IN THE SUPREME COURT OF GUAM

MARYANN S. LUJAN,
Plaintiff,

vs.

DAVID J. LUJAN, P.D. HEMLANI, and ZHONG YE, NC.,
Defendants.

P.D. HEMLANI,
Cross-Claim Plaintiff-Appellant,

vs.

DAVID J. LUJAN,
Cross-Claim Defendant-Appellee.

Supreme Court Case No.: CVA01-019
Superior Court Case No.: CV0543-89

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted on March 15, 2002
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice (Acting)[1], FRANCES TYDINGCO-GATEWOOD, Associate Justice, JOHN A. MANGLONA, Designated Justice.

TYDINGCO-GATEWOOD, J.:

[1] Cross-Plaintiff/Appellant P.D. Hemlani ("Hemlani") appeals the trial court's dismissal of this case for failure to prosecute. Hemlani's inaction was the subject of a previous motion to dismiss for failure to prosecute filed in 1994, which was denied. After years of litigation, including trial, appeal, and remand, Cross-Defendant/Appellee David J. Lujan ("Lujan") again filed a motion to dismiss for failure to prosecute before a different judge. Lujan argued that the first judge's denial of the initial motion to dismiss for failure to prosecute was erroneous as a matter of law. Lujan claimed, and the second judge agreed, that Hemlani's failure to file a timely at-issue memorandum was a per se failure to prosecute requiring dismissal of the case. We disagree and reverse the trial court's dismissal.

I.

[2] This case arose out of a conveyance of community real property without the consent of a spouse. Lujan was married to Mary Ann Lujan ("Mary Ann"). During the marriage, the couple acquired two lots of real property as community property. While still married, Lujan executed a contract to sell these lots to Hemlani. Thereafter, Hemlani executed a contract to sell one of the lots at issue to Zhong Ye, Inc., a Guam corporation. Lujan subsequently executed a quitclaim deed conveying the lots to Hemlani. Mary Ann became aware of the transfer of property and, in 1989, filed her Complaint to Cancel Instrument and to Quiet Title [to] Community Real Property against both Lujan and Hemlani. Lujan failed to answer the

[1] Chief Justice Peter C. Siguenza, Jr. recused himself from this appeal. Associate Justice F. Philip Carbullido, as the senior justice, was appointed Acting Chief Justice.

Complaint and Mary Ann took judgment by default against him. Hemlani, however, answered the Complaint, and filed a cross-claim against Lujan. Four years later, in 1993, Hemlani filed an At-Issue Memorandum for the cross-claim. In 1994, Lujan filed a Motion to Dismiss for Failure to Prosecute, which *Pro Tempore* Judge Marty Taylor denied.

[3] After several years of litigation, Hemlani ultimately prevailed against Lujan. However, upon motion by Lujan, the lower court set aside that decision. Hemlani appealed the set aside, and in *Lujan v. Lujan*, 2000 Guam 21, the Supreme Court affirmed the grant of a new trial on the ground that Judge Taylor was not qualified to preside at the time of trial. *Lujan*, 2000 Guam 21, at ¶ 19. There is no dispute that Judge Taylor was qualified at the time he presided over the Motion to Dismiss for Failure to Prosecute.

[4] On remand and before a different judge, Lujan filed a second Motion to Dismiss for Failure to Prosecute. In both motions to dismiss, Lujan alleged the same period of prosecutorial inactivity and raised the issue that Hemlani failed to file a timely at-issue memorandum in violation of Rule 7(D) of the Superior Court Rules of Court. The trial court found that it could properly reconsider the motion to dismiss, notwithstanding the denial of the initial motion to dismiss. The trial court held that Hemlani's failure to file a timely at-issue memorandum was a per se failure to prosecute requiring dismissal. This appeal followed.

II.

[5] This court has jurisdiction over a final judgment of the Superior Court. Title 7 GCA § 3107 (1994).

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III.

