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Intermediate Court of Appeals
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NO. CAAP-15-0000584

IN THE INTERMEDIATE COURT OF APPEALS

THE STATE OF HAWAII

HITOSHI YOSHIKAWA,
Defendant-Appellant

vs.

ASSOCIATION OF OWNERS OF KALELE
KAI,

Plaintiff-Appellee.

CIVIL NO. 12-1-1019-04 KTN

IN THE APPEAL OF

(1) FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT
FILED 3/17/15 AND INJUNCTION
AGAINST HITOSHI YOSHIKAWA;
NOTICE OF ENTRY, filed on August 14,
2015

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII

JUDGE: Honorable Karen T. Nakasone

PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL
FOR LACK OF APPELLATE JURISDICTION

MEMORANDUM IN SUPPORT OF MOTION

EXHIBITS A-B

DECLARATION OF COUNSEL

CERTIFICATE OF SERVICE

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HITOSHI YOSHIKAWA

PLAINTIFF-APPELLEE’S MOTION TO DISMISS APPEAL
FOR LACK OF APPELLATE JURISDICTION

COMES NOW, Plaintiff-Appellee, ASSOCIATION OF OWNERS OF KALELE KAI (“Appellee”) by and through its counsel CASE LOMBARDI & PETTIT and CHRISTOPHER SHEA GOODWIN AAL LLLC, and hereby submits its Motion to Dismiss Appeal for Lack of Appellate Jurisdiction (the “Motion”).

This Motion is brought pursuant to HRAP Rule 27, the attached Memorandum in Support of Motion, Declarations, and Exhibits A-C, and the records and files of this action.

DATED: Honolulu, Hawaii, September 10, 2015.

/s/ John D. Zalewski
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JANA M. NARUSE
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ASSOCIATION OF OWNERS OF KALELE KAI

/s/ Christopher Shea Goodwin
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MEMORANDUM IN SUPPORT OF MOTION

Appellee respectfully requests that the Notice of Appeal filed August 18, 2015 (“Appeal”) by Defendant-Appellant HITOSHI YOSHIKAWA (“Appellant”) be dismissed for several reasons, including the following:

1. The Intermediate Court of Appeals of the State of Hawaii lacks jurisdiction. No judgment or final judgment or interlocutory order has been entered in the underlying Circuit Court case. No Rule 54(b) certification has been granted. The Appeal is premature and improper.

2. The Appeal is also improper because it has been initiated for an improper purpose. Appellant has filed a Motion to Stay the Court’s August 14, 2015 Injunction Against himself, thereby trying to use this prematurely-filed Appeal to avoid compliance with the Injunction issued by the Honorable Judge Karen T. Nakasone of the First Circuit Court. Meanwhile Appellant is litigating in First Circuit Court on other issues in an effort to expand the scope of the Circuit Court case.

I. BACKGROUND

On August 14, 2015, Judge Nakasone entered the Findings of Fact, Conclusions of Law, and Order Granting Motion for Summary Judgment Filed 3/17/15 and Injunction Against Appellant. Exhibit A.

On August 18, 2015, only four days later, Appellant filed his Notice of Appeal and Civil Appeal Docketing Statement. (JEFS #1 and #4, respectively).

The Circuit Court action remains active, largely due to Appellant’s own filings. Among the motions which are pending is Appellant’s Motion to Stay the Court’s Injunction filed August 26, 2015 and set for hearing on October 8, 2015 before Judge Nakasone. Exhibit B. Another pending motion filed by Appellant is his Motion for Leave to File Amended

Counterclaim/Cross-Claim also filed on August 26, 2015 (“Motion for Leave to Amend”).

Exhibit C.

Additionally, Appellee filed its Motion for Award of Attorneys’ Fees and Costs Against Appellant on August 28, 2015 which is likewise still pending before Judge Nakasone.

Declaration of Counsel, ¶5.

No Judgment or Final Judgment has been entered in the Circuit Court case. No interlocutory order has neither been entered, nor sought in the Circuit Court case. No Rule 54(b) certification has been granted. Declaration of Counsel, ¶6.

II. THERE IS NO APPELLATE COURT JURISDICTION AT THIS TIME

HRS §641-1 states:

(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.

(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 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.

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

Once a party files a notice of appeal, the lower court is generally divested of jurisdiction to proceed further on the matter. Lowther v. Lowther, 99 Hawai‘i 569, 578, 57 P.3d 494, 503 (App.2002).

Jurisdiction of the ICA is governed by HRS §602-57, which states:

Notwithstanding any other law to the contrary, the intermediate appellate court shall have jurisdiction, subject to transfer as provided in section 602-58 or review on application for a writ of

certiorari as provided in section 602-59¹:

(1) To hear and determine appeals from any court or agency when appeals are allowed by law;

(2) To entertain, in its discretion, any case submitted without suit when there is a question of law that could be the subject of a civil action or proceeding in the circuit court, or tax appeal court, and the parties agree upon the facts upon which the controversy depends; and

(3) To make or issue any order or writ necessary or appropriate in the aid of its jurisdiction, and in such case, any judge may issue a writ or an order to show cause returnable before the court.

See HRS §602-57 (2015).

Jurisdiction of the Circuit Court of the First Circuit is governed by HRS §603-21.5, which provides in part:

(a) The several circuit courts shall have jurisdiction, except as otherwise expressly provided by statute, of:

...
(3) Civil actions and proceedings, in addition to those listed in sections 603-21.6, 603-21.7, and 603-21.8²;

“As a general matter, an appellate court’s jurisdiction is limited to review of final judgments, orders and decrees.” Wong v. Takeuchi, 83 Hawaii 94, 98, 924 P.2d 588, 592 (App. 1996) (citing Ciesla v. Reddish, 78 Hawaii 18, 20, 889 P.2d 702, 704 (1995) and HRS § 641-1(a)(1993)). A judgment, order or decree is not final unless it terminates “all rights and liabilities and all claims of all of the parties.” Arthur v. Sorenson, 80 Hawaii 159, 162, 907 P.2d 745, 748 (1995).

One exception to the general limitation requiring entry of a “final” judgment, order, or decree, is made where the circuit court has entered an order allowing an appeal from an interlocutory judgment, order or decree pursuant to HRS § 641-1(b), when the circuit court finds an interlocutory appeal “advisable for the speedy termination” of the litigation.

¹ The cited statutes do not apply to this Motion.

² The cited statutes do not apply to this Motion.

The MSJ Order which Appellant's Notice of Appeal purports to appeal is an interlocutory order. HRCP Rule 58 provides that **every judgment shall be set forth on a separate document**, and no judgment has yet been filed in this case.

The Supreme Court 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 Hawaii 115, 119, 869, P.2d 1334, 1338 (1994).

The separate judgment must “either resolve all claims against all parties or contain the finding necessary for certification under HRCP Rule 54(b).” Id.

“Thus based on Jenkins and HRCP Rule 58, an order is not appealable, even if it resolves all claims against the parties, until it has been reduced to a separate judgment.” Carlisle v. One (1) Boat, 119 Hawaii 245, 254, 195 P.3d 1177, 1186 (2008).

“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.” Jenkins v. Cades Schutte Fleming & Wright, 76 Hawaii at 120, 869 P.2d at 1339 (1994) (footnote omitted).

The Record on Appeal contains no order of the Circuit Court allowing an appeal from the interlocutory order attached to Appellant's Notice of Appeal.

Importantly, the fact that the Appellee has been forced to file additional motions after entry of the MSJ Order demonstrates that there remain outstanding issues for adjudication between the parties, including but not limited to a pending award of Appellee Association's attorneys' fees and costs from the trial court, for which a separate motion remains pending decision; and Appellant's Motion to Stay the Court's August 14, 2015 Injunction. Also, Appellant's Motion for Leave to Amend further demonstrates Appellant's attempt to expand the Circuit Court litigation, which is another example that finality has not been reached in the Circuit Court.

Appellant's actions to increase the Circuit Court litigation while attempting to appeal the Circuit Court action are irreconcilable.

The appealed order is only interlocutory, the Circuit Court has not entered an HRS § 641-1(b) order allowing this appeal, and jurisdiction is therefore lacking.

For these reasons alone, the Motion should be granted.

III. THE APPEAL HAS BEEN INITIATED BY APPELLANT FOR AN IMPROPER PURPOSE

Appellant appears to have initiated the present Appeal for the purpose of staying the mandatory injunction ordered by Judge Nakasone in the MSJ Order.

In an attempt to avoid the removal of his non-conforming yacht from the Kalele Kai project, which is over twice the maximum length allowed by the Declaration, Appellant's Motion to Stay Injunction emphasizes that, "[Appellant] has appealed the subject injunction, making removal of the Rola premature." Exhibit B at 4. Appellant's Motion further "requests that the Court stay its Injunction pending [Appellant's] appeal of the same and the final resolution of [Appellant's] counterclaims and cross-claims." Id. at 5.

Based on the above, it appears Appellant has initiated this Appeal as a delay tactic to keep his non-conforming yacht moored at the Kalele Kai project, in violation of Judge Nakasone's Injunction.

For these additional reasons, this Motion should be granted.

IV. CONCLUSION

Appellee contests the jurisdiction of the Supreme Court of Hawaii and/or the Intermediate Court of Appeals to hear Appellant's appeal. Unresolved issues remain pending in the Circuit Court. No Judgment or Final Judgment has been entered. No Rule 54(b) certification has been granted. No interlocutory order has been entered. There is no basis for appellate jurisdiction at this stage. Appellant must but cannot show appellate jurisdiction.

Jenkins at 117, 869 P.2d at 1336. The appeal should be dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawaii, September 10, 2015.

/s/ John D. Zalewski
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/s/ Christopher Shea Goodwin
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NO. CAAP-15-0000445

IN THE INTERMEDIATE COURT OF APPEALS
THE STATE OF HAWAII
Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000584
10-SEP-2015
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HITOSHI YOSHIKAWA,
Defendant-Appellant

vs.

ASSOCIATION OF OWNERS OF KALELE
KAI,

Plaintiff-Appellee.

CIVIL NO. 15-1004 KTN

IN THE APPEAL OF

(1) FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT
FILED 3/17/15 AND INJUNCTION
AGAINST HITOSHI YOSHIKAWA;
NOTICE OF ENTRY, filed on August 14,
2015

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII

JUDGE: Honorable Karen T. Nakasone

DECLARATION OF COUNSEL

I do hereby declare under penalty of law that the following is true and correct:

1. I am an attorney with the law firm of Case Lombardi & Pettit, counsel of record for Defendant-Appellee ASSOCIATION OF OWNERS OF KALELE KAI (“Appellee”). I have personal knowledge of the matters set forth herein.

2. Attached hereto as Exhibit A is a true and accurate copy of the Findings of Fact, Conclusions of Law, and Order Granting Motion for Summary Judgment Filed 3/17/15 and Injunction Against Hitoshi Yoshikawa; Notice of Entry filed August 14, 2015.

3. Attached hereto as Exhibit B is a true and accurate copy of Defendant/Counterclaimant/Cross-Claimant Hitoshi Yoshikawa’s Motion to Stay the Court’s August 14, 2015 Injunction Against Hitoshi Yoshikawa filed on August 26, 2015.

4. Attached hereto as Exhibit C is a true and accurate copy of Defendant/Counterclaimant/Cross-Claimant Hitoshi Yoshikawa's Motion for Leave to File Amended Counterclaim/Cross-Claim filed on August 26, 2015, exclusive of exhibits.

5. On August 28, 2015, Appellee filed its Motion for Award of Attorneys' Fees and Costs Against Appellant which is still pending before Judge Nakasone.

6. No Judgment or Final Judgment has been entered in the Circuit Court case. No interlocutory order has been entered in the Circuit Court case. No Rule 54(b) certification has been granted.

DATED: Honolulu, Hawaii, September 10, 2015.

/s/ John D. Zalewski
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ASSOCIATION OF OWNERS OF KALELE KAI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ASSOCIATION OF OWNERS
OF KALELE KAI,

Plaintiff,

vs.

HITOSHI YOSHIKAWA;
DOE DEFENDANTS 1-10,

Defendants.

CIVIL NO. 15-1-0102-01 KTN
(Declaratory Judgment)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify the foregoing was served on the persons by the means and on the date as follows:

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Attorneys for Defendant HITOSHI YOSHIKAWA

DATED: Honolulu, Hawaii, September 30, 2015.



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OWNERS OF KALELE KAI