

33, 37 (Chk. S. Ct. App. 2007). As set forth above, this Court finds that the Petitioner has not adequately demonstrated that he has a clear and indisputable right to the relief requested. Any ruling to the contrary would amount to overruling the Respondent's exercise of sound discretion.

CONCLUSION

The Petition does not meet the burden of showing the Respondent harbors bias or prejudice, nor does it show that any disqualifying knowledge was derived from an extrajudicial source. The mere fact that the Respondent made an adverse evidentiary ruling and declared a mistrial does not mean the Respondent's impartiality might reasonably be questioned. The Petitioner is entitled to a new trial, but not a new judge.

Accordingly, this Court hereby DENIES the Petition for Writ of Prohibition.

\* \* \* \*

FSM SUPREME COURT APPELLATE DIVISION

PACIFIC SKYLITE HOTEL, CAPTAIN OSIAS )  
CAMACHO, WILLIAM OMPOY, THEODY PLAZA, )  
ERNESTO GOMEZ, ANTERO PULMANO, and )  
GEOFFREY DELICA, )

APPEAL CASE NO. P7-2014

Appellants, )

vs. )

PENTA OCEAN CONSTRUCTION COMPANY )  
LTD. and TATSUNOSKE NISHIBA individually )  
and as Administrative Manager of PENTA )  
OCEAN CONSTRUCTION COMPANY LTD., )

Appellees. )

ORDER DISMISSING APPEAL

Ready E. Johnny  
Associate Justice

Decided: December 9, 2015

APPEARANCE:

For the Appellees: Fredrick L. Ramp, Esq.  
Ramp & Mida Law Firm  
P.O. Box 1480  
Kolonia, Pohnpei FM 96941

\* \* \* \*

## HEADNOTES

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

The burden is on the appellant to apply, before the time allowance has run, for additional time upon a showing of real need which will not unduly prejudice the appellee. Until such application for extended time is made so that it may be considered before the allotted time has expired, it is evidence of a lack of good faith and failing extraordinary circumstances, it constitutes neglect which will not be excused. Pacific Skylite Hotel v. Penta Ocean Constr. Co., 20 FSM R. 251, 253 (App. 2015).

Appellate Review – Dismissal

Among the factors which the court considers on a motion to dismiss under Rule 31(c) are the length of delay in filing the brief; evidence of prejudice to the appellee; nature of the reason for appellant's failure to file on time; and the extent of appellants' efforts in mitigation. Pacific Skylite Hotel v. Penta Ocean Constr. Co., 20 FSM R. 251, 253 (App. 2015).

Appellate Review – Dismissal

Although dismissing an appeal on purely procedural grounds is a sanction normally reserved for severe disregard of the Rules resulting in prejudice to the opposing party, this policy preference for adjudications on the merits does not negate all other considerations or make the procedural Rules a nullity. Pacific Skylite Hotel v. Penta Ocean Constr. Co., 20 FSM R. 251, 253 (App. 2015).

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

It is within a single justice's power to dismiss an appeal upon stipulation of the parties or upon a party's failure to comply with the Rules' timing requirements. The phrase "timing requirements of these rules" has been interpreted to include an appellant's failure to file an opening brief. Pacific Skylite Hotel v. Penta Ocean Constr. Co., 20 FSM R. 251, 253 (App. 2015).

Appellate Review – Dismissal

The court will, on the appellees' motion, dismiss an appeal when no opening brief has been filed or an enlargement sought and the court has found the appellants have exhibited severe disregard for the Appellate Procedure Rules' timing requirements and as a result of this, the appellees have been prejudiced. Pacific Skylite Hotel v. Penta Ocean Constr. Co., 20 FSM R. 251, 253 (App. 2015).

\* \* \* \*

## COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On October 9, 2015, Appellees filed a Second Motion to Dismiss Appeal, given Appellants' failure to prosecute this appeal in a timely manner. The Appellants filed their Notice of Appeal in this matter on March 19, 2014. On October 9, 2014, they filed a Motion to Enlarge Time to File Brief; requesting 30 days from the date transcripts of the testimony from two witnesses in the underlying trial were completed. On October 10, 2014, the Court issued an Order granting this enlargement and set forth that the due date for the Brief in Chief would be no later than 30 days after notice was issued, with respect to the transcripts' availability.

On October 27, 2014, one of these trial transcripts was tendered to Appellants and the remaining one produced on February 14, 2015.

On April 1, 2015, Appellees filed a Motion to Dismiss, which the Court denied on June 30,

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20 FSM R. 251 (App. 2015)

2015; finding the motion to be premature as the Record Ready Notice had not yet issued. On July 10, 2015, the clerk issued the Record Ready Notice, thereby triggering Appellants' requirement to file an Opening Brief within 40 days, pursuant to FSM Appellate Rule 31(a). Because the due date for Appellants' Opening Brief had long since passed, Appellees filed a Second Motion to Dismiss. The Court notes that except for the Motion for Enlargement of Time to File Brief, filed on October 9, 2014, Appellants have not requested any additional enlargement.

The burden is on the appellant to apply, before his[her] time allowance has run, for additional time upon a showing of real need which will not unduly prejudice the appellee. Until such application for extended time is made so that it may be considered before the allotted time has expired, it is evidence of a lack of good faith and failing extraordinary circumstances, it constitutes neglect which will not be excused.

Heirs of George v. Heirs of Dizon, 16 FSM R. 100, 114 (App. 2008). "Among the factors which the court considers on a motion to dismiss under Rule 31(c) [are] the length of delay in filing the brief; evidence of prejudice to the appellee; nature of the reason for appellant's failure to file on time and extent of appellants' efforts in mitigation." Chuuk v. Davis, 13 FSM R. 178, 183 (App. 2005) (quoting Nakamura v. Bank of Guam (I), 6 FSM R. 224, 227 (App. 1993)). The requested trial transcripts having been in Appellants' possession since February 14, 2015, coupled with the Record Ready Notice, that was issued on July 10, 2015, triggered a due date for filing Appellants' Opening Brief which is now presently more than four months overdue. Appellants have proffered no justification for the delay or taken any discernible effort to mitigate the lack of punctuality that accrues to Appellees' detriment.

Although dismissing an appeal on purely procedural grounds is a sanction normally reserved for severe disregard of the Rules resulting in prejudice to the opposing party, Nelson v. FSM Nat'l Election Dir. 16 FSM R. 412, 413 (App. 2009), this policy preference for adjudications on the merits does not negate all other considerations or make the procedural Rules a nullity. Heirs of George, 16 FSM R. at 115.

"It is within a single justice's power to dismiss an appeal upon the justice's own motion and with adequate notice, dismiss an appeal for an appellant's failure to timely file an opening brief." *Id.* at 113. In Palsis v. Tafunsak Mun. Gov't, 16 FSM R. 116, 128 (App. 2008), the court similarly held that a single Justice may not dismiss or otherwise determine an appeal, except upon stipulation of the parties or upon failure of a party to comply with the Rules' timing requirements. The "phrase 'timing requirements of these rules' has been interpreted to include an appellant's failure to file an opening brief . . . ." *Id.* at 128.

No Opening Brief having been filed or an enlargement sought (since October 9, 2014), the Court finds Appellants have exhibited "severe disregard" for the "timing requirements" contained in the FSM Rules of Appellate Procedure and as a result of this, the Appellees have been prejudiced.

Accordingly, the Court hereby GRANTS Appellees' Second Motion to Dismiss this Appeal. This appeal is dismissed.

\* \* \* \*