Kruger v. Rosenthal, 9 ROP 105 (2002)

STEPHEN KRUGER,
Appellant,

v.

MICHAEL J. ROSENTHAL,
R. BARRIE MICHELSEN and
ARTHUR NGIRAKLSONG,
Appellees.

R. BARRIE MICHELSEN and
ARTHUR NGIRAKLSONG,
Cross-Appellants,

v.

STEPHEN KRUGER,
Cross-Appellee.

CIVIL APPEAL NO. 01-55
Civil Action No. 00-93

Supreme Court, Appellate Division
Republic of Palau

Argued: April 17, 2002
Decided: May 14, 2002

[1] **Appeal and Error:** Preserving Issues

Arguments not presented to the Trial Division cannot be raised on appeal.

[2] **Civil Procedure:** Costs

Palau courts retain considerable discretion in assessing cost items.

[3] **Civil Procedure:** Costs

Costs generally will include court-related expenses, such as fees paid to the court or process servers, expenses for items actually used in court, and expenditures necessary to ⊥106 comply with the Rules of Court.

[4] **Civil Procedure:** Costs

Attorney travel expenses are not "costs" as such, but can be recoverable because of vexatious or bad-faith actions on the part of the losing party, or by a showing that the prevailing party had no choice but to hire off-island counsel.

[5] **Civil Procedure:** Costs

Trial court did not abuse its discretion when it held that hiring off-island counsel was necessary due to the inherent difficulties in having two sitting judges hire on-island counsel who, due to the small number of lawyers in Palau, would regularly appear before them.

[6] **Civil Procedure:** Costs

Trial court has wide discretion in assessing costs in the extraordinary cases where the retention of off-island counsel is required, but in the more usual situation, recovery of telephone, fax, and courier charges incurred as a result of retaining off-island counsel would be properly barred.

[7] **Civil Procedure:** Costs

Court related fees, such as fees paid to the court, certainly includes a *pro hac vice* admission fee.

[8] **Civil Procedure:** Sanctions

Unlike 14 PNC § 702, ROP R. Civ. Pro. 11 does not mandate that a court award attorney fees if the court finds a pleading frivolous.

[9] **Civil Procedure:** Sanctions

In determining whether the trial court relied upon 14 PNC § 702 or on ROP R. Civ. Pro. 11 to impose sanctions, the Appellate Division looks to the words used and the cases cited by the Trial Division.

Counsel for Appellant: Pro se

Counsel for Rosenthal: Pro se

Counsel for Michelsen and Ngiraklsong: Randal Todd Thompson

BEFORE: KATHLEEN M. SALII, Associate Justice; DANIEL N. CADRA, Associate Justice Pro Tem; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

SALII, Justice:

Kruger v. Rosenthal, 9 ROP 105 (2002)

This appeal stems from Stephen Kruger's suit alleging various torts that he claimed arose during a disciplinary investigation against him for practicing law without a license. He now challenges the Trial Division's grant of Summary Judgment in favor of the defendants, R. Barrie Michelsen, Arthur Ngiraklsong, and Michael Rosenthal, its denial of Kruger's cross motions for summary judgment, imposition of a $500 sanction against him, and the assessment of costs which were awarded to Ngiraklsong and Michelsen as prevailing parties. Ngiraklsong and Michelsen cross-appeal the Trial Division's decision not to award attorney's fees. Because none of the parties has demonstrated that the Trial Division erred, we affirm with regard to all issues in the appeal and the cross-appeal.

⊥107

Background

The events at issue began during the course of a separate Trial Division action brought by Kruger and presided over by Michelsen, *Kruger v. Doran* , Civil Action No. 99-304. The defendant in that case averred in an affidavit:

> I have, within the last two weeks, . . . seen a letter signed by Paul Reklai, Governor of the State of Aimeliik, prepared on Aimeliik State letterhead, and recommending Stephen Kruger for a position as Senate Legal Counsel; the letter of recommendation by Governor Reklai cites previous legal services provided by Stephen Kruger to the Governor of Aimeliik State.

According to a December 6, 1999 order in Civil Action No. 99-304, Michelsen was concerned, based on the information in the affidavit, that it was "possible" that Kruger's work for Governor Reklai "constitutes the unauthorized practice of law . . . ." Thereafter, Michelsen requested a copy of the letter of recommendation that the governor wrote for Kruger, ultimately concluding that "the issue was not clear-cut." Thus, Michelsen explains, he "showed the letter to Mr. Rosenthal and asked that he look into the matter and, as a member of the bar of this Court, decide whether a formal complaint should be lodged." Michelsen also stated that he "neither asked Mr. Rosenthal to file a complaint, nor report back to" him. At the time that Michelsen spoke to him, Rosenthal was Special Prosecutor for the Republic.

