IN THE SUPREME COURT OF GUAM

SUN YOUNG CHOI PARK
formerly known as SUN YOUNG CHOI
Plaintiff-Appellant,

vs.

SHINYA KAWASHIMA,
Defendant-Appellee,

Supreme Court Case No. CVA09-017
Superior Court Case No. CV1251-04

OPINION

Cite as: 2010 Guam 10

Appeal from the Superior Court of Guam
Argued and submitted on March 12, 2010
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Plaintiff-Appellant Sun Young Choi Park appeals from a Decision and Order of the Superior Court granting the motion to dismiss Park's complaint against Defendant-Appellee Shinya Kawashima for non-payment on a promissory note because of Park's failure to prosecute under Rule 41(b) of the Guam Rules of Civil Procedure and prior Civil Rule 7(D) of the Local Rules of the Superior Court. The trial court did not abuse its discretion in concluding that dismissal under Rule 41(b) for failure to prosecute was warranted, however, at the hearing on the motion to dismiss, the court did not make any finding that application of the current Local Rules of the Superior Court would not be feasible or would work injustice.[1] Nevertheless, whether the prior rule or current local rule should have been applied does not affect the propriety of dismissal under Rule 41(b), therefore, the judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Plaintiff-Appellant Sun Young Choi Park ("Park") initially brought suit *pro se* against Defendant-Appellee Shinya Kawashima ("Kawashima") to recover payments on a promissory note[2] on October 14, 2003. This case was filed as Civil Case No. CV1533-03. Kawashima moved to dismiss the complaint pursuant to Rules 12(b)(6) and 7(b) of the Guam Rules of Civil Procedure which the Superior Court granted on September 20, 2004.

[1] At the time the motion was filed in March 2007, the pre-existing Rules of Civil Procedure and Local Rules of the Superior Court were in effect, but when the hearing was held later that year, the revised Guam Rules of Civil Procedure and Local Rules of the Superior Court had already been adopted by the Supreme Court under Promulgation Order No. PRM06-006-02.

[2] The promissory note dated March 7, 2001was between Kawashima and Intercom, Inc.

[3] Subsequently, Park filed a second verified complaint against Kawashima in Civil Case No. CV1251-04 in December 2004 to enforce collection on the same promissory note. The complaint alleged that Choi became the legal holder in due course of the promissory note. Later that month, Kawashima sent a letter to Park which confirmed that since the parties were discussing settlement, the deadline to file Kawashima's answer would be suspended. The letter also provided copies of wire transfer receipts to Kowon Shipping Corporation, a company Kawashima asserts was owned by Park. The letter stated that the wire transfers to Kawashima were made at Park's request to satisfy Kawashima's obligations on Guam related to transshipment of cargo, but that Park had not confirmed how the money was spent, so Kawashima had an offset defense against Park's claim.

[4] In January 2005, Park replied denying she was Kowon's sole shareholder and claiming that the transactions were extremely divisible. Park also made an offer to settle the claim for a sum certain within ten (10) days, but if no settlement was made within the next ten (10) days, Park expected Kawashima to respond to the complaint as required by Rule 12 of the Guam Rules of Civil Procedure. Kawashima responded with a counter offer which was rejected by Park that same day and, Kawashima was advised to file an answer. A week later, Kawashima filed his answer. In February 2005, Kawashima served a request for production of documents and first set of interrogatories on Park. Park served her responses and also took Kawashima's deposition in March 2005.

[5] Nearly two (2) years later and with no further filings in the case, Kawashima filed a motion to dismiss the complaint for failure to prosecute pursuant to Rule 41(b) and prior Rule 7(D). A hearing on the motion to dismiss was scheduled but the hearing was continued when

Park asked for and received an extension to file an opposition. Another motion hearing was later scheduled in May 2008, but Park did not appear even though she had requested oral argument in her later-filed opposition to the motion to dismiss. The trial court dismissed the complaint with prejudice. Judgment was entered and Park timely filed this appeal.

II. JURISDICTION

[6] This court has jurisdiction of an appeal from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (West Supp. 2009); 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[7] Dismissal for failure to prosecute under Rule 41(b) of the Guam Rules of Civil Procedure is reviewed for an abuse of discretion. *Guam Hous. & Urban Renewal Auth. (GHURA) v. Dongbu Ins. Co.*, 2002 Guam 3 ¶ 14.

[8] An abuse of discretion occurs when the trial judge's "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." *Midsea Indus., Inc. v. HK Eng'g Ltd.*, 1998 Guam 14 ¶ 4 (citing *Santos v. Carney*,1997 Guam 4 ¶ 4). A trial court's decision will not be reversed unless we have a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.*

IV. DISCUSSION

A. Factors in Determining if Dismissal is Appropriate Under Rule 41(b)

[9] Park argues dismissal was not warranted because the trial court misapplied the five factors identified in *Santos v. Carney*, 1997 Guam 4, which are required to be evaluated by a court when reviewing a Rule 41(b) dismissal for failure to prosecute.

