

VII. CONCLUSION

The trial court findings are supported by substantial evidence in the record. The trial court did not misconstrue the applicable law. And, construing the entire body of evidence in the light most favorable to the appellees, the trial court's findings were not clearly erroneous. Accordingly, we affirm the trial court.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

CHRISTOPHER CORPORATION, PATRICIA)	APPEAL CASE NO. C1-2015
(PEGGY) SETIK, MARIANNE B. SETIK, THE)	APPEAL CASE NO. C1-2014
ESTATE OF MANNEY SETIK, ATANASIO SETIK,)	APPEAL CASE NO. C2-2015
VICKY SETIK IRONS, IRENE SETIK WALTER,)	(Civil Action No. 2007-1008)
MARLEEN SETIK, JUNIOR SETIK, ELEANOR)	
SETIK SOS, JOANITA SETIK PANGELINAN,)	
MERIAM SETIK SIGRAH, CHRISTOPHER JAMES)	
SETIK, GEORGE SETIK, individually and d/b/a)	
CHRISTOPHER STORE,)	
)	
Appellants,)	
)	
vs.)	
)	
FSM DEVELOPMENT BANK,)	
)	
Appellee.)	

ORDER GRANTING ENLARGEMENTS OF TIME AND CONSOLIDATING APPEALS

Decided: May 20, 2016

BEFORE:

Hon. Cyprian Manmaw, Specially Assigned Justice, Presiding*
Hon. Midasy O. Aisek, Specially Assigned Justice**
Hon. Benjamin F. Rodriguez, Specially Assigned Justice***

*Chief Justice, State Court of Yap, Colonia, Yap
**Associate Justice, Chuuk State Supreme Court, Weno, Chuuk
***Chief Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

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HEADNOTES

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

When the appellants have failed to adhere to the timeline set forth in Appellate Rule 31(a), the appeal is subject to dismissal pursuant to Appellate Rule 31(c) because it is within the court's discretion to dismiss an appeal for late filing of an appellant's brief. Among the factors which the court considers on a Rule 31(c) motion to dismiss are the length of delay in filing the brief; evidence of prejudice to the appellee; nature of the reasons for appellant's failure to file on time; and extent of appellant's efforts in mitigation. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 387 (App. 2016).

Appellate Review – Briefs, Record, and Oral Argument

Notwithstanding that 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, the court does not condone what it may perceive as a practitioner causing undue delay in filing a brief. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 387 (App. 2016).

Appellate Review – Motions

Appellate Rule 26(b) grants the appellate division broad discretion to grant an extension of time upon a showing of good cause, but enlargement is not automatic and will be granted only for good cause shown. "Good cause" is a legally sufficient reason or the burden placed on a litigant, usually by court rule or order, to show why a request should be granted or an action excused. In making its inquiry into a movant's good cause, the court's primary consideration should be the diligence of the party seeking the enlargement. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 387 (App. 2016).

Appellate Review – Motions

There are times when being a busy lawyer would satisfy the good cause standard. The court's discretion lies in determining whether the busy lawyer (since all lawyers claim to be busy) was busy enough to be considered good cause. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 388 (App. 2016).

Appellate Review – Dismissal

Dismissal at the appellate level is undoubtedly a harsh sanction and the court should exercise its discretion to dismiss under Appellate Rule 3(a) sparingly. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 388 (App. 2016).

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

Continued unfettered use of Appellate Rule 26(b) to enlarge time because of counsel's inability to find time to prepare a brief could quickly rise to a level of abuse causing undue delay, thus subjecting the appeal to dismissal. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 389 (App. 2016).

Appellate Review

The absence of express authority in FSM appellate case law to consolidate similar, but not identical, appeals does not mean the court lacks the ability to do so when appropriate circumstances present themselves so long as it does not conflict with any rule or law. Christopher Corp. v. FSM Dev.

Bank, 20 FSM R. 384, 389-90 (App. 2016).

Appellate Review

Since appeals may be consolidated by order of the Supreme Court appellate division on its own motion or on a party's motion, or by stipulation of the parties to the several appeals, it is clear that the court exercises broad discretion in determining whether or not to consolidate cases. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 390 (App. 2016).

Appellate Review

When common questions of fact pervade the trial case from which the three appeals all arose and when each appellate case shares at least one common issue, if not more, with at least one of the other cases, consolidation of the appeals is appropriate because addressing the several legal issues arising from the same facts and procedural history with commonality of parties in a single consolidated proceeding conserves judicial resources, reduces cost and delay, and expedites the disposition of the issues without sacrifice of justice and because consolidating the matters would further the interest of justice and ultimately promote judicial economy since the issues of law to be decided are closely interrelated in all three cases and since hearing the matter as three separate appeals would result in unnecessary duplicative efforts by the parties and the court. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 390 (App. 2016).

