

IN THE SUPREME COURT OF GUAM

BOB MERCHANT,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 NANYO REALTY, INC. and AQUA)
 WORLD MARINA, INC.)
)
 Defendants-Appellees.)
 _____)

Supreme Court No. CVA98-005
Superior Court No. CV1577-93

OPINION

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Appeal from the Superior Court of Guam

Argued and Submitted on 9 October 1998

Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS and JOAQUIN C. ARRIOLA, SR., Associate Justices.

WEEKS, J:

[1] Appellant Bob Merchant appeals from a judgment of dismissal upon Appellee's motion for reconsideration after the presentation of Merchant's case in chief. This case was originally filed before this court as CVA96-005, and was dismissed without prejudice in *Merchant v. Nanyo Realty Inc. and Aqua World Marina, Inc.*, 1997 Guam 16, for lack of jurisdiction, due to the absence of a separate document indicating a final judgment. Thereafter, judgment was entered from the trial court and a timely Amended Notice of Appeal was filed. Upon review, we express concern and dismay over the procedural and technical irregularities that occurred at the trial court level, but find that they were not so substantial as to overcome Merchant's failure to carry his burden in his case in chief. We thereby affirm the decision of the trial court.

I.

[2] Plaintiff-Appellant Bob Merchant (Merchant) owned a sailboat called the Islero which was moored in Apra Harbor, on property leased through Defendant-Appellee Aqua World Marina, Inc. Sometime in 1991, Merchant removed three masts from his sailboat and stored them in a "haul-out" area outside the boundaries of the property that Merchant leased from Appellees. The masts were stored for approximately four to five months in an area where sword grass grew. Sometime before July 1991, the management notified all tenants to clean up the area in compliance with Environmental Protection Agency regulations. The notice requested the tenants to remove their

debris and personal belongings from the land at and around mooring spaces. It gave the tenants two weeks from the date of the notice to comply; thereafter, the management would have the items removed and either stored or disposed of at the owner's expense.

[3] On or about 12 July 1991, Merchant discovered that his masts were not where he had stored them. They were later found in the haul out area, broken up and lying in dirt and water. Merchant found out later that the management had removed the masts with a front-end loader. Merchant subsequently sued Defendants-Appellees Nanyo Realty, Inc. and Aqua World Marina, Inc. for actual damages of \$50,000 (the purported value of the masts) and punitive damages. Trial commenced on 20 May 1996. At the close of Merchant's case in chief, Appellees moved for judgment on the pleadings, and for failure to state a claim upon which relief could be granted. The trial court then allowed Appellees two hours to prepare a written memorandum, and the motion was heard on that same day, 21 May 1996. After oral argument, the trial court denied Appellees' motion except for the claim of punitive damages, which was dismissed. Because Appellees were given only two hours to prepare their written legal memorandum on the motion, the Appellees then requested reconsideration of the denial, to allow for the production of trial transcripts and to submit other case law. The trial court granted the request and continued the trial for 24 June 1996.

[4] On 24 June 1996, Appellees submitted and argued their motion for reconsideration on the motion to dismiss. The court took the matter under advisement, and on 6 August 1996 granted Appellees' motion, on which date a Decision and Order was filed. An appeal was subsequently taken to this court wherein we dismissed without prejudice for lack of a final judgment or order. *See Merchant v. Nanyo Realty, Inc. and Aqua World Marine, Inc.*, 1997 Guam 16. Thereafter, entry of

Judgment of the trial court was made on 4 March 1998, and an Amended Notice of Appeal was timely filed on 31 March 1998 pursuant to Rule 4(a) of the Rules of Appellate Procedure for the Supreme Court of Guam.

II.

[5] The court has jurisdiction pursuant to 7 GCA §§ 3107 and 3108 (1994). Merchant assigns both procedural and substantive error to the trial court. He argues that the trial court procedurally erred by: (a) entertaining the motion to reconsider beyond the ten days as required under Guam R. Civ. P. 59(e), and (b) granting the motion for reconsideration when no new issues were raised. Merchant further argues that the trial court substantively erred in its factual findings by: (a) ruling that Merchant had not established duty and breach of duty when Appellees expressly waived that argument; (b) ruling that replacement costs were not sufficient to meet Merchant's burden of proof on the issue of damages; (c) disregarding testimony that the masts were totally destroyed; and (d) ruling that testimony by Merchant's expert on mast repair quotations did not tie into the value of Merchant's masts.

III.

