IN THE SUPREME COURT OF GUAM

IN THE MATTER OF THE PETITION OF GEORGE M. QUITUGUA TO CANCEL CERTIFICATE OF TITLE NO. 40335 and to receive Certificate of Title No. 39212 relative to Lot No. 10069-1-6, Ledeson, Machanao, Guam, Estate No. 16925, Suburban, containing an area of 3,998 square meters,
Petitioner-Appellant,

vs.

AMBROSIO F. FLORES and CARL J.C. AGUON, in his official capacity as Registrar of Titles for the Department of Land Management, Government of Guam,
Respondents-Appellees.

Supreme Court Case No. CVA03-011
Superior Court Case No. SP0150-97

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 23, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, Associate Justice.

PER CURIAM:

[1] Petitioner-Appellant George M. Quitugua appeals from a Decision and Order of the Superior Court granting a motion to dismiss for failure to prosecute and a Decision and Order denying a motion to reconsider the dismissal. Quitugua argues that the Superior Court failed to account for its role in delays and based its decision on evidence not before the court. After balancing the relevant factors in determining whether dismissal for failure to prosecute is an appropriate sanction, we hold that the court did not abuse its discretion in dismissing Quitugua's claims with prejudice for Quitugua's failure to prosecute. We further hold that the court did not abuse its discretion in later denying Quitugua's motion for reconsideration of the dismissal of his claims.

I.

[2] The underlying dispute in this case involves real property in Machanao, Guam ("the Property"). On July 10, 1974, property owner Maria F. Flores ("Maria Flores") executed a Deed of Gift granting the Property to Respondent-Petitioner Ambrosio F. Flores ("Flores") and Lawrence Vince Leon Guerrero, "to share and share alike."[1] Appellant's Excerpts of Record ("ER") Ex. B, p. 93 (Deed of Gift). A certificate of title ("the first certificate"), listing the names of both Flores and Leon Guerrero, was issued on July 30, 1974.

[3] On September 4, 1974, Maria Flores executed a "Corrected Deed of Gift" granting the Property to Flores alone, which stated "[t]his deed is made to delete the name of Lawrence Vince Leon Guerrero as one of the donees in that certain Deed of Gift executed by the donor herein on July 10, 1974, and

[1] The Property is described in the July 10, 1974 Deed of Gift as "Lot No. 10069-1-6, Ledesong, Machanao, Guam, Estate No. 16925, Suburban, containing an area of 3998 square meters, as shown on Drawing No. 104-T7OMA, prepared by Juan T. Untalan, R.L.S. No. 6, covered by Certificate of Title No. 24837, bearing Document No. 93723." Appellant's Excerpts of Record ("ER") Ex. B, p. 93 (Deed of Gift).

bearing Document No. 238372."[2] ER, Ex. C, p. 95 (Corrected Deed of Gift). A certificate of title ("the second certificate") listing Flores' name only was issued on January 28, 1975.

[4] Twenty years later, on May 17, 1995, Leon Guerrero executed a Deed of Gift purporting to grant his interest in the Property to Quitugua. Quitugua subsequently requested issuance of a certificate of title to reflect the interest he allegedly obtained from Leon Guerrero, but was informed by the Registrar of Titles that a court order was required. On May 30, 1997, Quitugua filed in the Superior Court of Guam a Petition to Cancel Certificate of Title against Flores, and Carl J.C. Aguon in his official capacity as Registrar of Titles, Department of Land Management, Government of Guam. Quitugua sought cancellation of the second certificate, maintaining that the second certificate was "erroneously issued" to Flores alone. Quitugua requested reinstatement of the first certificate which granted title to both Flores and Leon Guerrero or alternatively, partition of his interest in the Property.

[5] The case was initially assigned to Judge Frances Tydingco-Gatewood on June 3, 1997.[3] On August 21, 1997, Flores filed a Motion to Dismiss pursuant to Guam Rules of Civil Procedure Rule 12(b)(6) ("the Rule 12(b)(6) Motion"). Also on August 21, 1997, the Office of the Attorney General ("the AG's Office") on behalf of Aguon, filed an Answer.[4] On August 21, 1998, the parties stipulated that the

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[2] The record below does not indicate the reason for Maria Flores "correcting" the deed.

[3] On January 9, 2004, Flores filed an Objection to Justice Frances Tydingco-Gatewood's participation in this appeal, stating that she had disqualified herself from the case below. On January 14, 2004, Justice Tydingco-Gatewood responded to the Objection, stating that she had not disqualified herself from the case below, but had requested that the case be reassigned due to her heavy caseload of criminal matters. At the January 26, 2004 Status and Disqualification hearing, counsel for Flores indicated that the Answer filed by Justice Tydingco-Gatewood had clarified the issue, and orally stated that he had no objection to her participation on the panel.