[6] On appeal, Hemlani argues that Lujan's second Motion to Dismiss for Failure to Prosecute raises issues which were already decided by the trial court, and is barred by the law of the case doctrine. Hemlani also argues that Lujan cannot bring a motion to dismiss for failure to prosecute seven years after the alleged period of inactivity ended.

A. The Law of the Case Doctrine.

[7] With respect to the re-litigation of a previously decided issue, the rule is that "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *People v. Hualde*, 1999 Guam 3, ¶ 13. This rule is known as the "law of the case." *Id.* There are exceptions to the rule.

> A court has discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion.

Id (citations omitted). We note that the parties and the trial court failed to cite our opinion in *People v. Hualde* for the rule in this jurisdiction regarding the law of the case. However, because our review here is for an abuse of discretion, we must determine whether the trial court's decision was based on an erroneous conclusion of law or whether the "record contains no evidence on which the judge could have rationally based the decision." *Midsea Indus., Inc., v. HK Eng'g, Ltd.*, 1998 Guam 14, ¶ 4 (citation omitted). Thus, we determine whether the record will support affirmance of the trial court's decision to reconsider the failure to prosecute issue under any of the *Hualde* exceptions.

[8] Citing the case *Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376 (9th Cir. 1960), the trial court re-heard the failure to prosecute issue upon a finding of exceptional circumstances. The trial court found that Judge Taylor's decision on the first Motion to Dismiss for Failure to Prosecute did not recognize or address the Rule 7(D) per se failure to prosecute violation, and therefore the decision was inconsistent with the Superior Court Rules. Appellant's Excerpts of Record, tab Sept. 13, 2001, p. 8 (Decision and Order, Sept. 13, 2001).

[9] With respect to the *Hualde* factors, the trial court essentially found that Judge Taylor's decision was clearly erroneous because it was inconsistent with Rule 7(D). Thus, we must determine whether Rule 7(D) requires dismissal for failure to file a timely at-issue memorandum. This presents a question of law, which we review *de novo. See Ceasar v. QBE Ins. Int'l., Ltd.*, 2001 Guam 6, ¶ 7.

[10] The record shows that Hemlani's untimely at-issue memorandum, in violation of Rule 7(D), was put before Judge Taylor in the first motion to dismiss. Appellee's Supplemental Excerpts of Record, tab 4. p. 2 (Lujan Reply Memorandum, Dec. 23, 1994). We note, however, that Lujan did not argue that dismissal was mandatory under that rule. The second trial court held that Rule 7(D) absolutely required dismissal for failure to file a timely at-issue memorandum.

[11] There is no dispute that Hemlani's at-issue memorandum was untimely filed. Rule 7(D) provides that "[f]ailure to serve the at issue memorandum required by this rule constitutes failure to prosecute or comply with the Guam Rules of Civil Procedure as those terms are used in GRCP 41(b)." Guam Ct. R. 7(D). Guam Rule of Civil Procedure 41(b) provides in part: "[f]or failure of the plaintiff to prosecute or to 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." Guam R. Civ. P. 41(b). Lujan argues that Rule 7(D) offers no discretion to

a trial court and that dismissal is required for Hemlani's undisputed failure to file a timely at-issue memorandum. Lujan cites a decision of this court, *Santos v. Carney*, 1997 Guam 4, to support his position. We disagree with his interpretation of *Santos*.

[12] In *Santos*, this court stated, "[t]he only rule violation which constitutes a per se 'failure to prosecute' under GRCP 41(b) is Guam Rule of Court 7(d), which requires the filing and service of an at-issue memorandum within 120 days after the close of the pleadings." *Santos*, 1997 Guam 4 at ¶ 5 n.1. The *Santos* court was simply noting Rule 7(D) in defining a failure to prosecute. Contrary to Lujan's argument, *Santos* neither holds nor implies that a per se failure to prosecute mandates dismissal.

