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

KALAYAAN, INC.,
Plaintiff-Appellant-Respondent,

v.

CHRIS G. IMBO,
Defendant-Appellee-Movant.

Supreme Court No. 2016-SCC-0024-CIV

Superior Court No. 14-0209

ORDER GRANTING MOTION TO DISMISS

Cite as: 2016 MP 16

Decided December 23, 2016

Michael A. White, Saipan, MP, for Plaintiff-Appellant-Respondent.

Charity Hodson, Saipan, MP, for Defendant-Appellee-Movant.

BEFORE: ALEXANDRO C. CASTRO, CHIEF JUSTICE; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Defendant-Appellee-Movant Chris Imbo ("Imbo") moves to dismiss Plaintiff-Appellant-Respondent Kalayaan Inc.'s ("Kalayaan") appeal of the trial court's order dismissing Kalayaan's breach of contract lawsuit on the grounds of failure to timely serve the summons and complaint. Imbo argues that this Court should dismiss the appeal for lack of jurisdiction because (1) the order dismissing the case is not a final judgment, and (2) the appeal is moot since Kalayaan has refiled the original complaint in the trial court. For the reasons stated below, we GRANT the motion to dismiss.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 On October 13, 2014, Kalayaan filed a complaint against Imbo alleging breach of contract on a construction project, seeking $79,461.49 in damages, plus interest and costs. Kalayaan served Imbo the summons and complaint on May 18, 2016, 583 days[1] from the initial filing to the date of service. Imbo answered the complaint and moved to dismiss for failure to timely serve pursuant to NMI Rule of Civil Procedure 4(m) ("Rule 4(m)").[2]

¶ 3 The trial court granted the motion to dismiss, finding that Rule 4(m) did not allow for retroactive service, and that Kalayaan failed to show good cause for the delay. The trial court dismissed the complaint without prejudice. Kalayaan refiled the identical complaint in the trial court and, on the same day, filed the instant appeal with this Court contesting the trial court's decision to grant the motion to dismiss. Imbo now moves to dismiss the appeal.

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[1] The parties and the trial court incorrectly assert that this results in a 573 day gap. The error is immaterial as both time lengths are beyond the 240 day rule imposed by NMI Rule of Civil Procedure 4 (m).

[2] Rule 4(m) states:

> TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 240 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice, or may direct that service be effected within a specific time, provided, however, that the failure to make service within 240 days after the filing of the complaint shall not be grounds for dismissal of the complaint as to a defendant once that defendant has been served; and provided further, that if the plaintiff shows good cause for the failure, the Court shall extend the time for service for an appropriate period, and an extension shall be freely given when justice so requires. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

II. DISCUSSION

¶ 4 Imbo argues a dismissal without prejudice is not a final order and cannot be appealed. He further argues the issue on appeal is moot because Kalayaan has refiled the complaint in the trial court.

A. Final Order or Judgment

¶ 5 We have jurisdiction over final judgments and orders of the trial court. NMI CONST. art IV, § 3. Here, the trial court dismissed the case without prejudice. Imbo cites to *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 1999) to argue that a dismissal without prejudice that does not bar refiling the claim is not a final appealable order. Moreover, Imbo asserts that because his counterclaims were not dismissed, the order did not end the litigation on the merits, and therefore, it was not final.

¶ 6 There is no question our jurisdiction is limited if the trial court has not issued a final judgment or order. In *Commonwealth v. Crisostimo*, we held "[T]he Commonwealth Constitution limits the jurisdiction of the Supreme Court to judgments that are final. Article IV, Section 3 states: 'the Commonwealth supreme court shall hear appeals from final judgments and orders of the Commonwealth superior court.'" 2005 MP 18 ¶ 10 (quoting NMI CONST. art. IX, § 3).

¶ 7 The issue in part turns on whether the trial court's order dismissed the action, or solely the complaint.[3] *Compare United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949), *with WMX Techs. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). In *Wallace*, the appellees moved to dismiss the government's appeal arguing that the underlying case was dismissed without prejudice to filing another suit, thus was unappealable. The Supreme Court found, however, that a dismissal without prejudice did "not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned." 336 U.S. 793, 794 n.1 (1949). .