[4] The AG's Office and the Bank of Guam, although named as defendants and appellants herein, played very limited roles in this case. The Bank of Guam, as the mortgagee of the Property, became involved when the AG's Office filed a Motion to Join Indispensable Party, on October 15, 1997. Although both the AG's Office and the Bank of Guam filed answers to Quitugua's petition, their active involvement in the case ended there. Both the AG's Office and the Bank of Guam were represented at the August 29, 2002 hearing on the Motion to Dismiss pursuant to Rule 41(b). At that hearing, the AG's Office stated only that they did not oppose the motion to dismiss. The Bank of Guam orally joined the motion, but did not file a written joinder. With regard to the instant appeal, on October 7, 2003, the AG's Office and the Bank of Guam filed a Joint Motion for Extension of Time to File Joinders, stating that they would not file appellate briefs in this case. The motion was granted on October 24, 2003, and the joinders were subsequently filed on November 10, 2003.

Bank of Guam was an indispensable party, and the Bank of Guam subsequently filed an answer to Quitugua's petition on September 15, 1998.

[6] A hearing on the Rule 12(b)(6) Motion was scheduled for October 24, 1997, but a Stipulation and Order for Continuance was filed, and the hearing was rescheduled for November 21, 1997. The hearing on the Rule 12(b)(6) Motion was rescheduled five more times,[5] and the case was reassigned to Judge Elizabeth Barrett-Anderson on July 1, 1998.[6] Ultimately, the case was reassigned to Judge Steven S. Unpingco on August 18, 1998.

[7] On August 11, 2000, Flores filed a Motion to Dismiss for Failure to Prosecute pursuant to Guam Rule of Civil Procedure Rule 41(b)("the first Rule 41(b) Motion"). The hearing on this motion was rescheduled twice[7] before it was finally held on February 20, 2001. On March 6, 2001, the court issued a Decision and Order ("the March 6, 2001 Decision & Order") denying the first Rule 41(b) Motion. In denying the motion, the court acknowledged the "unusual circumstances" that caused "numerous delays" and concluded that "dismissal at this juncture is not warranted." ER, p. 8 (March 6, 2001 Decision & Order). The court, however, made it "clear that this ruling shall serve as a warning to [Quitugua] that further delays due to his inactivity will not be tolerated." ER, p. 8 (March 6, 2001 Decision & Order). The court further ordered Quitugua to pay reasonable costs, including attorney's fees, associated with bringing the first Rule 41(b) Motion.

[8] After the court's issuance of the March 6, 2001 Decision and Order, Quitugua made one request to Flores for production of documents but took no further action to prosecute his case. On April 3, 2002, Flores again filed a Motion to Dismiss for Failure to Prosecute pursuant to Guam Rules of Civil Procedure

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[5] The hearing was rescheduled by the court to November 21, 1997; January 9, 1998; March 13, 1998; May 1, 1998 and June 26, 1998.

[6] Judge Elizabeth Barrett-Anderson apparently disqualified herself from hearing this case, but the record below does not reflect the reason for the disqualification.

[7] The hearing, originally scheduled for September 29, 2000, was rescheduled to November 9, 2000 and again to January 17, 2001. The record does not indicate the reason the hearing was rescheduled.

Rule 41(b)("the second Rule 41(b) Motion"). The hearing on this motion was held on August 29, 2002. After taking the matter under advisement, the court granted the motion ("October 28, 2002 Decision & Order").

[9] Over a year later, on December 31, 2002, Quitugua filed a pleading styled as a Motion to Set Aside Decision and Order. A hearing on this motion was held on March 10, 2003, and in denying the motion, the court in the May 15, 2003 Decision and Order stated that notwithstanding the caption, the motion was treated as a Motion to Reconsider pursuant to the court's inherent authority. The court clarified that "[u]ntil a final judgment is entered in this matter, the court's decision is still an interlocutory order which cannot be appealed as of right" and thus, may be reconsidered at the discretion of the court at any time before entry of the final judgment. ER, p. 39 (May 15, 2003 Decision & Order re Petitioner's Motion to Reconsider). Thus, for purposes of this appeal, Quitugua's motion will be treated as a Motion to Reconsider.

[10] A final judgment was entered on May 15, 2003. Quitugua timely filed a Notice of Appeal on June 16, 2003.

II.

