Malsol v. Ngiratechekii, 7 ROP Intrm. 70 (1998)

CELESTINO MALSOL,
Appellant,

v.

AKIWO NGIRATECHEKII,
Appellee.

CIVIL APPEAL NO. 18-97
Civil Action No. 154-88

Supreme Court, Appellate Division
Republic of Palau

Submitted: March 20, 1998[1]
Decided: May 15, 1998

Counsel for Appellant: Marvin Hamilton, Esq.

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; ALEX R. MUNSON, Part-time Justice.

PER CURIAM:

Appellant Celestino Malsol contends that his due process rights were violated when the Trial Division entered judgment against him at a trial that he did not attend. According to Malsol, the court erred by proceeding without him in the absence of proof that he had been served by the police with proper notice of the date of trial. We disagree and therefore affirm.

I. BACKGROUND

On May 27, 1988, appellee Akiwo ⊥71 Ngiratechekii filed a personal injury suit against appellant Malsol and two other defendants, [2] alleging that defendants attacked him and caused permanent damage to his right eye. Malsol filed an answer *pro se* but failed to comply with ROP R. Civ. P. 11, which requires litigants to provide an address where they can be served. [3] The case lingered for the next nine years without a trial. During those years, Malsol appeared at two status conferences.

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[1] Because oral argument would not materially assist the Court in resolving this appeal, we are considering this appeal on the briefs alone. *See* ROP R. App. Pro.34(a).

[2] The Trial Division granted summary judgment against the other defendants on the issue of liability and they did not appeal.

[3] Rule 11 provides: "A party who is not represented by an attorney or trial assistant shall sign his pleading, motion or other paper and state his address." (emphasis added). We do not construe this rule to require a mailing address. Frequently, addresses in Palau are descriptive.

On March 11, 1997, the Trial Division issued an order setting the case for trial on April 29, 1997. Malsol did not appear on that date, and the trial was held in his absence. The court found in favor of Ngiratechekii. Malsol, by counsel, filed a notice of appeal and an opening brief, arguing that the Trial Division erred in proceeding with the trial in his absence when there was no proof that he had ever been served with a copy of the March 11 order setting the trial date.

We remanded, directing the Trial Division "to make a factual determination whether Malsol received the March 11, 1997 order or was otherwise aware that a trial date had been set." *See* 7 ROP Intrm. 24 (1998). On March 3, 1998, the Trial Division issued an order finding that:

> a copy of the March 11, 1997 Order was placed in the box of the Bureau of Public Safety at the Clerk's office and that, before trial, the Public Safety served defendant Malsol with the March 11, 1997 Order in the manner set forth in Rule 5(b) of the Rules of Civil Procedure.

This Court then issued a further order directing Malsol to show why the judgment should not be affirmed in light of the Trial Division's finding. Malsol responded with a supplemental brief, reiterating his prior contentions and arguing that the Trial Division's factual findings should be disregarded because they had not been made prior to trial.

II. DISCUSSION

Pursuant to the due process clause of the Palau Constitution [4], Appellant Malsol was entitled to notice of the April 29, 1997 trial. However, Malsol has now filed two briefs in this matter and has never asserted that he did not have actual notice of the trial or even that he did not receive the March 11 order setting the trial date. Instead, he argues merely that there is no proof in the trial file that he was served with that order.

We do not believe that the absence of proof of service in the trial file warrants the extraordinary relief that Malsol seeks in this appeal. On remand, the Trial Division found that Malsol had been served in accordance with the Rules of Civil Procedure. Although Malsol has argued that the finding should be disregarded, he has not argued that it is incorrect, nor has he given us any other ⊥72 reason to reach a contrary conclusion. Without any such suggestion, we are not inclined to set aside the judgment and have the Trial Division start from scratch. Due process is calculated to guarantee that a litigant receives notice of proceedings involving his life, liberty or property. It is not designed to allow a litigant to parlay an alleged technical miscue into a new trial when all indications are that the litigant had notice of the first trial and simply chose not to appear.

In any event, Malsol was not entitled to personal service of the notice of trial. Rule 5(a) of the ROP Rules of Civil Procedure requires service on the litigants of virtually all documents filed by the parties or entered by the court. [5] The service rules, however, do not require the court

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[4] Palau Const. art. IV, § 6.

[5] Rule 5(a) declares:

or the litigants to track down a party whose address is unknown. According to Rule 5(b), [6] if the address of the litigant is unknown, leaving a copy of the filing at the Clerk of Courts is sufficient service.

Since Malsol did not leave his address with the court, the burden was on him, not the court, to monitor the status of this case. The court could have satisfied the service rules by merely leaving copies of its orders with the Clerk of Courts. Due process offers no further protection to litigants who have not informed the court where they can be reached. [7] Nonetheless, although the trial file does not show that Public Safety actually served the March 11, 1997 order on Malsol, it does show that the Clerk of Courts went beyond the rules and attempted to serve Malsol with copies of relevant orders by placing them in the box of the Department of Public Safety for service upon Malsol. When the Clerk's Office makes an effort beyond that which is required by the law, an absence of proof that the step was successful does not create reversible error. Thus, even if we were to accept Malsol's suggestion to disregard the trial court's findings on remand, which we do not, we conclude that he would not be entitled to any relief here.

For the foregoing reasons, the judgment of the Trial Division is affirmed.

> Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties . . . .

[6] Rule 5(b) states: "Service upon . . . a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court."

[7] Malsol might have argued that, based on his receipt of prior filings from the court, he assumed that the court knew where to find him and that he believed no further information was necessary from him. In order to make that argument, however, Malsol would have to allege that he had not received the March 11 order, an allegation that, as noted above, is telling by its omission.