

NO. 29402

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

GROUP BUILDERS, INC. and TRADEWIND INSURANCE COMPANY, LTD.,
Plaintiffs/Counterclaim-Defendants/Appellants/Cross-Appellees,

v.

ADMIRAL INSURANCE COMPANY,
Defendant/Counterclaim-Plaintiff/Cross-Claim Plaintiff/
Cross-Claim Defendant/Appellee/Cross-Appellant,

and

NATIONAL INTERSTATE INSURANCE COMPANY,
SERVCO INSURANCE SERVICES CORP., formerly known as
and/or dba American Insurance Agency, Inc. and American
Insurance Agency; NATIONAL INTERSTATE INSURANCE COMPANY OF
HAWAII, INC., Defendants/Appellees/Cross-Appellants,

and

ZURICH AMERICAN INSURANCE COMPANY,
Defendant/Cross-Claim Defendant/
Cross-Claim Plaintiff/Appellee/Cross-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 05-1-2204)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2009 FEB 12 AM 7:56

FILED

ORDER PARTIALLY DISMISSING APPEAL AND
COMPLETELY DISMISSING ALL CROSS-APPEALS

(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

Upon review of the record for this case, it appears that we lack jurisdiction over a substantial portion of the appeal that Plaintiffs/Counterclaim-Defendants/Appellants/Cross-Appellees Group Builders, Inc. (Appellant Group Builders), and Tradewind Insurance Company, Ltd. (Appellant Tradewind Insurance Company) have asserted, and we lack jurisdiction over all of the cross-appeals that Defendants/Appellees/Cross-Appellants National Interstate Insurance Company (Cross-Appellant NIIC), National Interstate Insurance Company of Hawaii (Cross-Appellant NIICH)

Servco Insurance Services Corp. (Cross-Appellant Servco) and Defendant/Counterclaim-Plaintiff/Cross-Claim Plaintiff/Cross-Claim Defendant/Appellee/Cross-Appellant Admiral Insurance Company (Cross-Appellant Admiral Insurance Company) have asserted, from a total of eleven interlocutory orders that the Honorable Randal K. O. Lee and the Honorable Glenn J. Kim entered, because the circuit court has not reduced the appealed orders to a separate judgment as Rules 54(b) and 58 of the Hawai'i Rules of Civil Procedure (HRCP) require under the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994).

We initially note that Appellant Group Builders and Appellant Tradewind Insurance Company asserted an appeal from the following six interlocutory orders:

- (1) an April 3, 2007 "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Defendant/Counterclaimant/Cross-Claimant admiral Insurance Company's Motion for Partial Summary Judgment Re: Plaintiffs' Causes of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing and Claim for Punitive Damages, Notice of Entry";
- (2) a May 3, 2007 "Order Denying Plaintiffs' Motion for Reconsideration of Findings of Fact, Conclusions of Law and Order Entered on April 3, 2007, Granting in Part and Denying in Part Defendant Admiral Insurance Company's Motion, Filed on March 6, 2007, for Partial Summary Judgment Re: Plaintiffs' Causes of Action for Breach of Implied Covenant of Good Faith and Fair Dealing and Claim for Punitive Damages, Filed on April 5, 2007";
- (3) an October 10, 2007 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment as to Count Six of Plaintiffs' First Amended Complaint";
- (4) a June 12, 2008 "Order Granting in Part Defendants National Insurance Company, National Interstate

Insurance Company of Hawaii, and Servco Insurance Services Corp.'s Motion for Partial Summary Judgment as to Counts Six and Seven of Plaintiffs' First Amended Complaint and Denying in Part Defendants National Interstate Insurance Company, National Interstate Insurance Company of Hawaii, and Servco Insurance Services Corp.'s Motion for Partial Summary Judgment as to Count Four of Plaintiffs' First Amended Complaint, Filed on April 29, 2008";

- (5) a July 8, 2008 "Order Granting Defendant Admiral Insurance Company's Motion, Filed on June 13, 2008, for Partial Summary Judgment as to Count Four of Plaintiffs' First Amended Complaint, Filed on May 30, 2006"; and
- (6) a September 23, 2008 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008[.]"

Cross-Appellant NIIC, Cross-Appellant NIICH and Cross-Appellant Servco asserted a cross-appeal from the following three orders:

- (1) an August 15, 2006 "Order Denying Defendants National Interstate Insurance Company and Servco Insurance Services Corporation's Motion to Dismiss Plaintiffs' Complaint or in the Alternative, Motion for Summary Judgment, Filed on January 26, 2006";
- (2) a December 17, 2007 "Order Granting Plaintiffs' Motion for Partial Summary Judgment Re Defendants National Interstate Insurance Company and National Interstate Insurance Company of Hawaii, Inc.'s Duty to Defend, Filed October 25, 2007"; and
- (3) a July 11, 2008 "Order Denying Defendants National Interstate Insurance Company, National Interstate Insurance Company of Hawaii, and Servco Insurance Services Corp.'s Motion for Partial Summary Judgment Regarding No Duty to Indemnify Plaintiffs, Filed on June 6, 2008[.]"

Cross-Appellant Admiral Insurance Company asserted a cross-appeal from a December 11, 2006 "Amended Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Partial Summary Judgment Re: Defendant Admiral Insurance Co.'s Duty to Defend,

Notice of Entry[.]" As explained below, only one of these appealed interlocutory orders is appealable.

Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2007) authorizes appeals from "final judgments, orders, or decrees[.]" HRS § 641-1(a). Appeals under HRS § 641-1 "shall be taken in the manner . . . provided by the rules of the court." HRS § 641-1(c) (1993 & Supp. 2007). HRCP Rule 58 requires that "[e]very judgment shall be set forth on a separate document." Based on this requirement, the Supreme Court of Hawai'i has held that "[a]n appeal may be taken . . . 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, 76 Hawai'i at 119, 869 P.2d at 1338. "[A]n appeal from any judgment will be dismissed as premature if the judgment does not, on its face, either resolve all claims against all parties or contain the finding necessary for certification under HRCP [Rule] 54(b)." Id. "An appeal from an order that is not reduced to a judgment in favor of or against the party by the time the record is filed in the supreme court will be dismissed." Id. at 120, 860 P.2d at 1339 (footnote omitted).

When the record on appeal for this case was filed with the appellate court clerk on December 9, 2008, the record on appeal did not contain a separate judgment pursuant to HRCP Rule 54(b) and HRCP Rule 58. Although the circuit court entered an October 3, 2008 "Order Granting Plaintiffs' Motion for (1) Rule 54(b) Certification Re Various Orders or, (2) With

Respect to the Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, in the Alternative, for Leave to File an Interlocutory Appeal, and (3) for a Stay of these Proceedings Pending Appeal, Filed on September 3, 2008[,] " which contains an express finding of no just reason for delay in the entry of a judgment pursuant to HRCP Rule 54(b), "a party cannot appeal from a circuit court order even though the order may contain [HRCP Rule] 54(b) certification language; the order must be reduced to a judgment and the [HRCP Rule] 54(b) certification language must be contained therein." Oppenheimer v. AIG Hawaii Ins. Co., 77 Hawai'i 88, 93, 881 P.2d 1234, 1239 (1994). Absent the entry of a separate judgment document, none of the appealed orders are appealable pursuant to HRCP Rule 54(b).

Within the October 3, 2008 "Order Granting Plaintiffs' Motion for (1) Rule 54(b) Certification Re Various Orders or, (2) With Respect to the Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, in the Alternative, for Leave to File an Interlocutory Appeal, and (3) for a Stay of these Proceedings Pending Appeal, Filed on September 3, 2008[,] " the circuit court certified one of the orders for interlocutory appeal pursuant to HRS § 641-1(b) (1993 & Supp. 2007),¹ namely the September 23,

¹ Hawaii Revised Statutes (HRS) § 641-1(b) (1993 & Supp. 2007) authorizes interlocutory appeals to the ICA under the following circumstances:

(b) Upon application made within the time provided by the rules of court, an appeal in a civil matter may be allowed by a circuit court in its discretion from an order
(continued...)

2008 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008," by including an express finding that an interlocutory appeal from the September 3, 2008 order would more speedily determine the litigation because the insurance coverage issues in the September 23, 2008 order have not been resolved by Hawai'i appellate courts. Therefore, at this time, the only appealable order in this case is the September 23, 2008 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008[.]"

Appellant Group Builders and Appellant Tradewind Insurance Company filed their October 10, 2008 notice of appeal within thirty days after entry of the September 23, 2008 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008," as Rule 4(a)(1) of the Hawai'i Rules of Appellate Procedure (HRAP) requires, and, thus, Group Builders and Tradewind's appeal from this September 23, 2008 order is timely. Consequently, Appellant Group Builders and Appellant Tradewind Insurance Company's October 10, 2008 notice of appeal is effective as to the September 23, 2008 "Order Granting Defendant

¹(...continued)

denying a motion to dismiss or from any interlocutory judgment, order, or decree whenever the circuit court may think the same advisable for the speedy termination of litigation before it. The refusal of the circuit court to allow an appeal from an interlocutory judgment, order, or decree shall not be reviewable by any other court.

HRS § 641-1(b) (emphasis added).

Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008[.]" Appellant Group Builders and Appellant Tradewind Insurance Company's October 10, 2008 notice of appeal is not effective as to the other five orders from which Appellant Group Builders and Appellant Tradewind Insurance Company have attempted to appeal.

Cross-Appellant NIIC, Cross-Appellant NIICH, Cross-Appellant Servco, and Cross-Appellant Admiral Insurance Company did not assert cross-appeals from the September 23, 2008 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008[,]" and, instead, they asserted cross-appeals from other interlocutory orders that are not independently appealable.

Absent a separate, appealable judgment, most of the appeal and all of the cross-appeals are premature and must be dismissed for lack of appellate jurisdiction. Accordingly,

IT IS HEREBY ORDERED that:

- all of Appellant Group Builders and Appellant Tradewind Insurance Company's appeal is dismissed for lack of appellate jurisdiction, except for Appellant Group Builders and Appellant Tradewind Insurance Company's appeal from the September 23, 2008 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008" pursuant to HRS § 641-1(b), which shall proceed for appellate disposition;
- all of Cross-Appellant NIIC, Cross-Appellant NIICH, and Cross-Appellant Servco's cross-appeal is dismissed for lack of appellate jurisdiction; and
- all of Cross-Appellant Admiral Insurance Company's cross-appeal is dismissed for lack of appellate jurisdiction.

With respect to Appellant Group Builders and Appellant Tradewind

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

Insurance Company's appeal from the September 23, 2008 "Order Granting Defendant Admiral Insurance Company's Motion for Partial Summary Judgment Re: No Duty to Indemnify, Filed on June 25, 2008" pursuant to HRS § 641-1(b) (1993 & Supp. 2007), the parties shall proceed with briefing according to HRAP Rule 28.

DATED: Honolulu, Hawai'i, February 12, 2009.

Bernie K.A. Watanabe

Presiding Judge

Daniel R. Foley

Associate Judge

Amanda S. Inojima

Associate Judge