

NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs-Appellants, v. KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

ORDER DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of the record on appeal in appellate court case number CAAP-13-0004290, it appears that we do not have jurisdiction over this appeal that Plaintiffs-Appellants Ke Kailani Development, LLC, and Michael J. Fuchs (the Appellants) have asserted from the Honorable Gary W.B. Chang's April 19, 2013

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judgment, because the Appellants' October 21, 2013 notice of appeal is not timely under Rule 4(a) of the Hawai'i Rules of Appellate Procedure (HRAP).

The circuit court's April 19, 2013 judgment satisfies the requirements for an appealable final judgment under Hawaii Revised Statutes (HRS) 641-1(a) (1993 & Supp. 2015), Rule 58 of the Hawai'i Rules of Civil Procedure (HRCP) and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). Although HRAP Rule 4(a) initially required the Appellants to file their notice of appeal within thirty days after entry of the April 19, 2013 judgment, pursuant to HRAP Rule 4(a)(3), the Appellants extended the initial thirty-day time period when the Appellants timely filed their premature March 19, 2013 HRCP Rule 59 motion for reconsideration of the April 19, 2013 judgment before the ten-day time period after entry of the April 19, 2013 judgment expired, as HRCP Rule 59 requires for the purpose of invoking the tolling provision in HRAP Rule 4(a)(3). See Saranillio v. Silva, 78 Hawai'i 1, 7, 889 P.2d 685, 691 (1995) ("HRCP [Rule] 59 does not require that a motion be served after the entry of judgment; it imposes only an outer [ten-day] time limit on the service of a motion to alter or amend the judgment[.]"). HRAP Rule 4(a)(3) "provides that the court has 90 days to dispose of [the] post-judgment [tolling] motion . . . , regardless of when the notice of appeal is filed." Buscher v. Boning, 114 Hawai'i 202, 221, 159 P.3d 814, 833 (2007). "Although the rule does not address the situation in which a [post-judgment tolling] motion . . . is prematurely filed

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prior to the entry of final judgment, [the Supreme Court of Hawai'i] will deem such motion filed immediately after the judgment becomes final for the purpose of calculating the 90-day period." Buscher v. Boning, 114 Hawai'i at 221, 159 P.3d at 833. When "the court fail[s] to issue an order on [the movant]'s [post-judgment tolling] motion by . . . ninety days after [the movant has] filed the [post-judgment tolling] motion, the [post-judgment tolling] motion [i]s deemed denied." County of Hawai'i v. C&J Coupe Family Limited Partnership, 119 Hawai'i 352, 367, 198 P.3d 615, 630 (2008). Nevertheless, "when a timely post-judgment tolling motion is deemed denied, it does not trigger the thirty-day deadline for filing a notice of appeal until entry of the judgment or appealable order pursuant to HRAP Rules 4(a)(1) and 4(a)(3)." Association of Condominium Homeowners of Tropics at Waikele v. Sakuma, 131 Hawai'i 254, 256, 318 P.3d 94, 96 (2013). Consequently, "the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion[.]" HRAP Rule 4(a)(3) (emphasis added). Based on the holding in Sakuma, the event that triggered the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal from the April 19, 2013 judgment was the entry of the August 21, 2013 written order denying the Appellants' March 19, 2013 HRCP Rule 59 motion for reconsideration of the April 19, 2013 judgment.

The Appellants did not file their October 21, 2013 notice of appeal within thirty days after entry of the August 21, 2013 order, as HRAP Rule 4(a)(3) requires for a timely appeal. Instead, on Monday, October 21, 2013, the Appellants filed a

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

motion to extend the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), which authorized an extension under these circumstances if the Appellants could sufficiently show "excusable neglect":

(4) Extensions of Time to File the Notice of Appeal.

(A) . . .

(B) Requests for Extensions of Time After Expiration of the Prescribed Time. The court or agency appealed from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past the prescribed time. Notice of an extension motion filed after the expiration of the prescribed time shall be given to the other parties in accordance with the rules of the court or agency appealed from.

(Emphasis added). The Supreme Court of Hawai'i has defined "excusable neglect" as "some mistake or inadvertence within the control of the movant[.]" Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 352, 910 P.2d 116 123 (1996). Furthermore, "as a matter of law, only plausible misconstruction, but not mere ignorance, of the law or rules rises to the level of excusable neglect." Hall v. Hall, 95 Hawai'i 318, 320, 22 P.3d 965, 967 (2001) (citation and internal quotation marks omitted); Enos, 80 Hawai'i at 353, 910 P.2d at 124. For example, where an appellant's attorney mistakenly thought that the filing of the notice of entry of a judgment (rather than the entry of the actual judgment) triggered the time period for filing a notice of appeal, the Supreme Court of Hawai'i held that the "trial court abused its discretion by granting [a] motion to extend time for filing a notice of appeal [where] the failure to timely file the appeal was caused by counsel's failure to read and comply with

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

the plain language of the applicable procedural rules, which cannot constitute 'excusable neglect.' " Enos, 80 Hawai'i at 355, 910 P.2d at 126. In another example, the Supreme Court of Hawai'i held that a trial court abused its discretion by finding excusable neglect where

the record reveals that the only cause that can be discerned . . . for Hall's failure to timely file the notice of appeal . . . was Hall's counsel's purported confusion or misunderstanding regarding the likely outcome of his ex parte motion for an extension of time. His leap of faith that the ex parte motion would be granted under the rule is analogous to a misinterpretation of a rule when the language is crystal clear, which we held in Enos, 80 Hawai'i at 354, 910 P.2d at 125 to be a failure to follow the plain language of the rule rather than plausible misconstruction. . . . As the ICA's opinion observed, in light of the express provision in the rule that a court may extend the time for filing a notice of appeal, . . . counsel's belief that his motion for an extension of time would be granted was an unreasonable belief and not excusable. . . . Accordingly, the family court abused its discretion in construing Hall's counsel's conduct as excusable neglect.

Hall, 95 Hawai'i at 320, 22 P.3d at 967 (citation, internal quotation marks, and original brackets omitted).

In the Appellants' October 21, 2013 motion to extend the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), counsel for the Appellants argued that he had "excusable neglect" for not filing a timely notice of appeal because: "This morning I discovered, while routinely occasionally browsing Ho'ohiki, that this Court had entered on August 21, 2013 an order denying my clients' motion for reconsideration in the above-entitled action." "Unfortunately, no one informed my office, my office has never received a copy of the filed order nor any word from opposing counsel which otherwise has religiously emailed and hand delivered to me immediately every signed order and judgment in

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

this case, and no notice of entry of such an order was filed or served, suggesting that opposing counsel similarly never received word of the entry of the order either." Nevertheless, under the Hawai'i Rules of Civil Procedure, "[l]ack of notice of the entry by the clerk or failure to make such service [of an order or judgment], does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Hawaii Rules of Appellate Procedure." HRCP Rule 77(d). The Supreme Court of Hawai'i interpreted this language in HRCP Rule 77(d) as follows:

Although HRCP Rule 77(d) specifically refers to HRAP Rule 4(a) as providing the only relief for a party's failure to timely file a notice of appeal, nothing in Rule 77(d) suggests that the failure of the clerk to timely notify the parties of the entry of judgment could excuse a party's neglect. "A party has an independent duty to keep informed and mere failure of the clerk to notify the parties that judgment has been entered does not provide grounds for excusable neglect or warrant an extension of time." Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1412 (9th Cir.1986) (citations omitted). This is especially so where, as here, "[appellants] presented no reason for their failure, for example, to send a messenger to court to look up the relevant date, and we see no 'forces beyond their control,'-at least on this record-that prevented them from taking this eminently reasonable step." Virella-Nieves, 53 F.3d at 453.

Enos, 80 Hawai'i at 353, 910 P.2d at 124 (emphasis added); see also Ek v. Boggs, 102 Hawai'i 289, 300, 75 P.3d 1180, 1191 (2003). In Enos, the Supreme Court of Hawai'i dismissed an appeal as untimely, and, therefore, lacking appellate jurisdiction, because the circuit court abused its discretion in finding "excusable neglect" in granting a motion for an extension under HRAP Rule 4(a)(4)(B). Enos, 80 Hawai'i at 355, 910 P.2d at 126 (italics in original).

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Despite that the Appellants' reason for failing to file a timely notice of appeal was because, according to their counsel, the other parties and the clerk did not provide notice of entry of the August 21, 2013 order denying reconsideration to counsel for the Appellants, Enos held that a party has an independent duty to keep informed and that failure by the clerk to notify the parties that judgment was entered does not provide grounds for excusable neglect. In this case, Appellants' counsel's declaration establishes that he discovered the August 21, 2013 order had been entered "while routinely occasionally browsing Ho'ohiki." There is nothing to suggest that the August 21, 2013 order could not have been discovered in a more timely manner.

The circuit court appears to have disregarded HRCP Rule 77(d) and the requirements for "excusable neglect" under HRAP Rule 4(a)(4)(B) and the holding in Enos, and, instead, the circuit court expressly found "excusable neglect" and entered the October 21, 2013 order extending the period for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B). Based on the holding in Enos, it appears that the circuit court abused its discretion in entering the October 21, 2013 order extending the period for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), and, thus, the October 21, 2013 order is invalid. Consequently, the Appellants' failure to file their October 21, 2013 notice of appeal within thirty days after entry of the August 21, 2013 order denying the Appellants' March 19, 2013 HRCP Rule 59 motion for reconsideration violates the thirty-day time limit under HRAP Rule 4(a)(3) for a timely appeal under these circumstances.

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules."); HRAP Rule 26(e) ("The reviewing court for good cause shown may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal.").

Accordingly,

IT IS HEREBY ORDERED that appellate court case number CAAP-13-0004290 is dismissed for lack of appellate jurisdiction.

IT IS FURTHER ORDERED that the December 25, 2014 Motion to Consolidate Appeal is denied as moot.

DATED: Honolulu, Hawai'i, March 30, 2016.

Presiding Judge

Associate Judge

Associate Judge