

NOT FOR PUBLICATION

NO. 24392

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII, by its Office of Consumer Protection, Plaintiff-Appellee, v. METRO CLUB, INC., a foreign corporation, and DAVID A. KERSH, individually and as an officer of METRO CLUB, INC., Defendants-Appellants, and METRO CLUB, INC., a Michigan corporation, and DAVID A. KERSH, Defendants/Third-Party Plaintiffs/Appellants, and INTERNATIONAL KITCHENS, a Hawaii corporation, WYMT, INC., dba FOGCUTTER RESTAURANT, a Hawaii corporation, TRATTORIA, C&W CORPORATION, dba KING TSIN, a Hawaii corporation, CHURCH'S FRIED CHICKEN, INC., a Texas corporation, GANNETT PACIFIC CORPORATION, dba HONOLULU STAR-BULLETIN, a foreign corporation, BETTER BUSINESS BUREAU OF HAWAII, INC., a Hawaii corporation, Third-Party Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 00-0-63668)

MEMORANDUM OPINION

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

Defendants/Third-Party Plaintiffs/Appellants Metro Club, Inc. (Metro Club), a foreign corporation incorporated in Michigan, and David A. Kersh (Kersh), individually and as an officer of Metro Club¹ (collectively, Appellants) appeal from the "Order Denying [Kersh's] Amended Motion to Set Aside Order of Dismissal to Permit an Amended Counter and Third Party Complaint and to Permit the Issuance of Summons[,]" entered on June 19, 2001 by the Circuit Court of the First Circuit (the circuit

^{1/} During the entire relevant time period, Defendant/Third-Party Plaintiff/Appellant Metro Club, Inc. was a foreign corporation incorporated in Michigan and Defendant/Third-Party Plaintiff/Appellant David A. Kersh was a resident of Michigan.

court), Judge Virginia Lea Crandall (Judge Crandall) presiding. We affirm.

BACKGROUND

On December 3, 1980, the State of Hawai'i, by its Office of Consumer Protection (OCP), filed suit in the circuit court against Appellants for unfair trade practices. OCP alleged that Metro Club had sold "coupon" books that contained coupons for "2 for 1" meals at many Hawai'i restaurants. Many purchasers of these coupon books (which were to arrive by mail) did not receive them, and many purchasers who did receive the coupon books found that some of the coupons were not honored by several restaurants.²

On October 30, 1981, Appellants filed an answer to OCP's complaint. The answer did not contain any counterclaims against OCP. That same day, Appellants filed a third-party complaint against five Hawai'i corporations or restaurants that had been accused of not honoring Metro Club's coupons.³ Appellants' third-party complaint also claimed damages for libel from Gannett Pacific Corporation, doing business as Honolulu Star-Bulletin, and Better Business Bureau of Hawaii, Inc.

^{2/} In his Opening Brief, Kersh explains that these difficulties were the result of misunderstandings and screwups by the United States Postal Service.

^{3/} The five corporations or restaurants named in the third-party complaint were: International Kitchens; WYMT, Inc., doing business as Fogcutter Restaurant; Trattoria; C&W Corporation, doing business as King Tsin; and Church's Fried Chicken, Inc.

On December 23, 1981, OCP, without objection, filed for an extension of time to file its statement of readiness. There is nothing in the record to indicate that the motion was granted.

On March 30, 1984, the circuit court dismissed both OCP's complaint and Appellants' third-party complaint for lack of prosecution (the first dismissal order). OCP filed an objection and the first dismissal order was withdrawn on April 17, 1984.

Appellants' counsel withdrew on July 3, 1984.

On September 28, 1984, OCP filed a pre-trial statement, and trial was set for April 15, 1985. Neither Metro Club nor Kersh filed pre-trial statements. OCP moved for a continuance of the trial on November 21, 1984. OCP filed a settlement conference statement on March 7, 1985 and an amended pre-trial statement on April 26, 1985. Appellants did not file a settlement conference statement or a pre-trial statement.

On March 25, 1997, following approximately twelve years of no case activity, Judge Crandall dismissed the case with prejudice (the second dismissal order).

On May 2, 1997, Kersh moved, *pro se*, on behalf of himself and Metro Club, to set aside the second dismissal order. Kersh also asked that the circuit court "[r]emove this case to the Federal Court[,] " "[p]ermit [Appellants] to file an amended counter claim and third party claim[,] " and/or "[o]rder the clerk's office to provide summons to service all defendants who have not been served." This motion does not appear to have been

served on any other party, and no hearing was ever held on the motion.

On April 11, 2001, Kersh, *pro se*, filed an essentially identical amended motion to set aside the second dismissal order. This motion was not filed on behalf of Metro Club.

A hearing on Kersh's amended motion was held before Judge Crandall on May 7, 2001.⁴ Following the hearing, Judge Crandall orally denied the motion. A written order was entered on June 19, 2001.

