

FSM SUPREME COURT APPELLATE DIVISION

IN RE SANCTION OF SASAKI L. GEORGE,)
)
 Appellant.)
_____)

APPEAL CASE NO. K2-2010

OPINION

Argued: July 28, 2011
Decided: August 12, 2011

BEFORE:

Hon. Martin G. Yinug, Chief Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCE:

For the Appellant: Sasaki L. George, Esq.
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P.O. Box 38
Tofol, Kosrae FM 96944

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HEADNOTES

Appellate Review – Decisions Reviewable

A sanction against an attorney who is not a party to the underlying case is immediately appealable if the sanctioned attorney proceeds under his or her own name and as the real party in interest. In re Sanction of George, 17 FSM Intrm. 613, 616 (App. 2011).

Appellate Review – Decisions Reviewable

Generally, the appellate division may review only final decisions. A final decision is one that leaves nothing open to further dispute and which ends the litigation on the merits, leaving the trial court with no alternative but to execute the judgment, and an appeal that is not from a final decision will be dismissed for lack of jurisdiction without prejudice to any future appeal from a final decision. In re Sanction of George, 17 FSM Intrm. 613, 616 (App. 2011).

Appellate Review – Decisions Reviewable

Dicta is not a final decision that may be subject to appellate review since dicta cannot be used as a basis to require or compel any later action. In re Sanction of George, 17 FSM Intrm. 613, 616 (App. 2011).

Appellate Review – Standard of Review – Civil Cases – Factual Findings

Generally, an appellate court does not make factual findings. In re Sanction of George, 17 FSM Intrm. 613, 616 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

A factual finding and a legal conclusion should be vacated on due process grounds when they were arrived at without the benefit of due process of law. In re Sanction of George, 17 FSM Intrm. 613, 616 (App. 2011).

Attorney and Client – Attorney Discipline and Sanctions

A court's firm and definite statement that an attorney acted unethically (as opposed to a statement that he may have acted unethically) appears to be a reprimand. A reprimand, which can be either public or private, is sanction that a court may impose on an attorney. In re Sanction of George, 17 FSM Intrm. 613, 616-17 (App. 2011).

Civil Procedure – Res Judicata; Judgments

A statement by a court that, to the extent that it is not dicta, is a finding of fact, a conclusion of law, and a reprimand, cannot be used as a basis for any future action when it is vacated on appeal. In re Sanction of George, 17 FSM Intrm. 613, 617 (App. 2011).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This appeal is from a paragraph in a Kosrae State Court order, which the appellant, Sasaki L. George, Esq., reads as a finding that he had acted unethically and as an attorney sanction imposed on him personally. We conclude that, although the appealed paragraph is mostly only dicta, to whatever extent that it is not, it ought to be vacated. Our reasons follow.

I. BACKGROUND

During the land registration process for land known as Yemelil, attorney Sasaki L. George of Micronesian Legal Services Corporation came to represent two claimants: Timothy George and the Heirs of Isaiah Benjamin. On November 4, 2008, the Kosrae Land Court ruled that, within Yemelil, the Heirs of Clinton Benjamin owned Parcels No. 33-U-11 and 33-U-12; the Heirs of Tolenna Joseph owned Parcels No. 33-U-09 and 33-U-10; Chang B. William owned Parcel No. 33-U-08; the Heirs of Isaiah Benjamin owned Parcels No. 33-U-05 and 33-U-06; and the Heirs of Konlulu George owned Parcel No. 33-U-03.

On February 3, 2009, the Heirs of Clinton Benjamin appealed the award of Parcels No. 33-U-05 and 33-U-06 to the Heirs of Isaiah Benjamin and the award of Parcel No. 33-U-03 to the Heirs of Konlulu George. That appeal was docketed in the Kosrae State Court as Civil Action No. 6-09. On February 5, 2009, Timothy George and the Heirs of Isaiah Benjamin filed their own appeal, which was docketed as Civil Action No. 8-09. In their appeal, Timothy George claimed that he, and not the Heirs of Konlulu George, should have been awarded Parcel No. 33-U-03 and the Heirs of Isaiah Benjamin claimed that they had title over the Heirs of Clinton Benjamin and the Heirs of Tolenna Joseph.

On October 13, 2009, the State Court held a status conference to discuss the two appeals' possible consolidation and the parties' representation. The next day, the State Court issued a Record Ready Notice in No. 8-09 and dismissed Timothy George as an appellant in that case. Attorney Sasaki George moved to reinstate Timothy George as an appellant since Timothy George had been dismissed without notice and an opportunity to be heard and since, in his view, the Land Court had erred when it ruled that the Heirs of Konlulu George owned Parcel No. 33-U-03. Timothy George asserted that,

although the late Konlulu George had had several children of which he was the oldest son, only he had filed a claim to Parcel No. 33-U-03, and he had claimed it as his individual property and not as a representative of all of Konlulu George's heirs. During the subsequent November 17, 2009 hearing, the State Court personally questioned Timothy George in the Marshallese language, which his attorney Sasaki George did not understand, and then excluded Sasaki George from the hearing while further questioning Timothy George. On November 19, 2009, the State Court reinstated Timothy George as an appellant and noted that he would not be part of the Heirs of Konlulu George [appellees].

On December 12, 2009, the Clinton Benjamin heirs filed their opening brief and appendix in No. 6-09. On February 3, 2010, attorney Sasaki George filed in No. 6-09 an answering brief and appendix on Timothy George's behalf and another answering brief and appendix on the Isaiah Benjamin heirs' behalf. Also on February 3, 2010, the State Court dismissed No. 8-09 because appellants Timothy George and the Heirs of Isaiah Benjamin had not filed an opening brief in that appeal although they had filed a motion to enlarge time. On February 22, 2010, the State Court, on the No. 8-09 appellants' motion, vacated the No. 8-09 dismissal and set a March 12, 2010 hearing for them to show cause why the No. 8-09 appeal should not be dismissed and also to discuss attorney Sasaki George's possible ethical violations since he had represented Timothy George in No. 8-09 and the Heirs of Konlulu George appellees in No. 6-09. On April 14, 2010, the State Court included the following paragraph as part of a much larger order:

This Court also discussed at the March 12, 2010 hearing the possible ethical violation being committed by Counselor Sasaki George. While this Court was not having a hearing on the ethical violation or going to issue sanctions at that time, it wanted counsel to be aware of the situation. This Court, if deemed necessary, will hold a separate hearing on the ethical violations, with proper notice and opportunity to be heard issued to Counselor George. Counselor George in Civil Action 8-09 represents HO Isaiah Benjamin and Timothy George and filed the appeal from Land Court Decision 6-04 against, among others, HO Konlulu George. In Civil Action 6-09, HO Clinton Benjamin filed an appeal from Land Court Decision 6-04 against HO Isaiah Benjamin and HO Konlulu George. Counselor Sasaki George is representing both the Appellee's [sic] in that case. Rule 1.7 of the Model Rules of Professional Conduct states that a "lawyer shall not represent a client if the representation involves concurrent conflict of interest. A concurrent conflict of interest exists if: (a) the representation of one client will be directly adverse to the representation of another client." Civil Action 6-09 and 8-09 both involve the same land and are both appeals from the same Land Court Decision. It is therefore unethical for Sasaki George to represent HO Konlulu George in one case and have HO Konlulu George as a party opponent in another case involving the same issue. This issue was discussed because if this case was to be continued, Sasaki George would have to remove himself as counselor in this case or dismiss HO Konlulu George in this case.

Order Denying Appellants' Motion for Enlargement of Time; Order of Dismissal at 10-11 (Kos. S. Ct. Tr. Civ. No. 8-09, Apr. 14, 2010). Attorney Sasaki George appealed that paragraph's ruling.

II. ISSUE PRESENTED

Appellant Sasaki L. George contends that the Kosrae State Court committed an error of law and a clear error in its findings of fact when the State Court found that it was unethical for him to represent the Heirs of Konlulu George in one case and litigate against them as a party opponent in another, related case.

III. ANALYSIS

The threshold question is whether we can review the matter Sasaki George has appealed. A sanction against an attorney who is not a party to the underlying case is immediately appealable if the sanctioned attorney proceeds under his or her own name and as the real party in interest. In re Sanction of Woodruff, 9 FSM Intrm. 374, 375 (App. 2000); In re Sanction of Berman, 7 FSM Intrm. 654, 656 (App. 1996); *see also* FSM Dev. Bank v. Adams, 12 FSM Intrm. 456, 463 (App. 2004) (Rule 11 attorney sanction order immediately appealable if the sanctioned attorney proceeds under own name as real party in interest); FSM Dev. Bank v. Yinug, 12 FSM Intrm. 450, 453 (App. 2004) (same). Sasaki George, under his own name and as the real party in interest, appealed what he believes is a "finding" that he acted unethically and a resulting attorney sanction order.

What is uncertain is whether what he is appealing is actually a reviewable final order or decision. Generally (with a few exceptions not applicable here), we may review only final decisions. A final decision is one that leaves nothing open to further dispute and which ends the litigation on the merits, leaving the trial court with no alternative but to execute the judgment, Jano v. Fujita, 17 FSM Intrm. 281, 283 (App. 2010), an appeal that is not from a final decision will be dismissed for lack of jurisdiction without prejudice to any future appeal from a final decision, Smith v. Nimea, 16 FSM Intrm. 346, 349 (App. 2009).

The State Court, in its order, states that it had not held a hearing on the ethical violation and that if it were to impose sanctions on Sasaki George it would first give him proper notice and an opportunity to be heard at a separate hearing. That does not sound like a final decision leaving nothing for further dispute. Sasaki George's concern is that the State Court, in its order, made factual findings and conclusions of law that can be used to prevent him from challenging the basis for a future disciplinary action. He also maintains that the State Court ruling that it was "unethical for Sasaki George to represent HO Konlulu George in one case and have HO Konlulu George as a party opponent in another case involving the same issue" is a clearly erroneous factual finding and legal conclusion since he never represented the Heirs of Konlulu George as an entity in any part of the Yemelil title registration proceedings and since, in both No. 8-09 and No. 6-09 (as well as in Land Court), the only Konlulu George "heir" he ever represented was Timothy George as an individual.

Most of the paragraph (quoted on page 615 above in its entirety) can only be considered speculation about what might happen if a disciplinary proceeding were held, and, as such, is merely dicta and not a final decision that may be subject to appellate review. Dicta cannot be used as a basis to require or compel any later action. Narruhn v. Chuuk, 17 FSM Intrm. 289, 300 n.4 (App. 2010) (dicta are expressions in the court's opinion that go beyond the facts before the court and are therefore not binding in later cases); Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 481, 484 (App. 1996) (dicta does not create a precedent and is not binding).

However, the State Court statement that "[i]t is therefore unethical for Sasaki George to represent HO Konlulu George in one case and have HO Konlulu George as a party opponent in another case involving the same issue" is, from its definite and assertive tone, a factual finding [about whom Sasaki George represented] and a legal conclusion [that it was therefore unethical], which appears to be a final decision not open to further dispute. Generally, an appellate court, which is what the Kosrae State Court was in No. 6-09 and No. 8-09, does not make factual findings. *See* Goya v. Ramp, 14 FSM Intrm. 305, 307 n.1 (App. 2006). As a factual finding and a legal conclusion, this ruling should be vacated on due process grounds since it was arrived at without the benefit of due process of law. *See* Senda v. Creditors of Mid-Pacific Constr. Co., 7 FSM Intrm. 664, 669 (App. 1996). The firm and definite statement that Sasaki George acted unethically (as opposed to a statement that he may have acted unethically) appears to be a reprimand. A reprimand, which can be either public or private, is

sanction that a court may impose on an attorney. This "reprimand" and the finding that it was based upon, were made without the due process of law that the State Court acknowledged that it should give in an attorney sanction matter. As such, it should be vacated.

IV. CONCLUSION

The April 14, 2010 statement, whether it is a factual finding, a legal conclusion, or merely dicta, cannot be used as a basis for any action against Sasaki George or to prevent him from maintaining in any future proceeding that he never represented the Heirs of Konlulu George, that he only represented Timothy George personally and not as a representative of the Heirs of Konlulu George, and that his representation in the Yemelil land title determination has not been unethical. To the extent that the April 14, 2010 statement is a finding of fact, a conclusion of law, and a reprimand, it is accordingly vacated.

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FSM SUPREME COURT TRIAL DIVISION

CHUUK HEALTH CARE PLAN,)	CIVIL ACTION NO. 2010-1036
)	
Plaintiff,)	
)	
vs.)	
)	
PACIFIC INTERNATIONAL, INC.,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

Martin G. Yinug
Chief Justice

Decided: August 24, 2011

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