

NOT FOR PUBLICATION

NO. 25058

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

TAI YAU CHUNG, aka T.Y. CHUNG, Plaintiff-Appellee, v.
ANTHONY KIM, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 1RC01-6456)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

In a breach-of-lease/summary possession civil matter, the tenant, Defendant-Appellant Anthony Kim (Kim, Defendant or Appellant), appeals from the April 25, 2002 Judgment of the District Court of the First Circuit, in the amount of \$1,650.00 in favor of the landlord, Plaintiff-Appellee Tai Yau Chung, (Chung or Plaintiff).^{1/} We affirm.

BACKGROUND

On March 23, 2001, Chung and Kim entered into a written rental agreement (Agreement). The Agreement was for a six month term which began on April 1, 2001 and ended on September 30, 2001. The Agreement required Kim to pay Chung \$500.00 per month for Kim's occupancy of Chung's one-bedroom unit at 1764 Malanai Street, Apartment C, Honolulu, Hawai'i.

^{1/} Unless otherwise indicated, Judge Rhonda A. Nishimura presided in this case.

Allegedly, Kim paid for April and May 2001 and then failed to make any further payments. Allegedly, in August 2001, Kim offered a partial payment, on the condition that it satisfy his entire debt, and Chung refused.^{2/} Chung sent Kim a demand letter dated August 9, 2001. This letter was returned to counsel for Kim marked "unclaimed."

On September 25, 2001, Chung commenced this case. In his complaint, Chung sought summary possession of the premises and \$1,650.00 breach-of-lease monetary damages.^{3/} On September 27, 2001, when the deputy sheriff sought to serve the complaint, Kim was not present at the Malanai Street apartment and the deputy sheriff served the complaint "through ESTER KIM, mother and room mate [sic] of ANTHONY KIM[.]"

When Kim failed to appear at the scheduled hearing on October 4, 2001, the court orally entered a judgment for possession and a writ of possession in favor of Chung.

On October 9, 2001, Kim filed Defendant's Ex Parte Motion to Stay Execution of Writ of Possession in which he alleged, in relevant part, as follows:

The defendant has never received any service from [Chung]. Instead, this Defendant was shown a stack of letters by Ester Kim,

^{2/} In his opening brief, Defendant-Appellant Anthony Kim (Kim) states that "[a]fter refusing a \$1300 check offered by [Kim], plaintiff's have [sic] filed a \$1500 lawsuit for \$200 more. In spite of thousands of dollars in labors [sic] I have offered, the landlord TAI YAU CHUNG chose to litigate for a meager \$200 difference."

^{3/} The \$1,650.00 is the total of the \$500 per month rent and \$50.00 per month late fee for each of the months of June, July, and August 2001.

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whom suffers from Schizophrenia, Paranoia, Alzheimers, and has recently suffered a myocardial infarction and stroke. She has been disabled since about 1980 and . . . she does not speak english. She stated that a "big Being" had come from RUSSIA to bear me "gift".

Even if any service was made upon her, this service should be considered insufficient or unacceptable as she is in no way capable of comprehending the nature of this service, *if* indeed there was service, at any address or location. Additionally, she is not a resident of the apartment, addressed in this matter.

Further, this service fails to notice this Defendant with the minimum 5-business days notice as required by law, prior to the serving of Complaint for Summary Possession.

[Kim] hereby request this honorable court to Set Aside this Entry of Judgement, to STAY WRIT of possession and to require [Chung] to give proper notice as required by law of no less than 5-business days. [Kim] further request that any service be made to [Kim], the sole tenant at the rental unit, and not to any other persons or at any other address/location.

On October 9, 2001, the court entered an Order Granting Defendant's Ex Parte Motion to Stay Execution of Writ of Possession pending the hearing on Kim's October 9, 2001 motion.

On October 9, 2001, Kim also filed a motion to set aside the judgment for possession.

On October 11, 2001, the court entered a Judgment for Possession and a Writ of Possession confirming its October 4, 2001 oral order.

When Kim failed to appear for the October 22, 2001 scheduled hearing of his October 9, 2001 motion to set aside the judgment for possession, the court entered an order (a) setting aside its October 9, 2001 order staying execution of the writ of possession and (b) denying Kim's motion to set aside the judgment for possession.

According to the civil deputy, when Kim was served with the Writ of Possession on November 4, 2001, Kim "voluntarily

vacated the premises and removed all of his personal belongings and properties."

