

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28012

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PHILIP B. MAISE, Plaintiff-Appellee, v.
CECIL LORAN LEE, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 01-1-0444)

K. HAMAKA'DU
CLERK, APPELLATE COURTS
STATE OF HAWAII

2008 APR 30 AM 8:16

FILED

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

On June 29, 2006, Defendant-Appellant Cecil Loran Lee (Lee), appearing pro se, filed a notice of appeal from two judgments and twelve orders that were entered by the Circuit Court of the Third Circuit (circuit court).¹ These included judgments filed on September 30, 2004 and August 4, 2005, as well as a June 2, 2006 "Order Denying 'Defendant's Combined Motion to Quash Writ of Execution and Second Motion to Vacate Judgment or Alternatively Stay Judgment Dated August 4th, 2005', filed February 24, 2006" (Order Denying Second Motion to Vacate). We conclude that Lee's appeal was untimely as to the first thirteen of the fourteen judgments and orders that were appealed from, and accordingly, we dismiss the appeal from those judgments and orders for lack of appellate jurisdiction. We affirm the Order Denying Second Motion to Vacate.

¹ The Honorable Greg K. Nakamura presided.

On October 11, 2001, Plaintiff-Appellee Philip B. Maise (Maise) filed a complaint for "fraudulent contract" against Lee.² The complaint alleged that on September 6, 2000, Maise and his partner Didier Flament (Flament) entered into an agreement with Lee to purchase real property belonging to Lee (the property) in Pahoā, on the island of Hawai'i. However, on October 11, 2000, prior to closing of the purchase, Maise discovered that there was a federal forfeiture action against the property. After Maise advised Lee of this information, Lee responded that he was innocent of the charges against him and offered to sell Maise the property on a "lease purchase basis." The complaint alleges that as a result of Lee's conduct, Maise and Flament were forced to look for and purchase another property and incurred a number of expenses. The complaint sought a judgment of \$124,682, together with interest, costs and attorneys' fees, such "other relief as the Court deems fair and equitable," and \$50,000 in punitive damages. Lee answered Maise's complaint and filed a counterclaim against Maise.

Lee's opening brief does not contain a "concise statement of the points of error set forth in separately numbered paragraphs[,] " as required by Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4). However, the Supreme Court of

² Maise's complaint also names Michael Boyd as a defendant. However, the circuit court, pursuant to Maise's oral motion, dismissed Boyd as a defendant, and subsequently entered a written order dismissing Boyd.

Hawai'i "has consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, *where possible*." Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (emphasis added, internal quotation marks omitted). Accordingly, we will consider the following issues, which were identified in the argument section of Lee's opening brief, as the points of error on appeal:

(1) "Lee's rights to due process were violated because the court failed to conduct a proper inquiry into the factual basis of the default judgment and to require that Lee be notified via written notice as required by Rule 55(b)(1)."

(2) "The Court abused its discretion by not setting aside the default judgment despite good cause; excusable neglect; newly obtained evidence, fraud, and misrepresentations which were proved by Appellant to the Court."

(3) "The Court abused its discretion by relying on hearsay evidence and irrelevant evidence as a basis for the default judgment and a basis to deny Lee's Rule 60(b) applications for relief."

(4) "The Court abused its discretion by permitting the [sic] Maise to use a different damages formula at the default hearing than that basis of damages recited in the complaint."

(5) "Court's award of punitive damages is ill conceived because there was no tort, the case law cited by the

Court is inapplicable."

(6) "An award of attorney's fees in Maise's favor is without merit under the circumstances."

(7) "Lee's constitutional right to due process was violated by the totality of court proceedings in this case with respect to the deprivation of his property interest in the equity in his home."³

After a careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we resolve Lee's points of error as follows:

(1) First, we conclude that this court is without jurisdiction to consider Lee's appeal insofar as it relates to all but one of the orders and judgments identified in the notice of appeal. There were two judgments entered by the circuit court in this case, one on September 30, 2004, and another on August 4, 2005. Lee timely appealed from the first judgment in appeal No. 27378, but the Hawai'i Supreme Court dismissed that appeal after finding that it lacked jurisdiction since the judgment was not final. The August 4, 2005 judgment was in substance largely similar to the September 30, 2004 judgment; *inter alia*, it included additional background detail as well as the notation

