK Engineering, Ltd. and the Defendant-Appellee on May 24, 1994 seeking to recover the balance due, plus interest from either Defendant HK Engineering, directly, or the Defendant-Appellee, based on a claim of unjust enrichment. Service was made on Harry Uttamchandi on May 30, 1994. Some correspondence occurred between Plaintiff-Appellant and Defendant-Appellee's counsel between July 1994 and October 1994. Entry of default was filed by the Superior Court Clerk of Court on December 19, 1994 and a default hearing was scheduled for January 17, 1995. Mr. Uttamchandi, Harry's father, was present at the January 17, 1995 hearing, but counsel for the Defendant-Appellee was not. There was some dispute as to whether Harry was authorized to receive service. Mr. Uttamchandi indicated that his son, Harry, was only a manager, not a corporation member and that Mr. Uttamchandi did not receive the complaint served upon Harry. The hearing was continued to February 16, 1995 at which time neither Mr. Uttamchandi nor counsel for the Defendant-Appellee was present. A Default Judgment was entered against both defendants on March 9, 1995.

[3] The Declaration and Order for Issuance of Writ of Execution and Order for Examination of Judgment Debtor were filed June 9, 1995 and then subsequently heard on August 16, 1995. A Writ of Execution was issued and filed on June 21, 1995. Defendant-Appellee filed a motion to set aside the entry of default and default judgment on July 24, 1995. The Plaintiff-Appellant filed an opposition on February 22, 1996, to which the Defendant-Appellee replied on March 18, 1996. The motion was heard by the court on April 16, 1996, nearly nine (9) months after the filing of the motion, at which time the court took the matter under advisement. A written Decision and Order was issued on February 4, 1997 granting the motion to set aside the entry of default and default

judgment. A notice of appeal was filed on February 28, 1997.

ANALYSIS

[4] Motions to Set Aside an Entry of Default and a Default Judgment are governed by Guam Rules of Civil Procedure 55(c)[1] and 60(b)[2], respectively. Rule 55(c) motions are addressed extensively by this court in the case of *Adams v. Duenas*, 1998 Guam 15. We focus here on the review of the Rule 60(b) motion in which we examine the trial court's decision for clear abuse of discretion. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 687 (9th Cir. 1988). Abuse of discretion has previously been defined by this court and other courts of this jurisdiction to give broad latitude to trial courts. "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 (citation omitted,).

Although each case must depend upon its own facts, a rule of thumb generally

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[1]The Rule provides in pertinent part that "[f]or good cause shown, the court may set aside an entry of default, and if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). Guam R. Civ. P. 55(c).

[2]Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or if it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from operation of the Judgment.* Guam R. Civ. P. 60(b).

> applied is that the "trial court's exercise of discretion should not be disturbed unless there is '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.'" A trial judge abuses his/her discretion only when the decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision (citations omitted).

Lynn v. Chin Hueng Int'l, Inc., Civ. No. 85-0066A, 1986 WL 68916 * 2 (D. Guam App. Div. Oct. 22, 1986), *aff'd*; 852 F.2d 1221 (9th Cir. 1988).

[5] A court will deny a motion to set aside a default judgment if it is shown that (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. *Falk v. Allen,* 739 F.2d 461, 463 (9th Cir. 1984); *Alan Neuman Productions, Inc. v. Albright,* 862 F.2d 1388, 1392 (9th Cir. 1988); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992). A finding of but one of the three elements is sufficient to deny vacation of a default judgment. *Cassidy v. Tenorio*, 856 F.2d 1412, 1415-16 (9th Cir. 1988).

[6] Two policy determinations drive Rule 60(b) review— that the rule is meant to be remedial in nature and should be applied liberally, and that a default judgment is considered to be a drastic measure, only appropriate in extreme circumstances because, whenever possible, cases should be decided on their merits. *Falk,* 739 F.2d at 463.

