

FILED
SUPREME COURT
STATE OF WASHINGTON
5/17/2023 11:25 AM
BY ERIN L. LENNON
CLERK

Case No. 1019301

SUPREME COURT
OF THE STATE OF WASHINGTON

MOON H. HUR and SEUNGJA HONG, Petitioners

v.

PATTI KIM, Respondent.

**RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR
REVIEW AND MOTION FOR DISMISSAL BY
COMMISSIONER AND SANCTIONS UNDER RAP 18.9**

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I. INTRODUCTION

There are three fundamental aspects to this case. The first is that there is not an issue here that has not been addressed multiple times. Aside from multiple Motions for revision and reconsideration filed before the Trial Court, this includes two Motions for Discretionary Review, the Division I Opinion - “The tenants appeal several trial court orders but fail to establish a basis for appellate relief;” at 1 and, a Motion for Reconsideration of the Division I Opinion -denied.

Although Appellant raises 5 issues, none of them are new. Issues 3, 4 and 5 are duplicative, focusing on Appellant’s claim that its serial failure to comply with explicit deadlines in the Civil Rules was the result of “excusable neglect.” This issue was a principal focus of the Motion for Reconsideration to Division I:

This Court should also reconsider its holdings regarding Moon Hur and Seungja Hong’s preserved claim of excusable neglect regarding this Court’s consideration of the motion for reconsideration of the trial court’s motion to dismiss and remand this case for to the trial court for further proceedings.

Appellant's Motion for Reconsideration at 27. The same arguments here have already been made and rejected by Division I.

Second, Appellant's attempt to reargue the issues before the Trial Court are irrelevant to this proceeding. The only issue presented by this Petition is whether Appellant has identified a consideration justifying further review under RAP 13.4 (b).

The Appellant's argument that the decision by Division I is in conflict with other published opinions is based on a specious mis-reading of the case law. The Court of Appeals has the discretion to overlook Appellant's failure to preserve issues on appeal. Certainly true. But, the decision by Division I not to exercise that discretion does not create a conflict in reported case law. The Appellant conflates the ability to exercise discretion with the decision not to do so. There is no conflict between the Opinion of Division I and other appellate opinions.

In arguing that the standard for enforceability of option agreements represents a matter of significant public interest, Appellant raises an entirely new issue for the first time in a Petition for Review.

Finally, this Motion is both frivolous and, made for the purpose of delay. Respondent moves for dismissal of this Petition pursuant to RAP 18.9 (c) and for an award of sanctions pursuant to RAP 18.9 (a).

II SUPPLEMENTAL FACTS

This was an action to evict a tenant at sufferance. It has been dragging on now for three years. As Division I noted: “the record contains over 2,500 pages of clerk’s papers and 200 pages of the report of proceedings.” At 5. With the exception of continuance orders entered by the Trial Court– 5, there was essentially no ruling by the Trial Court which was not challenged by the Appellant with multiple Motions for revision/reconsideration and 2 separate motions for discretionary review.

Appellant filed a Motion to Modify the denial of discretionary review by this Court on 9/16/21. A Motion for Emergency Stay was denied in December 2021. Appellant sought extensions of filing deadlines before the Court of Appeals repeatedly, both on the losing effort to obtain discretionary review and, with respect to perfecting the record on review.

Appellant sought extensions for perfecting the record on review on 1/5/22, 1/25/22 and 4/26/22.

The Court of Appeals repeatedly required Appellant to refile appellate briefs for failure to comply with the rules; on 8/16/22 and 10/20/22. Division I concluded that Appellant failed to comply with each of RAP 2.5, 10.3(a)(4), 10.3(g) and 10.4(c) as bases for decision rejecting Appellant's Appeal on multiple issues because Appellant failed to preserve the issues raised here for appeal.

A copy of the Judgment is included in the Appendix to the Petition for Review. A particular significance to this Petition is the following provision appearing Section II (1) (d):

Should Defendants not vacate 1106 E. 52nd St., Tacoma, Wahington by October 31,2021, the judgment shall increase by \$72.00 for every day the Defendants remain on the premises.

The Trial Court entered a supersedeas order requiring a \$95,000 bond which included rent, \$72.00 per day, over the expected lifetime of the appeal. So, while Respondent is the owner of an income property from which the Appellant was ordered to be

evicted over 2 years ago, Respondent has been bearing all the costs of ownership without receiving any rent for over 2 years.¹

The objective of this Petition is to allow the Appellant to continue to occupy the subject property until the supersedeas is exhausted while continuing the burden on Respondent of covering the costs of ownership without receiving rent. This is delay for delay's sake.

III AUTHORITY AND DISCUSSION

1. The Appellant has failed to identify a basis for acceptance of review.

The Appellant spends a great deal of time asserting that various actions by the Trial Court were an abuse of discretion. The principal and dispositive issue in this appeal was whether the Trial Court's denial of an untimely Motion for Reconsideration was an abuse of discretion. The Motion sought reconsideration of the Appellant's failure to timely respond to Respondent's Motion to Dismiss. As in Appellant's Opening Brief Reply and

¹ As of the date of this Answer, 563 days have passed since 10/31/21. At \$72 per day, this is \$0,536 in rent which Respondent has not received while Respondent continues to pay real estate taxes, insurance etc. on the property.

