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FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

FRANCISCO S CHONG,)
)
Plaintiff,)
)
v.)
)
TADHIRO KAMOSHITA, KAMOSHITA)
MARIANAS ENTERPRISES, INC., TAKASHI)
YAMAGISHI and DOLORES DLG)
YAMAGISHI,)
)
Defendants.)
_____)

CIVIL CASE NO. 91-0264

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS FOR FAILURE TO
PROSECUTE**

This matter came before the Court on February 12, 2004 at 9:00 a.m. on Defendants Tadahiro Kamoshita, Kamoshita Marianas Enterprises, Inc., Takashi Yamagishi and Dolores DLG Yamgighi’s (collectively “Kamoshita”) *Motion to Dismiss for Failure to Prosecute and for Summary Judgment*. There has been no opposition filed in this matter. At the hearing Kamoshita was represented by John D. Osborn, Esq. and the Plaintiff, Francisco S. Chong (“Chong”), appeared *pro se*.

BACKGROUND

The facts and background of this case are lengthy and, for the most part, irrelevant to the pending motion.¹ Because the Court is only responding to the *Motion to Dismiss for Failure to Prosecute*, the relevant dates and facts pertaining to this motion are as follows:

- 1. On December 26, 1984, Chong conveyed certain real property located in Marpi,

¹ The underlying complaint in this case involves Article XII of the Northern Mariana Islands Constitution. Over the last ten years a substantial body of Commonwealth law has developed which might invalidate the theories Chong relies on in this matter. (citations omitted) . However, because the Court is deciding this case based on whether or not there has been a failure to prosecute, the Court need not discuss the merits of the underlying civil action.

1 Saipan to Kamoshita.

2 2. Chong filed the underlying civil action March 28, 1991.

3 3. Kamoshita filed an answer on May 15, 1991.

4 4. Between June 21, 1991 and August 9, 1991 a series of motions and oppositions to
5 said motions were filed regarding a collateral matter to the underlying civil action.²

6 5. No motions or pleadings were filed between August 9, 1991 and September 10,
7 1992.

8 6. On September 10, 1992, Kamoshita filed a motion to appear *pro hac vice*.

9 7. Between September 10, 1992 and June 26, 2003 no filings, court appearances or
10 other actions were taken by the plaintiff. There has been no discovery. No
11 depositions have been taken.

12 8. Defendants filed the instant motion with the Court on June 26, 2003.

13 DISCUSSION

14 Commonwealth Rule of Civil Procedure 41(b)(1) provides in pertinent part: “[f]or failure
15 of the plaintiff to *prosecute* or to comply with these rules or any order of court, a defendant may
16 move for dismissal of an action or of any claim against the defendant.” Com. R. Civ. P. 41(b)(1)
17 (emphasis added). The counterpart federal rule further states: “[u]nless the court in its order for
18 dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon
19 the merits.” FED. R. CIV. P. 41(b).

20 Under Rule 41(b), a court unquestionably has the power and discretion to dismiss a case with
21 prejudice for want of prosecution. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.
22 2d 734 (1962). This power is necessary to prevent undue delays in the disposition of pending cases,
23 docket congestion, and the possibility of prejudice to a defendant. *See id.* 370 U.S. at 629-630, 82
24 S.Ct. at 1388, 8 L.Ed. 2d at 737; *see also Wabol v. Villacrusis*, App. No. 99-008 (N.M.I. Sup. Ct.
25 Dec. 15, 2000)(Opinion) (although this case discusses Rule 41(b), it was decided on other grounds).

26 Rule 41(b) requires that a plaintiff prosecute an action with “reasonable diligence” in order
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28 ² Chong sought to disqualify the Judge presiding over the case. His motion was denied.

1 to avoid dismissal. *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). Indeed, “[t]he
2 failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a
3 showing of actual prejudice to the defendant from the failure.” *Morris v. Morgan Stanley & Co.*, 942
4 F.2d 648, 651 (9th Cir. 1991) (*quoting Air West, Inc.*, 542 F.2d at 524).

5 Courts have the inherent power to control their dockets and in the exercise of that power they
6 may impose sanctions including, where appropriate, dismissal of a case. *Ferdik v. Bonzelet*, 963
7 F.2d 1258, 1260 (9th Cir. 1992). Dismissal is a harsh penalty and should be imposed only in
8 extreme circumstances. *Id.* In determining whether to dismiss a case for lack of prosecution and for
9 failure to comply with court orders, a court must weigh five factors: (1) the public's interest in
10 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice
11 to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the
12 availability of less drastic alternatives. *Id.* at 1260-61. Here, an examination of the five factors set
13 forth by the Ninth Circuit shows that a dismissal is warranted.

14 **A. Interest in Expeditious Resolution of Litigation and Docket Management**

15 “[T]he public's interest in expeditious resolution of litigation always favors dismissal.”
16 *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). In addition to the interest of the
17 public, the court has an interest and an obligation to manage its own docket. Chong's case has been
18 pending for nearly thirteen years. Chong has failed to appear at several status conferences. When
19 Chong did appear for scheduled status conferences, his failure to procure counsel and/or lack of
20 preparation caused the conferences to either be continued or caused the Court to have to spend more
21 time than reasonably necessary. This, in turn, delayed other cases on the docket. Additionally, due
22 to Chong's general inactivity in prosecuting this case, several status conferences had to be continued.