[13] This issue was addressed by this court in another case during the pendency of the instant appeal. In *Guam Housing & Urban Renewal Auth. v. Dongbu Ins. Co.*, 2002 Guam 3, we held:

> Pursuant to the Guam Rules of Court Rule 7(D), a failure to serve an at issue memorandum constitutes a per se failure to prosecute. Guam Ct. R. 7(D); *see also Santos*, 1997 Guam 4 at ¶ 5 n.1. **However, a court's finding of a failure to prosecute does not mandate dismissal under GRCP 41(b)**. Rule 41(b) empowers the court to dismiss an action on a plaintiff's failure to prosecute; it remains within the court's discretion whether to exercise that power.

Id. ¶ 15 (emphasis added. We agree with and reiterate the holding of *Guam Housing & Urban Renewal*, that Rule 7(D) and GRCP 41(b) do not mandate dismissal for an untimely at-issue memorandum and the resulting per se failure to prosecute. In such a case, the trial court maintains the discretion to order an appropriate sanction including dismissal.

[14] In the instant case, Judge Taylor was not required by Rule 7(D) to dismiss the case for Hemlani's failure to file a timely at-issue memorandum. Consequently, Judge Taylor's decision was not clearly erroneous on this ground. We hold that the trial court abused its discretion by re-opening the failure to prosecute issue on this ground.

B. The Remaining *Hualde* Factors.

[15] Lujan's second motion does not allege, nor could this court find, any intervening change in law which would have otherwise permitted the second judge to re-open the failure to prosecute issue. Likewise, and as previously stated, Lujan's second motion focused on the Rule 7(D) issue. The second motion raised no new evidence; nor did it allege any changed circumstances which would have offered an exception to the law of the case rule.[2] Finally, because Rule 7(D) does not mandate dismissal for failure to file a timely at-issue memorandum, we find that no manifest injustice would result if Judge Taylor's decision was not overturned.

[16] Because no exception under *Hualde* justifies re-litigating the failure to prosecute issue, the law of the case doctrine applies. Thus, the trial court abused its discretion in considering and granting the motion to dismiss.

C. Do Seven Years of Activity Cure a Failure to Prosecute?

[17] Hemlani argues that even assuming the law of the case doctrine is inapplicable, the trial court nonetheless erred in granting Lujan's motion to dismiss. The period of inactivity, upon which Lujan's second motion to dismiss was based, ranged from 1989 to 1993. Lujan's Second Motion to Dismiss was filed in 2001. Hemlani argues that after Judge Taylor was appointed to this case in 1994, seven years of continuous litigation ensued. Hemlani argues that if the period of inactivity has ceased before the filing of a motion to dismiss for failure to prosecute, such a motion should be barred.

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[2] We note that Lujan argues that he suffered actual prejudice as a result of Hemlani's failure to prosecute because of the death of a key witness. However, this was considered and rejected by Judge Taylor in his denial of the first motion to dismiss. Appellant's Excerpts of Record, tab 224, p. 6 (Decision and Order, May 18, 1995).

[18] The trial court agreed that "diligent prosecution may rescue a claim that was previously inactive for various reasons." Appellant's Excerpts of Record, tab Sept. 13, 2001, p. 10 (Decision and Order, Sept. 13, 2001). However, the trial court stated that Rule 7 mandates dismissal for failure to file a timely at-issue memorandum and no discretion is granted under the rule. The trial court found that "subsequently revitalizing a dormant case will not cure a previous violation of a Superior Court Rule sufficient to warrant dismissal." Appellant's Excerpts of Record, tab Sept. 13, 2001, pp. 11-12 (Decision and Order, Sept. 13, 2001). However, in light of the holding of *Guam Housing & Urban Renewal*, that Rule 7(D) does not mandate automatic dismissal for an untimely at-issue memorandum, the trial court's reasoning here is in error. *See Guam Housing & Urban Renewal Auth.*, 2002 Guam 3 at ¶ 15.

