

FOR PUBLICATION

Appeal No. 03-022-GA

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

**OFFICE OF THE ATTORNEY GENERAL and DIVISION OF
IMMIGRATION SERVICES,**

Petitioners-Appellees,

v.

ROBERT C. SENIDO,

Respondent-Appellant.

Civil Case No. 03-0015-CV

**FULL PANEL REVIEW OF ORDERS ISSUED BY
A SINGLE JUSTICE AND ORDERS GRANTING APPELLEE'S
MOTION TO DISMISS APPEAL AND SANCTIONING COUNSEL**

Cite as: Office of the Attorney Gen. v. Senido, 2004 MP 6

Decided April 23, 2004

BEFORE: DEMAPAN, Chief Justice, MANGLONA, Associate Justice and ATALIG, Justice *Pro Tempore*

Per Curiam:

I.

¶1 On June 24, 2003, the Appellant, Robert C. Senido, filed a notice of appeal in the above-captioned appeal. His opening brief was originally due on December 31, 2004.¹ The parties jointly requested an amendment to the briefing schedule, so that Senido could have an additional thirty days to file his brief.² This request was granted, and Senido's brief was to be filed on January 30, 2004.³

¶2 One day before his brief was due, Senido again sought an amendment of the briefing schedule, asking for another thirty-day extension.⁴ This request was promptly granted, and Senido's brief was due on March 1, 2004.⁵

¶3 Two weeks after his brief was due,⁶ and without having timely filed a brief or sought either an extension of time in which to file a brief or permission to file a brief out of time, Senido filed a motion to "Take Case Off Calendar."⁷ Motion of Appellant to Take Case Off Calendar filed March 16, 2004. In support of this motion, Senido stated:

¹ See Notice Re: Filing of Certificate of Record entered November 21, 2003. Per this scheduling order, Senido, like all appellants, was given forty days to file an opening brief.

² See Stipulated Motion for Extension of Time To File Appellant's Opening Brief filed December 31, 2003.

³ Order entered December 31, 2003.

⁴ See Second Motion for Extension of Time to File Appellant's Opening Brief filed January 29, 2004.

⁵ See Order entered January 30, 2004.

⁶ Notwithstanding the fact that counsel explicitly sought an extension only until March 1, 2004, counsel stated that he believed the brief was due on April 1, 2004. See Motion of Appellant to Take Case Off Calendar filed March 16, 2004 at n.1.

⁷ This Court notes that it is an appellate court, and not a trial court. As such, an appropriate motion would be to suspend the briefing schedule.

In short, the investigator in Appellant's labor case has issued a determination and notice of violation (by appellant's employer), which represents new evidence pertinent to this appeal and the underlying action. Depending on the outcome of the labor case hearing (inclusive of rights of review), this case may become moot, or it may become appropriate to dismiss the appeal to permit Appellant to move the Superior Court pursuant to Comm. R. Civ. P. 60 for relief from the judgment. Alternatively, it may be necessary to proceed with the appeal. The critical point is it is not possible to determine the appropriate course until Appellant's labor case proceeds further.

Id.

¶4 The Appellees opposed Senido's motion, and filed a motion to dismiss the appeal. Petitioner-Appellees' Motion to Dismiss Appeal and Response in Opposition to Appellant's Motion to Take Case Off Calendar filed March 18, 2004. In their opposition to Senido's motion, Appellees argued:

[T]his case has been pending on appeal for many months, and due to the Respondent's delays, the briefing has not even begun. Now, Respondent wishes to delay the appeal even further, based on his suggestion that a separate case pending before an administrative agency will somehow affect *his* decision of whether *he* wants to proceed with this appeal. The Court should not allow Respondent to manipulate the appeal process in this manner, particularly when he cites no provision of the Commonwealth Code or Rules of Appellate Procedure that would authorize such a unilateral delay.

Id.

¶5 In regard to its motion to dismiss the appeal, Appellees noted that Senido was given "multiple extensions" and still did not file a timely brief or seek leave to file a brief out of time. *Id.* Further, it argued that it had "been more than reasonable in the past, having agreed on numerous occasions to Respondent's requests for extensions of time and other accommodations," and stated that it currently believed "that further extensions or consideration are unwarranted." *Id.*

¶6 That same day, a single justice of this Court issued an order denying Senido's motion to "Take Case Off Calendar." Order Denying Appellant's Motion to Take Case Off Calendar entered March 18, 2004. The Court stated it was not convinced "that Appellant has shown good cause why [his] motion for an order taking this matter off calendar should be granted." *Id.*⁸

¶7 The next week, having not heard a response from Senido in regard to the Appellees' motion to dismiss, the Court⁹ issued an Order to Show Cause why the appeal should not be dismissed for failure to prosecute, "and why [Senido] and, or his counsel should not be sanctioned for failure to prosecute" the appeal pursuant to Commonwealth Rule of Appellate Procedure 42(c). Order to Show Cause entered March 26, 2004. Senido was given until April 5, 2004, to show cause. *Id.*

¶8 Fifteen minutes before his written showing of cause was due, Senido sought a one-day extension of time.¹⁰ This request was granted.¹¹ The next day, Senido filed a last-second request for yet another one-day extension.¹² Apparently, Senido's counsel was "working diligently on the response to the OSC" when he was interrupted by one person to discuss a matter involving "16 other clients." Declaration of Counsel filed

⁸ While this order did note that Senido "had a total of 101 days in which to prepare, serve, and timely file its opening brief," Order Denying Appellant's Motion to Take Case Off Calendar entered March 18, 2004 at n.1, and further stated "[t]his [C]ourt is not convinced that Appellant has diligently pursued the prosecution of this appeal," *id.*, the Order did not purport to rule on, or anyway determine, the Appellees' motion to dismiss. *See id.*

⁹ A single justice, Chief Justice Miguel S. Demapan, issued the Order to Show Cause.

¹⁰ *See* Appellant's Request for Additional Time to Respond to Order to Show Cause filed April 5, 2004 at 2:45 p.m.

¹¹ *See* Order entered April 5, 2004. Pursuant to this order, Senido was to show cause "not later than 3:00 p.m., April 6, 2004." *Id.*

¹² *See* Appellant's Second Request for Additional Time to Respond to Order to Show Cause filed April 6, 2004 at 3:00 p.m.

April 6, 2004. Counsel claimed that, as a result of the interruption, he was unable to comply with the Court's order.

¶9 The Court denied this second request for an extension of time.¹³ On April 8, 2004, Senido filed a request for a full Court review of this Court's March 18, 2004, denial of his motion to "Take Case Off Calendar" and its April 7, 2004, denial of his "Second Request for Additional Time to Respond to Order to Show Cause."¹⁴

II.

¶10 After carefully reviewing Senido's request that we review the March 18, 2004 order, the March 18, 2004 order, Senido's March 16 motion and the Appellees' response thereto, we are convinced that the Court did not commit error when it denied Senido's motion to "Take Case Off Calendar."

¶11 Senido claims that new evidence has been found which is "pertinent to this appeal and the underlying action," Motion of Appellant to Take Case Off Calendar filed March 16, 2004, and that he may have to "dismiss the appeal to permit Appellant to move the Superior Court pursuant to Comm. R. Civ. P. 60 for relief from the judgment." *Id.*

¶12 "The Supreme Court may not take new or additional evidence." 1 CMC § 3103. This does not, however, preclude a party from obtaining relief in the trial court when this Court has jurisdiction of the appeal. In *Lizama v. Kintz*, 2002 MP 18, we outlined the proper procedure for obtaining relief for "mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, etc.," under Commonwealth Rule of Civil Procedure 60(b), after a notice of appeal has been filed.

¹³ See Order entered April 7, 2004.

¹⁴ Request for Review by Full Court and Motion For Leave to File Response to Order to Show Cause filed April 8, 2004.

The proper procedure for a party seeking [Commonwealth Rule of Civil Procedure] Rule 60(b) relief after the filing of a notice of appeal is for the party to file a Rule 60(b) motion in the trial court. If that court indicates that it is inclined to grant the motion, the movant should then move this court for a remand of the case so that the trial court may act on the Rule 60(b) motion.

Id. at ¶7.

¶13 Senido's motion does not claim that a Rule 60(b) motion was made in the trial court, and it certainly does not seek a limited remand of the case so the trial court may act on the nonexistent motion. *See* Motion of Appellant to Take Case Off Calendar filed March 16, 2004. In fact, the motion seems to do nothing more than ask this Court to do nothing until Senido can ascertain whether he wishes to proceed with the instant appeal.

¶14 Senido's motion of March 16, 2004, was substantively lacking, if the goal of said motion was to obtain Rule 60(b) relief in the trial court. *See supra* ¶¶12-13. If the point of the motion was merely to obtain more time to decide whether to proceed with the appeal, the Court did not abuse its discretion in determining that it had granted sufficient time already. *See, supra* ¶¶1-2. In either scenario, it was not error for the Court to deny the motion.

¶15 As noted *supra* ¶¶4-5, Appellees filed a motion to dismiss this appeal. Senido's brief was eventually due on March 1, 2004. *Supra* ¶2. As of today's date, Senido has failed to file a response to the motion to dismiss, and has failed to file a motion to file a late brief pursuant to Rule 31(e), which provides:

If an appellant fails to file a brief within the time allowed by Rule 31(a) ["appellant shall serve and file a brief within 40 days after the date on which the certificate of record is filed"] or an extension thereof, the Court may dismiss the appeal pursuant to Rule 42(c). *A late brief may be filed only with the permission of the Court, on such conditions as the Court may order.*

Com. R. App. P. 31(e) (emphasis added).

¶16 Senido's ongoing failure to file a response to Appellees' motion to dismiss is understandable since the time for doing so has passed, *see* Com. R. App. P. 27(a) (“[a]ny party may file a response in opposition to a motion . . . within 7 days after service of the motion”), but we note that he could have filed a motion pursuant to Commonwealth Rule of Appellate Procedure 26(b) to allow him to file a motion out of time.¹⁵ Senido's ongoing failure to file a Rule 31(e) motion (seeking permission of the Court to file a late brief) is perplexing considering the facts that, since March 1, he has filed no fewer than 4 discrete sets of submissions with this Court, *see supra* ¶¶ 3, 8-9, and this omission was brought to his attention in Appellees' motion to dismiss. *See* Petitioner-Appellees' Motion to Dismiss Appeal and Response in Opposition to Appellant's Motion to Take Case Off Calendar filed March 18, 2004 (“nor has he requested leave under rule 31(e) to file out of time”).¹⁶

¶17 Commonwealth Rule of Appellate Procedure 42(c) provides:

When an appellant fails to file the record or brief on time, pay the docket fee, or otherwise comply with the rules requiring the processing of appeals, 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.

¹⁵ Commonwealth Rule of Appellate Procedure 26(b) provides, in pertinent part:

The Court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the Court may not enlarge the time for filing a notice of appeal.

Com. R. App. P. 26(b).

¹⁶ Further, the Court mentioned Senido's failure to file a motion to file a late brief in its Order Denying Appellant's Motion to Take Case Off Calendar entered March 18, 2004. “Appellant also failed to properly address the matter by . . . request[ing] permission to file [a] late brief pursuant to rule.” *Id.*

Based on the above, *see supra* ¶¶ 15-16, good cause exists to grant Appellees' motion to dismiss this appeal. Accordingly, this appeal is DISMISSED pursuant to Com. R. Civ. P. 42(c).

¶18 As this appeal has been dismissed, Senido's request that the full panel review the Court's April 7, 2004, denial of his "Second Request for Additional Time to Respond to Order to Show Cause" is mooted insofar as he was to show cause why the appeal should not be dismissed.

¶19 The dismissal of this appeal does not, *ipso facto*, moot the issue of whether Senido and, or his counsel should be sanctioned for failing to prosecute this appeal. *See supra* ¶17. Counsel's proffered explanation for his inability to timely show cause why he should not be sanctioned for failing to prosecute this appeal, *see supra* ¶8, is inadequate.

¶20 This Court does not understand why, when a response to an Order to Show Cause was due (after having been granted an extension of time to file said response), counsel simply did not ask the visitor, mentioned *supra* ¶8, to return in a few hours when counsel's response to the Order was filed. While counsel did mention that he was preparing documents for a hearing scheduled the following day, he did not claim that those documents had a filing deadline prior to the Court's Order.¹⁷ As evidenced by the

¹⁷ Counsel stated:

This morning, I was in my office working diligently on the response to the OSC when Chinese Translator Norman Xing arrived with an emergency matter concerning some 16 Chinese workers with pending matters before the CNMI Department of Labor.

Because the matter required immediate attention today due to scheduled action at the Department of Labor, Division of Administrative Hearings tomorrow, I gave Mr. Xing the time necessary to prepare the documents he needed.

Addressing this emergency took from 11:00 a.m. until 2:17 p.m., without a break of any kind. As a result, I am unable to meet the deadline for responding to the OSC today, even though this is the time I myself requested.

I apologize to the Court for the continued delay but request the Court's understanding in that I did not consider it reasonable or proper for me to disregard or abandon the urgent,

Court's April 7, 2004, Order, the Court was not convinced that counsel showed good cause why another extension should be granted. The full panel is not convinced that it was proper for counsel to disregard this Court's Order due one day, in favor of another matter due the next day. Accordingly, the Court's April 7, 2004 Order shall not be disturbed.

¶21 Senido was ordered to Show Cause why he and/or his counsel should not be sanctioned, and this Court has not received a timely response thereto. As far as Senido is concerned, the dismissal of this appeal is an appropriate sanction. Counsel has demonstrated an inability to timely file a brief and a response to an Order to Show Cause in this matter, and has called into question his ability to manage his caseload. Accordingly, sanctions of one hundred dollars (\$100.00) are imposed on Counsel, due thirty days from the issuance of this Order.¹⁸

SO ORDERED THIS 23RD DAY OF APRIL 2004.

/s/ _____
MIGUEL S. DEMAPAN,
Chief Justice

/s/ _____
JOHN A. MANGLONA,
Associate Justice

/s/ _____
PEDRO M. ATALIG,
Justice *Pro Tempore*

emergency need of these 16 clients in order to meet the deadline on the OSC.
Declaration of Counsel filed April 6, 2004.

¹⁸ This does not preclude subsequent action by an interested person or entity.