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

9 MARGIE B. TUDELA, dba THE PYRAMID) **CIVIL ACTION NO. 97-1149D**
10 ENTERPRISES,)

11 Plaintiff,)

12 v.)

13 M.A. GAFUR MIAH, MOHAMMAD FERROJ)
14 AHMED, MOHAMMED ABDUL MOMEN,)
15 SHIEKH ABDUL HALIM, HOMAYAN)
16 KABIR, NOUSHER (NOUSHAR) JAHEDI)
17 a.k.a. 'TOPPON', AFSAR UDDIN, SUMON)
18 SUMON SUMON, AHAMAD UN NABI,)
19 ASHOK SARKER and MD. ENAMUL)
20 HOQUE,)

21 Defendants.)

22 **ORDER GRANTING DEFENDANTS'**
23 **MOTION TO DISMISS**

24 **I. INTRODUCTION**

25 THIS MATTER came on for a hearing on December 3, 2001 at 9:00 a.m., in courtroom 205A
26 on Defendants' motion to dismiss and Plaintiff's cross-motion to dismiss Defendants' counterclaims. Joe
27 Hill, Esq. appeared on behalf of Margie B. Tudela [hereinafter Plaintiff]. Pam Brown, Esq. appeared on
28 behalf of Mohammad Feroj Ahmed, Mohammed Abdul Momen, Shiekh Abdul Halim, Homayan
Kabir, Nousher (Noushar) Jahedi a.k.a. 'Toppon', Afsar Uddin, Sumon Sumon Sumon, Ahamad Un
Nabi and Ashok Sarker [hereinafter Defendants]. Defendant M.A. Gafur Miah [hereinafter
Defendant-Miah] and Defendant M.D. Enamul Hoque [hereinafter Defendant-Hoque] did not appear.
The Court, having reviewed the pleadings and arguments of counsels and being fully advised, now
renders its decision.

FOR PUBLICATION

1 **II. BACKGROUND**

2 On November 19, 1997, Plaintiff filed a verified complaint alleging: one count of fraud and
3 deceit against Defendants, Defendant-Miah and Defendant-Hoque; one count of breach of an
4 employment contract against Defendants; and, one count of breach of contract against Defendant-
5 Miah. On November 26, 1997, the Court entered an Order to Appear and Plead permitting Plaintiff to
6 serve Defendant-Miah with the summons and complaint by mail, return receipt requested, postage
7 prepaid to Defendant-Miah's last known address at: First Floor, 58/1-A Purana Paltan, Dhaka,
8 Bangladesh. Defendants were each served personally with the summons and complaint at the Afetna
9 Building, San Antonio, Saipan. Defendant-Hoque was not served.

10 On December 24, 1997, Defendants filed their answer to the complaint, stating affirmative
11 defenses and counter.claims against Plaintiff for: (1) fraud, deceit and misrepresentation; and, (2)
12 breach of contract. Defendant-Miah filed an answer in the form of a letter he wrote to Plaintiff's
13 counsel, Attorney Hill, dated January 7, 1998, stating in essence that he did not defraud Plaintiff and
14 that it was Plaintiff who breached her contract to provide jobs to Defendants. On January 15, 1998,
15 Plaintiff filed her answer to Defendants' counterclaims.

16 On July 31, 2001, then counsel for Defendants, John Cool, Esq., filed a notice to withdraw as
17 counsel for Defendants in the case. On the same day, Defendants filed a *pro se* motion to dismiss the
18 complaint pursuant to Rule 41 (b)(1) of the Commonwealth Rules of Civil Procedure. On August 25,
19 2001, Plaintiff filed her opposition to Defendants' motion to dismiss and filed a cross-motion to dismiss
20 the counterclaims. A hearing on Defendants' motion to dismiss was held on September 10, 2001, but
21 was continued to October 1, 2001 to enable Defendants to retain private counsel. For good cause
22 shown, the October 1, 2001 hearing was continued to October 22, 2001. On the day of the hearing,
23 Defendants' newly retained counsel, Pamela Brown, Esq., moved for a continuance to allow
24 Defendants additional time to file their
25 Pleadings, which the Court granted. On November 7, 2001, Defendants filed their opposition to
26 Plaintiff's motion to dismiss the counterclaims and filed a reply to Plaintiff's opposition to Defendants'
27 motion to dismiss. Defendants' opposition and reply were supported by a Declaration by Mohammad
28 Feroj Ahmed filed on November 7, 2001. *See* Ahmed's Declaration and Exhibits attached thereto filed

1 on November 7, 2001. On November 13, 2001, Plaintiff filed her reply to Defendants' opposition to
2 Plaintiff's cross-motion to dismiss the counterclaims. On the same date, Plaintiff also filed a motion for a
3 status conference and a scheduling order pursuant to Rule 16(a) of the Commonwealth Rules of Civil
4 Procedure. On December 3, 2001, the Court heard arguments on Defendants' motion to dismiss the
5 complaint, Plaintiff's motion to dismiss the counterclaims, and Plaintiff's motion for a status conference
6 and a scheduling order.

7 **III. ISSUE**

8 Whether this Court should grant Defendants' motion to dismiss for failure to prosecute pursuant
9 to Com. R. Civ. P. 41 (b)(1).

10 **IV. ANALYSIS**

11 Rule 41(b)(1) of the Commonwealth Rules of Civil Procedure provides that "[f]or failure of the
12 plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for
13 dismissal of an action or of any claim against the defendant." See Com. R. Civ. P. 41(b)(1). In
14 determining whether or not to dismiss a case for failure to prosecute, the court may consider a number
15 of relevant factors including:

- 16 (1) the public's interest in expeditious resolution of litigation;
- 17 (2) the court's need to manage its docket;
- 18 (3) the risk of prejudice to the defendants;
- (4) the public policy favoring disposition of cases on their merits; and,
- (5) the availability of less drastic sanctions.

19 See *Wabol v. Villacrusis*, App. No. 98-008 (N.M.I. Sup. Ct. December 15, 2000) (Opinion at 6)
20 (citing *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). Applying the principles above
21 to the case at bar, the Court finds that granting Defendants' motion to dismiss the complaint is the
22 appropriate course of action for the following reasons.

23 A. Expeditious Resolution of Litigation and the Court's Need to Manage its Docket.

24 In dismissing a case for lack of prosecution, the court must find a showing of unreasonable
25 delay. See *Henderson*, 779 F.2d at 1423. A finding of unreasonable delay gives rise to a presumption
26 of injury to the defendants which will, in and of itself, justify dismissal if not rebutted. *Id.*; See also *In re*
27 *Eisen*, 31 F.3d 1447, 1451-53 (9th Cir. 1994). In this case, the complaint was filed on November 19,
28 1997. Four years and five months have passed since Plaintiff filed her complaint. After filing her answer

1 to Defendants' counterclaim on January 15, 1998, Plaintiff took no further action in this case. Plaintiff
2 failed to request for a status conference or a trial date at any time prior to filing of Defendants' motion to
3 dismiss on July 31, 2001. In fact, Plaintiff did not make an appearance in this case until Defendants filed
4 this motion which is pending before the Court. Plaintiff further failed to state on the record or in her
5 opposition or in any pleading filed subsequent to Defendants' motion to dismiss, any reason or excuse
6 for her delay in prosecuting the case. Clearly, Plaintiff's failure to prosecute for four years and five
7 months, absent good cause, flies in the face of the public's interest in the expeditious resolution of
8 litigation and the court's need to manage its docket. Accordingly, the Court finds that Plaintiff's conduct
9 in not prosecuting the case constitutes unreasonable delay.

