

FSM SUPREME COURT TRIAL DIVISION

SOHNEL JOHNSON,)
)
Plaintiff,)
)
vs.)
)
PAULINO ROSARIO, in his capacity as Director)
of the Pohnpei Dep't of Health Services, and)
the POHNPEI GOVERNMENT,)
)
Defendants.)
)

CIVIL ACTION NO. 2010-022

ORDER DENYING MOTION TO SET ASIDE

Beauleen Carl-Worswick
Associate Justice

Decided: November 16, 2016

APPEARANCES:

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For the Defendants: Judah C. Johnny
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* * * *

HEADNOTES

Civil Procedure – Dismissal; Civil Procedure – Parties – Substitution of

Under Civil Rule 25(a)(1), when a party dies, the court may order substitution of the parties, but once the death is suggested on the record, a ninety-day time frame is triggered to file the substitution motion and if this deadline is not met, the action will be dismissed as to the deceased party. Johnson v. Rosario, 21 FSM R. 7, 9 (Pon. 2016).

Civil Procedure – Dismissal – Lack of Prosecution; Civil Procedure – Parties – Substitution of

When the counsel for the plaintiff, who had passed away on May 25, 2013, was put on notice, on July 27, 2016, that if further steps to prosecute the case were not taken, dismissal was warranted for failure to prosecute; and when counsel, on August 26, 2016, moved for a 330-day extension to file and complete probate but no probate action was initiated, the ninety-day window for moving to

substitute has long since closed. Johnson v. Rosario, 21 FSM R. 7, 11 (Pon. 2016).

Judgments – Relief from Judgment

Generally, attorney negligence is not a basis for Rule 60(b)(1) relief. Since, parties may freely choose their attorneys and should not be allowed to avoid the ramification of their chosen counsel's acts or omissions, to grant relief under Rule 60(b)(1) for attorney negligence would penalize the nonmoving party for the negligent conduct of the moving party's counsel. Johnson v. Rosario, 21 FSM R. 7, 11 (Pon. 2016).

Judgments – Relief from Judgment

Keeping a suit alive merely because the plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant. Johnson v. Rosario, 21 FSM R. 7, 12 (Pon. 2016).

Judgments – Relief from Judgment

Relief under Rule 60(b)(6) is reserved for "extraordinary circumstances." Subsection (6) is a grand reservoir of equitable power to do justice in a particular case, subject to the requirement that it is applicable only when there is a basis for relief different from those enumerated in subsections (1) through (5) of Rule 60(b), and to the requirement that "extraordinary circumstances" exist for justifying relief. Johnson v. Rosario, 21 FSM R. 7, 12 (Pon. 2016).

Judgments – Relief from Judgment

"Extraordinary circumstances" justifying relief under Rule 60(b)(6) means that the movant himself was not at fault for his predicament, and conversely, the usual implication of fault on the movant's part is that there are no "extraordinary circumstances." Johnson v. Rosario, 21 FSM R. 7, 12 (Pon. 2016).

Civil Procedure – Parties – Substitution of

The onus for failing to meet the Civil Rule 25(a)(1) timing requirement falls squarely upon the movant. Johnson v. Rosario, 21 FSM R. 7, 12 (Pon. 2016).

Civil Procedure – Dismissal – Lack of Prosecution

Civil lawsuits must be prosecuted with reasonable diligence to guard against delay in litigation and harassment of the defendant, as well as preventing undue delays in disposition of pending cases and avoiding court congestion. Since inactivity amounts to abandonment of a claim, the court, in dismissing an action, may consider the importance of a judge maintaining control of his or her calendar. Johnson v. Rosario, 21 FSM R. 7, 13 (Pon. 2016).

Civil Procedure – Dismissal – Lack of Prosecution; Civil Procedure – Parties – Substitution of; Judgments – Relief from Judgment – Grounds

The dilatory approach exhibited by not filing a substitution motion, even though the named plaintiff passed away almost three and a half years earlier, coupled with a representation that "a probate needs to be filed" in the future, is clearly not the type of "extraordinary circumstances" contemplated by Civil Rule 60(b)(6) for relief from judgment. Johnson v. Rosario, 21 FSM R. 7, 13 (Pon. 2016).

Judgments – Relief from Judgment – Grounds

A self-proclaimed obliviousness, in failing to make a motion to substitute once the plaintiff's death was suggested on the record, is not a "mistake" justifying relief under Civil Rule 60(b)(1). Neither was it "extraordinary circumstances" justifying relief under Civil Rule 60(b)(6), since the failure to file the relevant motion for substitution was attributable solely to the movant. The defendants should not be expected to endure the prejudicial repercussions attendant to the plaintiff's disproportionate tardiness. Johnson v. Rosario, 21 FSM R. 7, 13-14 (Pon. 2016).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On October 3, 2016, Plaintiff's Counsel filed a Motion to Set Aside [the] Order of Dismissal issued by this Court on September 2, 2016. This Dismissal Order was engendered by movant's failure to comply with the mandate of FSM Civil Rule 25(a)(1). Under Civil Rule 25(a)(1), when a party dies, the Court may order substitution of the parties, however once the death is suggested on the record, a ninety day time frame is triggered, in terms of filing the respective motion for substitution and should this deadline not be met, the action shall be dismissed as to the deceased party.

In support of the instant filing, Plaintiff's Attorney cites to FSM Civil Rule 60(b); specifically subsections (1) "mistake" and (6) "any other reason justifying relief." Counsel essentially concedes to his unfamiliarity with the timing requirement set forth in Civil Rule 25(a)(1), claiming a paucity of case law addressing this Rule would account for the "mistake." Although Counsel additionally relies on subsection (6): "another reason to justify the relief," to bolster his motion to set aside, no factual or legal arguments are marshaled in support thereof.

PROCEDURAL BACKGROUND

The Complaint in this matter was filed on October 1, 2010. Given the fact that the case lay dormant for a protracted period of time, the Court scheduled a Status Conference for September 15, 2015. At this hearing, Counsel for the Plaintiff notified the Court that the Plaintiff had passed away (on May 25, 2013), however the heirs would continue this action in his stead. Counsel additionally represented a suggestion of death would be dutifully submitted in accordance with Civil Rule 25, once the relevant death certificate was obtained. Counsel also informed the Court of his intention to dismiss a codefendant: Pohnpei Health Center Governing Board (PHCGB), pursuant to Civil Rule 41(a)(2). When asked by the Court when these filings could be expected, Plaintiff's Counsel responded: "within two weeks."

Inertia set in, since the above-mentioned filings were never received by the Court and consequently, another Status Conference was set for January 7, 2016. During this proceeding, Plaintiff's Counsel reiterated, that PHCGB would be dismissed from the action and noted the appropriate motion would be filed in two weeks. With respect to the production of Plaintiff's death certificate, consonant with the suggestion of death on the Record, Counsel apprised the Court it would be filed within one week. On January 15, 2016, the subject motion to dismiss PHCGB was filed and on January 22, 2016, the service of the fact of death (to which was affixed the subject death certificate). On February 5, 2016, the Court entered an Order countenancing the dismissal of PHCGB as a party Defendant.

On July 27, 2016, an Order was issued, placing the parties on notice that dismissal of this action was a distinct possibility, as there had been no activity for an inordinate length of time and it was the avowed intent of this Court to have this case move forward toward some type of resolution. In response, Plaintiff's Counsel filed a Motion for Enlargement of Time on August 26, 2016, wherein it was noted: "a probate needs to be filed and completed as required by Rule 25 of the FSM Rules of Civil Procedure," and therefore sought thirty days "to hopefully complete the probate of the estate."

As noted above, an Order of Dismissal was issued on September 2, 2016. In rendering such a disposition, this Court found:

Notification of the Plaintiff's passing on the Record was confirmed by "service of fact of death" via the aforementioned January 22, 2016 filing. In light of the intent to substitute parties having been 'suggested upon the Record' by Plaintiff's Counsel during the September 15, 2015 proceeding and the "service of the fact of death" effectuated on January 22, 2016, commencement of the prescribed time frame for a substitution of party under Rule 25(a)(1) was triggered. In sum, the absence of such a motion for substitution of the parties having been filed by Plaintiff within the subsequent ninety-day window warrants dismissal of this action.

This Dismissal Order is the focus of Plaintiff's present Motion to Set Aside.

