***** NOT FOR PUBLICATION *****

NO. 21613

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

JAMES THEODORE WINSTON, MARGARET PATRICIA WINSTON, SUSAN RAE WINSTON NOBLE and LINDA KAY WINSTON ROBINSON, Plaintiffs-Appellees,

vs.

HERMAN BUCK KIN LEE, SAM MOI LAU LEE, CINDY S.Y. LEE, DOWNTOWN PRODUCE INC., TING YIN CHOY SUEY, INC., Defendants-Appellants

and

HOWARD SUN HOON CHUN, LORRAINE KWAI FAH CHUN, and EDWIN WAI CHUNG CHEUNG, Defendants-Appellees

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CIV. NO. 1RC 96-9650)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendants-Appellants Herman Buck Kin Lee (Herman), Sam Moi Lau Lee (Sam) (collectively "the Lees"), Cindy S.Y. Lee (Cindy), Downtown Produce, Inc., and Ting Yin Chop Suey, Inc. (collectively "the Guarantors") (the Lees and the Guarantors are hereinafter collectively referred to as "Appellants") appeal certain judgments and orders of the District Court of the First Circuit (the court) in favor of Plaintiffs-Appellees James Theodore Winston, Margaret Patricia Winston, Susan Rae Winston Noble, and Linda Kay Winston Robinson (collectively "the Winstons") and Defendants-Appellees Howard Sun Hoon Chun and Lorraine Kwai Fah Chun (collectively "the Chuns") and against the

Lees, in a summary possession case. Specifically, on April 27, 1998, Appellants filed their notice of appeal from the April 14, 1998 final judgment "and from interim judgments, rulings and orders preceding or subsumed"[1] therein (supreme court number 21524); and on May 22, 1998, Appellants filed their notice of appeal from the April 28, 1998 amended final judgment "and from interim judgments, rulings and orders preceding or subsumed"[2] therein (supreme court number 21613). We affirm, except we dismiss the appeals insofar as they relate to the March 31, 1998 order herein.[3]

I.

In the instant case, the April 27, 1998 notice of appeal (supreme court number 21524) is a timely appeal from the April 6, 1998 order. While the April 27, 1998 notice of appeal designated that it was from the April 14, 1998 final judgment "and from interim judgments, rulings, and orders preceding or subsumed" therein, the April 6, 1998 order was a final order that was appealable without entry of the separate April 14, 1998 final judgment. See DCRCP Rule 58 (providing that "[t]he filing of the

[1] These orders include two of the court's orders of January 22, 1997, the orders of February 25, 1997, May 16, 1997, July 8, 1997, and April 6, 1998.

[2] These orders and judgments include the April 14, 1998 final judgment and the orders subsumed thereunder as set forth supra, note 1, and the March 31, 1998 order.

[3] On March 14, 2002, a Stipulation for Partial Dismissal of Appeal as between Appellants and Defendant-Appellee Edwin Wai Chung Cheung was filed and approved by this court.

judgment in the office of the clerk constitutes entry of the judgment"). The proceedings on the post-Stipulated Judgment challenges finally ended with the entry of the April 6, 1998 supplemental judgment and order awarding the Winstons attorneys' fees for having to defend the post-Stipulated Judgment challenges. As an order which finally ended the post-Stipulated Judgment proceedings, the April 6, 1998 order brings up for review all other orders entered in such proceedings. See Familian Northwest, Inc. v. Central Pacific Boiler & Piping, Ltd., 68 Haw. 368, 369-70, 714 P.2d 936, 937 (1986) (A "post-judgment order is appealable in its own right only if it meets the test of finality applicable to all judicial decisions." (Quoting Powers v. Ellis, 55 Haw. 414, 416, 520 P.2d 431, 433 (1974).)).

Thus, for purposes of appeal, the entry of the April 14, 1998 judgment was superfluous as Appellants were required to appeal from the April 6, 1998 order. However, as it was apparent from the April 14, 1998 final judgment that Appellants were appealing the April 6, 1998 order and the other post-Stipulated Judgment orders, we have jurisdiction over those orders. See City & County of Honolulu v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976) (noting that a mistake in designating the judgment should not result in a loss of an appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice of appeal). It was not apparent, however, that the April 14, 1998 final judgment included the

March 31, 1998 order granting the Chuns' motion for summary judgment as against the Lees.[4]

The April 27, 1998 notice of appeal also does not bring up for review the March 31, 1998 order granting the Chuns' summary judgment against the Lees. Although resolved during the period of the post-judgment proceedings, the order was unrelated to such proceedings, and the attempt to appeal the cross-claim is not evident from the filed notice of appeal.