On July 6, 2001, Kersh, *pro se*, filed a notice of appeal on behalf of himself and Metro Club, contending that Judge Crandall erred by denying Kersh's amended motion to set aside the second dismissal order and refusing to allow Appellants to proceed with a new counter-claim against OCP.

DISCUSSION

A. Jurisdiction Over Metro Club's Appeal

Metro Club's notice of appeal was written and signed by Kersh, who is not licensed as an attorney in Hawai'i (or elsewhere). "The prevailing rule is that a corporation cannot appear and represent itself either in proper person or by its officers[.]" Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 60 Haw. 372, 374, 590 P.2d 570, 572 (1979). A corporation appearing in court without an attorney is precluded from participating in court proceedings and entry of default may be

⁴ The transcript for this hearing is not in the record on appeal.

entered against it. Id. at 381, 590 P.2d at 576. Based on Oahu Plumbing, we conclude that Metro Club's notice of appeal is invalid and, accordingly, we lack jurisdiction to consider Metro Club's appeal.

B. The Order Denying Kersh's Motion to Set Aside That Part of the Second Dismissal Order That Dismissed His Third-party Claims

Hawai'i trial courts have the inherent power to *sua sponte* dismiss cases for lack of prosecution.

The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Compass Dev., Inc. v. Blevins, 10 Haw. App. 388, 395, 876 P.2d 1335, 1339 (1994) (quoting Link v. Wabash R.R., 370 U.S. 626, 630-31, 82 S. Ct. 1386, 1388-89, 8 L. Ed. 2d 734, 738 (1962)).

The Hawai'i Supreme Court has instructed, however, that this power must be used sparingly.

The power of the court to prevent undue delays and to achieve the orderly disposition of cases must be weighed against the policy of law which favors dispositions of litigation on its merits. Further, a dismissal of a complaint is such a severe sanction, that it should be used only in extreme circumstances where there is clear record of delay or contumacious conduct and where lesser sanctions would not serve the interest of justice. And, a dismissal is also warranted where there is evidence of actual prejudice suffered by the defendants.

Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Hawai'i 103, 107, 899 P.2d 386, 390 (1995) (brackets, citations, ellipsis, footnote, and internal quotation marks omitted).

In reviewing *sua sponte* dismissals by a trial court for lack of prosecution, the abuse of discretion standard applies.

Compass Dev., 10 Haw. App. at 397, 876 P.2d at 1340. Based on our review of the record, we conclude that the circuit court did not abuse its discretion in denying Kersh's amended motion to set aside the second dismissal order.

Although the record does not reflect that Kersh "deliberately delay[ed]" the proceedings or engaged in "contumacious conduct[,]"⁵ we conclude that actual prejudice resulted from the twelve-year delay between the filing of OCP's April 26, 1985 amended pre-trial statement and Kersh's first motion to set aside Judge Crandall's second dismissal order, filed on May 2, 1997. OCP asserts that it long ago destroyed all of its files on this case.⁶ It appears that most of the third-party defendants to the lawsuit are no longer in business, the Consumer Protector at the time the lawsuit was filed is no longer alive, the OCP attorney who filed the lawsuit is no longer with the office, and any witnesses to the coupon dispute will be difficult to locate or may have forgotten the relevant details about this twenty-year-old dispute over restaurant coupons.

It also appears that Kersh's counterclaim against OCP would be barred by the statute of limitations since Kersh first raised the counterclaim in 1997, over fifteen years after the

⁵ "Contumacious conduct" is defined as "[w]ilfully stubborn and disobedient conduct, commonly punishable as contempt of court." Black's Law Dictionary at 330 (6th ed., 1990).

⁶ We also note that the earlier records of the Circuit Court of the First Circuit in this case have been microfilmed.

events in dispute.⁷ Hawaii Revised Statutes § 661-5 (1993) provides a two-year statute of limitations for non-tort actions against the State of Hawai'i.

Limitations on action. Every claim against the State, cognizable under this chapter, shall be forever barred unless the action is commenced within two years after the claim first accrues; provided that the claims of persons under legal disability shall not be barred if the action is commenced within one year after the disability has ceased.

While Kersh may be frustrated over his inability to sue someone for his troubles, the circuit court did not abuse its discretion by dismissing this case for lack of prosecution on either side.

CONCLUSION

For the reasons discussed above, the circuit court's June 19, 2001 order denying Kersh's amended motion to set aside that part of the second dismissal order that dismissed Kersh's third-party claims is affirmed.

DATED: Honolulu, Hawai'i, April 2, 2003.

On the briefs:

David A. Kersh, *pro se*,
on behalf of himself and
Metro Club, Inc., defendants/
third-party plaintiffs/
appellants.

Lisa P. Tong (Office of
Consumer Protection) for
plaintiff-appellee.

^{7/} Kersh has not described in detail his counterclaim against the Office of Consumer Protection, but he appears to be alleging that his civil rights were violated by a "vicious anti-Semitic attorney [working for OCP] who hated white mainlanders and was going to make an example of Kersh and Metro Club, Inc[.]"