IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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RISONG SAITO,

Appellant,

v.

FRANCISCA MEKREOS,

Appellee.

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CIVIL APPEAL NO. 11-016
(Civil Action No. 04-361)

OPINION

Decided: May 15, 2012

Counsel for Appellant: Salvador Remoket
Counsel for Appellee: Scott Hess, Micronesian Legal Services Corporation

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

Appellant Risong Saito appeals the judgment entered against her on April 27, 2011, as a result of her failure to respond to two discovery requests. Saito claims that the Trial Division's entry of judgment was too drastic a sanction for her delay, and that the Trial Division violated her due process rights when it failed to hold a

hearing before entering judgment in favor of Appellee Francisca Mekreos. We agree with Saito and, accordingly, we reverse the Trial Division's decision.

I. BACKGROUND

This dispute began in late 2004. For over two years, the parties accomplished very little. Beginning in April 2007, the case was repeatedly scheduled for trial, but a series of events conspired to halt all progress until January 2010, when the case was scheduled for trial once more. Again, the parties were unable to proceed, and the trial was delayed first to June 2010 and then to February 2011.

In October 2010, in anticipation of the February 2011 trial, Mekreos served discovery requests on Saito, but Saito did not answer Mekreos' requests. One month later, Mekreos served Saito with additional discovery requests, but Saito failed to respond to those requests, too. On January 10, 2011, Mekreos filed a motion to compel Saito to respond to her discovery requests and requests for admissions. In turn, on January 21, 2011, the Trial Division apparently ordered Saito to respond to Mekreos' requests within seven days, but the court's instruction was ambiguous. The order as filed was evidently drafted as a proposal by Mekreos, and it included three disjunctive options for the Trial Division to entertain in response to the motion to compel. The three options, enumerated B through D, ranged in severity from demanding a response to the discovery requests within a certain number of days to be

determined by the court (option C), to outright judgment in favor of Mekreos (option D). Option B was an intermediate sanction. The Trial Division did not explicitly identify that it chose option C, but it did physically write the number "7" in a blank space provided to specify the number of days within which Saito was to respond to the discovery requests. Thus, it seems logical to conclude that the court intended to select option C and to require Saito to respond to Mekreos' discovery requests within seven days. Nevertheless, the order is unclear, and our conclusion is based on a measure of conjecture.

Whatever the court's intention, Saito once again failed to respond to the discovery requests or to the order. In turn, on February 8, 2011, the Trial Division signed and issued another order. Mekreos appears to have submitted this order, too, and it is even more ambiguous than the January 21 order. In relevant part, the February 8 order provides:

> [T]he Court hereby Orders that:
>
> E) Petitioner, Omelau Tanaka, and Administrator, Risong Saito, have failed to file their responses to Claimant, Francisca Mekreos's discovery requests, within thirty days, and have failed to comply with the January 21, 2011 Order to file their respective responses within seven (7) days of January 21, 2011, and find them in Contempt of this Order, and;
>
> F) Enter Judgment for Claimant and against Petitioner, Omelau Tanaka, and Administrator, Risong Saito or, in the alternative; or,

G) Deem admitted, as against Petitioner, Omelau Tanaka, and Administrator, Risong Saito, all responses to requests for admissions and exclude all evidence requested, documentary or otherwise, and not produced by Omelau Tanaka and Risong Saito; or,

Enter such other further relief or sanctions as this Court deems appropriate against Petitioner, Omelau Tanaka, and Administrator, Risong Saito;

I) The Court hereby Orders:

[sic]

The order contains no other markings, typewritten or otherwise, meant to explain the meaning of its text.

What happened next is indiscernible from the record, but the parties appear to have been engaged in negotiations to file a stipulation of some sort, the nature of which is unclear.[1] The case was initially set for trial on February 15, 2011, but the court delayed it pending a status conference on March 21, 2011. At the March 21 conference, the court gave Saito two days to file a stipulation or motion for relief from the February 8 order.

