

NO. 23793

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

BANK OF HAWAII, a Hawaii corporation, Plaintiff-Appellee,
v. JAMES J. BROWN, Defendant-Appellant, and
VILLAS OF HAWAII, INC., a Hawaii corporation, and
RICHARD W. LEWIS, Defendants-Appellees

APPEAL FROM THE FIRST CIRCUIT COURT
(CIVIL NO. 93-5028)

MEMORANDUM OPINION

(By: Lim, Acting C.J., Foley, J., and
Circuit Judge Town in place of Burns, C.J.,
recused, and Watanabe, J., recused)

Defendant-Appellant James J. Brown (Brown) appeals from
the following:

- (1) "Order Granting Plaintiff's Motion for
Reconsideration of Order Granting Defendant/
Crossclaimant James J. Brown's Motion to Dismiss
Verified Complaint Entered on May 17, 1999," filed
July 23, 1999;
- (2) "Order Granting Plaintiff Bank of Hawaii's Motion
for Summary Judgment Filed on 9/7/99," filed
February 3, 2000; and
- (3) "Amended Judgment in Favor of Plaintiff Bank of
Hawaii and Against Defendants Villas of Hawaii,

Inc., Richard W. Lewis, and James J. Brown," filed September 12, 2000.

Brown contends the Circuit Court of the First Circuit (circuit court)^{1/} abused its discretion by granting Bank of Hawaii's (BOH) Motion for Reconsideration and by not suspending the accrual of prejudgment interest when it granted BOH's Motion for Summary Judgment.

I. BACKGROUND

On October 25, 1988, Villas of Hawaii, Inc. (Villas), by and through its President, Richard L. Lewis (Lewis), applied for a Bankoh Business VISA Card. The terms of the application included a 16.5% annual finance charge on all charges and cash advances, as well as a 5% late charge "of the amount of any payment not made within 15 days of its due date." At an undisclosed date, Lewis and Brown signed a Continuing Guaranty (Guaranty) agreement with BOH. The Guaranty provided that in case of default in payment of the debt, BOH had the right to accelerate part or all of the debt and demand immediate payment. In addition, the guarantors would be jointly and separately liable for all obligations under the Guaranty.

On December 29, 1993, BOH filed a verified complaint against Villas, Lewis, and Brown for money owed on the VISA account in the amount of \$4,356.37, together with accrued

^{1/}The Honorable Gail C. Nakatani presided.

interest of \$501.84, per diem interest from October 28, 1993 until entry of judgment, and late charges of \$43.40. Villas and Lewis failed to answer, and an entry of default was entered on February 3, 1994 against Villas and Lewis.

On February 28, 1994, Brown filed an answer to BOH's verified complaint and cross-claims against Villas and Lewis. Villas and Lewis failed to answer the cross-claims, and an entry of default in favor of Brown was entered by the circuit court on September 16, 1994.

Brown and BOH were also parties to a companion collection case (hereinafter referred to as "Civil No. 93-5027") involving a corporate VISA card issued to Pacific Island Adventure ("Pacific"); Brown was a guarantor on this card as well.

On January 5, 1995, pursuant to the Rules of the Circuit Courts of the State of Hawaii (RCC) Rule 12(q),^{2/} the

^{2/}In 1995, RCC Rule 12(q) provided:

Rule 12. Ready Civil Calendar

. . . .
(q) Dismissal for want of prosecution. Where no pretrial statement has been filed within 1 year after a complaint has been filed or within any further period of extension granted by the court, the clerk shall notify in writing all parties affected thereby that the case will be dismissed for want of prosecution unless objections thereto showing good cause (specific reasons) are filed within 10 days after receipt of such notice. If objections are not filed within said 10-day period or any extension granted by the court, the case shall stand dismissed without prejudice without the necessity of an order of dismissal being entered therein. Where objections are filed within said 10-day period or any extension granted by the court, the court shall hear said objection upon notice and determine whether the case should be dismissed.

circuit court filed a Notice of Proposed Dismissal, which stated that unless objections showing good cause were filed within ten days after receipt of the notice, the court would dismiss the action without prejudice. On January 12, 1995, BOH filed its objections, stating the reason for the delay in filing its pretrial statement was because of ongoing settlement negotiations with Brown. The circuit court withdrew the Notice of Proposed Dismissal on January 18, 1995, and BOH filed its pretrial statement on February 10, 1995.

On March 17, 1995, Brown filed an "Ex-Parte Motion for Order Granting First Extension of Time to Enter Default Judgment Against Defendants/Crossclaim Defendants" Villas and Lewis (Motion for Extension). Brown asked for a six-month extension (until September 15, 1995) because he claimed he could not calculate the amounts due from Villas and Lewis until BOH's claim against him had been adjudicated. The circuit court granted Brown's Motion for Extension. Thereafter, since BOH's claims had still not been adjudicated, Brown filed and was granted seven more extensions (the eighth extension being until March 16, 1999).

On March 31, 1999, Brown filed a "Motion to Dismiss Verified Complaint Filed December 29, 1993" (Motion to Dismiss)

based on Hawai'i Rules of Civil Procedure (HRCP) Rule 41(b)^{3/} in this case and also filed a motion to dismiss in Civil No. 93-5027. In his memorandum in support of his Motion to Dismiss, Brown stated that since BOH had filed its pretrial statement there had been no activity in pursuing the suit, no status conference had been scheduled, and no further discovery had been conducted. Brown argued he was entitled to a dismissal of BOH's case due to its failure to diligently pursue its claims against him. BOH failed to file any opposition to Brown's Motion to Dismiss. At the April 21, 1999 hearing on both motions to dismiss, BOH's attorney stated to the circuit court that his office had never received the Motion to Dismiss. Brown's counsel informed the circuit court that BOH's attorney had been served with the Motion to Dismiss by hand delivery, as indicated on the certificate of service attached to the motion. The circuit court ordered dismissal with prejudice in accordance with HRCP Rule 41(b), and the order was filed on May 17, 1999.

^{3/}In 1999, HRCP Rule 41(b) provided:

Rule 41. Dismissal of actions.

. . . .
(b) Involuntary dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

On May 19, 1999, a Withdrawal and Substitution of Counsel for Plaintiff Bank of Hawaii was filed. On June 8, 1999, BOH filed "Plaintiff's Motion for Reconsideration of Order Granting Defendant/Crossclaimant James J. Brown's Motion to Dismiss Verified Complaint Entered on May 17, 1999" (Motion for Reconsideration) pursuant to HRCF Rules 59(e)^{4/} and 60(b)^{5/}. BOH argued it was entitled to relief from judgment because although the Order granting the Motion to Dismiss had been filed on May 17, 1999, it was not received by BOH's original attorney until June 3, 1999 and was never served on BOH's substitute counsel. BOH argued that, in the alternative, there existed excusable neglect or exceptional circumstances stemming from BOH's original attorney's declaration that no copy of the Motion

^{4/}In 1999, HRCF Rule 59(e) provided:

Rule 59. New trials; amendment of judgments.

. . . .

(e) Motion to alter or amend judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

^{5/}In 1999, HRCF Rule 60(b) provided:

Rule 60. Relief from judgment or order.

. . . .

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

to Dismiss had been received. On July 1, 1999, the circuit court granted BOH's Motion for Reconsideration, concluding:

[E]ven if [BOH's original attorney] received the motion to dismiss and overlooked the fact that two cases were scheduled, such conduct is inadvertent and excusable neglect. The law favors dispositions on the merits of a case; as such, the case is allowed to be reinstated.

On September 7, 1999, BOH filed a Motion for Summary Judgment, pursuant to HRCF Rules 54(b), 55(b)(2) and 56, asking for all of the principal, interest, and late fees on the account, as well as BOH's attorneys' fees and costs. Brown, in his "reply" memorandum, argued against the accrual of prejudgment interest because BOH should not be rewarded for its failure to timely prosecute the case. At the motion hearing, the circuit court granted BOH's Motion for Summary Judgment and concluded:

[T]here are no genuine issues of material facts in dispute and that Plaintiff is entitled to judgment as a matter of law with respect to the principal amount of \$4,356.37 and the late fees in the amount of \$43.50.

And with respect to the interest calculation the court does conclude that the Plaintiff had an affirmative duty to move this case along and neglected to do so and that there was no acquiescence by the defendant to these delays which were unreasonable and unjustified.

The court will allow interest to February 10, 1995 when the last pleading was filed by Bank of Hawaii. And the court will also allow attorney's fees and costs.

Villas, Lewis and Brown were found jointly and severally liable for the entire amount.

