

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28908

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JOSE LUIS ANDRADE CANALES and TORITO'S MEXICAN
and TORITO'S MEXICAN INC. II, Plaintiffs-Appellants,

v.

JULIO RODOLFO MELENDEZ ARTIGA, YOSHIMI MAKIMOTO,
and JULIO'S ACCOUNTANT CORPORATION, and JOHN DOES 1-10;
JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10,
and DOE GOVERNMENTAL ENTITIES 1-10, Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 07-1-1597)

ORDER DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Upon review of the record, it appears that we do not have jurisdiction over the interlocutory appeal that Defendants-Appellants Julio Rodolfo Melendez Artiga, Yoshimi Makimoto, and Julio's Accountant Corporation (the Appellants) have asserted from the Honorable Gary W. B. Chang's November 20, 2007 order denying the Appellants' motion to expunge the notice of pendency of action that Plaintiffs-Appellees Jose Lui Andrade Canales and Torito's Mexican Inc. I and Torito's Mexican Inc. II (the Appellees) filed on August 30, 2007, because the November 20, 2007 order is not an appealable final order under Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2007).

An aggrieved party may appeal "in civil matters from all final judgments, orders, or decrees of circuit . . . courts . . . to the intermediate appellate court[.]" HRS § 641-

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1(a) (1993 & Supp. 2007). "An appeal shall be taken in the manner and within the time provided by the rules of court." HRS § 641-1(c) (1993 & Supp. 2007). Rule 58 of the Hawai'i Rules of Civil Procedure (HRCP) requires that "[e]very judgment shall be set forth on a separate document." HRCP Rule 58. Based on HRCP Rule 58, the supreme court has held that "[a]n appeal may be taken from circuit court orders resolving claims against parties only after the orders have been reduced to a judgment and the judgment has been entered in favor of and against the appropriate parties pursuant to HRCP [Rule] 58[.]" Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). The circuit court has not yet entered a final judgment in this case.

As an exception to the general rule requiring a final judgment, the supreme court "ha[s], in rare situations, considered an interlocutory order so effectively 'final' that [it] ha[s] exercised appellate jurisdiction over an appeal that is neither a final judgment nor has been allowed by the circuit court under HRS § 641-1(b)." Abrams v. Cades, Schutte, Fleming & Wright, 88 Hawai'i 319, 321, 966 P.2d 631, 633 (1998).

Appellate jurisdiction in these cases is exercised under the collateral order doctrine. These interlocutory appeals are limited to orders falling in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. (citations, block quotation format and internal quotation marks omitted). To be appealable under the collateral order doctrine, an appealed order must satisfy all three of the following requirements: "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Id. at 322, 966 P.2d at 634 (citations, block quotation format and internal quotation marks omitted) (brackets in original).

With respect to the three requirements for appealability under the collateral order doctrine, the supreme court has held that

[a]n order expunging a lis pendens meets the three criteria. [1] The order conclusively resolves whether the lis pendens should or should not be cancelled because nothing further in the suit can affect the validity of the notice. [2] The order cancelling the lis pendens does not address the merits of the underlying claim. And [3] if the movant had to wait until final judgment on the underlying claim, the realty could be sold before the issue was resolved, thereby rendering the order unreviewable.

Knauer v. Foote, 101 Hawai'i 81, 85, 63 P.3d 389, 393 (2003)

(emphases added). However, the instant case does not involve an order granting a motion to expunge the notice of pendency of this lawsuit.¹ Instead, the Appellants are appealing from the November 20, 2007 order denying their motion to expunge the

¹ In case law that addresses such a notice, "[t]he terms lis pendens, notice of the pending action, and notice of pendency of the action are used interchangeably." Lathrop v. Sakatani, 111 Hawai'i 307, 309 n.1, 141 P.3d 480, 482 n.1 (2006).

notice of pendency. According to the holding in Knauer v. Foote, the November 20, 2007 order denying the Appellants' motion to expunge the notice of pendency appears to satisfy the second requirement for an appealable collateral order, because it does not address the merits of the action. However, the November 20, 2007 order does not appear to satisfy the first and third requirements for an appealable collateral order.

