NO. 29461

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

RUTH RYAN,
Plaintiff/Counterclaim Defendant-Appellee,

v.
JOHN HERZOG,
Defendant/Counterclaimant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(DC CIV. NO. 08-1-0948)

ORDER DENYING SEPTEMBER 1, 2009 MOTION TO DISMISS APPEAL
(By: Nakamura, C.J., Watanabe and Foley, JJ.)

Upon review of (1) Plaintiff/Counterclaim-Defendant/Appellee Ruth Ryan's (Appellee Ryan) September 1, 2009 motion to dismiss appellate court case number 29461 for lack of jurisdiction, (2) Defendant/Counterclaim-Plaintiff/Appellant John Herzog's (Appellant Herzog) November 13, 2009 memorandum in opposition to Appellee Ryan's September 1, 2009 motion to dismiss appellate court case number 29461 for lack of jurisdiction, and (3) the record, it appears that Appellee Ryan's September 1, 2009 motion to dismiss appellate court case number 29461 for lack of jurisdiction does not have merit.

Pursuant to Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2008),

> appeals are allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts. In district court cases, a judgment includes any order from which an appeal lies. A final order means an order ending the proceeding, leaving nothing further to be accomplished. When a written judgment, order, or decree ends the litigation by fully deciding all rights and liabilities of all parties, leaving nothing further to be adjudicated, the

> judgment, order, or decree is final and appealable.

Casumpang v. ILWU, Local 142, 91 Hawai'i 425, 426, 984 P.2d 1251, 1252 (1999) (citations, internal quotation marks, and footnote omitted) (emphases added). The requirement 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, 869 P.2d 1334 (1994), is "not applicable to district court cases." Casumpang, 91 Hawai'i at 427, 984 P.2d at 1253. In cases where there is no requirement for a separate judgment that, by itself, resolves all claims against all parties, and

> where the disposition of the case is embodied in several orders, no one of which embraces the entire controversy but collectively does so, it is a necessary inference from 54(b) that the orders collectively constitute a final judgment and entry of the last of the series of orders gives finality and appealability to all.

S. Utsunomiya Enterprises, Inc. v. Moomuku Country Club, 75 Haw. 480, 494-95, 866 P.2d 951, 960 (1994) (citations, internal quotation marks, and ellipsis points omitted).

In the instant case, the district court resolved the parties' claims through the following series of judgments and an order:

(1) the May 6, 2008 judgment for possession in favor of Appellee Ryan;

(2) the September 4, 2008 order granting Appellee Ryan's motion to strike Appellant Herzog's counterclaim; and

(3) the March 31, 2009 judgment dismissing Appellee Ryan's remaining claim for money damages.

The March 31, 2009 judgment is the final judgment in a series of judgments and an order that gives finality and appealability to all. Therefore, the March 31, 2009 judgment is an appealable final judgment pursuant to HRS § 641-1(a).

Appellee Ryan argues that Appellant Herzog's appeal is untimely pursuant to Rule 4 of the Hawai‘i Rules of Appellate Procedure (HRAP). Appellant Herzog's December 16, 2008 notice of appeal was premature, because Appellant Herzog filed his December 16, 2008 notice of appeal prior to entry of the March 31, 2009 judgment. Nevertheless, "[i]f a notice of appeal is filed after announcement of a decision but before entry of the judgment or order, such notice shall be considered as filed immediately after the time the judgment or order becomes final for the purpose of appeal." HRAP Rule 4(a)(2). The record on appeal shows that Appellant Herzog filed his December 16, 2008 notice of appeal

- after the district court's December 12, 2008 announcement that the district court was dismissing the remainder of Appellee Ryan's claims for money damages,
- but before entry of the March 31, 2009 judgment dismissing Appellee Ryan's claims for money damages.

Therefore, Appellant Herzog's premature December 16, 2008 notice of appeal from the March 31, 2009 judgment is timely pursuant to HRAP Rule 4(a)(2).

Although Appellant Herzog's December 16, 2008 notice of appeal does not specifically refer to the March 31, 2009

judgment, "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." HRAP Rule 3(c)(2) (emphasis added). Consequently, Hawai‘i appellate courts have held that, "a mistake in designating the judgment . . . should not result in [the] loss of the appeal as long as the intention to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." State v. Graybeard, 93 Hawai‘i 513, 516, 6 P.3d 385, 388 (App. 2000) (internal quotation marks omitted) (quoting City & County v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976) (quoting 9 Moore's Federal Practice § 203.18 (1975))); City & County v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976); Ek v. Boggs, 102 Hawai‘i 289, 294, 75 P.3d 1180, 1185 (2003); In re Brandon, 113 Hawai‘i 154, 155, 149 P.3d 806, 807 (App. 2006). Therefore, Appellant Herzog's mistake in omitting a reference to the March 31, 2009 judgment does not invalidate Appellant Herzog's December 16, 2008 notice of appeal, and we have jurisdiction over this appeal pursuant to HRS § 641-1(a).

"An appeal from a final judgment brings up for review all interlocutory orders not appealable directly as of right which deal with issues in the case." Ueoka v Szymanski, 107 Hawai‘i 386, 396, 114 P.3d 892, 902 (2005) (citation and internal quotation marks omitted). Therefore, Appellant Herzog's appeal from the final judgment in this case, i.e., the March 31, 2009 judgment, brings up for review all of the prior orders and judgments in this case, including the May 6, 2008 judgment for

possession. See, e.g., Ciesla v. Reddish, 78 Hawai‘i 18, 21, 889 P.2d 702, 705 (1995) ("The immediate appeal of the judgment for possession under the Forgay doctrine being untimely, [the appellant] just await final resolution of all claims in the case before challenging the judgment for possession.").

Appellee Ryan additionally argues that Appellant Herzog's appeal is moot because Appellant Herzog has already surrendered possession of the subject property. However, even assuming, arguendo, that Appellee Ryan has sufficiently proved that Appellant Herzog surrendered possession of the subject property, Appellant Herzog nevertheless seeks appellate review of additional issues other than his possessory interest in the subject property, such as the district court's September 19, 2008 judgment awarding attorneys' fees and costs to Appellee Ryan. Therefore, regardless whether Appellant Herzog has actually surrendered possession of the subject property, this appeal is not moot. Accordingly,

IT IS HEREBY ORDERED that Appellee Ryan's September 1, 2009 motion to dismiss appellate court case number 29461 for lack of jurisdiction is denied.

DATED: Honolulu, Hawai‘i, December 1, 2009.

Chief Judge

Associate Judge

Associate Judge