A. Culpable Conduct by the Defendant-Appellee Leading to Default

[7] The Plaintiff-Appellant alleges culpable conduct by the Defendant-Appellee based on the Defendant-Appellee's initial failure to timely answer the complaint. The record indicates that there was an apparent lack of communication between the Defendant-Appellee and counsel as to the

timing of the hearings, as evidenced through the client's presence at the January 17, 1995 hearing and the absence of counsel for the Defendant-Appellee. There was also a question as to whether proper service had been made on the Defendant-Appellee based on the service made upon Harry Uttamchandi whom the Defendant-Appellee argues is not a "corporation member." The Plaintiff-Appellant cites a case which stands for the proposition that default judgments should not be set aside because of a client's failure to notify his attorneys of receipt of a complaint and motion for default. *U.S. v. $22,640.00 in U.S. Currency*, 615 F.2d 356, 360 (5th Cir. 1980). In *U.S. v. $22,640.00*, the court made a determination that the failure to notify counsel of the receipt of the complaint did not constitute justifiable neglect as used in Rule 60(b)(1). *Id.* On appeal, the court recognized that such a determination was within the discretion of the trial court and one not to be disturbed absent a showing of clear abuse of that discretion. *Id.* However, in this case, the trial court found that poor communication between the Defendant-Appellee and counsel for the Defendant-Appellee was a contributing factor in the default but attributed most of the responsibility to the attorney, not to the Defendant-Appellee's culpable action.

[8] The Plaintiff-Appellant responds to this issue by arguing that a client chooses his attorney and should not be permitted to avoid the consequences of his agent's actions. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 1390 (1962). However, "default judgments should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court." *INVST. Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 400 (6th Cir. 1987). The court in *INVST. Financial* opined that "although a party who chooses an attorney takes the risk of suffering from the attorney's incompetence, we do not believe that this record exhibits

circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention." *Id.* Similarly, the court below did not believe the Defendant-Appellee should suffer because of counsel's actions or inaction.

[9] The Plaintiff-Appellant argues further evidence of the Defendant-Appellee's culpable conduct is grounded in the fact that there was a long passage of time between the Entry of Default and Default Judgment and then the subsequent setting aside of that judgment. The Plaintiff-Appellant states that prejudice has ensued based on the fact that it had to wait almost a full year for the Motion to Set Aside Default to be heard, and then an additional ten months for the Decision and Order to be issued, seemingly indicating that this delay was due to culpable conduct. However, no facts have been asserted to indicate that these delays were due to the culpable conduct of the Defendant-Appellee. We do not see how the Plaintiff-Appellant can claim that the Defendant-Appellee is somehow responsible for the trial court's delay in hearing the motion or issuing the Decision and Order almost a year later. The trial court did not abuse its discretion when it found that the Entry of Default and Default Judgment were not due to any culpable conduct of the Defendant-Appellee.

B. Meritorious Defenses of the Defendant-Appellee

[10] If it be shown that the Defendant-Appellee lacked a meritorious defense then a Rule 60(b) motion to set aside should be denied. The court must determine "whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default."

Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir. 1986); *INVST. Financial*, 815 F.2d at 399. The present case is based on the contention that the Defendant-Appellee is liable to the Plaintiff-Appellant for products received and installed by Defendant HK Engineering. No contract existed between the Defendant-Appellee and the Plaintiff-Appellant. The Defendant-Appellee asserts that it paid for those products and services rendered by Defendant HK Engineering and that it is not, therefore, liable to the Plaintiff-Appellant. If the Defendant-Appellee were to prove this contention, no liability would be found on its part. In its proposed answer, the Defendant-Appellee raised several possible defenses[3]. The trial court found that Defendant-Appellee's defenses seemed plausible and, furthermore, that there was a strong possibility that the outcome, after a full trial, would be contrary to the result achieved by default. The Plaintiff-Appellant attempts to draw a distinction between the words plausible and meritorious. It is unnecessary to examine any difference between the words in this situation since the trial court also stated that a result contrary to the one achieved by default was highly possible. *Hawaii Carpenters'*, 794 F.2d at 513 (holding that the necessary determination to be made in determining whether a meritorious defense existed is whether the outcome after a trial would be different from the one achieved by default).

