

IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
APPELLATE DIVISION

ERINE YOMA (RAMP) GOYA,) APPEAL CASE NO. P6-2003
))
 Appellant,))
))
 v.) OPINION
))
FREDRICK L. RAMP,))
))
 Appellee.))
_____)

Argued: August 11, 2004
Decided: January 13, 2005

BEFORE:

Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Judah C. Johnny, Specially Assigned Justice, FSM Supreme
Court*
Hon. Yosiwo P. George, Specially Assigned Justice, FSM Supreme
Court**

*Chief Justice, Pohnpei Supreme Court, Kolonia, Pohnpei
**Chief Justice, Kosrae State Court, Lelu, Kosrae

APPEARANCES:

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For the Appellee: Craig D. Reffner, Esq.
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* * * *

DENNIS K. YAMASE, Associate Justice:

This appeal arises from the trial court's denial of Erine Yoma (Ramp) Goya's motion to extend time to file a notice of appeal. We affirm the trial court. Our reasoning follows.

I. BACKGROUND

This matter originates in the November 18, 1988 divorce

of Fredrick L. Ramp and Erine Yoma Ramp (now Erine Yoma Goya). On June 7, 2002, Goya, the respondent in the divorce action, filed a motion to reconsider, or for relief from, the divorce decree concerning the couple's property division, and on August 1, 2002, she filed a motion to reconsider the child support portion of the decree. Ramp v. Ramp, 11 FSM Intrm. 630, 633 (Pon. 2003). The trial court denied both motions by order entered on June 30, 2003. Id. at 639, 644.

For some unknown reason, the court clerk failed to serve the order on Goya's counsel until July 10, 2003. Service was by mail. Goya's counsel, a sole practitioner without an office or staff to assist her, avers that she did not receive the mailed order until July 14, 2003, shortly before she was about to leave for a vacation in the United States. On September 10, 2003, counsel filed a motion to extend time to file a notice of appeal from the June 30, 2003 order.

Goya asserts, and for the sake of argument we presume the assertion to be true, that the following events took place between the July 10, 2003 service of the June 30, 2003 order and the September 10, 2003 filing of the motion to extend time to file a notice of appeal: (1) July 14, 2003, Goya's counsel receives order an hour before check in for counsel's flight to the United States for a vacation scheduled to last until September 6, 2003; (2) July 16-17, 2003, counsel calls Goya from U.S., learns that she wants to appeal, and urges her to

seek legal assistance from Micronesian Legal Services Corporation (MLSC) for the appeal; (3) August 8, 2003, Goya informs counsel that MLSC will not handle her appeal, Goya and counsel then agree to payment terms for counsel to handle appeal; (4) August 11, 2003, last day for a timely notice of appeal to be filed within required 42-day time limit, FSM App. R. 4(a)(1), and no notice of appeal filed; (5) September 6, 2003, counsel returns to Pohnpei; and (6) September 6-9, 2003, counsel experiences computer problems.

On September 10, 2003, Goya filed her motion for an extension of time to file a notice of appeal. On October 9, 2003, the trial court denied the motion on the ground that Goya had failed to show excusable neglect. On October 13, 2003, the trial court *sua sponte* and, based on Bualuay v. Rano, 11 FSM Intrm. 139 (App. 2002), quite properly vacated its previous order and asked that the parties also brief whether Goya had shown good cause for an extension of time. After further briefing, the trial court denied the motion on November 18, 2003. Ramp v. Ramp, 12 FSM Intrm. 228, slip op. Civ. No. 1988-038 (Pon. Nov. 18, 2003). This appeal followed.

II. QUESTION PRESENTED

A lower court's "grant or denial of an extension of time for appeal is an appealable order reviewed under the abuse of discretion standard." Bualuay v. Rano, 11 FSM Intrm. 139, 146 (App. 2002). Thus the sole question before the court is

whether the trial court abused its discretion when it denied Goya's motion for an extension of time to file her appeal from the trial court's June 30, 2003 order. Goya subdivides this one issue into three parts: (1) whether the trial court erred in interpreting the General Court Order regarding filing by facsimile to allow documents to be filed by fax without a prior court order allowing it already in place; (2) whether the trial court erred by failing to apply the standards in Northwest Truck & Trailer Sales, Inc. v. Dvorak, 877 P.2d 31 (Mont. 1994); and (3) whether the trial court erred in denying her motion to file a late notice of appeal.

