

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29411

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

ALTEKA CO., LTD, a Japan corporation,
Plaintiff/Counterclaim-Defendant/Appellant,

v.

HATSUKO OTSUKA;
Defendant/Counterclaim Plaintiff/
Cross-Claim Plaintiff/Third-Party Plaintiff/Appellee

and

HOTELS IN PARADISE, INC., formally known as
SHANGHAI INVESTMENT COMPANY, INC. and SIMON BEBB,
Defendants/Cross-Claim Defendants/Appellees

and

JOHN DOES 1-10; JANE DOES 1-10;
DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10;
DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 05-1-1398)

ORDER DISMISSING APPEAL FOR
LACK OF APPELLATE JURISDICTION

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

Upon review of the record in this case, it appears that we lack jurisdiction over Plaintiff/Counterclaim-Defendant/Appellant Alteka Co., Ltd.'s (Appellant Alteka), appeal from the Honorable Gary W.B. Chang's June 18, 2008 partial judgment (the June 18, 2008 partial judgment) and September 29, 2008 "Order Granting in Part and Denying in Part Plaintiff/Counterclaim Defendant Alteka Co., Ltd.'s[,] Motion for Certification of Partial Judgment Filed on June 18, 2008[,] under HRCF Rule 54(b) or in the Alternative to Rescind Order of Sale Filed on August 4, 2008" (the September 29, 2008 HRCF Rule 54(b) certification

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CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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order), because Appellant Alteka's appeal is

- untimely as to portion of the June 18, 2008 partial judgment that enters a judgment on a decree of foreclosure, and
- premature as to all other portions of the June 18, 2008 partial judgment and the September 29, 2008 HRCF Rule 54(b) certification order.

The instant case involves multiple claims, including a claim for foreclosure. When a party desires to assert an appeal from judgment on a decree of foreclosure, the two statutes that authorize the appeal are (1) Hawaii Revised Statutes (HRS) § 667-51(a)(1) (Supp. 2007)¹ and (2) HRS § 641-1(a) (1993 & Supp. 2007).² Pursuant to Rule 4(a)(1) of the Hawai'i Rules of

¹ Hawaii Revised Statutes (HRS) § 667-51 (Supp. 2007) provides:

§667-51 Appeals. (a) Without limiting the class of orders not specified in section 641-1 from which appeals may also be taken, the following orders entered in a foreclosure case shall be final and appealable:

- (1) A judgment entered on a decree of foreclosure, and if the judgment incorporates an order of sale or an adjudication of a movant's right to a deficiency judgment, or both, then the order of sale or the adjudication of liability for the deficiency judgment also shall be deemed final and appealable;
- (2) A judgment entered on an order confirming the sale of the foreclosed property, if the circuit court expressly finds that no just reason for delay exists, and certifies the judgment as final pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure; and
- (3) A deficiency judgment; provided that no appeal from a deficiency judgment shall raise issues relating to the judgment debtor's liability for the deficiency judgment (as opposed to the amount of the deficiency judgment), nor shall the appeal affect the finality of the transfer of title to the foreclosed property pursuant to the order confirming sale.

(b) An appeal shall be taken in the manner and within the time provided by the rules of court.

HRS § 667-51 (Supp. 2007); see also 2003 Haw. Sess. Laws Act 89 § 2.

² HRS § 641-1(a) (1993 & Supp. 2007) provides:

§641-1. Appeals as of right or interlocutory, civil matters. (a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court to the intermediate appellate court, subject to chapter 602.

HRS § 641-1(a) (1993 & Supp. 2007).

Appellate Procedure (HRAP), "the litigant who wishes to challenge a decree of foreclosure and order of sale may - and, indeed, must - do so within the thirty day period following entry of the decree or will lose the right to appeal that portion of the foreclosure proceeding." Beneficial Hawai'i, Inc. v. Casey, 98 Hawai'i 159, 165, 45 P.3d 359, 365 (2002) (citation omitted) (emphasis added). The language in each of the two appellate jurisdiction statutes is not the same. For example, regardless whether a circuit court has resolved any other remaining claims in a litigation matter, HRS § 667-51(a)(1) (Supp. 2007) clearly and unequivocally authorizes an immediate appeal from "[a] judgment entered on a decree of foreclosure[.]" HRS § 667-51(a)(1). In contrast, the language in HRS § 641-1(a) generally requires the resolution of all claims against all parties for appealability, but, based on the collateral order doctrine,

[t]he rationale for permitting (and requiring) an appeal of a foreclosure decree and its accompanying orders, even though there may be additional proceedings remaining in the circuit court, is that a foreclosure decree falls within that small class of orders 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.

Beneficial Hawai'i, Inc., 98 Hawai'i at 165, 45 P.3d at 365 (citations and internal quotation marks omitted). Therefore, pursuant to both HRS § 667-51(a)(1) and HRS § 641-1(a) the June 18, 2008 partial judgment is an immediately appealable judgment to the limited extent that the June 18, 2008 partial judgment enters judgment on a decree of foreclosure as to Defendant/Counterclaim Plaintiff/Cross-Claim Plaintiff/Third-

Party Plaintiff/Appellee Hatsuko Otsuka's (Appellee Otsuka) counterclaim for foreclosure. However, Appellant Alteka did not file its October 15, 2008 notice of appeal within thirty days after entry of the June 18, 2008 partial judgment, as HRAP Rule 4(a)(1) required. Therefore, Appellant Alteka's appeal from the June 18, 2008 partial judgment (to the extent that the June 18, 2008 partial judgment enters judgment on a decree of foreclosure) 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 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]."). Consequently, we lack jurisdiction over Appellant Alteka's appeal from the June 18, 2008 partial judgment (to the extent that the June 18, 2008 partial judgment enters judgment on a decree of foreclosure).

We also lack jurisdiction over the remainder of Appellant Alteka's appeal. With respect to the parties' claims other than foreclosure, HRS § 641-1(a) authorizes appeals to the intermediate court of appeals from "final judgments, orders, or decrees[.]" (emphasis added). 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). Rule 58 of the Hawai'i Rules of Civil Procedure (HRCPP) 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 v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). "[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. "If a judgment purports to be certified under HRCP [Rule] 54(b), the necessary finding of no just reason for delay . . . must be included in the judgment." Id. at 120, 869 P.2d 1339.

The June 18, 2008 partial judgment does not resolve all of the parties' claims in this multiple-claim case. For example, the June 18, 2008 partial judgment does not utilize operative language to expressly resolve Appellee Otsuka's claim against the Third-Party Defendant/Appellee Department of Finance, County of Maui. Despite that the June 18, 2008 partial judgment does not resolve all of the parties' claims, the June 18, 2008 partial judgment does not contain an express finding of no just reason for delay in the entry of judgment pursuant to HRCP Rule 54(b). Therefore, the June 18, 2008 partial judgment is not an appealable judgment to the extent that the June 18, 2008 partial judgment resolves claims other than foreclosure.

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Although the September 29, 2008 HRCF Rule 54(b) certification order contains a finding of no just reason for delay in the entry of the June 18, 2008 partial judgment pursuant to HRCF Rule 54(b), "a party cannot appeal from a circuit court order even though the order may contain [HRCF Rule] 54(b) certification language; the order must be reduced to a judgment and the [HRCF 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). Therefore, the September 29, 2008 HRCF Rule 54(b) certification order is not an independently appealable order, and Appellant Alteka's appeal from the September 29, 2008 HRCF Rule 54(b) certification order is premature.

Absent a timely appeal from an appealable judgment, we lack jurisdiction over this appellate case. Accordingly,

IT IS HEREBY ORDERED that appellate court case number 29411 is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, February 13, 2009.

Corinne K A Watanabe

Presiding Judge

Daniel R. Foley

Associate Judge

Ausa Olu Fijica

Associate Judge