¶ 8 In the alternative, however, courts have found that if the dismissal is of just the complaint and a plaintiff may refile that complaint, then the order is not final and not appealable. *See Ciralsky v. CIA*, 355 F.3d 661, 666 (D.C. Cir. 2004) ("However, courts often regard the dismissal without prejudice of a complaint as 'not final, and thus not appealable . . . , because the plaintiff is free to amend his pleading and continue the litigation.'") (quoting *Hoskins v. Poelstra*, 320 F.3d 761, 763 (7th Cir. 2003)); *WMX Techs*, 104 F.3d at 1136 ("[A] plaintiff, who has been given leave to amend, may not file a notice of appeal simply because he does not choose to file an amended complaint.").

¶ 9 Here, the trial court's order did not specify whether it dismissed the action or merely the complaint. However, in the order, the court relied on Rule

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[3] An action is a "civil or criminal judicial proceeding," Black's Law Dictionary 28 (7th ed. 1999) while a complaint is "[t]he initial pleading that starts a civil action . . . ." *Id.* at 279.

4(m), which states, in relevant part: "If service of the summons and complaint is not made upon a defendant within 240 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, *shall dismiss the action* without prejudice . . . ." NMI R. CIV. P. 4(m) (emphasis added). While Imbo argues that the action continued because his counterclaims were not dismissed, under Rule 4(m) this dismissal was of the action, not just the complaint. As such, the trial court's order dismissing the action is an appealable final order.

B. Mootness

¶ 10 Had Kalayaan not refiled its complaint in the trial court following the dismissal of its case, our consideration of Imbo's motion would end with the above analysis. However, because Kalayaan refiled the same complaint, word for word, as was dismissed, we must consider whether the appeal before us is moot.

¶ 11 We have defined mootness as:

> [W]hen a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. A question is 'moot' when it presents no actual controversy or where the issues have ceased to exist. Generally, an action is considered 'moot' when it no longer presents a justiciable controversy because issues involved have become academic or dead.

Oriental Crystal LTD. v. Lone Star Casino Corp., 1997 MP 25 ¶ 11 n.2. (citing Black's Law Dictionary 1008 (6th ed. 1990)).

¶ 12 In *Oriental Crystal*, we considered whether we could evaluate a non-compete clause when one of the parties was incapable of competing, and found we could not, as "[a]n action to enjoin a competition is moot when such a competition is no longer possible," and that to consider such an issue would be to give an opinion on a moot question or abstract proposition. 1997 MP 25 ¶ 11. CNMI courts have explored mootness in a variety of other circumstances, including parties seeking to enjoin construction already completed, *Govendo v. Micr. Garment Mfg., Inc.*, 2 NMI 270 (1991); seeking the release of a patient already released from the hospital, *In re Seman*, 3 NMI 57 (1992); and "when the parties lack a legally cognizable interest in the outcome" *In re Duncan*, 3 CR 383, 387 (Trial Ct. 1988).

¶ 13 Here, Kalayaan refiled its complaint in the trial court and filed this appeal on the same day. Were we to allow this appeal to continue, and find Kalayaan's arguments persuasive, the end result would be to put Kalayaan where it stands now, with an exact duplicate of the case and complaint already proceeding in the trial court. To proceed when such a result is possible would be nonsensical. The United States Supreme Court has noted:

> [T]he mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced. Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.

Renne v. Geary, 501 U.S. 312, 320–21 (1991) (citations and internal quotation marks omitted). There are no present adverse effects here, as Kalayaan is already proceeding with this case in the trial court. As such, this appeal was moot from the moment Kalayaan refiled the identical complaint in the trial court.

¶ 14 Kalayaan argues that the basis for this appeal, whether Rule 4(m) permits a plaintiff to cure a failure to timely serve violation by serving the defendant, should be heard as a matter of public policy, even if the instant appeal would otherwise be moot, because the issue is one that is capable of evading review. We disagree. Indeed, had Kalayaan not refiled its complaint, we would not hesitate to consider Kalayaan's appeal. As such, Kalayaan's public policy argument fails.

III. CONCLUSION

¶ 15 For the preceding reasons, we find under these circumstances we have jurisdiction over an order dismissing an action without prejudice. However, because the appeal is moot, we GRANT Imbo's motion to dismiss the appeal.

SO ORDERED this 23rd day of December, 2016.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice