IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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GRACE CHEN, Respondent/Plaintiff-Appellee,

vs.

JONATHAN WILLIAM MAH; JONATHAN MAH, DDS, INC.,
Petitioner/Defendant-Appellant

SCWC-16-0000712

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000712; CIV. NO. 12-1-2495-10)

JANUARY 30, 2020

OPINION BY RECKTENWALD, C.J., CONCURRING AND DISSENTING IN PART AND CONCURRING IN THE JUDGMENT, WITH WHOM NAKAYAMA, J., JOINS

I. INTRODUCTION

The majority sua sponte departs from the established test for setting aside entry of default pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 55(c). To replace it, the majority imports the test for determining on appeal whether a

trial court has abused its discretion by involuntarily dismissing a plaintiff's complaint. Respectfully, I believe this comparison is inapt, and that a wholesale departure from our established test is unwarranted.

In my view, we need not abandon the three factors we first articulated more than forty years ago in BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976) and reaffirmed more recently in County of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 423, 235 P.3d 1103, 1135 (2010). Nearly every federal circuit court of appeal and numerous state courts have adopted a test that includes a version of those three factors as relevant considerations. See, e.g., 10 Moore's Fed. Practice - Civil § 55.70[2] n.7 (2019) (collecting cases); United States v. Signed Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010); Tucker v. Williams, 198 So. 3d 299, 311 (Miss. 2016) ("[T]he same three factors considered under Rule 60(b) are relevant to a consideration of whether to set aside an entry of default"); In re EMM, 414 P.3d 1157, 1159-60 (Wyo. 2018) ("Good cause for setting aside an entry of default, pursuant to [Wyoming's Rule 55(c) equivalent], is to be found in the justifications for relief from a final judgment articulated in [Wyoming's Rule 60(b) equivalent]." (citations omitted)).

Indeed, it is sensible to look to the same factors for

setting aside both entry of default and entry of default judgment, since the same competing considerations of promoting finality and resolving cases on their merits apply in both contexts. Moreover, the majority replaces the BDM factors with the test from the HRCP Rule 41(b) context, which is inapplicable to Rule 55(c) for a number of reasons discussed in further detail below. For these reasons, I respectfully disagree with the majority's reasoning as to this issue.[1]

II. DISCUSSION

A. The BDM Factors Are Appropriate to Consider in Determining Whether to Set Aside Entry of Default

In BDM, we stated that a motion to set aside entry of default or default judgment "may and should be granted" when (1) "the nondefaulting party will not be prejudiced by the reopening," (2) "the defaulting party has a meritorious defense,[2]" and (3) "the default was not the result of

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[1] Because I conclude, as the majority does, that the trial court was correct to deny Mah's motion using the BDM and Ala Loop factors, I concur in the judgment affirming the ICA's decision. And I concur with the majority as to the other issues on appeal.

[2] Moore's Federal Practice compellingly explains the justification for this factor:

> When the defaulting party lacks a meritorious defense to the claims, relief from default or default judgment is pointless. . . . The defaulting party need not prove the defense before the court may set aside the default. The test is not whether there is a likelihood that the defaulting party will prevail on the defense, but rather whether a defense is proposed that is legally cognizable and, if proved at trial,

inexcusable neglect or a wilful act." 57 Haw. at 76, 549 P.2d at 1150. These factors are appropriate to weigh the competing values at play in motions to set aside default and default judgments because they take into account the preference for resolving cases on their merits while also promoting final resolution of claims and judicial economy.

Yet the majority finds it problematic that the factors articulated in BDM are the same as those that courts consider when deciding motions to set aside entry of default judgment. According to the majority, looking to similar factors in both contexts is unjustified given that Rule 55(c) allows default to be set aside upon good cause shown while Rule 60(b) requires a showing of excusable neglect. But as numerous courts, including our own, have indicated, a good cause analysis using the BDM factors gives a defendant more leeway than it would receive had default judgment been entered. Ala Loop, 123 Hawai'i at 423 ("[T]he showing necessary to set aside the entry of default [is] lower than that needed to set aside a default judgment. This is a reasonable distinction, since the entry of default occurs at a

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> would constitute a complete defense to the claims. The party must allege specific facts that, if proved at trial, would establish the defense. While the burden is not high, mere denials or conclusory allegations are not sufficient.

10 Moore's Fed. Practice - Civil § 55.70[2][d] (2019).

more preliminary stage of the case than does the entry of judgment.").

I would join the federal courts and other state supreme courts in holding that the BDM factors are instructive, but not a rigid test that trial courts must apply.[3] Instead, "[c]ourts should consider any matters that bear on the equities of the situation. The underlying consideration is whether good cause for relief from the default exists, and the various factors merely aid in that determination." 10 Moore's Fed. Practice - Civil § 55.70[3] (2019). For example, in determining whether good cause exists to set aside entry of default, "[c]ourts often consider . . . whether the party acted promptly to correct the default after learning of the entry of default or default judgment." Id.; see also Allstate Ins. Co. v. Green, 794 So. 2d 170, 179 (Miss. 2001) (Waller, J. concurring) ("In determining whether 'good cause' exists for setting aside an entry of default, a court may use the enumerated reasons under

[3] The Majority argues that we should not refer to federal caselaw interpreting Rule 55(c) because the federal rules do not contain a counterpart to HRCP Rule 41(b)(2) (which, as discussed below, governs setting aside sua sponte involuntary dismissal of plaintiffs' claims). Yet the text of the federal Rule 55(c) is substantively similar to Hawaii's Rule 55(c). This alone makes federal case law instructive. And, as discussed below, I believe that the Majority's comparison to Rule 41(b) is inapt in the first instance. In fact, one might argue that the lack of a Rule 41(b)(2) counterpart on the federal level makes the argument that Rule 41(b)(2) does not apply to this case more persuasive. Federal courts have not found any need to analogize sua sponte dismissal of plaintiff's claims to motions to set aside entries of default.

[Mississippi's Rule 60(b) equivalent], but a court may also consider reasons not contemplated by [the rule] such as, inter alia, illness, clerical mistake, misunderstanding, or failure to receive service.)".

I therefore respectfully disagree with the majority's choice to eliminate the factors articulated in BDM and Ala Loop.

B. Replacing the BDM Factors with a Rule Based on HRCP Rule 41(b) Is Incorrect

The majority posits that HRCP Rule 41(b), in which the phrase "good cause" appears, is the closest analogue to Rule 55(c) in our jurisprudence. Thus, the majority uses cases reviewing dismissals under Rule 41(b) to craft a new test for "good cause" in the context of Rule 55(c).

The relevant portion of Rule 41 reads as follows:

> (b) Involuntary dismissal: Effect thereof.
>
> (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against it.
>
> (2) For failure to prosecute or to comply with these rules or any order of the court, the court may sua sponte dismiss an action or any claim with written notice to the parties. Such dismissal may be set aside and the action or claim reinstated by order of the court for good cause shown upon motion duly filed not later than 10 days from the date of the order of dismissal.

(Emphasis added.)

The majority's comparison between the two rules and its use of Rule 41(b) cases to define Rule 55(c) good cause are inapt

for two reasons.

First, the phrase "good cause" is used in the context of setting aside sua sponte dismissals of plaintiffs' actions under Rule 41(b). Conversely, under Rule 55(c), a party must satisfy the good cause standard to set aside an entry of default that was entered upon the opposing party's motion. There are sound reasons to have a significantly lower bar to setting aside a sua sponte action in our adversarial system. First and foremost among these is that a sua sponte dismissal under Rule 41(b)(2) does not include notice and an opportunity to be heard prior to dismissal. It is significant that subsection (1) of Rule 41(b), which deals with dismissal on defendant's motion, does not allow the plaintiff to set aside the dismissal of his or her claims upon a showing of good cause. Yet the majority primarily relies on In re Blaisdell, 125 Hawai'i 44, 49-50, 252 P.3d 63, 68-69 (2011), in which this court reviewed a sua sponte Rule 41(b)(2) dismissal, in order to define "good cause" in Rule 55(c). Respectfully, I believe the significant differences between Rule 41(b)(2) and Rule 55(c) make the majority's comparison unhelpful.

Second, "good cause" appears only in the section of Rule 41(b)(2) that deals with setting aside involuntary dismissal. Yet Blaisdell was not reviewing a trial court's

denial of a motion to set aside its dismissal of the plaintiff's claims. Instead, Blaisdell arose from the plaintiff's appeal of the dismissal of the claims itself - in other words, this court considered whether there was a sufficient justification for the court's sua sponte dismissal of the plaintiff's claims. Id. Blaisdell thus did not define "good cause" because it did not discuss the circumstances under which the trial court should set aside its dismissal of a plaintiff's claims. Similarly, Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Hawai'i 103, 899 P.2d 386 (1995), which the majority also cites, reviewed the trial court's dismissal of the plaintiff's claims on defendant's motion. The phrase "good cause" appears nowhere in the subsection of the rule that deals with dismissals upon defendant's motion.

Both Blaisdell and Shasteen instead defined the circumstances in which a court would be within its discretion to dismiss a plaintiff's claims with prejudice, not what constitutes good cause to set aside such a dismissal. It is within this context that we developed the test the majority now applies to Rule 55(c), which requires analysis of deliberate delay, actual prejudice, and contumacious conduct. But for the reasons stated above, it is unhelpful to look to these cases when formulating a

definition of "good cause" for purposes of Rule 55(c).[4]

III. CONCLUSION

For the foregoing reasons, I respectfully disagree with the majority's opinion instituting a new test for "good cause" pursuant to Rule 55(c). I therefore concur and dissent in part and concur in the judgment.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

[4] The Majority cites Ryan v. Palmer, an ICA decision from 2013, as the authority for applying factors developed in the context of Rule 41(b)(2)'s dismissal provision to the rule for setting aside that dismissal provision. Although the trial court in Ryan denied the plaintiff's motion to set aside the sua sponte dismissal, the ICA in that case still did not purport to define good cause pursuant to the rule. Instead, the ICA in Ryan found that "the circuit court's dismissal with prejudice under these circumstances was an abuse of discretion." 130 Hawai'i 321, 324, 310 P.3d 1022, 1025 (App. 2013) (emphasis added). The ICA thus reviewed the sua sponte dismissal itself, not the trial court's denial of the motion to set aside that dismissal for failure to establish good cause.