Rather, the March 31, 1998 order awarding judgment to the Chuns on their cross-claim against the Lees was final and appealable as of March 31, 1998, and was not re-appealable upon entry of the April 28, 1998 amended final judgment.[5] Cf. Wong v. Wong, 79 Hawai'i 26, 31, 897 P.2d 953, 958 (1995) (the jurisdictional requirements of HRAP 4 cannot be changed by reentering a judgment to permit an otherwise untimely appeal). The notice of appeal filed on May 22, 1998 in supreme court number 21613, more than thirty days after March 31, 1998, thus is an untimely appeal of the March 31, 1998 order. Cf. Oppenheimer v. AIG Hawai'i Ins. Co., 77 Hawai'i 88, 93, 881 P.2d 1234, 1239 (1994) (time for appealing an order confirming an arbitration award commenced upon entry of the order, not upon entry of a separate, superfluous judgment on the order). Therefore, we do not consider Appellants' points of error relating to the

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[4] The April 14, 1998 final judgment did not purport to enter judgment on the March 31, 1998 order granting the Chuns' motion for summary judgment as against the Lees. See supra note 9.

[5] See supra note 12.

March 31, 1998 order, as we do not have jurisdiction over that order.

III.

Without specifying which party is appealing each judgment or order, Appellants argue the following with regard to the judgments and orders: (1) the court improperly applied Hawai‘i Revised Statutes (HRS) § 666-1 (1993) because the Winstons never terminated the Lease before seeking summary possession; (2) the court lacked jurisdiction because declaratory relief is unavailable in district court; (3) the court lacked jurisdiction because summary possession is unavailable to dispossess a tenant with a substantial real property interest; (4) the court erred in granting the Winstons' motion to strike their answer; (5) the court erred in striking the answer because the Winstons failed to name indispensable parties; (6) attorneys' fees were erroneously awarded to the Winstons under HRS § 666-4 (1993) because the Lease was not reinstated; (7) the court erred in awarding attorneys' fees in excess of the 25% authorized by HRS § 607-14 (Supp. 1997); (8) the court erred in awarding the Winstons double recovery; (9) the court erred in awarding the Winstons attorneys' fees against the Guarantors because they never requested it; (10) sanctions against Herman Lee were improper; (11) the court improperly filed an amended judgment, sua sponte, after Appellants filed a notice of appeal.

After carefully reviewing the record and the briefs

submitted by the parties, considering and analyzing the law relevant to the arguments, we hold, with respect to the arguments raised by Appellants, as follows:

(1) Termination of a lease is not a prerequisite element of summary possession. See HRS § 666-13 (1993) (stating that "[w]henever a writ [of possession] is issued for the removal of any tenant, the contract for the use of the premises, if any exists, and the relation of the landlord and tenant . . . shall be deemed to be cancelled and annulled").

(2) The district court did not grant declaratory relief, and the court did not lack jurisdiction merely because the Winstons' prayer used language that might be construed as requesting declaratory relief. See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 561 (1968) ("The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy.").

(3) The court had subject matter jurisdiction because the Lees did not have a substantial property interest in the property as defined by Queen Emma Foundation v. Tingco, 74 Haw. 294, 845 P.2d 1186 (1992). See 4000 Old Pali Road Partners v. Lone Star of Kauai, Inc., 10 Haw. App. 162, 188, 862 P.2d 282, 294 (1993) (holding that "[t]he *Tingco* rule, however, does not apply to [this] case which deals with a [20 year lease, which is] a medium-term lease of commercial property").

(4) The court properly struck Appellants' answer

because the answer was filed on May 9, 1997, over six months after the Complaint was filed, after the Guarantors failed to appear at the return hearing on November 1, 1996 and were eventually defaulted, and over six months after the Stipulated Judgment between the Winstons and the Lees was filed on November 18, 1996 with regard to the Lees.

(5) The court did not err in striking Appellants' answer with respect to the defense of indispensable parties, inasmuch as the defense was raised for the first time over six months after the case was initiated, the Guarantors had been defaulted, and after the Stipulated Judgment was filed. In addition, Appellants offer no explanation as to how they have been prejudiced. See Almeida v. Almeida, 4 Haw. App. 513, 516-17, 669 P.2d 174, 178-79 (1983) (stating that "there is reluctance on the part of an appellate court to overturn the trial court's decision as to indispensable parties, unless there is real prejudice to the absentee" (citing 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil 1609 (1972))).

(6) Appellants' argument that the Lease must be reinstated before attorneys' fees may be ordered under HRS § 666-14 is not supported by any statute or case law and Appellants' reliance on Forbes v. Hawaii Culinary Corp., 85 Haw. 501, 510, 946 P.2d 609, 618 (App. 1997), is inapposite.

(7) The court did not err in awarding the Winstons attorneys' fees in excess of 25% of the judgment, as authorized by HRS § 607-14, because the award of attorneys' fees was made

pursuant to the Stipulated Judgment, which was not appealable, see Ainamalu Corp. v. Honolulu Transp. & Warehouse Corp., 56 Haw. 362, 362, 537 P.2d 17, 18, (consent to an entry of judgment may not be reviewed under Hawai'i Rules of Civil Procedure Rules 55(c) and 60(b), reh'g denied (1975)), or, assuming arguendo it was appealable as a final judgment, it was not appealed from in a timely manner, see HRAP Rule 4(a) ("When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order.").

(8) Under the circumstances, the Appellant's claim of a double recovery by the Winstons cannot be sustained. The court, in its April 6, 1998 order, reduced the amount owed by Appellants to the Winstons from $14,117.47 to $8,081.25 (inclusive of attorneys' fees from November 18, 1996 to February 19, 1997). Thus, the Winstons have not had double recovery of the attorneys' fees owed them for the period of November 18, 1996 to February 19, 1997.

The Lees request that $6,036.22 (being the difference between $14,117.47 paid by the Chuns and the $8,081.25 credit) be applied as a credit against that part of the April 6, 1998 order directing that the Lees pay $8,554.50 for additional attorneys' fees incurred by the Winstons for the period of February 21, 1997 to June 30, 1997. The $8,544.50 award, however, was with respect to a completely separate award of attorneys' fees having no relation to the Chuns' payment to the Winstons.

Moreover, the Lees' argument as to the $6,036.22 for

which they seek credit, rests on the fact that they must reimburse the Chuns for $14,117.47. But the obligation to pay that amount stemmed from the March 31, 1998 order granting summary judgment on the Chuns' cross-claim against the Lees. As previously explained, this court is without jurisdiction to address the March 31, 1998 order.

(9) The court was correct in awarding the Winstons attorneys' fees from the Guarantors because the Guarantors were represented by the same attorney as the Lees, had joined in filing an answer on May 9, 1997 disputing possession, and were named on an affidavit filed with the court on February 9, 1998, in which the Winstons' sought additional attorneys' fees.

(10) Herman's claim that the court erred in sanctioning him absent a finding of bad faith is not considered because it is raised for the first time on appeal, see, e.g., Miller v. Leadership Hous. Sys., Inc., 57 Haw. 321, 325, 555 P.2d 864, 867 (1976) ("We hold that appellant is precluded from raising for the first time on appeal any contention that the order of June 30, 1975 is erroneous, a question which was not presented in the trial court." (Citations omitted.)), but had the argument been correctly raised, attorneys' fees would have been properly awarded under HRS § 666-14 because Herman was challenging possession of the premises by way of post-judgment motions, see, e.g., State v. Pattioay, 78 Hawai'i 455, 469, 896 P.2d 911, 925 (1995) ("uphold[ing] the circuit court's order suppressing the evidence--although it was based on [an] erroneous

conclusion . . . because the court was right for the wrong reasons" (citations omitted)).

(11) Lastly, Appellants' argument that the court erred in sua sponte filing an amended judgment after Appellants filed a notice of appeal has no bearing on this appeal because the filing of the final judgment and the amended final judgment were superfluous to consideration of the orders. As indicated previously, in the district court, no separate judgment need be filed; an order may be appealed from if it is a final order.[6] See DCRCP Rule 58 (providing that "[t]he filing of the judgment in the office of the clerk constitutes entry of the judgment"). The April 6, 1998 order was the last of the post-judgment orders entered and it brought up for review any previous orders. Cf. Hoge v. Kane, 4 Haw. App. 246, 247, 663 P.2d 645, 647 (1983) (dealing with a foreclosure case, the court stated that "[w]ith rare exception, all other orders are appealable upon entry of the last of a series of orders which collectively embrace the entire controversy" (footnote and citation omitted)). The March 31, 1998 order, as a final order on the Chuns cross-claim, was appealable in its own right. Thus, the entry of the April 14, 1998 final judgment and the April 28, 1998 amended final judgment were superfluous to consideration of the orders. Therefore,

IT IS HEREBY ORDERED that (a) the appeals are dismissed for lack of jurisdiction insofar as they relate to the March 31, 1998 order, but in all other respects, (b) the April 14, 1998

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[6] See supra note 13.

final judgment encompassing the court's two orders of January 22, 1997, the orders of February 25, 1997, May 16, 1997, July 8, 1997, and April 6, 1998, is affirmed, and the court's April 28, 1998 amended final judgment encompassing the April 14, 1998 final judgment and the orders subsumed thereunder as set forth supra, is affirmed.

DATED: Honolulu, Hawai'i, September 22, 2003.

On the briefs:

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