

Rdialul v. Kirk & Shadel, 12 ROP 89 (2005)
ABBY RDIALUL, RACHEL RDIALUL, and GAINY RDIALUL,
Appellants,

v.

THE LAW OFFICE OF KIRK & SHADEL,
Appellee.

CIVIL APPEAL NOS. 04-005 & 04-014
Civil Action No. 02-369

Supreme Court, Appellate Division
Republic of Palau

Argued: February 24, 2005
Decided: March 10, 2005

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Counsel for Appellants: Mark Doran

Counsel for Appellee: David Shadel

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

PER CURIAM:

The law practice shared by Kevin Kirk and David F. Shadel (“Kirk and Shadel” or “the Firm”) initiated this action to recover money owed by Abby Rdialul, his wife Rachel, and their son Gainy after Kirk and Shadel represented them in a civil lawsuit. Kirk and Shadel filed a motion for summary judgment, to which the Rdialuls failed to respond. After the trial court entered judgment, however, the Rdialuls filed a motion for relief from judgment, the denial of which is on appeal here, along with the Rdialuls’ challenge to an award of post-judgment attorney’s fees. Because an attorney’s off-island notice cannot excuse a failure to respond to a motion, and because attorney’s fees are allowed pursuant to the underlying contracts, we affirm the decision of the trial court.

BACKGROUND

The introductory facts and procedural history of this case are largely undisputed. Kirk and Shadel represented Abby and Gainy in a 1995 criminal trial when they were charged with

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assault and battery against Paul Chin. The trial ended in a not guilty verdict, and pursuant to a previous agreement, the Firm did not bill Abby and Gainy.

The following year, Chin sued Abby, Rachel, and Gainy in a civil action based on the incident that served as the foundation for the criminal charges. Kirk and Shadel again agreed to represent the Rdialuls, but this time requested payment for their services. Proceedings in the civil case were extensive, both before and after trial. To help defray litigation costs, Abby and Rachel signed an agreement to assign a portion of their rental income to the Firm, and Gainy signed a separate promissory note and mortgage. At the conclusion of the trial, Abby and Gainy were found liable to Chin for approximately \$30,000 in damages.

Several years later, Kirk and Shadel 191 had yet to receive payment for the Rdialul's outstanding legal fees, and so on November 15, 2002, they initiated this action to recover the money owed them. Appellants, with the aid of Clara Kalscheur as counsel, filed a timely answer, but the trial record gives no indication that they conducted any discovery or otherwise participated in this case for the six months after they filed their answer.

On July 30, 2003, counsel for Appellants left Palau for a six-week vacation, serving both the court and opposing counsel with an "off-island" notice, addressed to the bench and bar, specifying when she would be away. On August 11, Kirk and Shadel filed a motion for summary judgment and served Appellants' counsel as required. Appellants' counsel was advised of the motion via e-mail on August 21, but was erroneously informed that it was filed on August 1. She did not, however, file a response to the motion or seek an extension of time to do so.

After the deadline to respond to the motion passed, the trial court granted the summary judgment motion as unopposed, signing the proposed order tendered by Kirk and Shadel. That order provided that Appellants were to pay Kirk and Shadel over \$40,000, which included the principal amount due, interest, court costs, and attorney's fees, and also required "further daily interest . . . , costs, and attorney's fees thereafter."

Appellants' attorney returned to Palau on September 18, and on September 22, the following Monday, she learned that the trial court had entered summary judgment in her absence. On September 25, she filed a "motion to vacate order granting summary judgment" explaining that she was off-island, but she did not refer to Rule 60(b) of the Rules of Civil Procedure or discuss applicable standards for vacating a judgment. Appellants retained new counsel, Mark Doran, who is continuing to represent Appellants during this appeal. He filed a separate motion, citing to Rule 60(b) and incorporating arguments made by prior counsel. The trial court considered both motions but denied the relief sought by Appellants, finding inexcusable neglect and no meritorious defense. The Rdialuls appealed this judgment.

Trial court proceedings continued, however, with Appellants filing a motion to stay enforcement proceedings. The parties eventually entered into a stipulated order, which required Appellants to instruct their tenants to make rent payments to Kirk and Shadel. Thereafter, however, Appellants filed an emergency motion to release funds and to vacate the judgment, which the court denied. Kirk and Shadel filed a motion to release the funds Appellants were to

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pay, but Appellants opposed that motion and filed another request for relief from the judgment. Again, the trial court upheld the judgment. Additionally, during this time, Abby filed a formal disciplinary complaint against Kirk and Shadel, but the trial court judge recommended it be dismissed as meritless.