CIVIL RULE 25(a)(1)

The above-captioned Rule provides:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and together, with notice of hearing, shall be served on the parties in the manner provided in Rule 5 and upon persons not parties in the manner provide in Rule 4 for service of summons. Unless the motion for substitution is made not later than 90 days after the death is suggested on the record by service of the fact of death as provided herein for service of the motion, the action shall be dismissed as to the deceased party.

Within the present motion, Plaintiff's Counsel laments the purported dearth of case law in this jurisdiction addressing Civil Rule 25(a)(1) and submits this would account for his lack of familiarity (and attendant "mistake," in terms of noncompliance) with the timing requirement delineated therein. Contrary to Plaintiff's assertion, several cases have broached this Rule's timing constraint. In other words, assuming *arguendo*, that a scarcity of case law speaking to Civil Rule 25(a)(1) would somehow vindicate Counsel's nescience, (and as such, his professed "mistake") with respect to the timing proscription embodied therein, this representation is less than accurate, as there exists ample precedent on point.

- When a party has died, a statement suggesting the party's death may be placed on the record and served in compliance with the rules for service of motions and if a motion for substitution is not made within 90 days afterward then "the action shall be dismissed as to the deceased party."

Damarlane v. FSM, 8 FSM R. 10, 12 (Pon. 1997) (quoting FSM Civ. R. 25(a)(1)).

- Once the death of a party has been suggested on the record, the ninety-day deadline for making a motion for substitution of that deceased party starts running. . . . No motion for substitution of [the decedent], or for an enlargement of time, has been filed. The ninety days have passed. [Decedent] is accordingly dismissed as a party.

Beal Bank S.S.B. v. Maras, 11 FSM R. 351, 354 (Chk. 2003).

- Pursuant to Rule 25(a)(1) of the FSM Rules of Civil Procedure, if a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. And unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death, the

action shall be dismissed as to the deceased party.

Bank of FSM v. Rodriguez, 11 FSM R 542, 544 (Pon. 2003).

- Following the lead of Beal, in George v. Johnithan, 15 FSM R. 455 (Kos. S. Ct. Tr. 2007), the Court found

In [Beal], without discussion, the Court dismissed one of the defendants because he was deceased and no motion for substitution was filed within the 90-day limit. *Id.* To the extent it addresses the issue presented, Beal supports dismissal because the defendant in this matter is deceased and no motion for substitution was filed within the 90-day limit.

George, 15 FSM R. at 456.

- "An action shall be dismissed, as to the deceased party if no motion for substitution is made within 90 days after the suggestion of death." Sorech v. FSM Dev. Bank, 18 FSM R. 151, 155 (Pon. 2012).

Furthermore, within Plaintiff's Motion to Set Aside [the] Order of Dismissal is a request for an additional 90 days to file the motion for substitution, in order to complete probate. Plaintiff's Counsel submits: "probate needs to completed first before the matter can proceed" By virtue of an Order issued on July 27, 2016, Counsel was placed on notice "that in the event Plaintiff does not take further steps within 30 days to prosecute this case, grounds exist to warrant dismissal for failure to prosecute, pursuant to FSM Civil Rule 41(b)." Notwithstanding this admonition, Plaintiff's August 26, 2016 Motion for an Enlargement of Time, requested an extension of thirty days and stated unequivocally: "a probate needs to filed and completed." Having utilized the future tense, one can safely deduce that, as of that filing date, no such probate action had even been initiated, despite the fact Plaintiff had passed away on May 25, 2013 (i.e. three years and three months prior). Not only has movant failed to adhere to the timing requirements set forth in Civil Rule 25(a)(1), in terms of filing the requisite motion for substitution, but the elongated delay, as far as filing a probate action, is solely attributable to procrastination *per se*. In sum, the ninety-day window for making the motion for substitution has long since closed.

CIVIL RULE 60(b)(1) - MISTAKE

Counsel for the Plaintiff's intimation that his aforementioned unfamiliarity with the timing requirement set forth in Civil Rule 25(a)(1) constitutes a "mistake," entitling Plaintiff to relief under Civil Rule 60(b)(1), is misguided. As set forth in Amayo v. MJ Co., 10 FSM R. 371 (Pon. 2001),

Generally, under Mid-Pacific, attorney negligence is not a basis for Rule 60(b)(1) relief.¹ Parties "may freely choose their attorneys [and] should not be allowed to avoid the ramification of the acts or omissions of their chosen counsel." Parkland Dev., Inc. v. Anderson, 2000 Guam 8, ¶ 15. . . . To grant relief under Rule 60(b)(1) in such circumstances would penalize the nonmoving party for the negligent conduct of the moving party's counsel.

Amayo, 10 FSM R. at 381.

¹ Mid Pacific Constr. Co. v. Senda, 7 FSM R. 129, 135 (Pon. 1995).

Movant also submits: "Counsel's inability to fully understand Rule 25 should not be ground to punish heirs of Johnson." [sic]. With regard to such a proposition, Amayo is once again instructive, where the Court found: "'Keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant.'" *Id.* at 381 (quoting Link v. Wabash R.R., 370 U.S. 626, 634 n.10, 82 S. Ct. 1386, 1390 n.10, 8 L. Ed. 2d 734, 740 n.10 (1962)).

Under the facts of the case at bar, the Plaintiff died on May 25, 2013, however Counsel did not apprise the Court of his passing until the Status Conference conducted on September 15, 2015. In other words, two years and four months had elapsed before this death was brought to the attention of this Court. At that same Status Conference, Plaintiff's Counsel represented, on the record, that the heirs planned on supplanting Plaintiff. It took four more months for Counsel to file the relevant service of fact of death, almost another full year (after the September 15, 2015 Status Conference) to initiate a probate action and the motion for substitution has still not been filed. In sum, Civil Rule 60(b)(1) does not provide safe haven for dilatory behavior, as it is well established in the FSM, that clients must be held accountable for the acts or omissions of their attorneys.

CIVIL RULE 60(b)(6) - ANY OTHER REASON JUSTIFYING RELIEF

Although Plaintiff's Counsel additionally emphasizes this specific subsection, to the extent relief from the Dismissal Order is sought, no reasons are set forth to legitimize such an application. As noted in Farata v. Punzalan, 11 FSM R. 175 (Chk. 2002): "Relief under Rule 60(b)(6) is reserved for 'extraordinary circumstances.'" *Id.* at 178 (citing Ackerman v. United States, 340 U.S. 193, 199, 71 S. Ct. 209, 212, 95 L. Ed. 207, 211 (1950); United States v. Sparks, 685 F.2d 1128, 1130 (9th Cir. 1982); Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981)).

Subsection (6) has been described as a "'grand reservoir of equitable power to do justice in a particular case,'" subject to the requirement that the provision is applicable only where there is a basis for relief different from those enumerated in subsections (1) through (5) of Rule 60(b), and to the requirement that "extraordinary circumstances" exist for justifying relief. 12 JAMES WM. MILLER, MOORE'S FEDERAL PRACTICE § 60.48[1] (citing Compton v. Alton S.S. Co., 608 F.2d 96, 106 (5th Cir. 1979) (quoting an earlier edition of Moore's as to the first quoted material)). "[E]xtraordinary circumstances" usually means that the movant himself was not at fault for his predicament. *Id.* § 60.48[3][b]. Conversely, the usual implication of fault on the part of the movant is that there are no "extraordinary circumstances." *Id.* § 60.48[3][c].

Amayo, 10 FSM R. at 383.

As previously set forth, the onus for failing to meet the timing requirement delineated within Civil Rule 25(a)(1) falls squarely upon the movant. This case was filed over six years ago and has been pending for three years and five months without an individual properly identified to supplant the decedent.² In light of the ensuing lack of activity in this matter over the course of the next six months, this Court issued an Order on July 27, 2016, which placed the parties on notice of the possibility of dismissal for lack of prosecution. One month later, at this belated juncture, Plaintiff's Counsel filed a

² The named Plaintiff in this action died on May 25, 2013, yet the Court was not apprised of his passing until two years and four months later (on September 15, 2015). After having ultimately made such a crucial fact known to this Court (on the Record), an additional four months elapsed before the requisite service of fact of death was submitted (filed on January 22, 2016).

motion for enlargement (on August 26, 2016), representing "a probate needs to be filed" (i.e. although Plaintiff passed away on May 25, 2013, this filing had not yet been made) and sought an extension of thirty days. Finally, the instant motion, in addition to the relief requested, seeks yet another continuance of ninety days, as the probate "is presumed to be done in 90 days."

Plaintiff relies on Damarlane v. FSM, 8 FSM R. 10 (Pon. 1997) for the proposition that Civil Rule 25(a) cogitates appointment of a legal representative to replace a deceased party and there must be some designation by a Court. Damarlane, however, also recognized:

When a party has died, a statement suggesting the party's death may be placed upon the record and served in compliance with the rules for service of motions, and if a motion for substitution is not made within 90 days afterward[,] then "the action shall be dismissed as to the deceased party."

Id. at 12 (quoting FSM Civ. R. 25(a)(1)). As such, the Damarlane Court found, that the suggestion of death and motion for substitution before it were deficient, in that they failed to name a proper party to be substituted.

Although the Court in Damarlane, held off on issuing a ruling on the subject motion and allowed an enlargement of time within which to seek the appointment of an Executor or Administrator, the facts are distinguishable, to the extent, an Opposition had been filed which challenged whether the underlying claim actually survived, service was found to be deficient and the relevant motion sought to substitute statutory heirs in the decedent's stead. In the present matter, notwithstanding the passing of the named Plaintiff on May 25, 2013, this Court has merely been notified (although in a less than punctual fashion), that a probate intends to be filed.

Albeit within the context of dismissal for lack of prosecution, the underlying thought process articulated in Bisaram v. Oneisom Election Comm'n, 16 FSM R. 475 (Chk. S. Ct. App. 2009) is applicable, where the Court opined:

civil lawsuits must be prosecuted with reasonable diligence . . . [noting the need] to guard against delay in litigation and harassment of the defendant, as well as preventing undue delays in disposition of pending cases and avoiding court congestion. . . . [I]nactivity amounts to abandonment of [a] claim In dismissing an action, the court may consider the importance of a judge maintaining control of his[/her] calendar

Id. at 477-78 (citations omitted).

As a result, the dilatory approach exhibited in the case at bar, in terms of not filing the motion for substitution, especially since the named Plaintiff passed away almost three and a half years ago, coupled with a representation in the July 27th filing *to wit*: that "a probate needs to be filed" (i.e. future tense), is clearly not the type of "extraordinary circumstances" contemplated by Civil Rule 60(b)(6). In sum, the request for relief sought under Civil Rule 60(b)(6), is similarly unwarranted here.

CONCLUSION

Given the representation, on the Record, that the Plaintiff had passed away, it was incumbent upon Counsel to comply with the timing requirement set forth in the governing Rule - 25(a)(1), for filing a motion for substitution. A self-proclaimed obliviousness, in terms of the timing requirement for making such a motion once the death is suggested on the Record, is not tantamount to a "mistake" under Civil Rule 60(b)(1). Furthermore, this nonfeasance, in terms of filing the relevant motion for

substitution, was solely attributable to the movant and as such, "extraordinary circumstances" are not present to substantiate relief under Civil Rule 60(b)(6). Finally, the Defendants should not be expected to endure the prejudicial repercussions attendant to such disproportionate tardiness on the part of Plaintiff. As a result, Plaintiff's request to set aside the Dismissal Order is devoid of merit.

Accordingly, the Court hereby DENIES Plaintiff's Motion to Set Aside [the] Order of Dismissal entered on September 2, 2016.

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FSM SUPREME COURT TRIAL DIVISION

POHNPEI TRANSFER & STORAGE, INC.,)	CIVIL ACTION NO. 2011-011
d/b/a POHNPEI TRAVEL,)	
)	
Plaintiff,)	
)	
vs.)	
)	
PERCY SHONIBER,)	
)	
Defendant.)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Beauleen Carl-Worswick
Associate Justice

Trial: April 22, 2016
Decided: November 18, 2016

APPEARANCES:

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For the Defendant:	Salomon M. Saimon, Esq. Directing Attorney Micronesia Legal Services Corporation P.O. Box 129 Kolonias, Pohnpei FM 96941

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HEADNOTES

Evidence - Burden of Proof

In a civil case, the plaintiff has the burden of proving each element of his cause of action by a