Civil Procedure – Consolidation

The purpose of possessing the power to consolidate cases is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 391 (App. 2016).

* * * *

COURT'S OPINION

PER CURIAM:

Now before the court are several motions and oppositions thereto: Appellants' Motion to Enlarge Time filed January 11, 2016; Appellants' Motion to Enlarge Time filed February 11, 2016; Appellee's Opposition to Motion for Enlargement of Time filed February 18, 2016; Appellants' Motion to Consolidate Appeals and Motion for Enlargement of Time filed March 21, 2016; Appellee's Motion to Dismiss Appeal, Opposition to Motion to Enlarge Time, and Opposition to Motion to Consolidate, and; Appellants' Memorandum in Opposition to Motion to Dismiss Appeal.

STATEMENT OF FACTS

These three appeal cases arise from several orders entered by the FSM Supreme Court trial division in Civil Action No. 2007-1008. Appeal Case No. C1-2014 appeals the order in Aid of Judgment issued on February 14, 2014 for the order of sale of properties as well as a Writ of Garnishment issued that same day. Appeal Case No. C1-2015 appeals the trial division's order issued on July 17, 2015 denying defendants' requests to set aside the default judgment issued September 23, 2009, Orders in Aid of Judgment issued on April 5, 2013 and February 14, 2014, a Writ of Garnishment issued February 14, 2014, motion to stay execution of judgment, and motion for injunctive relief. Appeal Case No. C2-2015 appeals the trial division's order denying Defendants' motion to set aside the order filed on July 17, 2015 and motion to disqualify.

ANALYSIS

I. APPELLANTS' MOTIONS FOR ENLARGEMENT OF TIME AND APPELLEE'S MOTION TO DISMISS APPEAL

In Appeal Case No. C1-2015, Notice of Appeal was filed on August 25, 2015 followed by the Statement of Issues on August 31, 2015. Appellants appeal the trial division's Order issued July 17, 2015 denying defendants' Motion to Set Aside Judgment, denying defendants' Motion to Stay, denying defendants' Motion for Injunctive Relief, and issuing an order to show cause as to why defendants' counsel should not be held in contempt for the directive to BS Distributing Company not to follow the Writ of Garnishment. Record Ready Notice was filed on November 2, 2015. On December 1, 2015, the Notice of Briefing Schedule was filed requiring Appellants to file their opening brief on or before January 11, 2016. On January 11, 2016, Appellants filed a Motion for Enlargement of Time, which was not opposed by the Appellee. On February 11, 2016, Appellants' filed a second motion to enlarge time requesting a due date of March 21, 2016, which is opposed by Appellee as reflected in its opposition filed February 18, 2016. Again, on March 21, 2016, Appellants filed another Motion to Enlarge Time. On March 28, 2016, Appellee filed a Motion to Dismiss Appeal. Appellants filed a Memorandum in Opposition to Motion to Dismiss Appeal on April 7, 2016. The court has not addressed the motions. Whether Appellants' several enlargements for time or Appellee's Motion to Dismiss Appeal should be granted is currently the issue before the court.

Appellants have failed to adhere to the timeline set forth in FSM Appellate Rule 31(a). Therefore, the appeal is subject to dismissal pursuant to FSM Appellate Rule 31(c). The instant motion is Appellants' third motion for enlargement of time to file their opening brief. FSM Development Bank opposes the last two motions for extension and moves this court to dismiss the appeal pursuant to FSM Appellate Rule 31(c) based on Appellants' failure to prosecute this matter by failing to timely file their opening brief and appendix. It contends that the length of delay is substantial, the reasons presented for Appellants' failure to timely file their briefs are without merit, prejudice to Appellee is substantial, and Appellants have not taken steps in mitigation.

"It is within the court's discretion to dismiss an appeal for late filing of an appellant's brief. Among the factors which the court considers on a Rule 31(c) motion to dismiss are the length of delay in filing the brief; evidence of prejudice to the appellee; nature of the reasons for appellant's failure to file on time; and extent of appellant's efforts in mitigation." Cuipan v. FSM, 10 FSM Intrm. 323, 325 (App. 2001); *see also* Chuuk v. Davis, 13 FSM Intrm. 178, 183 (App. 2005); O'Sonis v. Bank of Guam, 9 FSM Intrm. 356, 361 (App. 2000); Nakamura v. Bank of Guam (I), 6 FSM Intrm. 224, 227 (App. 1993).

