

**FOR PUBLICATION**

Appeal No. 03-017-GA

IN THE SUPREME COURT OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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**ENGRACIA R. BABAUTA**, as Personal Representative  
of the **ESTATE OF JOSE B. BABAUTA**; and  
**ENGRACIA R. BABAUTA**, an individual,

Plaintiffs-Appellants,

v.

**JESUS M. BABAUTA, OSCAR R. BABAUTA, COLT'S  
MANUFACTURING COMPANY, INCORPORATED**  
and **DOES ONE** through **FIVE**,

Defendants-Appellees.

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**ORDER DENYING APPELLANT'S EMERGENCY EX PARTE MOTION FOR  
EXTENSION OF TIME TO FILE OPENING BRIEF**

**Cite as: *Babauta v. Babauta*, 2004 MP 2**

Civil Action No. 99-0072

Decided January 21, 2004

For Appellants:

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¶1 On January 16, 2004, the appellant, Engracia R. Babauta, filed a second motion for an extension of time to file an opening brief in this appeal.<sup>1</sup> For the reasons that follow, the Court hereby denies the motion.

¶2 On November 21, 2003, the appellant moved for an extension of time in which to file her opening brief, which was originally due on November 25, 2003. *See* Declaration of Counsel in Support of Emergency Ex Parte Motion for Extension of Time to File Appellant’s Opening Brief filed November 21, 2003.

¶3 In support of this motion, counsel for the appellant stated that he had “diligently begun working on Appellant’s opening Brief” but was unable to complete the brief due to his “involvement in the preparation for a civil jury trial entitled *Masaru Furuoka v. Dai Ichi Hotel (Saipan)*” and because of his involvement “in the preparation for a sentencing in *United States v. Montgomery, et al.*” *Id.* Counsel stated: “[s]hould the requested extension of time be granted as stipulated by the parties, the undersigned will complete the Opening Brief within the additional time allowed.” *Id.*

¶4 On November 21, 2003, this Court granted the appellant’s first request for a fifty-two day extension of time to file her opening brief. *See* Order entered November 21, 2003. Pursuant to this Order, the appellant was to file her opening brief “on or before January 16, 2004.” *Id.*

¶5 Notwithstanding counsel’s declaration that the brief would be completed without further extensions of time, *see supra* ¶3, the appellant filed another *ex parte* motion for an extension of time in which to file her opening brief.<sup>2</sup> This second motion was filed at

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<sup>1</sup> *See* Emergency Ex Parte Motion for Extension of Time to File Appellant’s Opening Brief filed January 16, 2004.

<sup>2</sup> *See* Emergency Ex Parte Motion for Extension of Time to File Appellant’s Opening Brief filed January 16, 2004.

2:55 p.m. on January 16, 2004, five minutes prior to the Opening Brief filing deadline. *See* Com. R. App. P. 25(a);<sup>3</sup> General Order No. 2000-300 issued September 18, 2000.<sup>4</sup>

¶6 In support of this second motion, counsel declared that the parties had, during the previously granted extension, discussed settlement, and were still actively seeking settlement.<sup>5</sup> *See* Declaration of Counsel in Support of Emergency Ex Parte Motion for Extension of Time to File Appellant’s Opening Brief filed January 16, 2004. Counsel further declared that opposing counsel did not oppose this second motion, and that:

[i]n requesting the first extension, it was presumed that since the undersigned has co-counsel in the *Furuoka* matter, he would have time to complete the brief. This presumption was proven wrong from the start of the *Furuoka* trial. The *Furuoka* jury trial began on January 6, 2004 and the undersigned’s time has been completely consumed by this trial-leaving absolutely no time to finish the brief.

*Id.*

¶7 The Court, after reviewing the moving papers and declaration filed in support thereof, finds good cause does not exist for the granting of the appellant’s second motion. While it is noted that the appellant’s second motion for an extension of time, filed a bare 5 minutes prior to the Opening Brief filing deadline, *see supra* ¶5, is technically timely such that it must be considered, it should also be noted that extensions of time are not automatically granted; rather, they are permissive and subject to certain procedural

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<sup>3</sup> Commonwealth Rule of Appellate Procedure 25(a) reads, in pertinent part: “[f]iling shall not be timely unless the papers are received by the Clerk within the time fixed for filing”.

<sup>4</sup> General Order No. 2000-300 reads, in its entirety:

IT IS HEREBY ORDERED that effective Tuesday, September 19, 2000, the hours of the Office of the Clerk of Court, Commonwealth Supreme Court, shall be from 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 3:00 p.m. All matters to be filed with the Clerk’s Office shall be filed during these hours. This is a standing order, applicable to all causes and proceedings before this Court, unless a different time for filing is ordered in a particular matter.

<sup>5</sup> The rules of appellate procedure provide a mechanism by which parties may stay the briefing schedule by requesting a settlement conference. *See* Com. R. App. P. 13. No party filed a request for a Rule 13 settlement conference.

requirements. *See* Com. R. App. P. 31(d).<sup>6</sup> Furthermore, this motion was filed under the emergency, *ex parte* provision of Rule 27(f), which contains its own procedural requirements. *See* Com. R. App. P. 27(f).

¶8 The Court denies the appellant’s motion on its merits. Notwithstanding counsel’s proffered explanation for the lack of progress on the brief, the Court notes that the appellant has had ample opportunity to submit an opening brief in this matter. She neither utilized the original forty days, which, pursuant to rule, is granted to every appellant, *see* Com. R. App. P. 31(a),<sup>7</sup> nor did she utilize the fifty-two day extension she was granted. *See supra* ¶4. The Court finds that ninety-two days is sufficient time to research, draft, and file a presumably routine<sup>8</sup> brief.

¶9 Furthermore, the appellant’s moving papers are procedurally deficient. Commonwealth Rule of Appellate Procedure 27(f)(2) requires the movant to file a “Rule

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<sup>6</sup> Commonwealth Rule of Appellate Procedure 31(d) reads:

Extensions of time may be granted only upon written motion supported by a showing of diligence and substantial need, as follows:

The motion shall be filed before the expiration of the time prescribed for filing the brief, and shall be accompanied by an affidavit saying:

- (1) when the brief is due;
- (2) how many extensions have been previously granted;
- (3) whether previous requests for extensions have been denied wholly or in part;
- (4) the length of the requested extension;
- (5) the reasons an extension is necessary;
- (6) counsel’s representation that counsel has exercised diligence and that the brief will be filed within the time requested; and
- (7) a statement that opposing counsel does or does not object to the extension or why the moving party has been unable to determine any such party’s position.

<sup>7</sup> Commonwealth Rule of Appellate Procedure 31(a) reads, in pertinent part: “[t]he appellant shall serve and file a brief within 40 days after the date on which the certificate of record is filed.”

<sup>8</sup> As no brief has been filed, the Court cannot know whether the issue or issues involved in this matter are complex such that an inordinate amount of time would be necessary to adequately prepare the brief. However, nothing in the moving papers suggests that the issues are complex, and the Court notes that the appellant has not sought leave, per Com. R. App. P. 28(s), to exceed the fifty page limit mandated by Rule 28(g). Thus, the Court presumes the issues on appeal are not complex such that extreme deviations from the briefing schedule are necessary.

27(f) Certificate,” which must contain, among other things, a declaration of “when and how counsel for the other parties were notified and whether they have been served with the motion; or, if not notified and served, why that was not done.” Com. R. App. P. 27(f)(2)(iii). No such representation is present in the appellant’s Rule 27(f) Certificate.<sup>9</sup> This requirement is far from a mere formality; generally,<sup>10</sup> it ensures that all parties are fairly apprised of all information which is presented to the Court.

¶10 There are other, technical deficiencies as well. For example, Commonwealth Rule of Appellate Procedure 31(d) explicitly requires that a motion for an extension of time must be accompanied by *an affidavit* containing “counsel’s representation that counsel has exercised diligence and that the brief will be filed within the time requested.” Com. R. App. P. 31(d)(6). Counsel’s affidavit lacks both representations required by Rule 31(d)(6).<sup>11</sup> *See* Declaration of Counsel in Support of Emergency Ex Parte Motion for Extension of Time to File Appellant’s Opening Brief filed January 16, 2004.

¶11 Nowhere in the affidavit is there a representation, as required by Rule 31(d)(6), that should the Court grant the second extension of time, the brief will be filed within the time requested. *See id.* Furthermore, while the affidavit does mention that counsel had exercised diligence in preparing the brief such that the granting of the first extension of time was proper, there is no representation that counsel had exercised diligence such that a second extension was proper. *See id.*

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<sup>9</sup> *See* Emergency Ex Parte Motion for Extension of Time to File Appellant’s Opening Brief filed January 16, 2004.

<sup>10</sup> Specific to this appeal, it would be interesting to learn when, prior to 2:55 p.m. on January 16, 2004, opposing counsel was informed of the need for another extension of time.

<sup>11</sup> These representations were found not in the affidavit, as required by Rule 31(d), but were recited elsewhere in the moving papers. *See* Emergency Ex Parte Motion for Extension of Time to File Appellant’s Opening Brief filed January 16, 2004.

¶12 As noted *supra* ¶4, counsel for the appellant waited until the last possible moment on January 16, 2004 to file this second motion for an extension of time. This is troublesome to the Court, because counsel, by his own admission, was aware that the brief would likely not be completed from the beginning of the *Furuoka* matter on January 6, 2004. See *supra* ¶6. Because of the delay in filing this procedurally deficient motion, simple, but technically required corrections cannot be made, for the time for filing opening briefs has passed. See *supra* ¶4.

¶13 While the Court could choose to overlook any one of these aforementioned violations pursuant to Commonwealth Rule of Appellate Procedure 2,<sup>12</sup> the cumulative weight of the errors militates against so doing. The appellant is now in a precarious, and unenviable position: if she is to file a brief, she must petition for leave to file a brief out of time pursuant to Rule 31(e).<sup>13</sup>

¶14 The appellant's motion for a second extension of time fails because the Court is disinclined to grant another extension of time, and because the moving papers do not

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<sup>12</sup> Commonwealth Rule of Appellate Procedure 2 reads:

In the interest of justice, or to expedite a decision, or for other good cause shown, this Court may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case, on application of a party or on its own motion, and may order proceedings in accordance with its direction.

<sup>13</sup> Commonwealth Rule of Appellate Procedure 31(e) reads, in pertinent part: “[a] late brief may be filed only with the permission of the Court, on such conditions as the Court may order.” The appellant’s ability to file a Rule 31(e) motion assumes she survives a motion to dismiss for lack of prosecution filed by the appellees pursuant to Rule 31(c), which reads, in pertinent part: “[i]f an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal,” and the case is not dismissed *sua sponte* pursuant to Rules 31(e) and 42(c). Commonwealth Rule of Appellate Procedure 31(e) reads, in pertinent part: “[i]f an appellant fails to file a brief within the time allowed by Rule 31(a) or an extension thereof, the Court may dismiss the appeal pursuant to Rule 42 (c).” Commonwealth Rule of Appellate Procedure 42(c) reads, in pertinent part: “[w]hen an appellant fails to file the... brief on time, . . . this Court may dismiss the appeal. The Court may take other appropriate actions, including the imposition of disciplinary or monetary sanctions, on those who failed to prosecute the appeal.”

meet the requirements of Rules and 27(f) and 31(d)(6). *See supra* ¶¶ 9-11. Accordingly, the appellant's motion is DENIED.

SO ORDERED THIS 21ST DAY OF JANUARY 2004.

/s/  
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JOHN A. MANGLONA, ASSOCIATE JUSTICE