Koshiba v. Alonz, 7 ROP Intrm. 4 (1998)

JOSHUA KOSHIBA, individually and as class representative on behalf of all past and present contributors to the Republic of Palau Civil Service Pension Plan,
Plaintiffs-Appellants,

v.

SYLVESTER ALONZ, KATHY KESOLEI, DAVE WILLIAMS, EMIL REMARUI, MARINO BELLS, TEMMY SCHMULL, DR. MASAO KUMANGAI, JONATHAN MAUI, individually and as Trustees of the Palau Civil Service Pension Plan;
REPUBLIC OF PALAU, Defendants-Appellees, and
REPUBLIC OF PALAU CIVIL SERVICE PENSION PLAN,
Intervenor-Appellee.

CIVIL APPEAL NO. 36-97
Civil Action No. 237-94

Supreme Court, Appellate Division
Republic of Palau

Submitted on the briefs.
Decided: January 13, 1998

Counsel for Appellants: Bruce Lamka, Esq.

Counsel for Appellees: Scott Campbell. Esq.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice

PER CURIAM:

Appellees have moved to dismiss this appeal, contending that appellants never fled a timely notice of appeal and did not comply with the court's briefing rules. Although ⊥5 appellees motion will be denied, the Court will instruct appellants to file a new brief within 30 days.

I. BACKGROUND

The parties settled this case without a trial, leaving open only the question of the attorney fees to which plaintiffs' counsel (hereinafter appellants) was entitled. On April 18, 1997, appellants, the United States law firm Davis, Wright and Tremaine, moved for an award of attorney fees and costs. The Trial Division denied the motion in an order dated July 8, 1997. On July 17, 1997, appellants moved the court to reconsider that order. On August 11, 1997, appellants filed a notice of appeal from the July 8, order. In that notice, appellants explained that

they wanted to delay the appeal until after the trial court had ruled on their motion for reconsideration, but were unsure whether such a delay was permitted under Palau's rules of civil procedure. On August 13, 1997, the trial court denied appellants' motion for reconsideration.

Appellants' notice of appeal was accompanied by several pages of legal arguments. On October 15, 1997, appellants having made no further filings and appellees having neither filed a responsive brief nor moved to dismiss the appeal, the Appellate Division directed appellees to treat appellants' notice of appeal as the opening brief and to file a response on or before November 14, 1997. On November 14, 1997, appellees filed this motion to dismiss the appeal and another motion to stay briefing on the merits of the appeal pending resolution of the motion to dismiss. On December 4, 1997, the Court granted appellees' motion to stay briefing. The Court has not received any filings from appellants since the August 11, 1997 notice of appeal.

II. DISCUSSION

A. Timing of the Notice of Appeal

Rule 4(a) of the Palau Rules of Appellate Procedure provides:

> Every appeal shall be directed to the Appellate Division of the Supreme Court and shall be filed within thirty (30) days after the imposition of sentence in a criminal case or service of a judgment or order in a civil case, unless otherwise provided by law. The time for filing an appeal is terminated by the timely filing, in accordance with the Rules of Civil Procedure or Rules of Criminal Procedure, of a motion to alter or amend the judgment or a motion for a new trial or in a criminal action, a motion in arrest of judgment. The full time for appeal commences to run and is to be computed from the service of an order granting or denying a motion to alter or amend the judgment or the denying of a motion for a new trial or motion in arrest of judgment.

Appellees argue that when appellants filed their motion to reconsider on July 17, it "terminated" their time for filing an appeal until such time as the trial court ruled on that motion. Because appellants filed their notice of appeal on August 11, 1997, two days before the trial court denied the motion to reconsider, appellees contend that the notice of appeal is ineffective. According to appellees, appellants needed to file a new notice of ⊥6 appeal after the trial court denied the motion and failed to do so.

Rule 4(a) of the Palau Rules of Appellate Procedure is modeled on Rule 4(a) of the United States Federal Rules of Appellate Procedure. However, in 1979 and again in 1993, important amendments were made to the American rule while the Palauan rule stayed the same. In 1979, Fed. R. App. 4(a) was changed to state specifically that if a litigant has filed a posttrial motion, he must wait until after the court has disposed of the motion to file a valid notice of appeal. In 1993, this rule was changed again to provide that a notice of appeal submitted before the resolution of a posttrial motion would become effective upon disposition of the motion. *See* Fed. R. App. P. 4(a), Advisory Committee Notes. In other words, under the present American

rule, a prematurely filed notice of appeal is suspended until the posttrial motion is resolved, at which point the notice becomes effective.

Because the Palau Supreme Court has not considered this issue, we look to American courts applying the pre-1979 Fed. R. App. P. 4(a). The courts went both ways, some finding that a prematurely filed notice of appeal was not sufficient to vest the appellate court with jurisdiction and others finding that a prematurely filed notice of appeal became effective once the posttrial motion was resolved. Those courts that determined the notice of appeal to be ineffective interpreted Rule 4(a) strictly, finding that because a motion to reconsider "terminated" the time for filing an appeal until that motion was resolved, no notice of appeal could be effective unless it was filed after the motion had been resolved. *See Century Laminating, Ltd. v. Montgomery* , 595 F.2d 563 (10th Cir. 1979) (notice of appeal filed while posttrial motion is pending is prematurely filed and does not transfer jurisdiction to the court of appeals), *Keith v. Newcourt, Inc.*, 530 F.2d 826 (8th Cir. 1976) (any appeal filed while rule 59 motion for new trial is pending is premature and therefore subject to dismissal).

As appellees acknowledge, the majority of courts went the other way, adopting a more lenient approach to prematurely filed appeals. *See Griggs v. Provident Consumer Discount Co.* , 103 S.Ct. 400, 402 (1982) (collecting cases); *Yaretsky v. Foley* , 592 F.2d 65 (2d Cir. 1979) (premature notice of appeal should be treated as effective to avoid "denial of justice, expense and inconvenience"); *Richerson v. Jones* , 551 F.2d 918, 922 (3rd Cir. 1977) ("A premature appeal taken from an order which is not final but which is followed by an order that is final may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party"); *Stokes v. Peytons, Inc.* , 508 F.2d 1287, 1288 (5th Cir. 1975) ("[W]here . . . it is obvious that the overriding intent was effectively to appeal, and no prejudice will result to the appellee, we are justified in treating the appeal as from a final judgment."); *Song Jook Suh v. Rosenberg* , 437 F.2d 1098, 1099 (9th Cir. 1971) ("To hold, under such circumstances, that the notice of appeal is void, and that we have no jurisdiction, would be technical in the extreme.").

We find that the lenient approach, which was adopted by the majority of United States courts and is now incorporated in the federal rule itself, is the better approach and we deem appellants' notice of appeal to have become effective upon the denial of their motion for reconsideration. Appellees cannot claim that they have been prejudiced in any way by the timing of appellants' notice of appeal. Moreover, given that the Clerk of Court in Palau looks after both Trial and ⊥7 Appellate Division cases, there is little chance that the Appellate Division would begin work on an appeal while a posttrial motion was still pending. Parties should be aware that the correct practice is to file an appeal only after all Rule 59(e) motions have been resolved. But where, as here, appellants' clear intent was to appeal the Trial Division's decision, we will not dismiss that appeal merely because it was filed two days before the Trial Division ruled on appellants' motion for reconsideration.

B. Sufficiency of Appellants' Brief

As appellees point out, appellants' notice of appeal / brief does not meet the standards required by Rule 28 of the Palau Rules of Appellate Procedure. Rather than dismiss the appeal

on that basis, however, we will require appellants to submit a brief in accordance with that rule. Appellants may have 30 days from the date of this opinion to file an opening brief in conformity with Rule 28. If the Court does not receive a new brief within this 30 day limit, it will assume that appellants no longer wish to pursue this appeal and will dismiss the appeal pursuant to Rule 31(c) of the Palau Rules of Appellate Procedure. If appellee does file a new brief, further briefing shall follow the time limits set forth in Rule 31(b).