On March 23, 2000, Rosenthal filed with Ngiraklsong an informal disciplinary complaint against Kruger.[1] The complaint states in pertinent part:

> [The Special Prosecutor's] Office determined that the [letter of recommendation from Governor Reklai to the Senate] sufficiently raised questions of violations of law by a government employee in addition to any possible violation of practicing law without a license. *See* attached letter dated February 2, 2000. Accordingly, on November 30, 1999, Office of the Special Prosecutor Investigators Bradley Kumangai and Hilario Rechesengel took the statement of former Governer Reklai (attached) consisting of five sentences, in relation to the work of Mr. Kruger for the State of Aimeliik.

[1]The Disciplinary Tribunal later ordered Rosenthal to file a formal complaint against Kruger, which Rosenthal did on September 6, 2000.

> Pursuant to Rule 4 of the Disciplinary Rules and Procedures for Attorneys and Trial Counselors practicing in the Courts of the Republic of Palau, all complaints concerning violations of the Disciplinary Rules are to be referred to the Chief Justice. Accordingly, this matter is being referred to you for such action as you deem appropriate.

⊥108

The February 2, 2000 letter to which Rosenthal refers was sent by Rosenthal to then-Attorney General Jennifer Young. In that letter, Rosenthal wrote that former Governor Reklai's letter of recommendation:

> sufficiently raised questions of violations of law in that Mr. Kruger may have provided false information to former Governor Reklai as to his status as an attorney, signed documents as such, or misused Government resources. Such conduct would constitute violations of the law including, but not limited to, forgery, misconduct in public office and civil and criminal contempt of court.

Shortly after receiving Rosenthal's informal disciplinary complaint against Kruger, Ngiraklsong concluded that the complaint was not "plainly without merit" and that the matter thus warranted additional proceedings. He appointed Rosenthal as the Disciplinary Counsel in the case.[2]

Kruger filed this suit on May 22, 2000, alleging that all three defendants violated his civil rights, invaded his privacy, and engaged in civil conspiracies by commencing and investigating the disciplinary charge against Kruger. Additionally, Kruger alleged that Michelsen and Rosenthal defamed him. Both Kruger and the defendants moved for summary judgment. The Trial Division granted the defendants' motions and denied Kruger's motions. The Trial Division subsequently granted Ngiraklsong and Michelsen's joint motion for sanctions by fining Kruger $500, but declined to award attorney's fees. Ngiraklsong and Michelsen also received costs in the amount of $2661.00.

Analysis

I. Summary Judgment

On appeal, Kruger first contests the grant of summary judgment to the defendants, and argues that summary judgment should have been granted in his favor. We believe that, in its well-reasoned and well-substantiated orders granting summary judgment and denying Kruger's motion for reconsideration, the Trial Division correctly disposed of all of the issues which Kruger reiterates on appeal. Accordingly, we affirm the judgment for substantially the reasons given by the Trial Division.

[1] Nevertheless, Kruger's appeal raises one issue that merits further discussion.

---

[2]Rosenthal filed his Disciplinary Counsel report on August 28, 2000, and, after a hearing, the Disciplinary Tribunal ultimately concluded that Kruger had engaged in the unauthorized practice of law while working for former Governor Reklai. *See In re Kruger*, 8 ROP Intrm. 257 (2001).

Specifically, we reject as waived Kruger's argument that Rosenthal was acting as Michelsen's agent, and thus that Michelsen should be responsible under a *respondeat superior* theory for the torts Rosenthal allegedly committed against Kruger. Kruger's argument that he did raise this issue below is unconvincing. We have reviewed the pleading in which Kruger now claims to have raised the issue, namely his motion for Summary Judgment against Michelsen. In this motion, Kruger merely asserted that "[w]hatever Michelsen intended, he is responsible, as tortfeasor, for the entirety of Rosenthal's conduct and all its natural consequences," and cited a products liability ⊥109 case regarding the foreseeability of design defects in a Volkswagen Beetle. Nowhere is an agency theory mentioned, and thus the issue is waived. *Tell v. Rengiil*, 4 ROP Intrm. 224, 225 (1994) (arguments not presented to the Trial Division cannot be raised on appeal).