On March 29, 2011, after three successive motions for more time, Saito's counsel filed a motion for relief from the February 8 order after the parties were

[1] The court's April 25, 2011, order, discussed *infra*, makes passing reference to the parties' stipulation negotiations in a footnote. We have no other source corroborating or expounding upon the nature of the negotiations or the proposed stipulation.

apparently unable to reach an agreement regarding the stipulation. Referring to the text of the February 8 order, Saito's motion asks the court to "order the third alternative [option H] against Administrator Saito instead of the first and second alternatives [options F and G, respectively]." Saito, therefore, did not understand the February 8 motion to be a definitive judgment against her. Yet, when the Trial Division denied Saito's motion for relief on April 25, 2011, it explained that "[t]he Court granted Mekreos' motion for an entry of judgment against . . . Saito on February 8, 2011."[2]

Saito was understandably confused about the nature of the February 8 order, but the Trial Division was not. In its April 25 order, the Trial Division explained that Saito had failed to respond to Mekreos' discovery requests and an order from the court and, therefore, the court would not set aside its February 8 order. The April 25 order closed with the following: "This matter has been pending too long and there is no reason to prolong it any longer. All of the parties have been given ample time and chances to move this case along and closure should come now rather than later. A final Order and Judgment is forthcoming."

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[2] Paradoxically, the Trial Division included the following as a footnote in its decision denying the motion for relief: "The only reason the Court has not entered a formal judgment is because Saito and Mekreos were talking of a possible stipulation. The parties failed to reach an agreement and instead, Saito has filed a motion to set aside the Court's order on February 8, 2011."

On April 27, 2011, two days after the denial of Saito's motion for relief, the Trial Division entered its "Final Order and Judgment." This order was not ambiguous. It clearly stated that "[j]udgment is entered for Claimant Francisca Mekreos and against . . . Administrator, Risong Saito," and that the matter "is hereby closed and settled." Saito appealed. Her only argument is that the Trial Division denied her due process when it entered judgment against her as a sanction for failing to respond to a discovery request.

II. STANDARD OF REVIEW

When a specific determination by the Trial Division is discretionary, we review that determination for an abuse of discretion. *W. Caroline Trading Co. v. Leonard*, 16 ROP 110, 113 (2009). "Under this standard, a trial court's decision will not be overturned unless it was arbitrary, capricious, or manifestly unreasonable, or because it stemmed from an improper motive." *Id.* (internal quotation omitted).

III. ANALYSIS

When the Trial Division closed this case, its orders and judgment did not specify the precise procedural rules under which it was operating or the exact sanction it was imposing for Saito's discovery dereliction. The judgment was neither a fully parsed consideration of the merits as one would expect from a summary judgment decision, nor a *sua sponte* dismissal of Saito's claim. Rather, the court rendered a

judgment in favor of Mekreos as a sanction and, consequently, did not reach the merits of the underlying dispute. Thus, although the Trial Division never explicitly refers to its final judgment and order as a default judgment under either ROP Rule of Civil Procedure 37(b)(2)(C) or 55(b)(2), we must construe it as such.

Rule 37(b)(2) provides that "[i]f a party . . . fails to obey an order [of the court] to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just." ROP R. Civ. P. 37(b)(2). Such orders may include "an order . . . dismissing the action . . . , or rendering a judgment by default against the disobedient party." ROP R. Civ. P. 37 (b)(2)(C); *but see* 23 Am. Jur. 2d *Depositions and Discovery* § 220 (2002) (describing dismissal as "a sanction of last resort, which should be used only in extreme circumstances to redress the most flagrant discovery abuses").[3] The trial court has broad discretion to manage discovery and order sanctions under Rule 37, but its discretion is not without constitutional limits. *See* 8A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2284 (3d ed. 1998) (interpreting Fed. R. Civ. P. 37, the American analogue to ROP R. Civ. P. 37). To pass constitutional muster, any Rule 37 sanction must be (1) "just" and (2) "specifically related to the particular claim which was at issue in the order to provide discovery."

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[3] In the absence of controlling Palauan law, we look to applicable American common law for reference. 1 PNC § 303.

Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee, 102 S. Ct. 2099, 456 U.S. 694, 707 (1982) (internal quotation omitted).

Separately, Rule 55(a) provides that an entry of default is appropriate "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." ROP R. Civ. P. 55(a). A party may move for Rule 55 default judgment at any time in litigation "when a defendant shows a pattern of deliberate delay or a lack of diligence and has ignored the court's commands or treated them with indifference." 46 Am. Jur. 2d *Judgments* § 253 (2006). This includes situations in which a party has failed to comply with pretrial and discovery orders. *Id.* *See also* ROP R. Civ. P. 16(f); ROP R. Civ. P. 37(b)(2)(C).

Upon entry of default, the non-defaulting party typically must (1) move the court for judgment by default and (2) send notice of the motion to any defaulting party who has appeared in the case. ROP R. Civ. P. 55(b)(2). Once the non-defaulting party has filed a motion and served notice on the defaulting party, the trial court may hold a hearing to determine whether to enter a judgment by default. 10A *Federal Practice and Procedure* § 2688 (interpreting Fed. R. Civ. P. 55, the American analogue to ROP R. Civ. P. 55). The court then has discretion to grant or deny the motion for default judgment. *Id.* § 2685.

Nevertheless, default judgments, whether entered under Rule 37 or Rule 55, "are not favored by the law and any doubts usually will be resolved in favor of the defaulting party." 10A *Federal Practice and Procedure* § 2681. As a result, the standard for setting aside an entry of default or default judgment is low. "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." ROP R. Civ. P. 55(c).

On these facts, we cannot say that default judgment against Saito is an appropriate sanction under either Rule 37 or Rule 55, even under the abuse of discretion standard. Many or most of the severe delays in this case were caused by Mekreos, not Saito. Saito's failures only occurred toward the end of this litigation. Punishing her with default judgment when both parties caused prolonged delays cannot be "just" under Rule 37. *See, e.g., Anilina Fabrique de Colorants v. Aakash Chemicals & Dyestuffs, Inc.*, 856 F.2d 873, 878 (7th Cir. 1988) (holding that default judgment against defendant was an abuse of discretion when the plaintiff was partly at fault for the delays in the case). Likewise, the default judgment fails under Rule 55 because both Mekreos' motions and the resulting court orders were nonsensical, thereby depriving Saito of sufficient notice, as required by Rule 55(b)(2), that she was in jeopardy of having judgment rendered against her. To affirm the Trial Division's

decision, we would have to side-step Rule 55(b)(2)'s notice requirement; disregard Rule 55(c)'s low bar to setting aside default judgment; and, most critically, look past Rule 37's command that all sanctions be just. Because the default judgment did not comport with our rules, the court abused its discretion, *see W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 129 (2008), and we cannot affirm. *See Anilina Fabrique de Colorants*, 856 F.2d at 878 ("While not approving the apparent lack of diligent attention, we are of the opinion that the imposition of the particular sanction was too harsh under the circumstances here presented and judicial discretion should have indicated other less extreme initial steps." (quotation omitted)).

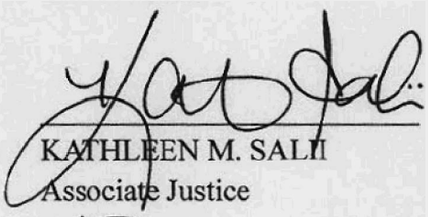
IV. CONCLUSION

Because we are sympathetic to the Trial Division's palpable frustration with the pace of this litigation, we reach our decision reluctantly. Time and time again, both parties caused significant and unreasonable delays only to submit incomprehensible motions, briefs, and proposed orders to the court. The parties' counsel are reminded that, if they are unable to zealously represent their clients' interests, they should consider withdrawing their representation.

For the foregoing reasons, we **REVERSE** the decision of the Trial Division and **REMAND** this case for further proceedings consistent with this Opinion.

So ORDERED this 15th day of May, 2012.

ARTHUR NGIRAKLSONG
Chief Justice



KATHLEEN M. SALII
Associate Justice

ALEXANDRA F. FOSTER
Associate Justice