In February 2004, Kirk and Shadel filed a motion seeking \$6,262.50 in post-judgment attorney's fees and \$19.75 in post-judgment costs. Appellants objected, but the trial court allowed the motion, finding that the fees and costs were reasonable, that the Rdialuls had acquiesced to the charges when the original agreement was entered, and that they were unnecessarily drawing out the post-judgment proceedings. The Rdialuls appealed from this order as well, and the case was consolidated with their appeal from the denial **192** of their Rule 60(b) motion.¹

ANALYSIS

I. Denial of Appellants' Rule 60(b) Motion

Because the notice of appeal challenges the trial court's denial of Appellants' Rule 60(b) motion, we will not evaluate the merits of the underlying judgment. *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85 (1997). Instead, we review only whether the denial of the motion to vacate the judgment was an abuse of discretion, *Ngerketiit Lineage v. Rechucher*, 9 ROP 214, 215 (2002), and unless the decision is "clearly wrong," it will not be overturned, *Tmilchol v. Ngirchomlei*, 7 ROP Intrm. 66, 68 (1998).

Rule 60(b) allows a trial court to relieve a party from judgment for a variety of reasons, including, as relevant here, "mistake, inadvertence, surprise, or excusable neglect." ROP R. Civ. P. 60(b)(1). In requesting relief from the summary judgment entered in favor of Kirk and Shadel, the Rdialuls explained that their failure to respond to the motion was due to counsel's excusable neglect, specifically that she was off-island at the time. Their original counsel explained that "[s]ince [she] had provided notice of her off-island trip, she did not expect the Motion to be acted upon during her absence." Appellants also asserted that "[i]t has been common and accepted practice in Palau for counsel to inform the court and other parties that counsel will be off-island," and that consistent with that practice, "[m]ost counsel in Palau have the common professional courtesy and decency to refrain from filing dispositive motions when they know opposing counsel is off-island." "At a minimum," Appellants argue, their attorney's off-island notice "should have been deemed as a motion to extend the time for filing of an opposition."

Many attorneys in Palau leave the island for periods of time, and prior to doing so, they send notification of the dates they will be absent to the court and other attorneys. This Court has not adopted, however, any rule of procedure or practice -- either explicit or otherwise -- suggesting that such notice, by itself, in any way alters case proceedings. We have previously addressed a similar situation, in which the appellants sought Rule 60(b) relief after they failed to

¹Trial proceedings continued until December 2004, with the trial court awarding Kirk and Shadel an additional \$9,500 in post-judgment costs and fees. Appellants did not, however, file a timely notice of appeal from that order and so it is not before us.

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respond to summary judgment because their attorney was off-island at the time, and stated

Appellants have presented no support for the contention that their notifying the Court that their counsel was leaving the island somehow relieved them of their obligations to file a timely response to the motion for summary judgment or even to request an extension of time to oppose the motion.

Melekeok State Gov't v. Basilius, 9 ROP 136, 138 (2002). Finding no excusable neglect, the Court upheld the trial court's denial of the Rule 60(b) motion, *id.*, a decision we issued over a year before counsel's off-island trip.

Appellants argue that the *Melekeok* opinion is not applicable because the trial court in that case had entered a scheduling order, providing a specific deadline for any pre-trial motions. Here, they claim, their attorney had no way of knowing that Kirk and 193 Shadel would file a motion for summary judgment during the period of time she was to be off-island. This distinction, however, does not change our conviction that attorneys must keep track of the dockets for their cases. And if anything, the lack of a set motions deadline requires counsel to be even *more* vigilant in monitoring the status of pending cases.

Regardless of whether Rdialul's first attorney knew that a motion deadline was approaching, it was inexcusable neglect for her to leave the island with no reliable mechanism for checking on her cases. She averred that she did not have computer access while she was away and instead relied on relatives to notify her when her office forwarded them an email message to relay. As the trial court noted, this is simply poor office management. Moreover, as counsel admitted, she received actual notice of the motion for summary judgment prior to the response deadline, but opted not to file a response or seek an extension of time until she returned to Palau because, due to a typographical error in the email from her office, she believed she had already missed the deadline. The decision to ignore an expired deadline cannot be justified, particularly when this Court accepts filings by facsimile. ROP R. Civ. P. 84. Such negligence cannot serve as the basis for Rule 60(b) relief. *Doe v. Doe*, 6 ROP Intrm. 221, 224 (1997) (“[C]ounsel’s negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief.”) (citation omitted).

