

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 OF DISMISSAL

Dennis K. Yamase  
Chief Justice

Decided: September 29, 2016

APPEARANCES:

For the Appellants: Marstella E. Jack, Esq.  
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For the Appellee: Fredrick L. Ramp, Esq.  
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HEADNOTES

Appellate Review – Briefs, Record, and Oral Argument

Under Appellate Rule 10(b)(3), when an appellant neglects to communicate with the opposing party about which portions of the record it intends to request, the appellee is deprived of an opportunity to designate additional parts, if not the entire transcript. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 649, 650 (App. 2016).

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

The burden is on the appellant to apply, before his or 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. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 649, 651 (App. 2016).

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

Among the factors which the court considers on a Rule 31(c) motion to dismiss an appeal 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 appellant's efforts in mitigation. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 649, 651 (App. 2016).

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 adjudication on the merits does not negate all other considerations or make the procedural rules a nullity. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 649, 651 (App. 2016).

Appellate Review – Dismissal

When the appellants have had ample time within which to file their brief after the court's February 18th order, much less engage in a dialogue with opposing counsel about what parts of the trial transcript need to be reproduced and made a part of the record and when the September 27th due date for filing a response to the appellee's motion to dismiss has expired and no enlargement was sought by the appellants, the appellee has been prejudiced by the resultant inordinate delay and the appeal may be dismissed by a single justice for failure to comply with the Appellate Rules' timing requirements. Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 649, 651 (App. 2016).

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## COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

On September 5, 2016, Appellee filed a Renewed Motion to Dismiss [this appeal]. On September 15, 2016, Appellants filed a Request for an Enlargement of Time to Respond to Appellee's Motion to Dismiss. An Order granting Appellants' enlargement was issued on September 21, 2016; setting a due date of September 27, 2016, for the responsive filing.

The Court notes, that on August 2, 2016 Appellants' July 21, 2016 motion seeking "one last enlargement of time," within which to file their "amended" opening brief was granted. In an Order entered February 18, 2016, the Appellee's first Motion to Dismiss was denied, but the Order directed 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." [Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp., 20 FSM R. 311, 315 (App. 2016).]

This Court found, that under FSM Appellate Rule 10(b)(3), when an Appellant neglects to communicate with the opposing party, in terms of which portions of the Record it intends to request, the Appellee is deprived of an opportunity to designate additional parts, if not the entire transcript. Appellants herein failed *inter alia*, to comply with the mandate of FSM Appellate Rule 10(b)(3), as there was no communication with Appellee, concerning what portions of the transcript would be reproduced. Adherence to this condition would have obviated Appellee's claim that the transcript, as requested by the Appellants, was incomplete.

Central Micronesia Commc'ns, Inc. v. FSM Telecomm. Corp.  
20 FSM R. 649 (App. 2016)

The Court-ordered September 27, 2016 deadline for Appellants to file their Response to Appellee's Motion to Dismiss has lapsed and there has been no response and no additional request for an enlargement by Appellants.

[T]he 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) [of the FSM Rules of Appellate Procedure] [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 appellant's efforts in mitigation." Chuuk v. Davis, 13 FSM R. 178, 183 (App. 2005) (quoting Nakamura v. Bank of Guam III, 6 FSM R. 224, 227 (App. 1993)). 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 adjudication on the merits does not negate all other considerations or make the procedural rules a nullity. Heirs of George, 16 FSM R. at 115.

Appellants have been provided ample time, within which to file their amended/compliant brief, in terms of remedial efforts denoted in this Court's February 18th Order, much less engage in a dialogue with opposing Counsel, with respect to what portions of the trial transcript need to be reproduced and made a part of the Record. Since the September 27th due date for filing a Response to Appellee's Motion to Dismiss has expired and no enlargement was sought by the Appellants, the Court finds that Appellee has been prejudiced by the resultant inordinate delay. Finally, a single justice may dismiss an appeal upon a failure to comply with the Rules' timing requirements. Palsis v. Tafunsak Mun. Gov't, 16 FSM Intrm. 116, 128 (App. 2008).

Accordingly, this Court hereby GRANTS the Appellee's Motion to Dismiss and DISMISSES this matter with prejudice.

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