Notwithstanding, FSM Appellate Rule 26(b) states that "[t]he 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." The court does not condone what it may perceive as a practitioner causing undue delay. Nevertheless, FSM Appellate Rule 26(b) grants the appellate division broad discretion to grant an extension of time upon a showing of good cause. O'Sonis, 9 FSM Intrm. at 361 (citing Kimoul v. FSM, 4 FSM Intrm. 344, 346 (App. 1990)). Enlargement is not automatic and will be granted only for good cause shown. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 627 (App. 2011). "Good cause" is defined as "[a] legally sufficient reason" or "the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused." BLACK'S LAW DICTIONARY 231 (8th ed. 2004). In making its inquiry into a movant's good cause, the court's primary consideration should be the diligence of the party seeking the enlargement. *See* Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95 (9th Cir. 2000) (quoting Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-09 (9th Cir. 1992)).

Here, all Appellants' counsel's motions for enlargement cite the reasons for her failure to file a brief. In her first Motion to Enlarge Time, counsel states the brief was not ready "due to several other deadlines and filings [i]n other cases, and other family obligations." Appellants' Mot. to Enlarge Time at 1 (Jan. 11, 2016). Counsel cites another appellate case she is working on to submit a brief and appendices, a trial scheduled in the coming weeks, and a family funeral as reasons for the delay. *Id.* at 1-2. Similarly, the second motion to enlarge time cited other deadlines and filings in other cases as well as extended travel outside of Pohnpei as reasons for the delay. Appellants' Mot. to Enlarge Time at 1-2 (Feb. 11, 2016). Appellants' counsel also informed the court of her status as a solo practitioner without means to hire a legal assistant or co-counsel to assist with her heavy case load. *Id.* at 2. Appellants' last Motion to Enlarge Time requests the court grant additional time so that the court may consider consolidation of this matter with the sister appeals. Appellants' Mot. to Enlarge Time at 3 (Mar. 21, 2016).

Appellee argues that Appellants' counsel's reasons are "insufficient to grant any further enlargements." Appellee's Opp'n to Mot. for Enlargement of Time at 2. In support of that argument, Appellee cites Palsis v. Tafunsak Municipal Government, 16 FSM Intrm. 116, 130 (App. 2008).

Palsis is distinguishable from the case at bar. In that case, "[n]ot once since the Chief Clerk issued the August 22, 2007 amended briefing schedule, ha[d] Palsis sought an enlargement of time until after the deadline ha[d] passed and the court issued an order." Palsis, 16 FSM Intrm. at 130. The court went on to state:

There is a pattern here. Enlargements of time were only sought after filing dates had passed. This was true whether the date was set by the court or by rule, or was even suggested by Palsis as when the brief would be done. Palsis's attorney even stated that he "thought that it was better" to finish the brief first and then ask for an enlargement of time for the court "to accept the brief late." Palsis further explained that, in his counsel's view, "this approach was better than getting multiple orders of enlargement of time and then missing the deadlines again." . . . [T]his practice is considered evidence of a lack of good faith.

Id. (citations omitted). Additionally, Appellant's brief in Palsis was filed six months late and no enlargements were sought. *Id.* at 131.

There are "times when being a busy lawyer would satisfy the good cause standard [T]he court's discretion lies in determining whether the busy lawyer (since all lawyers claim to be busy) was busy enough to be considered good cause." Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 627 (App. 2011).

Here, it is a very close case. Appellants' counsel has come dangerously close to having her clients' case dismissed. Appellants here have filed enlargements of time on the due date of each successive proposed due date and are three months late in filing their brief as measured by the original due date of January 11, 2016. Nevertheless, the facts of this case do not rise to such a level of neglect as Palsis so as to convince this court that Appellants' counsel lacks good faith or is otherwise abusing the enlargement mechanism in FSM Appellate Rule 26(b). Dismissal at the appellate level is undoubtedly a harsh sanction and this court should exercise its discretion to dismiss under FSM Appellate Rule 3(a) sparingly. Under the circumstances presented here, good cause appearing, and in respect to this court's preference for adjudicating matters on the merits, the court does not dismiss the appeal. See O'Sonis v. Bank of Guam, 9 FSM Intrm. 356, 361 (App. 2000); Nakamura v. Bank of Guam (I), 6 FSM Intrm. 224, 229 (App. 1993); Paul v. Hedson, 6 FSM Intrm. 146, 147 (Pon. 1993); Truk Transp. Co. v. Trans Pacific Import, Ltd., 3 FSM Intrm. 440, 443 (Truk 1988); Lonno v. Trust

Territory (III), 1 FSM Intrm. 279, 281 (Kos. 1983).

