IN THE SUPREME COURT OF GUAM

GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Plaintiff-Appellant,

v.

AFFORDABLE HOME BUILDERS, INC., dba GUAM CONCRETE BUILDERS, THOMAS V.C. TANAKA and JANE C. TANAKA,
Defendants-Appellees.

OPINION

Cite as: 2013 Guam 12

Supreme Court Case No. CVA12-025
Superior Court Case No. CV0841-01

Appeal from the Superior Court of Guam
Argued and submitted on February 14, 2013
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Presiding Justice[1]; KATHERINE A. MARAMAN, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

MARAMAN, J.:

[1] Plaintiff-Appellant Guam Economic Development Authority ("GEDA") appeals from a decision and order dismissing the case against Defendants-Appellees Affordable Home Builders, Inc., dba Guam Concrete Builders, Thomas V.C. Tanaka, and Jane C. Tanaka (collectively "AHB"). GEDA argues that the trial court abused its discretion when ordering involuntary dismissal of GEDA's civil action against AHB for failure to prosecute. GEDA's main argument is that the trial court erroneously applied relevant law and reached an incorrect conclusion of law. Additionally, GEDA argues that the court should have considered lesser sanctions before imposing the extreme sanction of dismissal.

[2] We hold the trial court did not abuse its discretion and affirm dismissal.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On May 17, 2001, GEDA filed its original complaint against AHB. Record on Appeal ("RA"), Compl. at 1-5 (May 17, 2001). In its amended complaint filed three months later, GEDA alleged eight causes of action, including breaches of contract, foreclosure of security interests, and fraud. Trial for this case was rescheduled on at least ten occasions, often at the request of AHB.[2] The most recent trial date was scheduled for February 2008 but was removed

[1] Associate Justice Robert J. Torres, as the senior member of the panel, was designated Presiding Justice.

[2] Trial was rescheduled three times by stipulation of the parties. Trial was also rescheduled twice at AHB's request. GEDA did not oppose AHB's motion for continuance in May of 2007 when their counsel required immediate off-island medical care. On at least one occasion, GEDA moved for a continuance at the behest of AHB. Moreover, as GEDA points out in its objection to the court's notice of pending dismissal, on at least one occasion GEDA filed a motion opposing a request to postpone trial.

from the calendar.[3] Since then, GEDA has not requested a new trial or filed any motions that would progress the case.

[4] On May 6, 2010, the trial court notified GEDA that, absent a written showing of good cause filed at least five days before July 23, 2010, the trial court would dismiss its case against AHB pursuant to Guam Rules of Civil Procedure ("GRCP") Rule 41 and the court's "inherent authority to control it's [sic] docket by entry of an order." RA, Notice of Pending Dismissal for Lack of Prosecution at 1 (May 6, 2010). GEDA failed to file a written statement of good cause on or before the deadline.

[5] Almost three months after that deadline, GEDA filed an objection to dismissal, arguing that dismissal was not warranted under GRCP Rule 41. In response, AHB filed a memorandum in support of the court's notice of pending dismissal. Subsequently, the trial court issued a decision and order dismissing GEDA's complaint pursuant to GRCP Rules 41(b) and 78 as a result of GEDA's failure to prosecute its case. GEDA filed a timely notice of appeal.

II. JURISDICTION

[6] This court has jurisdiction over this appeal pursuant to the following statutes: 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-12 (2013)); 7 GCA §§ 3107(b), 3108(a) (2005); and 7 GCA § 25102(b) (2005).

III. STANDARD OF REVIEW

[7] Dismissal for failure to prosecute under GRCP Rule 41(b) is reviewed for an abuse of discretion. *Quitugua v. Flores*, 2004 Guam 19 ¶ 12.

[3] In a stipulation and order signed by the trial judge on February 6, 2008, the parties agreed to vacate the motions hearing scheduled for February 8, 2008 in advance of the bench trial date set for February 22, 2008. *See* RA, Stipulation & Order at 1 (Feb. 6, 2008) ("The basis of this stipulation is as follows: 1. The parties are beginning substantial settlement negotiations; 2. Peter F. Perez is now the new counsel for Thomas V.C. Tanaka and Jane C. Tanaka; and 3. *No prejudice will be suffered by any party as a result of this stipulation.*" (emphasis added)).

[8] "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." *Id.* (citations omitted). But we will not reverse the trial court's decision unless we have 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." *Id.* ¶ 37 (citations omitted).

IV. ANALYSIS

[9] GEDA argues that the trial court abused its discretion when dismissing GEDA's case against AHB for failure to prosecute. Appellant's Br. at 8 (Sept. 10, 2012). In particular, GEDA contends that the trial court erroneously applied the five relevant factors listed in *Santos v. Carney* and reached an incorrect conclusion of law, and that the trial court should have considered lesser sanctions before dismissing the case. *Id.*; *see also Santos v. Carney*, 1997 Guam 4 ¶ 5. AHB argues that the trial court did not abuse its discretion when dismissing the underlying civil action because the records in both this case and a related case contain evidence on which the trial court could have rationally based its decision, because the trial court's decision was not based upon erroneous conclusions of law, and because the trial court did not commit a clear error of judgment in reaching its conclusions after weighing the five *Santos* factors. *See* Appellees' Br. at 12 (Oct. 10, 2012). Furthermore, AHB contends that the availability of lesser sanctions does not, in itself, preclude dismissal when warranted. *See id.* at 17-18.

A. Whether Dismissal was Warranted under GRCP Rule 41(b).

[10] The central issue on appeal is whether the trial court abused its discretion when dismissing GEDA's case against AHB for failure to prosecute under GRCP Rule 41(b). GRCP Rule 41(b) provides:

> Involuntary Dismissal: Effect Thereof. 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. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Guam R. Civ. P. 41(b).

[11] We have previously noted that the Guam Rules of Civil Procedure do not delimit what constitutes a failure to prosecute sufficient to warrant dismissal. *See Santos*, 1997 Guam 4 ¶ 5. Instead, we have employed the following five-factor test to determine whether dismissal is appropriate under GRCP Rule 41(b):

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.

Id. (citing *Eisen v. CoBen*, 31 F.3d 1447, 1451 (9th Cir. 1994)). According to the trial court, in deciding whether to dismiss a case for failure to prosecute under GRCP Rule 41(b), the trial court must first find the existence of at least one of these five factors, and then the court should review the particular circumstances of the case to see whether there has been "a pattern of delay or consistent disobedience of the orders of the court." *See* RA, Dec. & Order at 4 (May 29, 2012); *Park v. Kawashima*, 2010 Guam 10 ¶ 10 ("Dismissal is appropriate if at least four factors favor dismissal or three factors 'strongly' support dismissal." (citing *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999))).

[12] GRCP Rule 41(b) was derived from its federal analog, housed in the Federal Rules of Civil Procedure ("FRCP"), which is also denominated as Rule 41(b). *Compare* Guam R. Civ. P. 41(b), *with* Fed. R. Civ. P. 41(b). Accordingly, in addition to the five-factor *Santos* test, this

court may consider persuasive case law from other jurisdictions interpreting FRCP Rule 41(b) when reviewing the trial court's decision and order dismissing GEDA's complaint. *See Santos*, 1997 Guam 4 ¶ 4 ("The Ninth Circuit has afforded Guam courts great latitude in interpreting a Guam Rule of Civil Procedure identical to a federal rule, but which relates to the establishment of general standards of litigation conduct." (citing *Lynn v. Chin Heung Int'l, Inc.*, 852 F.2d 1221, 1222-23 (9th Cir. 1988))).

[13] The Ninth Circuit court does not review delay in a vacuum and refrains from dismissing a case under FRCP Rule 41(b) for failure to prosecute when the delay is reasonable. *See, e.g.*, *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir. 1980) ("We recognize that neither delay nor prejudice can be viewed in isolation. . . . [O]nly unreasonable delay will support dismissal for lack of prosecution, and unreasonableness is not inherent in every lapse of time." (citation omitted)); *McKeever v. Block*, 932 F.2d 795, 797 (9th Cir. 1991) (holding district court may sua sponte dismiss action for failure to prosecute but case should be dismissed only for unreasonable failure to prosecute).

[14] Other courts have adopted their own panoply of standards for determining what constitutes an unreasonable delay, but thematically it suffices if one party has disobeyed the court's orders repeatedly. *See, e.g.*, *Edwards v. Harris Cnty. Sheriff's Dep't*, 864 F. Supp. 633, 637 (S.D. Tex. 1994) ("Only an 'unreasonable' delay will support a dismissal for lack of prosecution. A delay is unreasonable if there is a significant period of total inactivity by the plaintiff, the plaintiff fails to adhere to repeated warnings that a dismissal will result from continued failure to proceed, or the plaintiff fails to obey court rules and court orders." (citations omitted)); *Adams v. Trs. of the N.J. Brewery Emps.' Trust Fund*, 29 F.3d 863, 871 (3d Cir. 1994)

(affirming dismissal for lack of prosecution despite lack of advance formal notice where litigant had otherwise adequate notice of dismissal and opportunity to explain four-year delay).

