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2 **For Publication**

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5 **IN THE SUPERIOR COURT**
6 **FOR THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

7 **NORTHERN MARIANAS HOUSING) CIVIL ACTION NO. 98-0052C**
8 **CORPORATION fka MARIANA)**
9 **ISLANDS HOUSING AUTHORITY,) ORDER DENYING DEFENDANT’S**
10 **Plaintiff,) MOTION TO STRIKE PLAINTIFF’S**
11 **vs.) AMENDED RESPONSE TO DISCOVERY**
12 **FRANTINA FINIK,) REQUEST AND DENYING**
13 **Defendant.) DEFENDANT’S MOTION TO QUASH**
14 **SERVICE AND DISMISS ACTION**

15 **I. INTRODUCTION**

16 THIS MATTER came before the Court for a hearing on May 2, 2005, at 9:00 a.m. in
17 courtroom 220A to consider Defendant Frantina Finik’s MOTION TO QUASH SERVICE AND TO
18 DISMISS ACTION. Defendant Frantina Finik (“Finik”) was represented by Jane Mack, Esq., and
19 Plaintiff Northern Marianas Housing Corporation (“NMHC”) was represented by Michael A.
20 White, Esq. In this case, Defendant Finik seeks dismissal pursuant to Com. R. Civ. P. 41(b) for
21 the Plaintiff’s alleged failure to prosecute this action.¹ Having considered the arguments of
22 counsel, the materials submitted and the applicable statutory and case law, the Court now denies
23 Defendant’s motions for the reasons that follow.

24 ¹ Commonwealth Rule of Civil Procedure 41(b)(1), relating to involuntary dismissal, provides: “[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant.”

1 60(b), this Court vacated the original judgment against Frantina Finik. On May 17, 2004,
2 NMHC filed a Second Amended Complaint and personally served Finik in Chuuk on June 3,
3 2004. Finik filed her Answer on July 1, 2004. The case is presently set for trial on August 25,
4 2005.

5 In her Motion, Defendant Finik contends that, because approximately six years and four
6 months transpired between the date that Plaintiff NMHC filed its original complaint (January 23,
7 1998) and the date that it served Defendant Finik personally in Chuuk (June 3, 2004), the delay
8 in service was “inherently unreasonable.” Defendant Finik also contends that, even if the Court
9 were to accept NMHC’s contention that it first learned of Finik’s move to Chuuk sometime
10 between June of 1998 and late 1999, NMHC’s delay in not serving Finik until June 3, 2004 was
11 still inherently unreasonable. Plaintiff NMHC responds that Finik waived the defense of failure
12 to prosecute by not raising it in her Answer, and that dismissal for failure to prosecute is not
13 warranted in this case given NMHC’s continued efforts to seek a judgment against the
14 Defendant.

15 Jurisdiction is vested in this Court under N.M.I. Const. art. IV, § 2.

16 **III. ISSUES**

- 17 1. Whether Defendant Finik waived her affirmative defense of failure to prosecute.
- 18 2. Whether the Plaintiff’s personal service of Defendant Finik, more than six years after
19 the filing of the original Complaint, warrants a dismissal of Plaintiff’s case for failure
20 to prosecute, when the Defendant left the CNMI’s jurisdiction, an original default
21 judgment was entered four years after the filing of the original Complaint, but only
two years after the filing of an Amended Complaint, and Defendant Finik was
promptly served personally in Chuuk with the Second Amended Complaint after the
original default judgment was vacated at Plaintiff’s request.

22 **IV. ANALYSIS**

- 23 **A. Defendant Finik Did Not Waive the Defense of Failure to Prosecute.**
- 24

1 NMHC alleges that Defendant Finik waived the affirmative defense of failure to
2 prosecute by not raising it in her Answer. In her single-page Answer to the Amended Complaint,
3 Defendant Finik specifically states as an affirmative defense: “process and service of process are
4 defective and untimely.” Although the words “failure to prosecute” were not *specifically* stated,
5 the Court considers the stated defenses sufficiently specific to preserve the defense of failure to
6 prosecute. Therefore, this defense was not waived by Defendant Finik.

7 **B. Defendant Finik’s Motion to Strike Plaintiff’s Amended Response to Discovery
8 Request is Denied.**

9 Defendant Finik has moved to strike Plaintiff NMHC’s Amended Response to Finik’s
10 discovery request. Whether or not to grant or deny a motion to strike is discretionary with the
11 Court. *See Lifoifoi v. Lifoifoi-Aldan*, 1996 MP 14 ¶ 2, 5 N.M.I. 1, 2 (citation omitted).

12 On January 11, 2005, Plaintiff NMHC filed its *original* Response to Defendant Finik’s
13 Discovery Request, which stated:

14 Plaintiff learned of Defendant’s relocation to Chuuk only when Plaintiff was
15 advised of this fact by its Attorney. **Plaintiff’s attorney learned of the
16 Defendant’s relocation to Chuuk in late 1997 or early 1998.** The exact date is
17 unknown to Plaintiff and its attorney.