10 B. Risk of Prejudice to Defendant.

11 It is well established that when considering prejudice to a defendant, the failure to prosecute
12 diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice
13 to the defendant from the failure to prosecute; the law presumes injury from unreasonable delay. *See*
14 *Eisen*, 31 F.3d at 1453 (*citing Anderson V. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976)). The
15 burden of proof as to prejudice is as follows:

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

22 *See Eisen*, 31 F.2d at 1453 (*citing Nealy v. Transportation Maritima Mexicana, S.A.*, 662 F.2d
23 1275, 1281 (9th Cir. 1980)). Prejudice itself takes two forms- - loss of evidence and loss of memory
24 by a witness. *Id.*

25 Considering the principles above, the Court finds that Defendants were prejudiced in two ways.
26 First, Defendants in this case are also complainants in consolidated Commonwealth Department of
27 Labor and Immigration [hereinafter DOLI], Division of Labor case numbers 96-580, 96- 586, 96-600,
28 97-051 and 97-067. *See Decl. of Mohammad Ahmed and Attached Exs. in Support of the Opp'n to*
Pl.'s Mot. to Dismiss Countercls./Reply to Pl.'s Verified Opp'n to Defs.' Mot. to Dismiss at ¶¶ 1-2
(Nov. 7, 2001) [hereinafter Ahmed Decl.]. Defendants filed a complaint against Plaintiff in the said

1 labor cases for violations of the Minimum Wage and Hour Act, breach of the parties' Employment
2 Contract and Employer's Agreement. *See* Ahmed Decl., Ex. 1. In the consolidated labor cases,
3 Plaintiff moved for a stay of the administrative proceedings pending the disposition of this case in the
4 Superior Court. *See* Ahmed Decl., Ex. 3. In the Division of Labor Administrative Order dated
5 December 18, 1997, hearing Officer Linn H. Asper granted Plaintiff's motion for a stay of the
6 administrative proceedings for the following reasons:

7 The Motion for Stay of Proceedings was based on a pending civil action
8 [Civil Action 97-1149D] as noted above. The civil action was filed in
9 order to forward respondent's theory that a Bangladeshi labor recruiter,
10 M.A. Gafur Miah, collaborated with complainants to defraud respondent.
11 Whether or not this theory provides respondent a valid defense to the claims
12 of complainants, it cannot be fully presented in the administrative proceedings,
13 because Miah is not a subject to the jurisdiction of the Department. As a
14 recruiter, Miah is not an employer or an employee under the terms of the
15 Nonresident Workers' Act. Therefore, I ruled that the administrative proceedings
16 should yield to the Superior Court case, which has the potential of providing
17 more complete relief among all the parties, including Miah.

18 *Id.* at 2. Plaintiff, however, failed to litigate her case in the Superior Court following the stay of
19 proceedings in the DOLI labor cases. Considering the fact that Plaintiff moved for a stay of
20 proceedings at DOLI on December 18, 1997, about one month after filing the case at bar, it is
21 apparent that Plaintiff, by not diligently pursuing this case at bar for four years and five months, opted to
22 let this case sit in the Superior Court knowing full well that the DOLI labor cases were stayed pending
23 the outcome of this case. As a result, Defendants have been denied relief both in the administrative
24 proceedings at the Division of Labor and in this case, due to Plaintiff's failure to timely and diligently
25 prosecute.

26 Second, Defendants have been denied their right to effectively defend themselves in this case
27 due to the unavailability of witnesses and the high cost of litigation due to the lapse of time. Apparently,
28 Defendant-Miah, who is the central focus of Plaintiff's claim for fraud, departed the Commonwealth on
or about November 15, 1996, and has not returned since that time. *See* Ahmed Decl. at ¶ 3. Other
defendants have also departed the Commonwealth and are not available to testify at trial. *See* Ahmed
Decl. at ¶¶ 5-6. As such, the remaining Defendants are extremely disadvantaged. Defendant-Miah and
other witnesses are unavailable to testify at trial and it would be extremely costly for Defendants to
bring them back to Saipan.

1 C. Public Policy Favoring Disposition of Cases on Their Merits.

2 In determining whether dismissal is warranted, courts weigh the public policy favoring
3 disposition of a case on its merits against plaintiff's delay and prejudice suffered by the defendant. *See*
4 *Eisen*, 31 F.3d at 1454. While this Court acknowledges the public policy favoring disposition of cases
5 on their merits, it finds that it would be a miscarriage of justice to reward Plaintiff by allowing her to
6 pursue her case in this Court while Defendants continue to be denied process in their pending
7 complaints at the Division of Labor. Although there is indeed a policy favoring disposition on the merits,
8 it is clear that Plaintiff, the complainant here, has the responsibility of moving towards disposition of the
9 case at a reasonable pace, and must not get away with dilatory and evasive delay tactics.

