

**SOUTH SEAS CORPORATION, et al., Plaintiffs-Appellants**

**v.**

**SABLAN CONSTRUCTION COMPANY, et al.,  
Defendants-Appellees**

**Civil Appeal No. 226**

**Appellate Division of the High Court**

**Mariana Islands District**

**February 21, 1978**

Appeal from denial of motion to vacate judgment. The Appellate Division of the High Court, Brown, Associate Justice, held that where trial judge was in error in requesting, without notice to other party, that prevailing party prepare findings of fact, conclusions of law, judgment and opinion, which judge modified and adopted, but there was no evidence of fraud, or of denial of full and fair trial to losing party, or that trial judge had already decided the case when he made his ex parte communication with prevailing party, and losing party was able to argue in open court regarding objections to the findings, and a thorough hearing was held on losing party's motion to vacate judgment, the hearing being held before a judge other than the trial judge, denial of the motion did not prejudice losing party and would be upheld.

**1. Judgments—Ex Parte Participation in Opinion**

It was improper and patent error for trial judge to, without notice to the other party, ask the prevailing party to prepare findings of fact, conclusions of law, judgment and opinion, which the judge then modified and adopted.

**2. Judgments—Motion To Vacate—Tests**

Where motion to vacate judgment was brought under federal rule which was remedial and should be liberally construed, appellate court to which denial of motion was appealed could not substitute its judgment for that of lower court absent a finding of abuse of discretion.

**3. Evidence—Statements of Counsel**

Statements of counsel, standing alone, do not constitute and cannot be considered as evidence.

**4. Judgments—Ex Parte Participation in Opinion**

Where trial judge was in error in requesting, without notice to other party, that prevailing party prepare findings of fact, conclusions of law, judgment and opinion, which judge modified and adopted, but there was no evidence of fraud, or of denial of full and fair trial to losing party, or that trial judge had already decided the case when he made his ex parte communication with prevailing party, and losing party was able to argue in open court regarding objections to the findings, and a thorough hearing was held on losing party's motion to vacate judgment, the

hearing being held before a judge other than the trial judge, denial of the motion did not prejudice losing party and would be upheld.

**5. Judgments—Motion To Vacate—Fraud or Misconduct**

To justify setting aside a judgment on the ground of fraud or misconduct, the acts or misconduct complained of must be such as to have prevented the losing party from fully and fairly presenting his case.

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Before BROWN, *Associate Justice*, and NAKAMURA,  
*Associate Justice*

BROWN, *Associate Justice*

Appellants (Plaintiffs below) appeal from an adverse ruling on their motion to vacate the Judgment of the trial court in favor of Appellees (Defendants below). This appeal does not address itself to the merits of the case but deals only with the question of procedures in connection with the preparation and promulgation of the Findings of Fact, Conclusions of Law, Judgment, and Opinion, signed and issued by the present Chief Justice, the Honorable Harold W. Burnett, who presided over the trial of the action.

The action was filed in February, 1975, and after the case came at issue and pre-trial matters had been disposed of, it was tried before the Trial Division of this Court. The trial consumed some twenty-two (22) trial days. After both sides had rested and had presented arguments, the case was taken under submission. Some time thereafter, it appears that Judge Burnett, who presided over the trial, became ill and was required to travel to Honolulu for medical treatment. During his absence, the Honorable Robert A. Hefner, Acting Chief Justice, communicated with counsel and suggested that each of them submit proposed Findings of Facts and Conclusions of Law. This was not done. Instead, Judge Burnett returned, communicated by telephone with counsel for Defendants, stated that Judgment

would be in favor of the latter, invited him to travel from Guam to Saipan to discuss the preparation of Findings of Fact, Conclusions of Law, the Judgment, and the Opinion. Opposing counsel was not notified. Defense counsel did appear in Saipan and did discuss these matters with Judge Burnett in the latter's chambers, and he did receive from Judge Burnett general instructions as to the preparation of those documents. Judge Burnett also instructed counsel for Defendants to keep the matter in confidence, except that he gave permission to counsel to advise one of the Defendants that the latter had prevailed in the action.

Following Judge Burnett's instructions, counsel did prepare several drafts of the documents, and this task apparently took about six weeks to complete. Judge Burnett then went to counsel's office, picked up the drafts, and returned to Saipan where he reviewed the drafts, made certain additions, corrections, deletions, and revisions, and then caused the revised drafts to be placed in final form satisfactory to him. When the final drafts were prepared, signed, filed and served, the drafts submitted by counsel seem to have been destroyed.

Upon receipt of copies of the documents in question, counsel for Plaintiffs timely moved for an Order amending the Findings of Fact, making additional findings, and amending the Judgment. Hearing was held on those motions, and, after argument, one of the findings was stricken, and the remaining motions were denied. During the course of that hearing, Plaintiff's counsel asked Judge Burnett who had prepared the Findings of Fact and the other documents to which reference has been made. The latter declined to answer, stating that he did not believe that that question was relevant to the motions then before the Court.

Thereafter, Plaintiffs, through their counsel, filed a Motion to Vacate the Judgment, and that matter was

assigned by Judge Burnett to the Honorable Cristobal C. Duenas, United States District Judge, District of Guam, and designated as a Justice of this Court. The matter came on for hearing before Judge Duenas on August 11, 1977, and evidence, both oral and documentary, was received and arguments were heard. Initially, the question was presented as to whether or not the procedure then being followed was correct, but Judge Burnett stated in open court, and while he was a witness, that it was his desire that there be a full exposition of the facts. He stated candidly that his integrity had been challenged, and that he had been, indeed, charged with fraudulent conduct. This waiver of defects on the part of Judge Burnett came about, in part, at least, as a result of counsel's statement that, as a result of the authorship of the Opinion, ". . . the integrity of the Court may well have been breached."

In denying the Motion to Vacate, Judge Duenas handed down a Memorandum Order which stated that there was nothing in the record or otherwise to suggest any improper influence, that Judge Burnett did review the record and his own notes and modified portions of the drafts submitted to him, that the Findings of Fact, Conclusions of Law, Judgment, and Opinion accurately reflected his own thinking, and that the due process rights of appellants were not violated. It is from this ruling that the appeal herein is taken.

Appellants' sole contention before this Court is that the case must be reversed solely because they were not informed that counsel for the prevailing party was preparing the Findings of Fact, Conclusions of Law, Judgment, and Opinion. We now direct ourselves to this contention.

[1] It was, of course, improper for Judge Burnett to have dealt on an ex parte basis with counsel for the prevailing party, and his so doing constituted patent error.

*Chicopee Mfg. Co. v. Kendall Co.*, 288 F.2d 719 (C.A. 4, 1961). The only question, therefore, is whether or not the error is so serious as to require reversal in spite of Judge Duenas' ruling.

[2] Before we can reverse Judge Duenas' ruling on the motion we must recognize that it was one brought under Rule 60(b) Fed. R. Civ. P. which rule is remedial and should be liberally construed. Thus, even if we were so inclined, we should not and cannot substitute our judgment for that of the lower court absent a finding of abuse of discretion, and no such finding can be made. *Atchison, Topeka and Santa Fe Railway Co. v. Barrett*, 246 F.2d 846 (C.A. 9, 1957), *Nederlansche Handel-Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114 (C.A. 2, 1962).

[3, 4] It is contended that Judge Burnett's actions constituted a fraud upon the judicial process. At the hearing on the Motion to Vacate, Judge Duenas found precisely to the contrary, and we agree with that finding. There was no evidence, written or oral, that even intimated the perpetration of fraud. True, counsel stated that there was fraud, but statements of counsel, standing alone, do not constitute evidence and cannot be considered as evidence. *Gist v. Frency*, 288 P.2d 1003 (Cal. App., 1955) (hearing den.).

Canon 3A(4) of the Code of Judicial Conduct provides that a judge:

. . . except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

It is clear that Judge Burnett did initiate and proceed with ex parte communications here, and this was improper and should not have been done. Again, though, we must determine if such impropriety mandates reversal. In this particular case, and under the particular circumstances presented to us, we think not.

[5] To justify setting aside a judgment on the ground of fraud or misconduct, the acts or misconduct complained of must be such as to have prevented the losing party from fully and fairly presenting his case. *Gilmour v. Strescon Industries, Inc.*, 66 F.R.D. 146, 153 (E.D. Pa., 1975). Nothing in the record even hints that Appellants were denied a full and fair trial. Nothing in the record tends to show that Judge Burnett had not already decided the case before he called counsel for the prevailing party. The record further shows that Appellants were given the opportunity to and did argue in open court concerning their objections to the Findings of Fact; and later, when Appellants moved to vacate the Judgment, Judge Duenas conducted a thorough and exhaustive hearing where written and oral evidence came before the court, and the entire matter was carefully considered. Thereafter, Judge Duenas concluded that Judge Burnett's opinion, although drafted initially by another, was his alone.

Keeping in mind that Appellants were given ample and even extraordinary opportunities to contest the Findings of Fact, Conclusions of Law, Judgment, and Opinion, and the procedures elected to be followed by Judge Burnett in their preparation, we conclude that Judge Duenas properly and reasonably found that while Judge Burnett should not have followed the procedures chosen by him, there was no prejudice to Appellants as a result of his doing so.

Accordingly, the denial of the Motion to Vacate is **AFFIRMED**.