Appellants' counsel is warned, however, that continued unfettered use of FSM Appellate Rule 26(b) because of counsel's inability to find time to prepare a brief could quickly rise to a level of abuse causing undue delay, thus subjecting the appeal to dismissal. In the event Appellant does not strictly adhere to any more deadlines set by the court or in the FSM Appellate Rules, the court will dismiss the consolidated appeal. This shall be the last enlargement this panel will grant for the filing of Appellants' opening brief.

Appellee further claims substantial prejudice if the case were not dismissed post-haste. Appellee's Mot. to Dismiss Appeal at 4-6 (Mar. 28, 2016). Such claim belies the fact that the trial court denied Appellants' motion to stay judgment entered on February 14, 2014, thereby authorizing Appellee to utilize the proper legal channels to seek out the judgment debtors for payment of the judgment rendered therein.

ACCORDINGLY, good cause appearing, the court hereby GRANTS Appellants' Motions for Enlargement of Time and thereby necessarily DENIES Appellee's Motion to Dismiss Appeal. Because this Court is consolidating the above captioned appeals, *see infra* Part II, Appellants shall serve and file a brief and appendix within 40 days after the date of notice by the clerk of the appellate division that the record is ready in Appeal Case No. C2-2015 in accordance with FSM Appellate Rule 31(a). As discussed *supra*, failure to meet this deadline will subject this appeal to dismissal.

II. APPELLANTS' MOTION TO CONSOLIDATE APPEAL CASE NOS. C1-2014, C1-2015, AND C2-2015

On March 21, 2016, Appellants moved this court to consolidate Appeal Nos. C1-2014, C1-2015, and C2-2015 and thereafter issue a briefing schedule for the consolidated appeal.

In Appeal Case No. C1-2014, Appellants directly challenges the Order in Aid of Judgment and Writ of Garnishment entered on February 14, 2014 as erroneous, contrary to law, and not based on substantial evidence. In Appeal Case No. C1-2015, Appellants contest the trial court's denial of their motions to set aside or vacate the default judgment, orders in aid of judgment, writ of garnishment, stay execution of judgment, and injunctive relief issued July 17, 2015. In the Statement of Issues, counsel expresses that involvement of temporary justice Materne in the case was erroneous, contrary to law, and in violation of the FSM Constitution. The third, Appeal Case No. C2-2015, appeals an order entered October 15, 2015 which denied Appellants' Motion to Set Aside entry of the July 17, 2015 Order, which is the subject of Appeal Case No. C1-2015, and denying a motion to disqualify temporary justice Materne.

In its opposition to the motion, Appellee argues there is no appellate authority supporting Appellants' motion for consolidation. In support of this argument, Appellee cites Kosrae Credit Union v. Palik, 10 FSM Intrm. 134, 136 (App. 2001) as appellate authority that allows consolidation of multiple appellate cases where the issue in both appeals is identical. Appellee's Opp'n to Mot. to Consolidate at 10. Appellee next cites to Felix v. Adams, 13 FSM Intrm. 28 (App. 2004), which stated consolidation is appropriate in an appeal from an order imposing sanctions with an appeal from an order fixing attorney's fees. Appellee's Opp'n to Mot. to Consolidate at 10. Appellee thereby concludes that there exists no appellate authority providing for consolidation of appeals under the current situation because the "three appeals are taken from very different trial court orders entered on three different dates spanning twenty (20) months." *Id.*

Appellee overlooks the fact that the absence of express authority in FSM appellate case law to consolidate similar, but not identical, appeals does not mean the court lacks the ability to do so when

appropriate circumstances present themselves so long as it does not conflict with any rule or law. Although this might very well be a case of first impression at the appellate level setting, we can look to the procedure followed by the FSM Supreme Court trial division, the several state courts, and non-FSM sources, particularly decisions by courts in the United States, for aid in our interpretation of FSM Appellate Rule 3(b). Alep v. United States, 7 FSM Intrm. 494, 496 (App. 1996).

The FSM Rules of Appellate Procedure state that "[a]ppeals may be consolidated by order of the Supreme Court appellate division upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals." FSM App. R. 3(b). It is clear that the court exercises broad discretion in determining whether or not to consolidate cases. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 293, 295 (Pon. 2001); Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 463, 464 (Pon. 2001); see Sampson v. Sapoznik, 117 Cal. App. 2d 607, 609, 256 P.2d 346, 347 (1953) (citing Silver v. Bank of America, 43 Cal. App. 2d 837, 838 (1941)). The court may consolidate actions involving a common question of law or fact. Pacific Sky Lite Hotel v. Penta Ocean, 18 FSM Intrm. 109, 110 (Pon. 2011); Suldan, 10 FSM Intrm. at 464.

