Maidesil v. Besebes, 2 ROP Intrm. 189 (1991)

FELIX MAIDESIL,
Appellant,

v.

NGIRACHELWOLW NAITO BESEBES,
and TECHEBUI NAITO,
Appellees.

CIVIL APPEAL NO. 9-89
Civil Action No. 28-89

Supreme Court, Appellate Division
Republic of Palau

Appellate decision
Decided: February 1, 1991

Counsel for Appellant: John S. Tarkong

Counsel for Appellees: Yukiwo P. Dengokl

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice.

SUTTON, Associate Justice.

This dispute involves a lease of land from Koror State held by Plaintiff.

Plaintiff sought to eject Defendant from a portion of this leasehold contending that he allowed them a use right and that they agreed to move off the land whenever he had a need for it.

Defendants counterclaim that Plaintiff had, instead, promised to arrange for transfer of a portion of the leasehold to them, that he has never done so and that they gave good and sufficient consideration in return for his promise.

No written contract or agreement was before the Trial Court at the time of the ruling appealed from and no record of any evidence presented to the Trial Court upon an alleged oral ⊥190 agreement is before us. The Statute of Frauds is not raised in this Appeal nor was the issue of Equity jurisdiction in the context of the order for specific performance cited.

Between January 1989, when the Complaint was filed, and June of that year the proceedings were delayed on several occasions when the Defendants requested extensions of time and continuances on the ground that discussions were in progress toward settlement of the case.

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In June of 1989, it was reported to the Court at conference that settlement discussions had ceased and a trial date of July 19, 1989, was agreed upon and set by the Court.

Both sides were properly noticed of the trial date of July 19, 1989.

Shortly before the date set for trial Defendant's Counsel contacted Plaintiff's Counsel and again requested a continuance stating that his clients were scheduled to attend a Land Claims Hearing which would conflict with the day set for trial.

Plaintiff's Counsel refused this informal request but granted permission to Defendants' Counsel to contact the Court ex parte regarding the problem. Defendants' Counsel did so and was told by the trial Judge that he could not set a new date before August of 1989.

In the meantime the conflict between the Land Claims Hearing and the Trial date cleared up and Counsel for the Plaintiff recanted his refusal and contacted Counsel for Defendants and suggested July 27, 1989, as a new trial date.

Counsel for Defendants never responded to this suggestion ⊥191 and no further orders were issued by the Court, nor was there any formal request for continuance filed by Counsel for Defendants.

On July 19, 1989, Defendants appeared with Counsel and announced ready for trial.

Plaintiff and his Counsel failed to appear and after brief efforts to reach Counsel for Plaintiff by telephone, the Court, sua sponte, issued "Ruling and Order" wherein it was found that the Plaintiff had abandoned his claim and conceded Defendant's counterclaim. The Court also ruled that a final judgment could not be effected without a hearing on whether specific performance of the oral agreement between Plaintiff and Defendants could be had or whether damages should be awarded. Finally, the Court issued sanction in the amount of $250.00 against Counsel for Plaintiff for failure to appear.

Plaintiff filed a Motion to set aside this Ruling and Order on July 24, 1989, and claimed that he believed, on the basis of his last conversation with Defendants' Counsel, that the matter would not go to trial on July 19 and that he instructed his client, the Plaintiff, not to appear. This Motion was denied.

Hearing was held on September 1, 1989, and the Judgment appealed from was entered on September 3, 1989.

Judgment was adverse to Plaintiff and voided any lawful objection he might have to subdivision of the leasehold allowing Koror State to partition off that portion of the leasehold occupied by Defendants and issue Defendants a lease therefore. Koror State, represented by Alexander Merep, Director, Koror State Public Lands, Authority, agreed to do so.

⊥192 Notice of Appeal, we find, was timely filed on September 18, 1989, fifteen (15) days following entry of judgment on September 3, 1989. Briefs were filed in due course and oral argument was heard on November 30, 1990.

Although Plaintiff/Appellant cites several errors in support of his motion we find that this appeal may be decided on the narrow question of whether the trial Judge abused his discretion in ruling on the merits of this matter and awarding judgment to the Defendants on the theory that the Plaintiff had abandoned his claim.

We hold that he did.

"Abandonment" is sui generis (a one of a kind or peculiar legal concept) in the law. It means that all hope, expectation, and intention of recovery is utterly and entirely relinquished. 1 Am. Jur. 2d, ABANDONED, LOST AND UNCLAIMED PROPERTY, Sec. 1.

It has been held, where a dismissal with prejudice has occurred pursuant to the U.S. Fed. Rules of Civil Procedure (Rule 41) of which our Rule 41 is a copy, that such is an extreme sanction which should be applied only where there exists a clear record of delay or contemptuous or recalcitrant conduct by the Plaintiff and that a party should not be punished for his attorney's mistake absent the same clear record and a finding that lesser sanctions would not suffice. *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 181 (1980).

There exists no statute or rule of Court in Palau on the specific concept of abandonment. We analogize, however, the facts here to facts required for the execution of ROP R. Civ. Pro. 41 (b) ⊥193 Involuntary Dismissal: for failure to prosecute, and find factual similarities sufficient to support the proposition that the issues on appeal may be dealt with pursuant to law associated with Rule 41.

We have no doubt that it is within the Court's jurisdiction and authority to execute an involuntary dismissal sua sponte but because of the extreme nature of such a sanction we hold that, except under factual circumstances not present here, e.g. where Plaintiff has absented himself from the jurisdiction and his/her whereabouts is unknown, Plaintiff is entitled to notice and a hearing before such dismissal. *See*, 24 Am. Jur. 2d, DISMISSAL, Sec. 63.

We hold further that where the Court, under the factual circumstances present in a particular case, has abused its discretion a sua sponte dismissal and/or a ruling on the merits may not be upheld. *Id.*, at Sec. 61.

We do not condone Counsel for Plaintiff's irresponsible and inattentive actions by this ruling, however, we do not find, that under the facts here, there exists the clear record of conduct required to support a dismissal or decision on the merits or that a lesser sanction would not have sufficed.

While reasonable persons might justifiably argue that the amount of the money sanction imposed on Counsel for Plaintiff was insufficient we decline to adopt or set out any measure as

such would necessarily contain elements of arbitrariness and unless clearly excessive or clearly insufficient, such decision, we find, should be left to the discretion of the trial Judge and not ⊥194 overturned on appeal.

In light of this decision all that followed the Trial Court's Ruling and Order of July 19, 1989 is declared null and void and of no legal effect.

Accordingly, we reverse and remand this matter except for the money sanction imposed on Counsel for Plaintiff with instruction to the trial Court to hold a trial on the merits or to proceed to disposition in a manner not inconsistent with this opinion.