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STATE OF HAWAII
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NO. 29095

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

GLADYS BOLES, HERK BOLTON, HARRIET S. BOLTON, KEVIN CAMPBELL, C. PAUL CHISENA, BERTHA B. CHISENA, LENA B. COOK, JEWELL COX, RUTH COX, STEVEN W. KARKS, W.D. DARKS, RUBY DARKS, PATRICIA K. FULLER, JOSEPH A. FULLER, DOUG GENTILE, BARBARA KENEDY, GLENNELLA KEY, THOMAS A. KRUKOW, JUDITH M. KRUKOW, HERMAN L. ROGERS, MARY M. ROGERS, JAMES WADDEY, IMMOGENE WADDEY, DON G. WARD, BETTE M. WARD, for themselves and all others similarly situated, Plaintiffs-Appellees,

vs.

CLYDE ENGLE, Defendant-Appellant,

and

NATIONAL DEVELOPMENT COMPANY, INC., and SUNSTATES CORPORATION, Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P. NO. 06-1-0078)

ORDER GRANTING PLAINTIFFS-APPELLEES'
JUNE 12, 2008 MOTION TO DISMISS APPEAL
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Upon review of (1) the June 12, 2008 motion by Plaintiffs-Appellees Gladys Boles, Herk Bolton, Harriet S. Bolton, Kevin Campbell, C. Paul Chisena, Bertha B. Chisena, Lena B. Cook, Jewell Cox, Ruth Cox, Steven W. Karks, W.D. Darks, Ruby Darks, Patricia K. Fuller, Joseph A. Fuller, Doug Gentile, Barbara Kenedy, Glennella Key, Thomas A. Krukow, Judith M. Krukow, Herman L. Rogers, Mary M. Rogers, James Waddey, Immogene Waddey, Don G. Ward, Bette M. Ward (the Appellees) to dismiss the appeal that Defendant-Appellant Clyde Engle (Appellant Engle) asserted from the Honorable Joseph E. Cardoza's October 19, 2007 order denying Appellant Engle's motion for relief from judgment

pursuant to Rule 60(b) of the Hawai'i Rules of Civil Procedure (HRCP), (2) Appellant Engle's June 23, 2008 memorandum in opposition to the Appellees' June 12, 2008 motion to dismiss this appeal, and (3) the record, it appears that we lack jurisdiction over this appeal because Appellant Engle's appeal is untimely.

This appeal arises out of a special proceeding that the Appellees initiated by filing an exemplified foreign judgment pursuant to Hawaii Revised Statutes (HRS) § 636C-3 (1993). Under these circumstances, the exemplified foreign judgment "has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this State, including establishing a lien, and may be enforced or satisfied in like manner." HRS § 636C-3 (1993). Therefore, Appellant Engle is asserting an appeal from a post-judgment order. HRS § 641-1(a) (1993 & Supp. 2007) authorizes appeals from final judgments, orders, or decrees. "A post-judgment order is an appealable final order under HRS § 641-1(a) if the order ends the proceedings, leaving nothing further to be accomplished." Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003) (citation omitted). Although a separate judgment is usually necessary for appealability under HRS § 641-1(a) (1993 & Supp. 2007), HRCP Rule 58 and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994), "the separate judgment requirement articulated in Jenkins is inapposite in the post-judgment context." Ditto v. McCurdy, 103 Hawai'i at 158, 80 P.3d at 979. For example, "[a]n order denying a motion for post-judgment relief under HRCP [Rule] 60(b) is an appealable final order under HRS § 641-1(a)." Ditto v. McCurdy, 103 Hawai'i at 160, 80 P.3d at 981 (citation omitted). Therefore, the October 19, 2007 order denying Appellant Engle's HRCP Rule 60(b) motion for relief from the judgment is an appealable final post-judgment order under HRS § 641-1(a) (1993 & Supp. 2007).