[11] This is an appeal from a final judgment, over which this court has jurisdiction. Title 7 GCA § 3107(b) (2000), *as amended by* Guam Pub. L. 27-31 (Oct. 31, 2003).

[12] Dismissal for failure to prosecute pursuant to Guam Rules of Civil Procedure Rule 41(b) is reviewed for an abuse of discretion. *Guam Hous. & Urban Renewal Auth. (GHURA) v. Dongbu Ins. Co.*, 2002 Guam 3, ¶ 14; *see also Ward v. Reyes*, 1998 Guam 1, ¶ 17; *Santos v. Carney*, 1997 Guam 4, ¶ 4. Denial of a motion for reconsideration is also reviewed for an abuse of discretion. *Ward*, 1998 Guam 1 at ¶ 10. "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. Hi Sup Ahn*, 2003 Guam 6, ¶ 27 (quoting *Brown v.*

Eastman Kodak Co., 2000 Guam 30, ¶ 11).

III.

[13] Quitugua presents two grounds to challenge the trial court's dismissal of the action below. First, he argues that the court "fail[ed] to account for its own role in the delays." Appellant's Opening Brief, p. 5. Second, he argues that the court erred in basing its decision "on evidence not before the court" and by "granting the dismissal absent an affirmative showing the . . . dismissal was proper [under Rule 41(b) of the Guam Rules of Civil Procedure] as a matter of law." Appellant's Opening Brief, p. 8

[14] Flores maintains the dismissal was proper because the delays were due to Quitugua's inaction. He further maintains that the court correctly found the delay to be unreasonable, and that the delay resulted in both presumed and actual prejudice to Flores.

A. The Motion to Dismiss

[15] Rule 41 (b) of the Guam Rules of Civil Procedure governs involuntary dismissals, and states in relevant part: "For 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). The instant appeal arises from the second Rule 41(b) motion, which Flores filed on April 3, 2002, and which the trial court granted in its October 28, 2002 Decision and Order.

1. Failure to prosecute

[16] This court has not expressly defined the action (or inaction) amounting to a failure to prosecute under Rule 41(b), but we have adopted the following five-factor test to determine whether a sanction of dismissal for failure to prosecute is appropriate: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Santos*, 1997 Guam 4 at ¶ 5 (quoting *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994)); *see also GHURA*, 2002 Guam 3 at ¶ 15; *Estate of Concepcion*, 2003 Guam 12, ¶ 15.

[17] The trial court applied the *Santos* five-factor test, and we review its decision for an abuse of discretion. *GHURA*, 2002 Guam 3 at ¶ 14; *Estate of Concepcion*, 2003 Guam 12 at ¶ 15.

a. Public's interest in expeditious resolution of litigation and court's need to manage its docket

[18] The trial court combined its consideration of the first two factors of public interest in an expeditious resolution, and docket management. The court found that despite its instruction in the March 6, 2001 Order that Quitugua "take steps to move the case forward," his only action since that date was the filing of a Request for Production of Documents. ER, p. 13 (October 28, 2002 Decision & Order). The court concluded that the delay in moving the case forward was unreasonable, and thus, the first two factors weighed in favor of dismissal. Trial judges are "best situated to determine when delay in a particular case interferes with docket management and the public interest." *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (quoting *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984)). Moreover, the "public's interest in expeditious resolution of litigation always favors dismissal." *Id.* Given the trial judge's superior position to evaluate the public interest and effects of delay on his docket, we agree that the first two factors favor dismissal.

b. Risk of prejudice to defendant

[19] The third *Santos* factor requires weighing the risk of prejudice to Flores. The trial court determined that Quitugua failed to meet the burden showing the reasonableness of the delay, and recognized that once a delay is determined to be unreasonable, then prejudice to Flores is presumed. Unnecessary delay inherently increases the risk that memories will fade and evidence will become stale. *See Sibron v. New York*, 392 U.S. 40, 57, 88 S. Ct. 1889, 1899 (1968). The court observed that Flores had suffered actual prejudice by the delay, because he was in possession of the property since 1974 and had been responsible for maintaining the buildings. Moreover, the attorney who prepared both the deeds passed away after the issuance of the March 6, 2001 Order. We agree with the trial court that Quitugua has presented an insufficient reason to justify his delay. He claims that he expected the judge to schedule the hearing on Flores' Rule 12(b)(6) motion, but, when the hearing date was not scheduled, Quitugua did

not file a motion requesting a hearing date or seek to schedule a status conference. Although the pending Rule 12(b)(6) motion was filed by Flores, it falls to the plaintiff, Quitugua, to press his case with due diligence. We agree this factor favors dismissal.

