

311
Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp.
20 FSM R. 311 (App. 2016)

FSM SUPREME COURT APPELLATE DIVISION

CENTRAL MICRONESIA COMMUNICATIONS,)
INC. and BERNARD'S ENTERPRISES, INC.,)
Appellants,)
vs.)
FSM TELECOMMUNICATIONS CORPORATION,)
Appellee.)

APPEAL CASE NO. P4-2014

ORDER

Dennis K. Yamase
Chief Justice

Decided: February 18, 2016

APPEARANCES:

For the Appellants: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonía, Pohnpei FM 96941

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

* * * *

HEADNOTES

Appellate Review – Briefs, Record, and Oral Argument

Appellate Rule 30(b) encourages the parties to agree about the appendix's contents and that failing, an appellant is required, no later than ten days following issuance of the record ready notice from the clerk's office, to serve on the opposing party a designation of the portions of the record that the appellant intends to include within the appendix, along with a statement of issues to be presented for review. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 311, 313 (App. 2016).

Appellate Review – Briefs, Record, and Oral Argument

Appellate Rule 30(b)'s mandatory language contemplates that the appellants will serve its intended designation of the record and statement of issues on the appellee, giving the opposing party the opportunity to supplement that designation by imposing a duty on the appellants to include within the appendix the portions sought by appellee. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 311, 314 (App. 2016).

Appellate Review – Briefs, Record, and Oral Argument

Appellate Rule 28(e) requires the parties, in their briefs, to cite to the record as included in the appendix or the record as a whole. Equally important as the provision of an appendix to both the appellate panel and appellee's counsel, is the proper referencing to the record in appellant's brief. Clear identification of parts of the record containing matter that forms the basis for appellant's argument is the brief writer's responsibility, as the court is not required to search the record for error. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 311, 314 (App. 2016).

Appellate Review – Dismissal

Although Appellate Rule 3(a) authorizes dismissal, courts, in the exercise of sound discretion, should, especially when a failure to comply with procedural rules is in issue, be particularly prudent in issuing such a ruling until the recalcitrant party has had an opportunity to remedy the defects. A lesser sanction is appropriate when the noncompliant party's conduct is merely inadvertent and undue prejudice does not redound to the opposing party. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 311, 314 (App. 2016).

Appellate Review – Briefs, Record, and Oral Argument

Since the appellants have neglected to comply with Rule 30(b) when they did not contact the appellee to solicit its input about the appendix's contents and when there were other deficiencies in the appendix's composition, the appellants will be entitled to cure those procedural defects, as their noncompliance did not rise to the level of willful conduct and remedying the cited deficiencies within a finite period of time will not unduly prejudice the appellee. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 311, 314-15 (App. 2016).

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

A motion to dismiss the appeal because of deficiencies in the appellants' appendix will be denied and the appellants instructed to confer with the appellee about the contents of the appendix and record as a whole, and include the appropriate citations to the latter within the appellants' "amended" brief. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 311, 315 (App. 2016).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

The Notice of Appeal in the present matter was filed on February 20, 2014 and Appellants' Opening Brief on September 15, 2014. On October 30, 2014, Appellee filed a Motion to Dismiss Appeal/Motion to Enlarge Time to File and Serve Appellee's Brief[,] Pending [a] Decision on [the] Motion to Dismiss. Appellants' Opposition to Appellee's Motion to Dismiss Appeal was filed on December 5, 2014. Appellee then filed a Reply to Appellants' Opposition to Appellee's Motion to Dismiss Appeal on January 11, 2015.

The gravamen of Appellee's Motion to Dismiss is the inadequacy of the appendix affixed to Appellants' Opening Brief, along with the Record's composition; noting myriad deficiencies with both. The failure of Appellants to cite specific parts of the Record, in support of sundry arguments advanced within the Brief, is also a bone of contention raised by Appellee in the Motion to Dismiss.

Rule 30(a) of the Appellate Rules of Procedure sets forth the anticipated contents of an appendix to the Brief of an Appellant. In contradistinction, Appellee's Motion to Dismiss found Appellants' subject appendix lacked a table of contents; the trial docket sheet or clerk's certified list was absent,

as was the Notice of Appeal; Pleadings were not included; the Judgment and relevant Orders were missing; Exhibits to be relied upon were not affixed and with the exception of transcripts which purportedly supported the arguments of Appellants, the remainder of the transcript was not included.

In addition, Rule 30(b) encourages parties to agree, with respect to the contents of a respective appendix and that failing, an Appellant is required, no later than ten days following issuance of the Record Ready Notice from the Clerk's Office, serve on the opposing party a designation of the portions of the Record which Appellant intends to include within the appendix, along with a statement of issues to be presented for review.

Appellee herein contends, that no discourse took place between the two sides, concerning the relevant contents of the appendix and Appellants were also remiss, as far as serving notice of the designated parts of the Record they planned to include within the appendix. As such, Appellee notes it was denied input with regard to the composition of the appendix in issue, which it envisioned would include the transcript *in toto*, as well as all exhibits introduced below. In juxtaposition, only a fragment of the transcript was included and zero exhibits contained within Appellants' appendix.

Without the presence of a complete transcript or exhibits *per se*, Appellee claims it is hamstrung, in terms of referencing same to buttress various arguments. Appellee further maintains, that four of the five issues broached in Appellants' Brief are predicated upon on an alleged insufficiency of evidence and as a result, the absence of a complete transcript makes this deficiency even more acute. Finally, Appellee takes issue with a failure on the part of Appellants to appropriately cite to applicable segments of the Record in support of various factual representations/arguments within their Opening Brief.

Appellants' Opposition to Appellee's Motion to Dismiss, essentially concedes that certain relevant portions of the Record may have been "overlooked," however intimates the presence of an exhaustive replication of the Record is excused, when it may be considered superfluous. In support of this position, Appellants cites to the language of Rule 30(b), which provides, *inter alia*: "In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation." Accordingly, Appellants contend that a good faith effort was made to comply with the Appellate Rules of Procedure and hence there was substantial compliance.

Appellants further maintain that dismissal is not warranted simply because they may have "inadvertently overlooked" citing within the body of the Opening Brief all relevant portions of the Record. In support thereof, Appellants reference Rule 30(a), which sets forth, among other things: "The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such part." Finally, Appellants cite to Rule 30(f), which states: "The appellate division, may by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record or relevant parts thereof, as the court may require."

Finally, Appellants note that dismissal of an appeal for failure to adhere to procedural Rules is an extreme sanction which the Court, in its discretion, should dispense sparingly. *Assuming arguendo*, that the composition of the appendix and Record are found to be wanting, Appellants propose a lesser sanction, *to wit*: allowing them the opportunity to cure the alleged inadequacies and thereby come into compliance with the applicable Procedural Rules.

Appellee's Reply to Appellants' Opposition claims the latter's reliance on Rule 30(b) is misplaced, since there was no communication between the parties, concerning what should be designated as part of the subject Record. In essence, Appellee claims, that application of the Rule 30(b) sentence quoted

Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp.
20 FSM R. 311 (App. 2016)

by Appellants in their Opposition is contingent upon the parties' agreement, concerning the contents of the appendix or Appellants having served its intended designation of the Record and statement of issues on Appellee.

The mandatory language utilized by Rule 30(b) contemplates such a communiqué enabling the opposing party the opportunity to supplement the heretofore designation, by imposing a duty on the Appellants to include the portions coveted by Appellee within the appendix. As a result, Appellee contends, that absent this condition precedent having been met, the above-mentioned sentence of Rule 30(b) is inapplicable.

Appellee also counters the affirmation by Appellants, that Rule 30(a) provides "The fact that parts of the record are not included within the appendix shall not prevent the parties or the court from relying on such part," by noting that Rule 30(a) delineates various documents, which should be part and parcel of the Record, as they are not only germane, but critical to a thorough review of the underlying proceedings. The inference made by Appellee is that the omissions of Appellants were hardly *de minimis*.

Appellee's penultimate argument within its Reply dismisses the reference by Appellants to Rule 30(f), as immaterial, since an appendix requirement can only be waived, in limited circumstances, by Special Order of the Court. In conclusion, Appellee redirects the Court's attention to the legion of deficiencies inherent within both the appendix and Record's composition; seeking dismissal of the present Appeal, in light of Appellants' abject failure to comply with the governing procedural Rules.

This Court, having reviewed Appellants' Brief, coupled with all filings by the parties pertaining to the Motion to Dismiss, notes that the composition of both the appendix to the Opening Brief and concomitant Record (including references thereto) in the subject appeal are wanting in several respects. Chuuk v. Davis, 13 FSM R. 178, 182 (App. 2005), found the inclusion of specific documents should be made part and parcel of an appendix to a Brief, consistent with those set forth in Rule 30(a) (1) through (8).

With respect to inadequate citations to the Appendix or Record in its present form, the Davis Court also stated: "Rule 28(e) requires the parties[,] in their briefs[,] to cite to the record as included in the appendix or the record as a whole. We take such citations to the record seriously." *Id.* at 183. Quoting language from Nakamaura v. Bank of Guam (I), 6 FSM R. 224, 228 (App. 1993), the Davis Court added:

[e]qually important as the provision of an appendix to both the appellate panel and appellee's counsel, is the proper referencing to the record in appellant's brief. Clear identification of parts of the record containing matter that forms the basis for appellant's argument is the responsibility of the brief writer, as the Court is not required to search the record for error.

13 FSM R. at 183. Although Rule 3(a) of Appellate Procedure authorizes dismissal, in the exercise of sound discretion, Courts should be especially prudent, in terms of issuing such a Ruling (especially when a failure to comply with procedural Rules is in issue), until the recalcitrant party has had an opportunity to remedy the defects. Damarlane v. Pohnpei Legislature, 15 FSM R. 301, 308 (App. 2007). Damarlane further noted, that a lesser sanction is appropriate, when the conduct of the noncompliant party is merely inadvertent and undue prejudice does not redound to the opposing party. *Id.*

As such, this Court finds that Appellants neglected to comply with Rule 30(b), in that Appellee was not contacted, in terms of soliciting input regarding the contents of the appendix, in addition to

the referenced deficiencies in its current composition. Notwithstanding, Appellants will be entitled to cure these procedural defects, since their noncompliance does not rise to the level of willful conduct and remedying the cited deficiencies within a finite period of time will not unduly prejudice Appellee.

Accordingly, the Court hereby DENIES Appellee's Motion to Dismiss [the] Appeal and instructs Appellants to confer with Appellee, regarding the contents of the Appendix and Record as a whole, along with appropriate citations to the latter within its Brief. Appellants' "amended" Brief, consonant with these contemplated remedial efforts, shall be due no later than 30 days from issuance of this Order. Furthermore, the Court GRANTS Appellee's Motion to Enlarge Time to File [their respective brief]; which shall be due no later than 30 days after service of the "amended" Brief of Appellants.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NOS. 2007-008 & 2010-006
)	(Consolidated)
Plaintiff,)	
)	
vs.)	
)	
MARIANNE B. SETIK, THE ESTATE OF MANNEY)	
SETIK, ATANASIO SETIK, VICKY SETIK IRONS,)	
IRENE SETIK WALTER, MARLEEN SETIK, JUNIOR)	
SETIK, ELEANOR SETIK SOS, PATRICIA SETIK,)	
JOANITA SETIK PANGELINAN, individually as dba)	
C-STAR APARTELLE,)	
Defendants.)	
_____)	
FSM DEVELOPMENT BANK,)	
)	
Plaintiff,)	
)	
vs.)	
)	
MERIAM SETIK, CHRISTOPHER JAMES SETIK,)	
JERMINA SETIK, AREEN SETIK, individually and)	
dba C-STAR APARTELLE,)	
Defendants.)	
_____)	

ORDER

Lourdes F. Materne
Temporary Associate Justice*

Decided: February 25, 2016

*Associate Justice, Palau Supreme Court, Koror, Palau