

NO. 23336

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

BANK OF HAWAII, Plaintiff-Appellee, v.  
JAMES J. BROWN, Defendant-Appellant, and  
PACIFIC ISLAND ADVENTURE, a Hawai'i corporation,  
and RICHARD W. LEWIS, Defendants-Appellees

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 93-5027)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant James J. Brown (Brown) appeals the circuit court's March 10, 2000 judgment in favor of Plaintiff-Appellee Bank of Hawaii (BOH), a Hawai'i corporation, in the amount of \$16,038.17.

Specifically, Brown challenges the circuit court's (1) May 14, 1999 order denying Brown's motion to dismiss BOH's Complaint (May 14, 1999 Order) and (2) December 6, 1999 order granting summary judgment in favor of BOH (December 6, 1999 SJ Order). We affirm.

QUESTIONS PRESENTED

1. Did the court abuse its discretion when it denied Brown's March 31, 1999 Motion to Dismiss Verified Complaint alleging BOH's failure to diligently prosecute the action?

2. Did the court abuse its discretion in granting BOH prejudgment interest pursuant to Hawai'i Revised Statutes (HRS)

§ 636-16 (1993),<sup>1</sup> notwithstanding BOH's delay in proceeding with the case?

#### BACKGROUND

On or about August 23, 1983, Defendant-Appellee Pacific Island Adventure (Pacific), a Hawai'i corporation, through its president, Defendant-Appellee Richard W. Lewis (Lewis), a Hawai'i resident, applied for a Visa credit card via application no. 4811000223541. On or about January 15, 1986, Lewis along with Brown, who was an officer and director of Pacific and a resident of Illinois, signed a Continuing Guaranty which, among other things, guaranteed the payment of principal, interest, costs, and expenses, including court costs and reasonable attorney fees, incurred by BOH to enforce this Continuing Guaranty. On December 29, 1993, BOH filed a Verified Complaint alleging that Pacific, along with Lewis and Brown, owed it "the principal sum of \$6,209.99 plus accrued interest in the sum of \$600.09 through October 27, 1993 and per diem interest from October 28, 1993 until entry of judgment accruing at the rate of approximately \$2.81 a day, late charges in the amount of \$38.95, plus costs and reasonable attorney's fees."

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<sup>1</sup> Hawai'i Revised Statutes § 636-16 (1993) states as follows:

**Awarding interest.** In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred.

On January 5, 1995, the circuit court filed its Notice of Proposed Dismissal for BOH's failure to file a pretrial statement. On January 18, 1995, the court withdrew its notice "on condition that PRETRIAL STATEMENT IS FILED WITHIN 60 DAYS." On February 9, 1995, BOH filed its Pretrial Statement.

Upon the request of Brown, the court entered orders extending the time to enter default on Brown's crossclaims against Pacific and Lewis on the following dates: March 17, 1995; September 12, 1995; March 19, 1996; September 20, 1996; March 19, 1997; September 19, 1997; March 24, 1998; and October 5, 1998. The latter order extended the time to March 23, 1999. Brown's expressed reason for these extensions was that he could not say what Pacific and Lewis owed him unless and until it was determined what, if anything, he owed BOH.

On March 31, 1999, Brown filed a motion, pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 41(b), for an order dismissing BOH's Verified Complaint because "[s]ince filing its Pretrial Statement over four (4) years ago, [BOH] has taken no action whatsoever in this case and has not conducted any discovery. As a result, [Brown] seeks a dismissal of the case for failure to prosecute." In its April 13, 1999 response, BOH pointed out that Brown had not filed a responsive pretrial statement.

The May 14, 1999 Order denied Brown's motion to dismiss as follows:

(1) The Motion is denied on the condition that within thirty (30) days, or on or before May 21, 1999, [BOH] take appropriate steps to schedule a trial setting conference with the Court. In the event [BOH] fails to seek a trial setting conference with[in] the thirty day period, [Brown] shall have the right to petition the Court for the entry of an order dismissing the case with prejudice; and

(2) As a result of [BOH's] delay in prosecuting the case, and further pursuant to Rule 12(t) of the Circuit Court Rules, [Brown] is awarded, as sanctions against [BOH], his attorney's fees and costs in preparing and filing the Motion, and in appearing at the hearing on the Motion to Dismiss. [Brown] shall submit an affidavit for attorneys fees and costs for the Court's consideration.

On May 27, 1999, "the law offices of James P. Dandar" was replaced by Michael C. Webb and Susan Cachero Sakai as counsel for BOH.

In its June 30, 1999 motion for summary judgment, BOH asserted that the debt was

principal in the amount of \$6,209.99, accrued interest through June 30, 1999, in the amount of \$6,413.91, late charges of \$38.95, costs of \$176.00, for a total indebtedness of \$12,838.85, as of June 30, 1999. Interest on the principal amount of this debt continues to accrue at an annual rate of 16.5% per annum or \$2.81 per day[.]

At the July 21, 1999 hearing, counsel for Brown stated that "[w]e were unable to obtain an affidavit from [Brown] in which to file any response to the motion" and that "we just haven't heard from our client[.]" Counsel for Brown merely asked the court to exercise its "discretion to stop the accrual of interest by reason of an unwarranted delay by the creditor pressing a claim[.]" The court orally denied the request and awarded summary judgment.

The December 6, 1999 SJ Order ordered the entry of judgment in favor of BOH and against Pacific, Lewis, and Brown in the amount of \$12,838.85 (\$6,209.99 principal plus \$6,413.91 interest plus \$38.95 late fees plus \$176.00 costs) and \$2,898.45 attorney fees and \$300.87 costs.

On February 24, 2000, the court entered its order authorizing entry of a final judgment pursuant to HRCF Rule 54(b). The March 10, 2000 judgment for \$16,038.17 followed.

#### STANDARDS OF REVIEW

##### A. Grant/Denial of Motion to Dismiss

HRCF Rule 41(b) states, "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 it." The following are some of the factors when considering a dismissal for lack of prosecution: (1) the public interest in expeditious resolution of litigation; (2) the court's need to effectively 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. Eisen v. Coben, 31 F.3d 1447, 1451 (9th Cir. 1994) (citations omitted). Although a grant or denial of a HRCF Rule 41(b) motion to dismiss a complaint is reviewed on appeal for abuse of discretion, Hawaii Automotive Retail Gasoline Dealers Ass'n., Inc. v. Brodie, 2 Haw. App. 99, 101, 626 P.2d

1173, 1175 (1981), the court's discretion to dismiss a case for want of prosecution is severely limited by the following precedent:

While a court has inherent power to dismiss a case for want of prosecution, "[a] dismissal of a complaint is such a severe sanction, that it should be used only in extreme circumstances when there is [a] 'clear record of delay or contumacious conduct . . . and where lesser sanctions would not serve the interest of justice.'" Lim v. Harvis Const. Inc., 65 Haw. [ 71,] at 73, 647 P.2d [ 290,] at 292 [ (1982)].<sup>2</sup> (citing Bagalay v. Lahaina Restoration Foundation, 60 Haw. 125, 132, 588 P.2d 416, 422 (1978). A dismissal is also warranted where there is "evidence of actual prejudice" suffered by the defendants. Lim, 65 Haw. at 73, 647 P.2d at 292.

Compass Development, Inc. v. Blevins, 10 Haw. App. 388, 396-97, 876 P.2d 1335, 1339 (1994).

#### B. Prejudgment Interest

The award of prejudgment interest pursuant to HRS § 636-16 is reviewable under the abuse of discretion standard. Schmidt v. AOA of the Marco Polo Apts., 73 Haw. 526, 533, 836 P.2d 479, 483 (1992).

### DISCUSSION

- A. It was within the court's discretion to deny the motion to dismiss.

Brown contends that the court abused its discretion in not dismissing the case.

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<sup>2</sup> In Bagalay v. Lahaina Restoration Foundation, 60 Haw. 125, 139, 588 P.2d 416, 425 (1978), the Hawai'i Supreme Court reversed the trial court's dismissal of the action citing the harshness of a dismissal and the lack of a showing of prejudice, contumacious conduct, or a clear record of delay. As noted by the court, "[I]n weighing the policies of having cases decided on their merits with that of the court's power to prevent delays, that in balancing the equities involved, the trial court erred in dismissing the complaint."

Prejudice usually takes the form of loss of evidence or the loss of memory by a witness. Nealy v. Transportation Maritima Mexicana, S.A., 662 F.2d 1275, 1281 (9th Cir. 1980). In the instant case, although a significant amount of time has passed from the initial complaint until judgment was entered, Brown has not alleged that he suffered any loss of evidence or that the witnesses suffered any loss of memories as a result of the delay. Brown cites Anderson v. Air West Inc., 542 F.2d 522, 526 (9th Cir. 1976), to provide an example where a court dismissed the case because the defendant experienced prejudice as a result of the plaintiff's lack of timely prosecution. In Anderson, however, the prejudice resulted from the death of two key defendants and the deliberate actions of the plaintiff's attorneys to delay the case. In the instant case, although BOH's counsel admits in its answering brief that the matter had probably "slipped through the cracks," no significant loss of memory or evidence is alleged that would permit consideration of the severe action of dismissal.

Although Brown alleges that BOH displayed contumacious conduct and/or a clear record of delay, he has failed to produce any evidence that BOH purposely delayed the suit to the detriment of Brown's defense. Unquestionably, a significant amount of time has passed from the filing of the complaint to the entry of the judgment. It must be noted, however, that (1) the circuit court

failed to file a notice of dismissal until eight months after the complaint was filed,<sup>3</sup> (2) Brown failed to file a responsive pretrial statement as mandated by Rule 12(h) of the Rules of the Circuit Courts of the State of Hawai'i (RCCSH), (3) at Brown's requests, the court entered orders extending the time to enter default on Brown's crossclaims against Pacific and Lewis from March 17, 1995, through March 23, 1999, and (4) Brown allowed five years to pass before he objected to the delay.

Dismissing the case represents the harshest sanction available. In light of the record, the circuit court's decision that the proper sanction was to award Brown his costs and attorney fees in filing his motion to dismiss was not an abuse of its discretion.

B. It was within the court's discretion to award prejudgment interest.

Noting that there is no evidence in the record on appeal that Brown challenged the award of prejudgment interest, BOH contends that

the appellate court does not have jurisdiction to decide whether the Circuit Court abused its discretion regarding the award or

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<sup>3</sup> Rule 12(q) of the Rules of Circuit Courts of the State of Hawai'i states as follows:

Where a pretrial statement has not been filed within 8 months after a complaint has been filed or within any further period of extension granted by the court or if a trial setting status conference has not been scheduled as required by Rule 12(c), the clerk shall notify in writing all parties affected thereby that the case will be dismissed for want of prosecution unless objections thereto showing good cause (specific reasons) are filed within 10 days after receipt of such notice.



denial of interest when the issue is not raised in the underlying case. *"The general rule is that an issue [that] was not raised in the lower court will not be considered on appeal. An appellate court will deviate from this rule only when justice so requires."* Han v. Yang, 84 Hawai'i 162, 176[-77], 931 P.2d 604, 618[-19] (1997) (citations omitted).

(Emphasis in original.) We respond that this is a matter of policy, not jurisdiction.

Brown notes that the purpose of HRS § 636-16 is "to allow the court to designate the commencement date of interest in order to correct injustice when a judgment is delayed for a long period of time for any reason, including litigation delays." Leibert v. Finance Factors, Ltd., 71 Haw. 285, 293, 788 P.2d 833, 838 (1990). In this case, however, starting with its Verified Complaint and continuing throughout the case, BOH consistently requested prejudgment interest and, as noted above, Brown failed to file a responsive pretrial statement as mandated by RCCSH Rule 12(h) and allowed five years to pass before he objected to the delay. Upon a review of the record, we conclude that the court did not abuse its discretion in awarding prejudgment interest to BOH.

#### CONCLUSION

Accordingly, we affirm the circuit court's March 10, 2000 judgment in favor of Plaintiff-Appellee Bank of Hawaii and against Defendant-Appellant James J. Brown (and Defendants-

Appellees Pacific Island Adventure and Richard W. Lewis) in the amount of \$16,038.17.

DATED: Honolulu, Hawai'i, March 15, 2001.

On the briefs:

Steven Guttman and  
Adrian W. Rosehill  
for Defendant-Appellant.

Chief Judge

Michael C. Webb and  
Susan Cachero Sakai  
for Plaintiff-Appellee.

Associate Judge

Associate Judge