23 The original date for Kamoshita's instant motions to be heard was set for August 28, 2003.
24 On that date counsel for the defendants appeared, but plaintiff did not. Since Chong's counsel had
25 withdrawn as counsel of record earlier that month, in an abundance of caution, this Court reset the
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1 date for the hearing to September 25, 2003.³

2 On September 25, 2003, Chong and Kamoshita (appearing through counsel) did appear in
3 court. Chong appeared without counsel and advised the Court that he wished to obtain counsel and
4 argue against Kamoshita's motions. The Court continued the hearing until January 15, 2004, in
5 order for Chong to obtain counsel and for counsel to have sufficient time to file documents in
6 opposition to Kamoshita's motions.⁴

7 On January 15, 2004, defense counsel appeared ready to argue his motions, but Plaintiff was
8 not present. The Court was advised that Plaintiff was sick and could not attend. The matter was
9 continued to February 14, 2004. On that date, Plaintiff and defense counsel appeared. Plaintiff
10 offered no opposition to Kamoshita's motions and stated to the Court, "give them the land."

11 To this date, Chong has failed to comply with the Court's request to provide progress reports
12 regarding his search for substitute counsel and has failed to file any written opposition to
13 Defendants' motions. Chong's inaction has repeatedly delayed the disposition of this litigation.

14 Furthermore, Chong's case has consumed significant amounts of the Court's time that could
15 have been devoted to other cases on the Court's docket. Given the length of time this case has been
16 on the docket without progress toward resolution and the Court's obligation to manage its caseload,
17 these first two factors weigh in favor of dismissal of this case.

18 **B. Prejudice to Defendants**

19 To show prejudice, a defendant must show that the plaintiff's actions interfered with
20 defendant's ability to proceed to trial or interfered with the rightful decision of the case. *See Malone*
21 *v. U.S. Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987). Here, given the length of this litigation,
22 recalling specific facts regarding the case becomes difficult and potential witnesses may no longer

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25 ³ In an Order dated September 25, 2003, the Court requested that Kamoshita personally serve Mr. Chong notice of the
26 pending motion. The Court had concerns that Chong had not received copies of the motions because Jeanne Rayphand, his counsel
27 of record, had filed a motion to withdraw as counsel on August 7, 2003. The Court was aware that Theodore Mitchell had been the
28 original attorney of record on the case, but that he had died in 2001. The September 25, 2003, hearing was a status conference
designed to give Chong the opportunity to inform the Court of how he wished to proceed on the motion to dismiss.

⁴ In the October 6, 2003 Order, the Court again extended Chong the benefit of more time to obtain counsel, to respond to
the motion to dismiss and to actively prosecute his case. The Court explained to Chong both from the bench and through its Order
that Chong had responsibilities to fulfill so that the case could move forward.

1 be available. As a result, this delay prejudices Kamoshita. Chong's delay in the adjudication of this
2 matter has required Kamoshita to defend against a virtually non-existent plaintiff. Further,
3 Kamoshita has incurred expenses in legal fees and wasted time appearing at conferences when
4 Chong has not been prepared or has failed to appear. *See Scarborough v. Eubanks*, 747 F.2d 871,
5 876 (3rd Cir. 1984) (prejudice includes "irremediable burdens or costs imposed on the opposing
6 party"). Thus, Kamoshita has demonstrated prejudice by Chong's inaction.

7 **C. Consideration of Less Drastic Alternatives**

8 It is not necessary for a trial court to examine every single alternative before dismissing an
9 action. *Air West, Inc.*, 542 F.2d at 525. A trial court is merely required to reasonably explore
10 possible and meaningful alternatives. *Id.* Here, the Court has exercised various alternatives prior
11 to dismissal. The Court has inquired into Plaintiff's status regarding legal representation and ordered
12 periodic updates. However, Chong has not complied. Moreover, in light of granting Chong's
13 former counsel's *Motion to Withdraw*, the Court gave Chong a generous amount of time, almost four
14 months, to find another attorney. Yet again, Chong did not comply.

15 Furthermore, a court's warning of the possibility of dismissal for a party's lack of diligent
16 prosecution can satisfy the "consideration of alternatives" requirement. *Ferdik*, 963 F.2d at 1262;
17 *see also Henderson v. Duncan*, 779 F.2d 1421, 1424. Here, the Court specifically warned Chong
18 on many occasions of the possibility of dismissal for lack of diligent prosecution. Thus, the Court
19 has considered various alternatives short of dismissal.

20 **D. Public Policy Favoring Disposition on the Merits**

21 The Superior Court of the Northern Mariana Islands is not a parking lot where plaintiffs and
22 their attorneys may place their cases and leave them for an indeterminate amount of time. It is not
23 a repository where cases are placed on hold while plaintiffs and their attorneys wait for decisions
24 in companion or appellate cases. Plaintiffs and their attorneys have a duty to prosecute their cases
25 with due diligence. Sometimes, for valid reasons, civil cases can take years to come to trial. The
26 Court has no problem with this. This was not the case in this matter. Plaintiff and his attorneys
27 simply chose to let the matter lie for no apparent reason; they have abandoned this case. Although
28 public policy strongly favors disposition of cases on its merits, this consideration is outweighed by

1 the four other factors which support dismissal of this action.

2 **CONCLUSION**

3 This Court does not like to resort to dismissal of cases without litigants having their day in
4 court. However, given the many chances Chong and his attorneys have had to move this case
5 forward, the Court must find in favor of the defendants. Chong's inaction and pattern of repeated
6 delays over the last thirteen years, his failure to comply with Court Orders, and his failure to prepare
7 for and attend status conferences are sufficient grounds to support dismissal of this action.
8 Accordingly, for the aforementioned reasons, the Court **GRANTS** Defendants' *Motion to Dismiss*
9 *for Failure to Prosecute*. It is further ordered that this civil action shall be **DISMISSED WITH**
10 **PREJUDICE**. Any and all other motions in relation to this case are hereby rendered **MOOT**.

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12 **IT IS SO ORDERED**

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14 **ENTERED** this 30th day of April 2004.

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16 /s/
17 KENNETH L. GOVENDO, Associate Judge