

NO. 29931

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DAMIEN TEXEIRA, Plaintiff-Appellant,

v.

TYSON MELCHOR and DOES 1-10, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 06-1-0126)

ORDER DISMISSING APPEAL
FOR LACK OF APPELLATE JURISDICTION
(By: Nakamura, C.J., Watanabe and Leonard, JJ.)

Upon review of the record, it appears that we lack jurisdiction over the appeal that Plaintiff-Appellant Damien Teixeira (Appellant Teixeira) has asserted from the Honorable Randal G. B. Valenciano's February 26, 2009 judgment, because Appellant Teixeira's appeal is untimely under Rule 4(a)(3) of the Hawai'i Rules of Appellate Procedure (HRAP).

The February 26, 2009 judgment resolved all claims against all parties, and, thus, the February 26, 2009 judgment is an appealable final judgment pursuant to Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2008), Rule 58 of the Hawai'i Rules of Civil Procedure (HRCPP), and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994).

Pursuant to HRAP Rule 4(a)(3),¹ Appellant Teixeira

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.

extended the thirty-day time period under HRAP Rule 4(a)(1) for filing a notice of appeal by timely filing Appellant Texeira's February 24, 2009 motion for judgment as a matter of law, a new trial and reconsideration within ten days after entry of the February 26, 2009 judgment, as HRCF Rule 50 and HRCF Rule 59 required for such motions. The fact that Appellant Texeira prematurely filed his February 24, 2009 motion for judgment as a matter of law, a new trial and reconsideration before, rather than after, entry of the February 26, 2009 judgment does not negate the timeliness of Appellant Texeira's compliance with the ten-day deadline for such post-judgment motions under HRCF Rule 50 and HRCF Rule 59. See, e.g., Saranillio v. Silva, 78 Hawai'i 1, 7, 889 P.2d 685, 691 (1995) ("HRCF [Rule] 59 does not require that a motion be served after the entry of judgment; it imposes only an outer [ten-day] time limit on the service of a motion to alter or amend the judgment[.]").

However, when a party files a timely post-judgment motion that tolls the time period for filing a notice of appeal pursuant to HRAP Rule 4(a)(3), "[t]he rule provides that the court has 90 days to dispose of [the] post-judgment [tolling] motion . . . , regardless of when the notice of appeal is filed." Buscher v. Boning, 114 Hawai'i 202, 221, 159 P.3d 814, 833 (2007); see HRAP Rule 4(a)(3) ("[T]he 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."). When "the court fail[s] to issue an order on [the movant]'s [post-judgment tolling] motion by . . . ninety days after [the date on which the movant] filed the [post-judgment tolling] motion, the [post-judgment tolling] motion [i]s deemed denied." County of Hawai'i v. C&J Coupe Family Limited Partnership, 119 Hawai'i 352, 367, 198 P.3d 615, 630 (2008). "Although the rule does not address the situation in which a [post-judgment tolling] motion . . . is prematurely filed prior to the entry of final judgment, [the Supreme Court of Hawai'i]

will deem such motion filed immediately after the judgment becomes final for the purpose of calculating the 90-day period." Buscher, 114 Hawai'i at 221, 159 P.3d at 833. Under the holding in Buscher, we deem Appellant Texeira's premature February 24, 2009 motion for judgment as a matter of law, a new trial and reconsideration as having been filed immediately after the February 26, 2009 judgment became final for the purpose of calculating the ninety-day period under HRAP Rule 4(a)(3), which means that the deemed filing date for Appellant Texeira's premature February 24, 2009 motion for judgment as a matter of law, a new trial and reconsideration is February 26, 2009. The ninetieth day after February 26, 2009, was May 27, 2009, at the end of which time Appellant Texeira's February 24, 2009 motion for judgment as a matter of law, a new trial and reconsideration was deemed denied pursuant to HRAP Rule 4(a)(3). Although the circuit court entered a June 4, 2009 written order that purported to deny Texeira's February 24, 2009 motion for judgment as a matter of law, a new trial and reconsideration, the June 4, 2009 written order was untimely, superfluous, and void under HRAP Rule 4(a)(3). Appellant Texeira did not file his July 2, 2009 notice of appeal within thirty days after the May 27, 2009 deemed denial of Appellant Texeira's February 24, 2009 motion for judgment as a matter of law, a new trial and reconsideration, as HRAP Rule 4(a)(3) required for a timely appeal. Therefore, Appellant Texeira's July 2, 2009 notice of appeal is untimely under HRAP Rule 4(a)(3).

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 appellate jurisdiction over this case.

Therefore, IT IS HEREBY ORDERED that appellate court case number 29931 is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, November 9, 2009.

Chief Judge

Associate Judge

Associate Judge