No. 22451

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

FITNESS AND NUTRITION HAWAII, INC., Plaintiff-Appellee
v. RODNEY LINDQUIST dba AMERICAN FITNESS WHOLESALERS
OF OAHU, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT, SECOND CIRCUIT,
(Wailuku Division, CIVIL NO. W98-877)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ)

Defendant-Appellant Rodney Lindquist, dba American Fitness Wholesalers of Oahu (Lindquist), appeals the district court of the second circuit's March 18, 1999 Order Granting Judgment against him and in favor of Plaintiff-Appellee Fitness and Nutrition Hawaii, Inc. (F&NI-Hawaii) for $19,950. We vacate and remand for a trial on the merits.

Background

F&NI-Hawaii filed its complaint against Lindquist on April 29, 1998, on an alleged debt. Lindquist was served with the Complaint and Summons on July 6, 1998. Three days later, Lindquist sent the Complaint and Summons via facsimile to attorney James J. Bickerton (Bickerton). However, Bickerton did not see the facsimile until July 13, 1998. Bickerton, using

July 13 as the date of service, miscalculated the return date as July 27. On the actual return date, July 20, 1998, Lindquist was not present or represented; consequently, Judge Yoshio Shigezawa entered a default judgment in the amount of $19,950 against Lindquist.

Bickerton later learned that he had miscalculated the return date when he contacted Ryther L. Barbin (Barbin), F&NI-Hawaii's counsel, to ask for a continuance of the return date.

Lindquist filed a Motion to Set Aside Default Judgment on September 28, 1998. At the November 23, 1998 hearing on the motion, Lindquist was represented by attorney Mark R. Zenger, due to Bickerton's scheduling conflict. In his motion, Lindquist denied liability based on allegations of nonexistence of the debt and a general pattern of fraud on the part of F&NI-Hawaii and parties related to F&NI-Hawaii. Judge Rhonda I. L. Loo, noting in part that Lindquist may have a meritorious defense, granted the motion and set the trial for March 1, 1999.[1]

[1] The Court: All right. The Court is in receipt of the motion to set aside default judgment as well as Mr. Barbin's memo in op.

The Court is aware that -- has to look at whether or not the non-defaulting party would not be prejudiced by the re-opening, that the defaulting party has meritorious defense, and that the default was not a result of excusable [sic] neglect or willful act.

(continued...)

(...continued)

> I have seen the declaration by Mr. Bickerton, who appears to be the previous attorney in this matter. . . .
>
> The Court, I find that obviously the calendaring of the events was not a result of excusable [sic] neglect or willful act. Obviously the non-defaulting party -- well, I don't think -- will not be prejudiced by the re-opening. Obviously, I'm sure, Mr. Barbin's clients want this matter to be taken care of already, but the Court doesn't believe that the non-defaulting party will not [sic] be prejudiced by the re-opening.
>
> As far as the meritorious defenses go, the Court has read Mr. Zenger's motion. There is some question here about possible alter ego, co-mingling, possibly some payment of the invoices. I'm not really sure at this point.
>
> So the Court is going to find that it could be that the defaulting party has a meritorious defense, so I am going to grant the motion to set aside default judgment.
>
> So shall we reset this, gentlemen, for trial?
>
> . . . .
>
> The Court: Okay. We'll set it for trial.
>
> . . . .
>
> Either the last week in February, first week in March. Both are available. Do you gentlemen have any preference?
>
> Mr. Zenger: First week in March, Your Honor.
>
> The Court: Okay. Mr. Barbin?
>
> Mr. Barbin: That's fine, Your Honor.
>
> The Court: All right. Can we set it for the first week in March, please?
>
> The Clerk: March 1st, 1999 at 9:50 a.m..
>
> The Court: All right. Mr. Zenger, will you prepare the order, please?

(continued...)

On the March 1, 1999 trial date, Lindquist had yet to file the Order Setting Aside Default Judgment. Just before trial was to commence, F&NI-Hawaii made an oral motion for judgment on the pleadings, which the court granted. The pertinent exchanges on the March 1, 1999 trial date were as follows:

> The Court: All right. Where is this?
>
> The Bailiff: Page 4.
>
> The Court: I have that. Apparently a default had been entered.
>
> Mr. Bickerton: That's correct, Your Honor.
>
> The Court: Then there was supposed to have been an order setting aside the default to be filed by defendant's counsel, and apparently it was not filed.
>
> Mr. Bickerton: That's also correct, Your Honor.
>
> The Court: Where does that leave us, Mr. Barbin?
>
> Mr. Barbin: Well, Your Honor, as you say, the default was set aside in November 23rd and trial was set for today. The default -- the order has not been presented to the Court this morning. It was presented to me for signature and I just signed it. And I understand that Mr. Zenger has it. I believe he probably filed it this morning but I'm not sure.

(...continued)

> Mr. Zenger: Yes, Your Honor.
>
> The Court: Thank you very much.

Mr. Zenger: I have it, Your Honor, but I haven't been able to locate Judge Loo as of this morning, who was the judge who heard the motion.

The Court: Well, the motion was granted when?

Mr. Bickerton: Your Honor, the complaint was filed in April, the judgment was entered in August, and the motion to set aside the default was filed in November -- was ordered in November.

The Court: And what's today's date?

Mr. Bickerton: Well, today's March 1st, Your Honor.

The Court: March. How much time is there between November and March? Quite a bit. There used to be. Has that changed?

Mr. Bickerton: There still is, Your Honor, but may I address the Court?

The Court: Well, if you really want to, go ahead.

Mr. Bickerton: Well, Your Honor, what occurred was, Mr. Bar --

I sent an order to Mr. Barbin in December, early December, I believe, and Mr. Barbin returned it. The problem was that when he returned it -- it was my error -- there were some spelling errors on his name. He took it upon himself to correct those errors by hand, Your Honor. And on the signature page as well as the non-signature page, what occurred after that is, is an office snafu on my part. I changed offices, I had a secretary change, and it got lost in the shuffle, Your Honor. And I tried to find

where it was. I haven't found the original, it was changed.

So I called Mr. Barbin's office last week in an effort to get a hold of him, he was out. I spoke to his secretary about it, I also spoke with the District Court people about it. And we brought it over here today, [M]r. Barbin graciously signed it, and it's the same order that --

The Court: All right. I'm satisfied that --

Mr. Barbin: Your Honor, if I may, Your Honor.

In addition to that matter, there also has been no answer filed in this case. There has not been a general denial either in this case. And so at this time, Your Honor, I'd ask for a judgement [sic] on the pleadings on the ground that no answer has been filed, no general denial, no counter claim, no defenses have been presented.

So based on Rule 8 of the Rules of District Court Civil Procedure I'd ask that this matter be -- that a judgment be granted on the pleadings.

The Court: You're telling me that a general denial has not been entered; is that correct, Madam Clerk?

The Clerk: (Inaudible).

The Court: Was this -- this case, I assume, was called at our Monday calendar call, but at that time the defendants did not appear and a default was entered, correct?

Mr. Bickerton: That's correct.

The Court: There was a motion to set aside the default, the motion was granted.

Now, when the Court granted the motion did the Court stipulate that an answer be filed?

Mr. Barbin: Well, Your Honor, it's my recollection that the Court satisfied [sic] the default and allowed the defendant time to file an answer, but that was not included in the proposed --

The Court: Excuse me, because if I don't do it now I'll forget.

Mr. Barbin: Okay.

The Court: What do the minutes show relative to what Mr. Barbin has just told us?

The Clerk: (Inaudible) and the default was set aside (inaudible) and this matter was set for trial.

The Court: All right. I think it's implicit that an answer should be filed, even if the minutes don't specifically require it. I think in a situation like that it is always the case that an answer be filed, and no answer, apparently, was filed.

Mr. Bickerton: Your Honor, we're prepared to file an answer once a [sic] order was signed. And if you look at our motion and our memorandum, we specifically set forth the grounds of our denial and the grounds of (inaudible) defenses. They're in the motion, Your Honor.

The Court: Look. It seems to me you're compounding the felony here. You tell me you were prepared to file your answer and as soon as the order is entered, but then it takes

> you from November to March just to file the order.
>
> Now let's give some of the problem to Mr. Barbin. Let's give him 10 days of it, which is probably 5 more than he's responsible for if indeed he's responsible for any, but that leaves you with months of complete foul up. And then you walk in here and say, well, we'll do it today.
>
> That's not good enough. It's just not good enough.
>
> I'm going to grant your motion.

An Order Granting Judgment was entered on March 18, 1999, in the amount of $19,950, against Lindquist. The Order stated:

> THIS MATTER having come on for Trial on March 1, 1999 at 9:30 a.m. before the Honorable John Vail, Judge of the above-entitled Court and Ryther L. Barbin, Esq. appearing as counsel for Plaintiff, Fitness and Nutrition, Inc, and Mark R. Zenger, Esq. and James J. Bickerton, Esq. appearing as counsel for Defendant, Rodney Lindquist, dba American Fitness Wholesalers of Oahu and the court having found that Defendants [sic] failed to timely file its written Order Setting Aside Default Judgment and Answer to the Complaint herein.
>
> IT IS HEREBY Ordered, Adjudged and Decreed that Judgment is entered against Defendant in the amount of $19,950.

Lindquist timely filed this appeal on April 16, 1999.

Issues on Appeal

Lindquist presents his issues on appeal in a rather fragmented manner. What his presentation boils down to is the contention that the court erred under each of three interpretations of the Order Granting Judgment: (1) the court sanctioned Lindquist for failing to timely file the written Order Setting Aside Default Judgment and Answer to the Complaint; (2) the court granted F&NI-Hawaii's oral motion for judgment on the pleadings; or (3) the court granted a second default judgment.

Standard of Review

The standard of review when the court's order is construed as a sanction is the abuse of discretion standard. Compass Development, Inc. v. Blevins, 10 Haw. App. 388, 397-98, 876 P.2d 1335, 1340 (1940). There is an abuse of discretion when the trial court has "'clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 504, 880 P.2d 169, 179 (1994) (quoting Amfac Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992)).

On appeal, the granting of a motion for judgment on the pleadings is reviewed de novo. Ruf v. Honolulu Police Department, 89 Haw. 315, 319, 972 P.2d 1081, 1085 (1995).

Discussion

In determining what law applies in this appeal, it is necessary to first determine how the March 18, 1999 Order Granting Judgment is to be characterized. The transcript of the hearing that day shows, at least ostensibly, that the court granted F&NI-Hawaii's oral motion for judgment on the pleadings.[2] However, the Order Granting Judgment signed by the court states that

> the court having found that Defendants [sic] failed to timely file its written Order Setting Aside Default Judgment and Answer to the Complaint herein.

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[2] Mr. Barbin: Your Honor, if I may, Your Honor.

In addition to that matter, there also has been no answer filed in this case. There has not been a general denial either in this case. And so at this time, Your Honor, I'd ask for a judgment on the pleadings on the ground that no answer has been filed, no general denial, no counter claim, no defenses have been presented.

So based on Rule 8 (sic) of the Rules of District Court Civil Procedure I'd ask that this matter be - that a judgment be granted on the pleadings.

. . . .

The Court: . . . I'm going to grant your motion.

> IT IS HEREBY Ordered, Adjudged and Decreed that Judgment is entered against Defendant in the amount of $19,950.

We look to the written Order Granting Judgment in interpreting the court's action. Rules of the District Courts of the State of Hawai'i (RDC) Rule 23. We do so because the substance of the order is not settled until the written order is filed. Id.; see also Carnation Company v. Huanani Enterprise Corporation, 1 Haw. App. 466, 620 P.2d 273 (1980).

In civil cases of conflict between the written order and the oral order, the written order supersedes the oral order. In Ching v. Tong, 39 Haw. 20 (1950), the appellant urged the Hawai'i Supreme Court to adopt the trial judge's oral findings of fact that were rendered before entry of the written decree. The written decision was incongruent with the oral findings.

The supreme court grounded itself upon the written decree and not the oral decision, reasoning that the written decision "being as it is final in form, and determinative of the rights of the parties to the controversy, was the final and appealable decree upon which the appeal was allowed and the jurisdiction of the court invoked." Id. at 22; see also Price v. Christman, 2 Haw. App. 212, 214, 629 P.2d 633, 635 (1981) ("an appeal filed prior to written entry of the court's oral order is

ineffective to give the appellate court jurisdiction over the appeal unless there has been something of record that could be construed as a refiling within the proper appeal period."); State v. English, 68 Haw. 46, 52, 705 P.2d 12, 16 (1985).

In this case, the written Order Granting Judgment does not state that judgment on the pleadings was granted. Nor does it express itself as a second default judgment. The Order does not justify its judgment on the pleadings by the fact that the default judgment was not set aside or the fact that an answer was not filed. The Order levies judgment against Lindquist because he "failed to timely file" his order setting aside the default judgment and his answer.

Hence, according to the Order, his was not a failure to defend on the merits. He was punished for being dilatory. Though not dispositive, the court's oral reasoning preceding its oral decision clearly characterizes the Order as a sanction:

> Look. It seems to me you're compounding the felony here. You tell me you were prepared to file your answer and as soon as the order is entered, but then it takes you from November to March just to file the order.
>
> Now let's give some of the problem to Mr. Barbin. Let's give him 10 days of it, which is probably 5 more than he's responsible for if indeed he's responsible for any, but that leaves you with months of complete foul up. And then you walk in here and say, well, we'll do it today.

That's not good enough. It's just not good enough.

I'm going to grant your motion.

We conclude that the Order Granting Judgment was a sanction and commence our discussion on that basis.

