IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

	)	**APPEAL NO. 98-008**
CONCEPCION S. WABOL, and	)	**CIVIL ACTION NO. 84-397**
ESTATE OF ELIAS S. WABOL	)	
	)	
Appellee,	)	
v.	)	
	)	
VICTORINO U. VILLACRUSIS,	)	**OPINION**
PHILIPPINE GOODS, INC., and	)	
TRANSAMERICA (SAIPAN) CORP.	)	
	)	
Appellants.	)	
	)	

Argued on July 25, 2000.

Cite as: *Wabol v. Villacrusis,* 2000 MP 18

Counsel for Appellants: Eric S. Smith
Saipan

Counsel for Appellees: Theodore R. Mitchell
Saipan

BEFORE: DEMAPAN, Chief Justice, MANIBUSAN, and ATALIG, Justices *Pro tempore*

DEMAPAN, Chief Justice:

[1]Transamerica (Saipan) Corp. ("Transamerica") appeals the lower court's February 19, 1998 order which granted Concepcion S. Wabol's ("Wabol") motion to dismiss for failure to plead and prosecute any claims for unjust enrichment which arose out of a 1995 decision of this Court. We have

FOR PUBLICATION

jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution, as amended.[1]

ISSUE PRESENTED AND STANDARD OF REVIEW

[2]Whether the lower court abused its discretion in ordering the dismissal with prejudice of Transamerica's lawsuit for failure to prosecute. Dismissal for failure to prosecute is reviewed for an abuse of discretion. *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 650 (9th Cir. 1991).

FACTUAL AND PROCEDURAL BACKGROUND

Concepcion S. Wabol and her brother, Elias S. Wabol, instituted this case on October 17, 1984. The history of this case encompasses fifteen years of litigation in the Superior Court, the CNMI Supreme Court, the Appellate Courts and U.S. Supreme Court. Only the relevant facts to this appeal are stated below.

On December 19, 1995, this Court vacated and remanded the lower court's April 19, 1994 judgment "for proceedings consistent with our mandate and the Appellate Division decision." *Wabol v. Villacrusis*, 4 N.M.I. 314 (1995). Part of this Court's directions included:

> Specifically on remand the court is to determine whether any quasi-contractual or periodic tendency obligations have arisen on the part of Concepcion S. Wabol or the Estate of Elias S. Wabol, and the amount, if any, of any unjust enrichment incurred as a result of improvements made on the property by the Appellants [Villacrusis, Philippine Goods, Inc., and Transamerica (Saipan) Corp.].
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> These considerations on remand must be entertained prior to the entry of judgement.

Wabol, supra, 4 N.M.I. at 319.

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[1] N.M.I. Const.,art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

On April 29, 1997, counsel for Wabol issued a Notice of Deposition of Oral Examination of Antonio Lim, President of Transamerica Corporation. Excerpts of Record at 17-18. Between May 7, 1997 and May 13, 1997, Antonio Lim was deposed at the office of Wabol's counsel.

On September 19, 1997, the lower court issued an Order setting a status conference. *Wabol v. Villacrusis*, Civ. No. 84-397 (N.M.I. Super. Ct. Sept. 19, 1997) (Order).

On December 17, 1997, Wabol filed the motion at issue here to Dismiss for Failure to Prosecute and Motion for Summary Judgment, pursuant to Com. R. Civ. P. 41(c).

On December 19, 1997, Transamerica requested a status conference which was ordered to be set for January 1998. *Wabol v. Villacrusis*, Civ. No. 84-397 (N.M.I. Super. Ct. Dec. 18, 1997) (Request for a Status Conference and Order Thereon). The court then rescheduled the status conference for February 11, 1998.

On February 11, 1998, the parties appeared at a hearing on Wabol's motion to dismiss. The lower court denied the Motion for Summary Judgment but granted the Motion to Dismiss Transamerica's Counterclaims for Failure to Prosecute stating:

> Since the remand by the Commonwealth Supreme Court, none of the defendants have taken steps to plead and prosecute any counterclaims based on the Supreme Court's decision.
>
> Counsel to Transamerica conceded on the record during the February 11, 1998 hearing that Transamerica had elected not to prosecute its counterclaims in this case while awaiting the outcome of an appeal in a different suit *Transamerica v. Wabol*, Civil Action No. 93-441 (Super Ct. 1993), *appeal pending* No. 96-036 (S. Ct. N.M.I. 1996) involving different claims and different issues[2].
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> It is therefore ordered, adjudged and decreed that the defendants have failed to prosecute

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[2] *Transamerica v. Concepcion Wabol*, Civil Action No. 93-441 was to enforce the terms and condition of a lease with Wabol and to permit Transamerica to continue possession.

their counterclaims with due diligence and they are therefore dismissed with prejudice.

Wabol v. Villacrusis, Civ. No. 84-397 (N.M.I. Super. Ct. Feb. 19, 1998) (Order Granting Plaintiff's Motion to Dismiss for Failure to Prosecute) ("Order").

The parties timely appealed.

On January 21, 1999, this Court issued the Opinion in Appeal No. 96-036 affirming the lower court's Order granting summary judgment in favor of Wabol.

ANALYSIS

1. The Rule of Mandate

[3]Although this Court previously ordered and analyzed the same rule of law in the case of *Wabol v. Villacrusis*, 4 N.M.I. 314 (1995), the same principles will again be stated below. Specific to the rule of mandate, the lower court, upon receiving the mandate of an appellate court, is under a duty "to [strictly] comply with the mandate . . . and to obey the directions therein without variation." *Wabol v. Villacrusis*, 4 N.M.I. 318; see also *Sanford Fork & Tool Co.*, 160 U.S. 247, 256, 16 S. Ct. 291, 293, 40 L. Ed. 414 (1895).[3] Actions of the lower court not in conformity with the directions are "void," this is true "even though the mandate may be erroneous." *Wabol*, 4 N.M.I. at 318.

This Court specifically remanded the 1995 *Wabol* decision and we will again remand the matter for proceedings on any obligations which may have arisen for restitution. *See Wabol*, 4 N.M.I., 318, for factual and procedural background.

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[3] Only those matters left open by the mandate may be reviewed on remand. In re *Sanford Fork & Tool Co.*, 160 U.S. 247, 256, 16 S. Ct. 291, 293, 40 L. Ed. 414 (1895).

This is highlighted by the mention, in the remand instructions, to determine the amount of the improvements made upon the property and that consideration of such on remand should be effected "in order to prevent unjust enrichment." *See Wabol*, 4 N.M.I. We read this instruction as imparting an obligation upon the trial court to afford the parties the opportunity to address the issue of unjust enrichment on remand.

[4]It was not for the trial court to pass judgment on and disregard the decision of this Court. Rather, the trial court had a duty to comply with the decision remanded by the mandate, regardless of its perception of the propriety of the decision. *Wabol* at 319. It was required to comply with the mandate.

The trial court had a duty to comply strictly with the mandate of the appellate court. Here, the appellate court was specific as to what the lower court was to do on remand. It is well settled that the duty of a lower court on remand is to comply with the mandate of the appellate court, and to obey the directions therein without variation even though the mandate may be erroneous. *Loren v. E'Saipan Motors, Inc.*, 1 N.M.I. 138 (1990). (The rule of mandate states that a district court may not deviate from the mandate of the appellate court. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cor. 1986). (While an order issued after remand may, in some instances, diverge from the appellate court's mandate, it must be consistent with the "spirit" of the appellate decision and within the scope of the remand. *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1404 (9th Cir. 1993)). (The absence of a specific remand directive did not bar the district court from ordering a new trial, as long as the new trial would not be inconsistent with the mandate of the earlier opinion as gleaned from the judgment together with the accompanying opinion. *United States v. Cote*, 51 F.3d 178, 181-182 (9th Cir.1995)).

2. Involuntary Dismissal with Prejudice is a Disfavored Sanction.

Transamerica asserts that the lower court's motion to dismiss under Com. R. Civ. P. 41 (b) was improper. In the motion to dismiss, Wabol alleges Transamerica has not gone forward with the action for four years which has prevented Wabol from leasing the involved property. In opposition, Transamerica asserts it has taken action to prosecute and the parties were working toward a settlement agreement. Further, Transamerica argues it had been awaiting the outcome of another case, directly related to the present action, before going forward.

[5,6,7]Rule 41(b) Com. R. Civ. P. provides:

> (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.
>
> (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 has been 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 sending of the notice.
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> (c) A case shall not be dismissed for lack of prosecution if within 30 days of sending the notice,
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> (i) there are further proceedings in the case.

[8,9]The Commonwealth Rules of Civil Procedure utilize language from the Federal Rules of Civil Procedure 41 (b) thus case law from other jurisdictions is supportive. *Govendo v. Micronesian Garment Mfg.*, 2 N.M.I. 270, 283, n.4 (1991). In the context of Rule 41(b) dismissals "[a] rule of thumb as to the meaning of the abuse of discretion standard provides that the trial court's exercise of discretion should not be disturbed unless there is a definite and firm conviction that the court below committed a clear error of

judgment in the conclusion it reached upon a weighing of the relevant factors. *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir.1976). Upon a motion to dismiss for failure to prosecute, the Ninth circuit utilizes a number of factors relevant in arriving at a decision:

(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 disposition of cases on their merits; and
(5) the availability of less drastic sanctions.

Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986), *see Al-Torki v. Kaepen*, 78 F.3d 1381 (9th Cir. 1996).

[10]In *Bagalay v. Lahaina Restoration Foundation*, 60 Haw. 125 588 P.2d 416 (1978), the Supreme Court of Hawaii reversed a lower court's order for failure to prosecute. The court found there was no actual prejudice suffered by defendants, in the absence of undue prejudice to defendants, and in light of the fact that counsel for plaintiff did not abandon the case but continued with pre-trial proceedings while attempting to locate heirs, the trial court had abused its discretion in dismissing the action.

The lower court's reasoning for dismissing the case was for failing "to prosecute with due diligence." From the factual record, the Court finds that Transamerica did not deliberately attempt to delay prosecution of its claims for unjust enrichment. The lower court's record shows that in April of 1997, there was a noticed deposition. In May of 1997, the deposition of the President of Transamerica was taken. During the October 22, 1997 status conference, Transamerica's counsel stated to the court the justifications for perceived inaction, as they were waiting the decision of the CNMI Supreme Court on the appeal of the 1991 leases where a favorable resolution in the 1991 lease would have rendered the issues in this case

moot.[4] About December 18, 1997 Transamerica filed a request of status conference.

[11, 12]The record is void of intentional or purposeful delaying tactics. Facts which do not amount to a clear record of delay does not warrant a dismissal and lesser sanctions could have been employed. *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 443 (5th Cir. 1981). While there is no requirement that every conceivable sanction be examined, meaningful alternatives must be explored. *Van Popperheim v. Portland Boxing and Wrestling Comm'n*, 442 F.2d 1047, 1054 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039, 92 S. Ct. 715, 30 L.Ed. 2d 731 (1972). Where there is no indication that such alternative sanctions were weighed and found wanting, a dismissal pursuant to Rule 41(b) is more difficult to sustain. *Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500 (9th Cir. 1987).

[13]There is no requirement that every single alternate remedy be examined by the court before the sanction of dismissal is appropriate. The reasonable exploration of possible and meaningful alternatives is all that is required. *Anderson* at 525. Sanctions less severe than dismissal with prejudice should be considered before a case is dismissed. *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 272 Mont. 37, 899 P.2d 531 (1995).

In this case the record shows that no the lower court did not make any findings of alternative sanctions prior to dismissing the case with prejudice.

Wabol claims prejudice arising from the passage of time, which deprives Wabol of the benefits of the judgment and the use of the property. The litigation has been ongoing for fifteen years, at a cost and

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[4] [I]f Transamerica were to obtain possession of the property under those 1991 leases, there would be no necessity for Transamerica to spend any money to ascertain whether there was an y quasi contractual or periodic tendency obligations that arose under the original lease. There would be no question to be litigated of unjust enrichment. Transcript, hearing on motion to dismiss, Feb. 11, 1998, p. 11. ER 51. The Court's opinion in Appeal 96-036 was issued on January 21, 1999 which affirmed summary judgment in favor of Wabol. *Transamerica (Saipan) Corp. v. Wabol*, Appeal No. 96-036, slip. op (Jan 21, 1999).

burden to both the parties which is one reason the case should be fairly and finally adjudicated on the merits. It is true that the case has been lingering, but during this entire period of time, motions and activities by both lawyers and the lower court judge were taking place. It is also true by the lower court's Order, there could have been an end to this case, but this Court requires that the December 19, 1995 Order of this Court be followed.

[14]The dismissal in this case was a sanction against Transamerica for moving too slowly. An involuntary dismissal with prejudice deprives a party of their right to seek adjudication on the merits of a potential valid claim. Dismissal of an action for failure to prosecute must remain the exception rather than the rule. It would be an infliction of injustice upon the parties to uphold the dismissal of the case on the ground that its not being prosecuted.