When Kim failed to appear at the scheduled November 26, 2001 hearing regarding Chung's claim for monetary damages, the court orally entered a default judgment in favor of Chung. On November 30, 2001, Kim filed a Motion to Set Aside Default. On December 17, 2001, the district court orally denied this motion.

On January 9, 2002, Kim filed a motion for reconsideration in which he included a motion for leave to file counterclaim. When Kim failed to appear at the January 14, 2002 scheduled hearing, the district court orally denied this motion.

On January 24, 2002, Kim filed a second motion for reconsideration. As confirmed in the court's March 6, 2002 "Order Denying Defendant's Second Motion to File a Counterclaim and Order Granting Defendant's Second Motion for Reconsideration Subject to Defendant's Payment of Attorneys' Fees and Deposit Into the Rent Trust Fund," after a hearing on February 25, 2002, the court orally granted Kim's second motion for reconsideration subject to the following conditions:

- a. That pursuant to Section 521-78 of the Hawaii Revised Statutes, [Kim] shall deposit with the Court into the rent trust fund, no later than Friday, March 1, 2002, the sum of \$1,500.00 by way of cash or cashier's check, which amount represents a portion of the principal amount claimed by [Chung] for delinquent rent, but excludes amounts claimed by [Chung] for other unpaid rent, interest, late fees, court costs, attorney's fees, and damage to the premises; and
- b. On or before 8:30 a.m. on Monday, March 4, 2002, [Kim] shall

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pay to the Law Offices of Reuben S.F. Wong^{4/} the sum of \$500.00 by way of cash or cashier's check, pursuant to an award of attorney's fees issued by the Court for hearings that took place on December 17, 2001 and February 25, 2002.

- c. That in the event [Kim] fails to pay either or both of the amounts in the time and manner stated above, then [Kim's] Motion for Reconsideration shall be denied with prejudice.

On February 28, 2002, Kim filed an "Ex Parte Motion to Shorten Time for Motion for Reconsideration or Alternatively for an Extension of Time to Deposit Monies into Rent Trust Fund and Pay Opposing Attorney's Fees Totalling \$2000.00." The motion for reconsideration was not filed, but was attached to the filed ex-parte motion to shorten time. In the motion for reconsideration, Kim noted, in relevant part, that

I have long since vacated the apartment unit. The deposit of rental amounts are designed to prevent tenants from incurring additional rents while courts move through the process of hearings and trial to 'evict' a tenant whose tenancy is "at will". This does not apply in this case as I have long since moved out and, the complaint filed by Landlords/Plaintiff is a "summary Possession" case.

(Spelling and punctuation errors in original.)

At some point in time, the court granted Kim's February 28, 2002 motion for reconsideration as follows:
"[Requirement] that monies be deposited in rent trust fund set aside and damages to be decided at trial. Payment of attorney fees to be paid prior to the trial date for damages."

On March 8, 2002, the court entered a Pre-Trial Conference Order Requiring Defendant's Payment of Attorneys'

^{4/} Throughout these proceedings, Plaintiff-Appellee Tai Yau Chung (Chung) has been represented by attorneys Reuben S.F. Wong and Delwyn H.W. Wong.

Fees^{5/} stating, in relevant part, as follows:

2. That in the event [Kim] fails to pay the \$500.00 award of attorney's fees in the time and manner stated above, then:
 - a) That [Kim's] Motion for Reconsideration filed on January 24, 2002, shall be denied with prejudice; (b) and that the Judgment by Default in the sum of \$1,650[.]00, as prayed for in the Complaint and heretofore ordered by the Court in favor of CHUNG shall be in full force and effect; and (c) That Plaintiff CHUNG reserves the right to amend the Judgment for additional rent and/or damages and for attorneys' fees.

Kim failed to comply with this order.^{6/}

On March 18, 2002, Kim filed a Motion for Discovery which the court summarily denied.

On April 5, 2002, the court entered its order confirming its December 17, 2001 oral denial of Kim's November 30, 2001 Motion to Set Aside Default Judgment.

On April 5, 2002, the court entered its order confirming its January 14, 2002 oral denial of Kim's January 9, 2002 motion for reconsideration.

On April 15, 2002, Kim filed a notice of appeal "from the Default Judgment, filed herein on or about March 14th, 2002. The judgement order has not been prepared yet by opposing counsel, and will be attached as Exhibit 'A' once this Appellant receives it's [sic] copy."^{7/}

^{5/} Judge David Lo presided over a pre-trial conference held on March 4, 2002.

^{6/} On March 13, 2002, Chung's attorneys filed an affidavit by one of them stating that Kim had failed to make any payment.

^{7/} Kim filed a notice of appeal ten days prior to the entry of the April 25, 2002 Judgment. According to Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a)(2) (2001), "In any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the

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On April 17, 2002, Kim filed a "Non-Hearing Motion for Clerical Error." In an accompanying memorandum, he stated, in relevant part as follows:

Judge . . . Nishimura, had sanctioned [Kim] for a **SECOND and THIRD** Motion for Reconsideration. However, a court's record clearly showed only two (2), a FIRST and SECOND, such motions were ever filed by [Kim]. Thus, at the very most, there should have been a sanction of only one motion, that is the second motion, or one days fees for Opposing Attorney's fees, if any, for \$250 instead of \$500.

Additionally, on March 14, 2002, the Court did "grant" this Defendants SECOND Motion for Reconsideration albeit on condition that this Defendant hire an attorney AND have him file a Motion to Continue Trial by no later than one-week's time (March 21, 2002).

As the Courts is aware, a party is entitled to represent himself without an attorney. Especially when he is financially unable to come up with the retainers sought by the attorney's consulted. That the Court would grant the Motions for an attorney, but not if I am not represented presents a prejudice against this party.

Also, this is a case that was begun "alone" by Plaintiffs without any proper service to Defendant. The plaintiff's have been asked to provide such documents showing proper service. They have provided none. because none exists.

In addition, this action was filed as a "summary possession action". No such action was ever required. This Defendant had long moved out before any summary possession, or "writ of possession" action was taken. That was largely due to the flooding caused by the tenants upstairs, which damaged Defendants belongings over 3-1/2 days. When asked, Plaintiffs attorney DELWIN WONG did not answer as to their outrageous BS claim for damages caused by this flooding. They are instead making a false claim against this Defendant for the flooding!

Because courts order abuses this Defendants "rights issues" and rights to represent myself "pro se", and since had this Motion for Reconsideration would have been granted had Defendant been able to afford and hire an attorney, the Sanction for Opposing Attorney's fees should be stricken.

I would like to have this fact clarified and provided in the court's minutes.

(Spelling and punctuation errors in original.) Kim's motion was

time the judgment becomes final for the purposes of appeal." Thus, the effective date of the notice of appeal is April 25, 2002.

summarily denied.

On April 17, 2002, Kim filed a "Non-Hearing Motion for Clerical Clarification of Court's Minutes." This motion was summarily denied.

On April 17, 2002, Kim filed a "Non Hearing Motion to Set Aside Sanctions and Dismissal of Discovery Motion." This motion was summarily denied.

On April 25, 2002, the court entered a Judgment in favor of Chung against Kim in the amount of \$1,650.00.

This appeal was assigned to this court on May 19, 2003.

DISCUSSION

A. Kim's Opening Brief

Kim was granted three extensions of time in which to file his opening brief. The brief was filed on October 11, 2002, nearly three months after the initial filing deadline of July 24, 2002.^{8/} Despite the additional time granted, Kim's opening brief does not comply with the requirements of Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b) (2004).^{9/}

^{8/} HRAP Rule 28(b) provides that, "[w]ithin 40 days after the filing of the record on appeal, the appellant shall file an opening brief[.]" The record on appeal in the instant case was filed on June 14, 2002.

^{9/} HRAP Rule 28(b) provides, in relevant part, that an opening brief must include the following sections, in the order indicated:

- (1) A subject index of the matter in the brief with page references and a table of authorities listing the cases, alphabetically arranged, text books, articles, statutes, treatises, regulations, and rules cited, with references to the pages in the brief where they are cited. Citation to Hawai'i cases since statehood shall include both the state and regional reporters. Where cases are generally available only from electronic databases,

citation may be made thereto, provided that the citation contains enough information to identify the database, the court, and the date of the opinion.

. . . .

(3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in summary fashion, with appropriate record references. Record references shall include page citations and the volume number, if applicable. Reference to transcripts shall include the date of the transcript, the specific page or pages referred to, and the volume number, if applicable. Lengthy quotations from the record may be reproduced in the appendix. There shall be appended to the brief a copy of the judgment, decree, findings of fact and conclusions of law, order, opinion or decision relevant to any point on appeal, unless otherwise ordered by the court.

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. . . .

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

(5) A brief, separate section, entitled "Standard of Review," setting forth the standard or standards to be applied in reviewing the respective judgments, decrees, orders or decisions of the court or agency alleged to be erroneous and identifying the point of error to which it applies.

. . . .

(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

(8) Relevant parts of the constitutional provisions, statutes, ordinances, treaties, regulations, or rules pertaining to the points of error set out verbatim, unless otherwise provided in the brief. If lengthy, they may be cited and their pertinent text set out in the appendix.

(9) A conclusion, specifying with particularity the relief sought.

In violation of HRAP Rule 28(b), Kim's opening brief does not include the following: (1) a subject index of the matter and a table of authorities, in violation of Rule 28(b)(1); (2) a statement of the case and a copy of the relevant orders and judgment, in violation of Rule 28(b)(3); (3) a statement of the points of error, in violation of Rule 28(b)(4); (4) a section setting forth the applicable standards of review, in violation of Rule 28(b)(5); (5) the relevant parts of the constitutional provisions, statutes, ordinances, treaties, regulations, or rules pertaining to the points of error, in violation of Rule 28(b)(8); (6) a conclusion, specifying with particularity the relief sought, in violation of Rule 28(b)(9); and (7) a statement of

. . . .

(11) Statement of Related Cases. A brief statement identifying any related case known to be pending in the Hawai'i courts or agencies. The statement shall include the following: case caption, docket number, and the nature of the relationship. Cases are deemed related if they:

- (A) arise out of the same or consolidated cases in the court or agency;
- (B) involve a case that was previously heard by the Hawai'i appellate courts;
- (C) involve the same parties;
- (D) involve the same or closely related issues;
- (E) involve the same basic transaction or event; or
- (F) have any other similarities of which the appellate courts should be aware.

The statement shall be presented on a separate page, entitled "Statement of Related Cases." The statement shall be the last page in the brief following the appendices, if any. If no other cases are deemed related, a single statement to this effect shall be provided. If appellant identifies a case as related, no other party need duplicate the listing in that party's brief. If appellant learns of a related case after filing the initial brief, appellant shall promptly file a statement.

related cases, in violation of Rule 28(b)(11).^{10/}

Moreover, Kim fails to comply with Rule 28(b)(7). Instead of presenting his contentions "on the points presented and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on[,]" Kim makes little effort to form legal arguments to support his case. The citations that appear in Kim's opening brief seem to be little more than case notes copied directly from a digest of Hawai'i case law.^{11/} However, the areas of law discussed by these case notes do not appear to be relevant to the errors that Kim alleges occurred.

In his answering brief, Chung points out the numerous violations of HRAP Rule 28(b) that occur in Kim's opening brief, and requests that this court dismiss Kim's appeal. Instead of addressing the deficiencies of his brief, Kim responds simply by characterizing Chung's statements as merely "technical

^{10/} Kim later attempted to remedy two of these defects by submitting a "Supplemental Opening Brief." Attached to this document was a subject index and table of authorities, as well as a statement of related cases. However, Kim's table of authorities fails to conform to the requirements and format specified in Rule 28(b)(1). Likewise, Kim's statement of related cases is defective in that he asserts that he researched cases occurring over "the past 1000 years," searching for cases (a) "arising out of a contradictory ruling over a Motion for Reconsideration in which, a judge sanctions a party for filing a second [Reconsideration] Motion while later granting same"; (b) where a court "denies a party to represent himself *pro se*, violating his most basic, fundamental of his [sic] civil rights"; or (c) where "a criminal matter involving a [sic] intentional and malicious claim fraught with false-accusations and allegations by a licensed attorney[.]"

^{11/} In his opening brief, Kim also makes reference to what he alleges to be various court rules. These references allude to "Hawaii Appellate Procedure, Rules S 5., 5-1, 6-2, 6-2.1, 6.2.2, HRCP [Hawai'i Rules of Civil Procedure] Rule 54(b), 24-3.1[3] . . ." With the exception of HRCP Rule 54(b), we are unable to find mention of any of these "rules" in either the HRCP or HRAP.

criticism." Kim states that, due to his pro se status, "[i]t is expected that he would not complete a perfect Brief[,] " implying that he should not be held accountable to the requirements imposed on all appellants by Rule 28(b). However, given that Kim's brief demonstrates an utter disregard for the Hawai'i Rules of Appellate Procedure, and that its assorted deficiencies are not merely technical in nature, we disagree. The Hawai'i Supreme Court has held that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom." Lepere v. United Pub. Workers 646, 77 Hawai'i 471, 473 n.2, 887 P.2d 1029, 1031 n.2 (1995) (internal citations omitted). "Neither is it a license not to comply with the relevant rules of procedural and substantive law." Id.

The Hawai'i Supreme Court has held that an appeal may be dismissed for an appellant's failure to conform an opening brief to HRAP Rule 28. "[Appellant's] failure to conform his brief to the requirements of HRAP Rule 28(b) burdens both the parties compelled to respond to the brief and the appellate court attempting to render an informed judgment. As we have previously stated, such noncompliance offers sufficient grounds for the dismissal of the appeal." Housing Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85, 979 P.2d 1107, 1111 (1999) (citing Bettencourt v. Bettencourt, 80 Hawai'i 225, 228, 909 P.2d 553, 556 (1995)). HRAP Rule 30 provides, in relevant part, that "[w]hen the brief

of an appellant is . . . not in conformity with these rules, the appeal may be dismissed or the brief stricken[.]” We also note, however, that Hawai‘i appellate courts have “consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible,” Schefke v. Reliable Collection Agency, Ltd., 96 Hawai‘i 408, 420, 32 P.3d 52, 64 (2001), and have often addressed the merits of an appeal, regardless of the nonconformity of the briefs. See, e.g., Housing Fin. & Dev. Corp., 91 Hawai‘i at 85, 979 P.2d at 1111-12; O’Connor v. Diocese of Honolulu, 77 Hawai‘i 383, 386, 885 P.2d 361, 364 (1994).

B. Points on Appeal

Kim's opening brief complains of many actions by the court and/or opposing counsel but it appears to present only the following two points on appeal:

1. The court erred by denying Kim his right to self-representation; and

2. The court erred when "on MAR 14, 2002, Judge Rhonda A. Nishimura, **GRANTED** Appellant's Motion for Reconsideration. But conditioned the granting on paying opposing attorney's fees at One Hundred Dollars (\$100) per month and deposit into a rent trust fund." (Citation omitted.)

1.

Kim contends that, on March 14, 2002, the court erred when it allegedly ordered him to retain counsel and have his attorney file a motion to continue trial. Our thorough examination of the record did not reveal any such order. The only evidence cited by Kim that such an order was made is the court's minutes of the March 14, 2002 hearing. Such minutes, however, are not a part of the record on appeal pursuant to HRAP Rule 10, and cannot be used to show what did and did not occur in the district court. Kim did not, pursuant to HRAP Rule 10, cause a transcript of the March 14, 2002 hearing to be a part of the record on appeal.^{12/} Therefore, Kim has failed to sustain his burden with respect to this point.

^{12/} HRAP Rule 10(b) provides in relevant part:

The transcript of proceedings.

(1) REQUEST TO PREPARE TRANSCRIPT.

(A) When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

. . . .

(3) DUTY OF THE APPELLANT IN INSUFFICIENCY OF THE EVIDENCE APPEALS. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

2.

As noted above, on January 24, 2002, Kim filed a second motion for reconsideration. After a hearing on February 25, 2002, the court orally granted Kim's second motion for reconsideration, subject to the following two conditions: (a) that Kim "shall deposit with the Court into the rent trust fund, no later than Friday, March 1, 2002, the sum of \$1,500.00 by way of cash or cashier's check"; and (b) "[o]n or before 8:30 a.m. on Monday, March 4, 2002, [Kim] shall pay to the Law Offices of Reuben S.F. Wong the sum of \$500.00 by way of cash or cashier's check, pursuant to an award of attorney's fees issued by the Court for hearings that took place on December 17, 2001 and February 25, 2002." Subsequently, the court ordered the requirement "that monies be deposited in rent trust fund set aside and damages to be decided at trial. Payment of attorney fees to be paid prior to the trial date for damages." On March 8, 2002, the court entered a Pre-Trial Conference Order Requiring Defendant's Payment of Attorneys' Fees.

In this appeal, Kim challenges relevant orders that the court allegedly stated at a hearing on March 14, 2002. As noted above, however, the record on appeal does not contain any information about court orders stated at a hearing on March 14, 2002. Therefore, Kim has failed to sustain his burden with respect to this point.

CONCLUSION

Accordingly, we affirm the April 25, 2002 Judgment in favor of Plaintiff-Appellee Tai Yau Chung, aka T. Y. Chung.

DATED: Honolulu, Hawai'i, July 16, 2004.

On the briefs:

Reuben S.F. Wong
for Plaintiff-Appellee.

Chief Judge

Anthony Kim
Defendant-Appellant Pro Se.

Associate Judge

Associate Judge