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

SU YUE MIN, WU YI PAN, HUANG SHI ZHONG, LI DAN YUN, XIAO XUE MING, and GUO LI YING,
Plaintiffs-Appellees,

v.

FENG HUA ENTER., INC., LI JIAN DE, and WU YAN MING,
Defendants-Appellants.

Supreme Court No. 2014-SCC-0016-CIV

Superior Court No. 09-0331-CIV

SLIP OPINION

Cite as: 2017 MP 3

Decided March 23, 2017

Joe Hill, Saipan, MP, for Plaintiffs-Appellees.

Robert H. Myers Jr., Saipan, MP, for Defendants-Appellants.

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

CASTRO, CJ.:

¶ 1 The Defendants-Appellants Feng Hua Enterprise Incorporation, Li Jian De and Wu Yan Ming (collectively "Feng Hua") appeal the trial court's order granting Plaintiffs-Appellees Su Yue Min, Wu Yi Pan, Huang Shi Zhong, Li Dan Yun, Xiao Xue Ming, and Guo Li Ying's (collectively "Su") motion to dismiss for failure to prosecute. For the foregoing reasons, we AFFIRM the trial court's order and SANCTION Feng Hua and its counsel.[1]

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2008, Su filed a complaint with the Department of Labor against Feng Hua. The Administrative Hearing Officer awarded Su $134,096.80, and the Secretary of the Department of Labor issued an order affirming the award. On August 19, 2009, Feng Hua filed a petition with the trial court for judicial review of the order.

¶ 3 On November 16 and December 9, 2009, and on April 6, 2010, the trial court issued orders setting procedural guidelines for judicial review. On each of the three orders, the court gave notice to the parties that failure to file an "At Issue Memorandum" within fifteen days of the court-ordered deadline may result in the dismissal of the appeal. Subsequent to the court issuing the last order setting guidelines, Feng Hua made no substantive filings.[2]

¶ 4 On August 23, 2012, the court held a status conference ordering Feng Hua to file its opening brief on or before September 24, 2012. Feng Hua did not comply.

¶ 5 On May 28, 2013, Su moved to dismiss Feng Hua's petition for failure to prosecute. On June 5, 2013—255 days after the court imposed deadline—Feng Hua filed its opening brief indicating the brief was submitted on September 24, 2014 but the court did not receive it due to an error in the electronic filing system. Feng Hua did not produce any evidence to substantiate its claim. Additionally, Feng Hua opposed Su's motion to dismiss but did not address any factual or legal arguments in their brief.

¶ 6 On June 27, 2013, the court held a hearing on the motion, and at the hearing, instructed Feng Hua to file a supplemental brief within ten days explaining and providing evidence regarding the alleged electronic error. Feng

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[1] For ease of reading, Feng Hua Enterprise Incorporation, Li Jian De, and Wu Yan Ming are treated as one entity.

[2] On April 26, 2010, Feng Hua filed a motion to stay a *different* case—*Su Yue Min et al. v. S&D Corp. et al.*, No. 10-0083—before the trial court. On August 8, 2011, the court denied the motion to stay for lack of standing concluding that Feng Hua was not a named party in Civil Action No. 10-0083.

Hua timely filed its brief, but the court found that it did not produce any credible evidence to corroborate its account of the late filing.

¶ 7 Subsequently, the court granted Su's motion to dismiss the petition for failure to prosecute. Feng Hua appealed to this Court. Su, in response, moved to dismiss the appeal and sanction Feng Hua and its counsel for filing a frivolous appeal.

II. JURISDICTION

¶ 8 We have jurisdiction over Superior Court final judgments and orders. NMI CONST. art. IV, § 3.

III. STANDARD OF REVIEW

¶ 9 Feng Hua argues the trial court erred in dismissing its petition for failure to prosecute. "Dismissal for failure to prosecute is reviewed for an abuse of discretion." *Wabol v. Villacrusis*, 2000 MP 18 ¶ 2 (citing *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 650 (9th Cir. 1991)). We have discretion to find an appeal frivolous under NMI Supreme Court Rule 38. *See Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (U.S. 1987) ("Rule 38 affords a court of appeals plenary discretion to assess just damages in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment." (internal quotation marks omitted)).[3]

IV. DISCUSSION

A. Violation of Appellate Rules

¶ 10 We will not waste our time on appellate briefs that egregiously fail to comport with the NMI Supreme Court Rules. Appellate rules are not merely "prudential rule[s] of convenience." *See Commonwealth v. Guiao*, 2016 MP 15 ¶ 12 (Slip Op., Dec. 19, 2016). Rather, they are mandatory, and compliance is necessary for the proper administration of justice in our adversarial system. *Id.* Nor is this a recent development. In 1996, we noted "the Rules of Appellate Procedure must be followed for all appeals." *Villagomez v. Sablan*, 4 NMI 396, 397 (1996). In particular, we have impressed the importance of the briefing rules noting that failure to comply may result in dismissal of the appeal. *See Guiao*, 2016 MP 15 ¶ 11 ("Ordinarily, we do not give consideration to issues not adequately briefed on appeal. We have reiterated this rule, time and time again, which is expressed in NMI Supreme Court Rules 28(a)(9)(A) and 28(b)." (internal citation omitted)). This is because "to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief." *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997).

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[3] NMI Supreme Court Rule 38 is patterned after Federal Rule of Appellate Procedure 38. Accordingly, we look to federal decisions for guidance. *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60.

¶ 11 Certainly, we can excuse a minor violation of a rule, or even a few rules. But when the violations are egregious, we cannot, in good faith, entertain the appeal, especially if the violations are so grave that they hinder us from accurately considering the merits of the case. *See Guiao*, 2016 MP 16 ¶ 19 (dismissing appeal when appellant's legal arguments were cursory); *Commonwealth v. Calvo*, 2014 MP 10 ¶ 7 (denying petition for rehearing based on appellant's failure to properly raise the issues). The case before us is one of those cases where dismissal is warranted because of an appellant's flagrant disregard for the rules. We find the violations egregious.

¶ 12 First, Feng Hua fails to include a corporate disclosure statement as required by Rule 28(a)(1).[4] Instead, it includes an obscure section in the opening brief entitled "Certificate Required by NMI Sup. Ct. R. 28(K)." No certificate is required by Rule 28(K) because Rule 28(K) does not exist in the Supreme Court Rules.

¶ 13 Second, the statement of issues is vague; it fails to articulate the issues on appeal. Feng Hua's brief states: "Did the reviewing court exceed the bounds of its discretion by: both accepting the *central premise* of the Appellee's motion AND ignoring (or just plain rejecting without any analysis) the Appellant's *substantive response* to that motion for purposes of Rule 41(b) and the relevant *Wabol* balancing factors test?" Appellants' Opening Br. at 5 (emphases added). But the statement compels us to ask: what is the central premise of the motion and what is the substantive response? The statement, at best, leaves us and Su to posit the appellate issues for Feng Hua.

¶ 14 Third, the statement of the case does not comport with Rule 28(a)(6), which provides that the statement must "*briefly* indicat[e] the nature of the case, the course proceedings, and the disposition below." (emphasis added). Feng Hua's statement is four pages long containing blanket factual assertions, serious allegations against the opposing counsel without reference to the record, conclusory legal arguments, and personal opinion of the counsel regarding an unrelated case.[5]

¶ 15 Fourth, Feng Hua fails to include the statement of facts and summary of argument in violation of Rules 28(a)(7) and (8).

¶ 16 Fifth, the argument section fails to comply with Rule 28(a)(9)(A) which

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[4] Feng Hua is a nongovernmental corporate party and therefore, required to file a corporate disclosure statement pursuant to Rule 28(a)(1).

[5] For example, the first ten paragraphs in the statement of the case elaborate on Civil Action No. 09-0072E—a case that is not relevant to the appeal. Feng Hua alleges that counsel for Su violated a stay order and filed ex parte materials to the Department of Labor and the Administrative Hearing Officer but fails to provide relevant evidentiary record to substantiate these serious allegations. Also, Feng Hua asserts the court ordered Su to file their brief first and that Su failed to comply, but again, Feng Hua does not cite to any record in support of its assertions.

requires citations to "authorities and parts of the record on which the appellant relies." While Feng Hua extensively argues that the court erred and that the "truth is easily proven by the record," it does not make adequate references to the relevant parts of the record.[6] We "are not obliged to search the entire record, unaided, for error." *Tevis v. Wilke, Fleury, Hoffelt, Gould & Birney, LLP (In re Tevis)*, 347 B.R. 679, 686 (B.A.P. 9th Cir. 2006).[7] Moreover, Feng Hua fails to properly cite to legal authorities. For instance, pages 15 through 17 of its opening brief contain a verbatim copy-paste of a Ninth Circuit case—*Nealy v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1278 (9th Cir. 1980)—without quotation marks. We find this error at minimum reckless, if not deliberate. Additionally, Feng Hua's arguments are conclusory at large, failing to apply the relevant law to the facts of the case. Instead, Feng Hua merely summarizes case law then argues their position without meaningfully assessing the pertinence of the cases cited.[8]

¶ 17 Sixth, Feng Hua's appendix does not comport with Rule 30(a) which requires an appellant to file docket entries, portions of pleadings, charge, findings, opinion, judgment, order, or decision relevant to the appeal. Here, Feng Hua did not submit actual documents as part of the appendix but provided hyperlinks to electronic copies of the purported documents that can only be accessed by electronic means through the File & ServeXpress website. This does not reasonably comport with the requirements of Rule 30(a).

¶ 18 Seventh, Feng Hua's conclusion is not short and precise as required by Rule 28(a)(10).

B. Dismissal for Failure to Prosecute

¶ 19 Even if we were to set aside Feng Hua's egregious violations of the appellate rules, the appeal still warrants dismissal. We review a trial court's dismissal for failure to prosecute under the abuse of discretion standard. *Wabol v. Villacrusis*, 2000 MP 18 ¶ 14. "[T]he trial court's exercise of discretion should not be disturbed unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* ¶ 19 (citation and internal quotation marks omitted).

¶ 20 In considering dismissal for failure to prosecute under NMI Rule of Civil Procedure 41(b), we adopted a five factor test from the Ninth Circuit. The

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[6] Feng Hua's failure to cite to relevant parts of the record is apparent in its brief. We will not waste our time pointing what portions of the brief contain these errors.

[7] In addition, Feng Hua makes substantive arguments that go to the merit of the administrative order instead of the order being appealed. For instance, it asserts the administrative hearing itself was faulty because the "record . . . clearly shows that evidence of those ex parte materials . . . were improperly used and relied upon by the [Administrative Hearing Officer]." Appellants' Opening Br. at 12.

[8] *See* Appellants' Opening Br. at 15–23.

factors are: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* ¶ 19. A dismissal may be affirmed "where at least four factors support dismissal, . . . or where at least three factors strongly support dismissal." *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (citations and internal quotation marks omitted). On review, we give great deference to the trial court's factual findings. *Id.*[9]

¶ 21 In granting the dismissal, the trial court concluded all five factors weighed heavily in favor of dismissal. Based on our review of the trial court's ruling in light of the facts and applicable law, we do not have a definite and firm conviction that the court erred. We discuss each of the five factors in turn.

1. Public's Interest in Expeditious Resolution of Litigation

¶ 22 We note "the public's interest in expeditious resolution of litigation always favors dismissal." *Yourish*, 191 F.3d at 990. Here, the court found Feng Hua failed to "take any affirmative action in furtherance of prosecuting their claims to completion for over three years," and when ordered to move forward with their case, failed to comply with the order. *Su Yue Min et al. v. Feng Hua Enter. et al.*, No. 09-0331 (NMI Super. Ct. Aug. 8, 2014) (Order Granting Defs. ['] Mot. Dismiss Failure to Prosecute). Because the public has an interest in the expeditious resolution of litigation and the record reflects a clear delay, the court did not err in weighing factor one in favor of dismissal.

2. Court's Need to Manage Docket

¶ 23 The second factor—the court's need to manage its dockets—"is usually reviewed in conjunction with the public's interest in expeditious resolution of litigation to determine if there is unreasonable delay." *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1452 (9th Cir. 1994). We give deference to the trial court as it is "best situated to decide when delay in a particular case interferes with docket management . . . ." *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984). Here, the court found the case dormant for over three years and found the delay to be unreasonable. Further, it noted that the court's time could have been spent on other cases rather than ensuring Feng Hua's compliance with court orders. On the basis of the unreasonable three-year delay and the court's time exhausted to ensure compliance from Feng Hua, this factor weighs in favor of dismissal. *See In re Eisen*, 31 F.3d at 1452 (noting that four-year delay is unreasonable weighing in favor of dismissal under factor two).

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[9] Feng Hua, in its response to the motion to dismiss, did not rebut Su's factual assertions or arguments. Accordingly, the trial court treated the arguments as conceded. We find no error in the court's determination. *See Bancoult v. McNamara*, 227 F. Supp. 2d 144, 149 (D.D.C. 2002) ("[I]f the opposing party files a responsive memorandum, but fails to address certain arguments made by the moving party, the court may treat those arguments as conceded, even when the result is dismissal of the entire case.").

3. Prejudice

¶ 24 "The law presumes injury from unreasonable delay. However, this presumption of prejudice is a rebuttable one and if there is a showing that no actual prejudice occurred, that factor should be considered when determining whether the trial court exercised sound discretion." *Anderson v. Air W., Inc.*, 542 F.2d 522, 524 (9th Cir. 1976) (internal citation omitted). Here, the court presumed prejudice on the basis of the unreasonable three-year delay, and Feng Hua did not rebut that presumption. Accordingly, the court did not abuse its discretion weighing factor three in support of dismissal.

4. Public Policy Favoring Disposition of Cases on the Merits

¶ 25 Though public policy favoring disposition on the merits does not favor dismissal, it may be outweighed by a party's dilatory conduct. *See Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991) ("Although there is indeed a policy favoring disposition on the merits, it is the responsibility of the moving party to move towards that disposition at a reasonable pace, and to refrain from dilatory and evasive tactics."). The court determined that factor four favors dismissal because Feng Hua failed to move the case toward disposition at a reasonable pace, engaging in dilatory litigation tactics to avoid paying a lawfully obtained judgment. We give deference to the court's findings and find no abuse of discretion.

5. Availability of Less Drastic Sanctions

¶ 26 "There is no requirement that every single alternate remedy be examined by the court before the sanction of dismissal is appropriate. The reasonable exploration of possible and meaningful alternatives is all that is required." *Anderson*, 542 F.2d at 525. "[W]arning a [party] that failure to obey a court order will result in dismissal can suffice to meet the consideration of alternatives requirement." *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 132 (9th Cir. 1987) (citation and internal quotation marks omitted). Here, the court warned Feng Hua that failure to timely file its opening brief may warrant a dismissal. Thus, the court did not abuse its discretion in finding the fifth factor in favor of dismissal.

C. Sanctions

¶ 27 Under NMI Supreme Court Rule 38 and under our inherent authority, we may sanction a party, his or her counsel, or both, for filing frivolous appeal.[10] *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 382 (2d Cir. 1982) (sanctioning counsel and party "jointly and severally, since attorney and client are in the best position between them to determine who caused [the] appeal to be taken."); *see Commonwealth v. Sablan*, 2016 MP 12 ¶¶ 14–17 (noting that under the inherent authority or via Rule 38, the Court may award attorney fees and single or double costs to an appellee if the appeal is found frivolous);

[10] NMI Supreme Court Rule 38 provides: "If the Court determines that an appeal is frivolous, it may, after a separately filed motion or notice from the Court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

Cabrera v. Ahn Yeoung Mi, 1997 MP 19 ¶¶ 20–21 (finding appeal sanctionable against party and counsel). A frivolous appeal is one that presents "no legal or factual basis upon which appellant relied." *Pac. Amusement, Inc. v. Villanueva III*, 2006 MP 8 ¶ 20 (overruled on other grounds). In *Cho v. Cho*, we noted that "failure to appreciate the applicable [rules] is a recipe for bringing frivolous appeals." *See* 2002 MP 24 ¶ 8 n.3. There, we determined the appeal frivolous and sanctionable when counsel for appellant failed to include a standard of review, misquoted case law to his benefit, and misconstrued evidence. *Id.* ¶ 18. The issues here are strikingly similar.

¶ 28 Here, the appeal is inundated with egregious violations of appellate rules. As described in Section A of this opinion, Feng Hua failed to include the requisite corporate disclosure statement, statement of facts and summary of arguments; provided a vague issue statement; elaborated on a case unrelated to the appeal; made factual assertions without making adequate references to the record; blatantly copied and pasted judicial opinion from the Ninth Circuit; proffered legal arguments that are, at large, conclusory; made serious allegations against the opposing counsel without evidentiary support; did not provide an adequate appendix; and failed to precisely state the relief sought. These serious violations reflect that the counsel has approached this Court and the opposing party with unacceptable discourteousness. The appeal, viewed as a whole, is unintelligible. Because the violations are so grave, we are unable to properly consider the actual merits of the case. Accordingly, we find the appeal entirely frivolous, and under Rule 38, impose sanctions against Feng Hua and its counsel jointly and severally.[11]

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[11] Feng Hua's counsel has a prior history for filing frivolous or untimely brief with this Court. In 2012, he filed an appeal which we found frivolous and warned him: "Further filing documents in this Court that are frivolous or fail[ure] to comply with the NMI Supreme Court Rules *will result in the imposition of sanctions against counsel*." *Su Yue Min et al. v. S&D Corp. et al.*, No. 2011-SCC-0029-CIV (NMI Sup. Ct. Oct. 9, 2012) (Order Re Order to Show Cause at ¶ 2) (emphasis added). Again in 2015, we imposed sanction against the said counsel in the case at bar for failing to meet a filing deadline. In the sanction order, we cautioned him that we "may be compelled to take harsher measure if [the counsel] continues to miss filing deadlines and otherwise fail to uphold his professional responsibilities without good cause." *Su Yue Min et al. v. Feng Hua Enter. et al.*, No. 2014-SCC-0016-CIV (NMI Sup. Ct. July 29, 2015) (Order Sanctioning Counsel at ¶ 3 n.1). Based on the counsel's prior history coupled with the notices from this Court, counsel should or should have known that the instant appeal warranted sanctions.

"Notice and an opportunity to respond must always be given before sanctions are imposed to comply with due process." *Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc*., 3 NMI 343, 363 (1992) (internal quotation marks and citation omitted); *See* NMI SUP. CT. R. 38 note 1 (2015) ("This rule modifies Rule 38(a) (1992) by requiring a separate motion or notice and opportunity to respond before damages or costs are awarded against a party or counsel bringing a frivolous appeal . . . ."). Feng Hua and counsel received due process because they had an opportunity to respond in writing to Su's motion for sanction which was filed separately with this Court.

¶ 29 It is hereby ORDERED that Feng Hua and its counsel pay, as sanction, Su reasonable attorney fees and single cost incurred in defending the frivolous appeal.[12]

V. CONCLUSION

¶ 30 For the foregoing reasons, we AFFIRM the trial court's order granting Su's motion to dismiss and SANCTION Feng Hua and its counsel consistent with this opinion.

SO ORDERED this 23rd day of March, 2017.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

[12] A separate order will be issued addressing when and how the sanction shall be paid.