1. The court abused its discretion when it Sanctioned Lindquist by granting judgment in favor of F&NI-Hawaii.

The inherent power of the court is "based upon the substantial principles of right and wrong, to be exercised for the prevention of error and injury, and for the furtherance of justice." A-One Building Co. v. Yee, 32 Haw. 15, 18 (1931). The inherent 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 disposition of litigation on the merits. Compass, 10 Haw. App. at 401-402, 876 P.2d at 1341; Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Hawai'i 103, 107, 899 P.2d 386, 390 (1995).

In Shasteen, a commercial dispute, the trial date was continued four times over three years for various reasons. In addition, the plaintiff failed to properly appear at a settlement conference and failed to file a settlement conference statement. One of the defendants filed a motion to dismiss, and the circuit court granted its motion, citing the plaintiff's "failure to file a Settlement Conference Statement, attend the Settlement

Conference, appear with counsel, and otherwise prosecute its case and for good cause shown." Id. at 106, 899 P.2d at 389.

On appeal, the Hawai'i Supreme Court approved several general principles to govern the propriety of such sanctions, among them that "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 where would not serve the interest of justice[,]" and that "an order of dismissal cannot be affirmed absent deliberate delay, contumacious conduct, or actual prejudice[.]" Id. at 107, 899 P.2d at 390 (emphasis added) (brackets, footnote, internal quotation marks and citations omitted).

The supreme court found that there was no deliberate[3] delay by the plaintiff. Though the case was continued four times, only two of the continuances were a result of requests by the plaintiff. And those two continuances were based on the legitimate unavailability of plaintiff's counsel. Id. at 108, 899 P.2d at 391.

[3] "Deliberate" is defined as "willful rather than merely intentional." Black's Law Dictionary 426 (6th ed. 1990).

The supreme court further found that there was no contumacious conduct[4] on the part of the plaintiff. Id. at 108-09, 899 P.2d at 391-92. Derelictions on its part in connection with the settlement conference were apparently spawned by the ambiguous advice of former counsel. Id. The supreme court noted in this connection that there is a "'preference for giving parties an opportunity to litigate claims or defenses on the merits[.]'" Id. at 109, 899 P.2d at 392 (quoting Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 60 Haw. 372, 380, 590 P.2d 570, 576 (1979)).

The supreme court also found that the movant did not suffer actual prejudice. Although a continuance was likely to happen, it had not yet happened, and thus any prejudice to the movant was speculative. Moreover, it was also speculative that the continuance would have resulted in a determination of deliberate delay, contumacious conduct, or actual prejudice. Id. at 109, 899 P.2d at 392.

The supreme court therefore held that the circuit court abused its discretion by dismissing the case with prejudice because there was nothing in the record that indicated "(1) a deliberate attempt on the part of the Shasteen corporation to

[4] "Contumacious conduct" is defined as "willfully stubborn and disobedient conduct." Black's Law Dictionary at 330.

delay the prosecution of this case, or (2) that the Shasteen corporation acted in a manner that we would consider contumacious conduct, or (3) that the Hilton suffered actual prejudice[.]" Id. at 109, 899 P.2d at 392.

a. Deliberate Delay and Contumacious Conduct

As noted above, both deliberate delay and contumacious conduct require the willful intent to delay the proceedings or to disobey the court. In this case, Lindquist exhibited neither.

Lindquist was served with the Complaint on July 6, 1998. Three days later, Lindquist sent the Complaint and Summons via facsimile to Bickerton. Bickerton did not see the facsimile until July 13, 1998. Bickerton, using July 13 as the date of service, miscalculated the return date as July 27. This unfortunate, but not willful, mistake led to Lindquist's absence on the return date and to the default judgment against Lindquist.

Lindquist then filed a Motion to Set Aside Default Judgment. Judge Loo granted the motion and required Lindquist to submit the order setting aside default judgment. Bickerton did prepare the order. However, a series of inadvertent misadventures ensued which prevented submission of the order to the court until the day of trial.

This unfortunate trail of events does not constitute deliberate delay or contumacious conduct. In fact, it shows

Lindquist's desire, however thwarted it may have been, to proceed diligently.

With respect to Lindquist's failure to file a written answer, Judge Loo did not require Lindquist to submit an answer. At the November 23, 1998 hearing, Judge Loo set the trial date for March 1, 1999.[5] By setting the trial date, the court implied that the case was at issue. Rule 13 of the Rules of the District Courts of the State of Hawai'i (1999) states, in pertinent part, that "[a]ny case at issue may be advanced and set for a pretrial or settlement conference or be immediately placed on the trial calendar for hearing or trial." (Emphasis added).

"Whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other, they are said to be at issue." Black's Law Dictionary 125 (6th ed. 1990). Lindquist did not file an answer. For the case to be at issue and hence ready for trial, Judge Loo must have treated Lindquist's appearance at the hearing and the defensive allegations in his motion as a general denial. District Court Rules of Civil Procedure Rule 8(b) (1999) provides, in pertinent part, that "an appearance without written answer shall be deemed

[5] The Court: Okay. We'll set it for trial.

to constitute a general denial of the truth of the facts stated in the complaint[.]"

Judge Loo did not require Lindquist to file an answer; thus Lindquist's failure to file an answer did not constitute deliberate delay or contumacious conduct.

b. Actual Prejudice

As discussed above, Lindquist was not required to file a written answer, so its absence cannot be the source of prejudice to F&NI-Hawaii. At the hearing in which the court set aside the default and set the case for trial, F&NI-Hawaii did not complain that it would be unable to proceed to trial without an answer to its complaint. In his Motion to Set Aside Default Judgment, filed three months before trial, Lindquist described the specific defenses he planned to pursue at trial. F&NI-Hawaii cannot claim that it did not know what defenses Lindquist planned to pursue.

Moreover, F&NI-Hawaii appeared at trial and was ready to try its case. Nowhere in the March 1, 1999 transcript did F&NI-Hawaii claim that it was unprepared to try its case. Thus, F&NI-Hawaii suffered no actual prejudice by Lindquist's failure to file a written answer. And the fact that Barbin signed the order setting aside the default judgment on the morning of trial and stood ready to go to trial that day belies any claim that

F&NI-Hawaii suffered prejudice by the absence of an order setting aside the default judgment.

The granting of judgment in favor of F&NI-Hawaii was an extreme sanction. There was no clear record of delay or contumacious conduct on Lindquist's part; nor was there actual prejudice suffered by F&NI-Hawaii. There was apparently no consideration or application of lesser sanctions for the dilatoriness of Lindquist's attorneys.

In entering a $19,950 judgment against Lindquist for the derelictions of his attorneys, for which Lindquist apparently had no responsibility whatsoever, the court abused its discretion.

2. Assuming *arguendo* that the court meant to grant judgment on the pleadings, there was a general denial and the motion for judgment on the pleadings should have been denied.

In order to obtain judgment on the pleadings, "'the movant [must] clearly establish[] that no material issue of fact remains to be resolved and that he [or she] is entitled to judgment as a matter of law.'" Mendes v. Heirs and/or Devisees of Kealakai, 81 Hawai'i 165, 168, 914 P.2d 558, 561 (App. 1996) (quoting 5A C. Wright and A. Miller, *Federal Practice and Procedure: Civil* (*Federal Practice)* § 1368, at 518 (2d ed. 1990)) (footnote omitted). Moreover, "the trial court is required to view the facts presented in the pleadings and the inferences to

be drawn therefrom in the light most favorable to the nonmoving party." Mendes, 81 Hawai'i at 168, 914 P.2d at 561. See also Burns v. Consolidated Amusement Co., 182 F.R.D. 609, 610 (D. Haw. 1998).

As noted above, Judge Loo implicitly treated Lindquist's appearance at the hearing on the Motion to Set Aside Default Judgment as a general denial. Thus there were material issues of fact to be controverted on the basic allegations of the complaint.

Moreover, taking Lindquist's statement of the facts as set forth in the Motion to Set Aside Default Judgment as true, there were material issues of fact with respect to Lindquist's defenses. As Judge Loo apparently concluded, the Motion raised questions as to "alter ego, co-mingling, possibly some payment of the invoices."

With all these material issues of fact unresolved, judgment on the pleadings should not have been granted, if indeed that is what the court did via its Order Granting Judgment.

3. Assuming *arguendo* that the court meant to grant a second default judgment, the court erred.

There is nothing in the record saying that the order was treated as a reimposition of the default. The Order Setting Aside Default Judgment was not filed until March 4, 1999. Hence

at the time of the trial, March 1, 1999, the default judgment was still in effect.

Ordering a second default judgment was unnecessary. This could not have been what the court intended in issuing the Order Granting Judgment. If it was, the court erred.

Conclusion

For the foregoing reasons, we vacate and remand for a trial on the merits.

DATED: Honolulu, Hawai‘i, September 27, 2000.

On the briefs:

James J. Bickerton, Alan B. Burdick, Scott K. Saiki (Bickerton Saunders Dang & Bouslog) and Mark R. Zenger for defendant-appellant. — Chief Judge

Ryther L. Barbin for plaintiff-appellee. — Associate Judge

Associate Judge