

Babul v. Singeo, 1 ROP Intrm. 123 (1984)
LORRAINE BABUL, et al.,
Plaintiffs/Appellees,

v.

SINGERU SINGEO,
Defendant/Appellant.

CIVIL APPEAL NO. 3-84
Civil Action No. 174-82

Supreme Court, Appellate Division
Republic of Palau

Order

Decided: May 18, 1984

BEFORE: MAMORU NAKAMURA, Chief Justice.

On March 23, 1984, the Plaintiffs/Appellees appeared by their attorney David F. Shadel and the Defendant/Appellant appeared by his attorney Johnson Toribiong for a hearing on the March 8, 1984, Appellees' Motion to Reconsider, Reverse, Strike, and Deny Appellant's Motion for Extension of Time and on the Appellees' March 20, 1984, Motion to Strike and Deny. After hearing argument, reviewing the motions and other documents, and after reviewing the authorities, the Court finds that Appellees' two motions should be granted.

The procedural facts are as follows. On January 30, 1984, the Court of Common Pleas entered its order denying Singeo's motion to vacate the default judgment. On March 1, 1984, Singeo filed in the Appellate Division of the Supreme Court a Motion for an Extension of Time Filing Defendant's Notice of Appeal, in which he alleged (in an unsworn statement) that his attorney had been unable to file the notice due to his being involved in a trial for the past several days; it had sought an extension of time to March 15 in which Singeo could file his notice of appeal. This Court, *ex parte*, approved an order granting the motion on March 6, 1984. On March 8, 1984, Babul filed her Motion To Reconsider and Reverse its March 6 order and To Deny And Strike Such Motion; she contended (1) that Appellate Rule 4(b) requires that a motion for extension of time to file a notice of appeal be made to the trial court (in this instance, the Court of Common Pleas) and that the Appellate Court lacked jurisdiction to entertain or to grant the March 1 motion, (2) that Appellate Rule 4(b) allows an extension only "upon a showing of excusable neglect," which excusable neglect is a fact which the alleged Appellant must prove but did not prove in the trial court, and (3) that she ¶124 was deprived of her rights to respond or object to the March 1 motion since it was never served upon her according to the certification of service until March 6, 1984.

On March 16, 1984, Singeo filed his Petition For Leave To File Notice of Appeal and alleged that power outages disturb the typing at his attorney's office and prevented the filing of

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the notice of appeal by March 15; this motion was not supported by any affidavit, and it was also filed in the Appellate Division of the Supreme Court. Also, on March 16, Singeo filed, again in the Appellate Division of the Supreme Court, his Request For Designation and Certification Of Record and his Notice of Appeal. On March 20, 1984, Babul filed her Motion To Strike And Deny Singeo's March 16 petition, his Notice of Appeal, and his Request For Designation and Certification Of Record; she contended that all three documents should have been filed in the trial court (in this instance, the Court of Common Pleas) and that the Appellate Division of the Palau Supreme Court has no jurisdiction to hear the Petition For Leave To File Notice of Appeal.

The Rule of Appellate Procedures governing the courts of the Republic of Palau state the procedure which is to be followed when a party desires to effectuate an appeal. Rule 1(a) states: "These rules shall govern procedure in appeals to the Appellate Division of the Supreme Court . . . from the Court of Common Pleas . . . [.]". Rule 3(a) states: "Filing The Notice of Appeal. An appeal shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." Subparagraph (e) requires that, "Upon the filing of any . . . notice of appeal from a trial court, the appellant shall pay to the clerk of the trial court such fees as have been established by the Supreme Court . . . [.]".

Other appellate rules also show that the trial court is the proper court in which the notice of appeal, bond, request for extension of time, and the request for the record, and other matters must be filed. Rule 4(b) provides: "Upon a showing of excusable neglect, the trial court may extend the time for filing the notice of appeal . . . [.]". Rule 7: "The trial court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary . . . [.]". Rule 8(a): "Application for a stay of the judgment or order of a trial court . . . must ordinarily be made in the first instance in the trial court." Rule 8(b):

Relief available in the Appellate Division of the Supreme Court under this rule may be condition upon the filing of the bond or other appropriate security in the trial **L125** court . . . [.] The motion . . . may be served on the clerk of the trial court . . . [.]