On March 2, 2000, Brown filed a Notice of Appeal. The Hawai'i Supreme Court dismissed the appeal because the judgment

lacked the language necessary for certification under HRCP 54(b). Thereafter, on September 12, 2000, the circuit court issued an Amended Judgment pursuant to HRCP 54(b), and Brown filed a Notice of Appeal on October 3, 2000.

II. STANDARDS OF REVIEW

A. Motion for Reconsideration-Abuse of Discretion

"Motions for reconsideration are reviewed for abuse of discretion. An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party-litigant." Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Hawai'i 286, 296, 944 P.2d 83, 93 (App. 1997) (internal quotation marks and citations omitted).

B. Granting/Denying Prejudgment Interest -- Abuse of Discretion

Prejudgment interest, where appropriate, is awardable under HRS § 636-16 in the discretion of the court. Generally, to constitute an abuse of discretion it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Schmidt v. AOA of the Marco Polo Apts., 73 Haw. 526, 533, 836 P.2d 479, 483 (1992) (citations omitted).

III. DISCUSSION

A. Rule 60(b) Relief Granted by Circuit Court

This court in Lambert v. Lua, 92 Hawai'i 228, 990 P.2d 126 (App. 1999), stated:

The Hawai'i Supreme Court has stated that "defaults and default judgments are not favored and that any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits." BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976). Additionally, the supreme court has instructed that

[i]n general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act. The mere fact that the nondefaulting party will be required to prove his [or her] case without the inhibiting effect of the default upon the defaulting party does not constitute prejudice which should prevent a reopening.

Id. at 77, 549 P.2d at 1150 (citations omitted).

Lambert, 92 Hawai'i at 235, 990 P.2d at 133 (emphasis added).

The circuit court ruled that even if BOH's attorney had received Brown's Motion to Dismiss and overlooked the fact that two cases were scheduled, "such conduct is inadvertent and excusable neglect." However, in Isemoto Contracting Co., Ltd. v. Andrade, 1 Haw. App. 202, 616 P.2d 1022 (1980), this court stated that "[t]he weight of authority has not recognized . . . carelessness of counsel to be excusable neglect justifying the invocation of relief under HRCF Rule 60(b)(1)." Id. at 205, 616 P.2d at 1025. To obtain relief under HRCF Rule 60(b)(1), BOH was required to "make some showing of why [BOH's attorney] was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough." Joaquin v. Joaquin, 5 Haw. App. 435, 443, 698 P.2d 298, 304 (1985) (internal quotation marks

omitted) (failure to read document not excusable neglect under Hawai'i Family Court Rules Rule 60(b)(1)).

Had Brown's Motion to Dismiss been served upon BOH's counsel, as the circuit court assumed, BOH's counsel apparently did not read it. Under Isemoto and Joaguin, this "carelessness" cannot be "excusable neglect" under HRCF 60(b)(1). BOH's attorney did not make some showing of why he was justified in failing to respond to Brown's Motion to Dismiss. He stated he was not served with the motion; however, the circuit court assumed he was served based on the record before it.

Because BOH's counsel made no showing justifying his failure to respond to Brown's Motion to Dismiss, the circuit court abused its discretion in granting BOH's Motion for Reconsideration. Because we reverse the Amended Judgment of the circuit court, we do not address Brown's point of error regarding prejudgment interest.

IV. CONCLUSION

Accordingly, the "Order Granting Plaintiff's Motion for Reconsideration of Order Granting Defendant/Crossclaimant James J. Brown's Motion to Dismiss Verified Complaint Entered on May 17, 1999" filed July 23, 1999; the "Order Granting Plaintiff Bank of Hawaii's Motion for Summary Judgment Filed on 9/7/99" filed February 3, 2000; and the "Amended Judgment in Favor of Plaintiff

Bank of Hawaii and Against Defendants Villas of Hawaii, Inc.,
Richard W. Lewis, and James J. Brown" filed September 12, 2000,
are reversed.

DATED: Honolulu, Hawai'i, September 18, 2002.

On the briefs:

Steven Guttman
for defendant-appellant
James J. Brown.

Acting Chief Judge

Micheal C. Webb,
Susan Cachero Sakai
for plaintiff-appellee
Bank of Hawaii.

Associate Judge

Villas of Hawaii, Inc.,
Richard W. Lewis
pro se defendants-appellees.

Acting Associate Judge