II. Costs

Kruger also disputes the Trial Division's calculation and award of costs to Ngiraklsong and Michelsen. He argues that charges for phone, fax, courier service, and *pro hac vice* special appearance fees are never taxable as costs, and that Ngiraklsong and Michelsen inadequately demonstrated their entitlement to recovery of photocopying costs. Underpinning all of these assertions is Kruger's contention that Ngiraklsong and Michelsen's retention of off-island counsel was unnecessary, and thus that all of the costs associated with off-island representation, including travel expenses as well as the charges listed above, are not taxable. We disagree.

[2-4] Pursuant to the first sentence of 14 PNC § 702,[3] Palau courts retain considerable discretion in assessing cost items. *See Kulas v. Becheserrak*, 7 ROP Intrm. 106, 106 (1998). Section 702 provides that a court "may allow and tax any additional items of costs or actual disbursement which it deems just and finds have been necessarily incurred for services which were actually and necessarily performed." 14 PNC § 702. As explained in the Appellate Division's most recent discussion of costs, *Winterthur Swiss Insurance Co. v. Socio Micronesia, Inc.*, 8 ROP Intrm. 212, 213 (2000), "generally costs will include court-related expenses, such as fees paid to the court or process servers." *See also* 14 PNC § 703 ("All fees and expenses . . . incurred . . . for the service of process, witness fees, or filing fees on appeal, by any party prevailing . . . shall be taxed as part of costs against the losing party . . . ."). The *Winterthur* Court also pointed to "expenses for items actually used in court, and expenditures necessary to comply with the Rules of Court" as two categories of costs that can be taxed. 8 ROP Intrm. at 213. Accordingly, that Court noted that expenses for photocopying that are "required to properly file and serve a brief" are taxable. *Id.* Moreover, although "[a]ttorney travel expenses are not 'costs' as such," the *Winterthur* Court explained that travel expenses can be recoverable "because of vexatious or bad-faith actions on the part of the losing party, or by a showing that the prevailing party had no choice but to hire off-island counsel." *Id.* at 213-14.

[5] The Trial Division did not abuse its discretion in taxing and calculating costs. The trial court first examined whether the case fell within *Winterthur's* "exceptional category of cases in which a party was required to retain off-island counsel," and answered this question in the

[3]We discuss below the second sentence of § 702, which concerns a court's discretion to find a complaint in a civil action frivolous and award attorney's fees.

affirmative, citing Michelsen's affidavit explaining the inherent difficulties in having two sitting judges hire on-island counsel who, due to the small number of lawyers in Palau, would regularly appear before them. Second, the court rejected Kruger's suggestion that even if the retention of off-island counsel was necessary, the court should limit, pursuant to *Winterthur*, taxable costs to the recovery of travel expenses. It reasoned that "[i]f the purpose of the [off-island counsel] exception is to recognize and provide compensation for the extraordinary expenditures entailed by the hiring of off- ⊥110 island counsel, then the Court can see no good reason to limit such recovery to travel expenses and to exclude other costs attendant upon such representation." The Trial Division thus concluded that Ngiraklsong and Michelsen were entitled to recover not only their attorney's travel expenditures, but also the telephone, fax, and courier charges incurred as a result of retaining an off-island attorney. Considering the wide discretion that § 702 grants a court in assessing costs, we conclude the court in this "extraordinary" case stayed well within its bounds, and that Kruger has not demonstrated otherwise.

[6] Before we leave this issue, however, we feel it is necessary to clarify a distinction that was not drawn in *Winterthur*. *Winterthur* does state that phone calls, faxes, and courier services are not recoverable as costs. But the *Winterthur* Court did not discuss § 702's grant of wide discretion to Palau courts in determining costs, regardless of the limits placed on the taxing of costs in the United States. Although this shortcoming does not undermine that Court's conclusion that phone calls, faxes and courier services are not recoverable costs in cases where a party has not demonstrated the necessity of retaining off-island counsel, *see Winterthur*, 8 ROP Intrm. at 214, we take this opportunity to distinguish *Winterthur* from cases such as this one, where the prevailing party has demonstrated such necessity. We hold that, consistent with the wide discretion afforded courts under § 702, courts may award these types of costs in the extraordinary case where the retention of off-island counsel is required. Nonetheless, in the more usual situation, such as in *Winterthur*, recovery of these costs would be properly barred.

