

NO. 28667

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PAUL THORYK, an individual, Plaintiff-Appellant

v.

CB RICHARD ELLIS INVESTORS, LLC; CB RICHARD ELLIS STRATEGIC PARTNERS IV, L.P.; FIFIELD REALTY CORPORATION; FRC WAIKIKI, LLC, and DOES 1 through 50, Defendant-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 07-1-0146)

ORDER GRANTING APPELLANT PAUL THORYK'S
DECEMBER 14, 2007 MOTION TO DISMISS WITHOUT PREJUDICE
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

In this appeal, Plaintiff/Counterclaim Defendant/Appellant Paul Thoryk ("Appellant Thoryk") appeals from the following orders entered by the Circuit Court of the First Circuit (circuit court): 1) the April 3, 2007 "Order Granting Defendants' Motion to Expunge Plaintiff's Notice of Pendency of Action (Filed January 23, 2007), Filed on February 21, 2007" (the "April 3, 2007 order expunging the notice of pendency of the action"); and 2) the June 25, 2007 "Order Denying Plaintiff Paul Thoryk's Motion for: (1) Reconsideration and/or Clarification Pursuant to H.R.C.P. Rule 59(e) of April 3, 2007 Order Granting Defendants' Motion to Expunge Plaintiff's Notice of Pendency of Action (filed January 23, 2007), Filed on February 21, 2007; and (2) in the Alternative, Motion for H.R.C.P. Rule 54(b)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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Certification of April 3, 2007 Order Granting Defendants' Motion to Expunge Plaintiff's Notice of Pendency of Action (filed January 23, 2007), Filed on February 21, 2007, Filed on April 16, 2007" (the "June 25, 2007 Order Denying Motion for Reconsideration").¹

Upon review of: (1) the Motion to Dismiss [This Appeal] Without Prejudice ("Motion to Dismiss") filed on December 14, 2007 by Appellant Paul Thoryk; (2) the statement of no position regarding this motion filed on December 17, 2007 by Defendants/ Counterclaim Plaintiffs/ Appellees CB Richard Ellis Investors, LLC, CB Richard Ellis Strategic Partners IV, L.P., Fifield Realty Corporation, and FRC Waikiki, LLC's (collectively referred to as "Appellees"); and the record, we observe that:

1. On November 15, 2007, this court filed an order directing the parties to address the issue of appellate jurisdiction in their appellate briefs. In our order, we stated:

Appellant Thoryk did not file his April 16, 2007 motion for reconsideration within ten days after entry of the April 3, 2007 order expunging the notice of pendency of the action. Therefore, an issue exists as to whether Appellant Thoryk's April 16, 2007 motion for reconsideration extended the time period for filing a notice of appeal pursuant to HRAP Rule 4(a)(3), which,

¹ Plaintiff/Counterclaim Defendant/ Appellant Paul Thoryk's "Motion for: (1) Reconsideration and/or Clarification Pursuant to H.R.C.P. Rule 59(e) of April 3, 2007 Order Granting Defendants' Motion to Expunge Plaintiff's Notice of Pendency of Action (filed January 23, 2007), Filed on February 21, 2007; and (2) in the Alternative, Motion for H.R.C.P. Rule 54(b) Certification of April 3, 2007 Order Granting Defendants' Motion to Expunge Plaintiff's Notice of Pendency of Action (filed January 23, 2007), Filed on February 21, 2007" will be referred to herein as the "motion for reconsideration."

in turn, impacts the issue of whether Appellant Thoryk's July 24, 2007 notice of appeal is timely as to the April 3, 2007 order expunging the notice of pendency of the action.

2. At the time that we issued our November 15, 2007 order, we were not aware of Appellant Thoryk's representation, contained in his Motion to Dismiss, that

Appellant [Thoryk] had delivered his motion for reconsideration to the Chambers of Judge McKenna on April 13, 2007, a Friday, at approximately 12:44 p.m. for assignment of a hearing date and filing. However, the Motion for Reconsideration was not filed by the Circuit Court until Monday, April 16, 2007.

~~(Citations to counsel's declaration omitted.)~~. Although Appellant Thoryk's motion for reconsideration was stamped by the circuit court as filed on April 16, 2007, our examination of the reverse side of the first page of Appellant Thoryk's motion for reconsideration reveals a date stamp of April 13, 2007. Cf. Doe v. Doe, 98 Hawai'i 144, 151, 44 P.3d 1085, 1092 (2002)

(concluding that the date on which a motion was submitted to and received by a family court clerk prevailed over the date on which the motion was stamped as filed by the family court for purposes of satisfying Rule 59 of the Hawai'i Family Court Rules).

3. Rather than file a brief addressing the issue of appellate jurisdiction, Appellant Thoryk filed his Motion to Dismiss. Appellees take no position on this motion.

IT IS HEREBY ORDERED that Appellant Thoryk's December 14, 2007 Motion to Dismiss is granted, and this appeal

is dismissed without prejudice to Appellant Thoryk's or any other party's right to subsequently seek appellate review of the circuit court's: 1) April 3, 2007 order expunging the notice of pendency of the action; and 2) June 25, 2007 Order Denying Motion for Reconsideration.

DATED: Honolulu, Hawai'i, March 10, 2008.

M. McDonald

Chief Judge

Corinne K. A. Watanabe

Associate Judge

C. H. Nakamura

Associate Judge