[6] Merchant submits that the standard of review for a motion for reconsideration is from the erroneous application of law and facts, and hence *de novo*. Appellees argue that the proper standard of review is for the trial court's abuse of discretion. We review for abuse of discretion. *See generally First Commercial Bank v McCord*, 1996 WL 254334 *1 (D. Guam App. Div. May 8,

1996). Merchant argues that the motion for reconsideration was essentially a GRCP 59(e) motion, a motion to alter or amend judgment, which is to be served not later than 10 days after entry of judgment. Even though no entry of judgment was docketed in this case, Merchant claims that such orders of dismissals are interlocutory and usually not docketed, and that the oral ruling of the court starts the clock running on the limitations period. Merchant cites *Iglesias v. Nissan Motor Corp. In Guam*, CV1823-95 (Super. Ct. Guam Oct. 22, 1996), where the trial court triggered the 10-day period for service of the motion for reconsideration from the date of the trial court's order on record, rather than formal entry of judgment on the docket. Merchant asserts that the motion for reconsideration was untimely because the trial court denied Appellee's motion to dismiss on 21 May 1996, and the motion for reconsideration was filed and served on 24 June 1996. Further, Merchant claims that the motion for reconsideration was substantively identical to the original motion and should not have been granted by the trial court.

[7] A motion for reconsideration may be either a Rule 59 motion or a Rule 60 motion. *See U.S. v. Nutri-Cology, Inc.*, 982 F.2d 394, 396-97 (9th Cir. 1992). GRCP 59(e) provides:

(e) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

The notation of a judgment in the docket constitutes entry of the judgment. 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 236.02 (2d ed. 1983). No entry of judgment was ever docketed, so as to trigger the 10-day time period. *See Moodie v. Fed. Reserve Bank of N.Y.*, 835 F.Supp. 751, 752 (S.D.N.Y. 1993) (holding that a motion for reconsideration was inappropriate under the Federal Civil Rule governing amendment of judgments since no judgment was entered

from which the motion to alter or amend could be based). Even if we were to use the oral ruling of the court as the date to start the running of the 10-day time period, the motion was served in excess of 30 days, and thus was untimely.

[8] Although the motion was untimely under Rule 59, we may construe the motion as one based on GRCP 60(b)(6). *See generally Straw v. Bowen*, 866 F.2d 1167, 1172 (9th Cir. 1989). GRCP 60(b)(6) provides in relevant part:

Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc. 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: . . .

(6) any other reason justifying relief from operation of the judgment. The motion shall be made within a reasonable time. . .

Appellees have argued that the transcript of proceedings not yet transcribed was needed for their motion for reconsideration, for which the trial court granted additional time. Additional briefing was permitted to aid the trial court in its decision. Although the motion for reconsideration was filed within a "reasonable" time under Rule 60(b)(6) (approximately 32 days after the oral ruling), the motion itself did not contain any information from the transcript of trial proceedings, for the transcript was at that time still unavailable for counsels' use. Appellees' motion for reconsideration simply reiterated in greater detail the same arguments Appellees used in their original motion to dismiss.

[9] Courts use rule 60(b)(6) relief sparingly "as an equitable remedy to prevent manifest injustice" and grant relief "only where extraordinary circumstances prevent a party from taking timely action to prevent or correct an erroneous judgment." *U.S. v. Alpine Land & Reservoir, Co.*,

984 F.2d 1047, 1049 (9th Cir. 1993). Awaiting the transcription of trial proceedings when both counsel were present during the trial does not rise to the level of “extraordinary circumstances”. Supplementing and further detailing previous arguments are not sufficient bases for reconsideration. The motion at issue is thus procedurally and substantively deficient under either Rule 59(e) or Rule 60(b)(6).

[10] Appellees argue that the motion for reconsideration was actually a renewed Rule 41(b) motion to dismiss, proffering that the substance of the motion should exalt over its form. *See Colorado Nat. Bank of Denver v. Merlino*, 668 P.2d 1304, 1307 (Wash.Ct.App. 1983) (holding that the court will measure the sufficiency of a motion by its content rather than technical format or its language); *Sea Ranch Ass’n v. California Coastal Zone Conservation Comm’ns*, 537 F.2d 1058, 1061 (9th Cir. 1976) (holding that the nomenclature of a Rule 60(b) motion does not prevent it from treatment as a 59(e) motion, since it was filed within the 10-day period set by rule). Under Rule 41(b), in an action tried by the court without a jury, the court as the trier of facts may determine and render judgment against the plaintiff after presentation of plaintiff’s evidence and upon motion for dismissal by the defendant, upon the ground that plaintiff has shown no right to relief upon the facts and the law. GRCP 41(b). The court may also decline to render any judgment until the close of all evidence. *Id.* Here, the court initially rendered judgment denying Appellees’ Rule 41(b) motion to dismiss, except as to the punitive damages, and then allowed Appellees time for further briefing, rather than proceeding with the trial and then entertaining the motion again at the close of all the evidence. Having denied the motion to dismiss on record, the trial court should have properly resumed the trial with the presentation of Defendants’-Appellees’ case. Appellees could have then

moved the court for dismissal at the close of all the evidence, or the trial court could have dismissed *sua sponte*.

[11] We believe that the underlying intent of the trial court in this case was to make a final decision with the aid of counsel's written arguments, despite its earlier oral ruling. Based upon our analysis, we do not view this as a motion for reconsideration. Neither do we believe that the trial court's actions constitute reversible error. Although we do not encourage or condone the procedural and technical irregularities that occurred in the case at bar, we are of the opinion that the trial court in this case ultimately reached a sound conclusion.

[12] Dismissal for insufficiency of the evidence is a final judgment, adverse to the plaintiff, which the plaintiff may appeal. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2376 (West 1995). Factual findings made pursuant to a motion to dismiss at the close of plaintiff's case in a nonjury case are reviewed under the clearly erroneous standard. *Johnson v. U.S. Postal Service*, 756 F.2d 1461, 1464 (1985)(citation omitted). A finding is clearly erroneous where, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake. *Aguon v. Taijeron*, 1983 WL 30217 *2 (D. Guam Ap. Div. Dec. 13, 1983)(citation omitted), *aff'd* 758 F.2d 655 (9th Cir. 1985). We review under the clearly erroneous standard.

[13] Merchant argues that the trial court erred in its factual findings; to wit, that Merchant had not established duty and breach of duty, that replacement costs were not the measure of damages, by disregarding testimony that the masts were totally destroyed, and by ruling that testimony of Merchant's expert on mast repair quotations did not tie into the value of Merchant's masts.

[14] To succeed on a claim of negligence, Merchant must prove:

- i. A duty, or obligation, recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks of harm;
- ii. A breach of that duty, or failure to conform to the required standard;
- iii. Proximate cause (a close and causal connection, also known as “legal cause”);
- iv. Actual loss or damage resulting to the interests of another.

W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (West 5th ed. 1984).

[15] Merchant never succeeds beyond the first element of the negligence claim; that is, a duty owed to Merchant by Appellees. There is no proof in the record that Appellees owed Merchant any duty, thus obviating any breach of duty. Although Merchant states that Appellees waived the duty element, a review of the record indicates that Appellees, in their argument to the court, conceded the duty element for purposes of the motion to dismiss only, to make the point that even if duty were established, Merchant could not prove damages.

[16] Merchant argues that damages should be measured by the replacement cost of the masts, since there was testimony that the masts were totally destroyed. He submits he provided all practical evidence to the court, absent any evidence of the value of the masts before the incident. His expert witness, Ken D’Amassa, testified as to the replacement value of the masts. Merchant contends that evidence in the form of a repair bill standing alone and unassailed is not only probative evidence of the difference in fair market value of personal property, it is sufficient to sustain a verdict for damage to same. *See McCarty v. Hall*, 697 S.W.2d 955, 956 (Ky.Ct.App. 1985). Given that the masts could not be repaired, Merchant argues that the measure of damages is replacement of the masts, which, in Merchant’s opinion, is equal to the cost of the repair of the vessel.

[17] The trial court found that damages were measured by the diminution in value of the property, which would be the difference in the fair market value of the property before and after the accident. *See Stevens v. F/V Bonnie Doon*, 731 F.2d 1433 (9th Cir. 1984). The court found that Merchant had not offered evidence as to what the masts were worth before the incident, what condition the masts were in at that time, nor what type of material the masts were made of. Further, Merchant's expert on repair quotations could not show how the cost estimate of the new masts related to the value of Merchant's own masts. The trial court reasoned that because there was no evidence presented to the court as to what the masts were worth prior to the incident (for the masts may have been worthless), the court could not take into account in its decision the evidence suggesting that the damage was total. It therefore could not determine what amount of damage Merchant suffered, nor whether Merchant was even damaged at all. We concur with the reasoning of the trial court.

[18] In the interests of judicial time and economy, rather than to permit Appellees to present their case and to arrive at the same conclusion, the trial court granted Appellees' motion for reconsideration. We cannot say that the trial court clearly erred in its factual findings, despite the procedural and technical irregularities surrounding the motion. Merchant chose to rest his case on evidence lacking the sufficiency to carry his burden on the negligence claim; i.e., any showing of duty, the breach of duty, and damages.

IV.

[19] Although we noted procedural and technical irregularities at the trial court level, it is our view that these irregularities do not rise to the level of substantively overcoming Merchant's failure

to prevail on his negligence claim in his case in chief. We therefore AFFIRM the motion to dismiss in favor of Appellees.

PETER C. SIGUENZA
Chief Justice

JANET HEALY WEEKS
Associate Justice

JOAQUIN C. ARRIOLA
Associate Justice