

FILED
SUPREME COURT
STATE OF WASHINGTON
10/24/2019 11:32 AM
BY SUSAN L. CARLSON
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Supreme Court No. 97519-1
Court of Appeals Cause No. 78014-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID ESSIG,

Plaintiff and Respondent,

v.

MICHAEL LAI AND VEENY VAN, et al.

Appellants and Petitioners.

REPLY TO ANSWER TO MOTION TO EXTEND TIME FOR
PETITION FOR REVIEW

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I. DEFENDANT LAI’S NEED FOR AN EXTENSION OF TIME TO PETITION FOR REVIEW AROSE FROM HIS MISTAKEN BELIEF THAT HIS DILIGENT EFFORTS TO SETTLE THE CASE WOULD SUCCEED; THE MISTAKE WAS CAUSED BY HIS IMPERFECT MASTERY OF ENGLISH

Plaintiff argues this motion to extend time to file the petition for review should be denied, because extraordinary circumstances do not justify the extension. The facts show the contrary to be the case.

It is undisputed that petitioner undertook diligent efforts to settle this lawsuit, that petitioner’s final effort at settlement within the 30-day period to petition for review failed on August 6, 2019, that the same day he retained appellate counsel to proceed with this petition, and that this did not leave enough time for counsel to timely file the petition, although the motion to extend time was filed within the 30-day period.

Thus, the need for the extension of time reflects Mr. Lai’s overestimation of the likelihood his diligent efforts to settle the lawsuit would succeed within the 30-day period permitted to file a petition for review. While advised by counsel, Mr. Lai’s ability to make judgments about such matters remained limited by his imperfect command of English.

Lai is Vietnamese and did not learn English until he came to the United States as an adult. Declaration of Michael Lai in Support of Reply to Answer to Motion for Extension of Time for Petition for Review (hereinafter “Lai Reply Declaration”), p. 1. Although he has lived here

since 1993, he conducts his business largely with the Vietnamese community and speaks Vietnamese with his family. Lai Reply Declaration, pp. 1-2. Indeed, petitioner was assisted by a Vietnamese translator in the trial of this case. Lai Reply Declaration, p. 2; RP 13-15.

Petitioner submits that grasping the level of progress, or lack thereof, in settlement negotiations with sufficient precision to ascertain, during a 30 day window to petition for review, the point at which the expectation of success should be abandoned in order to timely file a petition is something that understandably eluded petitioner due to his imperfect command of English.

Moreover, even if petitioner had retained appellate counsel sooner, indeed as soon as August 2, 2019, appellate counsel nonetheless would have required an extension of time to file the petition for review, until significantly after September 6, 2019. That is because on August 2, 2019 the California Court of Appeal granted him an extension of time, as appellant's counsel in *People v. Archila*, Cal.Ct.App. No. H045662, until September 6, 2019 to file the appellant's opening brief in that case, which was complex -- with no further extension of time permitted. Declaration of Randy Baker in Support of Reply to Answer to Motion for Extension of Time for Petition for Review, p. 1.

Respondent appears to advance two arguments: first, that petitioner knew of the 30-day deadline for filing the petition and second that “without explicitly saying so” he “appear[s] to claim” that the extension of time is required, because plaintiff and his counsel postponed settlement negotiations.¹ Answer to Motion to Extend Time for Petition for Review (hereinafter “Answer”), pp. 8-9.

While the first proposition is correct, it is immaterial. Petitioner’s grounds for the extension do not turn a claim of ignorance of the 30-day deadline.

The second argument fails, because it turns not on the argument petitioner has raised, but rather on plaintiff’s representation of how it looks to him. In fact, petitioner’s motion neither asserts nor does it presuppose that plaintiff and his counsel induced his delay in filing the petition through misrepresentation nor through any breach of a duty to petitioner. Rather, he cites their repeated postponement of settlement negotiations as the events that caused him to realize the need to proceed with the petition.

Indeed, as plaintiff acknowledges, there was a gap in settlement discussions from August 2, 2019, when Mr. Lai’s counsel resumed contact with Mr. Essig’s counsel about settlement, to August 6, 2019 when

1. Plaintiff does not deny this petition concerns a substantial question of law.

plaintiff's counsel met with Mr. Lai's counsel thereon. Answer, p. 6. It is undisputed that the parties' failure to reach a settlement on that day precipitated Mr. Lai's retaining counsel that same day to proceed with the petition for review.

Mr. Lai's declaration filed with the motion to extend time is incorrect in two respects. First, it refers to repeated "postponements" caused by plaintiff and his counsel, when the lapses would more accurately have been identified as "delays." Second, while the final delay that precipitated Mr. Lai's recognition settlement would not be reached within the 30-day period to petition for review in fact did arise from interactions with plaintiff and his counsel, the majority of the delays concerned interactions between Mr. Lai and his Attorney Mr. Sternberg. Lai had been telephoning and texting Sternberg several times per week to advance the settlement negotiations with plaintiff. Lai Reply Declaration, p. 1. Thus, the correct statement would have referred to a delay involving communications with plaintiff and his counsel, and to additional delays involving communications between petitioner and his own counsel.

These errors reflect petitioner's imperfect command of English. Lai Reply Declaration, pp. 1-2. Moreover, as explained, petitioner's motion does not turn on any allegation of misrepresentation or breach of

duty by plaintiff or plaintiff's counsel. Accordingly, these errors are immaterial to the merits of his motion.²

II. PLAINTIFF'S REQUEST FOR SANCTIONS SHOULD BE DENIED

Plaintiff asserts sanctions should be awarded, because Mr. Lai and his counsel misled the court. As explained, Mr. Lai did not mislead the court and his counsel neither misled the court nor did he have reason to believe Mr. Lai was misleading the court. Thus, the motion should be denied.

CONCLUSION

For the aforementioned reasons, and for the reasons stated in their motion to extend time, petitioners' request for an extension of time to file the petition for review should be granted. For the above-stated reasons, plaintiff's motion for sanctions should be denied.

Dated: October 24, 2019

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2. Since petitioner's representations to this Court that plaintiff challenges are substantially correct, it is unnecessary to address what plaintiff asserts to have been petitioner's prior false representations.

DECLARATION OF SERVICE

Essig v. Lai et al., No. 97519-1, Court of Appeals No. 78014-0-I

I, Randy Baker, declare, I am above 18 years of age and not a party to the above titled suit. My business address is 2719 E. Madison St., Suite 304, Seattle, WA 98112.

On October 24, 2019 I served a copy of the attached Motion for Extension of Time to File Petition for Review on Respondent's counsel, Brian K. Keeley, through this court's electronic filing system.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Seattle, Washington on this 24th day of October 2019.

Randy Baker /s/

October 24, 2019 - 11:32 AM

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