

to be cognizable under Rule 52(b). It is therefore stricken. It may be renewed, if need be, after the court has entered its findings.

\* \* \* \*

FSM SUPREME COURT APPELLATE DIVISION

MARY BERMAN,	)	APPEAL CASE NO. P5-2009
	)	Civil Action No. 2008-025
Appellant,	)	
	)	
vs.	)	
	)	
POHNPEI STATE GOVERNMENT,	)	
	)	
Appellee.	)	
_____	)	

ORDER AND MEMORANDUM

Martin G. Yinug  
Acting Chief Justice

Decided: September 27, 2010

APPEARANCE:

For the Appellant: Mary Berman, Esq. (pro se)  
P.O. Box 163  
Kolonia, Pohnpei FM 96941

\* \* \* \*

HEADNOTES

Appellate Review – Motions

With certain limitations, a single justice may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, and a motion for enlargement of time properly falls within such request for relief. Berman v. Pohnpei, 17 FSM Intrm. 251, 252 (App. 2010).

Appellate Review – Briefs, Record, and Oral Argument

"Service" is the key word in the Rule 26(c) provision that whenever a party is required or permitted to do an act within a prescribed period after service of a paper on that party and the paper is served by mail, six days is added to the prescribed period, but the prescribed period for filing the appellant's opening brief is not triggered by service. Berman v. Pohnpei, 17 FSM Intrm. 251, 252 (App. 2010).

Appellate Review – Briefs, Record, and Oral Argument

Rule 31(a)'s language is clear that an appellant must serve and file a brief within 40 days after the date of the Supreme Court appellate division clerk's notice that the record is ready. The appellate clerk must, on receipt of the "record ready certificate" from the clerk of the court appealed from, file

it and must immediately give notice to all parties of the date on which it was filed and the date, 40 days after the appellate clerk's notice, when the appellant's brief will be due. Berman v. Pohnpei, 17 FSM Intrm. 251, 253 & n.1 (App. 2010).

Appellate Review – Briefs, Record, and Oral Argument; Appellate Review – Motions

Rule 26(c) does not apply to an appellant's opening brief since the prescribed period for the brief's filing is triggered by the date of notice that the record is ready, and not by service of that notice. Thus, no future argument that Rule 26(c) is applicable to an appellant's opening brief will satisfy as "good cause shown" within the meaning of a Rule 26(b) motion for the enlargement of time. Berman v. Pohnpei, 17 FSM Intrm. 251, 253 (App. 2010).

\* \* \* \*

COURT'S OPINION

MARTIN G. YINUG, Associate Justice:

This matter comes before the court on a Motion for Enlargement of Time to File Opening Brief by appellant Berman. For the following reasons, the court grants the motion.

BACKGROUND

The Record Ready Notice in this appeal is dated August 18, 2010, and was served by mail on August 24, 2010. In her motion, Berman states that she has "40 days, plus six days when actual service is by mail, within which to file a brief, counting from the date of service of notice," and concludes that under the Rules of Appellate Procedure, she has 46 days after service of notice within which to file her opening brief.

ANALYSIS

A. *Power of a Single Justice to Entertain Motions*

A single justice "may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion," with certain limitations. FSM App. R. 27(c). A motion for enlargement of time properly falls within such request for relief.

B. *Rule 26(c)*

Berman asserts in her motion that she is entitled to six extra days to file her opening brief, because the Record Ready Notice was served six days after the date that appears on the notice. She does not cite an authority for this assertion; however, the reasoning seems to reflect Rule 26(c): "Whenever a party is required or permitted to do an act within a prescribed period after *service* of a paper upon that party and the paper is served by mail, 6 days shall be added to the prescribed period." FSM App. R. 26(c) (emphasis added). The key word is "service"; that is, in order for Rule 26(c) to apply, the prescribed period must be one that is triggered by service. Berman v. College of Micronesia-FSM, 15 FSM Intrm. 622, 624 (App. 2008). Thus the question is whether or not the prescribed period for filing the appellant's opening brief is one that is triggered by service.

The prescribed period for filing the appellant's opening brief is not triggered by service. Rule 31(a) prescribes the periods for opening briefs by both parties, and the language is clear: "The appellant shall serve and file a brief within 40 days after the *date of notice* by the clerk . . . pursuant

to Rule 12(b) that the record is ready." FSM App. R. 31(a) (emphasis added).<sup>1</sup> Compare this with the prescription for the appellee: "The appellee shall serve and file a brief within 30 days after *service* of the brief of the appellant." *Id.* (emphasis added). Thus, contrary to Berman's assertion, Rule 26(c), which would have allowed her an extra six days to file her opening brief, counting from the date of service, does not apply.

### C. Motion to Enlarge

Although Rule 26(c) does not apply in this case, Berman's motion for enlargement of time must still be considered on its own merits. With certain exceptions, the court "*for good cause shown* may upon motion enlarge the *time prescribed* for doing any act, or may permit an act to be done after the expiration of such time." FSM App. R. 26(b) (emphases added). Here, the prescribed time is "within 40 days after the *date of notice* by the clerk . . . that the record is ready." FSM App. R. 31(a) (emphasis added). The date of notice is August 18, 2010; therefore, the opening brief is due on Monday, September 27, 2010. Therefore, the question is whether or not there is good cause shown.

Berman makes only one argument why this motion should be granted. As shown above, that argument is made upon a rule that does not apply. As there is at least one other appeals case in which Berman was a party, she or her counsel should have been aware of the inapplicability of Rule 26(c) to the prescribed period for filing an appellant's opening brief. However, the court is willing to consider the possibility that Berman or her counsel was unaware of the holding in Berman v. College of Micronesia-FSM, and the implications it had regarding Rule 26(c).

Therefore, the court hereby explicitly states that Rule 26(c) does not apply to an appellant's opening brief, the prescribed period for the filing of which is triggered by the date of notice that the record is ready, and not by service of that notice, and that no future argument that Rule 26(c) is applicable to an appellant's opening brief will satisfy as "good cause shown" within the meaning of Rule 26(b) for the enlargement of time.

### CONCLUSION

Although Berman made an argument for enlargement that is clearly inapplicable to this situation, nevertheless, in the interest of getting to the merits of the appeal and making clear and explicit the law that Rule 26(c) cannot apply to motions for enlargement of time to file an appellant's opening brief, and because there has been no prejudice to the opposing party, the motion is GRANTED. Berman is hereby NOTIFIED that her opening brief is due on Monday, October 11, 2010.

\* \* \* \*

---

<sup>1</sup> Similarly, Rule 12(b) states: "Upon receipt of the "record ready certificate" from the clerk of the court appealed from pursuant to Rule 11(c), the clerk of the Supreme Court appellate division shall file it and shall immediately give notice to all parties of the date on which it was filed *and the date, 40 days after this notice from the appellate division clerk, when appellant's brief will be due.*" FSM App. R. 12(b) (emphasis added).