³ Lee presents no argument in his opening brief regarding his motion to quash the circuit court's writ of execution or to stay the August 4, 2005 judgment, and accordingly we deem any error with regard to that motion to be waived. See HRAP Rule 28(b)(7).

that "[a]ll other claims, counterclaims or cross-claims are dismissed with prejudice." The August 4, 2005 judgment was final and appealable, Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994), but Lee did not timely file a notice of appeal from that judgment. HRAP Rule 4(a)(1). Accordingly, we are without jurisdiction to consider Lee's appeal insofar as it seeks to challenge that judgment, Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986), or the interlocutory orders and rulings that preceded it. See Prof'l Sponsoring Fund, Inc. v. Rao, 5 Haw. App. 382, 383 n.1, 694 P.2d 885, 886 n.1 (1985).

Nor do we have jurisdiction to consider Lee's appeal insofar as it seeks to challenge the November 23, 2005 order denying Lee's September 14, 2005 motion to vacate or stay the August 4, 2005 judgment, and the January 3, 2006 order that denied Lee's November 4, 2005 Hawai'i Rules of Civil Procedure (HRCP) Rule 59(e) motion to reconsider the November 23, 2005 order, since those orders were final and appealable when entered by the court, and Lee did not timely appeal from them. See HRAP Rule 4(a)(1); Ditto v. McCurdy, 103 Hawai'i 153, 160, 80 P.3d 974, 981 (2003) ("An order denying a motion for post-judgment relief under HRCP 60(b) is an appealable final order under HRS § 641-1(a).").

However, this court does have jurisdiction to consider Lee's appeal from the Order Denying Second Motion to Vacate, since Lee timely filed a notice of appeal from that order.

(2) With regard to the Order Denying Second Motion to Vacate, we note that although Lee attached to his opening brief a purported photocopy of the transcript of the April 13, 2006 hearing on that motion, Lee failed to provide an official transcript as part of the record on appeal as is his duty under HRAP Rule 10(a) and (b), and Rule 11(a). See Bettencourt, 80 Hawai'i at 230-31, 909 P.2d at 558-59; Ditto, 103 Hawai'i at 163, 80 P.3d at 984 (the court affirmed the denial of an HRCP Rule 60(b) motion when appellant failed to provide a transcript of the hearing and stated that "we simply do not have a sufficient basis in the record to conclude that the circuit court abused its discretion by denying her motion on the ground of newly discovered evidence."); see also Marn v. Reynolds, 44 Haw. 655, 663, 361 P.2d 383, 388 (1961). In these circumstances, we will not consider a purported photocopy of a transcript of the April 13, 2006 hearing. Cf. Hous. Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85, 979 P.2d 1107, 1111 (1999).

(3) Many of Lee's points of error on appeal were not raised in the second motion to vacate the judgment filed on February 24, 2006 (Second Motion to Vacate). In that motion, Lee argued in substance that the court improperly relied on the

allegations of the complaint, rather than taking evidence, when it entered the default judgment. He also argued that a deposition taken of Maise in another case, as well as Maise's response to a request for admissions in that same case, constituted newly discovered evidence that established that Maise had misled the court and other parties. Lee argued that the new information showed that Maise had adopted a method of calculating his damages that differed from that in his complaint, that Maise admitted that he lacked receipts to substantiate the damages claimed in the complaint, and that Maise lacked standing to sue.

We will limit our consideration of Lee's points of error on appeal to the issues that were raised by him in the Second Motion to Vacate, and will not consider those points of error which he did not raise below. Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Haw. 466, 475-476, 540 P.2d 978, 985 (1975).

(4) We review the circuit court's denial of Lee's HRCP Rule 60(b) motion for abuse of discretion. Pogia v. Ramos, 10 Haw. App. 411, 876 P.2d 1342 (1994). In BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 549 P.2d 1147 (1976), the Hawai'i Supreme Court stated that "defaults and default judgments are not favored and . . . 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." Id. at 76, 549 P.2d at 1150. The court

further held 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); see Rearden Family Trust v. Wisenbaker, 101 Hawai'i 237, 65 P.3d 1029 (2003).

