

FILED

2014 AUG 14 PM 12: 58

SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

GALEN LUJAN, JOSE OKADA and ALICIA L. OKADA,
Plaintiffs-Appellants,

v.

BRANT T. McCREADIE and DINA C. McCREADIE,
Defendants-Appellees.

Supreme Court Case No. CVA13-019
Superior Court Case No. CV0831-10

OPINION

Cite as: 2014 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted February 17, 2014
Dededo, Guam

Appearing for Plaintiffs-Appellants:

Jacques G. Bronze, *Esq.*
Law Offices of Jacques G. Bronze
Capt. Harmon Plaza Bldg.
272 E. Harmon Industrial Park Rd., Ste. 203
Tamuning, GU 96913

Appearing for Defendants-Appellees:

Minakshi V. Hemlani, *Esq.*
Fisher & Associates
De La Corte Bldg.
167 E. Marine Corps Dr., Ste. 101
Hagåtña, GU 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and ALBERTO E. TOLENTINO, Justice *Pro Tempore*.

TOLENTINO, J.:

[1] Plaintiffs-Appellants Galen Lujan, Jose Okada, and Alicia L. Okada (collectively, “Lujan”) appeal the trial court’s decision to grant Defendants-Appellees Brant T. McCreadie and Dina C. McCreadie’s (collectively, “McCreadie”) motion to dismiss for failure to prosecute. Lujan argues the trial court abused its discretion in granting the motion to dismiss because Lujan did not unreasonably delay the resolution of this matter. Although there were a variety of reasons the prosecution of this case took substantially longer than would have normally been anticipated, we hold that the delay in prosecution cannot be solely attributed to Lujan. For the reasons set forth below, we reverse and remand this case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On June 2, 2010, Lujan filed a complaint against McCreadie for breach of three promissory notes used to secure the payments for the purchase of shares of ASPAC Distributors, Inc. (“ASPAC”). After the complaint was filed, the following is a partial list of activities in the case:

<u>Date</u>	<u>Activity</u>
June 22, 2010	McCreadie filed an answer and counterclaim.
June 24, 2010	This case was assigned to Judge Vernon P. Perez, who, on February 24, 2011, filed his notice of recusal.
July 8, 2010	Lujan filed an answer to McCreadie’s counterclaim.
October 7, 2010	The parties submitted their proposed joint scheduling order.
February 24-25, 2011	Lujan took the depositions of all Defendants.
March 1, 2011	This case was re-assigned to Judge Alberto C. Lamorena III,

who, on August 18, 2011, filed his notice of disqualifying facts. On September 2, 2011, McCreadie filed a motion to disqualify Judge Lamorena, resulting in the court's non-opposition on September 28, 2011.

April 18, 2011 The trial court filed the joint scheduling order which set trial for January 9, 2012.

May 23, 2011 Lujan filed a motion for summary judgment and a notice of hearing for the motion for summary judgment.

September 13, 2011 McCreadie made a settlement counteroffer. Lujan did not respond to the counteroffer.

September 30, 2011 The case was re-assigned to Judge Arthur R. Barcinas. On October 31, 2011, McCreadie filed a motion to disqualify Judge Barcinas, resulting in the court's non-opposition on November 9, 2011.

October 24, 2011 The trial court issued a notice for a status hearing, which was held October 31, 2011.

October 25, 2011 McCreadie withdrew the September 13, 2011 counteroffer, marking the end of the settlement negotiations.

October 28, 2011 McCreadie filed a motion to dismiss for failure to prosecute.

October 31, 2011 At the status hearing, Lujan requested a hearing date for the motion for summary judgment.

December 29, 2011 This case was re-assigned to Judge Anita A. Sukola, who, on January 10, 2012, disqualified herself from the case.

January 10, 2012 First Hawaiian Bank ("FHB") filed a separate complaint for breach of contract against ASPAC, Galen J. Lujan, and Evangeline D. Lujan. The complaint stemmed from Lujan's default on the ASPAC Line of Credit. McCreadie entered a consent judgment on behalf of ASPAC on June 28, 2012.

January 18, 2012 This case was re-assigned to Judge Michael J. Bordallo, who, on March 6, 2012, filed his notice of recusal.

March 7, 2012 This case was re-assigned to Judge Elizabeth Barrett-Anderson, who, on May 18, 2012, filed her notice of recusal.

May 22, 2012 This case was re-assigned to Judge James L. Canto II, who, on June 29, 2012, filed his notice of disqualifying facts. Lujan filed a motion to disqualify Judge Canto. On October 19, 2012, the court issued a decision and order granting Lujan's motion to disqualify Judge Canto.

October 30, 2012	This case was re-assigned to Judge <i>Pro Tempore</i> Richard H. Benson.
January 17, 2013	At a hearing, the trial court decided to treat the motion to dismiss for failure to prosecute separately from the motion for summary judgment, and set the motion to dismiss hearing date for February 27, 2013.
February 13, 2013	Lujan filed an opposition to Defendants' motion to dismiss for failure to prosecute.
February 27, 2013	The trial court heard McCreadie's motion to dismiss for failure to prosecute.
May 24, 2013	The trial court issued a decision and order granting McCreadie's motion to dismiss for failure to prosecute.

[3] Due to conflicts, seven different judges were assigned to and reassigned from this case. Prior to the filing of the motion to dismiss for failure to prosecute, two judges were reassigned, with the remaining five reassignments happening after the motion to dismiss was filed.

II. JURISDICTION

[4] This court has jurisdiction over appeals from final judgments from the Superior Court of Guam. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-125 (2014)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[5] "Dismissal for failure to prosecute under [Guam Rules of Civil Procedure] Rule 41(b) is reviewed for an abuse of discretion." *Guam Econ. Dev. Auth. v. Affordable Home Builders, Inc.*, 2013 Guam 12 ¶ 7 (citing *Quitugua v. Flores*, 2004 Guam 19 ¶ 12). "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.* ¶ 8 (citing *Quitugua*, 2004 Guam 19 ¶ 12). "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.” *Park v. Kawashima*, 2010 Guam 10 ¶ 8 (quoting *Midsea Indus., Inc. v. HK Eng’g, Ltd.*, 1998 Guam 14 ¶ 4) (internal quotation marks omitted).

IV. ANALYSIS

[6] Lujan contends that the trial court erred when it dismissed the case for failure to prosecute pursuant to Guam Rules of Civil Procedure (“GRCP”) 41(b). GRCP 41(b) states, in 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). While the GRCP provide the statutory framework for dismissal based on a failure to prosecute, this court expanded the analysis of GRCP 41(b) in *Santos v. Carney*, 1997 Guam 4. In *Santos*, this court adopted the Ninth Circuit’s five-factor test to determine if dismissal is proper. 1997 Guam 4 ¶ 5. The five factors are: “(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.* (quoting *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 (9th Cir. 1994) (interpreting Federal Rules of Civil Procedure Rule 41(b), after which GRCP 41(b) is modeled)).

[7] The trial court must weigh the factors and make a determination on whether to dismiss the case. *In re Eisen*, 31 F.3d at 1451. In making the determination, “[d]ismissal is appropriate if at least four factors favor dismissal or three factors ‘strongly’ support dismissal.” *Kawashima*, 2010 Guam 10 ¶ 10 (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). “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.” *Guam Econ. Dev. Auth.*, 2013 Guam 12 ¶ 16. “In order to warrant dismissal for failure to prosecute, the record of delay should be clear.” *Id.* ¶ 15. In this case, the trial court applied the *Santos* five-factor test, and we will now examine its consideration and weighing of those factors.

A. The Public’s Interest in Expeditious Resolution of Litigation and the Court’s Need to Manage its Docket

[8] Courts generally merge the first two factors into a single analysis because the public’s interest in expeditious litigation and docket management are similar goals. *Kawashima*, 2010 Guam 10 ¶ 13 (citing *Santos*, 1997 Guam 4 ¶ 7). In determining this first factor, the court must determine if Lujan failed in his obligation to reasonably move the case forward, taking into consideration the length of and reasons for the delay. *See Guam Econ. Dev. Auth.*, 2013 Guam 12 ¶ 18. However, there is no bright-line rule or specified time period that automatically constitutes a failure to prosecute. *See id.* ¶ 19. A mere passage of time does not mandate dismissal, but rather, the delay must be unreasonable. *Id.* ¶ 13 (“[O]nly unreasonable delay will support dismissal for lack of prosecution, and unreasonableness is not inherent in every lapse of time.” (alteration in original) (quoting *Nealey v. Transportacion Maritima Mexicana, S. A.*, 662 F.2d 1275, 1280 (9th Cir. 1980)) (internal quotation marks omitted)).

[9] In its decision and order, the trial court stated that it heard the motion to dismiss on February 27, 2013—more than one year after Lujan’s motion for summary judgment was filed. Record on Appeal (“RA”), tab 77 at 3 (Dec. & Order, May 24, 2013). According to the trial court, Lujan failed to pursue his case after the motion for summary judgment because Lujan did not file an agreement of hearing date or seek to schedule a status conference. *Id.* (stating Lujan’s

efforts to schedule a hearing before the motion was filed do not excuse inactivity after the motion was filed). The court recognized that settlement efforts may constitute reasonable delay but the pendency of negotiations is not an excuse where the delay is unreasonably long or if it continues after the negotiations would not be fruitful. *Id.* The trial court found that settlement negotiations between Lujan and McCreadie do not excuse the delay after October 25, 2011—the date McCreadie withdrew his counteroffer. *Id.* at 3-4. Citing *Ward v. Reyes*, 1998 Guam 1, the trial court further held that judicial delay does not excuse a plaintiff's duty to prosecute an action and judicial disqualifications do not defeat a plaintiff's ability to prosecute. *Id.* In addition, the court stated the delay violates the promulgated time standards for the expeditious resolution of litigation and the efficient administration of justice. Accordingly, the trial court ruled that the delay was unreasonable and it harmed the public's interests, and that the first two factors weighed in favor of dismissal. *Id.*

[10] McCreadie echoes the trial court's sentiments, arguing that the period of inactivity after the motion to dismiss was filed is an unreasonable delay in prosecution. McCreadie acknowledges the settlement negotiations, but argues that Lujan failed to show that the delay from October 25, 2011 (when settlement negotiations in the underlying case ended) to February 27, 2013 (when the trial court heard McCreadie's motion to dismiss) was reasonable. McCreadie further argues that the judicial reassignments should have no bearing on Lujan's ability to prosecute the case.

[11] Careful examination of the facts of this case and our analysis of the trial court's application of the first two *Santos* factors leave us with a definite and firm conviction that the trial court committed a clear error of judgment in concluding that the first two factors weighed in favor of dismissal. The time period considered by the trial court to determine that Lujan failed to

adequately prosecute his case was from the filing of the motion for summary judgment to the date the trial court heard McCreadie's motion to dismiss for failure to prosecute—a period of approximately sixteen months. However, this period was far too expansive. The trial court erred in considering any activity after McCreadie's motion to dismiss was filed. McCreadie's motion for dismissal for want of prosecution pursuant to GRCP 41(b) had its basis upon facts, circumstances, and inactivity at the time the motion was filed. It would be illogical and unfair to consider the merits of the motion to dismiss as including the passage of time or the actions that took place after the motion was filed.¹ To hold otherwise may, *a fortiori*, strengthen or weaken the merits of a motion and distract the trial court from properly considering the substantive virtues of the motion to dismiss based on the facts and circumstances at the time the motion was made. Therefore, McCreadie's GRCP 41(b) motion should be decided based on the merits of the arguments at the time of the filing of the motion, because any activity afterwards is irrelevant to the basis for the motion.