c. Public policy favoring disposition on the merits

[20] The fourth factor takes into account the public policy favoring disposition of a case on its merits. *Santos*, 1997 Guam 4 at ¶ 5. In its October 28, 2002 Decision and Order, the trial court recognized this policy, but emphasized that it "should not be used defensively as a shield by a passive Plaintiff who has failed in his obligation to prosecute the defendants with the vigor expected of a plaintiff." ER, p. 14 (October 28, 2002 Decision & Order) (quoting *Santos*, 1997 Guam 4 at ¶ 9). Although this factor does not favor dismissal, the court felt this consideration was outweighed by the other four factors which support dismissal. In *Morris v. Morgan Stanley & Co.*, 942 F.2d 648 (9th Cir. 1991), the plaintiffs had repeatedly failed to respond to correspondence regarding discovery and arbitration, failed to appear for at least one scheduled meeting, and failed to submit a stipulation regarding arbitration of their claims. *Id.* at 651. The defendants filed a Rule 41(b) Motion to Dismiss, which the district court granted and the Ninth Circuit affirmed, stating that "[a]lthough there is indeed a policy favoring disposition on the merits, it is the responsibility of the moving party to move towards that disposition at a reasonable pace." *Id.* at 652. In this case, Quitugua's failure to prosecute is evidenced in inactivity and a pattern of dilatoriness over months and even years; thus, we agree that this factor is outweighed by the other factors favoring dismissal.

d. Less drastic sanctions

[21] In considering the fifth factor of lesser sanctions, the trial court pointed out that it had already imposed lesser sanctions, as well as a warning to Quitugua that further delays would result in dismissal, and that Quitugua must take the necessary steps to move this case towards resolution. The court questioned the effectiveness of lesser sanctions, because despite its warning and monetary sanctions, there had been no "substantial activity" in the case. ER, p. 14 (October 28, 2002 Decision & Order). The decision of the Ninth Circuit Court in *Henderson v. Duncan*, 779 F.2d 1421 (9th Cir. 1986) is instructive,

as it involves a dismissal pursuant to Federal Rules of Civil Procedure Rule 41(b), which is identical to the Guam rule. In *Henderson*, the Ninth Circuit reviewed a *sua sponte* dismissal, where the plaintiff had failed to comply with an Arizona local court rule requiring plaintiffs to submit pretrial orders. *Id.* at 1422-23. In a span of almost eleven months, the plaintiff had obtained four continuances, and still had not submitted the pretrial order. *Id.* at 1423. The district court had given specific and express warnings that if the plaintiff did not comply, then dismissal would be forthcoming. *Id.* The court *sua sponte* dismissed the case for failure to submit the pretrial order as required by the local rule. *Id.* On appeal, the Ninth Circuit applied the abuse of discretion standard, and determined, *inter alia*, that "the [district] court first tried to warn counsel of the consequences of his continuing dilatory preparation. These warnings were crystal clear." *Id.* at 1424. Thus, although recognizing that although "[d]ismissal is a harsh penalty and is to be imposed only in extreme circumstances[,]" the Ninth Circuit nonetheless affirmed the district court. *Id.* at 1423.

[22] Here, the trial court, in denying the earlier motion to dismiss, gave a specific and express warning to Quitugua that he must move the case towards resolution, stating in its March 6, 2001 Decision and Order that "this ruling shall serve as a warning to [Quitugua] that further delays due to his inactivity will not be tolerated." ER, p. 8 (March 6, 2001 Decision & Order). Despite this warning and the imposition of sanctions, during the course of a year, Quitugua only served one request for production of documents. Thus, we agree that the trial court correctly concluded that the last factor weighed in favor of dismissal.

[23] The trial court conducted a thorough examination of each factor to determine whether a sanction of dismissal for failure to prosecute is appropriate, and found only the fourth factor, the interest in disposition on the merits, does not counsel in favor of dismissal. Although dismissal may be a harsh sanction, we cannot say the lower court "'committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Morris*, 942 F.2d at 652 (quoting *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976)); *see also Santos*, 1997 Guam 4 at ¶ 11; *GHURA*, 2002 Guam 3 at ¶ 19.

2. Failure to respond to the motion to dismiss

[24] The Superior Court, in granting the motion, also considered Quitugua's failure to respond to Flores' motion to dismiss. Quitugua argues that "mere failure of Petitioner to respond to the Motion to Dismiss does not automatically result in a dismissal absent an affirmative showing of the Respondent that the dismissal is proper as a matter of law." Appellant's Opening Brief, p. 12. The next issue we must address is whether Local Rule 5B of the Rules of the Superior Court requires that a judge deem unopposed motions to be conceded and automatically granted. Rule 5B provides:

> B. Responses to Motions
>
> (1) Procedure. Non-moving parties shall not later than fourteen (14) days before the hearing serve all other parties either:
>
> (a) A written opposition containing citations, analysis and explanation; or
>
> (b) A notice of non-opposition; or
>
> (c) A joinder in the motion.
>
> (2) Failure To File. Absent good cause shown, failure to file one of the papers required by B. supra has the same effect as filing a notice of non-opposition. If a party is prejudiced by failure to file such failure is sanctionable pursuant to Rule 11 of these rules.

Guam Ct. R. 5B.

[25] The trial court found Quitugua had failed to file a written opposition as required by Rule 5B. Moreover, the court, citing Rule 3A of the Rules of Superior Court, which provides: "Absent good cause shown, papers not timely filed shall be disregarded by the court[,]" found that Quitugua had failed to show good cause for the failure to file. Guam Ct. R. 3A. Quitugua's attorney had received notice of the motion and the court determined the explanation provided, an associate's departure from the firm, did not constitute good cause. Therefore, the court deemed the motion unopposed, and granted the motion.

[26] On appeal, Quitugua objects to dismissal for failure to file a response, stating "a non-opposition is not tantamount to a conclusion as a matter of law." Appellant's Brief at p. 12. He points to the statement in the October 28, 2002 Decision and Order concluding that "[p]ursuant to Superior Court Rules 3 and 5, [Flores'] Motion to Dismiss is deemed unopposed. As such, the motion will be granted." ER, p. 12 (October 28, 2002 Decision & Order). Because this language may give the impression that the dismissal necessarily resulted from Quitugua's failure to oppose the motion, we must elucidate the lower court's decision.

[27] Clearly, nothing in Rule 3 or Rule 5 mandates that the failure to file an opposition to a motion automatically results in that motion being granted. Specifically, Rule 3A provides the court may disregard papers not timely filed, while Rule 5B(2) provides that failure to file will have the same effect as the filing of non-opposition to the motion. These rules do not relieve the lower court of its duty to consider the merits of the motion before it.

[28] Here, the trial court did not "automatically" grant the motion because Quitugua failed to file an opposition.[8] Indeed, the court permitted Quitugua to argue in opposition to the motion at the scheduled hearing, and as discussed above, the court considered and applied the five-factor test in determining whether a dismissal was proper sanction pursuant to Rule 41(b). The court may have interpreted the failure to file an opposition as additional evidence of Quitugua's pattern of dilatoriness and inactivity, but the conclusion that dismissal was proper was based on the merits of the motion, not simply Quitugua's failure to file an opposition to the motion. In affirming the trial court's dismissal for failure to prosecute, we emphasize that the failure to file a written opposition to a motion, the filing of a notice of non-opposition to a motion, or the disregard of untimely filed papers, does not require a court to automatically grant the motion and is not dispositive of the motion itself.[9] The court has a duty to analyze the merits of the motion before rendering its decision. The court below discharged its duty and there was no abuse of discretion

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[8] If the trial court had not undertaken an analysis of the five-factor test adopted by this court but instead had granted the motion based solely on the motion being unopposed because of Quitugua's failure to respond, the result we reach may have been different.

[9] Despite local rules requiring a party to file oppositions before the hearing date or risk a finding that the party had consented to granting the motion, courts have considered the merits of an unopposed motion to dismiss. *People ex rel. Swim v. Dist. Dir.*, No. EDCV 02-00495-VAP, 2002 WL 1988181, *1 (C.D. Cal. July 8, 2002) (unreported); *see also Longshore v. Pine*, 222 Cal.Rptr. 364, 367 (Ct. App. 1986) ("In spite of appellant's failure to file timely opposition to the motion to dismiss, the trial court considered appellant's opposition papers and decided the motion on its merits although not required to do so."). Courts in another jurisdiction have held that the merits of a motion to dismiss should not be addressed if a party did not comply with local rules that require filing an opposition to such a motion. *See Czaja v. Sallak*, 536 A.2d 1001, 1002 (Conn. App. Ct. 1988)*; Burton v. Planning Comm'n*, 536 A.2d 995 (Conn. App. Ct. 1988). When these local rules were later amended; however, so that the failure to respond no longer resulted in a finding that the party consented to the motion, judges have exercised their discretion and considered the merits of unopposed motions. *See Bank of America v. Crumb*, No. CV 950129064S, 1999 WL 435770, *1 (Conn. Super. Ct. June 21, 1999) (unpublished memorandum decision on motion to dismiss); *A. Rotondo & Sons, Inc. v. Skanco Sharon-Foxboro Dev., Inc.*, No. CV93 0524589S, 1995 WL 116675, *1 (Conn. Super. Ct. March 3, 1995) (unpublished memorandum opinion).

in dismissing the case for failure to file a response.

3. Quitugua's other arguments on appeal

[29] Although Quitugua fails to directly address the five-factor analysis conducted by the court below, he does raise additional arguments on appeal. Initially, he argues that the court erred in failing to account for its role in the delay in moving the case forward, and relies on *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14, for support of this argument. In making this argument, Quitugua quotes from the March 6, 2001 Decision and Order, denying the Rule 12(b)(6) Motion to Dismiss.[10] Quitugua conveniently omits that in its March 6, 2001 Decision and Order, the court expressly acknowledged the "unusual circumstances" that caused "numerous delays[,]" and consequently, did not dismiss the case pursuant to the first Rule 41(b) Motion. ER, p. 8 (March 6, 2001 Decision & Order). Quitugua apparently also ignored the court's explicit warning that "further delays due to his inactivity will not be tolerated." ER, p. 8 (March 6, 2001 Decision & Order). Contrary to Quitugua's assertion, the court below recognized that delays had affected the case.

[30] Additionally, Quitugua's reliance on this court's ruling in *Midsea* is mistaken. As Flores correctly points out, *Midsea* involved a Motion to Set Aside Entry of Default and Default Judgment pursuant to Rule 60(b) of the Guam Rules of Civil Procedure,[11] rather than a Rule 41(b) Motion to Dismiss. The factors

[10] We take the opportunity to voice our concern regarding the delays that characterized the proceedings below. We are troubled by a calendaring system that allowed numerous continuances without raising a "red flag" with regard to the setting and hearing of Flores' Rule 12(b)(6) motion. In its March 6, 2001 Decision and Order, the trial court clearly indicated its intention to "set any pending motions as soon as possible in order to help move this case along." ER, p. 8 (March 6, 2001 Decision & Order). Despite this statement, the record before us reveals that Flores' Rule 12(b)(6) motion, which had been pending since being filed on August 21, 1997, was neither scheduled for hearing, nor was it ever heard. During the February 23, 2004 oral argument, Quitugua's attorney stated that the court had acknowledged the Rule 12(b)(6) motion was still pending and "promised" to set the motion for hearing; yet, after seven "discussions" the court did not do so. Undoubtedly, the judges' heavy caseload and priority given to criminal cases may have contributed to the frequent continuances and trial judges do not have multitudes of time to spend on the failures of litigants to follow orders, rules and requirements of our courts. Here, Quitugua is responsible for inexcusable delay and failure to comply with a court order to prosecute his case diligently. We nevertheless have difficulty accepting a calendaring system that not only allows so many continuances and permits cases to languish in the courts for several years, but also appears unfair to civil litigants.

[11] Rule 60(b) of the Guam Rules of Civil Procedure states 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

considered in denying a Rule 60(b) motion involve weighing the defendant's conduct in causing the delay, the defendant's meritorious defenses, and prejudice to the plaintiff if the judgment is set aside. *Midsea*, 1998 Guam 14 at ¶ 5. Although we review for abuse of discretion both the denial of a motion to set aside entry of a default judgment pursuant to Rule 60(b) and a dismissal for failure to prosecute pursuant to Rule 41(b), the relevant factors in evaluating a Rule 60(b) motion are not identical to the five-factor test in evaluating a Rule 41(b) motion. While both Rule 41(b) and Rule 60(b) are driven by the policy concern of deciding a case on its merits, only Rule 60(b) is intended to be "remedial in nature and should be applied liberally." *Id.* at ¶ 6. Review of Rule 41(b) motions does not share this policy consideration. Because of the factual and legal distinctions, *Midsea* does not control this case.

[31] Quitugua further maintains that Flores' Rule 12(b)(6) Motion to Dismiss should have been addressed before the case could move forward, and that Quitugua "reasonably anticipated" that the court's ruling on Flores' Rule 12(b)(6) motion would "stop or at least delay" proceedings or his ability or responsibility to move the case forward." Appellant's Opening Brief, p. 8. Essentially, Quitugua contends that he was waiting for the court to rule on the Rule 12(b)(6) motion before he could determine his ability to proceed with his case. Quitugua asserts that the Rule 12(b)(6) Motion, which raised a statute of limitations defense, was jurisdictional and dispositive and the court should have addressed the motion before the case could proceed on its merits;[12] however, this argument must fail as Flores' Rule 12(b)(6)

> 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 (1998).

[12] Quitugua raised this same argument at the hearing for the Motion for Reconsideration. At that hearing, the court clarified that as a matter of practice, courts often first address jurisdictional challenges, such as motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), or lack of jurisdiction over the person pursuant to Rule 12(b)(2), because such motions are dispositive of the entire case. Here, Flores filed a Rule 12(b)(6) motion, which was for "failure to state a claim upon which relief can be granted."

motion did not attack either subject matter jurisdiction or personal jurisdiction. Quitugua relies on several cases discussing the role of Rule 12(b)(6) motions, including, *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884 (3rd Cir. 1977), *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), and *Davis H. Elliot Co. v. Caribbean Utils. Co.*, 513 F.2d 1176 (6th Cir. 1975). These cases do not, however, support his contention that he is prevented from proceeding with the case absent a ruling on the 12(b)(6) motion. *Cf. DaVeiga v. Alberston's, Inc.*, No. Civ. 00-665-ST, 2000 WL 1520241 (D. Or. Oct. 10, 2000) (adopting a magistrate judge's recommendation that the grant of a Rule 41(b) motion to dismiss for failure to prosecute renders moot the pending Rule 12(b)(6) motion). Moreover, despite Quitugua's assertion, he fails to cite any authority that the pendency of a Rule 12(b)(6) motion prevents him from proceeding with the case.

[32] Quitugua additionally argues that the court erred in dismissing the case based on evidence not before the court and by granting the dismissal absent an affirmative showing the dismissal was proper as a matter of law. Quitugua's arguments arise from statements made by counsel for Flores during the August 29, 2002 hearing on Flores' Second Rule 41(b) Motion to Dismiss, regarding Quitugua's inaction in prosecuting the case. Specifically, Quitugua objects to the reference to statements that Quitugua had only made a request for production of documents since the issuance of the March 6, 2001 Decision and Order Denying the Motion to Dismiss, and that there had been "no substantial activity" by Quitugua. Appellant's Opening Brief, p. 10; ER, p. 13 (Oct. 28, 2002 Decision & Order).

[33] Quitugua relies on *People v. Santos*, 1999 Guam 1, apparently for the proposition that the court may only consider evidence that has been presented in affidavits and admitted into evidence. *Santos* does not, however, apply here, and Quitugua's reliance on this case is mistaken. In *Santos*, the government challenged the trial court's grant of a defendant's Motion to Suppress Evidence, arguing that the court had improperly used and considered an affidavit from defendant. 1999 Guam 1 at ¶¶ 7, 12. The defendant's affidavit, which was attached to the suppression motion, indicated that his consent to a search of his home had been obtained through coercion. *Id.* at ¶ 7. At the suppression hearing, this affidavit was not

introduced or otherwise admitted into evidence; the only evidence presented was the testimony of a police officer, who was a government witness. *Id.* at ¶ 8. We reversed the trial court's suppression of evidence, and examined the different purposes and uses of affidavits in suppression hearings. *Id.* at ¶¶ 2, 19-25. To put things simply, the trial court in *Santos* erred in considering and using an affidavit that had not been introduced into evidence; also there had been no notice that it would consider the affidavit in making its decision. *Id.* at ¶ 25.

[34] In the instant case, Quitugua would have this court adopt the converse of the ruling in *Santos*; namely, that a trial court consider only evidence that has been presented through affidavits and introduced into evidence. He presents no authority for this proposition, and we are not persuaded by his argument to expand the holding in *Santos*. Essentially, Quitugua argues that the trial court should not have considered the statements by Flores' counsel, made during the August 29, 2002 hearing, that Quitugua's only activity in the case since the last hearing was the filing of a single Request for Production of Documents, and further maintains that the trial court erred in relying on these statements as a basis for granting the Second Rule 41(b) Motion to Dismiss. ER, p. 13 (Oct. 28, 2001 Decision & Order). Our review of the record reveals that the trial court was made aware of the discovery request through Flores' Second Rule 41(b) Motion to Dismiss, which states that "Quitugua has still done nothing whatsoever to prosecute his claim against Flores, except to serve a discovery request after the Court's March 6, 2001 Order." Notice of Motion and Motion to Dismiss for Failure to Prosecute (April 3, 2002). Furthermore, when counsel for Flores referred to this discovery request during the August 29, 2002 hearing, Quitugua's attorney did not dispute this assertion. In fact, counsel for Quitugua further acknowledged that "we sent a request for discovery" after the March 6, 2001 Decision and Order. ER, p. 57 (Transcript of Proceedings of Respondent's Motion to Dismiss for Failure to Prosecute, Aug. 29, 2001). Moreover, at the August 29, 2002 hearing, Quitugua did not argue that there was other evidence to indicate that he had taken action to move the case forward. Therefore, even if the trial court erroneously considered and relied on counsel's statements

regarding the discovery request,[13] it was not error for the trial court to ultimately conclude that there had been "no substantial activity" in the case since the March 6, 2001 Decision and Order. ER, p. 13 (Oct. 28, 2001 Decision & Order).

[35] Finally, Quitugua argues that the lower court's dismissal was based on findings of prejudice, when there were no facts in the record to support such findings. To support this argument, Quitugua states that there had not been any showing that the death of a potential witness, Attorney J.U. Torres, who had drafted both of the deeds for Maria Flores, was prejudicial. We disagree. Obviously, the attorney who drafted both the original deed and the corrected deed for the original landowner, Maria Flores, could have presented testimony that may have shed light on the circumstances in amending or "correcting" the deed to delete Leon Guerrero as a grantee. The death of this particular potential witness was indeed prejudicial to Flores.

[36] Quitugua also objects to statements made by Flores' counsel at the August 29, 2002 hearing that Flores had been in possession of the disputed property and expended time and money in maintaining the property. Again relying on *Santos*, 1991 Guam 1, Quitugua apparently argues that because these statements were not in affidavits introduced into evidence, they should not have been considered. This contention was discussed above, and need not be considered extensively here, except to state that Quitugua has failed to provide any authority to expand the holding of *Santos*.

[37] Reversals of Rule 41(b) motions to dismiss are reviewed for an abuse of discretion. Quitugua's arguments on appeal do not overcome this high standard. The trial court did not rely on an erroneous conclusion of law; moreover, there was evidence on the record which the court could have rationally based its decision. *See Town House*, 2003 Guam 6 at ¶ 27. Although dismissal may be harsh, we do not have the "definite and firm conviction that the court below committed a clear error of judgment in the conclusion

[13] It seems apparent that if the trial court had not considered the information regarding the single discovery request submitted by Quitugua after the March 6, 2001 Decision and Order, then there would be no evidence at all before the trial court regarding any action taken by Quitugua, and the court could have concluded that no action had been taken. Thus, the court's reliance amounted to harmless error, as its reliance on the information "would not have made a difference in the trial court's decision, [and] thus [did] not affect[] the substantial rights of the parties." *Yang v. Hong*, 1998 Guam 9, ¶ 12; *see also* Guam R. Civ. P. 61.

it reached upon weighing of the relevant factors." *GHURA*, 2002 Guam 3 at ¶ 14 (quoting *Santos*, 1997 Guam 4 at ¶ 4). Moreover the authority to invoke the dismissal for failure to prosecute is vital to the efficient administration of judicial affairs and those in the best position to evaluate docket management are the trial judges. For these reasons, we affirm the trial court's dismissal pursuant to Rule 41(b).

B. The Motion for Reconsideration

[38] Denial of a motion to reconsider is also reviewed for an abuse of discretion. *Ward*, 1998 Guam 1 at ¶ 10. This court has adopted three prongs to justify reconsideration: "where the trial court: '(1) is presented with new evidence; (2) committed clear error or the decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Id.* (quoting *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

[39] Quitugua's only argument regarding reconsideration is that the court below committed clear error or was manifestly unjust in failing to account for its role in the delays and in basing its decision on evidence not in the record. Thus, he maintains that the court should have granted his motion for reconsideration.

[40] Quitugua's arguments in seeking reconsideration are identical to the arguments raised and rejected, *supra*, pages 13-18. In its October 28, 2002 Decision and Order, the court below conducted a detailed analysis of the five factors and found they weighed in favor of dismissal. There does not appear to be clear error in this analysis. Further, the dismissal does not appear to be manifestly unjust; the court had expressly warned Quitugua that further delays would result in dismissal. In sum, it cannot be concluded that the court abused its discretion dismissing the case. The court below did not base its decision to dismiss on erroneous conclusions of law, and there was evidence on which the court could have rationally based its decision. *See Town House*, 2003 Guam 6 at ¶ 27. Thus, the Motion for Reconsideration was properly denied.

IV.

[41] We hold that the the trial court did not abuse its discretion in concluding that dismissal was warranted, or in rejecting Quitugua's arguments that its decision to dismiss be reconsidered. Accordingly,

the decisions granting the Second Rule 41(b) Motion to Dismiss and denying the Motion for Reconsideration, and the Final Judgment, are hereby **AFFIRMED**.