If we were to conclude that the trial court had abused its discretion, we would reverse the trial court order, order a notice of appeal filed (one has not already been filed),¹ and set a schedule for further proceedings on the merits.

III. ANALYSIS

In civil cases, the deadline within which a notice of appeal must be filed is "forty two (42) days after the date of the entry of the judgment or order appealed from." FSM App. R. 4(a)(1)(A). The 42-day period to appeal the June 30, 2003 order ended on August 11, 2003. Appellate Rule 4(a)(5),

¹It might have been to Goya's advantage to have filed a notice of appeal along with her motion since "[t]he grant of a motion to extend time to appeal retroactively validates a previously-filed notice of appeal." *Bualuay v. Rano*, 11 FSM Intrm. 139, 148 (App. 2002).

however, allows the time to appeal to be extended under certain conditions. It provides that:

The court appealed from, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Rule 4(a). . . . No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

FSM App. R. 4(a)(5). No other extension of time to file a notice of appeal is permitted, and the appellate division has no power to enlarge the time within which to file a notice of appeal. Bualuay, 11 FSM Intrm. at 145-46; FSM App. R. 26(b). This is because the Rule 4(a)(1) time limit is jurisdictional and if that time is not extended by the grant of a timely Rule 4(a)(5) motion to extend that time period, the appellate division lacks jurisdiction to hear the case. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 95 (App. 2001).

Goya's motion was filed on September 10, 2003, the thirtieth day "after the expiration of the time prescribed by Rule 4(a)" – the very last day that Rule 4(a)(5) permits a motion to extend time to file a notice of appeal to be made. In order to prevail on the motion, Goya had to show either excusable neglect or good cause for the delay. Bualuay, 11 FSM Intrm. at 145; FSM App. R. 4(a)(5). The trial court concluded that she had not. It concluded that her failure to file the motion until the last possible day did not show either excusable neglect or good cause when other steps were

available earlier but had not been used. The trial court gave the example that Goya's counsel could have faxed a notice of appeal along with a request to file by fax to the court on August 8, 2003, three days before the 42-day appeal period expired. Ramp, 12 FSM Intrm. at 230, slip op. at 3.

A. *Filing by Fax*

Goya contends that she could not have filed a notice of appeal by facsimile transmission because there was no previous order in the case allowing her to file by fax. For this proposition she relies on the text of General Court Order 1990-1. She argues that under this General Court Order there had to be a prior order based upon a showing of special cause in order for anything to be filed by fax, and that when there is none, the clerk should throw away anything received by fax without notifying the judge on the case. She further contends that the court's "unwritten 'custom' of accepting faxed documents" conflicts with the General Court Order's express requirements. Appellant's Br. at 7.

General Court Order 1990-1 does not apply to civil cases. The (later promulgated) applicable portion of Civil Procedure Rule 5(e)² has superseded it. However, Rule 5(e)'s pertinent

²The current rules of Civil Procedure were promulgated in 1991 by General Court Order 1991-2. A later general court order supersedes an earlier one.

part is identical to section 2 of General Court Order 1990-1.³ It reads, "In absence of an order of a justice of this court, given for special cause, the office of the clerk of court shall not accept for filing any document transmitted to the clerk of court through a telecommunication facsimile." FSM Civ. R. 5(e). Neither the General Court Order's text nor Civil Rule 5(e) delineates the method(s) whereby an order to file by fax can be obtained or by which a request to file by fax is to be made. Neither expressly prohibit a request to file by fax from being made by fax.

The trial court has on occasion issued such a prior order permitting filing by facsimile. See, e.g., O'Sullivan v. Panuelo, 9 FSM Intrm. 229, 232 (Pon. 1999). But, as apparent from reported cases, filing by fax has often been done by faxing the document to be filed along with a motion or request to file by fax. See, e.g., FSM v. Wainit, 12 FSM Intrm. 405, 407-08, slip op. at 2-4 (Chk. Crim. No. 2001-1519 Mar. 30, 2004) (papers received by fax not filed because special cause not given and originals never received); Parkinson v. Island Dev. Co., 11 FSM Intrm. 451, 453 (Yap 2003) (granted); In re Engichy, 11 FSM Intrm. 450, 451 (Chk. 2003) (denied since special cause not shown); International Bridge Corp. v. Yap,

³General Court Order 1990-1 may retain some vitality in criminal cases since the current criminal rules do not contain a provision concerning fax filing.

9 FSM Intrm. 362, 364 (Yap 2000) (granted); Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 369-70 (Kos. 2000) (motion to file by fax denied when the court had an original filed copy of document, but granted for document when original had not yet been filed); *see also* FSM Dev. Bank v. Gouland, 9 FSM Intrm. 605, 606 (Chk. 2000) (motion received by fax not ordered filed because not accompanied by application to file by fax and originals not received). Customarily, the motion or request to file by fax is itself not filed but referred to the justice and only if and when the justice has issued an order (in response to the request) that the request is granted, are the motion to file by fax and the faxed papers filed (to be replaced by the originals when they are received). A faxed "motion" to file by fax remains an unfiled request for an order to file by fax unless and until a justice grants the request and orders the "motion" and accompanying papers filed.

Since "special cause" is a higher standard than mere "cause shown," In re Engichy, 11 FSM Intrm. 450, 451 (Chk. 2003) ("special cause" is a higher standard than cause shown but is not an excuse to wait for the filing deadline and then fax the papers to the court; waiting to the last minute because it can then be faxed does not constitute "special cause"), but a different standard than "good cause shown," the implication is that "special cause" will usually arise from either short, or very short, court-ordered deadlines, or as

the result of an unforeseen, unexpected, or unanticipated event or circumstance. Applying by fax for an order to file by fax would seem the only sensible method when the "special cause" shown is an unforeseen, unexpected, or unanticipated circumstance or event. See In re Engichy, 11 FSM Intrm. at 451. Special cause could have been found here based on an event not anticipated (although maybe it should have been) by counsel – that MLSC would not take Goya's case for appeal and the short time left (three days, August 8-11) to file a notice of appeal within the 42-day period.⁴

We therefore cannot state that the trial court's conclusion that counsel could have faxed a notice of appeal along with a motion/request to file by fax⁵ before the August 11, 2003 deadline passed was an erroneous conclusion of law.

B. *Other Filing Methods*

The trial court considered that the motion to extend time presented a "close question" under the good cause standard, Ramp, 12 FSM Intrm. at 230, slip op. at 4, and we might agree if filing a notice of appeal by fax had been Goya's only

⁴For instance, in Alep v. United States, Civ. No. 1988-1024 (Dec. 6, 1993) (unreported), the trial court, before the 42-day period had expired, granted the plaintiffs' faxed request to file by fax a motion to extend time to file a notice of appeal since counsel was in the United States and needed time to travel to Micronesia to consult his Chuukese clients to see if they wanted to appeal.

⁵Furthermore, since the trial court suggested that as a possibility, it is a request we expect it would have granted.

option. But there were many other possible steps counsel could have taken to assure that Goya's right to appeal was perfected. Trial counsel may have a duty to take steps to protect a client's appeal rights even though trial counsel may not be obligated or intended to be appellate counsel.⁶ See, e.g., Pete v. Henderson, 269 P.2d 78, 79 (Cal. Dist. Ct. App. 1954); 7 AM. JUR. 2D *Attorneys at Law* § 204 (rev. ed. 1980); W.E. Shipley, Annotation, *Attorney's Liability for Negligence in Preparing or Conducting Litigation*, 45 A.L.R.2d 5, 52-54 (1956); cf. FSM MRPC R. 1.3 cmt.

Despite the tardy receipt of the final, appealable order from the trial court, when counsel learned from Goya that Goya wanted to appeal (July 16-17 by counsel's own recounting) there were still 25 days left in which to file a notice of appeal. (August 11, 2003 was the end of the 42-day period to appeal.) Even if counsel did not want to commit herself to handling the appeal without a fee agreement, she could have promptly (shortly after July 17, 2003), either

(1) drafted a notice of appeal that Goya could sign and file pro se in the trial division⁷ and mailed it to her for

⁶What we find unfathomable is counsel's apparent expectation that, without even having contacted MLSC and receiving its approval, that MLSC would be willing to handle her client's appeal.

⁷A notice of appeal may be filed in either the trial division or the appellate division. FSM App. R. 3(a). A party has the right to represent herself pro se in the trial

filing; or

(2) drafted a motion to extend time to file a notice of appeal that Goya could file pro se and mailed it to her for filing (such a motion filed before the expiration of the 42-day appeal period can be made ex parte unless the court orders otherwise, FSM App. R. 4(a)(5)); or

(3) drafted a motion to extend time to file a notice of appeal and mailed it to the court for filing (such a motion filed before the expiration of the 42-day appeal period can be made ex parte unless the court orders otherwise, FSM App. R. 4(a)(5)); or

(4) drafted a motion to file by facsimile and mailed it to the court for filing, and then faxed (and mailed) a notice of appeal once she and Goya had agreed to payment terms for an appeal. Any of these should and would have arrived by mail before the end of the 42-day time to appeal on August 11th.

Even if counsel, by relying on her mistaken belief that MLSC would handle the appeal, was not diligent enough to preserve Goya's appeal rights before she was informed on August 8, 2003 that MLSC would not handle the appeal and she

division (although that may not always be a good idea). But appellate division filings usually require an admitted attorney's signature. See, e.g., *Kephas v. Kosrae*, 3 FSM Intrm. 248, 252 (App. 1987); see also FSM App. R. 31(d) (appellate briefs "must be signed by a person certified as an attorney eligible to practice law" before the FSM Supreme Court).

and Goya agreed to payment terms, there are other steps counsel could have taken then. She could have promptly either

(5) drafted and faxed a notice of appeal along with a request to file by fax (discussed above and mentioned by Judge Yinug in his denial); or

(6) drafted and faxed to Goya a notice of appeal that Goya could sign and then file pro se in the trial division; or

(7) drafted and faxed a motion to extend time to appeal and mailed it along with a notice of appeal; or

(8) drafted and mailed a motion to extend time to appeal along with a notice of appeal. Any of these methods should have obtained results before counsel's scheduled return.

Instead, counsel, apparently thinking it not necessary to do anything soon, did nothing until she returned to Pohnpei. This circumstance left the trial court with the impression that counsel considered it inconvenient to prepare anything for filing until she returned to Pohnpei.⁸ The trial court characterized this as an issue that "distills to one of convenience." Ramp, 12 FSM Intrm. at 230, slip op. at 2. It

⁸Counsel emphasizes that she notified the court (clerk) of the dates she would be off-island on vacation and asked that nothing be scheduled during that time that required her attention. While a court may, in the interests of the orderly administration of justice, accommodate, if possible, counsel's reasonable requests and travel plans, such notices are not binding on the courts. Counsel must accept the fact that things may arise that will require their attention at times when they would rather not be bothered.

apparently was not convenient to try to file anything while thousands of miles away in the United States.

In Bualuay v. Rano, 11 FSM Intrm. 139, 147 (App. 2002), we found good cause when a busy counsel's client was unavailable for consultation for an extended time; the opinion appealed from was not issued and available because the court was unable to make copies to serve it; and counsel discovered that not only did the FSM Appellate Rules apply to his appeal but that there was also a Chuuk state statute to comply with. Counsel in Bualuay filed the motion to extend time to file a notice of appeal only three days after the 42-day period to appeal had expired and promptly, once counsel had ascertained his client's desire to appeal, filed the appeal one day after that. Id. at 144. Here, counsel learned of Goya's intent to appeal on July 16-17, 2003, and told her to seek help from MLSC, but otherwise did nothing. When counsel was informed on August 8, 2003, that MLSC would not help and Goya made fee payment arrangements with counsel, counsel still did nothing. She waited until she returned to Pohnpei just before the end of the extra 30 days in which a motion to extend time to appeal can be filed, and then filed that motion on the last possible day. This is unlike Bualuay's counsel's diligence in promptly trying to secure his client's appeal rights as soon as his client's wishes were known.