[15] In order to warrant dismissal for failure to prosecute, the record of delay should be clear. *See, e.g.*, *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (noting dismissal is considered a "draconian" sanction to be imposed only where failure to comply with orders of the court, the record of delay, contumacious conduct, or prior failed sanctions are clear). Courts have held that conduct that occurs only once or twice will not suffice. *See, e.g.*, *Briscoe v. Klaus*, 538 F.3d 252, 261 (3d Cir. 2008). Moreover, in assessing dilatoriness, courts should consider a party's conduct over the course of the entire case. *Opta Sys., LLC v. Daewoo Elecs. Am.*, 483 F. Supp. 2d 400, 405 (D.N.J. 2007).

[16] We review the trial court's decision in this case under an abuse of discretion standard. *See Quitugua*, 2004 Guam 19 ¶ 12. When the trial court makes specific findings as to each factor, we must give due deference to the trial court for matters lying within its discretion, and only consider whether the trial court abused its discretion when finding that a case is unreasonably delayed. *See Santos*, 1997 Guam 4 ¶ 5.

1. *Santos* Factor #1: Public's interest in expeditious resolution of litigation

[17] The first *Santos* factor for this court to consider is the public's interest in the expeditious resolution of litigation. *Id.* ¶ 5. We have previously held that this interest in expediently resolving cases always favors dismissal. *See Quitugua*, 2004 Guam 19 ¶ 18 (citing *Yourish*, 191 F.3d at 990).

[18] In evaluating this first factor, we are tasked with calculating the cumulative length of delay attributable to the plaintiff and examining whether the plaintiff failed to pursue the case

diligently and did so for reasons that do not amount to good cause. *See Kawashima*, 2010 Guam 10 ¶¶ 13-14; *Santos*, 1997 Guam 4 ¶ 7 ("The fact that the Appellant filed a delinquent response to the discovery request is not indicative of any prosecutorial zeal and cannot be considered to excuse the delay in prosecuting the action."). The onus falls on the plaintiff to move the case along. *See In re Estate of Concepcion v. Siguenza*, 2003 Guam 12 ¶ 17; *West v. City of New York*, 130 F.R.D. 522, 524 (S.D.N.Y. 1990) ("It is plaintiff's obligation to move his case to trial, and should he fail to do so in a reasonable manner, his case may be dismissed with prejudice as a sanction for his unjustified conduct." (interpreting FRCP Rule 41(b))).

[19] This first factor does not require us to stencil a bright-line rule to be applied automatically or mechanically. *See Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) (interpreting FRCP Rule 41(b)). The fact that a lengthy amount of time has passed from the filing of the complaint until the motion to dismiss does not warrant dismissal when the plaintiff has pursued her case diligently throughout. *See Cherry v. Brown-Frazier-Whitney*, 548 F.2d 965, 969 (D.C. Cir. 1976) ("[S]peed simply for the sake of speed is not the purpose to be served [by the rule allowing dismissal for failure to prosecute]." (interpreting FRCP Rule 41(b)) (footnote omitted)); *Lujan v. Lujan*, 2002 Guam 11 ¶ 19 ("Review of the case law shows the general acceptance among jurisdictions that active prosecution after inactivity will cure a failure to prosecute.").

[20] In its decision and order, the trial court expressed that the record reflects GEDA's failure to move this case forward in its twelve-year pendency, and that from 2008 onwards, GEDA took no action that could be deemed "prosecutorial." RA, Dec. & Order at 5. The court also noted that the time standards outlined by Supreme Court of Guam Administrative Rule 06-001 became

effective on September 15, 2006. *Id.* In addition, the court disagreed with GEDA's implied contention that its efforts to negotiate a settlement should excuse its delay in resolving this matter. *See id.* at 6 ("Even if the parties mutually engaged in thorough settlement negotiations, the Court is not privy to such negotiations, the talks are not made on the record, and they have very little effect on Plaintiff's burden to advance their claims in court."). Finally, the court acknowledged that while GEDA has filed a few attorney withdrawals and stipulations to continue trial since 2007, few other filings have been submitted, and therefore in light of its crowded docket and the substantial and unjustified five-year period of inactivity, the court deemed the failure to prosecute this case "unreasonable." *Id.*

[21] GEDA argues that in order to properly analyze whether it shirked its responsibility to advance the litigation expeditiously we should only consider the period between the last scheduled trial date in February 2008 and the court's notice of pending dismissal issued in February 2010, a period of approximately twenty-seven months. Appellant's Br. at 13. GEDA emphasizes that there was "certainly activity prior to February 2008," and that the parties had agreed that a further continuance would not be prejudicial. *Id.* Additionally, GEDA notes that the February date was vacated to allow for AHB's new counsel to familiarize himself with the case. *See id.* ("To the extent delay arose because of AHB's counsel's need to educate himself in the case, that delay ought not to be laid at GEDA's feet.").