Motion for Reconsideration, Appellant seeks to argue the merits of the Motion to Dismiss to which Appellant failed to respond.

However, as Division I noted:

[I]n urging reversal of the trial court's ruling on reconsideration, Hur continues to argue the merits of the summary judgment decision, but that is not the proper standard of review for this sort of challenge. The trial court did not abuse its discretion by denying the motion for reconsideration.

At 8-9.

Appellant continues the effort to argue the merits of the underlying Motion to Dismiss in this Petition. These same arguments were rejected by Division I both in its original opinion and in the denial of the Motion for Reconsideration.

However, these arguments are simply irrelevant to the issue of whether this Court should accept review. RAP 13.4(b) sets forth the criteria governing acceptance of review by this Court:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial

public interest that should be determined by the Supreme Court.

The only issue presented here is whether any of these considerations warrants review in this case. They do not.

As Respondent understands Appellant's brief, Appellant asserts that the decision of the Court of Appeals not to consider issues not properly perfected for appeal under RAP 2.5, 10.3(a)(4), 10.3(g) and 10.4(c) was in conflict with reported authority holding that the decision not to review issues under these rules was discretionary:

The unpublished decision of the Court of Appeals is directly contrary to this Court's decision where "RAP 2.5(a) provides that if a party fails to raise an issue in the trial court, the appellate court may decline to review the issue on appeal. However, the rule's use of the term "may" indicates that it is a discretionary decision to refuse review. *Roberson v. Perez*, 156 Wash.2d 33, 39, 123 P.3d 844 (2005).

Appellant invokes RAP 13.4 (b)(1).

This same issue was raised in Appellant's Motion for Reconsideration to Division I:

It is clear from the language of RAP 1.2(a), and the cases decided by this Court and the Washington State Supreme Court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more

technical flaws in an appellant's compliance with the Rules of Appellate Procedure.

This argument was rejected by Division I when it denied Appellant's Motion for Reconsideration.

The reported decisions on which Appellant relies establish nothing more than that the Court of Appeals has discretion.

In general, issues not raised in the trial court may not be raised on appeal. *See* RAP 2.5(a) (an "appellate court may refuse to review any claim of error which was not raised in the trial court"). However, by using the term "may," RAP 2.5(a) is written in discretionary, rather than mandatory, terms.

Roberson v. Perez, 156 Wash. 2d 33, 39, 123 P.3d 844, 847–48.

The argument conflates the ability to exercise discretion with a decision not to exercise discretion. It is implicit in the case law holding that a Court of Appeals may exercise discretion that the same Court can decline to exercise discretion. That Division I declined to exercise discretion does not create a conflict with case authorities on which Appellant relies.

Appellant also attempts to invoke RAP 13.4(b)(4). Appellant states: "The case also warrants review because ensuring the proper standard for evaluating the enforceability

“option to purchase” agreements which is a matter of public interest & contractual predictability. RAP 13.4(b)(4). At 16. The Appellant has simply failed to identify anywhere in the record this was an issue. The standard for enforceability of option agreements was never at issue before the Trial Court. Nor at any point in this appeal prior to this Petition has the Appellant raised an issue regarding the standard for enforceability of option agreements. Appellant is improperly raising this issue for the first time in this Petition for Review.

Finally, this case has been characterized by a serial failure on the part of the Appellant to comply with the rules. This includes the repeated failure to comply with mandatory deadlines under the Superior Court rules and the failure to comply with multiple provisions of the RAP. It also includes a failure to comply with RAP prohibiting filings for the purpose of delay and/or which are frivolous and made for the sole purpose of delay.

B. This Appeal should be dismissed and sanctions awarded under RAP 18.9.

RAP 18.9 (a) provides:

The appellate court on its own initiative or on motion of a party may order a party or counsel ... who uses these rules for the purpose of delay, files a frivolous appeal, to pay terms or compensatory damages to any other party who has been harmed by the delay.

RAP 18.9 (b) provides: “The commissioner or clerk, on 10 days' notice to the parties, (1) may dismiss a review proceeding as provided in section (a).”

The standard governing whether an appeal is frivolous is determined by the following standard: “an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Green River Community College v Higher Education Personnel Board*, 107 Wn. 2d 427 at 442-443, 730 P. 2d 53 (1986). There are no debatable issues presented here.

The purpose of this Petition is to delay resolution through the exhaustion of the supersedeas amount so Appellant can continue to occupy the subject property. Delay has been Appellant’s objective throughout the course of these

proceedings as amply evidenced by the procedural history described above.

Accordingly, Respondent is requesting dismissal of this Petition under RAP 18.9 (c) and an award of sanctions under RAP 13.9 (a).

The undersigned certifies this Answer contains 2137 words.

Dated this 17th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17th, 2023, I electronically served Respondent's Answer to Petition for Review through email service on:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of May, 2023, at Tacoma, Washington.

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May 17, 2023 - 11:25 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,930-1
Appellate Court Case Title: Patti Kim v. Moon Hur and Seungja Hong
Superior Court Case Number: 20-2-07303-8

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