NO. CAAP-14-0000704

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

DONNALYN M. MOSIER, Plaintiff-Appellee, v.
KEITH PARKINSON and SHERRI PARKINSON, Defendants-Appellants

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CIVIL NO. 1RC12-1-1471)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, and Reifurth and Ginoza, JJ.)

In this summary-possession case, pro se Defendants/Counterclaimants-Appellants Keith and Sherri Parkinson (collectively, the "Parkinsons") appeal from a March 7, 2014 "Order Granting Plaintiff's Motion for Summary Judgment [("MSJ")], Filed on January 10, 2014" ("Order Granting MSJ"), which was issued by the District Court of the First Circuit, Honolulu Division ("District Court").[1/]

On appeal, the Parkinsons argue that the District Court erred because (1) the District Court lost subject matter jurisdiction over the case under Hawaii District Court Rules of Civil Procedure Rule 12.1 once the Parkinsons raised the issue of title to the subject property ("Property"); (2) the District Court lost jurisdiction over the case when the Parkinsons filed their notice of appeal in Case No. CAAP-12-0000541 on May 31, 2012 ("Notice of Appeal"); and (3) there were genuine issues of material fact with regard to issues raised in the MSJ filed by

[1/] The Honorable Hilary Benson Gangnes issued the Order Granting MSJ.

Plaintiff/Counterdefendant-Appellee Donnalyn M. Mosier ("Mosier").[2/]

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to

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[2/] In sum, the Parkinsons ask this court to vacate the following:

- March 15, 2012 "Minute Order for the Entry of the General Denial and for the Establishment of the Rent Trust Fund"
- March 27, 2012 "Order for Establishment of Rent Trust Fund"
- April 9 and 16, 2012 "Minute Order Denying [the Parkinsons'] Motion for Continuance and Motion to Dismiss"
- April 17, 2012 "Order Denying Defendant's Motion to Dismiss, Filed on March 14, 2012"
- April 25, 2012 "Order Striking [the Parkinsons'] Ex Parte Motion to File Counterclaim"
- May 3, 2012 "Minute Order Denying [the Parkinsons'] Oral Motion for Directed Verdict"
- May 3, 2012 "Minute Order Denying [the Parkinsons'] Oral Motion for Directed Verdict"
- May 3, 2012 "Minute Order Granting Judgment for Possession for [Mosier]"
- May 31, 2012 "Order Denying [the Parkinsons'] Motion to Set Aside Default Judgment"
- June 1, 2012 "Order Denying Ex Parte Motion to Stay Execution of Writ of Possession and Judgment for Possession:
- June 12, 2012 Judgment for Possession
- June 12, 2012 Writ of Possession
- June 18, 2012 FOF/COL/Order for Judgment for Possession, Writ of Possession
- August 20, 2012 "Order Granting in Part and Denying in Part [Mosier's] Motion for Partial Dismissal With Prejudice of First Amended Counterclaim Filed on June 9, 2012"
- September 10, 2012 "Minute Order for Default Against [the Parkinsons]"
- October 1, 2012 "Order Granting Motion for Issuance of Garnishee Summons"
- October 9, 2012 "Order Granting [Mosier's] Non-Hearing Motion for Default Judgment and Attorney's Fees"
- October 12, 2012 Judgment
- November 1, 2012 "Order Granting Motion for Issuance of Garnishee Summons"
- November 1, 2012 "Order Granting Motion for Issuance of Garnishee Summons"
- November 1, 2012 "Order Granting Motion for Issuance of Garnishee Summons"
- November 7, 2012 "Order Granting [Mosier's] Non-Hearing Motion for Default Judgment"
- November 8, 2012 "Order Granting [Mosier's] Motion for Disbursement of Funds in Rent Trust Fund, Filed on October 15, 2012"
- January 29, 2013 "Garnishee Order Filed and Issued to Charles Pankow Builders Ltd."
- January 17, 2014 "Order Denying [the Parkinsons'] Non-Hearing Motion for Continuance"
- March 7, 2014 "Order Granting [Mosier's] Motion for Summary Judgment, Filed on January 10, 2014"
- May 21, 2014 "Order Granting [Mosier's] Attorney Fees"
- June 4, 2014 "Amended Judgment for Attorney Fees"

the arguments they advance and the issues they raise,[3/] we resolve the Parkinsons' points of error by vacating the May 21, 2014 "Court Order" that partially granted Mosier's motion for attorneys' fees and the June 4, 2014 "Amended Judgment" for attorneys' fees,"[4/] and otherwise affirming the other challenged orders, including the March 7, 2014 Order Granting MSJ.

(1) We decline to further address the Parkinsons' first point of error, which we resolved in *Mosier v. Parkinson*, No. CAAP-12-0000541, 2015 WL 1851519 (Hawai‘i App. Apr. 22, 2015) (holding that the Parkinsons offered no evidence bringing title into question so as to divest the court of subject matter jurisdiction). Our determination of the issue in Case No. CAAP-12-0000541 is now the "law of the case," and the point cannot be relitigated. *Ditto v. McCurdy*, 98 Hawai‘i 123, 128, 44 P.3d 274, 279 (2002).

(2) The Notice of Appeal did not divest the District Court of jurisdiction to decide claims unrelated to the issue of who was entitled to possess the Property. Specifically, it did not divest the court of jurisdiction to decide Mosier's claim for damages contained in her MSJ or the Parkinsons' counterclaims.

The Judgment for Possession resolved the issues of whether the parties had entered into a purchase or a rental agreement, and whether the Parkinsons or Mosier breached that agreement, and a final ruling on those questions was necessary in order to resolve additional claims such as Mosier's request for damages in the amount of allegedly unpaid rent and who would be responsible for attorneys' fees and in what amount. Therefore,

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[3/] The Parkinsons claim to incorporate facts and arguments throughout their opening brief by reference to facts and arguments filed in other briefs and in other cases. The Hawai‘i Supreme Court has held that incorporating arguments by reference from the record into an opening brief violates the Hawai‘i Rules of Appellate Procedure ("HRAP") Rule 28(b)(7) and that such arguments should be disregarded. *Kapiolani Commercial Ctr. v. A & S P'ship*, 68 Haw. 580, 584, 723 P.2d 181, 184–85 (1986). While the Parkinsons proceed pro se and we strive to address such cases on their merits, *Housing Fin. and Dev. Corp. v. Ferguson*, 91 Hawai‘i 81, 85–86, 979 P.2d 1107, 1111–12 (1999), general references to the record do not provide us an adequate basis from which to do so.

[4/] Both the May 21, 2014 "Court Order" partially granting Mosier's motion for attorneys' fees and the June 4, 2014 "Amended Judgment" for attorneys' fees were issued by the Honorable Hilary Benson Gangnes.

even though the Judgment for Possession did not resolve all claims against all parties and was not a standard, appealable, final judgment under HRS § 641-1(a), this court had jurisdiction over the appeal in Case No. CAAP-12-0000541 from the Judgment for Possession, pursuant to the *Forgay* doctrine. *Ciesla v. Reddish*, 78 Haw. 18, 20, 889 P.2d 702, 704 (1995) ("The *Forgay* doctrine is an exception to the finality requirement for appeals and it allows an appellant to immediately appeal a judgment for execution upon property, even if all claims of the parties have not been finally resolved." (discussing a rule derived from *Forgay v. Conrad*, 47 U.S. 201 (1848)).

"Generally, the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case." *TSA Int'l Ltd. v. Shimizu Corp.*, 92 Hawai‘i 243, 265, 990 P.2d 713, 735 (1999). However, where, as here—similar to a situation involving HRCP Rule 54(b)—the appealed judgment does not resolve all of the claims in the case, the district court retains jurisdiction to adjudicate the remaining claims (that are not the subject of the appeal) while the appeal is pending. *See, e.g., Territory v. Damon*, 44 Haw. 557, 563, 356 P.2d 386, 390 (1960) ("We think that when an appeal is taken from such judgment, the trial court is divested of jurisdiction over the remainder of the case."); *Sturkie v. Han*, 2 Haw. App. 140, 146, 627 P.2d 296, 301 (1981) ("[A]n appeal under Rule 54(b) does not divest the trial court of jurisdiction to proceed with the other issues in the case."). The Parkinsons cite to no authority holding that this court's jurisdiction over the appeal in Case No. CAAP-12-0000541 on *Forgay* grounds divested the District Court of jurisdiction over pleadings unrelated to the issue of possession, and we find none.

While the District Court retained jurisdiction "over the remainder of the case," it did not have subject matter jurisdiction to further adjudicate the Judgment for Possession or to review any request for attorneys' fees incurred to obtain possession of the Property until Case No. CAAP-12-0000541 was resolved on August 31, 2015, when the Hawai‘i Supreme Court denied the Parkinson's application for a writ of certiorari from

this court's judgment on appeal, which had affirmed the Judgment for Possession. *See CRSC, Inc. v. Sage Diamond Co.,* 95 Hawai‘i 301, 307-08, 22 P.3d 97, 103-04 (App. 2001) (if a motion for attorneys' fees or costs is filed more than 10 days after entry of judgment and is not decided before a valid notice of appeal is timely filed, the circuit court lacks jurisdiction to decide the motion while the appeal is pending); *French v. French*, 110 Hawai‘i 399, 404, 133 P.3d 828, 833 (App. 2006) (concluding that the lower court was divested of jurisdiction to decide a motion for attorneys' fees/costs after the notice of appeal was filed). Therefore, the District Court erred to the extent that it prematurely awarded attorneys' fees related to the issue of possession in the October 12, 2012 Judgment and related garnishment orders, and prematurely awarded attorneys' fees related to the issue of possession in the June 4, 2014 Amended Judgment.

Because the District Court subsequently set aside the October 12, 2012 Judgment on December 2, 2013, and struck Mosier's declaration with instructions to submit a revised declaration for fees and costs on March 20, 2014, however, any error associated with the October 12, 2012 fees award and related garnishee summons was corrected as a matter of course. *See* Haw. R. Civ. P. 61 (a judgment or order is not to be disturbed absent conflict with the substantial rights of the parties). We vacate, however, as to the fees awarded in the June 4, 2014 Amended Judgment and remand for further proceedings.

(3) The District Court did not err in granting Mosier's MSJ because the Parkinsons failed to meet their burden to demonstrate any genuine issues of material fact. In the MSJ, Mosier claimed that she was entitled to damages in the amount of $3,850, representing unpaid rent for June 2012. Mosier explained that the lease term extended through July 7, 2012; that the Parkinsons did not make a June 2012 rental payment; and that she had applied the Parkinson's $3,850 security deposit toward the Parkinsons' outstanding February 2012 rental payment. As support, Mosier cited to provisions in the rental agreement, as well as Findings of Fact ("FOFs") 6 and 7 in the District Court's

June 18, 2012 "Findings of Fact, Conclusions of Law and Order Granting Entry of Judgment for Possession and Issuance of Writ of Possession Effective June 1, 2012" ("FOF/COL/Order for Possession").[5/] In opposition, the Parkinsons did not contest those FOFs or that they failed to make a rental payment for February or June 2012, and they did not claim an entitlement to withhold the rental payments. Rather, they reiterated their argument that Mosier breached the purported purchase agreement, an argument that the District Court had already found lacked merit in its FOF/COL/Order for Possession. To the extent that the Parkinsons thereby reargue the issues already addressed in our earlier determination in Case No. CAAP-12-0000541, that case, as noted earlier, cannot be relitigated. Therefore, the Parkinsons have not identified any genuine issues of material fact left to resolve, and the District Court, therefore, did not err.

With regard to the Parkinsons' Counterclaim No. 2, under HRS § 521-64, for reimbursement of repair costs, Mosier argued that the Parkinsons presented no evidence of a health or safety violation or defect in material noncompliance on the premises, or that Mosier, as a result of a wrongful act, was improperly benefitted by the repairs the Parkinsons made. To support these arguments, Mosier cited to the FOF/COL/Order for Possession, in which the District Court found that the premises were habitable when the Parkinsons signed the rental agreement and took possession, the Parkinsons were compensated for certain repairs they made, and the Parkinsons had agreed to maintain the pool and yard.

As the District Court found, and the Parkinsons have not contested, the Parkinsons deducted from their rental payments the amounts they spent to repair certain plumbing and sewer

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[5/] FOFs 6 and 7 provide:

> 6. [The Parkinsons] paid rent to [Mosier] for July, August, September, October, November, and December of 2011 as well as January 2012.
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> 7. [The Parkinsons] failed to pay rent for February 2012.

problems, and the Parkinsons were responsible under the rental agreement for pool and yard repair. The Parkinsons did not notify Mosier of other alleged defects on the Property, including the pest and termite problems, as required by the rental agreement. *See* Haw. Rev. Stat. § 521-64(c) (2006) (requiring a tenant to give his or her landlord notice of and the opportunity to cure any alleged defects in material non-compliance with § 521-42(a)[6/]).

Regarding the Parkinsons' alternative unjust-enrichment claim in Counterclaim No. 2, the District Court found no wrongdoing on Mosier's behalf, that any alleged defects to the pool and yard and Mosier's failure to address them did not constitute a breach by Mosier of her duty to repair or provide habitable premises, and that the parties did not have a purchase agreement with each other. The latter two findings mirror those already determined by the District Court and affirmed by this court in Case No. 12-0000541. In opposition to the MSJ, the Parkinsons did not dispute these findings; rather, they repeated their allegation that the parties had entered into a purchase agreement, which they claim Mosier breached by failing to credit toward the Property's purchase price the amounts that the Parkinsons paid to make repairs to the Property. That issue, of course, is not subject to relitigation.

As to the Parkinsons' Counterclaim No. 4, that Mosier took more than the allowable security deposit under the pretext of an "option agreement," in violation of HRS § 521-44, Mosier contended that $2,600 paid by the Parkinsons, which the Parkinsons asserted was an "additional security deposit," was actually consideration for a "right of first refusal." Mosier argued that because the Parkinsons signed the receipt indicating that the $2,600 was a purchase option, they clearly knew the amount did not represent an additional security deposit, as they

[6/] HRS § 521-42 provides, in relevant part that "[t]he landlord shall at all times during the tenancy . . . [m]ake all repairs and arrangements necessary to put and keep the premises in a habitable condition[.]" Haw. Rev. Stat. § 521-42(a)(3) (2006).

later claimed. Mosier cited to FOF 4[7/] in the FOF/COL/Order for Possession and the rental agreement to support this argument.

Since this court affirmed the FOF/COL/Order for Possession in Case No. CAAP-12-0000541, FOF 4 therein is binding and not subject to relitigation. Thus, in sum, the District Court did not err in granting Mosier's MSJ. *See* Haw. R. Civ. P. 56(b), (c), & (e); *Ralston v. Yim*, 129 Hawai‘i 46, 56-57, 60-61, 292 P.3d 1276, 1286-87, 1290-91 (2013).

Therefore, the District Court of the First Circuit's March 7, 2014 "Order Granting Plaintiff's Motion for Summary Judgment, Filed on January 10, 2014" is affirmed. The May 21, 2014 "Court Order" partially granting Mosier's motion for attorneys' fees, and the June 4, 2014 "Amended Judgment" for attorneys' fees are vacated and remanded to the District Court for proceedings consistent with this opinion.

DATED: Honolulu, Hawai‘i, June 24, 2016.

On the briefs:

Keith and Sherri Parkinson,
Pro Se Defendants-Appellants.

Presiding Judge

Yuriko J. Sugimura
(Bendet Fidell Sujimura)
for Plaintiff-Appellee.

Associate Judge

Associate Judge

[7/] FOF 4 provides that "The agreement provided for a security deposit of $3,850, which was paid by [the Parkinsons] to [Mosier]."