[22] In regards to the effect of negotiations, GEDA argues that it should not be punished where both parties agreed to vacate the trial dates to allow for settlement negotiations. *Id.* at 14. GEDA acknowledges that the court was not privy to the settlement negotiations, but suggests that it had some evidence that negotiations were taking place, sufficient for the court to find the

existence of "continued prosecutorial intent." *Id.* GEDA also provides persuasive authority as support for its position that a failure to advise the court of ongoing settlement negotiations during a 22-month period may be foolhardy but should not "warrant the fatal response of dismissal." Appellant's Reply Br. at 5 (Oct. 24, 2012) (citing *GCIU Emp'r Ret. Fund v. Chi. Tribune Co.*, 8 F.3d 1195 (7th Cir. 1993)).

[23] In support of the court's prospective dismissal, AHB counters GEDA's argument by submitting that the record contains evidence on which the trial court could have rationally based its decision. Appellees' Br. at 18. AHB highlights that, after February 2008, GEDA did not request a date for trial to be rescheduled, nor did it file any motions or take other action to prosecute the case. *Id.* Moreover, they aptly point out that GEDA did not meet the court's explicit deadline for showing written good cause as to why the case should not be dismissed, after receiving an explicit notice from the court of the potential consequence of dismissal for failure to do so. *Id.*

[24] As for the effect of settlement negotiations, AHB echoes the court's reasoning that settlement negotiations, "even when conducted in earnest," do not excuse GEDA from the need to pursue its case diligently or supply GEDA with good cause for delay. *Id.* at 20. They argue that, instead, the blame should rest with GEDA for delay, since GEDA controls the advancement of its claims. *See id.* ("Advancement of [GEDA's] claims to resolution is within [GEDA's] control, and the avoidance of prosecution of its claims to a resolution at trial is the reason that a final resolution has not been reached.").

[25] In reviewing these arguments, we reiterate our previously-held position that trial judges are "best situated to determine when delay in a particular case interferes with docket

management and the public interest" and that the "public's interest in expeditious resolution of litigation always favors dismissal." *Quitugua*, 2004 Guam 19 ¶ 18. Consequently, we give deference to the trial court in determining the reasonableness of the delay because the trial court "is in the best position to determine what period of delay can be endured before its docket becomes unmanageable." *Kawashima*, 2010 Guam 10 ¶ 11 (internal quotation marks omitted).

[26] When analyzing the effect of settlement negotiations in particular, we are mindful of the parameters we have previously set. As GEDA points out, settlement efforts may constitute excusable delay under GRCP Rule 41(b). *See* Appellant's Br. at 14 (citing *Kawashima*, 2010 Guam 10 ¶ 14). Nevertheless, while some delay in prosecuting a case may be attributable to settlement negotiations, we have recognized that "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." *See Kawashima*, 2010 Guam 10 ¶ 16 (quoting *Cox v. Cox*, 976 So. 2d 869, 875 (Miss. 2008)). In short, we have previously held that delays caused by settlement negotiations do not offer "compelling reasons" to avoid dismissal. *Id.* (citation omitted).

[27] Finally, in reviewing the effect of GEDA's failure to show good cause in writing in response to the court's explicit request, we recognize that this failure does not automatically warrant dismissal, but that it can provide strong grounds to dismiss. *See Vega-Encarnacion v. Babilonia*, 344 F.3d 37, 40 (1st Cir. 2003) (holding a litigant's tardy response to motion to dismiss does not automatically result in dismissal for failure to prosecute). *But see Cintron-Lorenzo v. Departamento de Asuntos del Consumidor*, 312 F.3d 522, 526 (1st Cir. 2002) (upholding dismissal for failure to prosecute under abuse of discretion standard given protracted

and largely unexplained noncompliance beyond time limits imposed by standing rules and specific orders and "in the teeth of explicit warnings").

[28] Therefore, the first *Santos* factor strongly favors dismissal in this case.

2. *Santos* Factor #2: Court's need to manage its docket

[29] The second *Santos* factor concerns the court's need to manage its docket. *Santos*, 1997 Guam 4 ¶ 5. This second factor should be evaluated in conjunction with the first *Santos* factor as a concomitant concern over judicial economy. *Id.* ¶ 7.

[30] We have previously deferred to the trial court's decision to utilize a motion to dismiss made pursuant to GRCP Rule 41(b) as a proper docket management tool. *Id.* ¶ 4. Again, the trial court is in the best position to determine what period of delay can be endured before its docket becomes unmanageable. *Kawashima*, 2010 Guam 10 ¶ 11 (quoting *Eisen*, 31 F.3d at 1451); *see also Reyes v. First Net Ins. Co.*, 2009 Guam 17 ¶ 22 ("Although the rule is phrased in terms of dismissal on the motion of the defendant, it is clear that the power is inherent in the court and may be exercised *sua sponte* whenever necessary to 'achieve the orderly and expeditious disposition of cases.'" (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962))).