With respect to the first requirement for an appealable collateral order, the November 20, 2007 order denying the Appellants' motion to expunge the notice of pendency does not conclusively resolve the disputed question, because the circuit court could change course and expunge the notice of pendency at some time in the future. For example, if certain factual circumstances change between now and the entry of a final judgment, the Appellants might renew their motion to expunge the notice of pendency. Furthermore, if the Appellants eventually prevail on all of the Appellees' claims that concern real property, the Appellants may be entitled to have the circuit court expunge the notice of pendency. TSA International, Limited v. Shimizu Corporation, 92 Hawai'i 243, 267, 990 P.2d 713, 737 (1999). Without a conclusive resolution of this collateral issue, the first requirement for an appealable collateral order is not satisfied.

With respect to the third requirement for an appealable

collateral order, the November 20, 2007 order denying the Appellants' motion to expunge the notice of pendency is not effectively unreviewable on appeal from a final judgment, because the continued existence of the notice of pendency does not appear to cause irreparable harm to the Appellants. Unlike an order granting a motion to expunge a notice of pendency, which permanently extinguishes a claimant's encumbrance on real property, an order denying a motion to expunge a notice of pendency merely preserves the status quo on a temporary basis. Despite the continued existence of the notice of pendency, the Appellants continue to be the owners of record of the real property unless they choose to sell it, in which case the "lis pendens does not prevent title from passing to the grantee, but operates to cause the grantee to take the property subject to any judgment rendered in the action supporting the lis pendens." S. Utsunomiya Enterprises, Inc. v. Moomuku Country Club, 75 Haw. 480, 502, 866 P.2d 951, 963 (1994). Furthermore, the purchaser could move to expunge the notice of pendency, because "there is precedent for permitting a purchaser of real property to challenge the filing of a lis pendens after the sale had taken place[, . . .] even though the purchaser . . . closed the purchase with actual knowledge of the lis pendens." 2003 and 2007 Ala Wai Boulevard, City and County of Honolulu v. New York Diamond, Inc., 85 Hawai'i 398, 407, 944 P.2d 1341, 1350 (App.

1997) (citation omitted), overruled on other grounds, Knauer v. Foote, 101 Hawai'i at 85-89, 63 P.3d at 393-97. Unless the November 20, 2007 order is effectively unreviewable on appeal from a final judgment, the third requirement for an appealable collateral order is not satisfied.

In the Appellants' statement of jurisdiction, the Appellants assert that the November 20, 2007 order denying the Appellants' motion to expunge the pendency is an appealable order under 2003 and 2007 Ala Wai Boulevard, City and County of Honolulu v. New York Diamond, Inc., 85 Hawai'i 398, 944 P.2d 1341 (App. 1997). However, 2003 and 2007 Ala Wai Boulevard, City and County of Honolulu v. New York Diamond, Inc. is not on point with the instant case, because 2003 and 2007 Ala Wai Boulevard, City and County of Honolulu v. New York Diamond, Inc. involved an appeal from a final judgment, while, in contrast, the circuit court has not yet entered a final judgment in the instant case, and, thus, the appealed November 20, 2007 order is an interlocutory, pre-judgment order that is not appealable unless it satisfies all three requirements under the collateral order doctrine.

The November 20, 2007 order denying the Appellants' motion to expunge the notice of pendency does not satisfy all three requirements for appealability under the collateral order doctrine. Therefore, November 20, 2007 order is not appealable

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under HRS § 641-1(a) (1993 & Supp. 2007), and we lack appellate jurisdiction. Accordingly,

IT IS HEREBY ORDERED that this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, June 2, 2008.

Mau Reddenwald

Chief Judge

Cornine K. A. Watanabe

Associate Judge

C. S. Nakamura

Associate Judge