In the April 27, 2005 Order Denying Defendant Cecil Loran Lee's Motion to Set Aside Default Judgment Filed on December 10, 2004, the circuit court found that "Lee knew about the September 27, 2004 trial date and intentionally failed to appear in Court on that date[,] " and further found "that, although [Lee] may have suffered from adverse medical conditions, [Lee] has consciously engaged in conduct to use his medical condition to escape the consequences of the civil action against him in this matter and for that purpose has fabricated evidence, or has caused evidence to be fabricated" The court concluded that "[i]n a situation where a party, after being given notice of a trial date, fails to appear for trial, it is proper to enter default against the party[,] " and that "Defendant Lee's failure to appear at trial on September 27, 2004 was not due to excusable neglect."

Because Lee did not challenge these findings and conclusions by timely appealing from the August 4, 2005 Judgment,

they are binding on him for purposes of this appeal. See Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002) ("Findings of fact . . . that are not challenged on appeal are binding on the appellate court."); Daily Mirror, Inc. v. New York News, Inc., 533 F.2d 53, 56 (2d Cir. 1976). Even assuming *arguendo* that they are not binding, we conclude that the factual findings were not clearly erroneous, that the circuit court did not err in concluding that Lee's failure to appear was not due to excusable neglect, and that the entry of default was appropriate in these circumstances. See Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989); Richardson v. Lane, 6 Haw. App. 614, 621, 736 P.2d 63, 69 (1987). Moreover, since Lee's failure to appear was "not due to excusable neglect," Lee has failed to satisfy the third prong of the BDM, Inc. test, i.e., "that the default was not the result of inexcusable neglect or a wilful act." BDM, Inc., 57 Haw. at 77, 549 P.2d at 1150. Thus, the circuit court did not abuse its discretion in refusing to set aside the default judgment.

(5) Even if Lee had been able to satisfy the BDM, Inc. test, the circuit court did not abuse its discretion in finding that Lee failed to establish that relief under HRCP Rule 60(b) was appropriate. Although Lee claimed to have newly discovered evidence, Lee failed to establish how that information "by due diligence could not have been discovered in time to move for a

new trial under Rule 59(b)." HRCF Rule 60(b)(2). Thus, that information did not constitute newly discovered evidence justifying relief under HRCF Rule 60(b)(2).

Second, Lee asserted that the circuit court erred by relying solely on the complaint and by failing to take evidence to support the default judgment. However, in opposition to Lee's HRCF Rule 60(b)(2) motion, Maise provided the court with a transcript of the September 27, 2004 trial which established that the court did have Maise testify with regard to the amount of his damages. Moreover, Lee's claims that the circuit court erred in determining the amount or basis for damages and Lee's argument that Maise was improperly awarded damages on a theory different from that asserted in his complaint,⁴ could have been raised by Lee had he timely appealed from the August 4, 2005 Judgment. As the Second Circuit Court of Appeals court noted in Daily Mirror, Inc., 533 F.2d at 56, "[a]n order denying relief under Rule 60(b) is an appealable order, but the appeal brings up only the correctness of the order itself. It does not permit the appellant to attack the underlying judgment for error that could have been complained of on direct appeal." (Citations omitted). Since Lee could have raised those issues on direct appeal but

⁴ Although Maise relied on a different methodology to calculate damages in the September 27, 2004 trial from that set forth in his complaint, the total amount of damages awarded by the court did not exceed that claimed in the complaint. Thus, Lee was provided with sufficient notice of the scope of Maise's claim and a meaningful opportunity to defend against it, and the default judgment was not void on due process grounds. In re Genesys Data Techs. Inc., 95 Hawai'i 33, 40, 18 P.3d 895, 902 (2001).

failed to do so, the circuit court did not abuse its discretion in denying the motion.

Accordingly, the June 2, 2006 "Order Denying 'Defendant's Combined Motion to Quash Writ of Execution and Second Motion to Vacate Judgment or Alternatively Stay Judgment Dated August 4th, 2005', filed February 24, 2006" is affirmed. Lee's appeal from the judgments and other orders appealed from are dismissed for lack of jurisdiction.

DATED: Honolulu, Hawai'i, April 30, 2008.

On the briefs:

Cecil Loran Lee
Pro Se Defendant-Appellant.

Philip B. Maise
Pro Se Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge