IN THE SUPREME COURT OF GUAM

EVELYN R. DUENAS
Plaintiff-Appellant

v.

LEO BRADY dba ISLAND ELEVATOR and DOES 1-10
Defendant-Appellee

OPINION

Cite as: 2008 Guam 27

Supreme Court Case No. CVA07-003
Superior Court Case No. CV2042-98

Appeal from the Superior Court of Guam
Argued and submitted on October 17, 2007
Hagåtña, Guam

For Plaintiff-Appellant:
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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice;[1] RICHARD H. BENSON, Justice *Pro Tempore.*

TORRES, J.:

[1] Plaintiff-Appellant, Evelyn R. Duenas, appeals the Decision and Order of the Superior Court of Guam denying her motion to set aside a dismissal for failure to prosecute and granting Defendant-Appellee Leo Brady dba Island Elevator's motions for summary judgment and dismissal of the First Amended Complaint. We hold that the Superior Court did not abuse its discretion in denying Duenas' motion to set aside the prior dismissal for failure to prosecute. Accordingly, we do not need to reach the issue of whether the Superior court properly granted summary judgment and dismissal with prejudice of the First Amended Complaint filed by Duenas.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The law Offices of Hogan and Bronze, on behalf of Duenas, filed a complaint in the Superior Court of Guam on August 20, 1998. The complaint asserted that on October 8, 1997, Duenas was injured while utilizing an elevator allegedly maintained by Island Elevator. Record on Appeal ("RA"), tab 3 (Compl., Aug. 20, 1998). Island Elevator was not served with the complaint. ER, tab 12 (Dec. & Order, April 7, 2004); Transcripts ("Tr.") at 3 (Hr'g Mot. Dismiss, Oct. 2, 2002); Appellant's Excerpts of Record ("ER"), tab 7, Ex. A (Hogan Decl., June 25, 2002).

[3] Nearly a month later, attorney Jerry Hogan, who signed the complaint, suffered a massive heart attack. On the advice of his doctor, Hogan left the private practice of law and subsequently

[1] After oral argument in this matter, but prior to the issuance of this opinion, Justice Robert J. Torres was sworn in as Chief Justice and Justice F. Philip Carbullido assumed the role of Associate Justice.

terminated his law firm, Hogan and Bronze. *Id.* Hogan advised Duenas to seek new legal representation and believed Duenas picked up her file and began to look for other counsel. *Id.*; ER, tab 7, Ex. A (Duenas Decl., June 22, 2002).

[4] In March 2001, approximately 26 months after picking up her file, Duenas retained Wayson Wong as legal counsel. ER, tab 7, Ex. 2 (Wong Decl., June 25, 2002). Although aware of the civil action, attorney Wong and Duenas decided instead to focus on a retirement disability claim. ER, tab 12 at 1 (Dec. & Order).

[5] On November 6, 2001, the Superior Court issued notice of a status hearing scheduled for December 28, 2001. RA, tab 6 (Notice of Status Hr'g, Nov. 6, 2001). A substitution of counsel had not been filed and the notice was served on Hogan's former partner, Jacques-Alain G. Bronze. RA, tab 18 (Aff. of Serv. on J. Bronze, Nov. 8, 2001).

[6] On a *sua sponte* motion, the Superior Court dismissed the complaint for failure to prosecute pursuant to Rule 41(b) of the Guam Rules of Civil Procedure (GRCP). RA, tab 8 (Order for Dismissal, Mar. 28, 2002). Subsequently, Duenas, through attorney Wong, filed a First Amended Complaint. RA, tab 13 (Amended Compl., April 29, 2002). In response to the amended complaint, Brady filed a Motion to Dismiss and for Summary Judgment. The grounds alleged were that the First Amended Complaint could not properly be filed under GRCP 5(c) because of the earlier dismissal of the complaint, and that the claims set forth in the First Amended Complaint were barred by the two-year statute of limitations contained in 7 GCA § 11306 applicable to personal injury claims. RA, tab 21 (Mot. Dismiss and for Summ. J., Aug. 5, 2002).

[7] Duenas then filed a Rule 60(b) Motion to Set Aside the dismissal of the complaint. ER, tab 7 (Mot. to Set Aside, June 26, 2002). After a hearing on the motions, the Superior Court

issued its Decision and Order denying Duenas' motion to set aside the dismissal and granting Brady's motion to dismiss and motion for summary judgment. ER, tab 12 (Dec. & Order). Summary Judgment was subsequently entered and Duenas filed a timely Notice of Appeal. RA, tab 39 (Not. Appeal, Mar. 8, 2007).

II. JURISDICTION

[8] This court has jurisdiction over this appeal from a final judgment pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 110-176 (2008)) and 7 GCA §§ 3107(b), 3108(a), 25102 (2005).

III. STANDARD OF REVIEW

[9] A trial court's denial of a Rule 60(b) motion is reviewed for an abuse of discretion. *Midsea Indus., Inc. v. HK Eng'g Ltd.*, 1998 Guam 14 ¶ 4. This standard of review affords "broad latitude to trial courts." *Id.* A trial court's decision will not be reversed unless we are left with "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 ¶ 2 (citing *Lynn v. Chin Heung Int'l., Inc.* 852 F.2d 1221 (9th Cir. 1988)). "A trial court abuses its discretion when its 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." *Town House Dep't Stores, Inc., v. Ahn*, 2003 Guam 6 ¶27. "A trial court's decision granting a motion for summary judgment is reviewed de novo." *Guam Top Builders v. Tanota Partners*, 2006 Guam 3 ¶ 8; *accord Bank of Guam v. Del Priore*, 2007 Guam 7 ¶ 9.

IV. DISCUSSION

A. Filing of Revised Opening Brief

[10] Initially, we must determine whether we should even consider the revised opening brief filed by Duenas. On the date Duenas' opening brief was due, Duenas filed a motion for extension of time to file, which this court promptly denied the same day in an order stating that counsel had not shown good cause for the extension. Duenas then timely filed an opening brief, in which "[Duenas'] counsel [Wayson Wong] apologize[d] to this Supreme Court for the incompleteness of this opening brief because of her counsel's efforts to file it quickly within the remaining time today." Appellant's Br. at 1 (July 9, 2007).

[11] The next day, Duenas filed the revised opening brief, in which Wong stated that he "rushed to and did file [Duenas'] opening brief, but because of lack of time, it contained numerous errors," and that "[t]his timely filed Revised Opening Brief has corrected those errors, and Ms. Duenas asks that it be accepted in lieu of her opening brief filed earlier today." Appellant's Revised Br. at 1 (July 10, 2007). Duenas did not submit a formal request for acceptance of the revised opening brief. However, Brady's brief was responsive to Duenas' revised opening brief.

[12] The court recognizes that the revised opening brief in this case was not timely filed. If the court does not accept Duenas' revised opening brief containing corrections and additions, then this court would seemingly not be able to consider arguments and authorities addressed in Brady's opposition brief. The Guam Rules of Appellate Procedure (GRAP) provide that "[i]n the interest of justice or of expediting a decision . . . the Supreme Court may . . . suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion . . . ." Guam R. App. P. 2. The circumstances here sufficiently establish that

the interest of justice warrants acceptance of the revised opening brief so that we may entertain the corrections and additions contained in Duenas' revised brief and addressed in Brady's opposition brief. Therefore, pursuant to GRAP 2 and in the interest of expediting a decision, the court will discuss whether the judge abused his discretion in denying Duenas' motion for relief pursuant to GRAP 60(b)(1) or GRAP 60(b)(6) of the GRCP from the order dismissing the complaint for failure to prosecute.[2]

B. Relief Pursuant to Rule 60(b)

[13] Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . . (6) any other reason justifying relief from the operation of judgment." GRCP 60(b)(1),(6). Our rule was modeled after Federal Rule of Civil Procedure ("FRCP") 60(b). *Brown v. Eastman Kodak Co.*, 2000 Guam 30 ¶ 14. "The subsections of [Rule 60(b)] are mutually exclusive" and "[t]hus, if the circumstances alleged fall into any of the other subsections allowing set aside, then relief under subsection (6) can not be had." *Brown*, 2000 Guam 30 ¶ 14. We stated in *Brown* that when the failure to comply with a deadline is due to reasons beyond a party's control, the appropriate mechanism for relief would be GRCP 60(b)(6), as such reasons do not constitute excusable neglect within GRCP 60(b)(1). *Id.* ¶ 32. "Rule 60(b)(6) provides for extraordinary relief and *requires a showing of exceptional circumstances.*" *Parkland Dev., Inc. v. Anderson*, 2000 Guam 8 ¶ 6, quoting *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 609 (7th Cir. 1986) (emphasis added); *see Tri-World v. K-Son*, 1987 WL 109888, at *4 (D. Guam App. Div. 1987).

[2] Counsel is cautioned that any further failure on his part to comply with GRAP will not be so generously excused.

Brown makes clear that a party must show extraordinary circumstances suggesting that a party is faultless in the delay in order to obtain relief under subsection (6). *Brown*, 2000 Guam 30 ¶ 32. (citations omitted).

[14] A court will deny a Rule 60(b) motion to set aside a default judgment if it is shown that (1) a 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*, 1998 Guam 14 ¶ 5; *see First Commercial Bank*, 1996 WL 254334, at *2. This case presents a motion to set aside a dismissal for failure to prosecute, not a motion to set aside a default judgment. Although we have not had an opportunity to speak on this issue, other jurisdictions have stated that the standards for evaluating a motion to set aside a dismissal for failure to prosecute should be the same as the standards for deciding a motion to set aside a default judgment. The Tennessee Supreme Court reasoned that a "dismissal for failure to prosecute is analogous to a default judgment" in that both are judgments without a hearing on the merits. *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003). In evaluating an appeal from a default judgment, the Seventh Circuit came to the same conclusion, explaining that a "default judgment is the mirror image of a dismissal of a suit for failure to prosecute." *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 602 (7th Cir. 1993). That court further articulated that:

> Default is failure to defend; failure to prosecute is a plaintiff's default; both a default judgment and a dismissal for failure to prosecute are sanctions for disruptive or dilatory conduct in litigation. The standard for whether to impose them should, therefore, be the same, and a comparison of decisions articulating the standard for the entry of a default judgment with the standard set forth . . . for dismissals for failure to prosecute indicates that they are the same.

Id.

[15] The Sixth Circuit, in *Buck v. U.S. Dep't of Agric.* similarly analogized defaults and dismissals for want of prosecution. 960 F.2d 603, 607 (6th Cir. 1992). The Sixth Circuit did, however, make a cautionary distinction in the identical treatment of the two situations, stating the three-part test for considering a request to set aside a default judgment[3] is not "followed precisely in cases of dismissal for failure to prosecute." *Id.* Judge Lively explained that a "default occurs at the very beginning of a case," while dismissals for want of prosecution typically have "proceeded beyond the initial pleading stage and the issues have been joined, and there is less risk of dismissal being based upon an unstated meritorious claim or defense." *Id.* Thus, in dismissals for want of prosecution, there does not have to be a "separate inquiry as to the existence of a meritorious claim." *Id.*

[16] Here, the case did not proceed beyond the initial pleading stage and we see no reason why we should not apply the *Midsea* factors for reviewing a 60(b) motion to set aside a default judgment to Duenas' 60(b) motion to set aside the Superior Court's dismissal for failure to prosecute. Therefore, we must determine whether: (1) Duenas' culpable conduct led to the dismissal; (2) Duenas has no meritorious claim, or (3) Brady would be prejudiced if the dismissal were to be set aside.

[17] In *Midsea* we held that "[a] finding of but one of the three elements is sufficient to deny vacation of a *default judgment.*" 1998 Guam 14 ¶ 5 (emphasis added). Once a court determines that a party's culpable conduct led to the default, the ruling may be upheld without inquiring into any meritorious defenses or possible prejudices to the plaintiff. *Polymer Plastics Co. v. AME Matex Corp.*, 1996 WL 875783, *1 (D. Guam App. Div. 1996), citing *Meadows v. Dominican*

[3] The three-part test adopted by the Sixth Circuit in *United Coin Meter v. Seaboard Coastline Railroad*, 705 F.2d 839, 845 (6th Cir. 1983), which lists the factors that should be considered by a court when requested to set aside a default judgment, is identical to the test we enunciated in *Midsea*.

Republic, 817 F.2d 517, 521 (9th Cir. 1987).[4]

[18] Duenas contends that she should not be denied her day in court for the errors attributed to previous and present counsel. "[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link v. Wabash*, 370 U.S. 626, 634 (1962) (internal quotes and citations omitted); *see also Pigford v. Veneman*, 292 F.3d 918, 926 (D.C. Cir. 2002) (stating there is a presumption of client accountability for attorney conduct, which is less easily overcome when the client has freely chosen his attorney); *Garcia v. I.N.S.*, 222 F.3d 1208, 1209 (9th Cir. 2000) ("In our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.");

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[4] The Ninth Circuit adopted the three-factor test in *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir.1984) (adopting factors from the Third Circuit). Since then, the Ninth Circuit has treated the test disjunctively. *See Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 815 (9th Cir. 1985); *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987); *Benny v. Pipes*, 799 F.2d 489, 494 (9th Cir. 1986); *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988); *In re Hammer*, 940 F.2d 524, 526 (9th Cir. 1991).

Despite the convincing case law from the Ninth Circuit, the majority of the circuits employ a balancing test – weighing all three factors rather than applying the test disjunctively. The Federal Circuit noted the differing application of the factors before eventually opting to employ the majority's balancing test. *Information Systems and Networks Corp. v. U.S.*, 994 F.2d 792, 796 (Fed. Cir. 1993). *See Meehan v. Snow*, 652 F.2d 274 (2d Cir. 1981); *Zawadski de Bueno v. Bueno Castro*, 822 F.2d 416, 419-420 (3d Cir. 1987); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981); *Bethelsen v. Kane*, 907 F.2d 617, 622 (6th Cir. 1990); *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980).

Guam precedent is to employ the relevant test disjunctively rather than as a balancing test, and Duenas has not advanced any reason why we should depart from this precedent. As the California Supreme Court expressed:

> It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. It is likewise well established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case.

Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, cited approvingly in *Sierra Club v. San Joaquin Local Agency Formation Comm'n.,* 981 P.2d 543, 552 (Cal. 1999) (internal citations and quotation marks omitted); *see also People v. Quenga*, that "[w]hile we note our authority to modify pre-existing interpretations of our laws that have been determined by federal tribunals . . . [w]e will not divert from such precedents unless reason supports such deviation." 1997 Guam 6 at ¶ 13 n.4.

Capital Dredge and Dock Corp. v. City of Detroit, 800 F.2d 525, 533 (6th Cir. 1986) ("The client is generally responsible for attorney's actions . . . .").

[19] In *Parkland*, after finding that "parties who may freely choose their attorneys should not be allowed to later avoid the ramification of the acts or omissions of their chosen counsel," this court cautioned that it is "a dangerous policy to allow a party to distance himself from the acts of his representative." *Parkland*, 2000 Guam 8 ¶ 15. But we have also recognized a reluctance to hold parties responsible for the errors of their legal representatives when the parties were "*not being personally negligent themselves in the pursuit or defense of their case.*" *Adams v. Duenas*, 1998 Guam 15 ¶ 9 n.2, quoting *Barber v. Tuberville,* 218 F.2d 34, 36 (D.C. Cir. 1954) (emphasis added). Similarly, in *Midsea*, we recognized that "although a party who chooses an attorney takes the risk of suffering from the attorney's incompetence," a record may exhibit "circumstances in which a client should [not] suffer the ultimate sanction of losing his case without any consideration of the merits because of his *attorney's neglect and inattention.*" *Midsea*, 1998 Guam 14 ¶ 8 (citations omitted) (emphasis added).

[20] Neither carelessness nor ignorance, ascribed to the party or party's attorney, may supply grounds for relief under 60(b)(1). *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992). A "plaintiff's entire lack of diligence and attention to the matter" does not constitute excusable neglect. *Martella v. Marine Cooks Stewards Union,* 448 F.2d 729, 729 (9th Cir. 1971).

[21] In *Brown*, we found "a pattern of inexcusable neglect," where an attorney did not defend against an initial motion for summary judgment even though he was the counsel hired, where the attorney gave repeated assurances to his client that his case was proceeding forward when it was

not, and where the attorney claimed the need for additional preparation time when another lawyer worked on the case. *Brown*, 2000 Guam 30 ¶ 21. It has also been stated that "[a]lthough attorney carelessness *can* constitute 'excusable neglect' under Rule 60(b)(1), attorney inattentiveness to litigation is not excusable, no matter what the resulting consequences the attorney's somnolent behavior may have on a litigant." *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006) (internal quotation marks omitted) (emphasis added).

[22] "Rule 60(b) is liberally applied in the default judgment context only in the exceptional circumstances where the events contributing to the default judgment have not been within the *meaningful control* of the defaulting party, or its attorney." *North Cent. Ill. Laborers' Dist. Counsel v. S.J. Groves*, 842 F.2d 164, 167 (11th Cir. 1988) (internal citation and quotation marks omitted) (emphasis in original). In reviewing a default after a failure to respond to a complaint, we determined in *Midsea* that "it was within the trial court's discretion to grant relief when failure to meet a deadline could be attributed to the party's attorney." 1998 Guam 14 ¶¶ 7, 9, cited in *Brown*, 2000 Guam 30 ¶ 30. In a Rule 60(b)(1) context, a trial judge is afforded much discretion in evaluating an attorney's neglect. *Harrington*, 433 F.3d at 546. Thus, our review is highly deferential.

[23] The Superior Court noted that Duenas picked up her file from Hogan in December 1998 and did not attempt to litigate this case until April 29, 2002, when Wong filed the amended complaint. ER, tab 12 at 3 (Dec. & Order). Wong did not enter an appearance in this case when he was retained in March 2001, and more than a year passed before he filed the amended complaint. Duenas had also not appeared *pro se* between December 1998 and March 2001, when she was without representation. *Id.* Moreover, Duenas offered no evidence as to her efforts to locate and retain counsel other than the statements that she could not get counsel to

represent her. *Id.* Duenas had not even served Brady with notice of her complaint until after the complaint was dismissed, "some two and a half years after the statute of limitations would have run and over three and a half years after the action was filed." *Id.* The judge also found that Duenas failed to establish inadvertence or excusable neglect warranting Rule 60(b)(1) relief. *Id.*

[24] While at least one court has found excusable neglect where a failure to prosecute was attributed to the withdrawal from the practice of law of an attorney, who overlooked the case at issue while terminating other cases, *De Chabert v. Wheatley*, 392 F. Supp 62, 63 (D.V.I. 1975), the facts here indicate that Hogan informed Duenas that he was leaving his practice and would not be able to continue handling the original complaint, and that Duenas picked up her file. Although Attorney Hogan did not file a withdrawal of counsel, the Superior Court attributes some of the inaction in this case to Duenas herself, noting her failure to enter a *pro se* appearance and to serve Brady with notice of her complaint, despite her awareness that she was without counsel for her pending complaint. The judge further observed that "[b]oth Ms. Duenas and Mr. Wong were aware of the pendency of this action but focused their efforts on obtaining disability retirement benefits." ER, tab 12 at 1 (Dec. & Order). While both of the plaintiff's attorneys may have faltered, Duenas also failed to take steps to protect her interests.

[25] "Rule 60(b) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate." *Edens v. Edens*, 109 P.3d 295, 302 (N.M. Ct. App. 2005) (internal quotation marks omitted); *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 796. "Rule 60(b) cannot be used to relieve a party from the duty to take legal steps to protect his interests." *Edens,* 109 P.3d at 302. "Rule 60 does not relieve parties from strategic mistakes." *Tareco Properties v. Morriss*, 321 F.3d 545, 549 (6th Cir. 2003). The deliberate decision of Duenas and Wong to focus on her claim for disability retirement benefits

and not prosecute the complaint properly filed in the Superior Court does not afford her relief under Rule 60(b).

[26] The judge apparently found that the events contributing to the dismissal of the original complaint were within the "meaningful control" of Duenas and Wong and that Duenas' culpability was not excusable. *See North Cent.*, 842 F.2d at 167. There is sufficient evidence in the record to support the Superior Court's findings that Duenas' culpable acts led to the eventual dismissal of her claim for failure to prosecute. ER, tab 7, Ex. A (Duenas Decl.); ER, tab 7, Ex. 2 (Wong Decl.). We therefore cannot say that the judge abused his discretion in denying reconsideration of the grant of Brady's motion to dismiss pursuant to Rule 60(b)(1). The extraordinary circumstances warranting Rule 60(b)(6) relief also do not exist in the present case because the judge apparently found that the dismissal of the original complaint resulted, at least partially, from conduct that was within Duenas' control. Duenas was not entirely faultless in her failure to prosecute her claims. Therefore the judge's decision to deny the motion to set aside the prior dismissal was not an abuse of discretion based on an erroneous conclusion of law because Rule 60(b)(6) also does not provide Duenas with the relief sought.

[27] Due to the disjunctive nature of the *Midsea* test and after finding Duenas' culpable conduct led to the eventual dismissal of her claim, we need not reach the other *Midsea* factors. The Superior Court did not abuse its discretion because its conclusions of law were not erroneous and the record contains evidence providing reasonable support for its decision. This court therefore affirms the denial of the motion to set aside the dismissal of the original complaint for failure to prosecute.

C. Motion to Dismiss and for Summary Judgment

[28] The dismissal of the original complaint for failure to prosecute was the underlying judgment that Duenas sought to set aside pursuant to Rule 60(b). "[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Director, Dep't. of Corrections*, 434 U.S. 257, 263 n.7 (1978); *accord Parkland*, 2000 Guam 8 ¶ 5; *Harman v. Harper,* 7 F.3d 1455, 1458 (9th Cir. 1993); *Kerrigan v. Gill*, 1996 WL 104517, *4. It would be inappropriate to consider the propriety of the underlying dismissal as part of our review of the denial of the motion to set aside.

[29] The Superior Court also did not extensively address the merits of Brady's motion to dismiss the amended complaint and for summary judgment. Instead, the Superior Court concluded that Duenas failed to satisfy the requirements of Rule 60(b)(1) to set aside dismissal of the original complaint. ER, tab 12 at 3 (Dec. & Order). The basis for dismissal of the amended complaint was not the statute of limitations or failure of service, but mootness resulting from the denial of the motion to set aside based on Rule 60(b)(1). "[O]nce the trial court dismissed the complaint, there was no action pending to amend." *Franklin v. State*, 488 S.E.2d 109, 110 (Ga. Ct. App. 1997); *accord Madison-Hughes v. Shalala*, 80 F.3d 1121, 1131 (6th Cir. 1996) (where the district court had properly dismissed the case for lack of subject matter jurisdiction, the motion to amend was moot and dismissal was therefore proper). Since the dismissal of the original complaint stands, the motions to dismiss the amended complaint and for summary judgment are moot because there is not an existing complaint on file to amend.

V. CONCLUSION

[30] Although the court maintains its policy of deciding cases on their merits, none of the Superior Court's actions demonstrate an abuse of discretion. There is a clear record of delay that

highlights the inattentiveness and lack of diligence of Duenas and her attorney. The Superior Court found that Duenas' lack of diligence and inaction in prosecuting her claim for this prolonged length of time led to the dismissal of the original complaint and justified its denial of her motion to set aside the dismissal for failure to prosecute. We agree and therefore **AFFIRM** the Superior Court's ruling. Because the dismissal of the original complaint stands, we do need to address the motions to dismiss the amended complaint or for summary judgment.

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

Original Signed By: **Richard H. Benson**
RICHARD H. BENSON
Justice, *Pro Tempore*

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice

highlights the inattentiveness and lack of diligence of Duenas and her attorney. The Superior Court found that Duenas' lack of diligence and inaction in prosecuting her claim for this prolonged length of time led to the dismissal of the original complaint and justified its denial of her motion to set aside the dismissal for failure to prosecute. We agree and therefore **AFFIRM** the Superior Court's ruling. Because the dismissal of the original complaint stands, we do need to address the motions to dismiss the amended complaint or for summary judgment.

ROBERT J. TORRES
Associate Justice

RICHARD H. BENSON
Justice, *Pro Tempore*

F. PHILIP CARBULLIDO
Chief Justice