10 In reviewing the record, the Court further notes that Plaintiff has not shown that she has a strong
11 case. Although Plaintiff asserts claims of fraud, she does not demonstrate a strong showing that her
12 actions are likely to be resolved in her favor. Plaintiff merely states that "mere lapse of time does not
13 mandate dismissal." Plaintiff cites *Marks v. San Francisco Real Estate Bd.*, 627 F.2d 947 (9th Cir.
14 1980) for the proposition that "[a]n earlier lack of diligence does not justify dismissal when the plaintiff
15 is currently acting diligently." The Court accepts Plaintiff's proposition, but finds that Plaintiff failed to
16 state what efforts she has undertaken to move the case forward or why it is important that her actions
17 be resolved on the merits. While the strength or weakness of the plaintiff's case may be a factor in
18 determining the harshness of dismissal in a particular case, it is well settled that the likelihood of success
19 on the merits is not decisive when considering a dismissal. *See Eisen* 31 F.3d at 1454. Based on what
20 has transpired in this case, the Court finds that dismissal is appropriate because Plaintiff has clearly
21 ignored her responsibilities to prosecute this action and Defendants have been prejudiced as a result
22 thereof.

23 D. Unavailability of Less Drastic Sanctions.

24 In considering whether alternative sanctions are warranted in this case, it is sufficient that
25 meaningful alternatives be explored. *See Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500
26 (9th Cir. 1987). The Court further notes, however, that "[u]nder egregious circumstances, it is
27 unnecessary (although helpful) for a trial court to discuss why alternatives to dismissal are infeasible."
28 *See Eisen*, 31 F.3d at 1455 (*citing In re Osinga*, 91 B.R. 893, 895 (B.A.P. 9th Cir. 1988)). The

1 Court finds that egregious circumstances exist in this case where: (1) Plaintiff allowed four years and
2 five months to pass without prosecuting her case; (2) Plaintiff failed to articulate any reason whatsoever
3 for the delay in prosecuting the case; (3) the Division of Labor, at Plaintiff's request, stayed
4 administrative proceedings regarding Defendants' labor complaint against Plaintiff pending the outcome
5 of this case; and, (4) Defendants have been prejudiced by Plaintiff's failure to timely prosecute.

6 Although the Court need not discuss why alternatives to dismissal will not suffice, the Court will
7 do so in this case. Here, awarding monetary sanctions or attorney's fees will not recompense
8 Defendants for their inability to obtain due process and resolve their DOLI cases, which were stayed at
9 Plaintiff's request pending the outcome of this case. Nor will such sanctions bring back
10 Defendant-Miah or other Defendants who have departed the Commonwealth to testify at trial. Further,
11 the Court questions Plaintiff's sincerity in resolving the dispute. At the December 3, 2001 hearing,
12 Plaintiff's counsel, in response to the Court's inquiry, informed the Court that Plaintiff relocated to the
13 United States mainland, and, that although she was not present at the hearing, she still seeks to proceed
14 with her case. Clearly, Plaintiff's actions in relocating to the U.S. mainland suggests Plaintiff's lack of
15 interest in this case. For the stated reasons, lesser sanctions will not cure Plaintiff's unreasonable delay;
16 therefore, dismissal is the Court's proper sanction.

17 **V. CONCLUSION**

18 Based on the foregoing reasons, the Court hereby **GRANTS** Defendants' motion to dismiss
19 pursuant to Com. R. Civ. P. 41(b)(1) for failure to prosecute. Plaintiff's complaint is hereby
20 **DISMISSED WITH PREJUDICE.**

21 **SO ORDERED** this 12th day of April, 2002.

22 /s/ _____

23 VIRGINIA S. SABLAN-ONERHEIM, Associate Judge