CONCLUSION

We conclude the lower court abused its discretion in dismissing the case. The case was moving continuously, albeit not urgently, toward concluding. On remand, the lower court shall hear and decide any claim for unjust enrichment or impose lesser sanctions than to dismiss with prejudice or determine that lesser sanction would have been futile. This case should be adjudicated on the merits to finally put to rest this on going litigation that has encompassed tremendous amounts of time and money.

DATED this 15th day of December, 2000.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN, Chief Justice

EDWARD MANIBUSAN, Justice Pro Tempore

/s/ Pedro Atalig
PEDRO ATALIG, Justice Pro Tempore

MANIBUSAN, Justice *Pro Tempore*, dissenting:

I respectfully dissent. Transamerica (Saipan) Corp. ("Transamerica") asserts that the lower court abused its discretion in dismissing its lawsuit for failure to prosecute. The majority agrees and states that the lower court wrongfully disregarded this Court's instructions on remand. I would not reach the same conclusion. I do not find that the lower court "pass[ed] judgment and disregard[ed] the decision of this Court," or that it abused its discretion in dismissing Transamerica's claims pursuant to Com. R. Civ. P. 41(b).

This case arises out of long and protracted litigation concerning a 1978 lease to real property and its validity under Article XII of the N.M.I. Constitution. In 1984, Concepcion S. Wabol and Elias Wabol brought suit against the lessees to establish their title as owners of the property described in the 1978 lease. In 1985, Chief Judge Robert A. Hefner issued a decision voiding *ab initio* that portion of the 1978 lease found to be in violation of Article XII, and allowing the lessees to occupy the property for no more than thirty years.[5] The Wabols appealed to the District Court Appellate Division, which reversed and remanded holding the entire 1978 lease void *ab initio*. On remand, the Appellate Division ordered the trial court to:

> determine the terms and conditions of any obligations which may have arisen in quasi contract or as a result of a periodic tenancy . . . [and to] determine the amount, if any, of payment appellees should receive from the appellants in order to prevent unjust enrichment for [improvements to the land].[6]

In 1987, the lessees appealed to the Ninth Circuit Court of Appeals, which affirmed the Appellate Division. The lessees then sought review in the United States Supreme Court, which denied certiorari.

In April 1994, the Commonwealth Supreme Court received the Ninth Circuit's mandate and issued

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[5] Factual statements are taken from the parties briefs as the record on appeal is incomplete.

[6] These claims had not been raised by the parties previously and thus effectively established new claims for the lessees to bring in the trial court.

it to the trial court. The trial court then entered judgment in favor of the Wabols and subsequently issued a Writ of Possession on June 3, 1994. Transamerica, as one of the lessees to the 1978 lease, appealed to the Supreme Court, which vacated the judgment and remanded on December 19, 1995:

> Specifically, . . . to determine whether any quasi-contractual or periodic-tenancy obligations have arisen on the part of Concepcion S. Wabol or the Estate of Elias S. Wabol, and the amount, if any, of any unjust enrichment incurred as a result of improvements made on the property by the Appellants. Further, on remand the court shall entertain the applicability of Public Law 8-32 to this matter as well as any other equitable considerations raised by the parties. These considerations on remand must be entertained prior to the entry of judgment.

In February 1998, more than two years after the remand, the trial court held a hearing on the Wabols' Motion to Dismiss Defendant's Counterclaims for Failure to Prosecute and Motion for Summary Judgment.[7] The trial court denied the motion for summary judgment and granted the motion to dismiss. Transamerica appealed and the majority's opinion now issues.

The majority begins with a discussion of the rule of mandate. I do not disagree with their construction of the rule that a lower court is under a duty to comply with a mandate and to obey directions contained therein. I do, however, disagree that the trial court wrongfully disregarded the Court's remand instruction. The evidence does not establish such action on the part of the trial court. Rather, the evidence shows that the trial court set a status conference directing "counsel for the parties [to] be prepared to set a briefing schedule and a trial date for all issues remianing in this matter." *Wabol v. Villacrusis*, Civ. No. 84-397 (N.M.I. Super. Ct. Sept. 19, 1997) (Order). The trial court took affirmative action to move the case to finality. Transamerica, however, informed the court that it was not willing to move the case forward because it was waiting for this Court's decision in a separate but related case.

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[7] At this time, Transamerica had not amended its answer to raise any equitable considerations as mandated.

Moreover, the Court's mandate does not make clear the trial court's responsibility to move this case to conclusion. Rather, the remand instructions imply that the responsibility for raising the issues and setting the hearing rested with the interested party, as the Court instructed the trial court to entertain those equitable considerations "raised by the parties." Here, Transamerica failed to amend its answer to raise any of the issues mandated for further determination. The question then is who is responsible for shouldering the burden of pushing the case to its conclusion? "Certainly a plaintiff, as the party instigating the litigation, has the burden to see that the case moves forward." *Flanigan v. City of Leavenworth*, 657 P.2d 555, 560 (Kan. 1983). It is counsel's responsibility to prosecute his client's case and the trial court cannot be expected to shoulder this burden on his behalf. To that end, the lack of clarity in this Court's remand should not be held against the trial court, but against the party failing to prosecute his case to its conclusion.

The issue that the majority does not recognize, therefore, is not whether the trial court failed to carry out a mandate of this court, but whether the trial court abused its discretion in dismissing this case for failure to prosecute pursuant to Com. R. Civ. P. 41(b). The power to dismiss is "committed to the sound discretion of the trial court, and appellate review is confined solely to whether the trial court has abused that discretion." *Lopez v. Aransas County Independent School District*, 570 F.2d 541, 544 (5th Cir. 1978). In reviewing a trial court's decision for abuse of discretion, this Court may only reverse when the trial court makes a clear error of law. *See Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978). "The abuse of discretion standard has been described as allowing a range of choice for the [trial court], so long as that choice does not constitute a clear error of judgment." *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989). It is my opinion, in this instance, that the trial court did not clearly err in judgment and abuse its discretion.

Pursuant to Rule 41(b), a defendant may move for dismissal of an action or claim against the defendant "[f]or failure of the plaintiff to prosecute or comply with these rules or any order of court."

> In determining whether dismissal is appropriate, the peculiar facts of the case are important. The trial court must consider several factors, including the plaintiff's diligence, "the court's need to manage its docket, the public interest in expeditious resolution of litigation . . . the risk of prejudice to defendants from delay . . . the policy favoring disposition of cases on their merits," and the availability of less drastic sanctions.

Ace Novelty Co., Inc. v. Gooding Amusement Co., Inc., 664 F.2d 761, 763 (9th Cir. 1981) (citations omitted).[8] Generally, a Rule 41(b) dismissal is proper if, in view of the entire procedural history of the case, the litigant has not manifested reasonable diligence in pursuing the cause. See *Bomate v. Ford Motor Co.*, 761 F.2d 713, 714 (D.C. Cir. 1985).

Here, the trial court, after seeing that this case languished on its calendar for two years following the mandate, attempted to spur the parties to action by setting a status conference for October 22, 1997. At the status conference, Transamerica specifically asserted that it would not go forward with the remaining issues because it preferred to wait for a decision from this Court in a related matter. There is no evidence that Transamerica took any steps to secure a stay or pursued any other legal protection of its rights under the mandate. Such action was intentional and deliberate and caused this case to languish on the trial court's calendar for an unreasonable amount of time.

In January 1998, Transamerica requested a second status conference. Prior to that status conference, the court held a hearing on Wabol's Motion to Dismiss for Failure to Prosecute. At that

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[8] The trial court is not required to make explicit findings to show that it considered the essential factors. *See Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986).

hearing, Transamerica again asserted that it was waiting for this Court to render a decision in the other related case because a favorable decision would make it unnecessary to pursue any claims under the mandate. Finding that Transamerica elected to not plead and prosecute its claims, the trial court correctly dismissed the case with prejudice.[9]

Moreover, I find that the majority's decision fails to give the necessary deference to the trial court's factual findings as stated in its order. The majority also does not allow the trial court to retain its inherent power to manage its own docket. The trial court's disposition of the case should not be disturbed and thus, should not be reversed. I therefore conclude that the trial court did not show a clear error in judgment in dismissing Transamerica's claims for failure to prosecute.

DATED this 15 day of December, 2000.

/s/ Edward Manibusan
EDWARD MANIBUSAN, Justice *Pro Tempore*

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[9] The majority points to the noticed deposition and deposition of Transamerica's president as activity sufficient to excuse Transamerica's failure to prosecute its case with due diligence. A reading of the record on appeal, however, establishes that Transamerica did not notice the deposition, but rather such activity resulted from the Wabols' actions. The Wabols are not responsible for litigating Transamerica's claims and it is imprudent to credit Transamerica with their actions.