[31] GEDA argues that the court failed to balance its calendar management against GEDA's procedural rights when it conclusively stated that it had a crowded docket without showing specifically how this case contributed to the congestion. *See* Appellant's Br. at 15 ("Litigants are entitled to their day in court unless they have abandoned their cause. If they are deprived [of] the justice they seek merely because the case lingers, then they are being punished for a contumaciousness simply not present in this record.").

[32] Despite the lack of actual evidence that this case contributed to congestion, we are nonetheless required to give deference to the trial court's actual determination of the effect of delay on its docket management, due to its superior position in making that judgment and in light of its inherent authority to utilize GRCP Rule 41(b) as a proper docket management tool.

[33] Therefore, the second *Santos* factor strongly favors dismissal.

3. *Santos* Factor #3: Risk of prejudice to the defendants

[34] The third *Santos* factor asks the court to evaluate the risk of prejudice to the defendants posed by the delay in the case. *Santos*, 1997 Guam 4 ¶ 5. The plaintiff is charged with the task of moving its case along, and "once a delay is determined to be unreasonable, prejudice . . . is presumed." *See Kawashima*, 2010 Guam 10 ¶ 21 (quoting *Santos*, 1997 Guam 4 ¶ 8). As such, the plaintiff must show that the delay is reasonable and that the defendant is not prejudiced by the delay. *Id.* ¶ 11. If the plaintiff offers a reasonable excuse for the inaction, the burden then shifts to the defendant who must demonstrate prejudice. *Id.*

[35] We have previously recognized the policy undergirding this factor, which is that unnecessary delay "inherently increases the risk that memories will fade and evidence will become stale." *Quitugua*, 2004 Guam 19 ¶ 19 (citing *Sibron v. New York*, 392 U.S. 40, 57 (1968)). We have also held that this presumption of prejudice, left untreated without rebuttal, is sufficient to warrant dismissal under GRCP Rule 41(b). *Kawashima*, 2010 Guam 10 ¶ 21 (citing *Santos*, 1997 Guam 4 ¶ 8).

[36] Some jurisdictions have required that the prejudice resulting from delay be severe. *See Gardner v. United States*, 211 F.3d 1305, 1309 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001) ("Prejudice . . . must be so severe[ ] as to make it unfair to require the other party to

proceed with the case." (alteration in original) (internal quotation marks omitted)). Others have required significant prejudice that is causally connected to the plaintiff's conduct. *See Nealey*, 662 F.2d at 1281 ("[A] district court in the exercise of its discretion should consider whether such losses have occurred and if so, whether they are significant. Not every loss, and particularly not every loss of memory, will prejudice the defense of a case. . . . Rather, the loss must in some way be causally related to the plaintiff's conduct."); *Carter v. Ryobi Techtronics*, 250 F.R.D. 223, 229 (E.D. Pa. 2008) (holding prejudice sufficient to warrant dismissal for lack of prosecution encompasses irretrievable loss of evidence, inevitable dimming of witnesses' memories, excessive and possibly irremediable burdens or costs imposed on opposing party, deprivation of information through non-cooperation with discovery, and costs expended obtaining court orders to force compliance with discovery). Still other jurisdictions have held that this factor, prejudice to the defendant, comes into play when there exists only moderate or excusable neglect on the part of the plaintiff in advancing the litigation. *See Charles Labs, Inc. v. Banner*, 79 F.R.D. 55, 57 (S.D.N.Y. 1978).

[37] In its objection to dismissal, GEDA argued that no prejudice would be suffered by the defendants because the human defendants were still alive and residing on Guam, and because the corporate defendant was still functioning on Guam. RA, Objection to Dissmissal [sic] of Lack of Prosecution & Mem. P. & A. at 4. GEDA also represented that all documents, exhibits, and witnesses were readily available for trial, and that in fact GEDA is the party prejudiced by the delay, because GEDA tried to sell the property at issue to no avail and eventually bid on the property. *Id.* By contrast, AHB averred that they suffered actual prejudice resulting from GEDA's delay in prosecuting its case. RA, Mot. & Mem. Supp. Court's Mot. Dismiss for

Failure to Prosecute & Opp'n Pl.'s Reply at 11 (Oct. 25, 2010) ("Thirteen (13) years later and almost nine years after filing of this action without prosecution, [GEDA] wants the [c]ourt to believe no prejudice has occurred. Defendants have been . . . prejudiced by the death of one witness and the relocation of another.").

[38] The trial court found that AHB was presumptively prejudiced by the delay in this case, and therefore found that this third *Santos* factor also weighs in favor of dismissal. RA, Dec. & Order at 6.

