

III. CONCLUSION

Regardless of the lesser standards that apply in revocation proceedings, due process is required. The defendant is entitled to a judicial determination of probable cause and to notice of those proceedings before the court can hold a delayed revocation hearing. This rule is jurisdictional. Ordinarily, when the warrant, summons, or order is executed, filed, and served, the defendant is provided with notice of this process, and the affidavit of violation is attached or adequately summarized therein, thereby fulfilling the procedural requirements of FSM Criminal Rule 32.1. This process, however, must be set in motion by the court, prior to the expiration of the probationary sentence.

UPON CONSIDERATION of the submissions and arguments of both parties, and the file and record contained herein, the court HEREBY DISMISSES the revocation matter for lack of jurisdiction over the defendant, Marson Edward.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

BENJAMIN M. ABRAMS,)	APPEAL CASE NO. P10-2014
)	
Appellant,)	
)	
vs.)	
)	
FSM DEVELOPMENT BANK,)	
)	
Appellee.)	
_____)	

ORDER DISMISSING APPEAL

Dennis K. Yamase
Chief Justice

Decided: March 23, 2016

APPEARANCES:

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HEADNOTES

Appellate Review – Decisions Reviewable – Final Decision Defined

In civil actions, the appellate division may take appeals from the trial division only from final decisions, but an order is not final when substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. Accordingly, a decision reserving certain questions for future determination or direction cannot ordinarily be final for the purposes of the appeal. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 343-44 (App. 2016).

Appellate Review – Decisions Reviewable

The well-established general rule is that only final judgment decisions may be appealed. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 344 (App. 2016).

Appellate Review – Decisions Reviewable – Final Decision Defined

When there was further trial court activity involving a determination of the specifics of the relevant sanctions requiring further analysis by the lower court, the order appealed from was not a "final decision" and consequently, the appellate court is without jurisdiction to consider the appeal. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 344 (App. 2016).

Appellate Review – Decisions Reviewable – Final Decision Defined

An adjudication on liability, without determining damages (the amount of that liability) is not a final judgment and thus not appealable. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 344 (App. 2016).

Appellate Review – Decisions Reviewable – Final Decision Defined; Appellate Review – Notice of Appeal

When the trial court issued an order awarding attorney's fees to counsel and a notice of appeal was filed, challenging the fee award, a final appealable order did not exist, thereby precluding appellate review, because the order appealed from established only the pecuniary responsibility for opposing counsel's reasonable fees but did not establish the amount of those fees. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 344 (App. 2016).

Appellate Review – Decisions Reviewable – Final Decision Defined; Appellate Review – Notice of Appeal

When a notice of appeal from the trial court's order denying reconsideration of the Rule 11 sanctions was lodged on June 20, 2014, the order was not a "final decision" since the specific amount of reasonable costs and attorney's fees was not determined until the issuance of the August 11, 2014 order. Hence, a subsequent notice of appeal was required in order to perfect an appeal challenging the propriety of levying sanctions. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 344-45 (App. 2016).

Appellate Review – Notice of Appeal

A timely notice of appeal from a final decision is a prerequisite to jurisdiction over an appeal. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345 (App. 2016).

Appellate Review – Decisions Reviewable; Appellate Review – Notice of Appeal

The Appellate Rule 4(a)(1) time limit is jurisdictional and if that time is not extended by a timely motion to extend that time period under Rule 4(a)(5), the appellate division is deprived of jurisdiction to hear the case. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345 (App. 2016).

Appellate Review – Decisions Reviewable; Appellate Review – Notice of Appeal

The relevant period of time, within which to file a notice of appeal is rigid, and the appellate court does not have the authority to allow an appeal that does not adhere to this time frame because an appellate court has jurisdiction over an appeal only if it is timely filed. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345 (App. 2016).

Appellate Review – Notice of Appeal

An "Amended Notice of Appeal" that appears in the appellant's appendix, but that was not served upon the appellees or filed with the court, clearly fails to comply with the timing requirements for filing notices of appeal and is not properly before the court. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345 (App. 2016).

Appellate Review – Decisions Reviewable

An appellate court has jurisdiction over an appeal only if it is timely filed. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345 (App. 2016).

Appellate Review – Notice of Appeal – Extension of Time

The time limit under the applicable rules is jurisdictional and the appellate court has no discretion to extend the time within which to file a notice of appeal. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345 (App. 2016).

Appellate Review – Dismissal

A single justice may dismiss an appeal for an appellant's failure to comply with the timing requirements for filing a notice of appeal that are set forth within the Appellate Rules. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345 (App. 2016).

Appellate Review – Notice of Appeal – Extension of Time

The time limit for filing a notice of appeal cannot be circumvented via an attempt to obtain an order *nunc pro tunc*, which runs counter to the underlying purpose of such a motion because the appellant does not seek the order to supply a record of an action previously done but omitted from the record through inadvertence or mistake, to have effect as of the former date, but instead asks the court to antedate an "Amended Notice of Appeal" that was never served, let alone filed and thus, was not listed in the underlying matter's certificate of record. That would be improper since the existence of the "Amended Notice" only came to light when it was included in the appendix of the appellant's opening brief. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 345-46 (App. 2016).

Appellate Review – Dismissal

When, given the absence of a timely filed appeal from a final decision, the appellate court has no jurisdiction, the appellee's motion to dismiss the appeal will be granted, thereby rendering moot all other motions. Abrams v. FSM Dev. Bank, 20 FSM R. 340, 346 (App. 2016).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

On June 20, 2014, Benjamin M. Abrams filed a Notice of Appeal, from an Order entered on June 12, 2014, by the Trial Division, which denied reconsideration of Rule 11 sanctions. The opening brief and appendix were submitted on December 10, 2014. The FSM Development Bank (FSMDB) filed a Motion [to] Dismiss [the] Appeal; Motion to Strike [a portion of the appendix] and a Motion to Enlarge Time [within which to file a responsive brief], on January 9, 2015. Abrams' Opposition to [the] Motion to Dismiss Appeal; to Strike, along with a Motion for an Order *Nunc Pro Tunc*, Augmenting the Record followed, on January 26, 2015. The FSMDB's reply, as well as an Opposition to the Motion to Augment the Record, was filed on February 2, 2015.

I. BACKGROUND

On January 22, 2014, the Defendants' Motion to Dismiss the underlying complaint in this matter was granted, Ehsa v. FSM Dev. Bank, 19 FSM R. 253 (Pon. 2014), and on February 3, 2014, a Motion for Rule 11 sanctions against the plaintiffs was filed. On April 29, 2014, the trial court issued a Memorandum and Order imposing Rule 11 sanctions upon plaintiffs' counsel (Appellant herein). Ehsa v. FSM Dev. Bank, 19 FSM R. 367 (Pon. 2014). The FSMDB proceeded to submit a Statement of Costs and Attorney's Fees on May 6, 2014. The plaintiffs filed a Motion for Reconsideration and to Vacate the April 29th order on May 12, 2014 and one day later, requested an enlargement of time, within which to respond to the FSMDB's Statement of Costs and Attorney's Fees. On May 22, 2014, the FSMDB filed an Opposition to Plaintiffs' Motion for Reconsideration and to Vacate the April 29th order, along with a Supplemental Statement of Attorney's Fees. Abrams' filed his reply to the aforementioned on June 2, 2014. As noted above, on June 12, 2014, an order was issued, denying reconsideration. Ehsa v. FSM Dev. Bank, 19 FSM R. 421 (Pon. 2014). On July 15, 2014, plaintiffs filed a motion, which requested a hearing on the determination of defendants' statement of costs and attorney's fees; defendants' opposition was submitted on July 24, 2014 and plaintiffs' reply to this opposition followed on July 30, 2014. An order denying plaintiffs' Motion for a Hearing and imposing reasonable attorney's fees in the amount of \$10,262.50, was issued on August 11, 2014.

A Notice of Appeal was filed on June 20, 2014. Within the appendix of the December 10, 2014 opening brief, appeared an "Amended Notice of Appeal."¹ It is noteworthy, that this document was never filed and as such, not made a part of the record. The subject "Amended Notice of Appeal" challenged the trial court's August 11, 2014 order, which denied the request for a hearing and determined the reasonable amount of attorney's fees to be imposed.

Notwithstanding Abrams' handwritten notation on the cover sheet of this "Amended Notice of Appeal," which reflected a filing date of September 22, 2014, Abrams later conceded, that it was never actually filed.² Accordingly, Abrams' January 26, 2015 motion to augment the record, via an order *nunc pro tunc*, asks this court to give retroactive effect to this unfiled appellate notice and by predating same, enable it to become part of the preexisting record.³

II. ANALYSIS

A. Appellate Jurisdiction - Final Decision

FSM Appellate Rule 4(a)(1)(A), sets forth, in pertinent part: "In civil cases, by the filing of a notice of appeal as provided in Rule 3[,] within forty-two (42) days after the date of the entry of the judgment or order appealed from, appeals may be taken: (A) from all final decisions of the trial divisions"

Abrams appealed the June 12, 2014 order denying reconsideration of Rule 11 sanctions, which had been imposed upon him. At issue is whether that order constituted a "final decision," as set forth

¹ Appendix at 11-13.

² Appellants' [sic] Opp'n to [the] Mot. to Dismiss Appeal; to Strike [and] Mot. for an Order *Nunc Pro Tunc*[,] Augmenting the Record, at 4.

³ Appellants' [sic] Opp'n to [the] Mot. to Dismiss Appeal; to Strike [and] Mot. for an Order *Nunc Pro Tunc*[,] Augmenting the Record at 4-5.

in Appellate Rule 4(a)(1)(A). Stated somewhat differently, could the trial court's June 12th order, which denied revisiting the April 29th order imposing sanctions against Abrams' be considered a "final decision," since there remained an outstanding determination *to wit*: ascribing a dollar amount to the sanctions levied.

Mori v. Hasiguchi, 18 FSM R. 83 (App. 2011), held: "We may take appeals from the Trial Division in civil actions[,] only from final decisions . . ." *Id.* at 84. Quoting from 4 AM. JUR. 2D Appellate Review § 90, at 714 (rev. ed. 1995), the Mori court further noted; "Generally, an order is not final where the substantial rights of the parties involved in the action remain undetermined and where the cause is retained for further action. Accordingly, a decision reserving certain questions for future determination or direction cannot ordinarily be final for the purposes of the appeal." Mori, 18 FSM R. at 84.

In this matter, the question concerning the dollar amount of the sanctions had yet to be determined when the trial court issued the April 29, 2014 decision, which found imposing Rule 11 sanctions upon Abrams' to be warranted or when it entered the June 12, 2014 order. In fact, the June 12th order appealed from, which denied reconsideration of said imposition, directed the plaintiffs to respond to the FSMDB's statement of costs and attorney's fees, Ehsa, 19 FSM R. at 425; reflecting that further action was needed before this determination could properly be considered final. "The well-established general rule is that only final judgment decisions may be appealed." Iriarte v. Individual Assurance Co., 17 FSM R. 356, 359 (App. 2011).

Not only did the trial court's June 12th order illustrate an absence of the requisite finality, but numerous filings were generated on the heels of its entry on June 12th. The post-issuance motions included, *inter alia*: Plaintiffs' July 15, 2014 Motion for a Hearing on Determination of Defendants' Statement of Costs and Attorney's Fees; Defendants' July 24, 2014 opposition thereto and Plaintiffs' reply to this opposition. As evidenced by this further court activity, which involved a determination of the specifics of the relevant sanctions, the June 12th order appealed from, hardly represented a "final decision." Given this further analysis undertaken by the lower court, there was no "final decision" and consequently, this court is without jurisdiction to consider the appeal.

"An adjudication on liability[,] without determining damages (the amount of that liability) is not a final judgment and thus[,] not appealable." FSM Dev. Bank v. Adams, 12 FSM R. 456, 462 (App. 2004). A "final decision" came to the fore on August 11, 2014, when the trial court issued an order that affixed a finite amount, in terms of the reasonable attorney's fees to which the FSMDB was entitled.

In Santos v. Bank of Hawaii, 9 FSM R. 285 (App. 1999), the trial court had issued an order which awarded attorney's fees to counsel, concerning an expenditure of time, in order to respond to an unsuccessful motion for relief from judgment. A notice of appeal was filed, challenging the award of fees. In dismissing the appeal, the Santos court found, that although the order appealed from established the pecuniary responsibility for opposing counsel's reasonable fees, it had not established the amount of those fees, therefore a final order did not exist, precluding appellate review. *Id.* at 287.

Similarly, the gravamen of the instant notice of appeal, lodged on June 20, 2014, addressed the trial court's order denying reconsideration of the Rule 11 sanctions it had imposed and as noted above, this order was not a "final decision" since the specific amount of reasonable costs and attorney's fees, to which the FSMDB was entitled, was not determined until issuance of the August 11, 2014 order. Pohnpei v. AHPW, Inc., 14 FSM R. 1 (App. 2006) has held that notwithstanding the fact that a fee award was part of a respective judgment, the post-judgment order, that spoke to the calculation and ultimate amount necessitated a further notice of appeal. *Id.* at 13. Hence, a subsequent notice of

appeal was required, in order to perfect the subject appeal, which sought to challenge the propriety of levying sanctions. Felix v. Adams, 13 FSM R. 28, 29 (App. 2004).

B. Appellate Jurisdiction - Timing Requirements

The August 11, 2014 order, that denied plaintiffs' motion for a hearing that determined that the reasonable amount of Rule 11 sanctions equaled \$10,262.50, was a "final decision." No notice of appeal was filed from that order. "A timely notice of appeal from a final decision is a prerequisite to our jurisdiction over an appeal." Berman v. College of Micronesia-FSM, 15 FSM R. 582, 589 (App. 2008).

Under FSM App. R. 4(a)(1), a prospective appellant has forty-two (42) days to file a notice of appeal and absent an extension having been granted, as per App. R. 4(a)(5), the appellate division is without jurisdiction to entertain the appeal, which is not filed within this time frame. "The time limit set by Rule 4(a)(1) is jurisdictional and if that time is not extended by a timely motion to extend that time period under Rule 4(a)(5), the appellate division is deprived of jurisdiction to hear the case." Hartman v. Bank of Guam, 10 FSM R. 89, 95 (App. 2001).

As previously noted, Abrams failed to comply with the subject time limit. Although an unfiled "Amended Notice of Appeal" appears at pages 11 through 13 of the appendix to the December 10, 2014 opening brief, it was not served upon the Appellees,⁴ much less filed with this court. The relevant period of time, within which to file a notice of appeal is rigid, and this court does not have the authority to allow an appeal that does not adhere to this time frame. As succinctly stated in Bualuay v. Rano, 11 FSM R. 139, 145 (App. 2002): "An appellate court has jurisdiction over an appeal only if it is timely filed."

In sum, the time limit under the applicable rules is jurisdictional and this court has no discretion to extend the time within which to file a notice of appeal. Goya v. Ramp, 13 FSM R. 100, 104-05 (App. 2005). Since the purported notice of appeal, found in Abram's opening brief, was never filed, it clearly fails to comply with the timing requirements and is not properly before the court. As such, an Appellate Court lacks jurisdiction and a single Justice may dismiss an appeal for failure to comply with the timing requirements for filing a notice of appeal, set forth within the Appellate Rules. Palsis v. Tafunsak Mun. Gov't, 16 FSM R. 116, 128-29 (App. 2008); O'Sonis v. Bank of Guam, 9 FSM R. 356, 360 (App. 2000).

C. Nunc Pro Tunc Motion

Abrams' Motion for an Order *Nunc Pro Tunc*[,] Augmenting the Record, "request[s] that the Court correct the apparent accidental misplacing and/or an inadvertent omission to file the Amended Appeal Notice, on 22 September 2014, retroactively *nunc pro tunc*."⁵ At the expense of repetition, the referenced "Amended Notice of Appeal" initially appeared within the Appendix of Appellants' December 10, 2014 opening brief. Prior thereto, this document had neither been served upon the other parties, nor filed and *a fortiori*, was not made a part of the record.

Abrams' instant motion endeavors to have this "Amended Notice of Appeal" be retroactively

⁴ Affidavits of Attorney Nora E. Sigrah and FSMDB Legal Secretary Rohma B. Silbanuz, affixed to Appellees' Reply and Opposition to Appellants' Motion to Augment the Record.

⁵ Appellants' Motion for an Order *Nunc Pro Tunc*[,] Augmenting the Record at 4-5.

acknowledged as filed on the intended date: September 22, 2014. The time limit for filing a notice of appeal, within the above-mentioned rules, cannot be circumvented, via the present attempt to obtain an order *nunc pro tunc*, which runs counter to the underlying purpose of such a motion. As set forth in People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 15 FSM R. 133, 134 (Yap 2007): "A court may issue an order *nunc pro tunc* to supply a record of an action previously done but omitted from the record through inadvertence or mistake, to have effect as of the former date." *Id.* (quoting Western Sales Trading Co. v. Ponape Federation of Coop. Ass'ns, 6 FSM R. 592, 593-94 (Pon. 1994)).

The "Amended Notice of Appeal" in issue hardly constituted a scenario, whereby this document was actually filed, yet a recording of same was absent from the record and therefore this omission should be corrected to reflect the filing date. As set forth above, the facts under this case are different, since the "Amended Notice" was never served, let alone filed and thus, not listed in the Certificate of Record for the underlying matter. Utilization of a *nunc pro tunc* entry, as sought by Abrams, would be improper, since it would require the court to antedate a document, the existence of which only came to light, within the appendix of Abrams' opening brief.

Accordingly, Abrams' motion for an order *nunc pro tunc* is HEREBY DENIED and given the absence of a timely filed appeal of a final decision, this court has no jurisdiction and the FSMDB's motion to dismiss the appeal is HEREBY GRANTED; thereby rendering moot the FSMDB's remaining motions to strike and to enlarge time.

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FSM SUPREME COURT TRIAL DIVISION

PACIFIC INTERNATIONAL, INC.,)	CIVIL ACTION NO. 2014-046
)	
Plaintiff,)	
)	
vs.)	
)	
THE NATIONAL GOVERNMENT OF THE)	
FEDERATED STATES OF MICRONESIA, by)	
and through its Agency, the FSM PROGRAM)	
MANAGEMENT UNIT (PMU),)	
)	
Defendant.)	
_____)	

ORDER

Beauleen Carl-Worswick
Associate Justice

Decided: March 23, 2016

APPEARANCES:

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