

NO. 27326

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

GREGORY FENTON, by ELIZABETH R. QUAYLE, Rental Agent,
Plaintiff-Appellee,

v.

GWEN WINTERMEYER, Defendant-Appellant

and

GWEN WINTERMEYER,
Third-Party Plaintiff-Appellee,

v.

DAVID H. WINTERMEYER,
Third-Party Defendant-Appellant

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
LAHAINA DIVISION
(DC-CIVIL NO. 04-1-1812)

MEMORANDUM OPINION

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

Third-Party Defendant-Appellant David H. Wintermeyer (David) appeals from the August 31, 2006 Amended Judgment¹ entered in the District Court of the Second Circuit, Lahaina Division, by Judge Douglas H. Ige. We affirm in part and reverse in part.

BACKGROUND

On June 24, 2003, in FC-D No. 03-1-0328, Family Court of the Second Circuit, State of Hawai'i, Defendant/Third-Party Plaintiff-Appellee Gwen Wintermeyer (Gwen), whose legal name is

¹ Initially, this appeal is taken from the May 10, 2005 Judgment.

Gwennyth Lorraine Wintermeyer, filed a complaint for divorce against David. In that divorce case, (a) a September 22, 2003 order required David to pay "[Gwen's] rent in the amount of \$1,900.00 per month, until further order of the Court[,] and (b) a July 14, 2004 stipulated order stated in part:

2. Pursuant to existing orders, [David] shall continue to pay on behalf of [Gwen] her monthly rental expense in an amount not exceeding \$1,900.00 per month, paid directly to the landlord and/or rental agent for the dwelling rented by [Gwen]. [David] shall be responsible and pay for any late fees or other charges occasioned by him to said landlord and/or rental agent.

On November 18, 2004, Gwen's landlord, Plaintiff-Appellee Gregory Fenton (Fenton), commenced this civil case by filing a complaint against Gwen for summary possession, unpaid rent, and late fees. On December 14, 2004, Gwen filed a third-party complaint against David.

In order to resolve the complaint, Gwen thereafter paid Fenton, and/or was required to pay Fenton, \$8,000 for unpaid lease rent, and \$1,168.18 for attorney fees, costs, and litigation expenses. By check dated December 29, 2004, Gwen paid rent to Fenton in the amount of \$8,000, but the \$1,168.18 remained unpaid.

In the divorce case, on January 31, 2005, the family court entered a divorce judgment.

In this civil case, on May 10, 2005, the district court entered (1) an order granting Gwen's motion for summary judgment, and (2) a Judgment for the following:

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

\$ 9,689.18	principal
\$ 265.46	pre-judgment interest [from December 29, 2004 until April 8, 2005]
\$ 2,000.00	attorney fees
\$ 25.00	sheriff's fees
\$ 17.00	sheriff's mileage
\$ 87.40	copies
\$ 36.28	postage
\$ 5.00	notary
\$ 9.80	<u>fax</u>
\$12,135.12	TOTAL

Because a pre-printed court form judgment was used, the May 10, 2005 Judgment erroneously says that it is entered in favor of "Plaintiff(s)" "upon application of Plaintiff(s) and on the verification that Defendant(s) is indebted to Plaintiff(s)." Although the May 10, 2005 Judgment was erroneously entered in favor of Fenton, not Gwen, and against Gwen, not David, David filed a notice of appeal from it on May 26, 2005. On September 8, 2005, while this appeal was pending, the district court entered an Amended Judgment that correctly enters judgment in favor of "Defendant/Third-Party Plaintiff(s)". On September 12, 2005, the district court entered "Findings of Fact, Conclusions of Law, Order for Judgment" (FsOF, CsOL, Order). This case was assigned to this court on February 15, 2006. On August 4, 2006, this court entered an Order of Temporary Remand for Entry of Amended Judgment. On August 31, 2006, the district court entered another Amended Judgment.

DISCUSSION

I.

We conclude that Hawaii Revised Statutes (HRS) § 607-14 (Supp. 2005)² does not authorize the award of attorney fees to a defendant/third-party plaintiff when the defendant/third-party plaintiff obtains a judgment against the third-party defendant based on the third-party defendant's failure to comply with the divorce court's order requiring the third-party defendant to pay the debt owed by the defendant/third-party plaintiff to the plaintiff. Such a proceeding is not an action in the nature of assumpsit, or an action on a promissory note, or other contract in writing that provides for an attorney's fee.

II.

We conclude that HRS § 636-16 (1993)³ provided the lower court the discretion to award pre-judgment interest on the \$8,000 paid by Gwen but not on the \$1,168.18 owed by Gwen.

² Hawaii Revised Statutes (HRS) § 607-14 (Supp. 2005) states in part:

Attorneys' fees in actions in the nature of assumpsit, etc.
In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable[.]

³ HRS § 636-16 (1993) states:

Awarding interest. In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred.

III.

David challenges the following FSO:

6. That [Gwen] thereafter paid [Fenton], and/or was required to pay [Fenton], the sum of \$8,000.00, as and for the said unpaid lease rent and late fees, and the sum of \$1,168.18, as and for [Fenton's] attorney's fees, court costs, and litigation expenses, in order to resolve the said Complaint;

7. That on January 31, 2005, Judge POLAK entered a Judgment in Wintermeyer vs. Wintermeyer that required [David] to pay the said unpaid lease rent;

8. That on February 15, 2005, Judge POLAK entered an Order in Wintermeyer vs. Wintermeyer that required [David] to pay the said unpaid lease rent;

9. That [David] still failed, refused, and/or neglected to pay the said unpaid lease rent[.]

In the opening brief, David contends:

The Divorce Judgment was not filed by Gwen in support of her *Third-Party Complaint* or her *Summary Judgment Motion*. The only information in the Record on Appeal about the Divorce Judgment is the discussion at the hearings on February 4, 2005, and April 1, 2005. In those discussions it was noted that the Family Court ordered David to pay the unpaid rent, in the amount of \$8,000, and that the Family Court authorized Gwen to deduct that sum from David's share of a \$36,000 sum which was to be divided between the parties as part of the divorce property division. . . .

. . . .
. . . The February 15, 2005, Family Court Order (Exhibit B to the *Summary Judgment Motion*), did state that "[David] shall pay the October, November, and December, 2004, and January, 2005, rental payments" on Gwen's residence, in an unspecified amount. However, that Order emanated from a hearing on January 26, 2005, and was superceded by the Family Court's Divorce Judgment, dated January 31, 2005. The Divorce Judgment specified how much David was to pay, and that Gwen was authorized to deduct that sum from David's share of a \$36,000 sum which was to be divided between the parties as part of the divorce property division.

(Record citations omitted.)

FOF no. 6 is not clearly erroneous. FOF No. 7 says that the January 31, 2005 Divorce Judgment required David to pay the unpaid lease rent. David challenges that part of FOF no. 7 on the basis that the January 31, 2005 Divorce Judgment is not a

part of the record in this civil case. He then challenges FOF no. 8 on the basis that the February 15, 2005 Order "was superceded by the Family Court's Divorce Judgment, dated January 31, 2005[.]" For the same reason that David's challenge of FOF no. 7 has merit, his challenge of Fsof nos. 8 and 9 does not have merit. Moreover, the fact that "the Family Court authorized Gwen to deduct that [\$8,000] sum from David's share of a \$36,000 sum which was to be divided between the parties as part of the divorce property division" did not require Gwen to do so, nor did it preclude Gwen from obtaining a civil judgment against David that includes the \$8,000.

CONCLUSION

Accordingly, we (1) reverse that part of the August 31, 2006 Amended Judgment that awards \$2,000 attorney's fees; (2) vacate that part of the August 31, 2006 Amended Judgment that awards \$265.46 pre-judgment interest, and we remand for a new calculation and award; and (3) affirm all other parts of the August 31, 2006 Amended Judgment.

DATED: Honolulu, Hawai'i, January 17, 2007.

On the briefs:

Robert M. Harris
for Third-Party Defendant-
Appellant.



Chief Judge



Associate Judge



Associate Judge