

CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the majority's decision. I write separately to highlight what I believe is the unintended effect that the 2006 amendment to Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a)(3) has had on post-judgment motions for costs under Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d)(1) (2000). In my view, as the result of the 2006 amendment to HRAP Rule 4(a)(3), a post-judgment motion for costs under HRCP Rule 54(d)(1) does not any longer toll the time for filing a notice of appeal or extend the time that a trial court retains jurisdiction to resolve a post-judgment motion for costs.

I.

Prior to its amendment in 2006, HRAP 4(a)(3) (2001) provided:

TIME TO APPEAL AFFECTED BY POST-JUDGMENT MOTIONS. If, not later than 10 days after entry of judgment, any party files a motion that seeks to reconsider, vacate, or alter the judgment, or seeks attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided, that the 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.

The notice of appeal shall be deemed to appeal disposition of all post-judgment motions that are filed within 10 days after entry of judgment.

(Emphases added.)

After its 2006 amendment, HRAP Rule 4(a)(3) (2006) provides:

TIME TO APPEAL AFFECTED BY POST-JUDGMENT MOTIONS. If any party files a timely motion for judgment as a matter of law, to amend findings or make additional findings, for a new trial, to reconsider, alter or amend the judgment or order, or for attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided, that the 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.

The notice of appeal shall be deemed to appeal the disposition of all post-judgment motions that are timely filed after entry of the judgment or order.

(Emphases added.)

The basic effect of the 2006 amendment was to replace the requirement of a motion filed within "10 days after entry of judgment" with the requirement of a "timely motion," in order to toll the time for filing a notice of appeal and extend the trial court's jurisdiction to decide post-judgment motions. However, this creates a problem for post-judgment motions for costs under HRCF Rule 54(d)(1) because HRCF Rule 54(d)(1) does not impose any time limit measured from the entry of judgment to file a motion for costs.^{1/} Accordingly, in my view, a post-judgment motion for costs under HRCF Rule 54(d)(1) can never be "timely" and therefore can never toll the time to file a notice of appeal or extend the trial court's jurisdiction to decide such motion. See Woodruff v. Hawai'i Pacific Health, No. 29447, 2014 WL 128607, at *17-18 (Hawai'i App. Jan. 14, 2013) (memorandum opinion).

II.

HRCF Rule 54(d)(1) provides:

COSTS OTHER THAN ATTORNEYS' FEES. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State or a county, or an officer or agency of the State or a county, shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 48 hours' notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(Emphasis added.)

"Although HRCF Rule 54(d)(1) imposes a five-day time limit on seeking review of the clerk's action on a request for taxation of costs, it does not impose any time limit for filing the initial request for taxation of costs with the clerk." Woodruff, 2014 WL 128607, at *18. Because HRCF Rule 54(d)(1) does not impose any time limit measured from the entry of judgment to file a motion for costs, a post-judgment motion for

^{1/} In this respect, a motion for costs under HRCF Rule 54(d)(1) differs from certain other motions listed in HRAP Rule 4(a)(3). For example, a motion for new trial must be filed "no later than 10 days after entry of the judgment" under HRCF Rule 59(b) (2000), and a motion for attorneys' fees must be filed "no later than 14 days after entry of an appealable order or judgment" under HRCF Rule 54(d)(2) (2000).

costs under HRCF Rule 54(d)(1) does not qualify as a "timely motion" for purposes of the tolling and extension of jurisdiction provisions of HRAP Rule 4(a)(3). Id. Accordingly, the filing of a notice of appeal while a post-judgment motion for costs under HRCF Rule 54(d)(1) is pending would divest the trial court of jurisdiction to decide the post-judgment motion for costs. See id.; Cox v. Cox, 125 Hawai'i 19, 28-29 & n.14, 250 P.3d 775, 784-85 & n.14 (2011) (concluding that the filing of a notice of appeal divested the family court of jurisdiction to decide a motion for costs sought pursuant to Rule 68 of the Hawai'i Family Court Rules).

III.

In this case, however, Hawaiian Airlines (Hawaiian) filed its motion for costs under HRCF Rule 54(d)(1) before the circuit court entered its Final Judgment on June 7, 2013. Because Hawaiian's motion for costs was filed pre-judgment rather than post-judgment, an argument can be made that it was "timely" under HRAP Rule 4(a)(3). More importantly, the Final Judgment itself entered judgment awarding costs to Hawaiian. Therefore, under the facts of this case, the premature, pre-judgment filing of the notice of appeal by Gene Wong did not divest the circuit court of jurisdiction to decide Hawaiian's motion for costs.^{2/}

Craig H. Nakamura

^{2/} In Buscher v. Boning, 114 Hawai'i 202, 221, 159 P.3d 814, 833 (2007), the court quotes the version of HRAP Rule 4(a)(3) in effect after its 2006 amendment. The facts of the case, however, reveal that it was the version of HRAP 4(a)(3) in effect prior to its 2006 amendment that was applicable to the case. See Buscher, 114 Hawai'i at 211, 221, 159 P.3d at 823, 833. It is not clear whether the court applied the version of HRAP 4(a)(3) in effect prior to or after the 2006 amendment in its analysis. See id. at 221-22, 159 P.3d at 833-34.