IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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SUPREME COURT
REPUBLIC OF PALAU

ALFONSO RIUMD and other children and heirs of Benged Riumd, and EDGAR PATRICK and other children and heirs of Patrick Delemel, Appellants, v. SIDNEY EICHI MOBEL, individually and on behalf of his siblings Barbara Ogle, Dora Mobel, Doralind Eichi, also known as Doralind Mobel, Donton Eichi, Dwayne Eichi, and Donna McKee, Appellee.	CIVIL APPEAL NO. 15-025 (Civil Action No. 04-045) **ORDER DENYING APPELLEES' SECOND MOTION TO DISMISS**

Decided: March 22nd, 2016

Counsel for Appellants: Johnson Toribiong
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: LOURDES F. MATERNE, Associate Justice; KATHERINE A. MARAMAN, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Before the Court is Appellee Sidney Eichi Mobel's motion to dismiss the appeal on the ground that Appellants Alfonso Riumd and Edgar Patrick have failed to diligently prosecute it. For the reasons that follow, we deny the motion.

BACKGROUND

Appellants filed their notice of appeal on September 15, 2015, and requested audio recordings of the case below on the same day. On October 6, 2015, the Clerk's Office issued a letter to Appellants notifying them of the cost of the audio recordings, requesting the amount be paid within seven days after the letter was received, and stating that Appellants had 14 days from the date of the letter to notify the Court whether a transcript would be ordered and that failure to order either the audio recordings or a transcript would result in Appellants' opening brief being due 45 days after the date the notice of appeal was filed. The letter also informed Appellants that any transcript they intended to file "shall be prepared and filed within 120 days from the receipt of the audio recordings." Letter at 1 (Oct. 6, 2015).

On November 2, 2015, Appellee filed his first motion to dismiss the appeal. Appellee asserted that Appellants had failed to pay the costs of the audio recordings, had thus failed to order audio recordings, and had failed to order a transcript within the time periods described in the letter from the Clerk's Office. Thus, Appellee contended, Appellants' opening brief was overdue, and the appeal should be dismissed.

Associate Justice Salii, acting alone, denied Appellee's motion to dismiss, concluding that the opening brief was not overdue:

> [Appellants], both represented by Johnson Toribiong, filed their notice of appeal in this matter on September 15, 2015. Attached to their notice of appeal, Appellants filed a certificate of service, certifying that they had served a copy of the notice of appeal on Maria Tanaka, a co-

defendant in the case below, through her counsel, Moses Uludong. The certificate also lists Tanaka as an appellant.

On the same day that they filed their notice of appeal, Appellants also requested audio recordings of the testimony adduced at trial. On October 6, 2015, the Clerk's Office sent a letter to Appellants, through Toribiong, notifying them that the cost of the recordings would be $10.00 per party and would be due within seven days of the letter's receipt. The letter also lists Uludong, as a counsel for an appellant, as one of its recipients. A handwritten edit strikes the total amount due, $20.00, amending it to $15.00. On October 13, 2015, Appellants, through Toribiong, remitted $15.00 to the Clerk's Office for the cost of the audio recording.

The audio recording has not been sent to Appellants by the Clerk's Office, apparently because the full amount due has not yet been paid. On November 2, 2015, Appellee[] moved to dismiss the appeal. Appellee[] claim[s] that, because Appellants failed to pay for the audio recording, their opening brief was due within 45 days after filing their notice of appeal and that, because Appellants failed to file their opening brief within the 45-day period, their appeal should be dismissed. *See* ROP R. App. P. 31(b)-(c).

By order entered November 13, 2015, the Court ordered Appellants, if they intended to name Tanaka as a party to this appeal, to show cause why Tanaka should not be dismissed as a party for failure to meet the requirements of ROP R. App. P. 3; and, if they did not intend to name Tanaka as a party to this appeal, to so notify the Court. Appellants responded to the show cause order on November 19, notifying the Court that they had not intended to name Tanaka as a party, apologizing for the erroneous certificate of service, specifying that only the Appellants . . . are appellants in this appeal, and requesting leave to remit to the Court the remaining amount required to procure the audio recordings and perfect their appeal.

