

NO. CAAP-16-0000209

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JASON SAMUEL KING,
Plaintiff-Appellee,
v.

AVRAHAM ELKAYAM and DAFNA ELKAYAM,
Defendants-Appellants,
and

THE BANK OF NEW YORK MELLON, a New York corporation, AS
TRUSTEE FOR THE BENEFIT OF CWMBS, INC. AND CHL
MORTGAGE PASS-THROUGH TRUST 2007-12 MORTGAGE PASS
THROUGH CERTIFICATES, SERIES 2007-12; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., solely as
Nominee for FIRST MAGNUS FINANCIAL CORPORATION;
BANK OF AMERICA CORPORATION, a Delaware
corporation; STATE OF HAWAII, DEPARTMENT OF
TAXATION, Defendants-Appellees,
and

JOHN DOES 1-50, et al., Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 10-1-0589(2))

ORDER

GRANTING IN PART AND DENYING IN PART MAY 5, 2016
MOTION TO DISMISS APPELLATE COURT CASE NUMBER
CAAP-16-0000209 FOR LACK OF APPELLATE JURISDICTION
AND DENYING MAY 20, 2016 MOTION TO DISMISS
APPELLATE COURT CASE NUMBER CAAP-16-0000209
(By: Foley, Presiding Judge, Leonard and Ginoza, JJ.)

Upon review of (1) Plaintiff-Appellee Jason Samuel King's (Appellee King) May 5, 2016 motion to dismiss appellate court case number CAAP-16-0000209 for lack of appellate jurisdiction, (2) attorney Michael J. Collins's (Attorney Collins) May 12, 2016 motion to withdraw as counsel for Appellee King, (3) a May 20, 2016 document that Appellee King himself signed and conventionally filed, apparently as a pro se litigant, that is entitled "Appellee's Opposition to Appellant's [sic] Appeal from Second Circuit Court Judgment and Motion to Dismiss[,]" which we construe to be a motion by Appellee King to dismiss appellate court case number CAAP-16-0000209, (4) Defendants-Appellants Avraham Elkayam and Dafna Elkayam's (the Elkayam Appellants) May 22, 2016 memorandum in opposition to Appellee King's May 5, 2016 motion to dismiss, (5) the May 26, 2016 order granting Attorney Collins's May 12, 2016 motion to withdraw as counsel for Appellee King, and (6) the record, it appears that we have appellate jurisdiction over the Elkayam Appellants' appeal as to the Honorable Peter T. Cahill's February 23, 2016 judgment on the order confirming the sale of the foreclosed property pursuant to Rule 54(b) of the Hawai'i Rules of Civil Procedure (HRCPP) and Hawaii Revised Statutes (HRS) § 667-51(a)(2) (Supp. 2015), but we lack appellate jurisdiction over the Elkayam Appellants' appeal as to the Honorable Peter T. Cahill's September 1, 2015 judgment on a decree of foreclosure, as well as any post-judgment orders that adjudicated post-judgment tolling motions regarding the September 1, 2015 judgment on the decree of foreclosure.

We note that the Elkayam Appellants' March 21, 2016 notice of appeal purports to appeal from the following three documents:

- (1) a February 17, 2016 post-judgment order denying the Elkayam Appellants' September 11, 2015 post-judgment HRCP Rule 59 motion for reconsideration of a September 1, 2015 judgment on the decree of foreclosure (the February 17, 2016 post-judgment order);
- (2) a February 17, 2016 interlocutory order granting Appellee King's motion to confirm the sale of the foreclosed property (the February 17, 2016 interlocutory order); and
- (3) a February 23, 2016 HRCP Rule 54(b)-certified judgment on the order confirming the sale of the foreclosed property.

However, the Elkayam Appellants' appeal is untimely as to the February 17, 2016 post-judgment order. HRS § 667-51(a) authorizes a party in a foreclosure action to assert an appeal from three different types of judgments:

§667-51 Appeals. (a) Without limiting the class of orders not specified in section 641-1 from which appeals may also be taken, the following orders entered in a foreclosure case shall be final and appealable:

- (1) A judgment entered on a decree of foreclosure, and if the judgment incorporates an order of sale or an adjudication of a movant's right to a deficiency judgment, or both, then the order of sale or the adjudication of liability for the deficiency judgment also shall be deemed final and appealable;
- (2) A judgment entered on an order confirming the sale of the foreclosed property, if the circuit court expressly finds that no just reason for delay exists, and certifies the judgment as final pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure; and
- (3) A deficiency judgment; provided that no appeal from a deficiency judgment shall raise issues relating to the judgment debtor's liability for the deficiency judgment (as opposed to the amount of the deficiency judgment), nor shall the appeal affect the finality of the transfer of title to the foreclosed property pursuant to the order confirming sale.

(b) An appeal shall be taken in the manner and within the time provided by the rules of court.

(Emphases added).

Although the circuit court entered a September 1, 2015 judgment on the decree of foreclosure that was immediately appealable under HRS § 667-51(a)(1), the Elkayam Appellants did not file a notice of appeal within thirty days, as Rule 4(a)(1) of the Hawai'i Rules of Appellate Procedure (HRAP) initially required. Instead, the Elkayam Appellants invoked the tolling provision under HRAP Rule 4(a)(3)¹ by filing a timely September 11, 2015 post-judgment HRCF Rule 59 motion for reconsideration within ten days after entry of the September 1, 2015 judgment on the decree of foreclosure. 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). The Supreme Court of Hawai'i has held that, 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). The Supreme Court of Hawai'i has also held that

¹ HRAP Rule 4(a)(3) provides:

(3) 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.

HRAP Rule 4(a)(3) (emphases added).

"when a timely post-judgment tolling motions 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 (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). Under 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 September 1, 2015 judgment on the decree of foreclosure was the circuit court's entry of the February 17, 2016 post-judgment order denying the Elkayam Appellants' September 11, 2015 post-judgment HRCR Rule 59 motion for reconsideration. However, the Elkayam Appellants did not file their March 21, 2016 notice of appeal within thirty days after February 17, 2016, as HRAP Rule 4(a)(3) required for a timely appeal.

The Elkayam Appellants subsequently filed a March 21, 2016 motion to extend time based on "excusable neglect" under HRAP Rule 4(a)(4)(B), in which counsel for the Elkayam Appellants argued that the Elkayam Appellants had not received notice or a photocopy of the February 17, 2016 post-judgment order until after the time period under HRAP Rule 4(a)(3) for filing a notice of appeal had expired. Nevertheless, HRCR Rule 77(d) provides that "[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). Under similar circumstances, the Supreme Court of Hawai'i interpreted 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 v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 353, 910 P.2d 116, 124 (1996); see also Ek v. Boggs, 102 Hawai'i 289, 300, 75 P.3d 1180, 1191 (2003). Thus, 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 Enos court "h[e]ld that the trial court abused its discretion by granting the motion to extend time for filing a notice of appeal because the failure to timely file the appeal was caused by counsel's failure to read and comply with the plain language of the applicable procedural rules, which cannot constitute 'excusable neglect.'" Enos, 80 Hawai'i at 355, 910 P.2d at 126. Under HRCP Rule 77(d) and the holding in Enos, the failure of the Elkayam Appellants to receive notice or a photocopy of the February 17, 2016 post-judgment order did not constitute "excusable neglect" under HRAP Rule 4(a)(4)(B). The circuit court did not abuse its discretion by entering its April 6, 2016 order denying the Elkayam's March 21, 2016

HRAP Rule 4(a)(4)(B) motion for an extension of time. Therefore, the Elkayam Appellants' March 21, 2016 notice of appeal was untimely as to the September 1, 2015 judgment on the decree of foreclosure, as well as the directly related February 17, 2016 post-judgment order, and the Elkayam Appellants waived their right to appellate review of that portion of this foreclosure case.² Accordingly, we dismiss that limited portion of this appeal.

Nevertheless, the circuit court's February 23, 2016 HRCP Rule 54(b)-certified judgment on the order confirming the sale of the foreclosed property was an independently appealable final judgment pursuant to HRS § 667-51(a)(2). The Elkayam Appellants timely filed their March 21, 2016 notice of appeal within thirty days after entry of the February 23, 2016 HRCP Rule 54(b)-certified judgment on the order confirming the sale of the foreclosed property, as HRAP Rule 4(a)(1) required for a timely appeal. Therefore, pursuant to HRS § 667-51(a)(2), the Elkayam Appellants timely invoked our appellate jurisdiction to review the February 23, 2016 HRCP Rule 54(b)-certified judgment on the order confirming the sale of the foreclosed property. Furthermore, the Elkayam Appellants' timely appeal from the February 23, 2016 HRCP Rule 54(b)-certified judgment entitles the Elkayam Appellants to appellate review of directly related

² 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.").

preliminary rulings such as the February 17, 2016 interlocutory order granting Appellee King's motion to confirm the sale of the foreclosed property, because, "when an order is properly certified pursuant to HRCP Rule 54(b), the certification necessarily renders every preliminary ruling upon which it was predicated final and appealable as well." Weinberg v. Mauch, 78 Hawai'i 40, 46, 890 P.2d 277, 283, (1995) (citation, internal quotation marks and brackets omitted).

We note that Appellee King signed and conventionally filed his May 20, 2016 motion to dismiss appellate court case number CAAP-16-0000209 without the signature of his counsel of record before entry of the May 26, 2016 order granting Attorney Collins's May 12, 2016 motion to withdraw as counsel for Appellee King. Consequently, Appellee King's May 20, 2016 motion was unauthorized under HRAP Rule 32(c), which expressly requires that "[a]ll conventionally filed documents must be signed in black ink by the party or, if the party is represented, by the party's attorney." (Emphases added).

Accordingly, IT IS HEREBY ORDERED that Appellee King's May 5, 2016 motion to dismiss appellate court case number CAAP-16-0000209 for lack of appellate jurisdiction is granted in part and denied in part. We grant in part Appellee King's May 5, 2016 motion to dismiss to the extent that the Elkayam Appellants seek appellate review of the September 1, 2015 judgment on a decree of foreclosure, as well as the February 17, 2016 post-judgment order denying the Elkayam Appellants' September 11, 2015 HRCP Rule 59 motion for reconsideration of the September 1, 2015 judgment. We

deny Appellee King's May 5, 2016 motion to dismiss appellate court case number CAAP-16-0000209 for lack of appellate jurisdiction to the extent that the Elkayam Appellants seek appellate review of the February 23, 2016 HRCP Rule 54(b)-certified judgment on the order confirming the sale of the foreclosed property, as well as directly related preliminary rulings such as the February 17, 2016 interlocutory order granting Appellee King's motion to confirm the sale of the foreclosed property.

IT IS FURTHER HEREBY ORDERED that Appellee King's May 20, 2016 motion to dismiss appellate court case number CAAP-16-0000209 is denied as unauthorized under HRAP Rule 32(c).

DATED: Honolulu, Hawai'i, July 13, 2016.

Presiding Judge

Associate Judge

Associate Judge