When a circuit court enters a post-judgment order denying a party's HRCP Rule 60(b) motion for relief from a judgment, the party is entitled to file one HRCP Rule 59(e) motion for reconsideration of the order. Cf. Professional Sponsoring Fund, Inc. v. Rao, 5 Haw. App. 382, 384, 694 P.2d 885, 887 (1985) (A "party is entitled to file one Rule 59(e), HRCP, motion for reconsideration of a denial of a [HRCP] Rule[] 60(b) . . . motion."). Pursuant to Rule 4(a)(3)[1] of the Hawaii Rules of Appellate Procedure (HRAP), Appellant Engle extended the thirty-day time period under HRAP Rule 4(a)(1) for filing a notice of appeal by filing Appellant Engle's October 29, 2007[2] HRCP Rule 59 motion for reconsideration within ten days after entry of the October 19, 2007 order denying Appellant Engle's HRCP Rule 60(b) motion for relief from the judgment, as HRCP Rule 59 requires. Although Appellant Engle filed a "corrected" version of this HRCP Rule 59 motion for reconsideration on October 31, 2007, the "corrected" October 31, 2007 version of this HRCP Rule 59 motion for reconsideration merely corrected clerical errors in the October 29, 2007 HRCP Rule 59 motion for reconsideration. Therefore, October 29, 2007, is the effective

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[1] Rule 4(a)(3) of the Hawai'i Rules of Appellate Procedure (HRAP) provides:

> (3) Time to Appeal Affected by Post-Judgment Motions. If any party files a timely motion for judgment as a matter of law, to amend findings or make additional findings, for a new trial, to reconsider, alter or amend the judgment or order, or for attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion.

HRAP Rule 4(a)(3) (effective July 1, 2006).

[2] Under the applicable provisions of the Hawaii Revised Statutes (HRS), Hawai'i Rules of the Circuit Courts of the State of Hawai'i (HCCR), and the Hawai'i Rules of Appellate Procedure (HRAP), the ex officio filing date of any document prevails over the file-stamped date to the extent that the dates differ from each other. HRS § 606-1(b) (1993); HRS § 606-8 (1993); HCCR Rule 2.1; HRAP Rule 25.

date of Appellant Engle's HRCP Rule 59 motion for reconsideration of the October 19, 2007 order denying Appellant Engle's HRCP Rule 60(b) motion for relief from the judgment.[3]

When, as here, a party has extended the time period for filing a notice of appeal by having filed a timely post-judgment motion pursuant to HRAP Rule 4(a)(3), "the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion." HRAP Rule 4(a)(3). The ninetieth calendar day after October 29, 2007, was Sunday, January 27, 2008, and, thus, HRAP Rule 26(a) extended the ninety-day disposition deadline under HRAP Rule 4(a)(3) until Monday, January 28, 2008. Therefore, on Tuesday, January 29, 2008, Appellant Engle's October 29, 2007 HRCP Rule 59 motion for reconsideration was automatically deemed denied pursuant to HRAP Rule 4(a)(3), at which time the circuit court lost its jurisdiction to enter a written order adjudicating Appellant Engle's October 29, 2007 HRCP Rule 59 motion for reconsideration. Consequently, the circuit court's written March 5, 2008 order denying Appellant Engle's October 29, 2007 HRCP Rule 59 motion for reconsideration was null and void.

Appellant Engle did not file his April 3, 2008 notice of appeal within thirty days after the January 29, 2008 deemed denial of Engle's October 29, 2007 HRCP Rule 59 motion for reconsideration, as HRAP Rule 4(a)(3) requires. Therefore, Appellant Engle's appeal is untimely.

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727

[3] In any event, based on the analysis set forth below, Appellant Engle's notice of appeal would have been untimely even if we calculated the time period for filing a notice of appeal from the October 31, 2007 filing date of Appellant Engle's "corrected" HRCP Rule 59 motion for reconsideration.

P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice thereof is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]."). Therefore, we must dismiss this appeal for lack of jurisdiction. Accordingly,

IT IS HEREBY ORDERED that the Appellees's June 12, 2008 motion to dismiss this appeal is granted, and this appeal is dismissed for lack of appellate jurisdiction.

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

Chief Judge

Associate Judge

Associate Judge