

Brel v. Ngiraidong, 3 ROP Intrm. 20 (1991)

**KODEP BREL,
Appellee,**

v.

**INGLONG NGIRAIDONG,
Appellant.**

CIVIL APPEAL NO. 29-90
Civil Action No. 667-89

Supreme Court, Appellate Division
Republic of Palau

Order denying motion to vacate
Decided: July 25, 1991

Counsel for Appellant: J. Roman Bedor, T.C.

Counsel for Appellee: William L. Ridpath

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice;
and ALEX R. MUNSON, Associate Justice

This matter came on regularly for hearing on July 24, 1991.

BACKGROUND

The notice of appeal in this case was filed on November 23, 1990. Appellant filed a motion to extend the deadline for filing her opening brief on March 26, 1991. The motion was granted; appellant's brief was timely filed on May 1, 1991. No proof of service exists in the file for the notice of appeal, the motion to designate the record (filed February 14, 1991), or appellant's motion for an enlargement of time. It appears that none of these papers were served upon appellee, who at the time these papers were filed was proceeding *pro se*.

121 Appellee's attorney, Mr. Ridpath, contends, and it is not disputed by appellee, that he was retained by appellee on May 29, 1991 at which point he was given a copy of appellant's brief. Believing that he had only two days remaining to file appellee's responding brief, Mr. Ridpath immediately obtained a stipulation to an extension of time to file the responding brief from opposing counsel. Affidavit of William L. Ridpath, dated June 20, 1991. This stipulation was enforced by an Order of the Chief Justice entered June 4, 1991, giving appellee until June 28, 1991, to file his responding brief. Thereafter, Mr. Ridpath discovered in reviewing the file and in his discussions with appellee's son, the fact that none of the aforementioned papers were served upon appellee. He then filed a Motion To Vacate the Order Granting An Enlargement of Time for the filing of appellant's brief.

According to the affidavits attached to the present motion, although appellee was never properly served, he had been keeping abreast of the status of the appeal by sending his son to inquire at the court at various intervals.¹

DISCUSSION

Appellee has moved to vacate the order granting appellant an **L22** enlargement of time to file her opening brief. But for all intents and purposes, appellee's argument is that the court should go back in time to the point before which appellee requested the stipulation extending time to file his responding brief and dismiss this appeal ² based on the following: (1) appellant's failure to file a motion to designate that record on time; (2) appellant's consequential failure to file her appellate brief on time; and (3) appellant's failure to serve copies of all papers on appellee. While we agree that appellant's procedural errors would, under other circumstances, provide a basis for dismissing this appeal, we conclude that appellee waived his right to object to these irregularities by asking for, and receiving, a time extension for his responding brief.

At oral argument, the parties did not dispute that Appellant's counsel told Appellee's counsel that the opening brief had not been served. At this point, Appellee's counsel asked for a stipulated extension of time even though it was unnecessary: the opening brief had not been properly served, therefore the time for filing the responsive brief had not started running. At the very least, Appellee's counsel's actions constituted a waiver of the right to move to vacate the order he requested.

We are cognizant of the fact that appellee's counsel was not aware of the failure of service of papers other than the opening **L23** brief and the untimely filing of the brief when he requested an extension. However, this was due only to the failure of appellee's counsel to thoroughly interview his client and examine all relevant files before making his request. Essentially, Appellee's counsel asks the court to charge his inadvertent error to appellant, which we refuse to do.

As in *Rurcherudel v. Uchel*, Civ. App. No. 5-90 (May 2, 1991), by failing to challenge the propriety of appellant's actions in time, counsel effectively waived his right to move to dismiss the appeal. *Rurcherudel, supra*, at 5. We are not persuaded by appellee's argument that the

¹ After the trial judgment was entered, Appellee's son was informed by the Clerk of Courts that he would have to wait thirty days to see if an appeal was filed. He checked back with the court thirty days later and was informed that a notice of appeal had been filed and that appellant would have forty -five days to file a brief. He later checked back again and discovered that Appellant had filed a motion for enlargement of time to file her appeal brief, that that motion had been granted and that Appellant would have until 30 days from April 1, 1991, to file her brief. On May 5, Appellee's son obtained a copy of the brief from the Clerk's office. Affidavit of Augustine Mesebeluu, dated June 20, 1991.

² Although Appellee moves only for an order vacating the order enlarging time, it is clear that the next step would be to move for dismissal based on the procedural errors discussed herein. We approach the present motion with that in mind in an effort to expedite this matter.

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present case is distinguishable from *Rurcherudel* because appellee's counsel's eagerness to enter a stipulation, as opposed to seeking a dismissal was based upon confusion brought about by appellant's failure to comply with the service requirements of the rules. Appellee knew which papers had been filed, as he had investigated the matter himself. Appellee did have an opportunity to file a motion to dismiss but instead, based on a cursory review of the matter, requested a time extension. Contrary to what Appellee's counsel contended at oral argument, following such a "path of least resistance" does not comport with an attorney's duty to determine, either through his client or the court file, whether service has been made properly.

This is not to say that we excuse the failure of appellant to properly serve papers pursuant to ROP Rule of Appellate Procedure 25(b). We emphasize that such failure could well, in another situation, constitute a basis for dismissal.

124 Appellee's motion is hereby DENIED. We direct that, pursuant to the Order entered June 24, 1991, appellee's brief shall be due 30 days from the date this order is entered.

SO ORDERED.