

NO. CAAP-15-0000080

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

McCULLY ASSOCIATES,
Plaintiff/Appellee,
v.

TEN GRAND ASSOCIATES, a Hawaii limited partnership,
and TEN GRAND INVESTMENTS, INC., a Hawaii corporation,
Defendants/Appellees

JERRY TARUTANI and HUO CHEN, Co-Trustees of the
Gregory Y.Y. Dunn Irrevocable Trust dated December 17, 1993;
Roger Y.H. Dunn Irrevocable Trust dated December 17, 1993;
Laurieann Y.F. Dunn Irrevocable Trust dated December 17, 1993;
and Michael Y.H. Dunn Irrevocable Trust dated December 17, 1993,
Additional Defendants/Appellees,

RONALD K. KOTOSHIRODO, Receiver,
Third-Party Plaintiff/Appellee,
v.

ALEXANDER Y. MARN, Third-Party Defendant/Appellant,
and

ERIC Y. MARN, Third-Party Defendant/Appellee

FIRST HAWAIIAN BANK, Garnishee/Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 05-1-2246-12)

MEMORANDUM OPINION

(By: Foley, Presiding J., Fujise and Leonard, JJ.)

Third-Party Defendant/Appellant Alexander Y. Marn
(**Marn**) appeals pro se from the "Order Granting Plaintiff McCully

Associates' Motion for Writ of Execution, Filed January 6, 2015"¹ entered on February 11, 2015 in the Circuit Court of the First Circuit² (**circuit court**).

On appeal, Marn contends the circuit court erred in "ruling that [his] motion for relief from writ of execution, filed May 7, 2015 was denied outright without [a] hearing" and "confirming the writ and sale of the Ekela Property, filed August 26, 2015."³

I. BACKGROUND

This appeal stems from a lawsuit that Plaintiff/Appellee McCully Associates, by and through Thomas E. Hayes, Receiver Pendente Lite of McCully Associates through its general partner Ala Wai Investments, Inc. (**Receiver Hayes**), filed against Defendants/Appellees Ten Grand Associates, a Hawaii limited partnership, and Ten Grand Investments, Inc., a Hawaii corporation (together, **Ten Grand**). The nature of the underlying lawsuit is not at issue in the current appeal. Rather, the relevant history of this appeal begins with monetary judgments that the circuit court entered on September 16, 2009⁴ and November 12, 2009⁵ (together, **Ten Grand Judgments**).⁶ The circuit court entered the Ten Grand Judgments in favor of McCully Associates and against Ten Grand, and also in favor of Ronald K.

¹ Marn's notice of appeal also lists a "Notice of Pendency of Action" filed by Plaintiff-Appellee McCully Associates on January 7, 2015. Appeals in civil matter may only be from "final judgments, orders, or decrees of circuit and district courts and the land court to the intermediate appellate court[.]" Hawaii Revised Statutes § 641-1(a) (Supp. 2015).

² The Honorable Rhonda A. Nishimura presided, unless otherwise indicated.

³ Marn also challenges this court's order denying his motion for stay, entered on September 10, 2015. We note, however, that in order for Marn to appeal our decision, he was required to submit an application for a writ of certiorari to the Hawai'i Supreme Court, pursuant to Hawaii Rules of Appellate Procedure (**HRAP**) Rule 40.1.

⁴ Marn filed a notice of appeal from the circuit court's September 16, 2009 Final Judgment on October 15, 2009.

⁵ The record on appeal does not indicate that Marn appealed from the circuit court's November 12, 2009 Judgment.

⁶ The Honorable Victoria S. Marks presided over the Ten Grand Judgments.

Kotoshirodo, as receiver for Ten Grand (**Receiver Kotoshirodo**) and against Marn, as a third-party defendant. On May 9, 2014, Receiver Kotoshirodo assigned all the judgments that Ten Grand held against Marn to Receiver Hayes, as receiver for McCully Associates.

On January 6, 2015, after Marn failed to make any payments, Receiver Hayes filed "Plaintiff McCully Associates' Motion for Writ of Execution" (**Motion for Writ of Execution**), which requested the circuit court place a levy on Marn's property located on Ekela Avenue in Honolulu (**Ekela Property**) and order the sale of the Ekela Property to the highest bidder to satisfy various monetary judgments that McCully Associates held against Marn. Specifically, McCully Associates' Motion for Writ of Execution sought satisfaction of the Ten Grand Judgments and an October 25, 2010 Partial Final Judgment that the circuit court entered in favor of McCully Associates and against Marn. The October 25, 2010 Partial Final Judgment was not entered in the case before us. Instead, the October 25, 2010 Partial Final Judgment was entered in a separate, although related, case: In re Marn Family Litigation, Master File No. 00-1-MFL 3RD, Civil No. 98-5371-12 and 98-4706-10.

Marn did not file a written opposition to the Motion for Writ to Execution, but the circuit court nevertheless allowed Marn to "make a few points" during the January 29, 2015 hearing on the motion.

On February 11, 2015, the circuit court entered an order granting McCully Associates' Motion for Writ of Execution (**Order Granting Motion for Writ of Execution**). The circuit court ordered:

3. The Director of Public Safety of the State of Hawaii, his/her deputy or any policy officer or other person authorized by the laws of the State of Hawaii Director, is ordered (a) to levy upon the personal property of and the real property of Defendant [Marn] located at [the Ekela Property] and (b) to sell the Ekela Property after thirty (30) days previous notice as required by law to the highest bidder, to include [McCully Associates] by credit bid, in order to satisfy [McCully Associates'] Judgments rendered against Defendant [Marn] filed September 16, 2009, November 12, 2009, and October 25, 2010, in favor of [McCully Associates] for \$10,676,768.35, costs of court inclusive, collecting also the legal interest from date of the Writ, and all costs, and expenses of levy, advertisement

and sale[.]

On February 11, 2015, the circuit court issued a Writ of Execution.

On February 17, 2015, Marn filed a notice of appeal from the circuit court's Order Granting Motion for Writ of Execution.

II. DISCUSSION

Marn contends the circuit court erred in denying his May 7, 2015 motion related to a request for relief from the Writ of Execution. In addition, Marn seeks to challenge the circuit court's August 26, 2015 "Order Granting Plaintiffs' Motion to Confirm (1) Return of Writ of Execution, and (2) Sale Filed June 26, 2015."

Notwithstanding Marn's attachments to his opening brief and his various other submissions on appeal, the orders that Marn apparently seeks to challenge are not referenced in his notice of appeal and are not included in the record on appeal or any supplemental record on appeal.⁷ "The law is clear in this jurisdiction that the appellant has the burden of furnishing the appellate court with a sufficient record to positively show the alleged error." Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (quoting Union Bldg. Materials Corp. v. Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)); see HRAP Rule 10 (setting forth the various items that an appellant must include in the record on appeal). We have no basis upon which to review the circuit court's decisions and, therefore, Marn's appeal is without merit.

III. CONCLUSION

Therefore, the "Order Granting Plaintiff McCully Associates' Motion for Writ of Execution, Filed January 6, 2015"

⁷ Even if Marn had filed an amended notice of appeal to include the challenged orders and even if Marn included a complete record on appeal, Marn's February 17, 2015 Notice of Appeal predated the subject orders. "[S]ince an amended notice of appeal relates back to the notice of appeal it purports to amend, it does not appeal an order, judgment, or decree entered subsequent to the notice of appeal it purports to amend." Enos v. Pac. Transfer & Warehouse, Inc., 80 Hawai'i 345, 355-56, 910 P.2d 116, 126-27 (1996) (quoting Chan v. Chan, 7 Haw. App. 122, 128, 748 P.2d 807, 811 (1987)).

enter on February 11, 2015 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 7, 2016.

On the briefs:

Alexander Y. Marn
Third-Party Defendant/
Appellant pro se.

Presiding Judge

Edward J. Bybee
for Plaintiff/Appellee
McCully Associates.

Associate Judge

Associate Judge