[12] Continuing our analysis, and mindful that the relevant time period to consider whether there had been an unreasonable delay in prosecuting the matter is from the inception of the case until the filing of the motion to dismiss, we observe that the case proceeded normally in its initial stages. Both parties filed complaints and answers and participated in discovery. After the close of discovery, the trial court scheduled trial for January 9, 2012. One month after the trial scheduling, Lujan filed his motion for summary judgment. Until the filing of Lujan's motion,

¹ There may be situations where consideration of a plaintiff's actions after the filing of a motion to dismiss for failure to prosecute may be appropriate, such as when the trial court specifically defers consideration of the motion to dismiss for a period of time to permit a plaintiff to prosecute his case or a plaintiff fails to file an opposition to the motion to dismiss. These circumstances are not present in this case, and there was a pending motion for summary judgment filed by Lujan that had not yet been ruled upon by the trial court and a trial date set.

there was clearly activity in the case. Thus, an argument for dismissal for failure to prosecute would not have been justified before the filing of the motion for summary judgment.

[13] The period between the filing date of Lujan's motion for summary judgment—May 23, 2011—and the filing date of McCreadie's motion to dismiss—October 28, 2011—is approximately five months. Although five months may in certain circumstances be a period of delay sufficient to warrant an allegation of a failure to prosecute, in this case, the trial date was already set for early 2012, and there may not have been any reason for Lujan to further prosecute his case pending trial. It is possible and just as reasonable to believe that Lujan was preparing for trial or elected to not pursue his motion for summary judgment and await trial as an alternative means of disposition.

[14] Moreover, Lujan and McCreadie were engaged in settlement negotiations, which ended only three days before the motion to dismiss was filed. Settlement negotiations do not necessarily absolve a plaintiff of the obligation to diligently prosecute the case; however, the pendency of negotiations may constitute excusable delay depending on the situation. See *Kawashima*, 2010 Guam 10 ¶ 16 (“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.” (citation and internal quotation marks omitted)). Here, the five-month delay is not unreasonably long. Lujan filed a dispositive motion in May and the parties were attempting to settle the case before either a ruling on the motion or the commencement of the trial. Furthermore, the negotiations were not fruitless because Lujan was still considering a counteroffer before it was revoked by McCreadie. The trial court recognized that settlement negotiations could have provided a valid excuse for delay before the counteroffer was withdrawn

on October 25, 2011, but that the time period subsequent could not be excused. RA, tab 77 at 3-4 (Dec. & Order). After the settlement negotiations ended, and before McCreadie's motion to dismiss was filed, only three days passed during which Lujan did not prosecute this case. The failure to prosecute a case for three days cannot be a sufficient period to constitute unreasonable delay in prosecution for purposes of GRCP 41(b).

[15] The delays in this case can also be attributed to other reasons. Lujan's primary defense to McCreadie's motion to dismiss was that the judicial reassignments were the main cause for the delay. The trial court ruled that judicial delay and judicial disqualifications did not excuse Lujan's duty to prosecute this action. *Id.* at 4 (citing *Ward v. Reyes*, 1998 Guam 1 ¶ 23; *McClenithan v. Lovato*, 432 P.2d 836, 838 (N.M. 1967)). Although the courts in *Ward* and *McClenithan* held that judicial delay was not a valid excuse for lack of prosecution under the circumstances of those cases, neither of those courts held that judicial delay could never be a valid excuse. *Ward*, 1998 Guam 1 ¶ 23 ("Ward's counsel blamed the delay on the court, yet Ward fails to realize that as the Plaintiff in the action, Ward herself had a duty to prosecute the matter."); *McClenithan*, 432 P.2d at 837 (explaining that in previous cases before the Supreme Court of New Mexico, "delays caused by disqualification and recusal of judges were held not to bring the case within the exception.").

