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SCWC-12-0000711

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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TITLE GUARANTY ESCROW SERVICES, INC.,  
a Hawaii corporation, Respondent/Plaintiff-Appellee,

vs.

MICHAEL J. SZYMANSKI, Petitioner/Defendant,  
Cross-Claimant, Third-Party Plaintiff, Third-Party Counterclaim  
Defendant-Appellant,

and

WAILEA RESORT COMPANY, LTD., a Hawai'i corporation,  
Respondent/Defendant, Cross-Claim Defendant-Appellee,

and

ADOA-SHINWA DEVELOPMENT CORPORATION, a Hawai'i corporation,  
and SHINWA GOLF HAWAI'I CO., LTD., a Hawai'i corporation,  
Respondents/Third-Party Defendants,  
Third-Party Counterclaimants-Appellees.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-12-0000711; CIV. NO. 02-1-0352(2))

DISSENT BY NAKAYAMA, ACTING C.J.

I must respectfully dissent. The Intermediate Court of Appeals (ICA) did not err in dismissing Petitioner Michael J. Szymanski's (Szymanski) untimely appeal for lack of jurisdiction and therefore I would reject his application for writ of

certiorari with this court. As I explained in my dissent to the acceptance of the application for writ of certiorari in Ass'n of Condominium Homeowners of Tropics at Waikeli v. Sakuma, No. SCWC-12-0000870, pursuant to the Hawai'i Rules of Appellate Procedure (HRAP) Rules 4(a)(1) and 4(a)(3), a motion for reconsideration that is not disposed of within 90 days is automatically deemed denied and the parties have 30 days as of the date of automatic denial to file the notice of appeal. The failure to file a timely appeal constitutes a jurisdictional defect that may be waived by neither the parties nor the court. Poe v. Haw. Labor Relations Bd., 98 Hawai'i 416, 418, 49 P.3d 382, 384 (2002).

In 1999, Szymanski and Wailea Resort Company (Wailea) entered into a land sales contract for the sale of property located in Honualua, Maui. Szymanski deposited money for the sale into an escrow account held by Title Guaranty Escrow Services, Inc. (Title Guaranty). The sale was not completed and Title Guaranty was left with \$51,000 plus accrued interest in the escrow account. Wailea and Szymanski were unable to agree upon the disposition of the escrow funds and Title Guaranty filed an interpleader action in the Circuit Court of the Second Circuit (circuit court) in 2002 against defendants Wailea and Szymanski. Pursuant to a stipulated judgment executed by the parties, the circuit court entered a final judgment on the interpleader claim in 2003 whereby Title Guaranty deposited the escrow funds with the court clerk in an interest bearing account and Title Guaranty was excused from further participation in the case.

Prior to the entry of the stipulated judgment, Szymanski filed a cross-claim against Wailea and a third-party complaint against ADOA-Shinwa Development Corp. and Shinwa Golf Hawaii Co., Ltd. (collectively, Shinwa), seeking specific performance of the land sale contract and damages. By order of October 20, 2004, the Honorable Rhonda I.L. Loo granted summary judgement in favor of Wailea. Final judgment was entered on April 20, 2005 pursuant to the Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b). The ICA affirmed the final judgment and this court rejected the application for certiorari review on September 17, 2009.

On October 28, 2009, Wailea and Shinwa filed a motion to expunge the lis pendens recorded by Szymanski against the subject land, to disburse the interpleader funds, and for final judgment. Judge Loo granted the motion and entered final judgment on the remaining claims on July 28, 2010.

On September 19, 2011, Szymanski moved for reconsideration of the final judgment of July 28, 2010 and the final partial judgment of April 20, 2005 pursuant to HRCP Rule 60(b)<sup>1</sup> based on Judge Loo's failure to recuse herself.

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<sup>1</sup> HRCP Rule 60, "Relief from Judgment or Orders," provides, in pertinent part:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule (continued...)

Szymanski argued that Judge Loo should have recused herself because, at the time of the 2004 hearings, she held stock in a company whose wholly owned subsidiary held a conditional ownership interest in the subject land. On January 4, 2012 the circuit court entered an order denying Szymanski's Rule 60(b) motion.<sup>2</sup> On January 13, 2012, Szymanski filed a motion for reconsideration of the order and the motion was set to be heard on March 14, 2012. Szymanski requested a short continuance due to a scheduling conflict and the motion was continued to the next available hearing date, June 27, 2012. Following the hearing, the circuit court denied the motion for reconsideration by order of July 11, 2012.<sup>3</sup>

On August 19, 2012, Szymanski filed a notice of appeal

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<sup>1</sup>(...continued)

59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

<sup>2</sup> The Honorable Shackley Raffetto presided.

<sup>3</sup> The Honorable Blaine J. Kobayashi presided.

from the January 4, 2012 order denying the Rule 60(b) motion, and the July 11, 2012 order denying the motion for reconsideration. On April 24, 2013, the ICA dismissed the appeal as untimely pursuant to Hawai'i Revised Statutes (HRS) § 641-1 (1993 & Supp. 2012) and HRAP Rules 4(a)(1) and 4(a)(3).

"An appeal shall be taken in the manner and within the time provided by the rules of court." HRS § 641-1(c). HRAP Rule 4(a)(1) provides: "When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order." However, pursuant to HRAP Rule 4(a)(3), a motion for reconsideration constitutes a tolling motion that extends the time for filing the notice of appeal to 30 days after entry of an order disposing of the motion. "[T]he failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion." HRAP Rule 4(a)(3).

The circuit court's January 4, 2012 order denying Szymanski's Rule 60(b) motion was an appealable final order. See Ditto v. McCurdy, 103 Hawai'i 153, 160, 80 P.3d 974, 981 (2003) ("An order denying a motion for post-judgment relief under HRCP [Rule] 60(b) is an appealable final order under HRS § 641-1(a)."). Szymanski timely filed his motion for reconsideration on January 13, 2012, within ten days after entry of the post-judgment order. See HRCP Rule 59 ("Any motion to alter or amend judgment shall be filed no later than 10 days after entry of the judgment."). The motion for reconsideration tolled the time for

filling the notice of appeal to 30 days after entry of an order disposing of the motion. The motion for reconsideration was not disposed of within 90 days and it was therefore deemed denied on the 90th day, April 12, 2012.<sup>4</sup> This deemed denial triggered the 30 day time period for the filing of a notice of appeal and Szymanski had until the end of the day on May 14, 2012<sup>5</sup> to appeal from the January 4, 2013 Rule 60(b) order. Szymanski, however, failed to file his notice of appeal until August 10, 2012 and therefore the ICA did not err in dismissing his untimely appeal for lack of jurisdiction.

"'[C]ompliance with the requirement of the timely filing of a notice of appeal is jurisdictional, and [the ICA] must dismiss an appeal on [its] motion if [it] lack[s] jurisdiction.'" Ditto, 103 Hawai'i at 157, 80 P.3d at 978 (quoting Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995)). Time limits derived from statutory time constraints limiting jurisdiction, such as those contained in HRAP Rule 4, may not be relaxed at the court's discretion. Cabral v. State, 127 Hawai'i 175, 182, 277 P.3d 269, 276 (2012) (reasoning that because the court derived the authority for setting the time

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<sup>4</sup> The circuit court lost jurisdiction over the motion after it was deemed denied. Therefore, the June 27, 2012 hearing and the July 11, 2012 order were of no legal effect.

<sup>5</sup> The thirtieth day after April 12, 2012, was Saturday, May 12, 2012. Because the thirtieth day was a Saturday, the deadline extended until the next business day, Monday, May 14, 2012. See HRAP Rule 26(a) ("In computing any period of time prescribed by these rules . . . [t]he last day of the period shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday.")

constraints in HRAP Rule 4 from HRS § 641-1(c), the time constraints are jurisdiction). Thus, HRAP Rule 2,<sup>6</sup> providing for the suspension of the Hawai‘i Rules of Appellate Procedure for good cause shown, is inapplicable to the time constraints in HRAP Rule 4.

The provisions of HRAP Rule 4 establish clear deadlines for the filing of appeals. Where a party fails to file a notice of appeal before the deadline, the appeal is untimely and the ICA lacks jurisdiction to hear the appeal. There exist no extraordinary circumstances here warranting the alteration of these well established rules. Szymanski, represented by counsel, requested that the circuit court reschedule the hearing on his motion for reconsideration. When the circuit court rescheduled the hearing to a date after the 90 day deadline for the resolution of his motion for reconsideration, Szymanski did not alert the circuit court to this result or request an earlier hearing date. That the circuit court held a hearing and issued an order after the deemed denial of the motion for reconsideration does not alter the legal effect of HRAP Rule (4) (a) (3).

The ICA did not err in dismissing Szymanski’s untimely

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<sup>6</sup> HRAP Rule 2 provides:

In the interest of expediting a decision, or for other good cause shown, either Hawai‘i appellate court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

appeal for lack of jurisdiction. Thus, I would reject Szymanski's application for writ of certiorari.

DATED: Honolulu, Hawai'i, August 5, 2013.

/s/ Paula A. Nakayama

