KOROR STATE PUBLIC LANDS AUTHORITY
v.
GEORGE KEBEKOL

Civil Appeal No. 14-032
Appeal from LC/B No. 08-01063

Supreme Court, Appellate Division
Republic of Palau

Decided: August 26, 2015

Counsel for George Kebekol ..... Raynold B. Oilouch

BEFORE: KATHLEEN M. SALII, Associate Justice
R. ASHBY PATE, Associate Justice
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem

Appeal from the Land Court, the Honorable C. Quay Polloi, Senior Judge, presiding.

[1] **Appeal and Error**: Untimely Filings
Appeal and Error: Excusable Neglect

Appellant's reliance on former counsel's incorrect statement that an opening brief had been filed did not constitute excusable neglect where former counsel's error was the result of mere inadvertence or negligence.

[2] **Appeal and Error**: Dismissal
Appeal and Error: Excusable Neglect

Even where excusable neglect is shown regarding an appellant's failure to file an opening brief, dismissal is warranted where the appellant fails to show excusable neglect in failing to respond to an order to show cause why the appeal should not be dismissed.

[3] **Appeal and Error**: Untimely Filings
Appeal and Error: Excusable Neglect

A party cannot avoid the consequences of failing to timely respond to an order of the Court by simply claiming that, for some undetermined reason, it never received actual notice of the order.

Order Dismissing Appeal

Per Curiam:

Appellee George Kebekol moves to dismiss this appeal due to Appellant Koror State Public Lands Authority's failure to timely file its opening brief. For the reasons set forth below, Appellee's motion is granted and this appeal is dismissed.

Appellant's opening brief in this matter was originally due by March 9, 2015. Subsequently, on Appellant's motion—filed by its former counsel, Debra Lefing—this deadline was extended to April 15, 2015. As of May 8, 2015, however, Appellant had neither filed its opening brief nor requested a second extension of time. Consequently, on that date, the Court issued an order requiring Appellant to show cause, in writing, on or before Friday, May 22, 2015, why this case should not be dismissed in accordance with ROP R. App. P. 31(c). The Court further advised that if Appellant failed to respond to the show cause order, this appeal might be dismissed without further notice. When Appellant failed to file a response to the show cause order, Appellee filed the present motion to dismiss the following Monday, May 25, 2015—the first business day after the deadline for Appellant's response to the show cause order.

On May 27, 2015, Appellant filed a brief in opposition to the motion to dismiss, which was signed by its Chairperson, Laurinda F. Mariur. As cause for its failure to timely file its opening brief, Appellant claims that it was not aware that no opening brief had been filed in this case until it was served with Appellee's motion to dismiss. For support, Appellant attached a memorandum purporting to show that, on March 13, 2015, Ms. Lefing informed Appellant that an opening brief had been filed in this case on that date. According to Appellant, shortly after distributing this memo, Ms. Lefing resigned her position and ceased representing Appellant, effective March 17, 2015.

Even assuming that Ms. Lefing in fact made such a false representation, Appellant has failed to demonstrate that its failure to timely file an opening brief was the result of excusable neglect. In *Fritz v. Koror State Pub. Lands Auth.*, 17 ROP 294 (2010), we addressed at length the various standards that apply to motions for an extension of time. Where, as here, "a litigant requests an extension *after* the expiration of the time period or, even worse, where the Court is required to issue a show cause order to track down the party after the deadline has passed, the Court will apply the *excusable neglect* standard." *Id.* at 299; *see also* ROP R. App. P. 26(c). This standard is more demanding than "good cause," which applies to motions filed before the expiration of the deadline at issue. *Fritz*, 17 ROP at 298. Excusable neglect is defined as "something more than the normal (or even reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law[,]" such that "[m]ere inadvertence," including the inadvertence of a party's counsel, which was at issue in *Fritz* and is generally attributable to the party pursuant to common principles of agency, "will not carry the day"; nor will "the party's own carelessness, inattention, or willful disregard of the court's process." *Id.*

at 299 (quotation and emphasis omitted). Accordingly, we held in *Fritz* that "[i]t is not excusable neglect that an attorney fails to mind his or her own calendar." *Id.*

[1] In this case, Appellant has not alleged that Ms. Lefing's purported misrepresentation regarding the opening brief in this case was the result of anything more than mere inadvertence or carelessness on her part. Under our decision in *Fritz*, such negligence on the part of Appellant's counsel does not constitute excusable neglect. *See id.* at 297. This is consistent with United States Supreme Court precedent, which has rejected "the contention that dismissal of [a party's] claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." *Link v. Wabash R. Co.*, 82 S. Ct. 1386, 1390 (U.S. 1962). On this issue, the U.S. Supreme Court has reasoned:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . .

Id. (quotation omitted); *accord Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 113 S. Ct. 1489, 1499 (U.S. 1993); *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002) ("Because the client is presumed to have voluntarily chosen the lawyer as his representative and agent, he ordinarily cannot later avoid accountability for negligent acts or omissions of his counsel.").

[2] Furthermore, even assuming that we would recognize an exception for gross negligence or other egregious conduct on the part of an attorney, *cf. Tani*, 282 F.3d at 1168-69, and that such an exception might warrant application here, Appellant has not demonstrated excusable neglect in failing to respond to the show cause order. Appellant's sole claim in this regard is again based entirely on hearsay. Specifically, Appellant asserts that Fidela Modechel, who is responsible for reviewing and internally disseminating Appellant's mail, has stated that she never received the show cause order.

According to Appellant's own description of its internal procedures, however, two other agents of Appellant, Ryan Ruluked and Rufino Kazuma, are responsible for checking Appellant's court mailbox and delivering any documents received there to Ms. Modechel. Yet, Appellant has wholly failed to account for Mr. Ruluked and Mr. Kazuma. Thus, even crediting Ms. Modechel's hearsay statement, this evidence fails to establish that the order was not placed in Appellant's court mailbox,[1] as there is

[1] In fact, Appellant stops well short of affirmatively representing that the order was never placed in its mailbox or that service was otherwise defective, instead choosing only to imply that the Court is somehow at fault for Appellant's failure to timely file an opening brief or respond to the show cause order. By contrast, court records, including

every possibility that one of these other individuals simply failed to pick up or otherwise misplaced the order to show cause. As these are agents of Appellant, this negligence is attributable to Appellant and, as discussed above, a party's own carelessness does not constitute excusable neglect.

Furthermore, based on Ms. Lefing's representation prior to her departure, Appellant should have expected Appellee to file a response brief by April 13, 2015. *See* ROP R. App. P. 31(b). Had Appellant simply reviewed the docket anytime between April 13, 2015 and May 22, 2015, it would have immediately learned of the apparently misplaced show cause order. In a jurisdiction that operates under the presumptions of constructive notice, *see, e.g.*, *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219 (1994), a party runs some risk when it relies on multiple agents to pick up, sort, and deliver documents served via its court mailbox. Accordingly, a dutiful litigant interested in prosecuting its appeal might reasonably be expected to at least occasionally review the docket, especially when a deadline passes and an anticipated and significant document is not served. To the extent that Appellant apparently uses no safeguards to ensure that it actually receives documents that are placed in its court mailbox, it does so at its own peril.

[3] In sum, a party cannot avoid the consequences of failing to timely respond to an order of the Court by simply claiming that, for some undetermined reason, it never received actual notice of the order. To hold otherwise would set a precedent that is rife for abuse, both by the careless and the more devious. As Appellant failed to timely file its opening brief or respond to the show cause order and has not shown that this failure was the result of excusable neglect, Appellee's motion is granted and this appeal is **DISMISSED** pursuant to ROP R. App. P. 31(c).

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notation on the original show cause order and the electronic docket, indicate that this order was filed, docketed, and served on the parties.