

NO. CAAP-23-0000381

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

MARK MALAGODI and JANET JOHNSTON,
Plaintiffs/Counterclaim Defendants-Appellees, v.
CAMERON E. NICE and MARTHA J. JACOBSEN,
aka MARTHA J. JACOBSEN-NICE,
Defendants/Counterclaimants-Appellants, and
AMERICAN SAVINGS BANK, F.S.B.,
a Federal Savings Bank, Defendant-Appellee, and
JOHN DOES 1-20; JANE DOES 1-20; DOE PARTNERSHIPS 1-20;
DOE CORPORATIONS 1-20; and DOE ENTITIES 1-20, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 5CCV-22-0000027)

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION
(By: Ginoza, Chief Judge, Wadsworth and Guidry, JJ.)

Upon review of the record, it appears that:

(1) On November 1, 2022, the Circuit Court of the Fifth Circuit (**circuit court**) entered an order granting summary judgment in favor of Plaintiffs/Counterclaim Defendants-Appellees Mark Malagodi and Janet Johnston on Claim 2 of their April 26, 2022 Complaint (**MSJ Order**).

(2) On January 27, 2023, self-represented Defendants/Counterclaimants-Appellants Cameron E. Nice and Martha J. Jacobsen, AKA Martha J. Jacobsen-Nice (**Nice Parties**) moved to vacate the MSJ Order, which the circuit court denied on April 25, 2023 (**Denial Order**).

(3) On or about May 3, 2023, the Nice Parties mailed a Motion for Reconsideration of the Denial Order (**Motion to Reconsider**) to Judge Randal G.B. Valenciano's clerk, along with a letter asking the clerk to file the motion with this court. The court construes the letter, together with the Motion to Reconsider, as a Notice of Appeal (**NA**) from the Denial Order.

(4) On or about May 29, 2023, the Nice Parties mailed the Motion to Reconsider to the Chief Clerk of the Hawai'i Supreme Court, asking her to file it in this court.

(5) On June 7, 2023, the Chief Clerk's Office filed the Motion to Reconsider as an NA, creating this appeal.

(6) Even assuming *arguendo* the NA was timely filed,¹ the court lacks jurisdiction over the appeal because the Denial Order is not a final, appealable order or judgment. See Hawaii Revised Statutes (**HRS**) § 641-1(a) (2016); Hawai'i Rules of Civil Procedure Rules 54(b) and 58; Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). Further, the Denial Order is not independently appealable under the collateral-order doctrine, the Forgay doctrine,² or HRS § 641-1(b). See Greer v. Baker, 137 Hawai'i 249, 253, 369 P.3d

¹ "A self-represented party . . . shall conventionally file the notice of appeal with the clerk of the court or agency appealed from. . . . The date of receipt shall be deemed the date the notice of appeal was filed with the appellate court." Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 3(a). Though the Nice Parties incorrectly submitted the NA to Judge Valenciano's clerk, rather than filing it with the circuit court clerk, it nonetheless appears to have been timely received on May 5, 2023, and "pro se litigants should not automatically have their access to appellate review . . . foreclosed because of failure to conform to requirements of the procedural rules." Erum v. Llego, 147 Hawai'i 368, 380-81, 465 P.3d 815, 827-28 (2020).

² See Forgay v. Conrad, 47 U.S. 201 (1848). Though the MSJ Order appears to have been independently appealable under the Forgay doctrine, the time to appeal that order expired on December 1, 2022, per HRAP Rule 4(a)(1), the deadline was not extended or tolled under HRAP Rule 4(a)(3) or (4), and the NA expressly appealed from the Denial Order, only.

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832, 836 (2016) (setting forth the requirements for appealability under the collateral-order doctrine and the Forgay doctrine); HRS § 641-1(b) (specifying requirements for leave to file interlocutory appeal).

Therefore, IT IS HEREBY ORDERED that the appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, June 26, 2023.

/s/ Lisa M. Ginoza
Chief Judge

/s/ Clyde J. Wadsworth
Associate Judge

/s/ Kimberly T. Guidry
Associate Judge