[19] Review of the case law shows the general acceptance among jurisdictions that active prosecution after inactivity will cure a failure to prosecute. In *Rollins v. United States*, 286 F.2d 761 (9th Cir. 1961), the plaintiff filed an action under the federal Tort Claims Act. *Rollins*, 206 F.2d at 762. The summons was not properly served upon the United States until more than two years later upon the order of the district court judge to issue an alias summons to the United States. *Id.* After answering the complaint, the United States moved for dismissal for lack of prosecution due to plaintiff's failure of timely service under the applicable statute of limitations. *Id.* The district court denied the motion and the United States did not appeal the denial. At trial, the United States renewed its motion to dismiss for lack of prosecution, and after trial filed a motion to reconsider the motion to dismiss. *Id.* at 762-63. The motion was granted on the ground that the service was made after passage of the statute of limitations, and the action was barred by laches, which was a jurisdictional defect under the circumstances. *Id.* at 763. The *Rollins* court stated that while the trial court would have been within its discretion in dismissing the action for lack of prosecution

when the motion to dismiss was originally filed, the pendency of the action permitted the trial judge to issue the alias summons and allow the plaintiff to proceed. *Id.* at 764. Most important to the case at bar, the *Rollins* court also found that because there was no lack of diligence following the issuance of the alias summons, it was error to dismiss the action. *Id.* at 765.

[20] In *Raab v. Taber Instrument Corp.*, 546 F.2d 522 (2d Cir. 1976), Raab was a shareholder who filed suit against Taber in 1967. *Raab*, 546 F.2d at 523. At or about the same time, another shareholder, Less, also represented by Raab's attorney, sued Taber over the same issue raised in Raab's suit. *Id.* In 1974, the district court issued an order stating that counsel for Less and Raab and counsel for Taber had agreed that Raab's case would proceed after the Less trial. *Id.* However, in 1975, after the *Less* case had been settled and the *Raab* case proceeded, Taber moved to dismiss for lack of Raab's prosecution. *Id.* The trial court found that the delay between 1967 and 1974 was reason for dismissal. *Id.* The Second Circuit reversed holding that the parties' actions from 1974 on, "breathed new life into dormant cases." *Id.* at 524.

[21] In *Spiegelman v. Gold Dust Texaco*, 539 P.2d 1216 (Nev. 1975), the Nevada Supreme Court stated:

> if the claim is presently being prosecuted with diligence it cannot be dismissed because at some earlier time plaintiff did not act diligently. . . . Where . . . the lapse has already occurred, and further proceedings have been taken, it is neither necessary or (sic) justifiable to allow dismissal because a party finds, as Taylor here found, that nearly two years prior to the motion to dismiss a lapse in excess of one year has occurred.

Id. at 1218-19 (citations omitted). *Spiegelman* involved a lapse in excess of one year. In the instant case, the lapse between the period of inactivity and Lujan's second motion to dismiss was seven years.

[22] In opposition, Lujan cites the case of *Gunner v. Van Ness Garage*, 310 P.2d 32, 150 Cal. App. 2d 345 (Cal. D. Ct. App. 1957). In *Gunner*, the plaintiff filed a complaint in December 1950 but failed to complete service until three years later. *Gunner*, 310 P.2d at 33, 150 Cal. App. 2d at 346. In September 1954, plaintiff filed an amended complaint. *Id.* The last answers were filed in January 1955, and defendants moved to dismiss for want of prosecution in February 1955. *Id.* at 33, 150 Cal. App. 2d at 347. The trial court found that from the filing of the complaint in 1950 to the filing of the amended complaint in 1954, plaintiff was guilty of inexcusable delay. *Id.* at 34, 150 Cal. App. 2d at 348. The *Gunner* court affirmed dismissal of the case notwithstanding plaintiff's activity after the period of inactivity stating:

> a belated manifestation of diligence could not operate to excuse the earlier lack of diligence which extended over a period of nearly four years, from December 1950 to September 1954. . . . . Plaintiff seeks to excuse herself by the facts that the case was actually set for trial, and that certain defendants obtained time to plead to the amended complaint by order of court. As we view the situation disclosed by the record these facts are immaterial since the inexcusable delay to support the trial court's order may be found in the period before the filing of the amended complaint. Counsel have cited no case holding that tardiness in making the motion to dismiss will excuse the plaintiff's previous inexcusable delay.

Id.

[23] The *Gunner* court noted that no case was cited which held that tardiness in filing a motion to dismiss would excuse a plaintiff's prior inactivity. *Id.* However, a later California case addressed this issue. In 1970, the California Supreme Court upheld the denial of a motion to dismiss for failure to prosecute when the motion had been filed *after* the complained of delay and *after* the trial court had set the matter for trial. *Denham v. Superior Court of Los Angeles*, 468 P.2d 193, 197, 2 Cal. 3d 557, 563-64 (1970). In *Denham*, the plaintiff filed a complaint in 1964. *Id.* at 194, 2 Cal. 3d at 559. In 1965, the court decided a motion filed by defendant. *Id.* at 195, 2 Cal. 3d at 561. Plaintiff made no other filings until

1967, when he filed an at-issue memorandum. *Id.* at 196, 2 Cal. 3d at 562. In February 1969, the court held a pretrial hearing and set trial for April 1969. *Id.* Just before trial, defendant moved to dismiss the action for failure to prosecute pursuant to a California law which gave the trial court discretion to dismiss the action if it was not brought to trial within two years of filing. *Id.* The California Supreme Court found that the trial court did not abuse its discretion in denying the motion to dismiss. *Id.* at 197, 2 Cal. 3d at 563-64.

[24] The *Denham* case and the cases cited above show that it is within a court's discretion to deny a motion to dismiss for failure to prosecute where the lapse in prosecution has already occurred and further proceedings have been taken. We agree and follow that line of cases. To the extent that *Gunner* is inconsistent with *Denham* and the line of cases cited above, we reject *Gunner*.

[25] In the instant case, Hemlani's inactivity occurred between 1989 and 1993. Judge Taylor was appointed in 1994 and trial commenced on June 5, 1996. Final judgment against Lujan was entered on January 26, 1999. On February 5, 1999, Lujan filed a motion for a new trial which was granted on April 22, 1999. Hemlani appealed on May 12, 1999. This court issued an opinion on June 16, 2000. All this litigation occurred during the eight years after Hemlani's inactivity and before Lujan filed his Motion to Dismiss for Failure to Prosecute on June 28, 2001. Clearly such active litigation should be sufficient to cure a previous period of inactivity. A dismissal under these circumstances would be a miscarriage of justice and an abuse of discretion. *Denham*, 460 P.2d at 199, 2 Cal. 3d at 566 ("a reviewing court should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice.").

[26] Motions to dismiss for failure to prosecute, even if filed after litigation has been reactivated, should be tried on a case-by-case basis. If diligence is shown after the inactivity has stopped, dismissal is inappropriate. *See Rollins*, 286 F.2d at 764; *see also Spiegelman*, 539 P.2d at 1218-19. In this case, Hemlani's actions after his period of inactivity show his diligence. Thus, the lower court abused its discretion in dismissing the case.

IV.

[27] Rule 7(D) of the Superior Court Rules of Court does not mandate dismissal for failure to file a timely at-issue memorandum. Dismissal or other sanction for such a violation is at the discretion of the trial court. There being no exception to the law of the case rule, the trial court erred in reconsidering and granting the Motion to Dismiss for Failure to Prosecute. Further, dismissal for failure to prosecute is inappropriate when a plaintiff acts diligently after the period of inactivity. The judgment of the trial court is **REVERSED** and the case is **REMANDED** for proceedings consistent with this opinion.