18 RESPONSE TO DISCOVERY REQUEST at ¶ 8 (emphasis added). On April 4, 2005, Plaintiff NMHC
19 filed an Amended Response to Discovery Request in which it modified its response at paragraph
20 8 of the earlier Response, stating:

21 Plaintiff learned of Defendant’s relocation to Chuuk only when Plaintiff was
22 advised of this fact by its Attorney. Plaintiff’s attorney is unable to state with any
23 degree of precision the date when he learned of the relocation, other than that it
24 occurred at some time after the filing of the Complaint and before the filing of the
25 First Amended Complaint. **Plaintiff’s attorney believes that, in all probability,
26 he learned of Defendant’s relocation to Chuuk no earlier than June 16, 1998,
27 and most likely not until late 1999.**

28 (Emphasis added). In the hearing, Plaintiff’s counsel argued that this change to NMHC’s
29 discovery response was made pursuant to counsel’s duty to correct an erroneous statement, and

1 that the error in NMHC's response was revealed to counsel upon reconsidering the facts of the
2 case. This Court agrees that counsel had a duty to inform the Court of his mistake, and finds
3 that, in the interest of using the *most accurate* facts available, the revised estimate submitted by
4 Plaintiff's counsel should not be struck. Accordingly, this Court DENIES the Motion to Strike
5 Plaintiff's Amended Response to Defendant's Discovery Request. For the reasons addressed
6 below, however, the Court finds that paragraph 8 of Plaintiff's Response to the Discovery
7 Request is irrelevant to this Court's determination of Defendant's Motion to Dismiss.

8 **C. Defendant Finik's Motion to Dismiss is Denied.**

9 **1. Legal Standard for a Rule 41(b) Motion to Dismiss for Failure to Prosecute**

10 When moving for dismissal on the basis of a plaintiff's failure to prosecute, it is
11 incumbent upon a defendant to "come forth with some facts indicating delay on the part of the
12 plaintiff." *Nealey v. Transp. Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir.1980)
13 (*citing Gomez v. Toledo*, 446 U.S. 635, 638, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d 572 (1980)).

14 Where a plaintiff has come forth with an excuse for his delay that is anything but
15 frivolous, the burden of production shifts to the defendant to show at least some
16 actual prejudice. If he does so, the plaintiff must then persuade the court that such
17 claims of prejudice are either illusory or relatively insignificant when compared to
18 the force of his excuse. At that point, the court must exercise its discretion by
19 weighing the relevant factors - - time, excuse, and prejudice.

20 *In re Eisen*, 31 F.3d 1447, 1453 (9th Cir.1994) (*citing Nealy*, 662 F.2d at 1281).

21 When considering prejudice to the defendant, the failure to prosecute diligently is
22 sufficient by itself to justify a dismissal, even in the absence of a showing of
23 actual prejudice to the defendant from the failure. . . . The law presumes injury
24 from unreasonable delay. However, this presumption of prejudice is a rebuttable
one and if there is a showing that no actual prejudice occurred, that factor should
be considered when determining whether the trial court exercised sound
discretion.

Id. at 1452-53 (*citing Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976)).

1 In the *Eisen* decision, the Ninth Circuit Court identified five determinative factors
2 regarding a motion for dismissal for failure to prosecute, stating:

3 We require the district court to weigh five factors to determine whether to dismiss
4 a case for lack of prosecution: (1) the public's interest in expeditious resolution of
5 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the
6 defendants; (4) the public policy favoring the disposition of cases on their merits;
7 and (5) the availability of less drastic sanctions. *Henderson v. Duncan*, 779 F.2d
1421, 1423 (9th Cir. 1986) (citing *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir.
1984), *cert. denied*, 470 U.S. 1007, 105 S. Ct. 1368, 84 L. Ed. 2d 387 (1985)).
Although beneficial to the reviewing court, a district court is not required to make
specific findings on each of the essential factors. *Henderson*, 779 F.2d at 1424.

8 *In re Eisen*, 31 F.3d at 1451.

9 2. Analysis

10 In the hearing on this matter, the Court held that Plaintiff NMHC failed to demonstrate
11 due diligence in its original attempt to serve process of the original Complaint upon Defendant
12 Finik in Chuuk, because it did not provide any information to the Court to demonstrate that it had
13 made any effort to determine Defendant Finik's whereabouts. Defendant Finik argues that the
14 defective original service, considered together with the various time lapses in this case,
15 demonstrate a failure on the Plaintiff's part to prosecute this case.

16 NMHC raises the point that, had it not moved to vacate the earlier judgment in this action
17 and had it instead filed a *new complaint*, Defendant Finik's present argument would not be
18 available to her. In other words, Plaintiff NMHC contends that, for the purposes of the instant
19 motion, and for purposes of determining *prejudice* to the Defendant, the period of time that
20 elapsed prior to the earlier default judgment represents a separate and distinguishable case.³ This
21 Court finds Plaintiff's argument persuasive: the lack of due diligence on the part of NMHC prior
22 to the entry of the original default judgment is separable from its actions since the time that the

23
24 ³ The Court notes that Plaintiff NMHC could not, in fact, file a new complaint on May 17, 2004, because it would
have been time barred by the six-year statutes of limitation governing contracts. 7 CMC § 2505.

1 default judgment was vacated. Ordinarily, a claim that is *presently* being prosecuted with due
2 diligence will not be dismissed by a court simply because at some earlier stage of the
3 proceedings the plaintiff did not act with due diligence. *See, e.g., Nealey*, 662 F.2d at 1280
4 (Ninth Circuit Court held that a plaintiff's diligent pursuit of a claim after service had been
5 effected was one factor warranting a denial of the defendant's motion to dismiss for failure to
6 prosecute); *Cristanelli v. United States Lines*, 74 F.R.D. 590 (D.C. Cal. 1977) (which held that,
7 when a plaintiff is presently prosecuting an action diligently, the action cannot be dismissed
8 simply because the plaintiff failed to act with due diligence at an earlier stage); *see also*
9 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2370 ("Want
10 of Prosecution") (2d ed. 1994). Although a previous delay in the prosecution may in certain
11 cases warrant dismissal, the decision of whether or not to grant a motion to dismiss for failure to
12 prosecute depends upon the particular circumstances of each case. *See generally, In re Eisen*, 31
13 F.3d 1447 (9th Cir.1994). Here, NMHC filed the original Complaint only six months after the
14 Finiks vacated the house. There is evidence that NMHC attempted to personally serve the
15 Defendants prior to seeking a court order to effectuate service by publication. NMHC obtained
16 the Court's permission to serve the Defendant by publication on January 27, 2000, almost two
17 years after filing the original Complaint, and only nine days after filing the Amended Complaint.
18 However, NMHC did not seek a default judgment against Defendant Finik for over two years
19 after publishing the Summons in the newspaper. After obtaining the original default judgment
20 on April 26, 2002, NMHC no longer had a duty to prosecute its claim, but had a right to pursue a
21 payment order.

22 Between April 2002, and April 2004, the date of the issuance of the Chuuk Trial Court's
23 decision to deny NMHC enforcement of its CNMI judgment in Chuuk, it cannot be said that
24 NMHC was not diligently prosecuting its claim, because the claim had been prosecuted to its

1 conclusion. A month after the Chuuk court’s decision, NMHC filed the pending Second
2 Amended Complaint, and NMHC served Defendant Finik a month later. Considering the
3 unusual procedural circumstances of the case; considering that Plaintiff has been diligent in
4 prosecuting this action at least since the date that the original default judgment was vacated in
5 May of 2004; and considering the factors outlined in *In re Eisen* described above; this Court
6 believes that the better course of action is to allow the case to continue, so that it may be decided
7 on its merits. Accordingly, the Motion to Dismiss is DENIED. With respect to the *In re Eisen*
8 factor of “less drastic sanctions,” the Court notes that it is amenable to considering a denial of the
9 Defendant’s request for prejudgment interest, should the case result in a judgment in the
10 Plaintiff’s favor.

11 **D. The Motion to Quash Service is Denied.**

12 Defendant Finik captioned her motion as a “Motion to Quash Service and to Dismiss
13 Action,” but made no argument therein with respect to quashing the service of process that was
14 made upon her in Chuuk. At the hearing, counsel for Defendant Finik offered that the basis for
15 the Motion to Quash was identical to that of the Motion to Dismiss, but presented little argument
16 directly addressing the Motion to Quash. Defendant Finik implicitly contends as a basis for the
17 Motion to Quash that the service upon her in Chuuk was defective because of the delays in the
18 case prior to the personal service. As explained above, this Court holds that the lack of due
19 diligence on the part of Plaintiff NMHC prior to the vacation of the default judgment does not
20 bear on the issue of prosecutorial delay for purposes of the Motion to Dismiss, and this reasoning
21 also applies to the Motion to Quash Service. The delays prior to the date that the default
22 judgment was vacated do not render the personal service on Defendant Finik any less valid, and
23 as stated above, Plaintiff has been diligent in prosecuting this action since that date. For these
24 reasons, the Motion to Quash Service is also DENIED.

1 **V. CONCLUSION**

2 For the foregoing reasons, Defendant Finik's Motion to Strike Plaintiff's Amended
3 Response to Discovery Request and Motion to Quash Service and to Dismiss Action are
4 DENIED.

5 SO ORDERED this 8th day of August 2005.

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7
8 /s/
RAMONA V. MANGLONA, Associate Judge