

NO. 23804

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DEREK C.M. HO and BONNIE B.G. HO, Plaintiffs-Appellees,
v. JU HUI WU and LIANG W.T. WU, Defendants/Third-Party
Plaintiffs-Appellants, v. HARRY J. CROZIER, in his
capacity as trustee of the HARRY J. CROZIER TRUST,
Third-Party Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(1RC 97-8515)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendants-Appellants Ju Hui Wu and Liang W.T. Wu
(collectively the Wus) appeal from the August 21, 2000 Court
Order granting a default judgment¹ in favor of the Plaintiff-
Appellees Derek C.M. Ho and Bonnie B.G. Ho (collectively the Hos)
in the District Court of the First Circuit, Honolulu Division
(the district court).

The Wus argue on appeal that the district court erred
in ordering an entry of default against the Wus because the Wus'
attorney failed to appear at a pretrial conference. We affirm.

¹The Honorable George Y. Kimura signed the August 21, 2000 order
granting the default judgment against the Wus and the Judgment filed on
October 16, 2000.

I. BACKGROUND

On October 17, 1997, the Hos filed a Complaint in the district court alleging "[s]evere water intrusion from [the Wus'] unit . . . Apt. 701, . . . into [the Hos'] residence on the floor below at Apt. 601, saturating [the Hos'] floors, walls and kitchen counters." The Wus entered a general denial on November 3, 1997.

On January 7, 1998, the Wus filed a Third-Party Complaint against Harry J. Crozier, in his capacity as trustee of the Harry J. Crozier Trust (Crozier), and Linh Hao Vuong (Vuong) alleging "[s]evere water intrusion from [Crozier's and Vuong's] unit . . . #801, into [the Wus'] unit below, #701[.]" The Third-Party Complaint was dismissed with prejudice as to Vuong on February 2, 1998 by stipulation of the parties.

At the April 5, 1999 Answer Calendar, the district court scheduled a pretrial conference for May 17, 1999 at 10:00 a.m. Neither the Wus nor their attorney were present at the Answer Calendar. When the Wus and their attorney failed to appear at the May 17, 1999 pretrial conference, the district court² entered default against the Wus and dismissed the Third-Party Complaint with prejudice as to Crozier.³

²The Honorable Gerald H. Kibe presided.

³Crozier did not make an appearance in this appeal.

On May 20, 1999, the Wus' attorney filed a Motion to Set Aside Default, arguing "I found out about this pretrial conference on 5/17/99 at 10:20 a.m. when I retrieved a voice mail message from [Crozier's attorney], that was left on 5/17/99 after 10 a.m. I immediately came to the conference, arriving at about 10:30 a.m." The Wus' Motion to Set Aside Default was heard on June 1, 1999 and was denied.

On August 31, 1999, the district court issued its "Findings of Fact and Order Denying Defendants and Third-Party Plaintiffs' Motion to Set Aside Default and Dismissal of Third-Party Complaint, Filed on 5/20/99." The Findings of Fact read, in part, as follows:

17. On December 1, 1998, . . . counsel for [the Hos], sent a letter to . . . counsel for the Wu Defendants. In the letter, [the Ho's counsel] requested that [the Wu's counsel] provide her office with estimates for repairs to [the Hos'] unit, and indicated that she had already received estimates from Defendant Crozier. In addition, the letter stated that [the Wus' counsel] was not returning her phone calls, and asked him to contact her. During this same time, Defendant Crozier's counsel was also leaving telephone messages for [the Wu's counsel] to contact him, and also did not receive any response.

18. On January 11, 1999, Defendant Crozier's counsel appeared in court and again asked for a continuance because he still had not heard from [the Wus' counsel]. As a result, the case was continued to April 5, 1999. After this continuance, Defendant Crozier's counsel left numerous phone messages for [the Wus' counsel] to contact him, and again received no response.

19. On March 16, 1999, Defendant Crozier's counsel wrote a letter to [the Wus' counsel] informing him that the parties have been attempting to contact him, but have been unsuccessful. The letter informed [the Wus' counsel] that the case "has been continued on the Answer Calendar for further status" to April 5, 1999. More importantly, the letter informed [the Wus' counsel] that, if Defendant Crozier's counsel's office did not hear from him before that

date, he would be asking the court to dismiss the Third-Party Complaint.

20. On April 5, 1999, counsel for Defendant Crozier and [the Hos] appeared for the Answer Calendar. At the time, Defendant Crozier's counsel still had not received a response to his letter. As a result, Defendant Crozier's counsel orally moved to dismiss the Third-Party Complaint against Defendant Crozier. The motion was denied, and the case was set for pretrial conference on May 17, 1999. Following this appearance, counsel for Defendant Crozier stated that he left a telephone message on [the Wus' counsel's] answering machine to inform him of the pretrial conference.

21. On May 17, 1999, counsel for [the Hos] and Defendant Crozier appeared for the pretrial conference. However, counsel for the Wu Defendants was not present. As a result, the Honorable Gerald H. Kibe entered a default against the Wu Defendants and dismissed the Third-Party Complaint against Defendant Crozier with prejudice.

22. On May 25, 1999, counsel for the Wu Defendants filed a Motion to set aside the default and dismissal.

23. On June 1, 1999, the hearing on the Wu Defendants['] Motion was heard by the Honorable George Y. Kimura. . . .

24. At the hearing, [the Wus' counsel] acknowledged that he had received numerous messages from both counsel of Defendant Crozier and [the Hos] to contact them over the last six months. He further acknowledged that he did not contact them.

25. [The Wus' counsel] acknowledged that he knew that the parties were waiting to receive his contractor's estimates, and that he had received them in February of 1999. Despite receiving them in February of 1999, and despite [the Hos' counsel's] letter of December 1, 1998 requesting the estimates, [the Wus' counsel] did not transmit the estimates to either counsel for Defendant Crozier or [the Hos].

26. [The Wus' counsel] acknowledged that he had received both letters described in Paragraphs 17 and 19 of these Findings of Fact and that he did not respond to either letter.

27. [The Wus' counsel] was put on notice that Defendant Crozier's counsel would be asking for a dismissal of the Third-Party Complaint at the Answer Calendar on April 5, 1999 if he failed to contact him. Despite this, [the Wus' counsel] failed to attend the Answer Calendar and made no effort to contact other counsel or the Court to find out what had occurred at the Answer Calendar on April 5, 1999.

28. On the day of, or shortly after the April 5, 1999 Answer Calendar, Defendant Crozier's counsel called

[the Wus' counsel's] office and left a message for him informing him of the date and time of the Pre-trial conference, which message [the Wus' counsel] denies receiving.

29. Even if [the Wus' counsel] had not received the message left for him by Defendant Crozier's counsel informing him of the date and time of the pre-trial conference, [the Wus' counsel] had the obligation under the above described circumstances, to inquire as to what had transpired at the Answer Calendar on April 5, 1999.

30. Had [the Wus' counsel] attempted to contact the Court or other counsel to find out what had happened at the Answer Calendar on April 5, 1999, he would have known that the matter had been set for pre-trial conference on May 17, 1999 at 10:00 a.m.

31. [The Wus' counsel] knew, or should have known, of the pre-trial conference scheduled for May 17, 1999, yet even after receiving a phone message from Defendant Crozier's counsel inquiring as to his absence he did not attend the pre-trial conference, arriving only after the default and dismissal had been entered.

32. It was only after the case was dismissed that [the Wus' counsel] took any action.

33. The Complaint in this matter was filed nearly two years ago.

34. The court docket reflects fifteen continuances in this case. The last two were all as a result of [the Wus' counsel's] failure to respond to counsel for Defendant Crozier or [the Hos'] messages and correspondences [sic].

35. The Wu Defendants have failed to prosecute their claim or to cooperate in the orderly prosecution of the case, to the prejudice of Defendant Crozier and [the Hos].

Default judgment in favor of the Hos in the amount of \$8,104.83 was granted on August 21, 2000.

The Wus filed their Notice of Appeal on September 20, 2000, appealing the August 21, 2000 Court Order of default judgment. The final Judgment and Notice of Entry of Judgment or

Order were entered by the district court on October 16, 2000.⁴

The Notice of Entry of Judgment or Order indicates that the form was filed by the Hos' counsel and copies were mailed to the Wus' counsel and Crozier's counsel.

II. STANDARD OF REVIEW

A. Abuse of Discretion

An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74

⁴Rule 58 of the District Court Rules of Civil Procedure provides:

Rule 58 ENTRY OF JUDGMENT.

When the court directs entry of judgment in any case, the court shall order the prevailing party or the clerk to prepare such judgment of the court. When the clerk is ordered to prepare the judgment the clerk shall sign and enter it forthwith, unless directed by the court to submit the form of the judgment for the court's approval. The filing of the judgment in the office of the clerk constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Notice of Entry of Judgment is required by Rule 77(d) of the District Court Rules of Civil Procedure, which provides:

(d) Notice of Orders or Judgments. Immediately upon entry of a judgment, or an order for which notice of entry is required by these rules, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and such other person as the court may direct, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of a judgment or order is required by these rules. In addition, immediately upon entry, the party presenting the judgment or order shall serve a copy thereof in the manner provided in Rule 5. Lack of notice of the entry by the clerk, or failure to make such service, does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(a) of the Hawai'i Rules of Appellate Procedure.

Haw. 85, 114, 839 P.2d 10, 26 (1992) (internal quotation marks omitted).

III. DISCUSSION

A. Jurisdiction

1. The Statement of Jurisdiction

We initially note that the Wus failed to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 12.1, which states that "[w]ithin 10 days after the record on appeal is filed each appellant and cross-appellant shall file a statement of jurisdiction." The appellant bears the burden of showing appellate jurisdiction. Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 117, 869 P.2d 1334, 1336 (1994).

2. The Time for Filing the Notice of Appeal

"When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order." HRAP Rule 4(a)(1). "The filing of the judgment in the office of the clerk constitutes the entry of the judgment; and the judgment is not effective before such entry." District Court Rules of Civil Procedure (DCRCP) Rule 58. However, Rule 4(a)(2) of the HRAP states that "[i]n any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal." In Jenkins, the Hawai'i Supreme Court stated that "[a]n 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." 76 Hawai'i at 120, 869 P.2d at 1339 (footnote omitted).

In this case, the Wus filed their Notice of Appeal on September 20, 2000, and the Record on Appeal was filed with the Supreme Court on November 20, 2000. The Judgment was entered October 16, 2000. The Notice of Appeal was premature, but became effective pursuant to HRAP Rule 4(a)(2) immediately after the judgment became final on October 16, 2000.

B. The Order of Default

The Wus argue that because they answered the Complaint, they did not fail "to plead or otherwise defend,"⁵ basing their argument on First Hawaiian Bank v. Powers, 93 Hawai'i 174, 998 P.2d 55 (App. 2000).

⁵Rule 13 of the Rules of the District Courts (RDC) gives the district court the authority to issue a default judgment, while Rule 55 of the DCRCP sets out the procedure:

Rule 13 TRIAL CALENDARS.

. . . .
When any civil action is called for trial or for a pretrial or settlement conference after timely notice to all attorneys or parties not represented by counsel, the court, may, on its own motion or on the motion of any party, dismiss such action or hold the defendant in default, as the case may be, if any of the parties fails to appear.

Rule 55 DEFAULT.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and the fact is made to appear by affidavit or otherwise, the clerk shall enter that party's default.

In First Hawaiian Bank (FHB), this court reversed a default judgment against Powers that had been entered after Powers missed a pretrial conference. However, Powers was actively involved in the defense of his case.

[Powers] not only filed an answer to FHB's complaint but also filed six separate motions to dismiss the complaint. He also returned to Hawai'i from his home on the mainland several times to attend scheduled pre-trial conferences. He, therefore, clearly did not "fail to plead or otherwise defend" against FHB's lawsuit within the meaning of the rules so as to allow default to be entered against him.

Id. at 184, 998 P.2d at 65.

In this case, by failing to challenge any of the district court's Findings of Fact, the Wus' attorney admits that he failed to respond to numerous telephone messages and letters from the attorneys for the Hos and Crozier; refused to provide requested estimates for repair of the Hos' apartment; caused continuances in the district court; failed to appear at scheduled court proceedings despite prior notification of such proceedings; and failed on behalf of his clients "to prosecute their claim or cooperate in the orderly prosecution of the case, to the prejudice of Defendant Crozier and [the Hos]."⁶

⁶HRAP Rule 28(b)(4) provides that the appellant shall file an opening brief containing:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

. . . .

(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as

We conclude that the district court did not abuse its discretion in ordering entry of a default judgment against the Wus given the uncontested findings of the district court. The Hos filed their Complaint against the Wus On October 17, 1997. The Wus were served on October 23, 1997. Other than entering a general denial to the Complaint on November 3, 1997 and filing a Third-Party Complaint on January 7, 1998, the Wus failed to defend against the Hos' Complaint until the Wus' attorney moved to set aside the default on May 20, 1999.

IV. CONCLUSION

The October 16, 2000 Judgment of the district court granting default judgment in favor of the Hos is affirmed.

DATED: Honolulu, Hawai'i, May 29, 2002.

On the briefs:

Emelyn H. Higa
for defendants/third-
party plaintiffs-appellants.

Chief Judge

Beverly Lynne K. Hiramatsu,
Bonnie L. Moore,
for plaintiffs-appellees.

Associate Judge

Kevin P.H. Sumida,
Daniel C.H. Fong,
for third-party defendant-
appellee.

Associate Judge

error[.]

. . . .
Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.