The rules regarding the timely filing of an appellant's opening brief are clear . . . . Rule 31(b) provides that an opening brief is due within 45 days of one of three separate triggering events: (1) the appellant's receipt of an audio recording; (2) the appellant's service of a transcript after he has previously [] ordered it; and (3) the appellant's filing of a notice of appeal and the subsequent absence of a request by the appellant for an audio

> recording or a transcript. Failure to timely file an opening brief is grounds for dismissal of the appeal. *See* ROP R. App. P. 31(c).
>
> Here, Appellee[] claim[s] that Appellants were required to file their opening brief within 45 days of filing their notice of appeal. Appellee[is] mistaken. Appellants would only be required to file their opening brief within 45 days of filing their notice of appeal, that is on or before October 30, 2015, "[i]f no [audio] recording or transcript has been requested." ROP R. App. P. 31(b). Because Appellants requested the audio recordings, the filing of their notice of appeal is not the event that triggers the 45-day period for filing the opening brief in this appeal.
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> Instead, the triggering event for the 45-day period in this appeal will be either Appellants' receipt of the audio recording or else their service of a transcript after having ordered the transcript. *See* ROP R. App. P. 10(a) (according parties 14 days after receiving audio recording to elect whether to order transcript or file certificate that no transcript will be ordered). Because neither of those events have occurred, the 45-day period has not yet begun to run. Consequently, Appellees motion to dismiss the appeal on the grounds that Appellants have failed to timely file an opening brief, pursuant to Rule 31(b)-(c), is **DENIED**.

Order at 1-4 (Nov. 19, 2015).

On November 25, 2015, the Clerk's Office provided Appellants with the requested audio recordings, along with another letter. The letter again informed Appellants that they had 14 days in which to inform the Court whether they would order a transcript and that "[t]he transcript should be prepared, filed, and served on parties within 120 days from the receipt of the audio recording[s]." Letter at 1 (Nov. 25, 2015). On December 8, 2015, Appellants informed the Court that they had ordered a transcript to be prepared.

On March 14, 2016, Appellee filed his second motion to dismiss the appeal. Appellee grounds his motion on Appellants' failure to timely file a transcript, which

Appellee asserts amounts to a failure to prosecute the appeal that prejudices Appellee and thus warrants the appeal's dismissal.

DISCUSSION

I. Validity of single-justice order denying first motion to dismiss the appeal

As an initial matter, we must address Appellee's argument that Justice Salii's order denying his first motion to dismiss the appeal was outside the scope of her authority as a single justice of the Appellate Division to entertain appellate motions pursuant to ROP R. App. P. 27(c). Under that Rule, "[a] single justice may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding." ROP R. App. P. 27(c). Although the language of the Rule, on its face, does not appear to prohibit a justice from *denying* a motion to dismiss,[1] Appellee observes that we have previously held, in *Rurcherudel v. Uchel*, 2 ROP Intrm. 244 (1991), that "[a] motion to dismiss an appeal is one of 'substance' and therefore must be considered and decided by the full appellate panel." 2 ROP Intrm. at 247-48.

[1] Current Rule 27(c) is nearly identical to Fed R. App. P. 27(c). Several U.S. federal appellate courts have pointed out that an order denying a motion to dismiss neither dismisses nor determines the appeal; rather, such an order merely requires the parties to continue to a briefing on the merits. *See Brown v. Fifth Third Bank*, 730 F.3d 698, 701 (7th Cir. 2013); *Pioneer Props., Inc. v. Martin*, 776 F.2d 888, 890 n.1 (10th Cir. 1985); Thus a number of appellate judges, acting alone, have denied motions to dismiss, acknowledging that, if properly raised again by the movant, the grounds for dismissal later may be addressed by the panel. *See Brown*, 730 F.3d at 701; *Fort James Corp. v. Solo Cup Corp.*, 412 F.3d 1340, 1346 (Fed Cir. 2005); *Fieldturf, Inc. v. Sw. Recreational Indus., Inc.*, 357 F.3d 1266, 1268 (Fed. Cir. 2004); *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1157 n.5 (Fed. Cir. 2004).

We doubt that *Rurcherudel* remains controlling on the issue, as it appears to have been decided under the 1983 version of the Rules of Appellate Procedure, which contained no provision regarding the power of a single justice to entertain appellate motions.[2] In the absence of appellate rules promulgated by the Supreme Court, the *Rurcherudel* court was free to determine that a single justice could not entertain a substantive motion, such as a motion to dismiss. Now that a Rule has been promulgated speaking directly to the issue, the continuing validity of *Rurcherudel*'s determination is debatable.

Despite our doubt, we have no occasion to conclusively say whether *Rurcherudel*'s holding applies to Appellee's first motion to dismiss. Although we have authority to review any order issued by a single justice, ROP R. App. P. 27(c), a request for relief from such an order must be made by motion, *see* ROP R. App. P. 27(a) (stating that, unless otherwise specified by the Rules, "an application for an order or other relief shall be made by filing a motion for such order or relief"). To comply with Rule 27, a

[2] *Rurcherudel* seems to divide procedural motions, which a single justice could decide, from substantive motions, which the justice could not decide. *See* 2 ROP Intrm. at 247 ("A motion . . . which seeks relief in the form of 'procedural orders' that do not 'substantially affect the rights of the parties or the ultimate disposition of the appeal' may be ruled upon by a single judge" (ellipses omitted) (quoting 9 J. Moore, et al. *Moore's Federal Practice*, § 227.01 (2d ed. 1983))); *see also Idecheel v. Uludong*, 4 ROP Intrm. 236, 238 (1994) (referring to similar division). This dichotomy was later employed by in the 1994 version of the Rules of Appellate Procedure, which stated that "motions for procedural orders may be acted upon by a single justice." ROP R. App. Pro. 27(b) (1994). The current version of the Rule, however, appears broader than the 1994 version, permitting a single justice to "act alone on *any* motion" but prohibiting the justice from "dismiss[ing] or otherwise determin[ing] an appeal." ROP R. App. P. 27(c) (emphasis added). Under this language, a number of appellate judges, acting alone, have deemed it proper to deny a motion to dismiss an appeal. *See supra* note 1.

motion "must state with particularity the grounds for the motion [and] the relief sought." ROP R. App. P. 27(a). Here, Appellee has not asked us to review Justice Salii's order but, instead, simply states that the order was invalid and that he has not waived the grounds for dismissal underlying his first motion. Nowhere in the instant motion does Appellee argue that the appeal should be dismissed for Appellants' failure to timely file an opening brief. In fact, the entirety of the motion is devoted to a different argument for dismissal, namely Appellants' failure to timely file their transcript. We conclude that the instant motion does not meet Rule 27's requirements for seeking relief from Justice Salii's order, and we will not review the validity of that order. *See Rebluud v. Fumio*, 5 ROP Intrm. 55, 58 n.2 (1995) (declining to consider request for relief made in appellate filing that was not raised in separate motion); *NECO v. Rdialul*, 3 ROP Intrm. 98, 100 (1992) ("The rules of appellate procedure indicate the proper manner by which parties can raise substantive and procedural questions for formal resolution by the court." (citing ROP R. App. P. 27)).

II. Second motion to dismiss the appeal

ROP R. App. P. 10(d) requires that, when an appellant orders a transcript, "[t]he transcript . . . must be filed and served within one-hundred twenty (120) days *after filing the notice of appeal*." ROP R. App. P. 10(d) (emphasis added). Because Appellants filed their notice of appeal on September 15, 2015, absent an order extending the time in which to submit it, Appellants' transcript was due on or before January 13, 2016.

Despite Rule 10(d)'s clear designation of the filing of the notice of appeal as the trigger for the running of the 120-day period, the Clerk's Office issued two letters to the Appellants, stating that the 120-day period began to run upon Appellants' receipt of the audio recordings they had ordered. If the receipt of the audio recordings, rather than the filing of the notice of appeal, started the clock, then Appellant's transcript would be due 120 days after November 25, 2015, which would require filing on or before March 24, 2016. However, the Clerk's Office's letters were in error. Under the Rules of Appellate Procedure, which "govern procedure in appeals to the Appellate Division," ROP R. App. P. 1(a), the transcript was due January 13, 2016.

In *Fritz v. Koror State Pub. Lands Auth.*, 17 ROP 294 (2010), we had occasion to define the three standards—good cause, extraordinary circumstances, and excusable neglect—which apply to late appellate filings depending under which of three specific situations are present. 17 ROP at 297; ROP R. App. P. 26(c). Good cause is "the most lenient of the three standards [in Rule 26(c)], requiring any legally satisfying and sufficient reason to show why a[n extension] should be granted." *Fritz*,17 ROP at 298. Under Rule 26(c), for good cause, and without motion or notice, the Court may extend the time in which a party must submit a filing, so long as the time originally prescribed for submission has not expired and the party has not previously requested and received an extension of time to submit the filing. ROP R. App. P. 26(c).

Our previous cases demonstrate that, when a litigant reasonably relies upon erroneous information provided by the Clerk's Office, the Court does penalize the litigant for acting upon that information. *See Estate of Olkeriil v. Ulechong*, 3 ROP Intrm. 83, 85 (1992) (explaining that Clerk's error in not timely certifying record for appeal so as to alert appellant of the 45-day deadline for filing his opening brief caused appellant confusion, and "[s]ince the error was administrative in nature, [the Court] cannot penalize [a]ppellant for it"); *Remeliik v. Luii*, 1 ROP Intrm. 592, 593 (1989) (noting that, although "appellants have made numerous efforts over the years to move the litigation along[,] . . . [t]he primary problem has been the inability of the clerk's office to produce a full transcript of the trial proceedings" and concluding that "[p]lainly, it would not be appropriate to punish the appellants for these administrative problems"); *Echerang Lineage v. Tkel*, 1 ROP Intrm. 547V, 547X (1988) (stating that delay in prosecuting appeal "was attributable to Court personnel and, therefore, not chargeable to [a]ppellant"). In light of our precedent, we conclude that a litigant's reasonable reliance on information provided by the Clerk's Office, which later proves erroneous, is a legally satisfying and sufficient reason to grant that litigant an extension under Rule 26(c)'s good cause standard.

Here, the delay in Appellants' preparing and filing a transcript appears to have been caused by the Clerk's Office's communicating to Appellants an incorrect amount for procuring the audio recordings and twice stating to Appellants an erroneous deadline

for submitting the transcript. We conclude that, because administrative errors caused Appellants to delay procuring transcription services, the Court will not charge the delay to Appellants. Instead, the delay caused by administrative errors constitutes good cause for extending the time in which Appellants may file the transcript. The transcript is due on or before March 24, 2016.

Because the time for filing the transcript has not expired, Appellee's second motion to dismiss the appeal based on Appellants' failure to timely file a transcript in accordance with ROP R. App. P. 10(d) is premature.

CONCLUSION

As the foregoing explains, Appellants' transcript is due **March 24, 2014**, and Appellee's second motion to dismiss the appeal is **DENIED**.

So ORDERED this 22nd day of March, 2016.

Lourdes F. Materne

LOURDES F. MATERNE
Associate Justice

Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice

HONORA E. REMENGESAU RUDIMCH
Associate Justice Pro Tem

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