Gibbons v. ROP, 1 ROP Intrm. 547MM (1988)

FLORENCIO GIBBONS and
NEMECIO ANDREW
Appellants,

v.

GOVERNMENT OF THE REPUBLIC OF PALAU, PALAU NATIONAL COMMUNICATIONS CORPORATION; ORION TELECOMMUNICATIONS, LTD; LAZARUS SALII, PRESIDENT OF THE REPUBLIC OF PALAU; and GORONES INTERNATIONAL CONSTRUCTION CORPORATION,
Appellees.

CIVIL APPEAL NO. 28-87
Civil Action No. 66-87

Supreme Court, Appellate Division
Republic of Palau

Opinion and order
Decided: October 21, 1988

Counsel for Appellants: Douglas Cushnie

Counsel for Appellees Gov't. of the Republic of Palau and President Lazarus Salii: Philip Isaac

Counsel for Appellee Palau National Communications Corporation: Kevin N. Kirk

Counsel for Appellee Gorones International Communication Corporation: Johnson Toribiong

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice.
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NGIRAKLSONG, Associate Justice:

The plaintiffs are Florencio Gibbons and Nemecio Andrew. The defendants are the Republic of Palau Government (hereafter "government", President Lazarus Salii, in his official capacity), Orion Telecommunications, Ltd. (hereafter "Orion"), Palau National Communications Corporation (hereafter"PNCC") and Gorones International Construction Corporation (hereafter "Gorones").

The complaint alleges that the government owns the IPSECO power plant in Aimeliik. Defendant government entered into a contract with Gorones for the latter to manage the power plant. Plaintiffs allege that such contract between the government and Gorones is null and void because the government failed to undertake the bidding requirements of 40 PNC §§ 402 and 403. Plaintiffs state that the government under this illegal contract is paying Gorones to the plaintiffs'

detriment as taxpayers.

For their second cause of action, plaintiffs allege that Orion entered into a joint venture contract with defendant PNCC and with the approval of the late President Salii. Under that contract, Orion is to undertake a substantial role in the construction and management of a nationwide communications system. Plaintiffs allege that this contract is null and void because again the government did not undertake the bidding requirements of 40 PNC §§ 402 and 403 prior to awarding the contract to Orion. Additionally, plaintiffs contend that the ⊥547OO contract is also null and void because Orion, as a corporation not wholly owned by citizens of Palau, is required to comply with the provisions of the Foreign Investors Business Permit Act, as a condition precedent to doing business in Palau, and that Orion has not done so.

On November 4, 1987, the trial court ruled on the claims of plaintiffs against PNCC and Orion.

On December 8, 1987, the trial court ruled on the plaintiffs' claims against the Republic of Palau and Gorones.

The plaintiffs filed their notice of appeal on December 29, 1987, from the trial court's rulings on November 4, 1987, regarding PNCC and Orion and on December 8, 1987, regarding Republic of Palau and Gorones.

Appellees PNCC and Orion filed a motion to dismiss the appeal on January 22, 1988 on the ground that the notice of appeal was filed late and therefore, the court had no jurisdiction to entertain the appeal as it related to them.

Specifically, appellees argue that appellants should have filed their notice of appeal from the trial court's ruling on plaintiffs' claim against them entered on November 4, 1987, within thirty (30) days of that date. ROP App. Pro. Rule 4(a) and 14 PNC § 602 require that a notice of appeal shall be taken within 30 days from entry or service of the judgment or order. Plaintiffs did not file their notice of appeal until after the trial court's ruling on the plaintiffs' claims against defendants Republic of Palau and Gorones on December 8, 1987. While plaintiffs' notice of appeal is timely with ⊥547PP respect to the government and Gorones, PNCC and Orion argue that the appeal was not timely as to them and should be dismissed.

Plaintiffs argue that when lawsuits involving multiple claims or multiple parties are appealed from, the rule controlling timeliness of the notice of appeal from a partial ruling is ROP Civ. Pro. 54(b). We agree.