It is indisputable that common questions of fact pervade the trial case, Civil Action No. 2007-1008, from which these three appeals arise; namely, the court ordered sale of Appellants' properties to satisfy a judgment and the resulting flurry of motions and orders based on the decision in that order and temporary justice Materne's involvement in the case. Because each of the appeals originates from a single identical civil case, the operative facts are identical for each appeal, although the appeals were each taken at different stages of the trial division proceeding.

Appellee argues that because the "three appeals are taken from very different trial courts [sic] orders entered on three different dates spanning twenty (20) months . . . the procedural history, standards of review, issues and anticipated legal argument in all three appeals are all very different." Appellee's Opp'n to Mot. to Consolidate at 10. Appellee is correct that the appeals are taken from different orders issued by the trial division. Notwithstanding, a close inspection of the orders on appeal persuades the court that the issues to be addressed in each appeal will necessarily involve similar or overlapping appellate records, legal arguments and standards of review. Appeal Case No. C1-2014 appeals the February 14, 2014 order for sale of the Nepon #2 property as aid in judgment and the writ of garnishment for rental income from a separate property. Appeal Case No. C1-2015 appeals, in addition to others, the trial division's July 17, 2015 order denying a motion to set aside the February 14, 2014 judgment which was directly appealed in Appeal Case No. C1-2014. That appeal also disputes temporary justice Materne's involvement in the case. Appeal C2-2015 appeals the trial division's October 15, 2015 order denying defendants' motion to set aside entry of the July 17, 2015 order which is appealed in Appeal Case No. C1-2015 and denying defendants' motion to disqualify temporary justice Materne from the case. Based on the foregoing, it is clear that each appellate case shares at least one, if not more, common issues with at least one of the other cases. See Pacific Legal Found. v. California Coastal Comm'n, 33 Cal. 3d 158, 165 (1982) (suggesting cases eligible for consolidation should share at least one common issue). Ultimately, the issues boil down to whether or not the sale of the properties and writ of garnishment were proper as aids in judgment and whether or not temporary justice Materne's involvement in the case was improper. The questions presented are so related in the cases as to make it advisable to consolidate.

Appellee also notes that it "would be wholly unable to present all of its arguments for all three appeals in one brief within the page limits specified by FSM Appellate Rule 28(g)." Appellee's Opp'n to Mot. to Consolidate at 12. While this may be true, it is pure speculation at this time and easily overcome by filing a motion for permission from the court to exceed the length limitation pursuant to FSM Appellate Rule 28(g).

The purpose of possessing the power to consolidate cases "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2381 (1971). Here, consolidation of these appeals is appropriate. Addressing the several legal issues arising from the same facts and procedural history with commonality of parties in a single consolidated proceeding conserves judicial resources, reduces cost and delay, and expedites the disposition of the issues without sacrifice of justice. Consolidating proceedings in these matters would further the interest of justice and ultimately promote judicial economy because the issues of law to be decided are closely interrelated in all three cases and because hearing the matter as three separate appeals would result in unnecessary duplicative efforts by the parties and the court.

Appellants requested this court to consolidate C1-2014 and C2-2015 into this matter, C1-2015. Appellants overlook the fact that the certified record in this matter does not include the order appealed in C2-2015. Therefore, it is more appropriate to consolidate C1-2014 and C1-2015 into C2-2015 for purposes of preserving a complete record. Once the record is certified therein, it will include all the relevant orders in each appeal.

NOW THEREFORE IT IS HEREBY ORDERED that Appeal Case No. C1-2014 and Appeal Case No. C1-2015 are hereby CONSOLIDATED with Appeal Case No. C2-2015 pursuant to FSM Appellate Rule 3(b).

IT IS FURTHER ORDERED that Appellants shall serve and file a brief and appendix in consolidated Appeal Case No. C2-2015 within 40 days after the date of notice by the clerk of the appellate division that the record is ready in accordance with FSM Appellate Rule 31(a). As discussed *supra* Part I, failure to meet this deadline will result in the dismissal of this matter.

* * * *

FSM SUPREME COURT TRIAL DIVISION

PISENTE PILLIAS, for his minor son, FJ PILLIAS,)
)
 Plaintiff,)
)
 vs.)
)
 SAKI STORES, Weno Island, Chuuk State, and)
 CHUUK PUBLIC UTILITIES CORPORATION,)
)
 Defendants.)
)

CIVIL ACTION NO. 2015-1030

ORDER GRANTING DISMISSAL WITHOUT PREJUDICE

Ready E. Johnny
Associate Justice

Decided: May 23, 2016