

FSM SUPREME COURT APPELLATE DIVISION

NATIONAL GOVERNMENT OF THE FEDERATED)	APPEAL CASE NO. P12-2021
STATES OF MICRONESIA, by and through its)	
agency, the FSM Program Management Unit,)	
)	
Appellant,)	
)	
vs.)	
)	
PACIFIC INTERNATIONAL, INC.,)	
)	
Appellee.)	
_____)	

ORDER DENYING DISMISSAL

Larry Wentworth
Associate Justice

Decided: November 24, 2021

APPEARANCES:

For the Appellant: Jeffrey S. Tilfas, Esq.
Assistant Attorney General
FSM Department of Justice
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For the Appellee: Thomas M. Tarpley, Jr., Esq.
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HEADNOTES

Appellate Review – Notice of Appeal

A notice of appeal filed before a motion for reconsideration is decided would be premature (and ineffective) when the reconsideration motion sought to alter the trial court's judgment. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 454 (App. 2021).

Appellate Review – Notice of Appeal

A notice of appeal should specify the party or parties taking the appeal; should designate the judgment, order or part thereof appealed from; should name the FSM Supreme Court appellate division as the court to which the appeal is taken; should provide the names of all parties in the proceeding appealed from, as well as the names, addresses and telephone numbers of the legal counsel in that proceeding, and should include certification of service upon all other parties. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 454-55 (App. 2021).

Appellate Review – Dismissal; Appellate Review – Notice of Appeal

An appeal shall not be dismissed for informality of form or title of the notice of appeal. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 455 (App. 2021).

Appellate Review – Notice of Appeal

For there to be an effective notice of appeal, it is enough that a document is timely filed under Rule 4 and conveys the information required by Rule 3(c). Courts will construe Appellate Rule 3's requirements liberally, and when the papers are technically at variance with the letter of Rule 3, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 455 (App. 2021).

Appellate Review – Notice of Appeal

When an FSM court has not previously construed an FSM Appellate Procedure Rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule, such as when, other than the FSM rule's provision that the appellant, instead of the trial court clerk, serve the notice of appeal, Appellate Rules 3 and 4 are very similar to their U.S. federal rule counterparts. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 455 n.1 (App. 2021).

Appellate Review – Notice of Appeal

While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, this requirement's purpose is to ensure that the filing provides sufficient notice to other parties and the courts. Thus, the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 455 (App. 2021).

Appellate Review – Notice of Appeal

If a party has failed to abide by the simple requirement of filing a notice of appeal with the clerk, an effective substitute demands some sort of paper or entry on the written record that might reasonably be construed as a notice of appeal and that in fact gives adequate notice to the courts and to the other parties as to the appeal from a particular judgment. Items that may satisfy this requirement include briefs, motions to proceed in forma pauperis on appeal, requests for appointment of appellate counsel, requests for leave to appeal, motions for extension of time to appeal, requests for extraordinary writs, letters to the trial court, requests for a certificate of probable cause or certificate of appealability, filings concerning the record on appeal, a motion or bond for a stay pending appeal, and various other filings. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 455 (App. 2021).

Appellate Review – Notice of Appeal

When a notice of appeal filed on September 6, 2021, would be timely under Rule 4 and when the appellant's statement of issues filed that day would contained the information required by Rule 3 to be included in a notice of appeal, with the exception of the telephone number of the appellee's counsel (an insignificant deficiency since appellee's counsel presumably knows its own phone number), the statement of issues was thus a functional equivalent of a notice of appeal because it gave notice to the parties and the court of the appellant's intent to appeal, it contained the required information, and because the appellee was not prejudiced by its filing. FSM v. Pacific Int'l, Inc., 23 FSM R. 452, 455-56 (App. 2021).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This comes before the court on Pacific International, Inc.'s Motion to Dismiss Appeal, with supporting

affidavit, filed October 6, 2021; the FSM's Opposition to Pacific International, Inc.'s Motion to Dismiss Appeal, filed October 14, 2021; and Pacific International, Inc.'s Reply to the FSM's Opposition to Motion to Dismiss Appeal, filed October 19, 2021. For the reasons explained below, the motion is denied.

I. CASE POSTURE

On August 27, 2021, the FSM national government filed a notice of appeal from the trial division's August 20, 2021 Oder Denying Motion for Reconsideration; July 2, 2021 Final Order re: PII's Motion for Entry of Judgment on AAA/CDR Arbitrators' Final Award (and July 6, 2021 Judgment); and June 13, 2018 Order re Stay of Litigation and Enforcement of Arbitration Agreement. The FSM neglected to serve this notice on Pacific International, Inc. ("PII"), although the attached certificate of service stated that it had been (or would be) served by certified mail. On September 6, 2021, the FSM filed and served a Rule 10(b) Statement of Issues. PII's counsel then informed the FSM that neither he nor his office had received any notice of appeal from the FSM. On October 6, 2021, PII moved to dismiss the appeal.

PII contends that this appeal must be dismissed because it was never served the FSM's notice of appeal, if there was one; because the FSM's Statement of Issues cannot be a notice of appeal since it is not entitled "notice of appeal" and since a notice of appeal and a statement of issues are different things; and because the "Statement of Issues" was filed too late to be a timely notice of appeal of the July 6, 2021 judgment. PII further contends that even if the FSM had filed a notice of appeal, the lack of service is still grounds to dismiss this appeal.

The FSM opposes any dismissal and asserts that its failure to promptly serve on PII's counsel the August 27, 2021 notice of appeal was an oversight that it had, or would, correct and that it is always preferable that an appeal be decided on the merits rather than dismissed, especially when there is no prejudice to the appellee.

In reply, PII notes that the FSM admitted, in an un-notarized "affidavit," that the August 27, 2021 notice of appeal was not served on PII, that its attached certificate of service was thus false, and that the notice was sent to PII's counsel by certified mail on October 7, 2021, after PII's motion to dismiss was filed.

II. FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL

Regardless of whether the FSM's tardy service of its August 27, 2021 notice of appeal was effective, the FSM's service of its September 6, 2021 Statement of Issues may serve as the functional equivalent of an effective notice of appeal, thus preserving the appellate division's jurisdiction and requiring a denial of PII's motion to dismiss. The court will therefore not address whether the FSM's tardy (October 7, 2021) service of its August 27, 2021 notice of appeal makes that notice of appeal ineffective.

A. *Statement of Issues' Filing Date*

The court must first reject PII's contention that the FSM's Statement of Issues was filed too late to be effective as a notice of appeal since it was filed more than 42 days after the July 6, 2021 judgment. A notice of appeal filed before the FSM's motion for reconsideration was decided on August 20, 2021 would have been premature (and ineffective), FSM App. R. 4(a)(4), since the reconsideration motion sought to alter the trial court's judgment. See, e.g., Heirs of Henry v. Heirs of Akinaga, 18 FSM R. 542, 546 (App. 2013); Alonso v. Pridgen, 15 FSM R. 597, 600 (App. 2008). The time to appeal therefore started running on August 20, 2021, when the trial court denied the FSM's reconsideration motion. The FSM's Statement of Issues was thus filed within the time required by Appellate Rule 4.

B. *Whether the Statement of Issues is Effective as a Notice of Appeal*

A notice of appeal should

specify the party or parties taking the appeal; sh[ould] designate the judgment, order or part thereof appealed from; sh[ould] name the Federated States of Micronesia Supreme Court appellate division as the court to which the appeal is taken, sh[ould] provide the names of all parties in the proceeding appealed from, as well as the names, addresses and telephone numbers of the legal counsel in that proceeding, and sh[ould] include certification, as specified in Rule 25(d), of service upon all other parties.

FSM App. R. 3(c). “An appeal shall not be dismissed for informality of form or title of the notice of appeal.” *Id.*

Generally, for there to be an effective notice of appeal, it is enough that a document is timely filed under Rule 4 and conveys the information required by Rule 3(c). Courts will construe Appellate Rule 3’s requirements liberally, and “when the papers are ‘technically at variance with the letter of [Rule 3], a court may nonetheless find that the litigant has complied with the rule if the litigant’s action is the functional equivalent of what the rule requires.’” *Smith v. Barry*, 502 U.S. 244, 248, 112 S. Ct. 678, 681-82, 116 L. Ed. 2d 678, 685 (1992) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17, 108 S. Ct. 2405, 2408-09, 101 L. Ed. 2d 285, 291 (1985)).¹

While a notice of appeal must specifically indicate the litigant’s intent to seek appellate review, the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts. Thus, the notice afforded by a document, not the litigant’s motivation in filing it, determines the document’s sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Smith, 502 U.S. at 248-49, 112 S. Ct. at 682, 116 L. Ed. 2d at 685 (citations omitted). Generally,

courts have recognized a host of substantial equivalents to the formal act of filing a proper written notice of appeal with the . . . court clerk. The consensus seems clearly to be that if a party has failed to abide by the simple requirement of filing a notice of appeal with the clerk, an effective substitute demands some sort of paper or entry on the written record that might reasonably be construed as a notice of appeal and that in fact gives adequate notice to the courts and to the other parties as to the appeal from a particular judgment. Items found to satisfy this requirement include briefs, motions to proceed in forma pauperis on appeal, requests for appointment of appellate counsel, requests for leave to appeal, motions for extension of time to appeal, requests for extraordinary writs, letters to the [trial] court, requests for a certificate of probable cause or certificate of appealability, filings concerning the record on appeal, a motion or bond for a stay pending appeal, and various other filings.

16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3949.6, at 155-63 (4th ed. 2008) (footnotes omitted). The court concludes that the FSM’s Statement of Issues qualifies as an adequate “other filing.”

In *Lincoln Composites, Inc. v. Firetrace USA, LLC*, 825 F.3d 453, 458 (8th Cir. 2016), when the initial notice of appeal was ineffective because it was premature and no amended notice of appeal was filed, the appellate court construed the appellant’s amended statement of issues, filed after the trial court decided a

¹ When an FSM court has not previously construed an FSM Appellate Procedure Rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule. *Palsis v. Tafunsak Mun. Gov’t*, 16 FSM R. 116, 123 n.4 (App. 2008). Other than the FSM rule’s provision that the appellant, instead of the trial court clerk, serve the notice of appeal, Appellate Rules 3 and 4 are very similar to their U.S. federal rule counterparts.

