

NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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 DEEVER 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 DENYING APRIL 5, 2016 HRAP RULE 40 MOTION
FOR RECONSIDERATION OF MARCH 30, 2016 ORDER
DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of (1) the March 30, 2016 order dismissing appellate court case number CAAP-13-0004290 for lack of appellate jurisdiction, (2) Plaintiffs-Appellants Ke Kailani Development, LLC, and Michael J. Fuchs's (the Appellants) April 5, 2016 motion to reconsider that March 30, 2016 dismissal order pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure (HRAP), and (3) the record, it appears that the court did not overlook or misapprehend any points of fact or law when we entered the

March 30, 2016 dismissal order.

Appellants argue that the issue whether the circuit court abused its discretion by granting the HRAP Rule 4(a)(4)(B) extension of time was not properly before the Hawai'i Intermediate Court of Appeals because no party contested the issue of timeliness in any appellate brief. However, the Supreme Court of Hawai'i has consistently held that

[i]n each appeal, the supreme court is required to determine whether it has jurisdiction. . . . Without jurisdiction, a court is not in a position to consider the case further. . . . An appellant's failure to file a timely notice of appeal is a jurisdictional defect that can neither be waived by the parties nor disregarded by the court in exercise of judicial discretion.

Poe v. Hawai'i Labor Relations Board, 98 Hawai'i 416, 418, 49 P.3d 382, 384 (2002) (citations and internal quotation marks omitted; emphasis added); Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986) ("When we perceive a jurisdictional defect in an appeal, we must, *sua sponte*, dismiss that appeal.") (citation omitted); 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."). Therefore, the fact that no party contested the issue of timeliness in any appellate brief is irrelevant. This court clearly had a duty to review the jurisdictional issue whether the Appellants' appeal was timely.

Appellants next argue that it was inappropriate for this court to hold that the circuit court abused its discretion by granting the Appellants' HRAP Rule 4(a)(4)(B) motion for an

extension of time because the transcript of the hearing for the Appellants' HRAP Rule 4(a)(4)(B) motion was not in the record on appeal. However, ensuring that the record on appeal contains all relevant documents is the duty of the appellant.

It is the responsibility of each appellant to provide a record, as defined in Rule 10 and the Hawai'i Court Records Rules, that is sufficient to review the points asserted and to pursue appropriate proceedings in the court or agency from which the appeal is taken to correct any omission.

HRAP Rule 11(a).

Although the Appellants attached a copy of the hearing transcript to their April 5, 2016 HRAP Rule 40 motion for reconsideration of the March 30, 2016 dismissal order, the hearing transcript would not have changed our conclusion that the circuit court abused its discretion by finding excusable neglect for the Appellants' untimely appeal. The Supreme Court of Hawai'i has long held that the failure of a circuit court to provide formal notice of entry of an appealable order or appealable judgment does not excuse any aggrieved party from filing a timely notice of appeal. For example, thirty years ago, the Supreme Court of Hawai'i held that, where the appellant had not received prompt notice that an appealable order had been filed, it did not toll the time for appeal and her untimely request to extend the time for appeal barred her appeal. Bacon v. Karlin, 68 Haw. at 652, 727 P.2d at 1130-31.

Even though she did not receive prompt notice of entry of the order granting summary judgment, Ms. Bacon had advance knowledge that the order would be filed. Her attorney was present when the oral order awarding judgment was issued, and he approved the written order of September 23, 1985 before it was filed. Furthermore, delinquent service of such a notice does not toll the time

for appeal, for HRCP Rule 77(d) expressly provides that

[l]ack of notice of the entry by the clerk, or failure to make such service, 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.

We are without jurisdiction to hear and decide the appeal, and it is dismissed.

Id. (footnote omitted; emphasis added). Similar to the appellant in Bacon v. Karlin, the record in this case indicates that the Appellants' counsel was present at the relevant June 17, 2013 circuit court hearing when the circuit court announced that it would enter the written post-judgment order that eventually triggered the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal in the instant case, and, furthermore, the lack of any formal notice of entry of that written post-judgment order does not affect the time to appeal under HRCP Rule 77(d). Therefore,

IT IS HEREBY ORDERED that the Appellants' April 5, 2016 HRAP Rule 40 motion for reconsideration of the March 30, 2016 dismissal order is denied.

DATED: Honolulu, Hawai'i, April 21, 2016.

Presiding Judge

Associate Judge

Associate Judge