[39] On appeal, GEDA argues that while unreasonable delays raise a presumption of prejudice, that presumption is rebuttable and this court should find that GEDA successfully rebutted the presumption for two reasons. Appellant's Br. at 16. First, GEDA draws attention to AHB's assertion that vacating the trial dates in 2008 to allow for negotiations and for their new counsel to familiarize himself with the case "would not be prejudicial." *Id.* (citing RA, Stipulation & Order at 1 (Feb. 6, 2008)). Second, GEDA presents case law to support its proposition that the presumption of prejudice is rebutted where the defendants have sought delay. *Id.* (citing *Nita v. Conn. Dep't of Envtl. Prot.*, 16 F.3d 482, 486 (2d Cir. 1994)).

[40] In support of the trial court's decision, AHB reminds us that the burden is on the plaintiff to show that the defendant is not prejudiced by the delay, and that presumed prejudice that is not rebutted is sufficient to support dismissal under Rule 41(b). Appellees' Br. at 16-17 (citing *Santos*, 1997 Guam 4 ¶¶ 3-4).

[41] As discussed, we previously held that a presumption of prejudice arises out of unreasonable delay in prosecution because such delay inherently increases the risk that memories will fade and evidence will become stale. *See Quitugua*, 2004 Guam 19 ¶ 19 (citing *Sibron*, 392

U.S. at 57). In this case, not only did GEDA leave the presumption of prejudice without sufficient rebuttal, but were we to find that the burden shifted to AHB, we note that AHB did make a showing in the record of actual prejudice in the form of lost evidence suffered as a result of unreasonable delay.

[42] Therefore, the third *Santos* factor favors dismissal.

4. *Santos* Factor #4: Public policy favoring the disposition of cases on their merits

[43] The fourth *Santos* factor concerns the public policy favoring the disposition of cases on their merits. *Santos*, 1997 Guam 4 ¶ 5. We previously held that, even when a motion to dismiss is unopposed, the court is obligated to determine issues on their merits. *See Mano v. Mano*, 2005 Guam 2 ¶ 14 (citing *Quitugua*, 2004 Guam 9 ¶ 28). On the other hand, we have also held that the public policy of determining cases on their merits "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." *Kawashima*, 2010 Guam 10 ¶ 23 (quoting *Santos*, 1997 Guam 4 ¶ 9). Notwithstanding the policy favoring disposition on the merits, the plaintiff must move towards that disposition at a reasonable pace. *See id.* (citing *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991)). In other words, this factor must be balanced against the first two *Santos* factors. *See Kawashima,* 2010 Guam 10 ¶ 22 (holding policy favoring resolution of cases on their merits "must be weighed against the first two factors, the expeditious resolution of litigation and the court's need to manage its docket." (quoting *Siguenza*, 2003 Guam 12 ¶ 23)).

[44] The trial court found that the policy favoring determination of cases on their merits did not justify the delay and prejudice caused by GEDA's inaction. RA, Dec. & Order at 7. In its objection to dismissal, GEDA stated that this general policy favoring review of the merits is

particularly applicable in this case because this case involves the recovery of Government of Guam funds from a debtor, so to dispose of this case not on the merits would be a "disservice to the entire island." RA, Objection to Dissmissal [sic] of Lack of Prosecution & Mem. P. & A. at 4. Also, in its opening brief, GEDA argues that in analyzing this fourth factor, the trial court was required to "explore the existence of actual prejudice," rather than merely relying on presumed prejudice. Appellant's Br. at 17; *see also id.* ("If presumed prejudice of itself were sufficient, there would [be] nothing to weigh and the factor would always outweigh public policy." (internal quotation marks omitted)). AHB counters by parroting the point addressed in *Santos*, that the policy favoring adjudication on the merits "should not be used as a shield by a passive plaintiff who has failed in his obligation to prosecute the defendants with the vigor expected of a plaintiff." Appellees' Br. at 17 (citing *Santos*, 1997 Guam 4 ¶ 9).

[45] We previously held that even when the fourth *Santos* factor does not favor dismissal, that consideration can be outweighed by the other four factors, should they support dismissal. *See Quitugua*, 2004 Guam 19 ¶ 20. More recently, we reaffirmed that the fourth factor can be outweighed by the first two factors alone. *See Kawashima*, 2010 Guam 10 ¶ 22.

[46] Therefore, standing alone, this fourth *Santos* factor militates against dismissal, but it is still subject to a weighing of the other factors.

5. *Santos* Factor #5: Availability of less drastic sanctions

[47] The fifth and final *Santos* factor concerns the availability of sanctions less drastic than dismissal. *Santos*, 1997 Guam 4 ¶ 5. Dismissal for failure to prosecute is considered a harsh sanction, only to be used in extreme circumstances, such as when there has been a pattern of delay or consistent disobedience of court orders. *See Siems v. City of Minneapolis*, 560 F.3d

824, 826 (8th Cir. 2009). In part, dismissal under Rule 41(b) is considered harsh or drastic because it "operates as an adjudication upon the merits." Guam R. Civ. P. 41(b).

[48] We previously held that "[t]he 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." *Santos*, 1997 Guam 4 ¶ 10; *see also Kawashima*, 2010 Guam 10 ¶ 24 ("A trial court is not required to examine every single alternate remedy in deciding if sanction of dismissal is appropriate." (citing *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976))). The same holds true when the court first issues a warning to the disobedient party, which, when ignored, evinces noncompliance. *See Henderson v. Duncan*, 779 F.2d 1421, 1423-24 (9th Cir. 1986) (recognizing dismissal as harsh sanction to be imposed "only in extreme circumstances" but nonetheless upholding sua sponte dismissal when district court first tried to warn counsel of the consequences of continuing dilatory preparation and these warnings were "crystal clear").

[49] Moreover, as we previously held, a trial court is not required to issue advance warnings before dismissing for failure to prosecute. *See Rapadas v. Benito*, 2011 Guam 28 ¶ 31 (holding it 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 (citing *Santos,* 1997 Guam 4 ¶ 10)).

[50] Other jurisdictions have similarly held that no advance warnings are required when reviewing motions to dismiss under FRCP Rule 41(b). *See, e.g.*, *Rogers v. Kroger Co.*, 669 F.2d 317, 319-20 (5th Cir. 1982) (holding district court has inherent power to dismiss action for failure to prosecute without giving notice to the parties); *Pomales v. Celulares Telefonica, Inc.*,

342 F.3d 44, 49 n.5 (1st Cir. 2003) (noting absence of notice as to possibility of dismissal does not render dismissal void); *Beshear v. Weinzapfel*, 474 F.2d 127, 133 (7th Cir. 1973) (noting same); *Rogers v. Andrus Transp. Servs.*, 502 F.3d 1147, 1152 (10th Cir. 2007) (stating warning not a sine qua non for dismissal and explaining how "constructive notice" objectively based on totality of the circumstances suffices, since "the need to prosecute one's claim (or face dismissal) is a fundamental precept of modern litigation, certainly known to every competent attorney.").

[51] The trial court indicated that, when the court has previously issued sanctions or warnings to the plaintiff, the fifth *Santos* factor may weigh in favor of dismissal. RA, Dec. & Order at 7. GEDA submitted in its dilatory objection to dismissal that "[n]o orders had been set by this court . . . order[ing] the parties to either settle or move to trial or to warn the plaintiff that if no further action occurs that dismissal would be the outcome. RA, Objection to Dissmissal [sic] of Lack of Prosecution & Mem. P. & A. at 4. In support of the court's order, AHB cited a persuasive case, *Lynn v. Chin Heung International, Inc.*, in which the Ninth Circuit Court of Appeals affirmed the decision of the Superior Court of Guam dismissing a complaint pursuant to GRCP Rule 41(b) before warning the plaintiff or considering lesser sanctions. *See Lynn*, 852 F.2d 1221. Here, the trial court was persuaded by the *Lynn* case. *See* RA, Dec. & Order at 7.

[52] In its opening brief, GEDA suggests that the court's notice of intent to dismiss, issued in May 2010, was the first warning, and that "[t]here was no prior warning." Appellant's Br. at 17. GEDA also suggests that while the court is not required to impose lesser sanctions shy of dismissal, that freedom of choice "does not give the trial court *carte blanche* to ignore lesser sanctions." *Id.* at 18. GEDA then proceeded to cite cases from the Second Circuit where the failure to consider lesser sanctions before dismissal resulted in a reversal. *See id.* at 19. GEDA

argues, essentially, that the trial court must at least consider lesser sanctions when choosing not to impose them before dismissal, because only then will the court's dismissal be justified in accordance with the policy supporting the employ of drastic sanctions at the outset. *Id.* at 19-20 ("A requirement to consider lesser sanctions is consistent with this Court's instruction that the trial court need not employ lesser penalties when to do so would encourage neglect and noncompliance with the Guam Rules. This necessarily presupposes a consideration that lesser sanctions (fines, assessment of costs, disciplinary measures against an attorney and the like) would be ineffective.").

[53] AHB underscores that in this case GEDA showed neglect and noncompliance with the court's order. *See* Appellees' Br. at 18 ("GEDA did not file a document in writing, showing good cause why the cause should not be dismissed, as was required by the notice."); *id.* at 21 ("The court has not imposed lesser sanctions but finds that the imposition of a lesser sanction than dismissal would not serve to encourage more haste on the part of [GEDA]. It is plain that [GEDA] has not heeded the court warning."). AHB also cited to decisions from other jurisdictions that stand for the proposition that clear warnings left unheeded may sufficiently justify dismissal before imposing lesser sanctions.

> While the Court could have attempted to obtain plaintiff's cooperation by imposing lesser sanctions . . . it is not our job to re-exercise the trial court's discretion. . . . [A] trial court is entitled to say, under proper circumstances, that enough is enough, and less severe sanctions need [not] be imposes [sic] where the record of dilatory conduct is clear.

RA, Mot. & Mem. Supp. Court's Mot. Dismiss for Failure to Prosecute & Opp'n Pl.'s Reply at 9 (citations and internal quotation marks omitted).

[54] We previously found instructive the decision of the Ninth Circuit Court in *Henderson v. Duncan*, a case involving a dismissal pursuant to the analogous FRCP Rule 41(b). *See Quitugua*, 2004 Guam 19 ¶ 21 (citing *Henderson*, 779 F.2d 1421 (9th Cir. 1986)). In *Henderson*, the Ninth Circuit affirmed the trial court's sua sponte dismissal of a case after the plaintiff failed to comply with a local rule requiring the submission of a pretrial order. *Henderson*, 779 F.2d at 1425. Applying an abuse of discretion standard when affirming the dismissal, the *Henderson* court noted "the [district] court first tried to warn counsel of the consequences of his continuing dilatory preparation. These warnings were crystal clear." *Id.* at 1424.

[55] Subsequent to *Henderson*, we conducted our own balancing test under similar auspices. In *Park v. Kawashima*, we found the trial court did not abuse its discretion when electing to impose dismissal:

> 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).

Kawashima, 2010 Guam 10 ¶ 25.

[56] In this case, a prior warning was issued and ignored.

[57] Therefore, this fifth *Santos* factor strongly favors dismissal.

[58] The trial court deemed unreasonable the failure to prosecute this case, in light of the court's crowded docket and the substantial and unjustified five-year period of inactivity. As discussed, settlement negotiations, however sincere, do not serve as a sacred talisman. Evaluating the five *Santos* factors on balance, we find that factors one, two, and five strongly

favor dismissal, factor three moderately favors dismissal, and only factor four militates against dismissal. Thus, after weighing these five *Santos* factors, we agree with the trial court and hold that dismissal was warranted under GRCP Rule 41(b).

B. Whether Dismissal was Warranted Due to Dismissal of a "Related Case."

[59] In their response brief, AHB seeks to entwine the outcome of this case with the fate of a "related" case, CV0653-06, which involved "the same or related parties, the same or related transactions or events, and . . . the same or closely related issues." *See* Appellees' Br. at 3 n.1 ("Plaintiff did not appeal the dismissal issued in CV0653-06 so that the case is not a 'related case' as that phrase is defined . . . however, it is part of the context in which the trial court determined to dismiss both cases."). GEDA counters in its reply brief that it would amount to clear error of judgment for the trial court to dismiss this case by taking into consideration the procedural history of CV0653-06, since dismissal under GRCP Rule 41(b) "should be analyzed in light of the circumstances and facts of a particular case" and the courts should not apply a party's action (or inaction) in one case to its analysis for dismissal in another. *See* Reply Br. at 2-3 (citing *Santos*, 1997 Guam 4 ¶ 7). Moreover, GEDA aims to distinguish the two civil cases on the basis that a prior warning was given in CV0653-06, which was not heeded by the parties, while no such warning was violated here. *Id.* at 3.

[60] In considering whether the outcome of CV0653-06 should be dispositive of, or otherwise affect the outcome in this case, we note that case law directs us to ignore the related case. Courts in other jurisdictions have held that "[n]o exact rule can be laid down as to when a court is justified in dismissing a case for failure to prosecute" and "[e]ach case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal." *Sandee*

Mfg. Co. v. Rohm & Haas Co., 298 F.2d 41, 43 (7th Cir. 1962); *see also Doyle v. Murray*, 938 F.2d 33, 34-35 (4th Cir. 1991) (holding counsel's conduct in unrelated litigation did not justify dismissal for failure to prosecute as sanction).

[61] In short, a related case has no bearing on whether the trial court was warranted in its decision to dismiss this case for failure to prosecute. Instead, the outcome of this case rests with the discretionary determination made by the trial court, after balancing the five *Santos* factors and considering judicial economy, that this case should be dismissed.

V. CONCLUSION

[62] The trial court did not abuse its discretion and correctly dismissed GEDA's case against AHB for failure to prosecute under GRCP Rule 41(b) after weighing the five relevant *Santos* factors. For the foregoing reasons, we **AFFIRM** the order issued below dismissing the civil action underlying this appeal.

Original Signed By: Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Richard H. Benson

RICHARD H. BENSON
Justice, *Pro Tempore*

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Presiding Justice