[10] The *Santos* factors used to determine whether a sanction of dismissal is appropriate include: "(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 ¶ 5 (quoting *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994). Dismissal is appropriate if at least four factors favor dismissal or three factors "strongly" support dismissal. *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999).

[11] The burden is on the plaintiff to show the delay is reasonable and that the defendant is not prejudiced by the delay. *Santos*, 1997 Guam 4 ¶ 5 (citing *Franklin v. Murphy*, 745 F.2d 1221, 1232 (9th Cir. 1984)). If a reasonable excuse exists for the inaction, the burden shifts to the defendant to demonstrate prejudice. *Id.* This court should give deference to the trial court in determining the reasonableness of the delay "because it is in the best position to determine what period of delay can be endured before its docket becomes unmanageable." *Id.* (quoting *In re Eisen*, 31 F.3d at 1451.).

[12] We now will review the trial court's decision applying the *Santos* five-factor test for an abuse of discretion. *GHURA*, 2002 Guam 3 ¶ 14.

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

[13] Generally, the first two *Santos* factors may be considered together. *Santos*, 1997 Guam 4 ¶ 7. In addressing both factors, the trial court explained that there was no prosecutorial activity since September 2005 and no filings were made between December 2004, when the complaint was filed, and March 2007, when Kawashima filed the motion to dismiss. Appellant's Excerpts of Record ("ER"), at 115 (Dec. & Order, Mar. 9, 2009). Moreover, the trial court found that

even during the intervening months after the motion to dismiss was filed, "no documents, scheduling orders, discovery plans, or other requests for trial" were filed by Park. *Id.* Park also failed to file an opposition before the originally scheduled motion hearing date and the court granted Park's request for an extension to file her opposition, which was filed almost two months later. At the later scheduled hearing on the motion in May 2008, Park's counsel failed to appear. In computing the time of delay in this case, the trial court concluded that Park was "responsible for a delay of forty-one (41) months from the filing of the complaint and the hearing on the motion to dismiss." *Id.*

[14] The trial court disagreed with Park's argument that Kawashima was responsible for the delay because Park had repeatedly refuted a response to a previous settlement offer, finding that Park's letter to Kawashima about settling the matter did not fulfill Park's duty to prosecute her claims in court. *Id.* at 116. The court determined that settlement negotiations, even when conducted in earnest, did not excuse Park from pursuing the case diligently and did not constitute good cause for the delay in bringing the case to trial. *Id.* (citing *Jepson v. New*, 792 P.2d 728, 733 (Ariz. 1990)). Finally, the court recognized the time standard established by Supreme Court of Guam Administrative Rule 06-001, that all civil matters be completed and closed within eighteen (18) months of filing and found that this case far exceeded the limitation standard. The trial court determined that Park offered no reason "to continue its existence on its already crowded docket" and after considering the public interest and the delay to its dockets, found the delay unreasonable. ER at 116 (Dec. & Order, Mar. 9, 2009). Accordingly, the court concluded the first two *Santos* factors weighed in favor of dismissal. *Id.* at 116.

[15] Park complains that in evaluating whether the delay was reasonable, the trial court should have not only considered the lack of filings, but also the settlement discussions and potential set-off in a separate civil matter captioned *Kowon Shipping Corp. v. Sino Trading Japan, Ltd.*, Civil Case No. CV0327-05.[3] That case went to trial in March 2007 and Park submits that because Kawashima disputed payments made to Park in CV0327-05, it "makes only logical sense to resolve that matter first" then proceed in this case. Appellant's Br. at 9 (Aug. 31, 2009).

[16] Settlement efforts may constitute excusable delay under Rule 41(b). Guam R. Civ. P. 41(b). *Cox v. Cox*, 976 So. 2d 869, 875 (Miss. 2008) (In determining whether dismissal under Rule 41(b) for failure to prosecute was appropriate, the court also considered whether settlement efforts excused the delay); *But see, Kelso Veach Vacationland Inc. v. Kelso Woods Assoc.*, 29 Pa. D. & C.4th 59, 62 (Pa. Commw. Ct. 1995) ("In determining whether a party has a legitimate excuse for not acting diligently, it is well settled that delays caused by settlement negotiations, . . . are not deemed to be compelling reasons"). While some delay in prosecuting a case may be attributable to settlement negotiations, "the pendency of negotiations is not an excuse where the delay is unreasonably long . . . or if it continues after it is apparent that the negotiations would not be fruitful." *Cox*, 976 So.2d at 875.

[17] There is evidence in the record to show the parties initially engaged in settlement discussions after the complaint in CV1251-04 was filed but settlement was not successful. Indeed, Park's letter to Kawashima dated January 20, 2005, which rejected Kawashima's counter

[3] Park and Kawashima were not named individually as parties in Civil Case No. CV0327-05.

offer notified Kawashima that Park expected Kawashima to file his responsive pleading. Kawashima then filed his answer.

[18] Park submits that the correspondence between the parties discussed the claims made in both CV1251-04 and CV0327-05. While the initial letters in December 2004 and January 2005 discussed alleged payments made by Kawashima to Park and mention an offset defense against Park's claim, the letters do not in any way suggest the "offset" defense related to the claims made in CV0327-05. In fact, the complaint in CV0327-05 had not even been filed when Kawashima sent the letter in December 2004 about an "offset." Park further contends that only after the deposition of Kawashima in March 2005 did she first learn that the basis for the offset defense stemmed from the matter in CV0327-05. Therefore, it made sense to await the conclusion of CV0327-05 before proceeding with prosecution of CV1251-04.

[19] Even assuming the "offset defense" was related to the matter in CV0327-05, Park made no filings in CV1251-04 to inform the court about this discovery, or to stay the proceedings, or to consolidate the cases. Park and Kawashima were not named parties to the complaint in CV0327-05 and no filings in that case were presented to the trial court which would demonstrate and confirm whether these claims made were even related to the offset alleged in CV1251-04. Park also did not provide any other evidence for the trial court to consider about the parties continued settlement discussions for both cases. Park, therefore, has failed to show that the pendency of settlement negotiations or the potential set off which may result in CV0327-05 were acceptable excuses for delay. The trial court is in the best position to decide when delay in a particular case interferes with the public interest and docket management, and we give deference to its determination of the reasonableness of the delay. *Santos*, 1997 Guam 4 ¶ 5. Given the

Judge's superior position in evaluating the public interest in expeditious resolution of this case, and the effect of delays on his docket, we agree with the conclusion that the first two *Santos* factors weighed strongly in favor of dismissal.

2. Risk of prejudice to Kawashima

[20] The next *Santos* factor requires weighing the risk of prejudice to the defendant. The trial court found this factor also weighed in favor of dismissal and determined that Kawashima was presumptively prejudiced by the approximately four year delay. Specifically, the trial court stated, "advancement of [Park's] claims to resolution was within [Park's] strict control, and the continued failure to prosecute the claims to a resolution at trial is the only discernable reason that a final resolution has not been reached." ER at 117 (Dec. & Order, Mar. 9, 2009).

[21] Park is mistaken that Kawashima must show actual prejudice from the delay because "[o]nce a delay is determined to be unreasonable, prejudice . . . is presumed." *Santos*, 1997 Guam 4 ¶ 8. Moreover, we have stated that presumed prejudice is sufficient to support a Rule 41(b) dismissal. *Id.* The risk of prejudice to Kawashima is presumed and while this presumption is rebuttable, Park's excuses for the delay are paltry at best and Park was not required to show actual prejudice. Accordingly, this factor also weighs in favor of dismissal.

3. Public policy favoring disposition on the merits

[22] The fourth *Santos* factor necessitates considering the public policy favoring disposition of a case on its merits which ordinarily weighs against dismissal. *Santos*, 1997 Guam 4 ¶ 9. Although public policy always favors a resolution of cases on their merits, and this factor generally weighs in favor of the plaintiff, "it must be weighed against the first two factors, the expeditious resolution of litigation and the court's need to manage its docket." *In re Estate of*

Concepcion v. Siguenza, 2003 Guam 12 ¶ 23. The question is whether the policy of determining cases on their merits justifies the delay and prejudice caused by Park's actions. *Id.*

[23] We expressly stated in *Santos* that "[i]t is sufficient to demonstrate that the plaintiff has 'ignored his responsibilities to the court in prosecuting the action and the defendant had suffered prejudice as a result thereof.'" *Santos*, 1997 Guam 4 ¶ 9 (quoting *Anderson v. Air West, Inc.*, 542 F.2d 522, 526 (9th Cir. 1976)). Furthermore, this policy "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." *Id.* The trial court concluded that Park ignored the responsibilities to the court in prosecuting the case and because of the delay, Kawashima suffered actual prejudice. ER at 117 (Dec. & Order, Mar. 9, 2009). Park's failure to prosecute is evidenced by the inactivity and dilatoriness in moving the case forward, thus causing an unreasonable delay. GRCP 41(b); *Santos*, 1997 Guam 4 ¶ 7. Park, therefore, has failed to show how this factor outweighs the expeditious resolution of litigation and the court's need to manage its docket. Accordingly, this factor also weighs in favor of dismissal. *Id.*