Rule 10(c):

Upon learning that the appellant has ordered and prepaid the estimated expense of . . . the transcript . . . , the trial judge shall cause a transcript . . . to be prepared and filed . . . [.] The clerk of the trial court where the motion of appeal was filed shall forward to the Clerk of Courts for the Appellate Division . . . all of the original papers . . . [.]

Rule 10(d): "The clerk of the trial court shall then notify each party . . . of the date in which he certified and forwarded the record on appeal." Rule 10(e):

If any party considers that the record as certified by the clerk of trial court is inaccurate . . . , the party . . . shall arrange with the trial judge for a . . . hearing . . . [.] After giving all parties an opportunity to be heard, the trial

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judge will then make such changes . . . [.]

The thrust and direction of the rules is clear: all initial papers filed prior to the certification of the record by the trial court clerk are to be filed within the trial court and with the trial court clerk. This allows the trial judge to hear any matter concerning any disputed facts (which may concern, e.g., either the record or a hearing for an extension of time) and allows the facts to be determined by the trial court, which is best equipped under our procedures to determine those facts. After all of the factual matters then have been heard by the trial court, then the Appellate Court has a proper record upon which to render a decision upon all of the facts from which the appeal is taken; an Appellate Court Justice then is not awkwardly put into a fact finding position, a position which would become even more awkward when an appeal needs to be taken from his factual or legal determination. In this way, a sensible orderly procedure is maintained. This procedure is almost identical to that under the prior Trust Territory Appellate Rules. *See*, for example, T.T.R. App. P. 4(b), 8 and 16 (including the 1978 amendment).

The March 1 motion raises a second problem. The conclusory allegations of counsel, as in the March 1 motion, “do not constitute evidence and cannot be considered as **1126** evidence.” *South Seas Corp. v. Sablan Construction Co.*, 7 TTR 577 at 581 (App. Div. 1978); *see also*, *Madrainglai v. Emesiochel*, 6 TTR 604 at 606 (Tr. Div. 1974). Hence, they cannot be proof of the “excusable neglect” required by App. Rule 4(b). “Excusable neglect” is a fact, like any other fact, the burden of proving of which is upon the party asserting it.

A third problem arises from the failure of Singeo to serve his March 1 motion at the proper time upon Babul. Appellate Rule 25(b) clearly requires that “copies of all papers filed by any party . . . shall, at or before the time of filing, be served by a party . . . on all other parties . . . [.]” (Emphasis added). Counsel are admonished to obey this rule and to serve timely all motions upon opposing parties. A failure to do so deprives parties of the notice which is due to them, and orders made upon unserved motions shall be void. *Madrainglai v. Emesiochel*, 6 TTR 604 at 610-11 (Tr. Div. 1974). Also, Appellate Rule 27(d) allows “any party adversely affected by [an ex-parte ruling on a motion to] request reconsideration, vacation, or modification of such action.” For either of the above reasons, Babul is entitled to relief from the March 6 order.

The Court concludes that the Appellate Division of the Palau Supreme Court has no jurisdiction to entertain Singeo’s March 1 motion or his March 16 motion; therefore, they must be now denied and stricken from the record. Likewise, Singeo’s March 16 Request For Designation And Certification Of The Record and his March 16 Notice Of Appeal are erroneously filed in the Appellate Division of the Supreme Court and are now stricken.

IT IS HEREBY ORDERED, that this Court’s order of March 6, 1984, is Vacated, the Singeo’s March 1, 1984, motion for extension is denied and stricken, that his March 16, 1984, petition is denied and stricken, and that his March 16, 1984, notice of appeal and request for the record are stricken.