[16] Throughout its lifespan, eight different judges were assigned to the instant case, and we are particularly concerned by the amount of time it took for judges to decide disqualification motions and for the case to be reassigned. While judicial delay does not automatically relieve a plaintiff of his obligation to prosecute a case, the time it took for the judicial disqualifications to be decided and for judicial reassignments to occur were at least partially responsible for the delay here. Indeed, these delays likely contributed to the violation of the promulgated time

standards for the expeditious resolution of litigation and the efficient administration of justice, which the trial court suggested constituted unreasonable delay.

[17] For the reasons stated above, and contrary to the trial court's findings, the first two factors do not weigh in favor of dismissal.

B. The Risk of Prejudice to the Defendants

[18] This court has previously held that "once a delay is determined to be unreasonable, prejudice . . . is presumed." *Guam Econ. Dev. Auth.*, 2013 Guam 12 ¶ 34 (quoting *Kawashima*, 2010 Guam 10 ¶ 21) (internal quotation marks omitted). Unreasonable delay produces a presumption of prejudice because of the inherent risk of fading memories and the ephemeral nature of evidence. *Id.* ¶ 35; *Quitugua*, 2004 Guam 19 ¶ 19. "If the plaintiff offers a reasonable excuse for the inaction, the burden then shifts to the defendant who must demonstrate prejudice." *Guam Econ. Dev. Auth.*, 2013 Guam 12 ¶ 34. The severity of the prejudice that must be suffered by the defendant varies among different jurisdictions—from severe to moderate or excusable neglect. *Id.* ¶ 36.

[19] In its decision and order, the trial court found presumptive prejudice and ruled the delay was unreasonable. RA, tab 77 at 4 (Dec. & Order) ("Plaintiffs have failed to show that the delay from October 25, 2011, until February 27, 2013, is reasonable."). However, the delay was not unreasonable when taking into consideration the appropriate dates. The time between the filing of the summary judgment motion on May 23, 2011, and October 25, 2011, when McCreadie withdrew the September 13, 2011 counteroffer, was five months, during which period settlement negotiations were ongoing. Between the termination of settlement negotiations and October 28, 2011, the date McCreadie filed the motion to dismiss, a period of only three days elapsed. Thus,

any delay was not unreasonable, and, therefore, prejudice will not be presumed; actual prejudice must be shown.

[20] We acknowledge that McCreadie may have suffered some prejudice as a result of actions taken by Lujan. Subsequent to ASPAC's change in ownership, Lujan defaulted after continuing to borrow against the ASPAC credit line, causing FHB to file a complaint for breach of contract against ASPAC, Galen J. Lujan, and Evangeline D. Lujan. The lawsuit against ASPAC led McCreadie to enter into a consent judgment on behalf of ASPAC. However, we fail to see how the five months from the summary judgment motion to the termination of the settlement negotiations or the three days of non-prosecution before the motion to dismiss was filed, contributed to McCreadie's consent judgment. Although McCreadie argues that there was prejudice, there is no causal connection between the prejudice suffered and the delay. McCreadie's ultimate action of entering into the consent judgment was not caused by the delay. The cause was Lujan's default in payment due on the ASPAC credit line. Thus, McCreadie was not prejudiced by a delay in prosecution of the case, and this factor does not weigh in favor of dismissal.

C. The Public Policy Favoring the Disposition of Cases on Their Merits

[21] Generally, public policy favors the disposition of cases on their merits and disfavors the dismissal of cases prematurely. *Santos*, 1997 Guam 4 ¶ 9. While courts favor disposition of cases on their merits, this factor "should not be used defensively as a shield by a passive [p]laintiff who has failed in his obligation to prosecute the defendants with the vigor expected of a plaintiff." *Guam Econ. Dev. Auth.*, 2013 Guam 12 ¶ 43 (quoting *Kawashima*, 2010 Guam 10 ¶ 23) (internal quotation marks omitted). This factor should be weighed against the first two

factors to determine whether the policy of disposing of cases on their merits justifies the delay. *See Kawashima*, 2010 Guam 10 ¶ 22.

[22] Although courts provide necessary procedural rules that bar certain actions from proceeding to final judgment, ideally all cases should find a resolution based on the merits. *See Guam Econ. Dev. Auth.*, 2013 Guam 12; *Kawashima*, 2010 Guam 10; *Santos*, 1997 Guam 4. This case was not disposed of on its merits, but rather for a want of prosecution. However, as discussed above, the delay in prosecution was five months at the very maximum, but more likely only three days. To deny Lujan an opportunity to resolve this case on the merits because of a three-day delay in prosecution would be clearly unjust. No public policy could favor a rule with such an outcome. Thus, in weighing the public's interest in expeditious resolution of litigation and the court's need to manage its docket versus a three-day delay in prosecution, the court finds that the scale tips in favor of having this case disposed of on its merits.

[23] Moreover, the trial court had an opportunity to dispose of this case on its merits in the same time period it took to rule on the motion to dismiss. The motion for summary judgment was filed five months before the motion to dismiss, and Lujan requested a hearing date at the October 31, 2011 status hearing. However, instead of hearing the motion for summary judgment first—or simultaneously—the trial court elected to only hear the motion to dismiss. Thus, the disposition of this case was not based on a need for an expeditious resolution. The fourth factor does not weigh in favor of dismissal.

D. The Availability of Less Drastic Sanctions

[24] “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.” *Santos*, 1997 Guam 4 ¶ 10. Nor is the trial court required to give a warning of

possible dismissal. *Id.*; see also *Lynn v. Chin Heung Int'l, Inc.*, 852 F.2d 1221, 1222 (9th Cir. 1988). “A trial court is not required to examine every single alternate remedy in deciding if sanction of dismissal is appropriate.” *Kawashima*, 2010 Guam 10 ¶ 24 (citing *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976)). However, courts are strongly encouraged to consider lesser sanctions before dismissal. See *Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500 (9th Cir. 1987) (“While there is no requirement that every conceivable sanction be examined, meaningful alternatives must be explored.”); *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996) (“Dismissal, however, is so harsh a penalty it should be imposed as a sanction only in extreme circumstances.” (citation and internal quotation marks omitted)); see also *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

[25] The trial court ruled that the only way to remedy the period of inactivity in this case is through dismissal. RA, tab 77 at 5 (Dec. & Order) (“Here, the imposition of lesser sanctions, like an award of expenses, shall not meaningfully remedy more than a year of substantive inactivity.”). However, the period of inactivity was not more than a year as the trial court determined. While the imposition of a sanction is not in direct correlation with the period of inactivity, a shorter time period should not draw such a harsh penalty. Inactivity for a period of three days would not necessitate any sanction. If the time period were longer, conceivably a warning, not allowing oral arguments on the summary judgment, or a monetary sanction would be more satisfactory than an outright dismissal.

V. CONCLUSION

[26] The trial court clearly erred in applying and weighing the relevant *Santos* factors by considering an overly expansive period of time and other matters occurring after the motion to dismiss was filed. Once the correct dates are applied, it becomes evident that the delay in

prosecution was not unreasonably long. Because the five factors weigh against dismissal, the motion to dismiss for failure to prosecute should not have been granted. Accordingly, we **REVERSE** and **VACATE** the judgment, and **REMAND** for further proceedings not inconsistent with this opinion.

Original Signed By : F. Philip Carbullido

F. PHILIP CARBULLIDO
Associate Justice

Original Signed by Alberto E. Tolentino

ALBERTO E. TOLENTINO
Justice Pro Tempore

Original Signed By : Robert J. Torres

ROBERT J. TORRES
Chief Justice