

NO. 29095

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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 DENYING DEFENDANT-APPELLANT
CLYDE ENGLE'S JULY 21, 2008 MOTION FOR
RECONSIDERATION OF THE JULY 10, 2008 DISMISSAL ORDER
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

NOEMA T. YARA
CLERK OF APPELLATE COURTS
STATE OF HAWAII

2008 AUG -6 AM 11:39

FILED

Upon review of (1) the July 10, 2008 order granting the 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 (HRCPP), (2) Appellant Engle's July 21, 2008 motion to reconsider the July 10, 2008 dismissal order pursuant to Rule 40 of the Hawai'i Rules of Appellate Procedure (HRAP), and (3) the record, we conclude that Appellant Engle's July 21, 2008 HRAP Rule 40 motion for reconsideration of the July 10, 2008 dismissal order lacks merit.

We initially note that Appellant Engle cites an unpublished order of dismissal in Banque de Tahiti v. Kurth, No. 28312, 2007 WL 609262 (Hawai'i App. February 27, 2007), in support of Appellant Engle's July 21, 2008 HRAP Rule 40 motion for reconsideration of the July 10, 2008 dismissal order. Although HRAP Rule 35(c)(2) authorizes the citation of unpublished dispositional orders that courts issue on or after July 1, 2008, HRAP Rule 35(c)(1) specifically prohibits the citation of unpublished dispositional orders that courts have issued before July 1, 2008:

A memorandum opinion or unpublished dispositional order filed before July 1, 2008 shall not be cited in any other action or proceeding except when the memorandum opinion or unpublished dispositional order (i) establishes the law of the pending case, or (ii) has res judicata or collateral estoppel effect, or (iii) in a criminal action or proceeding, involves the same respondent.

HRAP Rule 35(c)(1) (as amended April 23, 2008, effective July 1, 2008) (emphasis added). Therefore, the unpublished order of dismissal in Banque de Tahiti v. Kurth, No. 28312, 2007 WL 609262 (Hawai'i App. February 27, 2007) may not be cited in this proceeding.

Appellant Engle also cites published opinions from other jurisdictions in support of Appellant Engle's assertion that a post-judgment order is appealable only if the post-judgment order resolves all of the possible proceedings in the post-judgment phase of a case. However, the cited published opinions from other jurisdictions do not support Appellant

Engle's argument. More importantly, the Supreme Court of Hawai'i has unequivocally held that, although appellate review of a pre-judgment ruling usually requires, as a prerequisite, the entry of a separate judgment under Rule 58 of the Hawai'i Rules of Civil Procedure (HRCP) 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.

Furthermore, neither precedent nor logic compels us to extend the rule in Jenkins - requiring a separate judgment - to the post-judgment order at issue here. The sole purpose of HRCP Rule 58's separate document requirement is to clarify when the time for appeal commences. . . . In the context of initial litigation, with claims, cross-claims, counterclaims, and multiple orders deciding them, a dispositive document that is distinct from any decision or order serves to eliminate confusion as to which order ends the litigation. . . . Thus, Jenkins required a separate judgment resolving all claims. Here, there is no comparable risk of confusion with respect to a post-judgment order granting a return of garnished funds and costs and denying attorneys' fees where the order is properly entered in the record, . . . and resolves the motion requesting relief.

Ditto v. McCurdy, 103 Hawai'i 153, 158-59, 80 P.3d 974 979-80 (2003) (citations omitted). Therefore, "[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)." Id. at 160, 80 P.3d at 981 (citation omitted). Accordingly, the October 19, 2007 order denying Appellant Engle's HRCP Rule 60(b) motion for relief from the judgment was an appealable final post-judgment order under HRS § 641-1(a) (1993 & Supp. 2007). As already explained in the July 10, 2008 dismissal order, Appellant Engle did not file his April 3, 2008 notice of appeal within thirty days after the January 29, 2008 deemed denial of Appellant Engle's October 29, 2007 HRCP Rule 59 motion for reconsideration of the October 19, 2007 order, as HRAP Rule 4(a)(3) required. Therefore, Appellant Engle's appeal was untimely, and we lack

jurisdiction over this appeal. Accordingly,

IT IS HEREBY ORDERED that Appellant Engle's July 21, 2008 HRAP Rule 40 motion for reconsideration of the July 10, 2008 dismissal order is denied.

DATED: Honolulu, Hawai'i, August 6, 2008.



Chief Judge



Associate Judge



Associate Judge