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

MARY ANN S. MILNE, Plaintiff, v. LEE PO TIN and JUAN DOE 1-25, Defendants.	)	Civil Action No. 94-0419 DECISION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Mary Ann S. Milne ("Milne") brings this action to quiet title on a parcel of land which was the subject of a 1979 contract of sale and lease of property. Milne argues that both instruments are part of the same transaction which is void ab initio as it violates the Commonwealth Constitution, Article XII. Defendant Lee Po Tin ("Lee") concedes that the contract of sale is void, but argues that the lease is a valid instrument. On April 13, 1998, Lee moved for an order dismissing Milne's complaint under Commonwealth Rule of Civil Procedure 41(b)(1) on the grounds that there was no prosecution of the case by Milne since September 6, 1994. With her opposition to the motion to dismiss, Milne moved for summary judgment. Lee likewise moved for summary judgment. The court, having reviewed all briefs, declarations, exhibits, and having heard and considered the arguments of counsel, now renders its written decision. **[p. 2]**

II. FACTS

On or about October 5, 1979, Ernest Milne transferred land interests to Lee, a non-Northern Marianas Descent ("NMD") person. One document was an Agreement for Sale of Real Property ("Contract"), effective only when and if the law changes to permit Lee to hold fee simple title to land in the CNMI. The other document was a lease of the same land ("Lease"), effective for forty years

from the date of execution. On January 22, 1980, Ernest Milne and Lee amended the Lease with a clause providing for the purchase of improvements made on the land.

After the death of Ernest Milne, plaintiff Milne inherited the subject land. This action was brought against Lee on April 29, 1994. On August 5, 1994, Lee moved to dismiss the action or, in the alternative, quash the service of process. On August 24, 1994, the court denied Lee's motion. On September 6, 1994, Lee's answer was filed. From that point onward, there was nothing filed by Milne. Lee's motion to dismiss was filed April 13, 1998. After obtaining the court's permission to exceed the twenty-five page limit, Milne filed her opposition and motion for summary judgment on May 6, 1998.

III. ISSUES

1. Whether by filing an opposition and motion for summary judgment within thirty days of Lee's motion to dismiss for failure to prosecute, Milne automatically prevents her action from being dismissed.

2. Whether under Rule 41 of the Commonwealth Rules of Civil Procedure, Milne's action is dismissed.

3. Whether the Lease violates Article XII of the Commonwealth Constitution.

IV. ANALYSIS

A. Motion to Dismiss

Rule 41(b)(1) of the Commonwealth Rules of Civil Procedure ("CRCP") provides a defendant with the ability to move for dismissal for failure to prosecute. Milne argues that under 41(b)(2), she has 30 days to respond to such a motion, and that if she responds or continues to prosecute, the motion to dismiss must automatically fail. Rule 41(b) states:

(b) INVOLUNTARY DISSMISSAL; EFFECT THEREOF.

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> (1) For failure of the Plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.
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> (2) (A) At the end of each calendar year, the clerk shall prepare a list of all cases pending in the court, other than criminal cases, in which no action was taken by any party during the preceding two years. The clerk shall then mail notice to all persons who have entered an appearance in such a case that, subject to the provisions of

> subparagraph (C), below, the case will be dismissed without further notice 30 days after the sending of the notice.
>
> (B) After the 30th day following the sending of the notice, without order of the court the clerk shall, subject to the provisions of subparagraph (C), below, enter an order of dismissal for all cases on the list....
>
> (C) A case shall not be dismissed for lack of prosecution if within 30 days of sending the notice
>
> i. There are further proceedings in the case....

Lee argues that 41(b)(2) only applies where the court has initiated the dismissal. This court agrees.

When interpreting a statute, it is necessary to look first to the plain meaning of its language. Nansay Micronesia Corp. v. Govendo, 3 N.M.I. 12 (1992). A statute's meaning rests on the clarity of its words as well as the internal cohesion of its sections. Pressley v. Capital Credit & Collection Service, 760 F.2d 922 (1985); *see* In re Estate of Rofag, 2 N.M.I. 18 (1991). Not only do the letters (A), (B), and (C) fall solely under section two as numbered, but each lettered paragraph clearly describes a situation where the clerk of court has initiated a dismissal. Each paragraph in section two consistently refers to the thirty day notice the clerk will send for failure to prosecute. To the contrary, section one is a general provision. There are no references to thirty day periods. Accordingly, section one stands alone as a means for a defendant to bring a motion to dismiss for failure to prosecute.

Further support for this interpretation of CRCP Rule 41 can be found by examining the Federal Rules of Civil Procedure. In interpreting local statutory laws, the court may look to federal law for guidance where identical federal provisions exist. Govendo v. Micronesian Garment Manufacturing, Inc., 2 NMI 270, 283 n. 4 (1991). Federal Rule of Civil Procedure ("FRCP") 41(b) is nearly identical to our local rule, with the exception that it does not have a mechanism for the clerk of court to dismiss cases. Instead, FRCP merely provides under rule 41(b) that "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of **[p. 4]** any claim against the defendant...." The federal rule then provides for res judicata of the dismissal, tracking the language of our 41(B)(3). The major difference between the CNMI rule and the federal rule is that the CNMI rule adds a section on how the court can dismiss

a case. The 30 day provision falls within this section. Because this section has its own provisions for dismissal, the 30 day provision only makes sense if read within 41(b)(2). Section 41(b)(2) does not apply here. The fact that the plaintiff filed a motion within 30 days is not dispositive. Instead, the court has the discretion it would have under FRCP rule 41(b) to decide whether to dismiss this action for failure to prosecute.

In determining whether to dismiss an action for failure to prosecute, the court will consider the following factors:

(1) the public's interest in expeditious resolution of litigation;

(2) the court's need to manage its docket;

(3) the risk of prejudice to the defendants;

(4) the public policy favoring the disposition of cases on their merits; and

(5) the availability of less drastic sanctions.

In re Eisen v. Moneymaker, 31 F.3d 1447, 1451 (9th Cir. 1994). Dismissal is a harsh remedy, and less drastic alternatives should first be considered. McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996).

The factors enumerated above constitute the test for a showing of "unreasonable delay" which is necessary to support dismissal of a case for lack of prosecution. Ash v. Cvetkov, 739 F.2d 493, 496, *cert. denied* 105 S.Ct. 1368 (1984). A finding of unreasonable delay creates a presumption of prejudice to the defendant. Id. However, the court may examine whether actual prejudice exists in its determination of whether a delay is unreasonable. Id. The court is not required to make specific findings, although here it chooses to do so. Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986).

The public interest in expeditious resolution of litigation is usually considered in tandem with the court's need to manage its docket. In re Eisen v. Moneymaker, 31 F.3d 1447, 1451 (9th Cir. 1994). The delay of time on its face is unreasonable. Over three years elapsed without any attempt by Milne to prosecute her case. Counsel's argument that he could not proceed because the case law is unsettled is not persuasive. First, the court disagrees with counsel: the case law in this jurisdiction is settled to a degree that prosecution should not have been hindered. Just because counsel does not agree with the holdings of the CNMI and 9th Circuit case law as it stands, it does not therefore follow

that the case law **[p. 5]** is unsettled.[1] Further, counsel has litigated Article XII cases up to the 9th Circuit Court of Appeals and so has been fully aware of the developments of the law. *See* Milne v. Hillblom, No. 97-16618 (9th Cir. 1999); Ferreira v. Borja, 1 F.3d 960 (9th Cir. 1993); Ferreira v. Borja, 93 F.3d 671 (9th Cir. 1996)[2]. Second, counsel was able to produce a 39 page opposition brief and motion for summary judgment only 23 days after the motion to dismiss was brought. After reading the brief, it is clear to the court that these arguments could have been made far earlier. Third, and of most concern to this court, is that this type of problem is not new to this particular counsel.[3]

Nevertheless, the court looks to the other factors as well in coming to its determination of whether there has been an unreasonable delay. Although long delays are not condoned by the court, its docket has not yet been made unmanageable by cases of this nature. This court, wherever possible, will attempt to dispose of matters on the merits. Further, the court notes that in all of the cases cited, supra, the party whose case was dismissed for failure to prosecute had in some way failed to adhere to a judicial scheduling request.

As far as prejudice to the defendant, a failure to prosecute is sufficient on its own to justify a dismissal. In re Eisen v. Moneymaker, 31 F.3d 1447 (9th Cir. 1994). However, if a plaintiff comes forward with an excuse for the delay which is anything but frivolous, the burden shifts back to defendant to show prejudice. Id. at 1453. Prejudice here is defined as loss of evidence and loss of

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[1] Aldan-Pierce v. Mafnas, No. 90-021 (N.M.I. July 5, 1991); Ferreira v. Borja, 93 F.3d 671 (9th Cir. 1996); Diamond Hotel v. Matsunaga, 4 N.M.I. 213 (1995), *app dism*. 99 F.2d 296 (9th Cir. 1996).

[2] The Superior Court found that Mr. Mitchell's Rule 60(b) motion, made on April 25, 1997, to set aside the judgment on the grounds that the Ninth Circuit had no jurisdiction to vacate the 1992 judgment in the Ferreira case was frivolous. This decision was affirmed in Ferreira v. Borja, No. 97-026/029 (N.M.I. Jan. 21, 1999) (slip. op.). Substantive Article XII law would not have been affected in any event.

[3] See Manglona v. Tenorio, Civ. Action 93-1061 (Superior Court). In Manglona, Mr. Mitchell failed to timely respond to a request for admissions. In allowing the defendant to respond to the admissions late, the court noted in a footnote:

> Despite the ruling in the instant case, the Court strongly cautions Mr. Mitchell that he should pay close attention to the documents served upon his office. The Court is aware of at least one other recent incident in which this attorney has used the argument that his failure to act resulted from an office "oversight." *See* Milne v. Hillblom, Civil Action No. 93-448 (N.M.I. Super. Ct. Apr. 7, 1993) (failure to respond to subpoena). The Court may not be very receptive to such excuses in the future.

memory by a witness. Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275 (9th Cir. 1980). Even though **[p. 6]** Milne's excuse may border on the frivolous, the main causes of prejudice are absent here. The outcome of this case rests squarely on the Contract and Lease, which are available as evidence. Defendant has not alleged any specific injury as a result of the delay. Although the amount of time that has elapsed without prosecution is in itself a prejudicial event, other signs of prejudice are not present and this factor does not override the court's other considerations. *See* Hernandez v. City of El Monte, 138 F.3d 393 (9th Cir. 1998).

Looking at the factor of the merits, it is important to first state that it is not the court's obligation to scrutinize the merits of a particular case. In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994). Instead, this factor goes to the harshness of dismissing a particular case. Id. This case is an Article XII land case involving arguably the single most important issue for the citizens of the CNMI. Article XII of the Constitution of the Commonwealth of the Northern Mariana Islands limits the rights of non-NMDs to acquire land, our scarcest yet most important resource.[4] The enforcement of this restriction on alienation of land is imperative to maintaining the social stability, identity, and pride of the people of the CNMI. Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1992) as amended, *cert. denied sub nom.*; Diamond Hotel v. Matsunaga, N.M.I. Jan. 19, 1995 (slip op. 93-023); L. Guerrero, *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands*, pp. 163-180 (December 6, 1976) (unpublished manuscript). To allow an action involving ownership of land by a NMD to be dismissed when there is an illegal contract with a non-NMD for the purchase of land, is unacceptably harsh.

Lastly, the availability of less drastic sanctions is available here. Dismissal with prejudice is warranted only where a lesser sanction, such as a fine or penalty, would not serve the interests of justice. Cohen v. Carnival Cruise Lines, Inc., 782 F.2d 923 (11th Cir. 1986). In this case, a fine or penalty is an appropriate sanction. Therefore, plaintiff's counsel is ordered to pay defendant for the cost of bringing the motion to dismiss. Because this lesser sanction is adequate to serve the interests

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[4] Section 1 states: Alienation of Land. The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent. CNMI Constitution, Art. XII, §1 (ratified 1977, effective 1978).

of justice, the court declines to dismiss this action for failure to prosecute. For the above reasons, Lee's motion is denied.

[p. 7] B. Motions for Summary Judgment

A motion for summary judgment may be granted only if "...the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Com. R. Civ. P. 56(c). The court views the facts in a light most favorable to the nonmoving party. Cabrera v. Heirs of De Castro, 1 N.M.I. 172 (1990). If the moving party meets its initial burden to show that no genuine issue of material fact exists and as a matter of law it is entitled to the relief requested, the burden shifts to the nonmoving party to show a genuine dispute of material fact. Cabrera, *supra*, at 176; Riley v. Public School Sys., 4 N.M.I. 85, 89 (1994).

Milne argues that the Contract and Lease taken together constitute a single overreaching transaction in which Lee attempted to acquire an illegal long term interest in real property. The term "transaction" is used in Article XII as follows:

> Section 3: Permanent and Long-Term Interests in Real Property. The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building. Any interests acquired above the first floor of a condominium building is restricted to private lands. Any land **transaction** in violation of this provision shall be void. This amendment does not apply to existing leasehold agreements.[5] (emphasis added)
>
> Section 6: Enforcement. Any **transaction** made in violation of Section 1 shall be void ab initio... (emphasis added) CNMI Constitution, Art. XII, §3, §6 (ratified 1977, effective 1978, amended 1985)

There is no definition for the term "transaction" within Article XII or any Commonwealth statute. Milne argues that the term "transaction" should be defined broadly, as it is for purposes of Com.R.Civ.P. 13(a) (compulsory counterclaims). However, the Supreme Court has held that the Rule 13(a) definition of "transaction" is not appropriate to use in the context of a case involving Article XII. Manglona v. Kaipat, 3 N.M.I. 322, 334 (1992). The Manglona court went on to

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[5] At the time Ernest Milne entered into the agreements, the maximum leasehold interest was forty (40) years. Section 3 read: "The term permanent and long-term interests in real property used in section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights." CNMI Constitution, Art. XII, §3 (ratified 1977, effective 1978). The language including the term "transaction" was a later addition.

specifically define the term "transaction" to mean "the acquisition by a non-NMD of an illegal interest in real property. That acquisition is the transaction which is void under Article XII." Id. at 334.

[p. 8] Because the term "transaction" is construed narrowly, it would be inappropriate here, where the parties purposefully drafted two separate documents, to make them into one transaction. Wherever possible, the court must strive to give effect to the agreement between the parties. Diamond Hotel, Ltd., *supra*, at 220-21.

Examining the documents individually, the Contract is clearly invalid. The Contract provided for a fee simple transfer to Lee in the event of a change in CNMI law permitting non-NMDs to hold title to land. Similar change of law provisions have been held to violate Article XII as they prevent a grantor from presently encumbering or disposing of land subject to the provision. Diamond Hotel v. Matsunaga, 4 N.M.I. 213, 218 (1995), *app. dism.*, 99 F.2d 296 (9th Cir. 1996). Accordingly, the Contract is in direct contravention of Article XII and is void ab initio.

However, the Lease stands alone separately as a valid instrument. The Lease is legal and enforceable as it does not allow Lee to acquire a long term interest longer than that allowed by CNMI law. Milne argues that a 1980 addendum to the Lease restricts alienation and unjustly enriches Lee. The lease amendment, paragraph 1, amends paragraph 12 of the original lease as follows:

> If, at the expiration of the Term of this Lease as set forth in Paragraph 1 hereof, ownership of the premises shall be vested in any person other than Lessee, then and in such event all improvements remaining upon the Premises as of the date of the expiration of the Term shall be purchased by Lessor for a purchase price equal to the fair market value of such improvements plus the fair market value of the Premises as of such date; provided, however, that the purchase price shall not be less than $40,000.00. The parties agree that the foregoing provision is fair and equitable. The parties further agree that, in the event that they are not able to agree upon the exact amount of the purchase price, then Lessee may seek a determination thereof from any court of competent jurisdiction, and in the event that Lessee does so, Lessor shall pay all of Lessee's attorneys' fees and expenses in connection with the seeking of such a determination and with the recovery of the purchase price.

Milne argues that even if she receives the property at the end of the Lease, if a judgment is entered because she cannot pay for improvements, a lien could be obtained against the property and a forced sale might ensue.

However, this clause does not cause an extension of the leasehold, purport to transfer the land to Lee, or prevent Milne from encumbering or transferring her remainder interest. It merely ties the

price of any improvements made to the fair market value of the property. There is nothing inherently wrong with a lease clause which provides for a purchase of improvements. *Cf*. Matter of Chicago, Rock Island **[p. 9]** and Pacific R. Co., 753 F.2d 56 (C.A.Ill. 1985) (lease provision governs improvements). The fact that Milne must purchase improvements at the end of the Lease does not affect her ownership of the land. The land will revert back at the end of the Lease. As a result, this Lease does not violate Article XII.[6] Milne's motion for summary judgment is denied. Lee's motion for summary judgment is granted, insofar as the court declares the Contract void ab initio and the Lease legal and binding.

VI. CONCLUSION

For the foregoing reasons, Lee's motion to dismiss is denied, Milne's motion for summary judgment is denied, and Lee's motion for summary judgment is granted.

So ordered this 19 day of May, 1999.

/s/ Edward Manibusan
EDWARD MANIBUSAN, Presiding Judge

[6] Because there is no need to invalidate the Lease, it is not necessary to address Milne's argument that public law 8-32 is unconstitutional. If a matter can be resolved on other grounds, then constitutional issues should not be addressed. Marianas Public Land Trust v. Marianas Public Land Corp., 1 CR 974, 977-8 (N.M.I. Tr. Ct. 1984).