[7] On a final cost-related note, Kruger makes three additional arguments, none of which has merit. With respect to photocopying costs, Kruger contends that Ngiraklsong and Michelsen failed to show that the copying was related to filing briefs. We have reviewed the itemized bill of costs proffered by Ngiraklsong and Michelsen's counsel, as well as both counsel's and counsel's local agent's sworn declarations that 75% of the copying expenses were related to filing and serving briefs. We conclude that the itemized list is extremely comprehensive, and that the affidavits meet the standard for demonstrating the allowability of photocopying costs. Moreover, counsel's and counsel's local agent's statements that the photocopies were related to the filing and serving of briefs are certainly distinguishable from, and far more specific than those presented in, *Winterthur*, where an appellee's explanation that photocopying expenses were "associated with the appeal" was found to be inadequate. *Winterthur*, 8 ROP Intrm. at 215 (internal quotations omitted). As for Kruger's assertion that the photocopies that off-island counsel's local agent made are not taxable because they were purely for the local agent's convenience, Kruger failed to make an adequate showing to support his proposition. *See Kulas*, 7 ROP Interm. at 106. Similarly lacking merit is Kruger's contention that the filing fees off-island counsel paid to be admitted *pro hac vice* are not recoverable expenses. *Winterthur* specifically allows for "court-related expenses, such as fees paid to the court," *id.* at 214, which certainly includes a *pro hac vice* admission fee. Thus Kruger has demonstrated no error in the

assessment of costs.

III. Sanctions

We now arrive at the second sentence of 14 PNC § 702, which provides that "[w]hen, in its discretion, the court finds that a complaint in a civil case is groundless, frivolous, or brought in bad faith, it shall ⊥111 award reasonable attorney's fees in favor of the prevailing defendant." In their cross-appeal, Ngiraklsong and Michelsen argue that because the Trial Division found Kruger's complaint frivolous under § 702, it was erroneous for the court to decline to award attorney's fees pursuant to that statute. Specifically, Michelsen and Ngiraklsong contend that the use of the word "shall" in the second phrase of this section requires a court to assess attorney's fees if that court determines that the complaint is frivolous.

[8] Although this argument regarding the mandatory nature of attorney's fees under § 702 is persuasive, we do not believe that the trial court in this case actually found Kruger's complaint frivolous under that statute. Rather, the trial court imposed sanctions pursuant to Rule 11 of the ROP Rules of Civil Procedure. In arriving at this conclusion, we first note that Ngiraklsong and Michelsen requested sanctions under *both* Rule 11 and § 702. Unlike § 702, Rule 11 does not mandate that a court award attorney's fees if the court finds a pleading frivolous (although it does allow for the award of such fees). ROP R. Civ. Pro. 11. Thus, if the trial court decided that sanctions were more appropriately brought under Rule 11, it could have imposed any reasonable sanction it thought befitting the offending party's actions. Furthermore, the court stated that "plaintiff's theories were infected by factual or legal propositions that were without any reasonable basis," and did not use § 702's language that the complaint is "groundless, frivolous, or brought in bad faith." This may seem like a mere question of semantics, but the Appellate Division previously has looked to the words the Trial Division used in assessing sanctions to determine whether the court relied on § 702. *See Arugay v. Wolff* , 5 ROP Intrm. 239, 242-43 (1996) (because trial court's sanctioning order found complaint "to be 'groundless and frivolous' and this terminology is used only in § 702, the record establishes that this was the authority under which the trial court was proceeding.").

[9] Admittedly, the words "without reasonable basis" are not contained in Rule 11 either, so this Court has no sure way of knowing whether the trial court relied on that rule or § 702 to impose the sanction against Kruger. *See, e.g.* , *Wolff v. Sugiyama* , 5 ROP Intrm. 105, 113-14 (vacating and remanding award of sanctions because, among other procedural irregularities, trial court failed to cite authority it relied on to impose those sanctions). Nonetheless, all of the cases that the trial court cited in its sanction order are Rule 11 cases. Based on this fact, and on the trial court's belief that it had a degree of discretion in the type of sanction it awarded, which is true only for Rule 11 sanctions, we conclude that the trial court fined Kruger under Rule 11, and not § 702. Accordingly, the cross-appeal of Michelsen and Ngiraklsong lacks merit.

In light of our conclusion that the Trial Division relied on Rule 11 to impose sanctions, we reject out of hand Kruger's contention that the trial court inappropriately relied on hindsight in concluding that his complaint was frivolous. Kruger asserts that because the trial court did not dismiss the complaint for failure to state a claim at the pleadings stage, the court could not later

deem his complaint frivolous. Rule 11, however, allows a court to impose sanctions for any "pleading, motion, or other paper" which violates the rule. Therefore, it was not erroneous for the Trial Division to impose sanctions for baseless facts and legal propositions that may have become apparent through Kruger's motions after he filed his ⊥112 complaint.[4]

Conclusion

For the foregoing reasons, we affirm the decisions of the trial court. We moreover deny all pending motions.

[4]Kruger argues several other meritless points in his appeal regarding sanctions, none of which we believe needs discussion.