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Supreme Court No. 97519-1

Court of Appeals No. 78014-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID ESSIG,
Respondent

v.

MICHAEL LAI, et al.,
Petitioners.

Answer to Motion to Extend Time for Petition for Review

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INTRODUCTION

The deadline to file a petition for review is only extended when there are “extraordinary circumstances” justifying such an extension. There are no such circumstances here, and the request is based on false or misleading testimony from Petitioner Michael Lai. The motion should be denied, the petition should be rejected as untimely, and Petitioners should be sanctioned.

ISSUE PRESENTED FOR REVIEW

Petitioners and their counsel (both appellate counsel and collection-avoidance counsel) knew of the deadline to file a petition for review. They failed to do so, claiming settlement negotiations somehow prevented them from doing so. They rely on the false or misleading testimony of Michael Lai, whom the trial court found to be “not credible” and who has submitted unequivocally and demonstrably false testimony before. Are these “extraordinary circumstances” justifying an extension of the time within which Petitioners were required to file their petition for review? No. The motion should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent David Essig filed this suit in 2016 for breach of an employment contract, failure to pay wages, and statutory penalties for failure to pay wages. The case was tried before Judge Timothy Bradshaw of the King County Superior Court from October 30 through November 2, 2017. Findings of fact, conclusions of law, and a judgment were entered January 24, 2018 against Petitioners Michael Lai, Veeny Van, and five

entities they own or control (ML Companies LLC, USASIA Pacific Inc., PT Holding LLC, Realty Network Team Inc. and Seattle Modern Living on 35th LLC). Petitioners appealed to Division One of the Court of Appeals. The Court of Appeals issued an opinion on July 8, 2019, affirming the judgment.

Instead of filing a timely petition for review, Petitioners filed a motion for an extension of the time to do so, and filed that on the last day to file a petition for review. The motion is supported almost entirely by the declaration of Petitioner Michael Lai, who states under oath that he did not direct counsel to file a petition for review until the day before it was due because *he* thought the parties would reach a settlement and because Respondent Essig and undersigned counsel “postponed” settlement negotiations.

Petitioner Lai is not honest, has been found by the trial court judge in this matter to be not credible, and has offered demonstrably false testimony before. At trial, Lai testified to various inconsistent reasons why he believed the contract he entered into was not enforceable. In rendering an oral decision at trial, the trial court judge explained Lai’s lack of credibility in doing so:

Though counsel for Mr. Lai has wisely not fought whether Exhibit 3 is a valid employment agreement, his client did. Mr. Lai took an oath before this Court and proceeded to tell the Court that Exhibit 3 was not valid because he has one beer or because he did not read it or he read it and didn’t understand it or he read it, understood it, and was not intoxicated, yet did so because of a perceived pressure. Such testimony is incredible and telling when the Court

needs to make a credibility determination.

(Keeley Dec. Ex. A, VRP 402:17-25.)

The trial court judge carried this finding through to the written finding of fact and conclusions of law that followed. Among the trial court's findings and conclusions, the trial court judge specifically found that Lai was not credible, hand-writing this addition to the proposed findings: "nor was his testimony credible." (Keeley Dec. Ex. B, CP at 432.)

Lai's willingness to testify falsely continued after the judgment was entered. Petitioners moved for a stay of enforcement of the judgment by offering alternate security. (Keeley Dec. Exs. C and D. When Petitioners filed these, they included no exhibits with Lai's declaration.) The security they offered was two parcels of property that Lai claimed to own. That motion was supported by a declaration from Lai specifically testifying: "I am the owner of the lots of real property at 4918 S. Willow St Seattle, WA 98118 and 4912 S. Willow St Seattle, WA 98118, respectively." (Keeley Dec. Ex. D.) Respondent Essig opposed that motion, pointing out that Lai's testimony was inconsistent with his prior sworn testimony and with publicly available documents clearly and unequivocally showing that Lai was *not* the owner of the properties. (Keeley Dec. Ex. E, F, and G.) After Respondent Essig pointed out this demonstrably false testimony, Petitioners withdrew that motion. (Keeley Dec. Ex. H.)

Lai's past false testimony is important here, where the motion

depends largely on his testimony, namely his bare, disingenuous statement that Petitioners and their counsel did not prepare a timely petition because “Essig and his counsel have postponed our negotiations.” His testimony is, if not false, incomplete and misleading. The following chronology sets out what actually occurred shortly before and since the Court of Appeals issued its decision in this matter on July 8, 2019.

Petitioners were represented at the Court of Appeals by attorney Randy Baker. Attorney Baker submitted briefing at the Court of Appeals and argued on behalf of Petitioners on June 11, 2019. (Keeley Dec. ¶8.)

On June 24, 2019, Attorney Craig Sternberg contacted Respondent Essig’s counsel to provide notice that he would represent Petitioners with respect to Essig’s collection of the judgment. On June 25, 2019, Attorney Sternberg, copying Attorney Baker, confirmed that Attorney Sternberg would represent Petitioners on collection issues and Attorney Baker represented them on appeal issues. (Keeley Dec. ¶9 and Ex. I.)

On July 8, 2019, the Court of Appeals issued its decision upholding the trial court’s judgment.

On July 11, 2019, Attorney Sternberg contacted Respondent Essig’s counsel, copying Attorney Baker, requesting a meeting to discuss settlement on Tuesday, July 16, 2019. (Keeley Dec. ¶10 and Ex. J.)

On Tuesday, July 16, 2019, Attorney Sternberg sent a settlement proposal to Respondent Essig’s counsel. Later that morning, Attorney Sternberg met with Respondent Essig’s counsel to discuss the proposal. Respondent Essig’s counsel explained that the proposal was wholly

unacceptable and that Essig would not be responding to it. During that meeting, Attorney Sternberg discussed Petitioners' plan to file a petition for review with this Court. The meeting ended without progress on settlement, and with Attorney Sternberg stating that he would provide a different settlement proposal. (Keeley Dec. ¶11.)

On Friday, August 2, 2019, Attorney Sternberg contacted Respondent Essig's counsel with settlement options, but no settlement proposal. On Monday, August 5, 2019, Respondent Essig's counsel informed Attorney Sternberg that they could speak on Tuesday, August 6, 2019, which Attorney Sternberg acknowledged. (Keeley Dec. ¶12 and Ex. K.)

On Tuesday, August 6, 2019, Respondent Essig's counsel and Attorney Sternberg spoke by phone about possible settlement terms. No proposal was made by either side. During that discussion, Attorney Sternberg specifically mentioned that the deadline for a petition for review was the following day, indicating awareness of the deadline. (Keeley Dec. ¶13.)

On Wednesday, August 7, 2019, instead of filing a petition for review, Attorney Baker filed this motion for an extension of the time to do so.

ARGUMENT AND AUTHORITY

A. No Extraordinary Circumstances Justify an Extension

Under Rule 18.8(b) of the Rules of Appellate Procedure, the court "will only in extraordinary circumstances and to prevent a gross

miscarriage of justice extend the time within which a party must file ... a petition for review.” RAP 18.8(b). The rule continues: “The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.” *Id.*

This Court has held that “‘extraordinary circumstances’ include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Shumway v. Payne*, 136 Wn.2d 383, 395 (1998). The standard is “rarely satisfied.” *Id.* Although this Court has granted an extension where a litigant proceeding pro se was confused over a change in the rules and exercised reasonable diligence in following the rules he thought applied, *Scannell v. State*, 128 Wn.2d 829, 834-35 (1996), this Court has also denied an extension where the party does not claim reasonable diligence, does not claim confusion about the method for seeking review, does not claim excusable error in interpreting the rules, and does not claim the delay was due to circumstances beyond the party’s control. *Shumway*, 136 Wn.2d at 396.

Petitioners do not claim that they were reasonably diligent in their efforts to file a petition for review. To the contrary, despite being represented by counsel for appellate issues *and* counsel for collection issues, they and their counsel apparently took no steps whatsoever to file a petition until the day before it was due. That is not reasonable diligence.

Petitioners do not claim they suffered from confusion or error

about how to seek review. To the contrary, their counsel twice acknowledged their ability to do so and acknowledged the deadline for doing so. There was no confusion about how to seek review or when a petition was due.

Petitioners appear to claim (without explicitly saying so) that the delay is due to circumstances beyond their control, relying on Lai's false statements under oath that Respondent "Essig and his counsel have postponed our negotiations." (Lai Dec. second unnumbered paragraph.) That testimony is false, and it comes from someone with a history of offering testimony that is not credible or demonstrably false. Moreover, it relies on the illogical conclusion that somehow Respondent Essig would, after 4 years, somehow benefit from delaying settlement negotiations. This argument also ignores that Petitioners had more than sufficient time after the rejection of their July 16, 2019 settlement proposal to prepare a petition for review; they simply chose not to.

These are not "extraordinary circumstances" that justify an extension of the time to file a petition for review. The motion should be denied.

B. Request for Sanctions

Under Rule 18.9(a), a party who uses the Rules of Appellate Procedure for the purpose of delay or who fails to comply with the rules may be ordered to pay terms or compensatory damages to the other party or to pay sanctions to the court. Petitioner Lai has once again submitted false statements under oath, and has done so this time for the purpose of

delay. This action should not only not be rewarded, but Petitioners and their counsel should be sanctioned for Lai once again misleading a court. Terms, compensatory damages, or other sanctions are appropriate.

CONCLUSION

Petitioners' motion to extend the time for submitting a petition for review should be denied and Petitioners should be sanctioned.

Respectfully submitted this 21st day of October, 2019.

SCHLEMLEIN FICK & SCRUGGS, PLLC

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