C. *Standard in Dvorak*

Goya contends that the trial court should have adhered to the standard for granting an extension of time to file a notice of appeal in Northwest Truck & Trailer Sales, Inc. v. Dvorak, 877 P.2d 31 (Mont. 1994), but did not. The trial court rejected this contention and noted that in Dvorak the appellant, as a result of a calendaring error, filed its notice of appeal only one day late instead of the 30 days late as in this case and that there was no calendaring error in this case. Ramp, 12 FSM Intrm. at 230, slip op. at 4. Goya argues that under the factors to consider for excusable neglect discussed in Dvorak, the trial court abused its discretion when it did not grant her motion for an extension of time to file a notice of appeal.

Goya relies upon factors the Dvorak court considered in determining excusable neglect under Appellate Rule 4(a)(5). Dvorak, 877 P.2d at 35. Under Dvorak, "all relevant factors should be considered, including the danger of prejudice, length of delay and its potential impact on judicial proceedings, reason for the delay and whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id. (citing Pioneer Ins. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 597 U.S. 380, ___, 113 S. Ct. 1489, 1498, 123 L. Ed. 2d 74, 89-90 (1993)). "[T]hese are factors which may be properly considered in assessing the facts on a case by case basis to determine whether a motion

for extension of time should be granted to the movant." Dvorak, 877 P.2d at 35. Goya contends that the late filing was not willful because counsel had no opportunity to file anything before leaving Pohnpei for vacation; that there was no prejudice to the opposing party by the late filing, but considerable prejudice to her; that there is a meritorious issue on appeal involving considerable sums of money; that counsel did nothing to willfully thwart the court's rules because "any motions Berman might have attempted through ordinary postal mail after August 11 would have been denied by the FSM Trial Court," Appellant's Br. at 16; and the motion was made within the time permitted.

The statement that "any motions Berman might have attempted through ordinary postal mail after August 11 would have been denied by the FSM Trial Court" is presumptuous. It presumes that the trial court would not have granted a motion that was filed by mail even though that motion would have arrived and been filed earlier than the one counsel waited until the last day to file. This makes no sense. One factor to consider is the length of the delay. (The statement also avoids that question of why counsel did not attempt to file by mail before August 11, 2003.) The length of delay was as long as it could possibly be - to the last day of the 30-day extended period. The delay was under the defendant's counsel's reasonable control because it was caused by

counsel's unwillingness (and maybe misperceived inability) to try to file anything while she was on vacation in the U.S. What may, in a close case, constitute good cause or excusable neglect only one or two days after the 42-day period to appeal has expired, may no longer be good cause or excusable neglect 30 days later. Given, as noted above, the number of possible steps counsel could have taken and the minimal amount of effort any of them would have required, it seems that the delay was purposeful. The potential impact on judicial proceedings would be to change the 42-day time period to appeal to a 72-day time period where any reason given for not filing a notice of appeal before the 72nd day would suffice. This we decline to do. The Dvorak factors of length of delay and its potential impact on judicial proceedings, reason for the delay and whether it was within the reasonable control of the movant, and possibly whether the movant acted in good faith, thus all weigh against a conclusion that excusable neglect was present. Only the danger of prejudice factor does not clearly weigh against Goya.

We therefore cannot say that the trial court abused its discretion when it concluded that Goya had not shown excusable neglect, and, given the number of available options, both before and after August 8, 2003, we cannot say that the trial court abused its discretion when it concluded that Goya had not shown good cause.

IV. CONCLUSION

An abuse of discretion by the trial court occurs when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision. Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992). In light of all the possible methods by which the situation may have been avoided, the trial court's denial of the motion to extend time to appeal was neither clearly unreasonable, arbitrary, nor fanciful nor was it based on an erroneous conclusion of law. The trial court therefore did not abuse its discretion when it found neither excusable neglect nor good cause to extend Goya's time to file a notice of appeal. The trial court is accordingly affirmed.

So ordered the 12th day of January, 2005.

/s/

Dennis K. Yamase
Associate Justice

/s/

Judah C. Johnny
Specially Assigned Justice

/s/

Yosiwo P. George
Specially Assigned Justice

Entered this 13th day of January, 2005.

/s/

Kohsak M. Keller
Chief Clerk of Court

