

**APPELLATE COURT
STATE OF CONNECTICUT**

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| A.C. NO.: 42602 | : | APPELLATE COURT |
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| MERIBEAR PRODUCTIONS, INC. d/b/a MERIDETH BAER AND ASSOCIATES | : | STATE OF CONNECTICUT |
| | : | |
| V. | : | |
| | : | |
| JOAN FRANK, ET AL. | : | MARCH 13, 2019 |

OBJECTION TO MOTION FOR PERMISSION TO FILE LATE APPEAL

The Appellee, Meribear Productions, Inc. (hereinafter "Meribear"), hereby moves pursuant to Practice Book § 60-2, et seq., that the Appellants' Motion to File Late Appeal be denied.

I. BRIEF HISTORY OF THE CASE

Meribear is a California corporation in the business of, *inter alia*, providing interior design and staging services to facilitate their clients' sale of real estate. The Defendants/Appellants, Joan and George (a/k/a Andy) Frank, are individuals who at all times relevant hereto owned or had an interest in real estate known as 3 Cooper Lane, Westport, Connecticut (the "Premises"). The Franks hired Meribear to stage the Premises in order to give it a "showroom like quality" in conjunction with their placing the Premises on the residential real estate market in order to sell it.

On March 13, 2011, Meribear and the Franks entered into the "Staging Services and Lease Agreement", the Franks' breach of which formed the basis of the underlying dispute. The sole purpose of the agreement was to have Meribear design, decorate, deliver and install

rental furnishings, including high-end antiques and art, at the Premises in order to facilitate the sale of the Premises. In fact, it was the Defendants' Realtor, Jillian Klaff, who was working to sell 3 Cooper Lane, who contacted Mr. Baer directly and requested that he put together a proposal for staging the house.

The Contract also provided that in exchange for its work, Meribear was to receive payment according to the Contract terms. Notwithstanding, and despite the fact that Meribear fully performed its obligations, the Franks failed, refused or neglected to make payment and thereby breached the Contract. Moreover, the Franks interfered with and prevented Meribear from removing the furnishings after the Franks' breach, thereby causing Meribear to suffer additional damages. In fact, the Franks have wrongfully retained – and continue to this day to retain - possession of Meribear's goods.

On February 15, 2012, Meribear filed suit in the Superior Court of California, County of Los Angeles, claiming, *inter alia*, breach of contract and conversion ("California Action"). Meribear served process on both of the Franks in conformance with the Laws of the State of California. Ultimately, on August 7, 2012, after determining that Meribear had complied with the laws and requirements of the State of California, a Default Judgment ("Judgment") was entered in the California Superior Court, County of Los Angeles against Joan and George Frank and in favor of the Plaintiff in the amount of \$259,746.10.

The Judgment remaining entirely unpaid, Meribear commenced suit in the Superior Court for the Judicial District of Fairfield at Bridgeport in order to enforce the Judgment. Meribear claimed enforcement of the Judgment in the First Count and, in the alternative,

conversion damages for breach of the underlying Contract in the Second Count and damages in Quantum Meruit in the Third Count. The trial of this case was conducted on March 27, 2013 and April 24, 2013 before the Honorable Theodore Tyma.

On October 14, 2014, the Trial Court rendered an extremely thorough, well-reasoned Memorandum of Decision. In it the court found constructive service had been properly made on George Frank who was an owner of the company and routinely present at the office. Accordingly, the court found in Plaintiff's favor for common law enforcement of the Judgment against George Frank, but not against Joan Frank. With regard to the breach of contract claim, the court found in Plaintiff's favor as to both Joan and George Frank, specifically finding "the plaintiff's evidence relevant to the claimed breach to be credible, and the defendants' evidence not credible." In fact, the court expressly stated that it "*found George Frank's testimony on the procedural and substantive issues to be manufactured and lacking in truthfulness.*" (emphasis added). The Court rejected the Franks' Special Defenses, including that C.G.S. § 42-134a, the Home Solicitation Sales Act ("HSSA"), barred enforcement of the contract or that jurisdiction was lacking.

On or about December 18, 2014, the Defendants filed an appeal. By decision dated May 10, 2016, the Appellate Court affirmed the trial court's decision in favor of Meribear. Meribear Productions, Inc. v. Joan E. Frank et. al, 165 Conn.App. 305 (2016). Specifically, it found, *inter alia*, that Andy Frank had contractually consented to personal jurisdiction, that the contract at issue was not governed by the HSSA, and that the damages awarded were proper.

On May 31, 2016, the Franks filed their Petition for Certification to Appeal to which Meribear objected. The Supreme Court thereafter granted certification to appeal.

By Memorandum of Decision released on May 15, 2018, the Supreme Court determined that the Appellants' joint appeal of December 18, 2014 was improper and that the decision should be reversed and remanded with direction to the Appellate Court to dismiss the appeal because that Court lacked jurisdiction. Meribear Productions, Inc. v. Joan E. Frank et al., 328 Conn. 709, 726 (2018). Specifically, the Supreme Court concluded that although the judgment was final as to Joan Frank, Id. at 724; Id. at 726, FN 4; it was not final as to George Frank. Id. at 725. The Court determined that because the trial court failed to dispose of either the contract count (Count 2) or the quantum meruit count (Count 3) as to George Frank, those counts were not legally inconsistent alternative theories of liability, there was no final judgment as to George Frank from which to appeal and therefore the joint appeal required dismissal. Id. at 723-25. In its decision, the Supreme Court all but informed the Appellants that the appeals should have been taken separately. The appeal was thereafter dismissed.

On or about October 2, 2018, the Plaintiff filed a Motion for Attorney's Fees in the trial court as well as a Motion for Post Judgment Interest. On January 29, 2019, Meribear filed a withdrawal of Counts 2 and 3 of its Complaint as to George Frank. The Motions for Attorney's Fees and Post Judgment Interest were argued on January 30, 2019. The parties stipulated, and the trial court confirmed that an award of Attorney's Fees in the amount of \$66,410.00 would enter. On or about January 31, 2019, the trial court issued a written decision granting

Meribear an award of Post Judgment Interest in the amount of five percent (5%).¹ Neither action by the Court affects the finality of the judgment here at issue.

On or about February 15, 2019, Joan Frank and George Frank filed the instant joint appeal. Again, the appeal was taken jointly. Meribear thereafter filed a Motion to Dismiss the appeal on the ground that despite the Supreme Court's admonition that the judgments against the two Appellants were distinct and should have been pursued separately, the Appeal was nonetheless filed jointly. That Motion and Objection remains pending. In response, the Franks filed their Motion for Permission to File Late Appeal to which this Objection is directed. However, because the appeal was final as to Joan Frank nearly five years earlier, the appeal as to her is more than "late" and therefore renders the appeal subject to dismissal for the Franks' inability to establish the good cause necessary to file the appeal late.

II. SPECIFIC FACTS ON WHICH MOVANT RELIES

In support of this Objection to File Late Appeal, Meribear relies on the fact that the time for Joan Frank to appeal has long expired, the judgment against her having been entered on October 14, 2014. To call an appeal of the judgment against her "late" at this juncture is ludicrous at best. Moreover, the Franks contention that Meribear "could not be prejudiced by permitting a late appeal" (*Motion to For Permission to File Late Appeal, March 8, 20-19, pg. 1*) is absurd: permitting an appeal to go forward as to Joan (and by extension George, due to the

¹ [A] judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees [or interest] for the litigation remains to be determined. Hylton v. Gunter, 313 Conn. 472, 478-79 (2014).

combined appeal) would seriously prejudice Meribear. Meribear has been waiting to collect its judgment as to Joan for five years and continues to incur considerable attorney's fees in the appellate process-all while the Franks continue in possession of Meribear's personal property. Moreover, given the Supreme Court's determination that the appeals should have been pursued separately, filing the appeal on behalf of both Franks once again not only flies in the face of logic but renders it subject to the same infirmity as the first. Accordingly, the Franks are unable to establish the good cause necessary to file a late appeal and their Motion should be denied.

III. LEGAL GROUNDS FOR MOTION

This Objection to Motion to File Late Appeal should be sustained because the decision as to Joan Frank was conclusively determined by the Supreme Court to have entered in December 2014:

Applying these rules to the present case, we conclude that the judgment as to Joan Frank was final. The trial court expressly disposed of counts one and two as to her. Counts two and three alleged mutually exclusive theories.

Meribear Productions, Inc. v. Joan E. Frank et al., 328 Conn. at 724. Despite the Franks' contention that it was not final until Counts Two and Three were withdrawn, even assuming, *arguendo*, that that claim could be true as to George (*Motion to For Permission to File Late Appeal, March 8, 20-19, pg. 6*), it is certainly not true as to Joan given the clear holding by the Supreme Court that the judgment was final as to her. Just as the lack of a final judgment as to George Frank rendered the initial joint appeal improper in its entirety, so too is the present

joint appeal improper due to the fact that one of the judgments from which appeal is taken is well outside the 20 day time limit for filing an appeal. Moreover, to call the appeal as to Joan “late” is beyond the pale; it’s been nearly five years since judgment entered against her. While “each case must stand or fall on its own merits [with regard to whether the Appellate Court properly dismissed a late filed appeal]” Alliance Partners, Inc. v. Volatarc Technologies, Inc., 263 Conn. 204, 214 (2003), in this case there is simply no good reason for filing an appeal five years after judgment entered and following the issuance of a Supreme Court decision all but directing that the appeals should have been pursued separately. Put simply, the Franks are unable to establish the good cause necessary pursuant to P.B. § 60-2 for this Court to permit the late appeal given the history of the case.

“[W]hen a motion to dismiss that raises untimeliness is, itself, timely filed pursuant to Practice Book § 4056 [now § 66–8], it is ordinarily our practice to dismiss the appeal if it is in fact late, and if no reason readily appears on the record to warrant an exception to our general rule. This practice is based in part on the fact that if the untimely appeal is entertained, a delinquent appellant would obtain the benefit of the appellate process after contributing to its delay, to the detriment of others with appeals pending who have complied with the rules and have a right to have their appeals determined expeditiously. Appellees are given the right under our rules to object to the filing of a late appeal and should be given the benefit of that rule, barring unusual circumstances or unless they waive the benefit of that rule. See, Federal Deposit Ins. Corp. v. Hillcrest Associates, 223 Conn. 153, 173 (1995). We ordinarily dismiss late appeals that are the subject of timely motions to dismiss, knowing also that our discretion

can be tempered by Practice Book § 4183(6) [now § 60–2(6)], which provides for the filing of late appeals for good cause shown.” Nicoll v. State, 38 Conn.App. 333, 335-36 (1995). Even appeals filed one day late may be dismissed without such showing. See, e.g., Alliance Partners, Inc., *supra*, 263 Conn. at 214.

Further, the rationale underlying the Supreme Court’s ruling in Meribear, advancing Connecticut jurisprudence as to what is and what is not a final judgment, would be undermined should this appeal be allowed to proceed. Specifically, the Court’s “[...final judgment rule advances the policies underlying that rule, namely, the prevention of piecemeal appeals and the conservation of judicial resources. Niro v. Niro, 314 Conn. 62, 78 (2014); In re Joheli V. *, 184 Conn.App. 259, 272–73 (2018). Based on the foregoing, the second bite at the proverbial apple being sought here by the Appellants (some five years after judgment against one of the joint appellants, no less) should not stand.

The Supreme Court’s decision in this very matter all but informed the Appellants that the appeal from the October 14, 2014 judgment should have been filed separately, or that they could have, but failed, to request that the Court consider them separately should it conclude that the judgment as to George Frank was not final. Id. at 726, FN 4. Similarly here, despite the Supreme Court’s holding, the Appellants have filed a joint appeal which by its nature renders an infirmity as to one Appellant an infirmity as to both and there is no good cause on which to permit this “late” appeal to proceed some five years after judgment as to one of the joint appellants. Accordingly, the appeal is late, would prejudice Meribear should it be permitted to proceed, and should be dismissed.

III. CONCLUSION

For the reasons asserted herein, the Court should sustain this Objection to Motion for Permission to File Late Appeal.

THE PLAINTIFF/APPELLEE,

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MERIDITH BAER and ASSOCIATES,

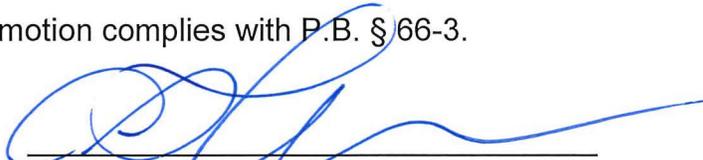
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CERTIFICATION

This is to certify that this motion complies with P.B. § 66-3.



Anthony J. LaBella
Commissioner of the Superior Court

CERTIFICATION

The undersigned attorney hereby certifies that on March 13, 2019, pursuant to Connecticut Rule of Appellate procedure § 62-7, that:

- (1) The electronically submitted Objection to Motion for Permission to File Late Appeal (hereinafter "Objection") was delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address was provided; and
- (2) The electronically submitted Objection and the filed paper have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and
- (3) A copy of the Objection was sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal as indicated below, in compliance with § 62-7; and
- (4) The Objection filed with the appellate clerk is a true copy of the Objection that was submitted electronically; and
- (5) The Objection complies with all provisions of this rule.

Courtesy Copy:
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