[11] The Plaintiff-Appellant argues that in the case of *Direct Mail Specialists*, which also involved a lack of privity of contract defense, the court denied the Rule 60(b) motion because culpable

[3]The following defenses were raised in the Defendant-Appellee's answer— (1) the Plaintiff-Appellant's complaint is barred by the doctrine of accord and satisfaction; (2) the Plaintiff-Appellant's complaint is barred for lack of mutuality of obligation; (3) the debt is not owing and due from the Defendant-Appellee; (4) a lack of privity between the Plaintiff-Appellant and the Defendant-Appellee; (5) misjoinder by the Plaintiff-Appellant; (6) the statute of frauds; (7) the fact that the Plaintiff-Appellant is a foreign corporation, nor licensed to engage in business in Guam; and (8) the doctrines of waiver, estoppel and laches. It is unnecessary for the Defendant-Appellee to establish that an outcome, favorable to the Defendant-Appellee, would result based on any of the aforementioned defenses, but instead, merely that a meritorious defense did and does exist.

conduct of the defendant was established. 840 F.2d at 688-90. The Plaintiff-Appellant argues that although the court did not reach the issue of whether the lack of privity defense was meritorious, it stated that no meritorious defense would have overridden the defendant's culpable conduct. The Plaintiff-Appellant apparently argues that in *Direct Mail Specialists*, the court, having already established culpable conduct, in one part of the test, would have allowed a sufficiently meritorious defense by the defendant to support Rule 60(b) relief. However, as previously recognized by the parties, the *Falk* test is disjunctive. We are not persuaded by the Plaintiff-Appellant's argument that a finding on one part of the *Falk* test would, by itself, outweigh another part of the test when such is not the rule of law. The trial court correctly determined that a meritorious defense existed and that the Default Judgment should be set aside and the case decided on its merits.

C. Prejudice to the Plaintiff-Appellant if the Default Judgment was Set Aside

[12] Possible prejudice to the plaintiff is another factor in determining whether a default judgment should be vacated. In this jurisdiction, the courts have explored this factor more extensively in regards to motions to dismiss for lack of prosecution pursuant to Guam Rule of Civil Procedure 41(b). *See Lynn v. Chin Heung Int'l, Inc.*, 852 F.2d 1221 (9th Cir. 1988). In *Lynn*, the defendants sought dismissal for lack of prosecution by the plaintiff. 852 F.2d at 1222. The defendants based their arguments on a lack of plaintiff's diligence in pursuing the case and lapse of time which resulted in prejudice to the defendants. *Id.* The trial court agreed with the defendants' contention that prejudice had resulted and granted the motion. *Id.* The trial court found the defendant was prejudiced because it was unable to gather evidence or locate witnesses for trial because one of the

defendants was no longer doing business in Guam. *Id.* Additionally, any witnesses who possessed first hand knowledge of the unavailable defendant's defense were not present on island and thus, beyond the reach of the court's process. *Id.*

[13] The Plaintiff-Appellant similarly asserts that the passage of time has diminished the likelihood of recovery due to a decreasing chance of finding the principals involved in the case. The Plaintiff-Appellant also asserts that an offer to settle, and other opportunities provided by the court to avoid the entry of default and a default judgment, were ignored by the Defendant-Appellee. The argument that the Defendant-Appellee could easily have avoided the default judgment may be true; however, it does not, in and of itself, constitute evidence of prejudice to the Plaintiff-Appellant. The court considered the delay and its possible ramifications, but determined that the possibility of prejudice resulting from delay was not sufficient to deny the Rule 60(b) motion.[4] Instead, the court indicated that it would protect the Plaintiff-Appellant through other means.[5]

[14] Courts will normally make a determination of prejudice at the time when the defaulting party moves to set aside the default. *Cribb v. Matlock Communications, Inc.*, 768 P.2d 337, 340 (Mont. 1989). The facts of this case, however, do not present an issue as to the timeliness of the Defendant-Appellee's actions in moving to vacate the default judgment. Although the question of whether prejudice to the plaintiff existed begs the analysis of the defendant's conduct, the facts of this case warrant further review of the role the trial court played in creating prejudice to the Plaintiff. The

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[4]In its Decision and Order, the trial court briefly stated that inherent in every case is the possibility of prejudice from delay; however, such is not sufficient to deny a Rule 60(b) motion. *Midsea v. HK Engineering*, CV0798-94 (Super. Ct. Guam Feb. 4, 1997).

[5]In recognition that some hardship was suffered by the Plaintiff-Appellant, the trial court, accordingly, awarded the Plaintiff-Appellant attorney's fees for both the preparation for and attendance at the default hearings.

time-line of events as they took place from the entry of the default judgment was entered until the time at which that judgment was set aside are as follows. The default judgment was entered against the Defendant-Appellee on March 9, 1995. The Declaration and Order for Issuance of Writ of Execution and Order for Examination of Judgment Debtor were subsequently filed on June 21, 1995. On July 24, 1995, approximately one month later, the Defendant-Appellee filed a Motion to Set Aside Entry of Default and Default Judgment. We consider the Defendant-Appellee's filing of the Rule 55(c) and Rule 60(b) Motions to Set Aside to have been timely made. However, the hearing for the Motion to Set Aside Entry of Default and Default Judgment was not held by the trial court until April 16, 1996, nearly nine months after its filing. The Decision and Order was issued and filed ten month later on February 4, 1997.

[15] We are empowered to interpret the local procedural rules of this jurisdiction, even those which are either identical to or closely coincident with the language of the Federal Rules. *Lynn*, 852 F.2d at 1223. We feel the record on appeal does not reflect that an adequate hearing on the determination of whether and what prejudice existed, and what the cause of that prejudice might be. The concern of this court is the trial court's role in creating the additional delay beyond that which would be present in every Rule 60(b) case and the possibility that, as a result, the Plaintiff-Appellant would be prejudiced if the default judgment were set aside.

[16] It is not enough for the Plaintiff-Appellant to say that lapse of time resulted in prejudice, but instead there must be the presentation of evidence to support those allegations. Nor is it sufficient for the Defendant-Appellee to sit back and claim that the delay in time was inconsequential and presume no prejudice resulted. Furthermore, the trial court as well does not have the luxury of

merely citing a proposition of law that the possibility of prejudice exists in every Rule 60(b) case, present no analysis of whether any actual prejudice did exist and then summarily rule that it found no prejudice to the plaintiff would result if the default was vacated.

[17] A full hearing on the issue of prejudice must occur, including the presentation of evidence, be that in the form of affidavits, deposition testimony or in court testimony, and a proper analysis and determination of whether prejudice existed must be conducted. Only after such a hearing and analysis can this court determine whether the trial court abused its discretion in setting aside the Default Judgment.

CONCLUSION

[18] The court takes this opportunity, coupled with the *Adams* case, to make a strong policy statement generally disfavoring default judgments and in favor of having cases heard on the merits. The trial court applied the proper analysis to the first two factors in a Rule 60(b) motion; however, the facts in this case may present extenuating circumstances which would call for reversal. The trial court's role in creating prejudice, as a result of postponing and delaying the hearing of the Motion to Set Aside and the subsequent issuance of its decision, must be closely examined in order to determine whether the trial court erred in granting the Defendant-Appellee's motion. The other two bases for setting aside the default judgment— a lack of any meritorious defense and defendant's culpable conduct, are not at issue. We find there is no question that the Defendant-Appellee raised a meritorious defense and that there was no culpable conduct of the Defendant-Appellee which led to either the Entry of Default or Default Judgment. The case is hereby REMANDED to

the Superior Court and the trial judge who originally heard this matter for an evidentiary hearing on whether the action or inaction of the trial court caused the Plaintiff-Appellant sufficient prejudice to warrant a different decision.

BENJAMIN J. F. CRUZ, Associate Justice

JANET HEALY WEEKS, Associate Justice

PETER C. SIGUENZA, Chief Justice