4. Availability of less drastic sanctions

[24] "[I]t is not a per se abuse of discretion for a trial judge to dismiss an action due to a party's failure to prosecute without issuing advance warnings or lesser sanctions." *Santos*, 1997 Guam 4 ¶ 10. "The trial court is not required to impose lesser sanctions, when the rules do not so provide, and when to do so would encourage neglect and noncompliance with the Guam Rules of Civil Procedure." *Id.* The trial court considered whether to impose lesser sanctions but concluded that "the imposition of a lesser sanction than dismissal would condone and promote the inaction and delay of [Park]." ER at 118 (Dec. & Order, Mar. 9, 2009). A trial court is not

required to examine every single alternate remedy in deciding if sanction of dismissal is appropriate. *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976). Rather, "[t]he reasonable exploration of possible and meaningful alternatives is all that is required." *Id.* Park made no filings after the notice of deposition and failed to timely file an opposition to the motion to dismiss. Park also failed to appear at the motion hearing even though she requested oral argument and did not offer reasonable alternate sanctions. Park's actions suggest that less drastic sanctions would fail. This, coupled with the almost frivolous reasons further advanced by Park for her inaction, substantiates the court's conclusions on the effect of lesser sanctions.

[25] Weighing all of these factors, we do not have a definitive and firm conviction that the court below committed a clear error of judgment in granting the Rule 41(b) dismissal for failure to prosecute. Park failed to carry the burden of establishing the reasonableness of the delay and failed to rebut the presumption of prejudice arising from such delay. *Santos*, 1997 Guam 4 ¶ 11. Although dismissal is a harsh penalty, the court weighed the necessary factors before dismissing the action and application of these factors support dismissal. Therefore, the court did not abuse its discretion in dismissing the action under Rule 41(b).

B. Failure to File At-issue Memorandum

[26] Park provides no arguments in her opening brief addressing whether Rule 7(D) warrants dismissal. Instead, Park primarily argues the trial court misapplied the factors in *Santos v. Carney*, 1997 Guam 4. Kawashima however, contends that this court need not address whether the trial court misapplied the *Santos* factors because Park's failure to file an at-issue memorandum was a *per se* violation of Rule 7(D) which "by itself justified dismissal under the Rules of Court and the Rules of Civil Procedure . . . ." Appellee's Br. at 16 (Oct. 1, 2009).

[27] The motion to dismiss under Rule 41(b) was filed by Kawashima in March 2007, and a motion hearing was held in May 2008. The court issued its decision in March 2009. At the time the motion was filed, the prior Rule 7(D) and Rule 41(b) of the Guam Rules of Civil Procedure were in effect. The trial court recognized that the Guam Rules of Civil Procedure and Local Rules of the Superior Court were amended in June 2007 but applied the prior Rule 7(D) because at the time the case was initially filed in December 2004, the 2007 rules had not been promulgated. The Supreme Court of Guam Promulgation Order Number PRM06-006-02, which promulgated the revised Guam Rules of Civil Procedure and Local Rules of the Superior Court, makes clear that the 2007 revised rules apply to all actions, cases and proceedings brought after the Rules take effect pursuant to the terms of the Promulgation Order. The 2007 revised rules also apply to all actions, cases and proceedings commenced prior to the effective date of June 1, 2007, except to the extent that application of the Guam Rules of Civil Procedure or the Local Rules of the Superior Court of Guam to those pending actions, cases and proceedings would not be feasible, or would work injustice. Prom. Ord. No. PRM06-006-02, May 31, 2007. In such an event, the prior valid Guam Rule of Civil Procedure or Rule of the Superior Court of Guam shall apply. *Id.*

[28] The trial court's Decision and Order contains no analysis or determination that the use of the 2007 rules would not be feasible or would work injustice, such that the prior rules should apply. The trial court simply applied the prior Rule 7(D) because the case was filed in December 2004. This was in error. Moreover, even if the prior Rule 7(D) applied, we have already held that application of such rule does not warrant a per se dismissal. *See Lujan v. Lujan,* 2002 Guam 11 ¶ 13 ("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."). The trial court should not have held that dismissal was required because Park's failure to file the at-issue memorandum pursuant to the rules in effect in 2005 constituted a *per se* failure to prosecute. Nevertheless, this holding was harmless and dismissal was still proper under Rule 41(b).

III. CONCLUSION

[29] In sum, the application of the *Santos* factors supports involuntary dismissal of the action under GRCP 41(b) and the trial court did not abuse its discretion in concluding that dismissal for failure to prosecute was warranted. The trial court did not make any finding that the current Local Rules of the Superior Court would not be feasible or would work injustice and instead applied the prior Rule 7(D). It was error for the trial court, in applying prior Rule 7(D), to conclude that Park's failure to file an at-issue memorandum constituted a *per se* dismissal. However, such error was harmless and dismissal was still appropriate under Rule 41(b). Therefore, the judgment of dismissal is **AFFIRMED.**

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice