

FSM SUPREME COURT APPELLATE DIVISION

IRENE SETIK WALTER, individually and as the)	APPEAL CASE NO. P2-2014
Administrator for THE ESTATE OF MANNY)	(Civil Action Nos.2007-008 & 2010-006)
SETIK, ELEANOR SETIK SOS, MARLENE SETIK,)	
MERIAM SETIK, and PATRICIA SETIK,)	
individually and d/b/a C-STAR APARTELLE,)	
)	
Appellants,)	
)	
vs.)	
)	
FSM DEVELOPMENT BANK,)	
)	
Appellee.)	
)	

ORDER GRANTING MOTION TO DISMISS

Decided: November 1, 2016

BEFORE:

Hon. Larry Wentworth, Associate Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
Hon. Benjamin F. Rodriguez, Specially Assigned Justice, FSM Supreme Court**

*Chief Justice, State Court of Yap, Colonia, Yap

**Chief Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

For the Appellants: Yoslyn G. Sigrah, Esq.
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For the Appellee: Nora E. Sigrah, Esq.
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HEADNOTES

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

The appellants' motions for enlargement are no longer material or relevant when the appellants did not file an opening brief within the time periods for which enlargements were sought and have neither filed a brief nor sought a further enlargement since then. Walter v. FSM Dev. Bank, 21 FSM R. 1, 3 (App. 2016).

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

An appellant must file and serve a brief within 40 days after the date of the court clerk's notice that the record is ready, and if the appellant fails to file a brief within that time frame, or within the time as extended, an appellee may move for the appeal's dismissal. Walter v. FSM Dev. Bank, 21 FSM R. 1, 3 (App. 2016).

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

An appellate court may dismiss an appeal when the appellant has failed to file an opening brief within the time prescribed and the appellee has moved for dismissal, and, when an appellee has so moved. The factors that the court may consider are: the length of delay in filing the brief; evidence of prejudice to the appellee; nature of the reason(s) for the appellant's failure to file on time; and the extent of appellant's efforts in mitigation. Walter v. FSM Dev. Bank, 21 FSM R. 1, 3-4 (App. 2016).

Appellate Review – Dismissal

An appellate court will, on an appellee's motion, dismiss an appeal when no opening brief has been filed and the appellants have severely disregarded the Appellate Procedure Rules' timing requirements and the appellee has been prejudiced as a result. Walter v. FSM Dev. Bank, 21 FSM R. 1, 4 (App. 2016).

Appellate Review – Dismissal

The appellants' tardiness in filing their brief, with no explanation offered in response to a motion for dismissal, constitutes a ground for dismissal of an appeal. Walter v. FSM Dev. Bank, 21 FSM R. 1, 4 (App. 2016).

Appellate Review – Dismissal

An appeal will be dismissed when the filing of the appellants' brief has been delayed over two years with no likely expectation of an imminent filing or indication that an opening brief will ever be filed; when the prejudice to the appellee is the further difficulty, expense, and delay in having its money judgment satisfied; when, earlier, the appellants' grounds for seeking an enlargement of time to file their brief were a pending Rule 60(b) motion and a pending or expected payment to reduce the judgment amount, neither of which are relevant now because the Rule 60(b) motion was denied well over a year ago and the loan principal credit occurred before then; when the appellants have thus had, even though no enlargement of time or stay was granted, more than ample time to complete an opening brief, but have not done so and no reasons have been given for this excessive delay; and when the appellants have made no attempt to mitigate. Walter v. FSM Dev. Bank, 21 FSM R. 1, 4 (App. 2016).

Appellate Review – Dismissal; Appellate Review – Motions

It is within a single justice's power to dismiss, on motion, an appeal because of the appellants' failure to comply with the Appellate Rules' timing requirements to file an opening brief, but when a long time has elapsed since the motion was filed, it may be better that a full appellate panel consider a motion to dismiss. Walter v. FSM Dev. Bank, 21 FSM R. 1, 4 (App. 2016).

* * * *

COURT'S OPINION

PER CURIAM:

This comes before us on the appellee's motion to dismiss this appeal case. The motion is granted. The reasons follow.

I. PROCEDURAL HISTORY

On February 3, 2014, the appellants, Irene Setik Walter, individually and as the Administrator of the Estate of Manny Setik, Eleanor Setik Sos, Marlene Setik, Meriam Setik, and Patricia Setik, filed a notice of appeal (accompanied by a statement of issues and a transcript request) from the December 24, 2013 order in aid of judgment in Civil Action No. 2007-008 (which includes Civil Action No. 2010-006). The appellants, in their statement of issues, challenge the validity of the trial court's order to sell land mortgaged to secure the funding for the C-Star Apartelle business.

On April 17, 2014, the appellants filed a Withdrawal and Substitution of Counsel, in which Yoslyn G. Sigrah, Esq. replaced Salomon Saimon, Esq. as the appellants' counsel.

On May 7, 2014, the clerk filed a notice that the record was ready. And on May 15, 2014, the chief clerk filed a notice of briefing schedule, which set June 24, 2014, as the deadline for the appellants to file and serve their opening brief. On June 23, 2014, the appellants filed their motion to enlarge time, asking that the deadline be enlarged to August 4, 2014. On August 4, 2014, the appellants filed a second motion to enlarge time, asking that the deadline to file their opening brief be enlarged to September 8, 2014.

On September 1, 2014, the appellants filed a motion to stay appellate proceedings. They asked for an indefinite stay until the trial court decided their January 30, 2014 Rule 60(b) motion for relief from judgment. On September 8, 2014, the appellee FSM Development Bank filed its opposition to the motion to stay. It also filed a motion to dismiss the appeal for want of prosecution – for the appellants' failure to file an opening brief. The appellants have not filed an opposition to the motion to dismiss. Nor have they filed an opening brief. These motions were not decided earlier due to the lack of an FSM Supreme Court justice (not otherwise disqualified), available to decide them.

II. MOTIONS

A. *Appellants' Motions to Enlarge and to Stay*

The appellants' motions for enlargement are no longer material or relevant since the appellants did not file an opening brief within the time periods for which enlargements were sought. Nor have they filed a brief or sought a further enlargement since then.

The appellants' motion to stay has become moot since the trial court has ruled on and denied the January 30, 2014 Rule 60(b) motion for relief from judgment. See FSM Dev. Bank v. Setik, 20 FSM R. 85, 88-89 (Pon. 2015).

B. *Bank's Motion to Dismiss*

The bank moves to dismiss this appeal because the appellants have not filed an opening brief. An appellant must file and serve a brief within 40 days after the date of the court clerk's notice that the record is ready, FSM App. R. 31(a), and if the appellant fails to file a brief within the time frame provided by the rule, or within the time as extended, an appellee may move for the appeal's dismissal, FSM App. R. 31(c). Cuipan v. FSM, 10 FSM R. 323, 325 (App. 2001).

It is within our discretion to dismiss an appeal when the appellant has failed to file a brief within the time prescribed and the appellee has moved for dismissal. Nakamura v. Bank of Guam (II), 6 FSM R. 224, 227 (App. 1993). When an appellee has moved, under Rule 31(c), for an appeal's dismissal because the appellants have failed to file an opening brief, the factors that we may consider are: the

length of delay in filing the brief; evidence of prejudice to the appellee; nature of the reason(s) for the appellant's failure to file on time; and the extent of appellant's efforts in mitigation. Christopher Corp. v. FSM Dev. Bank, 20 FSM R. 384, 387 (App. 2016); Chuuk v. Davis, 13 FSM R. 178, 183 (App. 2005); Cuipan, 10 FSM R. at 325; O'Sonis v. Bank of Guam, 9 FSM R. 356, 361 (App. 2000); Nakamura (II), 6 FSM R. at 227.

We will thus, on an appellee's motion, dismiss an appeal when no opening brief has been filed and we have found that the appellants have severely disregarded the Appellate Procedure Rules' timing requirements and, as a result, the appellee has been prejudiced. See Pacific Skylite Hotel v. Penta Ocean Constr. Co., 20 FSM R. 251, 253 (App. 2015). The appellants' tardiness in filing their brief, with no explanation offered in response to a motion for dismissal, constitutes a ground for dismissal of an appeal. Alaphonso v. FSM, 1 FSM R. 209, 229-30 (App. 1982).

Here, the filing of the appellants' brief has been delayed over two years with no likely expectation of an imminent filing or indication that an opening brief will ever be filed. The prejudice to the appellee is the further difficulty, expense, and delay in having its money judgment satisfied. The appellants' grounds for seeking an enlargement of time until September 8, 2014 to file their opening brief were: 1) their Rule 60(b) motion for relief from judgment pending in the trial court and 2) a pending or expected \$83,333.20 payment or credit to (and a reduction of) the loan principal (thus affecting the judgment amount).

Even if they ever were material, neither of these grounds are relevant now. The trial court decided the Rule 60(b) motion on July 1, 2015, Setik, 20 FSM R. at 88-89, well over a year ago, and the \$83,333.20 credit to the loan principal occurred before then, *id.* at 87, 88. The appellants have thus had, even though no enlargement of time or stay was granted, more than ample time to complete and file and serve their opening brief. They have not done so. No reasons have been given for this excessive delay. The appellants have made no attempt to mitigate.

There have been three subsequent appeals (docketed as App. Nos. P4-2015, P11-2015, and P6-2016) from Civil Action No. 2007-008, which have recently been, by order entered October 27, 2016, consolidated and a consolidated briefing schedule set. In those consolidated appeals, the appellants herein raise most, if not all, of the same issues that they raise in this appeal, as well as some other issues. There is thus little likelihood that the grant of the bank's unopposed motion to dismiss this appeal will unduly prejudice the appellants or prevent or hinder them from obtaining appellate review of the issues that concern them.

III. APPELLATE PANEL

It is within a single justice's power to dismiss, on motion, an appeal because of the appellants' failure to comply with the Appellate Rules' timing requirements to file an opening brief (since the Rule 27(c) phrase "timing requirements of these rules" includes an appellant's failure to file an opening brief), Pacific Skylite Hotel, 20 FSM R. at 253; Palsis v. Tafunsak Mun. Gov't, 16 FSM R. 116, 128 (App. 2008) (construing FSM App. R. 27(c)); Heirs of George v. Heirs of Dizon, 16 FSM R. 100, 113 (App. 2008); Ting Hong Oceanic Enterprises v. FSM, 8 FSM R. 264, 265 (App. 1998) (construing FSM App. R. 27(c)). But because of the long time that has elapsed since the motion was filed, we think it better that a full appellate panel consider the motion.

IV. CONCLUSION

Accordingly, for the reasons given above, we hereby grant the appellee's motion to dismiss. This case is closed.

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