Nakatani v. Nishizono, 1 ROP Intrm. 718 (1989)

NORIYOSHI NAKATANI & NAKATANI CONSTRUCTION COMPANY, Plaintiff/Respondent,

v.

MASAO NISHIZONO & SEIBU DEVELOPMENT CORPORATION, Defendant/Appellants,

and

REPUBLIC OF PALAU, Additional/Defendant/Appellant,

and

PACIFICA DEVELOPMENT CORP., A Palau Corporation, Intervenor/Respondent.

MASAO NISHIZONO a/k/a KWON BOO SIK CONSTRUCTION CO., Plaintiff/Appellant,

v.

ROMAN TMETUCHL, M. TMETUCHL AND NORIYOSHI NAKATANI, Defendants/Respondents,

and

REPUBLIC OF PALAU, Additional Defendant/Appellant,

⊥719 and

PACIFICA DEVELOPMENT CORP., A Palau Corporation, Intervenor/Respondent.

CIVIL APPEAL NO. 5-86
Consolidated Civil
Action Nos. 25-85 & 73-85

Supreme Court, Appellate Division
Republic of Palau

Order

Nakatani v. Nishizono, 1 ROP Intrm. 718 (1989)

Decided: October 10, 1989

Counsel for Plaintiff/Respondent: John Tarkong

Counsel for Defendants/Appellants: Salii & Brooks

Counsel for Intervenor/Respondent: Johnson Toribiong

Counsel for Defendants/Respondents: Johnson Toribiong

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice Pro Tem.

Appellants moved this Court on August 14, 1989, for sanctions against attorneys for Pacifica Development Corp., Roman Tmetuchl, Airai State, Noriyoshi Nakatani, and Nakatani Construction Co., alleging failure to comply with the Rules of Court in moving to extend the time in which to reply to Appellants' opening brief.

Specifically, Appellants allege a violation of ROP R. App. Pro. 27(a), which in pertinent part states: "[A]n application for an order or other relief shall be made by filing a motion . . . with proof of service on all other parties." (Emphasis added).

Appellants have asked for monetary sanctions in an amount equal to the legal fees and incidental expenses incurred by ⊥720 counsel in Guam, allegedly as a result of the lack of notice: long distance telephone calls, facsimile messages with co-counsel in Palau, and round-trip air transportation and expenses in Palau, so that Guam counsel could confer with Palau co-counsel and his client about the extensions of time being sought by opponents.

Appellants have also requested that this Court further sanction Roman Tmetuchl and Airai State by striking their briefs and by refusing to hear them at oral argument. Appellants claim that Roman Tmetuchl and Airai State were not included in the Court's order of June 27 extending the time for filing the briefs. Appellants cite ROP App. Pro. 31(c) in support of these sanctions.

Two motions for extension were filed by Pacifica Development Corporation. The first was "agreed to" by Nakatani; however, there was no clear indication provided to Appellants that Nakatani was also seeking extension.

The second was signed by counsel for Nakatani (Mr. Tarkong); however, again there was no clear joinder by Nakatani in Pacifica Development Corporation's motion to extend.

Neither Tmetuchl or Airai State joined in either motion.

Finally, each motion was unaccompanied by proof of service as required by ROP R. App. Pro. 27.

ROP R. App. Pro. 27(a) is identical to the U.S. Federal Rule of Appellate Procedure of the same number. Therefore, cases from the U.S. are appropriate for guidance.

In *Marcaida v. Rascoe* , 569 F.2d 828, 830 (5th Cir. 1978), ⊥721 the court said that, "[F]ailure of service is not alone sufficient to prejudice opposing counsel, even though he may have desired to challenge the . . . motions . . . ." Counsel complaining about failure of service and asking for sanctions should, first of all, follow the procedure in Rule 27(b), which provides that any party "adversely affected by such action may request reconsideration, vacation, or modification of such action." ROP R. App. Pro. 27(b). *See Marcaida v. Rascoe*, 569 F.2d at 830.

Secondly, a party who requests sanctions for a Rule 27(a) violation should be able to show "prejudice flowing to him" as a result of the violation. *Marcaida v. Rascoe* , 569 F.2d at 830. In the instant case, Appellants claim a detriment in the amount of attorney fees, facsimile charges, phone fees, and travel expenses incurred allegedly in order to investigate the circumstances surrounding the Rule 27(a) violation.

This Court will not award these expenses to Appellants' attorneys. Appellants have counsel on Guam and on Palau. Palau co-counsel was in an excellent position to investigate the Rule 27(a) violation. We fail to see why co-counsel in Guam had to fly to Palau to pursue these matters.

A second factor in our refusal to award Appellants' attorneys these expenses is that Appellants' attorneys did not comply with ROP R. App. Pro. 27(b): "Any party adversely affected by such action may request reconsideration, vacation or modification of such action." *See Marcaida v. Rascoe*, 569 F.2d at 830.

The third factor in our refusal to award expenses claimed is ⊥722 that Appellants' attorneys are close to being in pari delicto with the attorneys of the other parties throughout much of the debacle surrounding this particular skirmish in the larger controversy.

We refer specifically to the fact that Appellants' attorneys submitted documents to this Court in which they claimed that the Court had granted an "indefinite" extension of time to Intervenor/Respondent, Pacifica Development Corporation, to file its brief in opposition to Appellants' opening brief. Appellants' "Memorandum In Support of Motion to Amend Order Extending Time[" sic], p. 1, Civil Appeal 5-86 (Civil Action 25-85 and 73-85), (App. Div., filed Aug. 28, 1989).

In fact, the original of the document in question does not grant an open-ended extension, but states that the extension of time shall be until August 25, 1989, for the Intervenor/Respondent Pacifica Development Corporation to file its brief. "Motion For An Extension of Time to File Intervenors[sic]/ Respondents' Brief[" sic], p.1, Civil Appeal No. 5-86 (Civil Action No. 25-85 Consolidated with Civil Action No. 73-85, Filed July 27, 1989, Granted July 27, 1989).

This Court is deeply concerned by the behavior and performance of all of the attorneys

involved in this dispute, but it is especially disturbing when licensed attorneys do not take the trouble to check the original documents on file with the Court when alleging such an unusual order as the granting of an "indefinite" amount of time for a party to file its brief. For licensed attorneys to appear before this Court and base an argument on such inaccurate information, and then to ask for ⊥723 sanctions partly as a result of that inaccurate view of the situation, shows a level of carelessness at least equal to that exhibited by other counsel herein.

For all of the above reasons, the Appellants' motion for legal sanctions consisting of attorney fees, travel, and incidental expenses is denied. Additionally, we hereby impose a sanction against Appellants' attorneys in the form of a fine of $100.00 for their misfeasance in connection with this motion. Having thus dealt with Appellants' motion, we turn to the Intervenor/Respondent, Pacifica Corporation.

Attorney for Interenor/Respondent Pacifica Corporation did not serve copies of his original motion for an extension of time on opposing counsel. Even if there were actual notice and no prejudice to opposing counsel, Rule 27(a) clearly commands formal notice. For this misfeasance the Court imposes a fine of $100.00 on attorney for the Intervenor/Respondent, Pacifica Corporation.

Attorney for Plaintiff/Respondent Noriyoshi Nakatani and Nakatani Construction Company did not clearly join attorney for Intervenor/Respondent in its original motion for an extension of time to file briefs, and therefore Plaintiff/Respondent's second motion for an extension was not proper. Counsel's duty to his client was to either file his own motion for a continuance or to clearly and unequivocally join in Intervenor's motion; counsel did neither. For this misfeasance we sanction attorney for Plaintiff/Resondent, Noriyoshi Nakatani and Nakatani Construction Company, by fining him the sum of $100.00.

However, this Court will not strike any of the briefs, nor ⊥724 will it refuse to hear any of the parties. This is a very important, complex case, and issues of public interest are at stake. Therefore, in the interests of justice and the public good, the more severe sanctions that are available will not be imposed over these incidents. *See Marcaida v. Rascoe*, 569 F.2d at 830; 9 J. Moore, Moore's Federal Practice, para. 231.02 [3] (2d ed. 1983).

We close this dismal skirmish with a warning. These motions have been handled unprofessionally. Counsel who work in this fashion risk more severe sanctions than we have today imposed, including dismissal, thereby prejudicing the rights of their clients. We do not want to see this sort of display again.