

NO. 29486

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MCCULLY ASSOCIATES, Plaintiff-Appellee,

v.

TEN GRAND ASSOCIATES, a Hawai'i Limited Partnership,
and TEN GRAND INVESTMENTS, INC., a Hawai'i Corporation,
Defendants-Appellees,

and

JERRY TARUTANI and HUO CHEN,
Co-Trustees of the GREGORY Y. DUNN
IRREVOCABLE TRUST DATED DECEMBER 17, 1993, et al.,
Additional Defendants/Third-Party Plaintiffs/Appellees

RONALD K. KOTOSHIRODO, Receiver,
Third-Party Plaintiff/Appellee,

v.

ALEXANDER Y. MARN and ERIC Y. MARN,
Third-Party Defendants/Appellants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 05-1-2246)

ORDER DENYING FEBRUARY 11, 2009 MOTION TO DISMISS APPEAL
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon review of (1) Defendants/Third-Party Plaintiffs/
Appellees Jerry Tarutani and Huo Chen, Co-Trustees of the Gregory
Y. Y. Dunn Irrevocable Trust Dated December 17, 1993, Roger Y. H.
Dunn Irrevocable Trust Dated December 17, 1993, Laurieann Y. F.
Dunn Irrevocable Trust Dated December 17, 1993, Michael Y. H.
Dunn Irrevocable Trust Dated December 17, 1993's (collectively
referred to as "the Dunn Trust Appellees") February 11, 2009
motion to dismiss Third-Party Defendant/Appellant Eric Y. Marn's
("Appellant Marn") appeal from the Honorable Victoria S. Marks'

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

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August 6, 2008 "Order Granting Third-Party Defendant Eric Marn's Second Motion to Continue the Trial Date Filed July 8, 2008" ("the August 6, 2008 order") and October 29, 2008 "Order Denying Third-Party Defendants' Motion for Reconsideration in Part Re: Order Granting Third-Party Defendant Eric Marn's Second Motion to Continue Trial Date Filed July 8, 2008 (Filed August 6, 2008), Filed August 18, 2008" ("the October 29, 2008 order denying reconsideration"), (2) Appellant Marn's February 20, 2009 memorandum in opposition to the Dunn Trust Appellees' February 11, 2009 motion to dismiss this appeal, and (3) the record, it appears that the Dunn Trust Appellees' February 11, 2009 motion to dismiss this appeal lacks merit.

Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2007) authorizes appeals from "final judgments, orders, or decrees[.]" HRS § 641-1(a) (1993 & Supp. 2007). 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 (HRCP) requires that "[e]very judgment shall be set forth on a separate document." HRCP Rule 58. Based on this requirement under HRCP Rule 58, 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). "An appeal from an order that is not reduced to a judgment in favor or against the party by the time the record is filed in the supreme court will be dismissed." Id.

at 120, 869 P.2d at 1339 (footnote omitted).

The circuit court has not entered a final judgment on all claims in this case. Both the August 6, 2008 order and the October 29, 2008 order denying reconsideration are interlocutory orders. Nevertheless, it appears that the August 6, 2008 order is appealable under the collateral order doctrine, because, in addition to granting Appellant Marn's second motion to continue the trial date, the August 6, 2008 order appears to have sanctioned Appellant Marn. The collateral order doctrine has three requirements:

In order to fall within the narrow ambit of the collateral order doctrine, the be appealable under the collateral order doctrine, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.

Siangco v. Kasadate, 77 Hawai'i 157, 161, 883 P.2d 78, 82 (1994) (citations and internal quotation marks omitted; brackets in original). The supreme court has held that an interlocutory sanction order satisfied the three requirements for appealability under the "collateral order doctrine" if "the order directed payment of the assessed sum and was immediately enforceable through contempt proceedings." Harada v. Ellis, 60 Haw. 467, 480, 591 P.2d 1060, 1070 (1979). Thus, despite the absence of a judgment, an "[i]mmediate appeal is allowed of a sanction order against a party that is immediately enforceable through contempt proceedings and that places the sanctioned party in immediate jeopardy of being found in contempt of court for failure to comply." In re Adams, 105 Hawai'i 507, 516, 100 P.3d 77, 86

(App. 2004) (citations omitted).

The August 6, 2008 order granted Appellant Marn's second motion to continue the trial date, but, it additionally appears to have sanctioned Appellant Marn by ordering Appellant Marn to pay \$410.40 to an adverse party by certain date. It appears that this sanction is immediately enforceable through contempt proceedings, which places Appellant Marn in immediate jeopardy of being found in contempt of court for failure to comply. Therefore, the August 6, 2008 order appears to be appealable under the collateral order doctrine.

Pursuant to Rule 4(a)(3) of the Hawai'i Rules of Appellate Procedure (HRAP),¹ Appellant Marn extended the thirty-day time period under HRAP Rule 4(a)(1) for filing a notice of appeal when Appellant Marn filed his August 18, 2008 HRCP Rule 59 motion for reconsideration of the August 6, 2008 order within ten² days after entry of the August 6, 2008 order, as HRCP Rule 59 requires. Appellant Marn filed his November 26, 2008 notice of appeal within thirty days after entry of the

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) (emphases added).

² The tenth calendar day after August 6, 2008, was Saturday, August 16, 2008, and, thus, HRAP Rule 26(a) extended the ten-day time limit under HRCP Rule 59 until Monday, August 18, 2008.

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October 29, 2008 order denying Appellant Marn's August 18, 2008 HRCP Rule 59 motion for reconsideration, as HRAP Rule 4(a)(3) requires. Appellant Marn's timely appeal from the the August 6, 2008 order allows Appellant Marn to obtain appellate review of the October 29, 2008 order denying reconsideration, because a "notice of appeal shall be deemed to appeal the disposition of all post-judgment motions that are timely filed after entry of the judgment or order." HRAP Rule 4(a)(3). Therefore, we have appellate jurisdiction over this case pursuant to HRS § 641-1(a) (1993 & Supp. 2007) and the collateral order doctrine.

Accordingly,

IT IS HEREBY ORDERED that the Dunn Trust Appellees' February 11, 2009 motion to dismiss this appeal is denied.

DATED: Honolulu, Hawai'i, March 2, 2009.


Daniel P. Foley
Presiding Judge


Auna Olu Fijini
Associate Judge


Associate Judge