ROP Rule 54(b) is identical to Rule 54(b) of the U.S. Federal Rules of Civil Procedure. Accordingly, we may rely on the judicial construction that has been placed on the Rule by the U.S. federal courts. *Kap v. Trust Territory*, 4 TTR 338 (1969), citing *Reed v. Allen*, 121 Vt. 202, 73 A.L.R. 2d 1161.

ROP R. Civ. Pro. 54 reads:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties . When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

There is no question that this is a multiple claims and multiple parties case. Thus, a ruling at the trial court that resolves fewer than all of the claims or determines completely the rights and liabilities of fewer than all of the ⊥547QQ parties is an unappealable interlocutory order. *Carolyn Huckeby v. Frozen Food Express* , 555 Fed 2d 542 (1977). Rule 54(b) provides an exception to the above general rule. For a ruling, that resolves fewer than all the claims or determines rights of fewer than all the parties, to be appealable, the trial court must take two separate steps. The trial court must make "an express determination that there is no just reason for delay" and it must also make "an express direction for the entry of judgment." ROP R. Civ. Pro. 54(b), supra. *Levin v. Baum*, 513 F.2d 92 (7th Cir. 1975); *McLaughlin v. City of Cagrance* , 662 F.2d 1385, 1387 (11th Cir. 1981); and *Touler v. Moss*, 625 F.2d 1161, 1165 (5th Cir. 1980).

The trial court's partial ruling on November 4, 1987, meets neither of the above requirements. Without a Rule 54(b) certification the November 4, 1987, ruling of the trial court is nonappealable. *Huckeby, supra*.

The later ruling of the trial court entered on December 8, 1987, disposing of appellants' claims against the government and Gorones, was likewise not a final judgment under Rule 54(b). That ruling did not resolve all the claims of all the parties and did not contain a Rule 54(b) certification.

Rather than remanding this case to the trial court for Rule 54(b) certification nunc pro tunc, we find that the two rulings of the trial court, considered together, have effectively terminated this case at the trial level. Accordingly, we find further that the notice of appeal was filed timely and that we do have appellate jurisdiction over ⊥547RR this appeal. This finding constitutes an exception to Rule 54(b) certification requirements recognized in the case of *Jetco Electronic Industries v. Robert Gardiner* , 473 F.2d 1228. (Feb. 8, 1973), rehearing denied Mar. 21, 1973.

Accordingly, we rule that the notice of appeal is timely and we do have appellate jurisdiction over this appeal.

Appellees in their reply brief concede the existence of Rule 54(b) but they argue that if this court is to enforce Rule 54(b), then it must also enforce ROP R. Civ. Pro. 58 which requires that there be an "entry of judgment" on a separate document.

The trial court's ruling on December 8, 1987 states the following:

> Judgment is hereby entered for Defendants Republic of Palau and President Lazarus Salii against plaintiffs.

It is clear to this court that the trial court intended both its rulings to be final decisions and that its failure to enter a judgment on a separate document was an inadvertent omission. Appellees did not object to the appellants taking an appeal in the absence of a separate judgment and therefore, we find, have waived that requirement. *Bankers Trust Co. v. Mallis and Franklyn Kapferman*, 435 U.S. 381, 98 S.Ct. 1117. (Mar. 28, 1987), rehearing denied May 15, 1978. With the waiver of separate judgment, our jurisdiction on this appeal is proper. *Id.*

Finally, appellees argue in their reply brief that Rule 54(b) and Rule 58 are unconstitutional because they ⊥547SS contravene 14 PNC § 602. The appellees do not expand on this argument. We see no inconsistency between Rule 54(b) and 58 and 14 PNC § 602 just as we see no conflict between Rules 54(b) and 58 and ROP R. App. Pro. 4(a).

Based upon the foregoing, we deny appellees' motion to dismiss this appeal.

O R D E R

It is ordered that PNCC and Orion shall file their responsive briefs 30 days from the date of entry of this decision. The appellants may file a reply brief within 15 days after service of the responsive briefs. It appears that Gorones has not filed an appellee's brief, as did the government, nor a motion to justify its failure to do so.