II. Award of Post-Judgment Attorney’s Fees and Costs to Appellees

As noted above, the summary judgment order prepared by Kirk and Shadel and signed by the trial court judge required the Rdialuls to pay over \$40,000.00 which included the principal amount due, interest, court costs, and attorney’s fees, and also provided for “further daily interest . . . , costs, and attorney’s fees thereafter.” The order closed by noting that Kirk and Shadel could “apply for an award of attorney fees for post-judgment work.” Kirk and Shadel did so in February 2004 by filing a motion for almost \$6,300.00 in post-judgment costs and fees.

In overruling the Rdialuls’ objections to the motion, the trial court concluded that the cases cited by Kirk and Shadel in support of their motion were correct. The court also found that the time Kirk and Shadel worked on the case was reasonable, particularly given that the Rdialuls

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were unnecessarily drawing out the proceedings by filing motions and disciplinary complaints. Finally, the trial court noted that the Rdialuls had consented to the award of post-judgment fees in the original agreement they entered.

Appellants first try to discredit the legality of the award by raising the merger doctrine. Citing to American Jurisprudence, Appellants explain that, after the entry of a final judgment in a contract action, the underlying contract or debt is extinguished and the prevailing party has only those rights granted to it in the judgment; that party can no longer seek to enforce provisions of the original agreement. Accordingly, Appellants claim, although the promissory notes and mortgages provide for post-judgment attorney's fees, they cannot serve as the basis for the trial court's award of fees and costs because any rights Kirk and Shadel had under those agreements were extinguished when the trial court entered judgment.

This argument ignores that the summary judgment order explicitly provided for attorney's fees. Kirk and Shadel are no longer seeking to collect attorney's fees because of any language on the original 194 promissory agreements. Instead, they can rely on the trial court's order itself. The doctrine of merger is thus irrelevant to the issue of post-judgment attorney's fees.

Appellants also maintain that the trial court erred in finding that they agreed to any award of post-judgment fees and costs and that the issue of post-judgment fees should be resolved in accordance with the common law of the United States, which provides that each party pays for its own attorney's fees absent a statute or contract to the contrary. That is a correct statement of law, *Francisco v. Chin*, 10 ROP 44, 54 (2003), but in this case, the underlying contracts specifically provided for Appellants to pay attorney's fees and costs in the event of a collection or foreclosure action. Accordingly, we find no error in the trial court's decision to award fees and costs to the Firm.

III. Appellee's Motion to Dismiss

After Appellants filed their opening brief, Kirk and Shadel opted to file a motion to dismiss the appeal in lieu of a response brief. The motion to dismiss asserted that "Appellants have failed totally even to assign as error or to argue, at all, in their brief the primary, necessary, and essential element of the appeal—whether the trial court abused its discretion in determining that appellants had failed to prove *excusable neglect*" (emphasis in original). This Court chose not to rule on the motion to dismiss at that time, requesting that instead Kirk and Shadel file a brief addressing the merits of the appeal.

Having now decided the appeal on the merits, we deny by implication the motion to dismiss. But we also wish to comment on the practice of filing motions to dismiss appeals. We have said before that motions to dismiss ought not be used before the Appellate Division to raise issues presented in the Trial Division. *Becheserrak v. ROP*, 3 ROP Intrm. 279, 280-81 (1993). Similarly, it seems to be a waste of time and resources—both counsel's and this Court's—to argue in a motion to dismiss that which should be addressed in a response brief, including, as here, whether Appellants' brief presented a sufficient basis for reversing the trial court's

judgment.

IV. Attorney's Fees and Costs on Appeal

Kirk and Shadel request that this Court award them attorney's fees and costs for work done during the appellate proceedings, and they rely on Rule 38 of the Rules of Appellate Procedure, Rule 11 of the Rules of Civil Procedure, and this Court's inherent power to justify the award. Rule 38 allows damages, including attorney's fees, to an appellee if an appeal is frivolous, ROP R. App. P. 38, while Rule 11 allows a trial court to impose sanctions on attorneys who raise frivolous or baseless claims, ROP R. Civ. P. 11(c). We decline Appellees' invitation to award attorney's fees based on a finding that the appeal was frivolous or vexatious. We are unwilling to say that Appellants' arguments, although not successful, were wholly without merit or made in bad faith. *See, e.g., Ross v. City of Waukegan*, 5 F.3d 1084, 1090 (7th Cir. 1993).

Pursuant to Rule 39, Kirk and Shadel are entitled to costs of the appeal, and are allowed 14 days from the date of this order to file a petition for costs. Appellants may respond to that petition within 14 days of its filing.

CONCLUSION

We affirm the trial court in all respects—as to the denial of the Rule 60(b) motion and as to the award of post-judgment **195** attorney's fees and costs.